REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

C. H. MASTERS, K.C.

ASSISTANT REPORTER

L. W. COUTLÉE, K.C., (QUE.)

PUBLISHED PURSUANT TO THE STATUTE BY

E. R. CAMERON, K.C., REGISTRAR OF THE COURT.

VOL. 38. NO. 6.

CANADA LAW BOOK COMPANY, LIMITED,
32-34 Toronto St.,
TORONTO, CANADA.

1907.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Hon. CHARLES FITZPATRICK C.J.

" DÉSIRÉ GIROUARD J.

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

" JOHN IDINGTON J.

" JAMES MACLENNAN J.

" LYMAN POORE DUFF J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. ALLEN BRISTOL AYLESWORTH, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. JACQUES BUREAU, K.C.

ERRATA AND ADDENDA.

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

Page 19, line 11, for "d'appeal" read "d'appel"; line 15, for "requiérants" read "requérants."

Page 20, line 6, for "l'invioliabilité" read "l'inviolabilité."

Page 27, line 22, for "of" read "on."

Page 60, line 29, for "29th of November" read "16th of October."

Page 126, line 25, after "*Settlement*" add "v. *Weymss.*"

Page 239, line 21, for "149" read "139."

Page 327, line 15, after "between" add "the."

Page 412, line 3, after "from" add "37 N.B.Rep. 545."

Page 492, the fifth foot-note should refer to "38 Can. S.C.R. 41."

MEMORANDUM.

On the 28th of June, 1907, the Honourable Charles Fitzpatrick, Chief Justice of Canada, was created Knight Commander of the Most Distinguished Order of Saint Michael and Saint George.

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, SINCE THE ISSUE OF VOLUME 37 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

The SS. "Albano" v. *The SS. "Parisian"* (37 Can. S.C.R. 284). Appeal allowed with costs, 27th February, 1907; (1907) A.C. 193.

The SS. "Arranmore" v. *Rudolph* (38 Can. S.C.R. 176). Under Rule V. of 13th June, 1853, the appeal stands dismissed with costs for want of prosecution within three months.

The Attorney General of Quebec v. *Fraser and Adams* (37 Can. S.C.R. 577). Petition for leave to appeal withdrawn by leave of the Privy Council, the case having been settled between the parties; 5th June, 1907.

Burke v. *Ritchie* (Cout. Cas. 365). Petition for special leave to appeal to Privy Council dismissed with costs; 18th July, 1907.

Conmee v. *The Securities Holding Co. et al.* (38 Can. S.C.R. 601). Petition for special leave to appeal to the Privy Council dismissed with costs; 19th July, 1907.

The James Bay Railway Co. v. *Armstrong* (38 Can. S.C.R. 511). Special leave to appeal to the Privy Council granted on terms; 19th July, 1907.

Jamieson v. *Harris* (35 Can. S.C.R. 625). Petition for special leave to appeal to the Privy Council, dismissed with costs; 4th July, 1907.

The Johnson's Co. v. *Wilson* (Cout. Cas. 356). Petition for special leave to appeal to the Privy Council dismissed with costs; 17th July, 1907.

Mayrand v. *Dussault* (38 Can. S.C.R. 460). Petition for special leave to appeal to the Privy Council dismissed with costs; 18th July, 1907.

McLean v. *The King* (38 Can. S.C.R. 542). Special leave to appeal to the Privy Council granted; 19th July, 1907.

The Rural Municipality of North Cypress et al. v. *The Canadian Pacific Railway Co.* (35 Can. S.C.R. 550). Petition for special leave to appeal to the Privy Council dismissed; 27th February, 1907.

Prévost v. *Lamarche* (38 Can. S.C.R. 1). Special leave to appeal to the Privy Council granted; 19th July, 1907.

Syndicat Lyonnais du Klondyke v. *Barrett* (36 Can. S.C.R. 279). Appeal allowed with costs; 9th May, 1907.

Toronto Railway Co. v. *King* (not yet reported). Special leave to appeal to the Privy Council granted; 2nd July, 1907. (49 Can. Gaz. 343).

Toronto Railway Co. v. *City of Toronto* (37 Can. S.C.R. 430). Judgment of Supreme Court of Canada varied in favour of the Toronto Railway Co. with costs in favour of that company; 26th April, 1907. (49 Can. Gaz. 102).

Union Bank of Canada v. *Brigham et al.* (Cout. Cas. 355). Petition for special leave to appeal to the Privy Council dismissed; 27th February, 1907.

RULES OF THE SUPREME COURT.

ORDER AFFIRMING JURISDICTION.

RULE 1. Any party proposing to appeal to the Supreme Court, may at the time of his application to have the security approved, when the application is made in the Supreme Court, and in the Yukon Territory within twenty days, and in all other cases within ten days after the security has been approved by the court below, or has been deposited in court as provided by the Act giving an appeal, or within such further time as may be allowed, apply to a judge of the Supreme Court in Chambers, on notice, for an order affirming the jurisdiction of the court to hear the appeal.

RULE 2. When the application to allow the security is made in the Supreme Court, the respondent may, on the return of the motion, move to have the security refused on the ground that the court has no jurisdiction to hear the appeal.

RULE 3. Any party dissatisfied with the order made upon any such motion, may appeal therefrom to the court, and upon a notice of such appeal being served, all further proceedings in the main appeal shall be stayed until after the hearing of the said motion, unless a judge of the Supreme Court shall otherwise order.

RULE 4. When the appellant has not, within the time above limited, applied to have the jurisdiction of the court affirmed, any respondent who desires to object to the jurisdiction of the court to hear the ap-

peal shall, in the Yukon Territory within thirty days, and in all other cases within fifteen days after the security has been approved by the court below, or within such time as may be extended by a judge of the Supreme Court in Chambers, serve the appellant, his solicitor or agent, with a notice of motion to quash the appeal returnable at the then present, or on the first day of the next ensuing session of the court, and in default thereof, in the event of the appeal being quashed the respondent may, in the discretion of the court, be ordered to pay all or part of the costs of the appeal.

RULE 5. Upon service of a notice of motion to quash an appeal for want of jurisdiction as hereinbefore provided, all further proceedings in the appeal shall be stayed until the motion has been disposed of, unless a judge of the Supreme Court shall otherwise order.

CASE TO CONTAIN REASONS FOR JUDGMENT.

RULE 6. The case provided for by the Supreme Court Act certified under the seal of the court appealed from, shall be filed in the office of the Registrar, and in addition to the proceedings mentioned in said section, shall invariably contain a transcript of all the opinions or reasons for their judgment delivered by the judges of the court or courts below, or a certificate signed by the clerk of such court or courts or an affidavit that such reasons cannot be procured, and stating the efforts made to obtain the same.

CASE TO CONTAIN COPY OF JUDGMENTS BELOW AND ANY ORDER ENLARGING TIME.

RULE 7. The case shall also contain a copy of all judgments made in the courts below, and a copy of

any order which may have been made by the court below, or any judge thereof, enlarging the time for appealing.

CASE MAY BE REMITTED TO COURT BELOW.

RULE 8. The court, or a judge of the Supreme Court in Chambers, may order the case to be remitted to the court below for correction, or in order that it may be made more complete by the addition thereto of further matter.

MOTION TO DISMISS FOR DELAY.

RULE 9. If the appellant does not file his case in appeal with the Registrar within forty days after the security required by the Act shall be allowed, he shall be considered as not duly prosecuting his appeal, and the respondent may move to dismiss the appeal pursuant to the provisions of the Act in that behalf.

CERTIFICATE OF SECURITY GIVEN.

RULE 10. The case shall be accompanied by a certificate under the seal of the court below, stating that the appellant has given proper security to the satisfaction of the court whose judgment is appealed from, or of a judge thereof, and setting forth the nature of the security to the amount of five hundred dollars as required by the said Act, and a copy of any bond or other instrument by which security may have been given shall be annexed to the certificate.

CASE TO BE PRINTED AND TWENTY-FIVE COPIES DEPOSITED WITH REGISTRAR.

RULE 11. The case shall be printed by the party appellant, and twenty-five printed copies thereof shall

be deposited with the Registrar for the use of the judges and officers of the court.

2. As soon as the case has been printed the solicitor for appellant shall, on demand, deliver to the solicitor for the respondent three printed copies thereof.

FORM OF CASE.

RULE 12. The case shall be in *demy quarto* form. It shall be printed on paper of good quality, and on one side of the paper only with the printed pages to the left, and the type shall be pica, and the size of the case shall be eleven inches by eight and one-half inches, and every tenth line shall be numbered in the margin. Where evidence is printed there shall be a head-line on each page, giving name of witness, and shewing whether the evidence is examination-in-chief, cross-examination, or as the case may be. All exhibits shall be grouped together and printed in chronological order. All pleadings, judgments, and other documents, shall be printed in full unless dispensed with by the Registrar. The title page shall contain the name of the court and province from which the appeal comes, and the style of the cause, putting the appellant's name first, as follows:

A. B.
(Plaintiff or defendant, as the case may be),
Appellant;

AND

C. D.,
(Defendant or plaintiff, as the case may be),
Respondent.

The names of solicitors and agents may also be added.

There shall be an index at the beginning of the case, which shall set out in detail, the entire contents of the case in four parts as follows:

Part I. Each pleading, rule, order, entry, or other document with its date, in chronological order.

Part II. Each witness by name, stating whether for plaintiff or defendant, examination-in-chief or cross-examination or as the case may be, giving the page.

Part III. Each exhibit with its description, date, and number, in the order in which they were filed.

Part IV. All judgments in the courts below, with the reasons for judgment, and the name of the judge delivering the same.

2. If the appellant desires, the case may be printed according to the regulations as to form and type in appeals to His Majesty in Council.

CASE NOT TO BE FILED UNLESS RULES COMPLIED WITH.

RULE 13. The Registrar shall not file the case without the leave of the court, or a judge, if the foregoing order has not been complied with, nor if it shall appear that the press has not been properly corrected, and no costs shall be taxed for any case not prepared in accordance with this order.

DISPENSING WITH PRINTING. ORIGINAL RECORD.

RULE 14. The court or a judge in Chambers may dispense with the printing or copying of any of the documents or plans forming part of the case.

2. The original record in the court appealed from and all exhibits and documentary evidence filed in the

cause, shall be transmitted to the Registrar with the certified case provided for in the Act.

NOTICE OF HEARING OF APPEAL.

RULE 15. After the filing of the case, a notice of the hearing of the appeal shall be given by the appellant for the next following session of the court as fixed by the Act, or as specially convened for hearing appeals according to the provisions thereof, if sufficient time shall intervene for that purpose, and if between the filing of the case and the first day of the next ensuing session there shall not be sufficient time to enable the appellant to serve the notice as hereinafter prescribed, then such notice of hearing shall be given for the session following the then next ensuing session.

SPECIAL NOTICE CONVENING COURT—FORM OF.

RULE 16. The notice convening the court for the purpose of hearing election or criminal appeals, or appeals in matters of *habeas corpus,* or for other purposes under the provision of the Act in that behalf, shall, pursuant to the directions of the chief justice or senior puisné judge, as the case may be, be published by the Registrar in the *Canada Gazette,* and shall be inserted therein for such time before the day appointed for such special session as the said chief justice or senior puisné judge may direct, and may be in the form given in Form A, of the Schedule to these Rules.

FORM OF NOTICE OF HEARING.

RULE 17. The notice of hearing may be in the form given in Form B of the Schedule to these Rules.

WHEN TO BE SERVED.

RULE 18. The notice of hearing shall be served at least fifteen days before the first day of the session at which the appeal is to be heard.

HOW NOTICE OF HEARING TO BE SERVED.

RULE 19. Such notice shall be served on the attorney or solicitor, who shall have represented the respondent in the court below, at his usual place of business, or on the booked agent, or at the elected domicile of such attorney or solicitor at the City of Ottawa, and if such attorney or solicitor shall have no booked agent or elected domicile at the City of Ottawa, the notice may be served by affixing the same in some conspicuous place in the office of the Registrar, and mailing on the same day a copy thereof prepaid to the address of such attorney or solicitor.

2. Where the validity of a statute of the Parliament of Canada is brought in question in an appeal to the Supreme Court, notice of hearing, stating the matter of jurisdiction raised, shall be served on the Attorney-General of Canada.

3. When the validity of a statute of a Legislature of a Province of Canada is brought in question in an appeal to the Supreme Court, notice of hearing stating the matter of jurisdiction raised shall be served on the Attorney-General of Canada and the Attorney-General of the Province.

"THE AGENT'S BOOK."

RULE 20. There shall be kept in the office of the Registrar of this court, a book to be called "The

Agent's Book," in which all advocates, solicitors, attorneys and proctors practising in the said Supreme Court may enter the name of an agent (such agent being himself a person entitled to practise in the said court), at the said City of Ottawa, or elect a domicile at the said city.

SUGGESTION BY APPELLANT OR RESPONDENT WHO APPEARS IN PERSON.

RULE 21. In case any appellant or respondent who may have been represented by attorney or solicitor in the court below, shall desire to appear in person in the appeal, he shall immediately after the allowance by the court appealed from, or a judge thereof, of the security required by the Act, file with the Registrar a suggestion in the form following:

"A. vs. B.

"I, C. D., intend to appear in person in this appeal.

(SIGNED) C. D."

IF NO SUGGESTION FILED.

RULE 22. If no such suggestion be filed, and until an order have been obtained as hereinafter provided for a change of solicitor or attorney, the solicitor or attorney who appeared for any party in the court below shall be deemed to be his solicitor or attorney in the appeal to this court.

SUGGESTION BY APPELLANT OR RESPONDENT WHO ELECTS TO APPEAR BY ATTORNEY.

RULE 23. When an appellant or respondent has appeared in person in the court below, he may elect

to appear by attorney or solicitor in the appeal, in which case the attorney or solicitor shall file a suggestion to that effect in the office of the Registrar, and thereafter all papers are to be served on such attorney or solicitor as hereinbefore provided.

Election of Domicile by Appellant or Respondent who appears in person.

Rule 24. An appellant or respondent who appears in person may, by a suggestion filed in the Registrar's office, elect some domicile or place at the City of Ottawa, at which all notices and papers may be served upon him, in which case service at such place of all notices and papers shall be deemed good service.

Service when Appellant or Respondent Appears in Person Without Electing Domicile.

Rule 25. In case the appellant or respondent who shall have appeared in person in the court appealed from, or who shall have filed a suggestion under Rule 21 shall not, before service, have elected a domicile at the City of Ottawa, service of all papers may be made by affixing the same in some conspicuous place in the office of the Registrar.

Changing Attorney or Solicitor.

Rule 26. Any party to an appeal may, on an *ex parte* application to the Registrar, obtain an order to change his attorney or solicitor, and after service of such order on the opposite party, all services of notices and other papers are to be made on the new attorney or solicitor.

SUBSTITUTIONAL SERVICE.

RULE 27. Where personal service of any notice, order or other document is required by these Rules, or otherwise, and it is made to appear to the court or a judge in Chambers that prompt personal service cannot be effected, the court or judge in Chambers may make such order for substitutional or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just.

AFFIDAVITS OF SERVICE.

RULE 28. Affidavits of service shall state, when, where and how and by whom such service was effected.

FACTUMS TO BE DEPOSITED WITH REGISTRAR.

RULE 29. At least fifteen days before the first day of the session at which the appeal is to be heard, the parties appellant and respondent shall each deposit with the Registrar, for the use of the court and its officers, twenty-five copies of his factum or points of argument in appeal.

CONTENTS OF FACTUM.

RULE 30. The factum or points for argument in appeal shall consist of three parts, as follows:

Part 1. A concise statement of the facts.

Part 2. A concise statement setting out clearly and particularly in what respect the judgment is alleged to be erroneous. When the error alleged is with respect to the admission or rejection of evidence, the evidence admitted or rejected shall be stated in full. When the error alleged is with respect to the

charge of the judge to the jury, the language of the judge and the objection of counsel shall be set out *verbatim*.

Part 3. A brief of the argument setting out the points of law or fact to be discussed, with a particular reference to the page and line of the case and the authorities relied upon in support of each point. When a statute, regulation, rule, ordinance or by-law is cited, or relied on, so much thereof as may be necessary to the decision of the case shall be printed at length.

How to be Printed.

Rule 31. The factum or points for argument in appeal shall be printed in the same form and manner as hereinbefore provided for with regard to the case in appeal, and shall not be received by the Registrar unless the requirements hereinbefore contained, as regards the case, are all complied with.

Motion by Respondent to Dismiss Appeal on Ground of Delay in Filing Factum.

Rule 32. If the appellant does not deposit his factum or points for argument in appeal within the time limited by Rule 29, the respondent shall be at liberty to move to dismiss the appeal on the ground of undue delay under the provisions of the Act in that behalf.

Appellant may Inscribe Ex Parte if Factum not Filed.

Rule 33. If the respondent fails to deposit his factum or points for argument in appeal within the

said prescribed period, the appellant may set down or inscribe the cause for hearing *ex parte*.

SETTING ASIDE INSCRIPTION EX PARTE.

RULE 34. Such setting down or inscription *ex parte* may be set aside or discharged upon an application to a judge in Chambers sufficiently supported by affidavits.

REGISTRAR TO SEAL UP FACTUMS FIRST DEPOSITED.

RULE 35. The factum or points for argument in appeal first deposited with the Registrar shall be kept by him under seal, and shall in no case be communicated to the opposite party until the latter shall himself bring in and deposit his own factum or points.

INTERCHANGE OF FACTUMS.

RULE 36. As soon as both parties shall have deposited their said factums or points for argument in appeal, each party shall, at the request of the other, deliver to him three copies of his said factum or points.

REGISTRAR TO INSCRIBE APPEALS FOR HEARING.

RULE 37. Appeals shall be set down or inscribed for hearing in a book to be kept for that purpose by the Registrar, at least fourteen days before the first day of the session of the court fixed for the hearing of the appeal. But no appeal shall be so inscribed which shall not have been filed twenty clear days before said first day of said session, without the leave of the court or a judge in Chambers.

COUNSEL AT HEARING.

RULE 38. Except by leave on special grounds no more than two counsel on each side shall be heard on any appeal, and but one counsel shall be heard in reply. Three hours on each side will be allowed for the argument, and no more, without special leave of the court. The time thus allowed may be apportioned between the counsel on the same side at their discretion.

POSTPONEMENT OF HEARING.

RULE 39. The court may in its discretion postpone the hearing until any future day during the same session, or at any following session.

DEFAULT BY PARTIES IN ATTENDING HEARING.

RULE 40. Appeals shall be heard in the order in which they have been set down, and if either party neglect to appear at the proper day to support or resist the appeal, the court may hear the other party, and may give judgment without the intervention of the party so neglecting to appear, or may postpone the hearing upon such terms as to payment of costs or otherwise as the court shall direct.

JUDGMENTS—HOW TO BE SIGNED.

RULE 41. All orders and judgments of the court shall be settled and signed by the Registrar.

ENTRY OF JUDGMENT.

RULE 42. The solicitor for the successful party shall obtain an appointment from the Registrar for

settling the judgment, and shall serve a copy of the draft minutes and a copy of the appointment upon the solicitor for the opposite party two clear days at least before the time fixed for settling the judgment. The Registrar shall satisfy himself in such manner as he may think fit that service of the minutes of judgment and of the notice of appointment has been duly effected.

RULE 43. If any party fails to attend the Registrar's appointment for settling the draft of any judgment, the Registrar may proceed to settle the draft in his absence.

RULE 44. Where the successful party neglects or refuses to obtain an appointment to settle the minutes of judgment, the Registrar may give the conduct of the proceedings to the opposite party.

RULE 45. The Registrar may adjourn any appointment for settling the draft of any judgment or order to such time as he may think fit, and the parties who attended the appointment shall be bound to attend such adjournment without further notice.

RULE 46. Notwithstanding the preceding rules, the Registrar shall in any case in which the court or a judge may think it expedient, settle any judgment or order without making any appointment, and without notice to any party.

RULE 47. Any party dissatisfied with the minutes of judgment as settled by the Registrar may move the court to vary the minutes as settled, upon serving the solicitor for the opposite party with two clear days' notice of his motion, and the said motion shall be brought on for hearing at the nearest convenient session of the court, but the said motion shall not

stay the entry of the judgment, if the Registrar is of the opinion that the motion is frivolous or would unreasonably prejudice the successful party, unless a judge of the Supreme Court shall otherwise order. Such a motion shall be based only on the ground that the minutes as settled do not in some one or more respects specified in the notice of motion accord with the judgment pronounced by the court.

RULE 48. Every judgment shall be dated as of the day on which such judgment is pronounced, unless the court shall otherwise order, and the judgment shall take effect from that date; provided that by special leave of the court or a judge a judgment may be ante-dated or postdated.

RULE 49. Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz.: "If you, the within-named A. B., neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same."

ADDING PARTIES BY SUGGESTION.

RULE 50. In any case not already provided for by the Act, in which it becomes essential to make an additional party to the appeal, either as appellant or respondent, and whether such proceeding becomes necessary in consequence of the death or insolvency

of any original party, or from any other cause, such additional party may be added to the appeal by filing a suggestion, which may be in the Form C in the Schedule to these Rules.

Suggestion May be Set Aside.

Rule 51. The suggestion referred to in the next preceding Rule may be set aside on motion, by the court or a judge thereof.

Service of Notice.

Rule 52. Notice of the filing of such suggestion shall be served upon the other party or parties to the appeal.

Determining Questions of Fact Arising on Motion.

Rule 53. Upon any motion to set aside a suggestion, the court or a judge thereof may, in their or his discretion, direct evidence to be taken before a proper officer for that purpose or may direct that the parties shall proceed in the proper court for that purpose, to have any question tried and determined, and in such case all proceedings in appeal may be stayed until after the trial and determination of the said question.

Motions.

Rule 54. All interlocutory applications in appeals shall be made by motion, supported by affidavit to be filed in the office of the Registrar. The notice of motion shall be served at least four clear days before the time of hearing.

NOTICE OF MOTION, HOW SERVED.

RULE 55. Such notice of motion may be served upon the solicitor or attorney of the opposite party by delivering a copy thereof to the booked agent, or at the elected domicile of such solicitor or attorney to whom it is addressed, at the City of Ottawa. If the solicitor or attorney has no booked agent, or has elected no domicile at the City of Ottawa, or if a party to be served with notice of motion has not elected a domicile at the City of Ottawa, such notice may be served by affixing a copy thereof in some conspicuous place in the office of the Registrar of this court.

AFFIDAVITS IN SUPPORT OF MOTION.

RULE 56. Service of a notice of motion shall be accompanied by copies of affidavits filed in support of the motion.

SETTING DOWN MOTIONS.

RULE 57. Motions to be made before the court are to be set down in a list or paper, and are to be called on each morning of the session before the hearing of appeals is proceeded with.

EXAMINATION ON AFFIDAVIT.

RULE 58. Any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may, by leave of a judge in chambers, serve upon the party by whom such affidavit has been filed, or his solicitor, a notice in writing, requiring the production of the deponent for cross-examination before the Registrar or a commissioner for taking affidavits in the court; such notice

shall be served within such time as the Registrar may specially appoint; and unless such deponent is produced acordingly, his affidavit shall not be used as evidence unless by the special leave of the court or a judge in chambers. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production unless the Registrar so direct.

Appeal Abandoned by Delay.

Rule 59. Unless the appeal is brought on for hearing by the appellant within one year next after the security shall have been allowed, it shall be held to have been abandoned without any order to dismiss being required, unless the court or a judge shall otherwise order.

Intervention.

Rule 60. Any person interested in an appeal between other parties may, by leave of the court or a judge, intervene therein upon such terms and conditions and with such rights and privileges as the court or judge may determine.

2. The costs of such intervention shall be paid by such party or parties as the Supreme Court shall order.

Re-hearing.

Rule 61. There shall be no re-hearing of an appeal except by the leave of the court on a special application, or at the instance of the court.

DISCONTINUANCE.

RULE 62. When a notice of discontinuance has been given by an appellant to a respondent, the latter shall be entitled to have his costs taxed by the Registrar without any order, unless the notice of discontinuance is served after the appeal has been inscribed for hearing in the Supreme Court. In the latter event, such order shall be made by the court as to costs and otherwise as to the court may seem meet.

RULES APPLICABLE TO EXCHEQUER APPEALS.

RULE 63. The foregoing Rules shall be applicable to appeals from the Exchequer Court of Canada, except in so far as the Exchequer Court Act has otherwise provided.

RULES NOT APPLICABLE TO CRIMINAL APPEALS, NOR HABEAS CORPUS.

RULE 64. The foregoing Rules shall not, except as hereinbefore provided, apply to criminal appeals, nor to appeals in matters of *habeas corpus* under section 62 of the Act.

CASE IN CRIMINAL APPEALS AND HABEAS CORPUS.

RULE 65. Criminal appeals may be heard on a written case certified under the seal of the court appealed from and in which case shall be included all judgments and opinions pronounced in the courts below. The appellant shall also file six type-written or printed copies of the case with a memorandum of the points for argument except in so far as dispensed with by the Registrar.

2. In appeals in *habeas corpus* cases under section 62 of the Act, a printed or type-written case containing the material before the judge appealed from, and the judgment of the said judge, together with a memorandum of the points for argument, except in so far as dispensed with by the Registrar, shall be filed.

When Case to be Filed.

Rule 66. In criminal appeals and in appeals in cases of *habeas corpus* under section 62 of the Act, unless the court or a judge in chambers shall otherwise order, the case shall be filed fifteen clear days before the day of the session of the court at which the appeal is proposed to be heard.

Notice of Hearing in Criminal Appeals and in Appeals in Matters of Habeas Corpus.

Rule 67. In cases of criminal appeals and appeals in matters of *habeas corpus* under section 62 of the Act, notice of hearing shall be served at least five days before the day of the session at which the appeal is proposed to be heard.

Election Appeals.

Rule 68. Except as otherwise provided by the Dominion Controverted Elections Act, and by the three following Rules, the Supreme Court Rules shall, so far as applicable, apply to appeals in controverted election cases.

Rule 69. In controverted election appeals the party appellant shall obtain from the Registrar, upon payment of the usual charges therefor, a certified

copy of the record or of so much thereof as a judge in Chambers may direct to be printed, and shall have forty (40) copies of the said certified copy printed in the same form as herein provided for the case in ordinary appeals, and immediately after the completion of the printing shall deliver to the Registrar thirty (30) of such printed copies, twenty-five (25) thereof for the use of the court and its officers and five (5) thereof for the use of the respondent, and to be handed by the Registrar to the respondent or his solicitor or booked agent upon application made therefor.

2. For printing in election appeals the same fees shall be allowed on taxation as for printing the *Case* in ordinary appeals.

Fixing Time of Hearing.

Rule 70. As soon as the Registrar shall have received the record duly certified by the clerk of the election court, the appellant shall apply on notice to a judge in chambers to have a day fixed for the hearing and to have the appeal set down, and on one week's default the respondent may move to dismiss the appeal.

Order Dispensing with Printing of Record or Factum in Election Appeals.

Rule 71. In election appeals a judge in Chambers may, upon the application of the appellant or respondent, make an order dispensing with the printing of the whole or any part of the record, and may also dispense with the delivery of any *factum* or points for argument in appeal.

HABEAS CORPUS.

RULE 72. Applications for writs of *habeas corpus ad subjiciendum* shall be made by motion for an order which, if the judge so direct, may be made absolute *ex parte* for the writ to issue in the first instance; or the judge may direct a summons for the writ to issue, and the judge in his discretion may refer the application to the court. Such summons and order may be in the Forms D and E respectively set out in the Schedule to these Rules.

RULE 73. If a summons for the writ to issue is granted, a copy thereof shall be served upon the Attorney-General of the Province in which the warrant of commitment was issued, and shall be returnable within such time as the summons shall direct.

RULE 74. On the argument of the summons for a writ to issue, the judge may in his discretion, direct an order to be drawn up for the prisoner's discharge instead of waiting for the return of the writ, which order shall be a sufficient warrant to any gaoler or constable or other person for his discharge.

RULE 75. The writ of habeas corpus shall be served personally, if possible, upon the party to whom it is directed; or if not possible, or if the writ be directed to a gaoler or other public official, by leaving it with a servant or agent of the person confining or restraining at the place where the prisoner is confined or restrained, and if the writ be directed to more than one person, the original delivered to or left with such principal person, and copies served or left on each of the other persons in the same manner as the writ. Such writ of *habeas corpus* may be in the Form F set out in the Schedule to these Rules.

RULE 76. If a writ of *habeas corpus* be disobeyed by the person to whom it is directed, application may be made to the judge or the court on an affidavit of service and disobedience, for an attachment for contempt. The affidavit of service may be in the Form G set out in the Schedule to these rules.

RULE 77. The return to the writ of *habeas corpus* shall contain a copy of all the causes of the prisoner's detention indorsed on the writ, or on a separate schedule annexed to it.

RULE 78. The return may be amended or another substituted for it by leave of the court or a judge.

RULE 79. When a return to the writ of *habeas corpus* is made, the return shall first be read, and motion then made for discharging or remanding the prisoner, or amending or quashing the return.

REFERENCES.

RULE 80. Whenever a reference is made to the court by the Governor in Council or by the Board of Railway Commissioners for Canada, the case shall only be inscribed by the Registrar upon the direction and order of the court or a judge thereof, and factums shall thereafter be fyled by all parties to the reference in the manner and form and within the time required in appeals to the court.

APPEALS FROM BOARD OF RAILWAY COMMISSIONERS.

RULE 81. Whenever an appeal is taken from any decision of the Board of Railway Commissioners for Canada pursuant to the provisions of the Railway Act, the appeal shall be upon a case to be stated by the parties, or in the event of difference, to be settled

by the said Board or the chairman thereof, and the case shall set forth the decision objected to, and so much of the affidavits, evidence and documents as are necessary to raise the question for the decision of the court.

2. All the Rules of the Supreme Court from 1 to 62, both inclusive, shall be applicable to appeals from the said Board of Railway Commissioners for Canada, except in so far as the Railway Act otherwise provides.

THE REGISTRAR'S JURISDICTION.

RULE 82. The transaction of any business and the exercise of any authority and jurisdiction in respect of the same, which by virtue of any statute or custom, or by the practice of the court, was, on the 23rd day of June, 1887, or might thereafter be done, transacted or exercised by a judge of the court sitting in chambers, except the granting of writs of *habeas corpus* and adjudicating upon the return thereof, and the granting of writs of *certiorari,* may be transacted and exercised by the Registrar.

RULE 83. In case any matter shall appear to the said Registrar to be proper for the decision of a judge, the Registrar may refer the same to a judge, and the judge may either dispose of the matter, or refer the same back to the Registrar, with such directions as he may think fit.

RULE 84. Every order or decision made or given by the said Registrar sitting in chambers shall be as valid and binding on all parties concerned, as if the same had been made or given by a judge sitting in chambers.

RULE 85. All orders made by the Registrar sitting in chambers shall be signed by the Registrar.

RULE 86. Any person affected by any order or decision of the Registrar, except as otherwise in these Rules provided, may appeal therefrom to a judge of the Supreme Court.

RULE 87. All appeals from the Registrar to a judge of the court shall be by motion on notice setting forth the grounds of objection, and served within four days after the decision complained of, and two clear days before the day fixed for hearing the same, or served within such other time as may be allowed by a judge of the said court or the Registrar.

RULE 88. Appeals from the Registrar to a judge of the court shall be brought on for hearing on the first Monday after the expiry of the delays provided for by the next preceding rule, or so soon thereafter as the same can be heard, and shall be set down not later than the preceding Saturday in a book kept for that purpose in the Registrar's office.

RULE 89. For the transaction of business under these rules, the Registrar, unless absent from the city, or prevented by illness or other necessary cause, shall sit every juridical day, except during the vacations of the court, at 11 a.m., or such other hour as he may specify from time to time by notice posted in his office.

FEES TO BE PAID REGISTRAR.

RULE 90. The fees mentioned in Form H set out in the Schedule to these rules shall be paid to the Registrar by stamps to be prepared for that purpose.

Costs.

RULE 91. Costs in appeal between party and party shall be taxed pursuant to the tariff of fees contained in Form I set out in the Schedule to these rules.

RULE 92. The court or a judge may direct a fixed sum for costs to be paid in lieu of directing the payment of costs to be taxed.

RULE 93. In any case in which by the order or direction of the court, or judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the Registrar may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto, in the same manner as costs ordered to be paid may be recovered. This rule shall not apply to appeals from the Province of Quebec.

RULE 94. The Registrar may, whenever he deems it advisable, reserve any question arising on the taxation of costs for the opinion of a judge.

RULE 95. The Registrar shall, for the purpose of any proceeding before him, have power and authority to administer oaths and examine witnesses, and shall in relation to the taxation of costs have authority to direct the production of such books, papers and documents as he shall deem necessary.

RULE 96. Any person who may be dissatisfied with the allowance or disallowance by the Registrar, in any bill of costs taxed by him, of the whole or any

part of any items, may, at any time before the certificate or allocatur is signed, or such earlier time as may in any case be fixed by the Registrar, deliver to the other party interested therein, and carry in before the Registrar, his objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items or parts thereof objected to, and the grounds and reasons for such objections, and may thereupon apply to the Registrar to review the taxation in respect of the same. The Registrar may, if he shall think fit, issue, pending the consideration of such objections, a certificate of taxation or allocatur for or on account of the remainder of the bill of costs, and such further certificate or allocatur as may be necessary shall be issued by the Registrar after his decision upon such objections.

RULE 97. Upon such application the Registrar shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof.

RULE 98. Any party who may be dissatisfied with the certificate or allocatur of the Registrar as to any item which may have been objected to as aforesaid, may within two days from the date of the certificate or allocatur, or such other time as the Registrar at the time he signs his certificate or allocatur may allow, appeal to a judge of the Supreme Court from the taxation as to the said item, and the judge may thereupon make such order as to him may seem just; but the certificate or allocatur of the Registrar shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

RULE 99. Such appeal shall be heard and determined by the judge upon the evidence, which shall

have been brought in before the Registrar and no further evidence shall be received upon the hearing thereof, unless the judge shall otherwise direct, and the costs of such appeal shall be in the discretion of the judge.

Cross-Appeals.

Rule 100. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends upon the hearing of an appeal to contend that the decision of the court below should be varied, he shall, within fifteen days after the security has been approved, or such further time as may be prescribed by the court or a judge in chambers, give notice of such intention to all parties who may be affected thereby. The omission to give such notice shall not in any way interfere with the power of the court on the hearing of an appeal to treat the whole case as open, but may, in the discretion of the court, be ground for an adjournment of the appeal, or for special order as to costs.

Rule 101. The respondent who gives a notice of cross-appeal shall deposit a printed factum or points for argument in appeal with the Registrar in the manner hereinbefore provided as regards the principal appeal, and the parties upon whom such notice has been served shall also deposit their printed factum in the manner hereinbefore provided as regards the principal appeal. Factums on the cross-appeal shall be interchanged between the parties as hereinbefore provided as to the principal appeal. The factum on the cross-appeal may be included in the factum on the main appeal.

Translation of Factum.

Rule 102. Any judge may require that the factum or points for argument in appeal of any party shall be translated into the language with which such judge is most familiar, and in that case the judge shall direct the Registrar to cause the same to be translated and shall fix the number of copies of the translation to be printed, and the time within which the same shall be deposited with the Registrar, and the party depositing such factum shall thereupon cause the same forthwith to be printed at his own expense, and such party shall not be deemed to have deposited his factum until the required number of the printed copies of the translation shall have been deposited with the Registrar.

Translations of Judgments and of Opinions of Judges of Court Below.

Rule 103. Any judge may also require the Registrar to cause the judgments and opinions of the judges in the court below to be translated, and in that case the judge shall fix the number of copies of the translation to be printed and the time within which they shall be deposited with the Registrar, and such translation shall thereupon be printed at the expense of the appellant.

Payment of Money into Court.

Rule 104. Money required to be paid into court shall be paid into the Bank of Montreal at its Ottawa agency, or such other bank as shall be approved of by the Minister of Finance.

2. The person paying money into court shall obtain

from the Registrar a direction to the bank to receive the money.

3. The bank receiving money to the credit of any cause or matter shall give a receipt therefor in duplicate; and one copy shall be delivered to the party making the deposit, and the other shall be posted or delivered the same day to the Registrar.

4. The stamps for the fees payable on money paid into court shall be affixed to the receipt directed by this Rule to be posted or delivered to the Registrar.

PAYMENT OF MONEY OUT OF COURT.

RULE 105. If money is to be paid out of court, an order of the court or a judge in chambers must be obtained for that purpose, upon notice to the opposite party.

HOW MADE.

RULE 106. Money ordered to be paid out of court is to be so paid upon the cheque of the Register, counter-signed by a judge.

FORMAL OBJECTIONS.

RULE 107. No proceeding in the said court shall be defeated by any formal objection.

EXTENDING OR ABRIDGING TIME.

RULE 108. In any appeal or other proceeding the court or a judge in chambers may by order, enlarge or abridge the time for doing any act, or taking any proceeding upon such (if any) terms as the justice of the case may require, and such order may be granted, although the application for the same is not

made until after the expiration of the time appointed or allowed.

NON-COMPLIANCE WITH RULES.

RULE 109. The court or a judge may, under special circumstances, excuse a party from complying with any of the provisions of the Rules.

REGISTRAR TO KEEP NECESSARY BOOKS.

RULE 110. The Registrar is to keep in his office all appropriate books for recording the proceedings in all suits and matters in the said Supreme Court.

ADJOURNMENT IF NO QUORUM.

RULE 111. If it happens at any time that the number of judges necessary to constitute a quorum for the transaction of the business to be brought before the court is not present, the judge or judges then present may adjourn the sittings of the court to the next or some other day, and so on from day to day until a quorum shall be present.

COMPUTATION OF TIME.

RULE 112. In all cases in which any particular number of days not expressed to be clear days is prescribed by the foregoing rules, the same shall be reckoned exclusively of the first day, and inclusively of the last day, unless such last day shall happen to fall on a Sunday, or a day appointed by the Governor-General for a public fast or thanksgiving, or any other legal holiday or non-juridical day, as provided by the statutes of the Dominion of Canada.

Other Non-juridical Days.

Rule 113. Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sundays and other days on which the offices are closed shall not be reckoned in the computation of such limited time.

Rule 114. Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open.

Rule 115. Services of notices, summonses, orders, and other proceedings, shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any week-day except Saturday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday.

Sittings and Vacations.

Rule 116. The office of the Supreme Court shall be open between the hours of ten o'clock in the forenoon and four o'clock in the afternoon (except on Saturdays, when it shall close at one o'clock), every day in the year except statutory holidays, and Long Vacation and Christmas Vacation.

2. During Vacation the office shall be open between the hours of ten o'clock in the forenoon and one o'clock in the afternoon.

Christmas Vacation.

Rule 117. There shall be a vacation at Christmas, commencing on the 15th of December and ending on the 10th of January.

Long Vacation.

Rule 118. The Long Vacation shall comprise the months of July and August.

Vacation in Computation of Time.

Rule 119. The time of the Long Vacation or the Christmas Vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for the doing of any act.

Writs.

Rule 120. A judgment or order for the payment of money against any party to an appeal other than the Crown, may be enforced by writs of *fieri facias* against goods, and *fieri facias* against land.

Rule 121. A judgment or order requiring any person to do any act other than the payment of money or to abstain from doing anything may be enforced by writ of attachment, or by committal.

Rule 122. Writs of *fieri facias* against goods and lands shall be executed according to the exigency thereof, and may be in the Form J set out in the Schedule to these rules.

RULE 123. Upon the return of the sheriff or other officer, as the case may be, of "lands or goods on hand for want of buyers," a writ of *venditioni exponas* may issue to compel the sale of the property seized. Such writ may be in the Form K set out in the Schedule to these rules.

RULE 124. In the mode of selling lands and goods and of advertising the same for sale, the sheriff or other officer is, except in so far as the exigency of the writ otherwise requires, or as is otherwise provided by these rules, to follow the laws of his province applicable to the execution of similar writs issuing from the highest court or courts of original jurisdiction therein.

RULE 125. A writ of attachment shall be executed according to the exigency thereof.

RULE 126. No writ of attachment shall be issued without the order of the court or a judge. It may be in the Form L set out in the Schedule to these rules.

RULE 127. In these Rules the term "writ of execution" shall include writs of *fieri facias* against goods and against lands, attachment and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party," shall mean the issuing of any such process against his person or property as shall be applicable to the case.

RULE 128. All writs shall be prepared in the office of the Attorney-General, or by the attorney or solicitor suing out the same, and the name and the address of the attorney or solicitor suing out the same, and if issued through an agent, the name and residence of the agent also, shall be indorsed on such writ, and every such writ shall before the issuing thereof be

sealed at the office of the Registrar, and a *præcipe* therefor shall be left at the said office, and thereupon an entry of issuing such writ, together with the date of sealing and the name of the attorney or solicitor suing out the same, shall be made in a book to be kept in the Registrar's office for that purpose, and all writs shall be tested of the day, month and year when issued. A *praecipe* for a writ may be in the Form M set out in the Schedule to these rules.

RULE 129. No writ of execution shall be issued without the production to the officer by whom the same shall be issued of the judgment or order upon which the execution is to issue, or an office copy thereof shewing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

RULE 130. In every case of execution the party entitled to execution may levy the interest, poundage fees and expenses of execution over and above the sum recovered.

RULE 131. Every writ of execution for the recovery of money shall be indorsed with a direction to the sheriff, or other officer to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon if sought to be recovered, at the rate of five per cent. per annum, from the time when the judgment or order was entered up.

RULE 132. A writ of execution, if unexecuted, shall remain in force for one year only, from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by

leave of the court or a judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked in the margin with a memorandum signed by the Registrar or acting Registrar of the court, stating the date of the day, month and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and having the like memorandum; and a writ of execution so renewed shall have effect, and be entitled to priority according to the time of the original delivery thereof.

RULE 133. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with the memorandum in the last preceding Rule mentioned, shewing the same to have been renewed, shall be *primâ facie* evidence of its having been so renewed.

RULE 134. As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or making of the order.

RULE 135. Where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the court or a judge for leave to issue execution accordingly. And the court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect. And the court or judge may impose such terms as to costs or otherwise as shall seem just.

RULE 136. Any party against whom judgment has been given, or an order made, may apply to the court

or a judge for a stay of execution or other relief against such a judgment or order, and the court or judge may give such relief and upon such terms as may be just.

RULE 137. Any writ may at any time be amended by order of the court or judge upon such conditions and terms as to costs and otherwise as may be thought just, and any amendment of a writ may be declared by the order authorizing the same to have relation back to the date of its issue, or to any other date or time.

RULE 138. Sheriffs and coroners shall be entitled to the fees and poundage set out in Form N of the Schedule to these rules.

RULE 139. Every order of a judge in chambers may be enforced in the same manner as an order of the court to the same effect, and it shall in no case be necessary to make a judge's order a rule or order of the court before enforcing the same.

RULE 140. No execution can issue on a judgment or order against the Crown for the payment of money. Where, in any appeal, there may be a judgment or order against the Crown directing the payment of money for costs, or otherwise, the Registrar may, on the application of the party entitled to the money, certify to the Minister of Finance the tenor and purport of the judgment or order, and such certificate shall be by the Registrar sent to or left at the office of the Minister of Finance.

ACTING REGISTRAR.

RULE 141. In the absence of the Registrar through illness or otherwise, the Chief Justice or acting Chief

Justice may appoint an acting Registrar to perform the duties of the Registrar, and all powers and authorities vested in the Registrar may be exercised by the acting Registrar.

INTERPRETATION.

RULE 142. In the preceding rules, unless the context otherwise requires, "judge" or "judge of the court" means any judge of the Supreme Court, and the expression "judge of the Supreme Court in chambers" or "judge in chambers" shall also include the Registrar sitting in chambers under the powers conferred upon him by rules 82 to 89 inclusive.

RULE 143. In the preceding rules the following words have the several meanings hereby assigned to them over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction, that is to say:

(1) Words importing the singular number include the plural number, and words importing the plural number include the singular number.

(2) Words importing the masculine gender include females.

(3) The word "party" or "parties" includes a body politic or corporate, and also His Majesty The King, and His Majesty's Attorney-General.

(4) The word "affidavit" includes affirmation.

(5) The words "the Act" mean "The Supreme Court Act."

(6) The word "month" means calendar month where lunar months are not expressly mentioned.

SCHEDULE TO THE SUPREME COURT RULES.

FORM A.

NOTICE CALLING SPECIAL SESSION.

DOMINION OF CANADA.

The Supreme Court will hold a special session at the City of Ottawa on the day of , 19 , for the purpose of hearing causes and disposing of such other business as may be brought before the court, (or for the purpose of hearing election appeals, criminal appeals, or appeals in cases of *habeas corpus*, or for the purpose of giving judgments only, as the case may be).

By order of the Chief Justice, or by order of Mr. Justice .

(Signed). E. R. C.
Registrar.

Dated this day of , 19 .

FORM B.

FORM OF NOTICE OF HEARING APPEAL.

IN THE SUPREME COURT OF CANADA.

J. A., appellant, v. A. B., respondent. Take notice that this appeal will be heard at the next session of the court, to be held at the City of Ottawa on the day of , 19 .

To , appellant's solicitor or attorney, or appellant in person.

Dated this day of , 19 .

FORM C.

SUGGESTION OF DEATH, INSOLVENCY, &C.

A. v. B.

It is required owing (to the death, insolvency, or as the case may be) that be made a party (appellant or respondent) to this appeal.

(Signed). C. D.

FORM D.

SUMMONS FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

IN THE SUPREME COURT OF CANADA.

The Honourable Mr. Justice

(Style of Cause).

Upon reading the several affidavits of, &c., filed the day of , 19 , and upon hearing Mr. of counsel (or the solicitor for).

It is ordered that all parties concerned attend before me (or before the Honourable Mr. Justice , or before the court, as the case may be) at the Supreme Court Building, Ottawa, on the day of , 19 , at the hour of in the noon, to shew cause why a writ of *habeas corpus* should not issue directed to to have the body of before a judge of the Supreme Court at the Supreme Court Building in the City of Ottawa, forthwith to undergo, etc.

Dated, etc.

FORM E.

ORDER FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

IN THE SUPREME COURT OF CANADA.

Upon reading the several affidavits of, etc., filed the day of , 19 , and upon hearing counsel (or the solicitors) on both sides (or as the case may be)—

It is ordered that a writ of *habeas corpus* issue directed to , to have the body of A. B. before me (or the Honourable Mr. Justice) at the Supreme Court Building in the City of Ottawa, on the day of at the hour of to undergo and receive, etc.

Dated, etc.

FORM F.

WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

Edward, by the Grace of God, etc., to greeting:

We command that you have in the Supreme Court of Canada before the Honourable Mr. Justice at the Supreme Court Building in the City of Ottawa, on the day of , the body of A. B. being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, to undergo and receive all and singular such matters and things as Our Judge shall then and there consider of concern-

ing him in this behalf; and have you there then this Our writ.

Witness, etc.

To be indorsed,

By order of Mr. Justice
This writ was issued by, etc.

FORM G.

AFFIDAVIT OF SERVICE OF WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

IN THE SUPREME COURT OF CANADA.

I, A. B., of, etc., make oath and say:

1. That I did on the day of , 19 , personally serve C. D. with a writ of *habeas corpus* issued out of and under the seal of this Honourable Court, directed to the said C. D., commanding him to have the body of before ( ) immediately to undergo, etc., (describe the direction and mandatory part of the writ), by delivering such writ of *habeas corpus* to the said C. D., personally at in the Province of .

Sworn, etc.

FORM H.

TARIFF OF FEES TO BE PAID TO THE REGISTRAR OF THE SUPREME COURT OF CANADA.

On entering every appeal	$10 00
On entering every judgment; decree or order in the nature of a final judgment.....	10 00

On entering every other judgment, decree or order	2 00
On filing every document or paper	10
Every search	25
Every appointment	50
Every enlargement of any appointment, or on application in chambers	50
The foregoing items are not to apply to criminal appeals or appeals in matters of *habeas corpus* arising out of a criminal charge.	
On sealing every writ (besides filing)	2 00
Amending every document, writ or other paper.	50
Taxing every bill of costs (besides filing)	1 00
Every allocatur	1 00
Every fiat	50
Every reference, inquiry, examination or other special matter referred to the Registrar, for every meeting not exceeding one hour	1 00
Every additional hour or less	1 00
For every report made by the Registrar upon such reference, etc.	1 00
Upon payment of money into court, or deposited with the Registrar, every sum under $200.00	1 00
A percentage on money over $200.00 paid in at the rate of one per cent.	
Receipt for money	25
Comparing, examining and certifying transcript record on appeal to the Privy Council	10 00
Comparing any other document, paper or proceeding with the original on file or deposit in the Registrar's office, per folio	2½

Every other certificate required from Registrar.	1 00
Copy of any document, paper or proceeding or any extract therefrom, per folio	10
Every affidavit, affirmation or oath administered by Registrar	25
Every commission or order for examination of witnesses	1 50

FORM I.

Tariff of Fees.

To be taxed between party and party in the Supreme Court of Canada:

On stated case required by section 73 of the Act when prepared and agreed upon by the parties to the cause, including attendance on the judge to settle the same, if necessary, to each party	$25 00
Notice of appeal	4 00
On consent to appeal directly to the Supreme Court from the court of original jurisdiction.	3 00
Notice of giving security	2 00
Attendance on giving security	3 00
On motion to quash proceedings under section 50 according to the discretion of the Registrar to	25 00
Subject to be increased by order of the court or of a judge in chambers	
On *factums* in the discretion of the Registrar to	50 00
Subject to be increased by order of the court or a judge in Chambers	

For engrossing for printer copy of case as settled, when such engrossed copy is necessarily and properly required, per folio of 100 words 10

For correcting and superintending printing, per 100 words 5

On dismissal of appeal if case be not proceeded with, in the discretion of the Registrar to.. 25 00

Subject to be increased by order of the court or a judge in chambers.....

Suggestions under sections 83, 84 & 85 including copy and service 2 50

Notice of intention to continue proceedings under section 87 ..... 4 00

On depositing money under section 66 of the Dominion Controverted Elections Act.... 2 50

Notice of appeal in election cases limiting the appeal to special and defined questions under section 67 of the Dominion Controverted Elections Act 6 00

Allowance to cover all fees to attorney and counsel for the hearing of the appeal, in the discretion of the Registrar to 200 00

Subject to be increased by order of the court or a judge in chambers.....

On printing *factums,* the same fees as in printing the case.

Besides the Registrar's fees, reasonable charges for postages and disbursements necessarily incurred in proceedings in appeal will be taxed by the taxing officer.

Allowance to the duly entered agent in any appeal, in the discretion of the Registrar, to. 20 00

FORM J.

WRIT OF FIERI FACIAS.

CANADA,
Province of } In the Supreme Court of Canada.

Between

A. B., (Plaintiff, *or as the case may be*) Appellant.

AND

C. D., (Defendant, *or as the case may be*) Respondent.

Edward, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith:

To the Sheriff of , Greeting:

We command you that of the goods and chattels of C. D., in your bailiwick, you cause to be made the sum of and also interest thereon at the rate of six per centum per annum, from the day of [*day of judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be*], which said sum of money and interest were lately before us in our Supreme Court of Canada, in a certain action [or certain actions, *as the case may be*], wherein A. B. is plaintiff and appellant, and C. D. and others are defendants and respondents [or in a certain matter there depending, intituled, "In the matter of E. F.," *as the case may be*], by a judgment [or order, *as the case may be*], of our said court, bearing date the day of , adjudged [or ordered, *as the case may be*], to be paid by the said C. D. to A. B., together with certain costs in the said judgment [or order, *as the case may be*] mentioned, and which costs have been taxed and allowed, by the taxing officer of our

court, at the sum of , as appears by the certificate of the said taxing officer, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick, you further cause to be made the said sum of [costs], together with interest thereon at the rate of per centum per annum, from the day of [*the date of the certificate of taxation.* [*The writ must be so moulded as to follow the substance of the judgment or order*], and that you have that money and interest before us in our said court immediately after the execution hereof, to be paid to the said A. B., in pursuance of the said judgment [or order, *as the case may be*], and in what manner you shall have executed this our writ, make appear to us in our said court immediately after the execution thereof, and have there then this writ.

Witness the Honourable Charles Fitzpatrick, Chief Justice of our Supreme Court of Canada, at Ottawa, this day of , in the year of our Lord, one thousand nine hundred and , and in the year of our reign.

FORM K.

WRIT OF VENDITIONI EXPONAS.

CANADA,
Province of } In the Supreme Court of Canada.

Between—

A. B., (Plaintiff, *or as the case may be*) Appellant.

AND

C. D., (Defendant, *or as the case may be*) Respondent.

Edward, etc. (*as in the writ of fieri facias*).

To the Sheriff of , Greeting:

Whereas by our writ we lately commanded you

that the goods and chattels of C. D. [*here recite the fieri facias to the end*], and on the day of you returned to us, at our Supreme Court of Canada aforesaid, that by virtue of the said writ to you directed, you had taken goods and chattels of the said C. D., to the value of the money and interest aforesaid, which said goods and chattels remained on your hands unsold for the want of buyers. Therefore we being desirous that the said A. B. should be satisfied his money and interest aforesaid, command you that you expose for sale and sell, or cause to be sold, the goods and chattels of the said C. D., by you, in form aforesaid, taken, and every part thereof for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Supreme Court of Canada immediately after the execution hereof, to be paid to the said A. B. and have there then this writ.

Witness, etc. (conclude as in writ of *fieri facias*).

FORM L.

Writ of Attachment.

Edward, etc. (*as in the writ of fieri facias*).

To the Sheriff of , Greeting:

We command you to attach so as to have him before us in our Supreme Court of Canada, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said court shall make in this behalf, and hereof fail not, and bring this writ with you.

Witness, etc. (*as in the writ of fieri facias*).

FORM M.

PRAECIPE FOR WRIT.

CANADA,
Province of } In the Supreme Court of Canada.

Between—

A. B., (Plaintiff, *or as the case may be*) Appellant.

AND

C. D., (Defendant, *or as the case may be*) Respondent.

Seal a writ of *fieri facias* directed to the Sheriff of to levy of the goods and chattels of C. D. the sum of $ and interest thereon at the rate of per centum per annum, from the day of [and $ costs, *or as the case may be, according to* the writ required].

Judgment [or order] dated day of

[Taxing Master's certificate, dated].

[X. Y., Solicitor for *party on whose behalf writ is to issue*].

FORM N.

SHERIFFS' AND CORONERS' FEES.

Every warrant to execute any process directed to the sheriff, when given to a bailiff.....$	75
Service of process, each defendant (no fee for affidavit of services in such cases to be allowed unless service made or recognized by the sheriff).....	1 50
Serving other papers beside mileage	75
For each *additional* party served	50
Receiving, filing, entering and indorsing all writs, notices or other papers, each.....	25

Return of all process and writs (except subpœna) notices or other papers	50
Every search, not being a party to a cause or his attorney	30
Certificate of result of such search, when required (a search for a writ against lands of a party, shall include sales under writ against same party and for the then last six months)	1 00
Poundage on executions and on writs in the nature of executions where the sum made shall not exceed $1,000, six per cent.	
When the sum is over $1,000 and under $4,000, three per cent., when the sum is $4,000 and over, one and a half per cent., in addition to the poundage allowed up to $1,000, exclusive of mileage, for going to seize and sell; and except all disbursements necessarily incurred in the care and removal of the property.	
Schedule taken on execution or other process, including copy to defendant, not exceeding five folios	1 00
Each folio above five	10
Drawing advertisements when required by law to be published in the *Official Gazette* or other newspaper, or to be posted up in a court house or other place, and transmitting same in each suit	1 50
Every necessary notice of sale of goods, in each suit	75
Every notice of postponement of sale, in each suit	25

The sum actually disbursed for advertisements required by law to be inserted in the *Official Gazette* or other newspaper.	
Bringing up prisoner on attachment or *habeas corpus*, besides travelling expenses actually disbursed, per diem	6 00
Actual and necessary mileage from the court house to the place where service of any process, paper or proceeding is made, per mile.	13
Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the Registrar.	
Drawing bond to secure goods seized, if prepared by sheriff	1 50
Every letter written (including copy) required by party or his attorney respecting writs or process, when postage prepaid	50
Drawing every affidavit when necessary and prepared by sheriff.....	25
For services not hereinbefore provided for, the Registrar may tax and allow such fees as in his discretion may be reasonable.	

CORONERS.

The same fees shall be taxed and allowed to coroners for services rendered by them in the service, execution and return of process, as allowed to sheriffs for the same services as above specified.

GENERAL ORDER.

It is hereby ordered that all the rules and orders of the Supreme Court of Canada now in force, except

as hereinafter provided, be and the same are hereby repealed from and after the first day of September, 1907.

2. It is further ordered that the Rules, including the Schedule of Forms therein referred to and hereunto annexed, and marked A, and initialed on each page thereof by the Registrar, be the rules regulating the procedure of and in the Supreme Court of Canada and the bringing of cases before it from courts appealed from or otherwise.

3. It is further ordered that the said Rules shall not apply to any appeal in which the security shall have been allowed previous to the first day of September, 1907, but that to such appeals the present rules and general orders of the Supreme Court of Canada shall be applicable.

Dated at Ottawa this Nineteenth day of June, A.D. 1907.

Signed. C. FITZPATRICK, C.J.
" D. GIROUARD, J.
" L. H. DAVIES, J.
" JOHN IDINGTON, J.
" JAMES MACLENNAN, J.
" LYMAN P. DUFF, J.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE.

Adams, Allcroft *v*..... 365
Allcroft *v.* Adams..... 365
Ames & Co., Conmee *v*...601
Andrews *v.* Calori..... 588
Armstrong, James Bay Railway Co. *v*..... 511
"Arranmore," The *v.* Rudolph. 176

B.

Baldocchi *v.* Spada.... 577
Bank of Montreal *v.* The King. 258
Barr Cash and Package Carrier Co., Hamilton Brass Mfg. Co. *v*.....216
Bartlett *v.* Nova Scotia Steel Co. 336
Black *v.* Hiebert..... 557

C.

Calori, Andrews *v.* 588
Canadian Breweries Co. *v.* Gariepy..... 236
Canadian Pacific Railway Co. *v.* The King. 137
—— *v.* —— 211
Carleton Woollen Mills Co. *v.* Town of Woodstock. 411

PAGE.

Clair, Temiscouata Railway Co. *v*..... 230
Conmee *v.* Securities Holding Co. 601
Copeland-Chatterson Co. *v.* Paquette. 451
Corbett, McNeil *v.* 198
Coté *v.* James Richardson Co..... 41
Cumberland Railway & Coal Co. *v.* St. John Pilot Commissioners.. 169

D.

"D. C. Whitney," The, *v.* St. Clair Navigation Co. 503
Dodge *v.* The King.... 149
Dussault, Mayrand *v*... 460

F.

Fultz, McNeill *v*..... 198

G.

Garborino, Baldocchi *v*.. 577
Gariepy, Canadian Breweries Co. *v*..... 236
Gilbert *v.* The King... 207
——— *v.* ———..... 284
Gloster *v.* Toronto Electric Light Co..... 27

H.

PAGE.

Hamilton, City of, *v.* Hamilton Brewing Assoc. 239
——, ——, *v.* Hamilton Distillery Co. 239
——, ——, Hamilton Street Railway Co. *v.* 106
Hamilton Brewing Assoc., City of Hamilton *v.* 239
Hamilton Distillery Co., City of Hamilton *v.* . . . 239
Hamilton Brass Mfg. Co. *v.* Barr Cash and Package Carrier Co. . 216
Hamilton Street Railway Co. *v.* City of Hamilton. 106
Hatfield, The Ship "Wandrian" *v.* 431
Hiebert, Black *v.* 557

J.

James Bay Railway Co. *v.* Armstrong. 511
James Richardson Co., Coté *v.* 41

K.

Kincaid, Lamb *v.* 516
King, The Bank of Montreal *v.* 258
——, ——, Canadian Pacific Railway Co. *v.* 137
——, ——, ——— ——— *v.* 211
——, —— Dodge *v.* 149
——, ——, Gilbert *v.* . . . 207
——, ——, —— *v.* 284
——, ——, McLean *v.* . . 542
——, ——, Paul *v.* 126

PAGE.

King, The, Pigott & Ingles *v.* 501
——, ——, Quebec North Shore Turnpike Road Trustees *v.* 62
——, ——, Saunders *v.* 382
Klondyke Government Concession *v.* McDonald. 79

L.

Lafferty *v.* Lincoln. . . . 620
Lamarche, Prevost *v.* . . . 1
Lamb *v.* Kincaid. 516
Lefrançois, Morel *v.* 75
Lincoln, Lafferty *v.* 620

M.

Manning *v.* Naas. 226
Mayrand *v.* Dussault. . . 460
Misener, Wabash Railroad Co. *v.* 94
Montreal Construction Co., Montreal Street Railway Co. *v.* 422
Montreal Street Railway Co. *v.* Montreal Construction Co. 422
Morel *v.* Lefrançois. . . . 75
Mulvaney, Toronto Railway Co. *v.* 327

Mc.

McDonald, Klondyke Government Concession *v.* 79
McLean *v.* The King. . . 542
McNeill *v.* Fultz. 198

N.

PAGE.

Naas, Manning *v*..... 226
Nova Scotia Steel Co. Bartlett *v*. 336

P.

Paul *v*. The King..... 126
Paquette, Copeland-Chatterson Co. *v*..... 451
Pigott & Ingles *v*. The King. 501
Prevost *v*. Lamarche... 1

Q.

Quebec North Shore Turnpike Road Trustees *v*. The King..... 62

R.

Richard, In re..... 394
Robinson, Little & Co. *v*. Scott & Sons..... 490
Rockwell, Wood *v*..... 165
Rudolph, The "Arranmore" *v*..... 176
Rutledge *v*. United States Savings & Loan Co. 103

S.

Saunders *v*. The King.. 382
Scott & Sons, Robinson, Little & Co. *v*..... 490
Securities Holding Co. Conmee *v*. 601

PAGE.

Spada, Baldocchi *v*.... 577
Spinney, Union Bank of Halifax *v*. 187
St. Clair Navigation Co., The "D. C. Whitney" *v*. 303
St. John Pilot Commissioners, Cumberland Railway & Coal Co. *v*. 169

T.

Temiscouata Railway Co. *v*. Clair..... 230
Toronto Electric Light Co. Gloster *v*..... 27
Toronto Railway Co. *v*. Mulvaney. 327

U.

Union Bank of Halifax *v*. Spinney..... 187
United States Savings & Loan Co., Rutledge *v*. 103

W.

Wabash Railroad Co. *v*. Misener. 94
"Wandrian," The *v*. Hatfield. 431
Wood *v*. Rockwell..... 165
Woodstock, Town of, Carleton Woolen Mills Co. *v*. 411

TABLE OF CASES CITED.

A.

NAME OF CASE.	WHERE REPORTED.	PAGE.
Adams *v.* Allcroft	37 N.B. Rep. 332	365
"Agra," The *v.* The Elizabeth-Jenkins"	L.R. 1 P.C. 501	180
Allan *v.* Pratt	13 App. Cas. 780	46
Allen *v.* Bennet	3 Taun. 169	594
"American," The and The "Syria"	L.R. 4 A. & E. 226; 6 P.C. 127	434
Ames & Co. *v.* Conmee	10 Ont. L.R. 159; 12 Ont. L.R. 435.	602
——— *v.* Sutherland	9 Ont. L.R. 631; 11 Ont. L.R. 417; 37 Can. S.C.R. 694.	603
Ancher *v.* Bank of England	2 Doug. 637	270
Andreas *v.* Canadian Pacific Railway Co.	37 Can. S.C.R. 1	97
Andrews *v.* Ramsay & Co.	[1903] 2 K.B. 635	591
Anti-Vibration Lighting Co. *v.* Crossley	22 Cutler 441	455
Arcot *v.* East India Co.	3 Bro. C.C. 292	415
Armory *v.* Delamirie	1 Str. 505	540
Armstrong *v.* James Bay Railway Co.	12 Ont. L.R. 137	511
Ashton *v.* Stock	6 Ch. D. 719	518
Ashworth *v.* English Clothing Co.	19 Cutler 463	455
"Athol," The	1 Wm. Rob. 374	128
Atlantic & North-West Railway Co. *v.* Judah	23 Can. S.C.R. 231	512
——— *v.* Turcotte	Q.R. 2 Q.B. 305	45
"Atlas," The	10 Blatch. 459	180
Attorney-General *v.* Boyd	3 Aust. Jur. Rep. 89	519
——— *v.* Lansell	10 Vict. L.R. 84	519
——— *v.* Manchester	[1893] 2 Ch. 87.	107
——— *v.* Mersey Railway Co.	95 L.T. 387	119
——— *v.* Pontypridd Urban District Council	[1905] 2 Ch. 441	119
——— *v.* City of Toronto	23 Can. S.C.R. 514	245
——— of Straits Settlement *v.* Wemyss	13 App. Cas. 192	135
Aveson *v.* Lord Kinnaird	6 East 188	299

B.

Back *v.* Dick, Kerr & Co.	[1906] A.C. 325	128
Bailey *v.* Birkenhead, L. & C. Junction Railway Co.	12 Beav. 433	415
Baily & Co. *v.* Clark, Son & Morland	[1902] 1 Ch. 649	82

NAME OF CASE.	WHERE REPORTED.	PAGE.
Bain *v.* Anderson	27 O.R. 369	374
Band of Hope *v.* Young Band Extended Quartz Mining Co.	8 Vict. L.R. 277	519
Bank of Commerce *v.* Union Bank.	3 Comst. 230	270
Bank of England *v.* Vagliano Bros.	[1891] A.C. 107	262
Bank of New South Wales *v.* Owston	4 App. Cas. 270	56
Bank of St. Alban's *v.* Farmers & Mechanics Bank	10 Verm. 141	270
Banner *v.* Johnston	L.R. 5 H.L. 157	209
Banque Jacques-Cartier *v.* Banque d' Epargne de Montreal.	13 App. Cas. 111	590
Barkworth *v.* Young	4 Drew. 1	593
Barry *v.* Butlin	2 Moo. P.C. 480	468
Barry Railway Co. *v.* White	17 Times L.R. 644	101
Bartlett *v.* Nova Scotia Steel Co.	1 East. L.R. 293; 35 Can. S.C.R. 527	336
Bartram & Sons *v.* Lloyd	20 Times L.R. 281	592
Bass *v.* Clive	4 M. & S. 13	270
"Batavier," The	10 Jur. 19	434
Baumann *v.* James	3 Ch. App. 508	594
Bavins, Jr., & Sims *v.* London & Southwestern Bank	[1900] 1 Q.B. 270	263
Baynton *v.* Morgan	22 Q.B.D. 74	81
Beach *v.* The King	9 Ex. C.R. 287	81
Beauchemin *v.* Armstrong	34 Can. S.C.R. 285	59
Beckhuson & Gibbs *v.* Hamblet	[1900] 2 Q.B. 18	602
Belden *v.* Chase	150 U.S.R. 674	179
"Belgenland," The	9 Fed. Rep. 576; 114 U.S. R. 355	306
"Benares," The	9 P.D. 16	184
Bennett, *Ex parte*	10 Ves. 381	591
Bentinck *v.* London Joint Stock Bank.	[1893] 2 Ch. 120	604
Birely *v.* Toronto, H. & B. Railway Co.	25 Ont. App. R. 88	512
"Birkenhead," The	3 Wm. Rob. 75	198
Bishop of Winchester *v.* Paine	11 Ves. 194	575
Blackburn Building Soc. *v.* Cunliffe, Brooks & Co.	22 Ch. D. 61	262
Bodega Co., *In re*	[1904] 1 Ch. 276	377
Borjesson & Wright *v.* Carlberg *et al.*	3 App. Cas. 1317	321
Borrowman, Phillips & Co. *v.* Free & Hollis	48 L.J.Q.B. 65	539
Boswell *v.* Kilborn	12 Moo. P.C. 467	56
Boursot *v.* Savage	L.R. 2 Eq. 134	194
Bradford *v.* Ferrand	[1902] 2 Ch. 655	82
Bristol C. & S. Aerated Bread Co. *v.* Maggs.	44 Ch. D. 616	591
Brown *v.* Fisher	63 L.T. 465	468
——— *v.* Patch	[1899] 1 Q.B. 892	386
Browne *v.* Dunn	6 R. 67	539
Bulli Coal Mining Co. *v.* Osborne.	[1899] A.C. 351	518
Bush *v.* Trustees of Whitehaven	52 J.P. 392	509

NAME OF CASE.	WHERE REPORTED.	PAGE.
Butterfield *v.* Forrester	11 East 60	329
Buxton *v.* Rust	L.R. 7 Ex. 1	593
"Bywell Castle," The	4 P.D. 219	180

C.

Calori *v.* Andrews	12 B.C. Rep. 236	589
Canal Bank *v.* Bank of Albany	1 Hill (N.Y.) 287	270
Canadian Asbestos Co. *v.* Girard	37 Can. S.C.R. 13	488
Canadian Breweries Co. *v.* Gariépy	38 Can. S.C.R. 236	492
Canadian Pacific Railway Co., *In re* Branch Lines	36 Can. S.C.R. 42	147
"Cape Breton," The *v.* Richelieu & Ontario Navigation Co.	36 Can. S.C.R. 564	180
Capital & Counties Bank *v.* Gordon	[1903] A.C. 240	263
Carleton Woollen Co. *v.* Town of Woodstock	3 N.B. Eq. 138; 37 N.B. Rep. 545	412
Carnatic *v.* East India Co.	1 Ves. 371	415
Carr *v.* London & Northwestern Railway Co.	L.R. 10 C.P. 307	414
—— *v.* Lynch	[1900] 1 Ch. 613	593
Carter-Crume Co. *v.* American Sales Book Co.	124 Fed. Rep. 903	454
Case *v.* Barber	T. Raym. 450	375
—— *v.* Cressy	17 Cutler 255	455
Castrique *v.* Imrie	L.R. 4 H.L. 414	309
Catling *v.* King	5 Ch. D. 660	593
Cave *v.* Hastings	7 Q.B.D. 125	593
Cavendish-Bentinck *v.* Fenn	12 App. Cas. 652	594
Chambers *v.* Whitehaven Harbour Commissioners	[1899] 2 Q.B. 132	128
Champion *v.* Plummer	8 R.R. 795; 1 Bos. & P. (N.S.) 252	590
Champoux *v.* Lapierre	Cout. Dig. 56	47
Chase *v.* City of Boston	62 N.E. Rep. 1059	604
Chipperfield *v.* Carter	72 L.T. 487	592
"City of Peking," The	14 App. Cas. 40	434
Clair *v.* Temiscouata Railway Co.	1 East. L.R. 524	230
Clark *v.* Adie	2 App. Cas. 423	454
—— *v.* London General Omnibus Co.	21 Times L.R. 505; 22 Times L.R. 691; 75 L.J.K.B. 907; [1906] 2 K.B. 648.	329, 335
Clarkson *v.* Snider	10 O.R. 561	610
"Cleadon," The	14 Moo. P.C. 92	435
Clement *v.* La Banque Nationale	33 Can. S.C.R. 343	491
Clowes *v.* Higginson	1 Ves. & B. 524	591
Cocks *v.* Masterman	9 B. & C. 902	262
Coe *v.* Clay	5 Bing. 440	555
Colonial Bank of Australasia *v.* Marshall	75 L.J.P.C. 76; [1903] A.C. 559	263
Commercial Bank *v.* Wilson	3 E. & A. (U.C.) 257	492
Commins *v.* Scott	L.R. 20 Eq. 11	593
Common School Fund, *In re*	30 Can. S.C.R. 306	512
Connecticut Fire Ins. Co. *v.* Kavanagh	[1892] A.C. 473	539
"Constantia," The	6 Asp. M.C. (N.S.) 478	186
Cook *v.* Addison	L.R. 7 Eq. 470	541

NAME OF CASE.	WHERE REPORTED.	PAGE.
Cooper *v.* Meyer	10 B. & C. 468	270
——— *v.* North Carolina Railroad Co.	3 L.R.A. (N.S.) 391; 52 S.E. Rep. 932	99
Copeland-Chatterson Co. *v.* Paquette	10 Ex. C.R. 410	452
Copper Miners Co. *v.* Fox.	16 Q.B. 229	378
Corbett *v.* South Eastern & Chatham Railway Companies Managing Committee	[1906] 2 Ch. 12	107
Cornwal *v.* Wilson	1 Ves. Sr. 509	589
Coté *v.* James Richardson Co.	38 Can. S.C.R. 41	237, 492
"Courier," The	Lush. 541	322
Coventry *v.* McLean	22 O.R. 1	591
Cox *v.* Sutherland	24 Can. L.J. 55: Cout. Dig. 214	602
Craig *v.* Elliott	15 L.R. Ir. 257	593
Crease *v.* Barrett	1 C.M. & R. 919	349
Creen *v.* Wright	1 C.P.D. 591	374
Crocker-Woolworth National Bank *v.* Nevada Bank	139 Cal. 564	271
Crossley *v.* Dixon	10 H.L. Cas. 293	454
——— *v.* Maycock	L.R. 18 Eq. 180	590
"Cuba," The *v.* McMillan	26 Can. S.C.R. 651	179
Culverwell *v.* Birney	14 Ont. App. R. 266	590
Cumberland Railway & Coal Co. *v.* St. John Pilot Commissioners	37 N.B. Rep. 406	169
Cutter *v.* Powell	2 Sm. L.C. (11 ed.) 1	378

D.

Dansereau *v.* Bellemare	16 Can. S.C.R. 180	455
Davies *v.* Mann	10 M. & W. 546	329
D'Avignon *v.* Jones	32 Can. S.C.R. 650	465
DeHertel *v.* Goddard	Q.R. 8 S.C. 72; 66 L.J. P.C. 90	14
Dempster *v.* Lewis	33 Can. S.C.R. 292	488
"Devonian," The	[1901] P.D. 221	434
"Diana," The	Lush. 539	322
"Dictator," The	[1892] P.D. 304	322
Dobie *v.* Temporalities Board	7 App. Cas. 136	633
Dominion Coal Co. *v.* The "Lake Ontario"	32 Can. S.C.R. 507	181
Donohue *v.* Donohue	33 Can. S.C.R. 134	491
Douglas *v.* Carpenter	17 App. Div. N.Y. 329	602
Driffill *v.* Ough	13 Ont. L.R. 8	492
Dublin, Wicklow & Wexford Railway Co. *v.* Slattery	3 App. Cas. 1155	102
"Duke of Manchester," The	2 Wm. Rob. 470	440
Dumont *v.* Dumont	7 L.C. Jur. 12	16
Duncan *v.* Hill	L.R. 8 Ex. 242	603
Dyas *v.* Stafford	9 L.R. Ir. 520	590

E.

East India Co. *v.* Tritton	3 B. & C. 280; 27 R.R. 353	262
Eastman *v.* Boston & Maine Railroad Co.	165 Mass. 342	295

NAME OF CASE.	WHERE REPORTED.	PAGE.
Ehrlich *v.* Ihlee	5 Cutler 198, 437	453
Embrey *v.* Owen	6 Ex. 353	82
"Energy," The	L.R. 3 A. & E. 48	439
Erie Railway Co. *v.* State of Pennsylvania.	21 Wall. 492	416
"Esk," The *v.* The "Niord"	L.R. 3 P.C. 436	181
"Europa," The	14 Jur. 627	433
Ewing *v.* Dominion Bank	35 Can. S.C.R. 133; [1904] A.C. 806	265, 266
"E. Z.," The	33 L.J. Adm. 200	436

F.

Fair *v.* Dolan	2 Legal News 395	429
Farnell *v.* Bowman	12 App. Cas. 643	135
Farquharson *v.* Imperial Oil Co.	30 Can. S.C.R. 188	512
"Farragut," The	10 Wall. 334	180
Fawcett *v.* Homan	13 Cutler 268, 398	453
Fenn *v.* Miller.	[1900] 1 Q.B. 788	128
"Fidelity," The	16 Blatch 569	128
Filion *v.* The Queen	24 Can. S.C.R. 482	128
Firth, *Ex parte*	19 Ch. D. 419	539
First National Bank *v.* Marshalltown State Bank	107 Iowa 327	271
Fish *v.* Leser.	69 Ill. 394	592
Fleming *v.* H. W. McNeil Co.	23 Can. L.T. (Occ. N.) 312	518
Foquet *v.* Moor	7 Ex. 870.	375
Forget *v.* Ostigny	[1895] A.C. 318	603
Fortier *v.* Lamb	25 Can. S.C.R. 422	247
Foss *v.* Harbottle	2 Hare 461	415
"Frankland," The	L.R. 3 A. & E. 511	432
Freeman *v.* Cooke	2 Ex. 654	414
Fulton *v.* Andrew	L.R. 7 H.L. 448	468
Fultz *v.* Corbett	1 East. L.R. 54	199

G.

Gaden *v.* Newfoundland Savings Bank	[1899] A.C. 281	263
Gendron *v.* McDougall	Cout. Dig. 56	47
Geo. Matthews Co. *v.* Bouchard	28 Can. S.C.R. 580	330
Giblin *v.* McMullen	L.R. 2 P.C. 317	97
Gilbert *v.* Gilman	16 Can. S.C.R. 189	47
Glengarry Election Case	14 Can. S.C.R. 453	210
Gloster *v.* Toronto Electric Light Co.	12 Ont. L.R. 413	27
Gloucester Bank *v.* Salem Bank	17 Mass. 32	270
Goddard's Case	15 Cox 7	295
——— *v.* Merchants Bank	4 Comst. 147	270
Goodfallow, *Re*	19 O.R. 299	196
Goring *v.* Nash.	3 Atk. 186	591
Granby, Village of, *v.* Ménard	31 Can. S.C.R. 14	465
"Grandee," The	8 Ex. C.R. 54	170
Grand Trunk Railway Co. *v.* Hainer	36 Can. S.C.R. 180	330
——— *v.* McKay.	34 Can. S.C.R. 81	99

NAME OF CASE.	WHERE REPORTED.	PAGE.
Grand Trunk Railway Co. *v.* Rainville.	29 Can. S.C.R. 201	330
Grant *v.* Gold Exploration, etc. Syndicate.	69 L.L.Q.B. 150	592
Gray *v.* Turnbull.	L.R. 2 H.L. Sc. 53	182
Grey *v.* Pearson.	6 H.L. Cas. 61	592
Griffin *v.* Coleman	28 L.T. 493	591
Grip Printing & Pub. Co. *v.* Butterfield.	11 Can. S.C.R. 291	454
Grissell *v.* Bristowe	L.R. 3 C.P. 112	603
Gugy *v.* Gugy	1 L.C.R. 273	55

H.

Hack *v.* London Provident Bldg. Soc.	23 Ch. D. 103	592
Halifax Street Railway Co. *v.* Inglis	30 Can. S.C.R. 256	329
Hall *v.* Snowdon, Hubbard & Co.	[1899] 2 Q.B. 136	132
Hallett's Estate, *In re*.	13 Ch. D. 696	196
Hamburg American Packet Co. *v.* Desrochers. . .	8 Ex. C.R. 263	181
——— *v.* The King.	33 Can. S.C.R. 252	128
Hamer *v.* Sharp	44 L.J. Ch. 53	589
Hamilton, City of, *v.* Hamilton Street Railway Co.	8 Ont. L.R. 455; 10 Ont. L.R. 575	106
Hamilton Brewing Assoc. *v.* City of Hamilton. .	10 Ont. L.R. 280; 12 Ont. L.R. 75; 38 Can. S.C.R. 239	240, 417
——— Distillery Co. *v.* ———		
Hancock *v.* Smith	41 Ch. D. 456	196
Harmer *v.* Cornelius	5 C.B.N.S. 236	377
Harper *v.* Davies	45 U.C.Q.B. 442	374
Harris *v.* Robinson	21 Can. S.C.R. 390	591
——— *v.* Truman	7 Q.B.D. 340	196
Harrold *v.* Watney	[1898] 2 Q.B. 320	33
Hart *v.* TenEcyk.	2 Johns. Ch. (N.Y.) 62	541
Harvey *v.* Facey	[1893] A.C. 552	590
Harwood *v.* Great Northern Railway Co.	35 L.J.Q.B. 27	458
Hatfield *v.* The "Wandrian"	11 Ex. C.R. 1	432
Henderson *v.* Mayor of St. John. .	14 N.B. Rep. 197	413
Heugh *v.* Chamberlain	25 W.R. 742	455
"Highgate," The	6 Asp. M.C. (N.S.) 512	179
Hilton *v.* Woods	L.R. 4 Eq. 432	518
Hinks *v.* Safety Lighting Co. . . .	4 Ch. D. 607	453
Hoe *v.* Cottrell	1 Fed. Rep. 597	453
Holland *v.* Eyre	2 Sim. & Stu. 194	590
Honeyman *v.* Marryatt	21 Beav. 14; 6 H.L. Cas. 112.	590
Hood *v.* Lord Barrington	L.R. 6 Eq. 218	593
Hornsey Local Board *v.* Monarch Investment Bldg. Soc.	24 Q.B.D. 1	416
Hovenden *v.* Lord Annesley	2 Sch. & Lef. 607	222
Hovil *v.* Pack	7 East 164	589
Howard & Preston *v.* Mississippi Valley Bank	28 La. An. 727	271
Hoyle, *In re*	[1893] 1 Ch. 84	592

NAME OF CASE.	WHERE REPORTED.	PAGE.
Huddleston *v.* Briscoe	11 Ves. 583	590
Hudson *v.* Buck	7 Ch. D. 683	590
Hussey *v.* Horne-Payne	47 L.J. Ch. 751; 48 L.J. Ch. 846; 8 Ch. D. 670; 4 App. Cas. 311	589, 590

I.

"Ida," The	1 Lush. 6	306
"Illinois," The	103 U.S.R. 298	179
Imperial Bank *v.* Bank of Hamilton	31 Can. S.C.R. 344; [1903] A.C. 49	262, 267
"Industrie," The	L.R. 3 A. & E. 303	433
"Inflexible," The	1 Swab. 32	128
Inman *v.* Reck	L.R. 2 P.C. 25	179

J.

"Jassy," The	95 L.T. 363	321
Jegon *v.* Vivian	6 Ch. App. 742	518
Jenys *v.* Fawler	2 Str. 946	269
Jervis *v.* Berridge	42 L.J. Ch. 518	591
Jinks *v.* Edwards	11 Ex. 775	555
Johnston *v.* Great Western Railway Co.	[1904] 2 K.B. 250	330
Jonas *v.* Gilbert	5 Can. S.C.R. 356	415
Jones *v.* Corporation of Liverpool	14 Q.B.D. 890	434
——— *v.* Victoria Graving Dock Co.	46 L.J.Q.B. 219	591
Joseph *v.* Castonguay	3 L.C. Jur. 141	16
Joyce *v.* Hart	1 Can. S.C.R. 321	47

K.

Karunaratne *v.* Ferdinandus	[1902] A.C. 405	539
Kelly *v.* Solari	9 M. & W. 54	262
Kensit *v.* Great Eastern Railway Co.	27 Ch. D. 122	90
Kersteman *v.* King	15 Can. L.J. 140	591
"Khedive," The	5 App. Cas. 876	179
Kiely *v.* Kiely	3 Ont. App. R. 438	413
King *v.* Dupuis	28 Can. S.C.R. 388	47
King, The, *v.* Bank of Montreal	10 Ont. L.R. 117; 11 Ont. L.R. 595	259
———, ——— *v.* Dodge	10 Ex. C.R. 208	149
———, ——— *v.* Quebec North Shore Turnpike Road Trustees	8 Ex. C.R. 390	62
———, ——— *v.* Saunders	12 Ont. L.R. 615	382
———, ——— *v.* The Mayor, etc., of St. John	1 N.B. Rep. 155	413
Kinghorn *v.* Larue	22 Can. S.C.R. 347	47
Kirkpatrick *v.* McNamee	36 Can. S.C.R. 152	518
Knox *v.* Gye	L.R. 5 H.L. 656	222
Kruse *v.* Johnson	[1898] 2 Q.B. 91	249
Kynoch & Co. *v.* Webb	17 Cutler 100	455

L.

NAME OF CASE.	WHERE REPORTED.	PAGE.
Lachance *v.* La Société de Prêts et de Placements	26 Can. S.C.R. 200	492
Lambkin *v.* South Eastern Railway Co.	5 App. Cas. 352	330
"Lancashire," The	29 L.T. 927	434
Lancashire Explosives Co. *v.* Roburite Explosives Co.	12 Cutler 470	453
Larose *v.* The King	31 Can. S.C.R. 206	130
Last Chance Mining Co. *v.* American Boy Mining Co.	2 Martin's M.C.	150, 541
Leeds, Duke of, *v.* Amherst	52 Eng. Rep. 595; 20 Beav. 239	540
Lefeunteum *v.* Beaudoin	28 Can. S.C.R. 89	488
Letourneux *v.* The King	33 Can. S.C.R. 335	128
Levi *v.* Leed	6 Can. S.C.R. 482	47
Levy *v.* Bank of United States	4 Dall. 234	270
Liggins *v.* Inge	7 Bing. 682	81
Livingstone *v.* Rawyards Coal Co.	5 App. Cas. 25	518
London County Council *v.* The Attorney-General	86 L.T. 161; [1902] A.C. 165	119
London Joint Stock Bank *v.* Simmons	[1892] A.C. 201	194
Long *v.* Millar	4 C.P.D. 450	593
Longbottom *v.* Shaw	8 Cutler 333	453
Loosemore *v.* Tiverton & North Devon Railway Co.	22 Ch. D. 25	539
Lord *v.* Commissioners of Sydney	12 Moo. P.C. 473	85
"Lord Hobart," The	2 Dod. 100	128
Lowth *v.* Ibbotson	[1899] 1 Q.B. 1003	134
Lucas *v.* Miller	2 Cutler 155	455
Lupton *v.* White	15 Ves. 432	519
Lyon *v.* Goddard	10 Cutler 334	453
——— *v.* Reed	13 M. & W. 285	81

M.

"Mabey," The and The "Cooper"	14 Wall. 204	434
"Mac," The	7 P.D. 126	170
Malzard *v.* Hart	27 Can. S.C.R. 510	180
Manitoba & N. W. Land Corporation *v.* Davidson	34 Can. S.C.R. 255	592
Mann *v.* Edinburgh Northern Tramways Co.	[1893] A.C. 69	107
Mara *v.* Cox	6 O.R. 359	602
"Marpesia," The	L.R. 4 P.C. 212	432
Marsh *v.* Buchan	46 N.J. Eq. 595	591
Martley *v.* Carson	20 Can. S.C.R. 634	91
Marvin *v.* Gotshall	36 Fed. Rep. 908	453
"Mary," The	5 P.D. 14	435
Mason *v.* Hill	5 B. & Ad. 1	81
"Meanatchy," The	[1897] A.C. 351	434
"Mentor," The	1 Rob. 179	128
Michael *v.* Hart & Co.	[1902] 1 K.B. 482	205
Miller *v.* Déchêne	8 Q.L.R. 18	44
Miner *v.* Gilmour	12 Moo. P.C. 131	82
Minor *v.* Beveridge	141 N.Y. 399	603

NAME OF CASE.	WHERE REPORTED.	PAGE.
"Miranda," The	7 P.D. 185	432
Misener *v.* Wabash Railroad Co.	12 Ont. L.R. 71	94
Monette *v.* Lefebvre	16 Can. S.C.R. 387	59
Montreal, City of, *v.* Montreal Street Railway Co.	34 Can. S.C.R. 459; [1906] A.C. 100	107
Montreal Gas Co. *v.* St. Laurent	26 Can. S.C.R. 176	519
Morgan *v.* State of Louisiana	93 U.S.R. 217	416
Mountney *v.* Collier	22 L.J.Q.B. 124	349
Mulholland *v.* Benning	15 L.C.R. 284	44
Munro *v.* Sutherland	4 Aust. Jur. Rep. 75, 139	519

Mc.

Macfarlane *v.* Leclaire	15 Moo. P.C. 181	47
Macnamara *v.* Sweetman	1 Hogan 29	415
McArthur *v.* Cornwall	[1892] A.C. 75	518
McCorkill *v.* Knight	3 Can. S.C.R. 233; Cout. Dig. 56	57
McDonald, *Ex parte*	27 Can. S.C.R. 683	406
McElroy *v.* Maxwell	101 Mo. 294	591
McIntosh *v.* Moynihan	18 Ont. App. R. 237	590
——— *v.* The Queen	23 Can. S.C.R. 180	294
McIntyre *v.* Hood	9 Can. S.C.R. 556	590
McLean *v.* The King	10 Ex. C.R. 390	542
McMichael & Wildman Mfg. Co. *v.* Stafford	105 Fed. Rep. 380	454
McNaught *v.* Dawson	22 Cutler 389	456

N.

Naas *v.* Manning	39 N.S. Rep. 133	226
"Nautik," The	[1895] P.D. 121	322
Nant-Y-Glo & Blaina Ironworks Co. *v.* Grave	12 Ch. D. 738	205
Nash and McCracken, *In re*	33 U.C.Q.B. 181	415
National Bank of Australasia *v.* Morris	[1892] A.C. 287	587
National Park Bank *v.* Ninth National Bank	46 N.Y. 77	269
Nelson *v.* Branford Lighting & Water Co.	8 Am. Elec. Cas. 542	30
Newell *v.* Radford	L.R. 3 C.P. 52	593
"Niobe," The	13 P.D. 55; [1891] A.C. 401	434
Noel *v.* Chevrefils	30 Can. S.C.R. 327	238
North British & Mercantile Ins. Co. *v.* Tourville	25 Can. S.C.R. 177	180, 488
North Ontario Election Case	3 Can. S.C.R. 374	209
North-West Transportation Co. *v.* McKenzie	25 Can. S.C.R. 38	589, 619
Noyes *v.* Crawley	10 Ch. D. 31	224

O.

Oatway, *In re*	[1903] 2 Ch. 356	541
"Odin," The	1 C. Rob. 248	583
"Ogemaw," The	32 Fed. Rep. 919	433
Oliver *v.* Hunting	44 Ch. D. 205	594
Orr-Ewing *v.* Colquhon	2 App. Cas. 839	82
Ottawa, City of, *v.* Hunter	31 Can. S.C.R. 7	492
Ottawa Electric Co. *v.* Brennan	31 Can. S.C.R. 311	514

P.

NAME OF CASE.	WHERE REPORTED.	PAGE.
Page *v.* Bowdler	10 Times L.R. 423	539
Panama & South Pacific Telegraph Co. *v.* India Rubber, etc., Co.	45 L.J. Ch. 121; 10 Ch. App. 515	377, 591
Paradis *v.* Municipality of Limoilou	30 Can. S.C.R. 405	465
Parton *v.* Crofts	16 C.B.N.S. 11	593
Pearce *v.* Watts	L.R. 20 Eq. 492	591
Peart *v.* Grand Trunk Railway Co.	10 Ont. L.R. 753	97
Peoples' Bank of Halifax *v.* Estey.	34 Can. S.C.R. 429	414
Peoples' Milling Co. *v.* Council of Meaford	10 O.R. 405	415
Perry *v.* Société des Lunetiers	13 Cutler 664	453
Peruvian Guano Co. *v.* Dreyfus Bros. & Co.	[1892] A.C. 166	524
Pickard *v.* Sears	6 A. & E. 469	414
"Picton," The	4 Can. S.C.R. 648	181
Pigott *v.* The King	10 Ex. C.R. 248	502
Pirie *v.* Town of Dundas	29 U.C.Q.B. 401	415
Polsen *v.* Town of Owen Sound	31 O.R. 6	416
"Pongola," The	73 L.T. 512	221
Potts *v.* Creager	155 U.S.R. 597	453
Powell *v.* Kempton Park Race Course Co.	[1899] A.C. 143	385
——— *v.* Lloyd.	31 R.R. 598; 2 Y. & J. 372	591
——— & Thomas *v.* Jones & Co.	[1905] 1 K.B. 11	591
Prévost *v.* Prévost	Q.R. 28 S.C. 257	2
——— *v.* ———	Q.R. 14 K.B. 309	14
Price *v.* Neal	3 Burr. 1355	263
——— *v.* Ordway	34 Can. S.C.R. 145	330
Prickett *v.* Badger	1 C.B.N.S. 296	378
Pulbrook *v.* Lawes	1 Q.B.D. 284	378

Q.

Quebec, City of, *v.* The Queen	24 Can. S.C.R. 420	128
Queen, The, *v.* Cunningham	18 N.S. Rep. 31; Cout. Dig. 401.	294
———, ——— *v.* Keyn	2 Ex. D. 63	311
———, ——— *v.* Saddlers' Co.	10 H.L. Cas. 404	375
Queen's College *v.* Jayne	10 Ont. L.R. 319	590
"Quickstep," The	15 P.D. 196	434

R.

Rader's Administrator *v.* Maddox.	150 U.S.R. 128	589
Reg. *v.* Bedingfield	14 Cox 341	288
——— *v.* Cameron	15 O.R. 115	405
——— *v.* Johnson	38 U.C.Q.B. 549	415
——— *v.* McMahon	18 O.R. 502	295
——— *v.* Pipe	1 O.R. 43	415
——— *v.* Porter	20 N.S. Rep. 352	405
——— *v.* Rose	22 N.B. Rep. 309	405
——— *v.* Smith	16 O.R. 454	405
Reiter *v.* Jones	35 Fed. Rep. 421	453
"Reliance," The *v.* Conwell	31 Can. S.C.R. 653	182

NAME OF CASE.	WHERE REPORTED.	PAGE.
Renaud *v.* Lamothe	32 Can. S.C.R. 357	488
Rex *v.* Foster	6 C. & P. 325	288
Reynolds *v.* Herbert Smith & Co.	20 Cutler 123	455
Rice *v.* The King.	32 Can. S.C.R. 480	295
Ridgway *v.* Wharton	6 H.L. Cas. 238	593
Robinson *v.* Mollett	L.R. 7 C.P. 84; 7 H. L. 802	602, 604
——— *v.* McGillivray	12 Ont. L.R. 91; 13 Ont. L.R. 232	490
Robson *v.* Argue	25 Gr. 407	575
Rossi *v.* Edinburgh Corporation	[1905] A.C. 21	415
Rossiter *v.* Miller	3 App. Cas. 1124	592
Rubber Tire Wheel Co. *v.* Columbia Pneumatic Wagon Wheel Co.	91 Fed. Rep. 978	454
Rummens *v.* Robins	3 DeG. J. & S. 88	591
Russell *v.* Lefrançois	8 Can. S.C.R. 335	488
——— *v.* The Queen	7 App. Cas. 829	407
Rutledge *v.* United States Savings & Loan Co.	37 Can. S.C.R. 546	103
Ryan *v.* Bank of Montreal	14 Ont. App. R. 533	271
——— *v.* Sing.	7 O.R. 266	589
——— *v.* United States.	136 U.S.R. 68	593
Ryder *v.* The King.	36 Can. S.C.R. 462	128

S.

Sale *v.* Lambert.	L.R. 18 Eq. 1	593
Salford, Corporation of, *v.* Lever	[1891] 1 Q.B. 168	594
Salmon *v.* Duncombe	11 App. Cas. 627	91
Salt Springs Bank *v.* Syracuse Savings Institution	62 Barb. 101	271
"Samuel Dillaway," The	98 Fed. Rep. 138	180
Sanderson *v.* Collman	4 Man. & G. 209	270
Sandwich, Earl of, *v.* Great Northern Railway Co.	10 Ch. D. 707	82
"Santandarino," The *v.* Vanvert	23 Can. S.C.R. 145	181
"Sapphire," The	11 Wall. 164	433
"Saragossa," The	7 Asp. M.C. (N.S.) 289	179
Sarl *v.* Bourdillon	1 C.B.N.S. 188	593
Schmidt *v.* Missouri Pacific Railroad Co.	3 L.R.A. (N.S.) 196; 191 Mo. 215	99
Schweitzer's Administrator *v.* Citizens General Elec. Co.	7 Am. Elec. Cas. 571	30
Schofield *v.* Lord Londesborough	[1896] A.C. 514	262
Scott & Horton *v.* Godfrey	[1901] 2 K.B. 726	603
Sénésac *v.* Central Vermont Railway Co.	26 Can. S.C.R. 641	465, 519
"Shannon," The	1 Wm. Rob. 463	433
Shardlow *v.* Cotterell	20 Ch. D. 90	593
Sheffield, Earl of, *v.* London Joint Stock Bank	13 App. Cas. 333	194
Shipway *v.* Broadwood	68 L.J.Q.B. 360; [1899] 1 Q.B. 369	592
Sims *v.* Grand Trunk Railway Co.	10 Ont. L.R. 330	330
"Sinquasi," The	5 P.D. 241	436
"Siren," The	7 Wall. 152	128

NAME OF CASE.	WHERE REPORTED.	PAGE.
"Sisters," The	3 Asp. M.C. (N.S.) 122; 1 P.D. 117	181, 433
Smith, *In re*	1 P.D. 300	313
——— *v.* Anderson	15 Ch. D. 247	416
——— *v.* Brentnell.	[1888] W.N. C9	594
——— *v.* Chester	1 T.R. 654	270
——— *v.* Goldie	9 Can. S.C.R. 46	455
——— *v.* Hayes	29 O.R. 283	30
——— *v.* Mercer	6 Taun. 76	270
——— *v.* Surman	33 R.R. 259; 9 B. & C. 561	590
——— *v.* Webster	3 Ch. D. 49	590
Snelling *v.* Huntingfield	1 C.M. & R. 20	375
Spence *v.* Union Marine Ins. Co.	L.R. 3 C.P. 427	541
Sproule, *In re*	12 Can. S.C.R. 140	395
"S. Shaw," The	6 Fed. Rep. 93	433
St. Clair Navigation Co. *v.* The "D. C. Whitney."	10 Ex. C.R. 1	303
St. Lawrence & Ottawa Railway Co. *v.* Lett	11 Ont. App. R. 1; 11 Can. S.C.R. 422	330
Steamship Carisbrook Co. *v.* London & Prov. Mar. & Gen. Ins. Co.	[1901] 2 K.B. 861	205
Stein *v.* Bourassa	18 R.L. 484	53
Stephen *v.* Montreal, P. & B. Railway Co.	7 Legal News 62	53
Stiles *v.* Galinski	[1904] 1 K.B. 615	107
Stimpson *v.* Pond	2 Curtis Cir. Ct. 502	405
Stock *v.* Great Western Railway Co.	7 U.C.C.P. 526; 9 U.C.C.P. 134	378
Stratford *v.* Bosworth.	2 Ves. & B. 341	590
Stratford Turf Assoc. *v.* Fitch	28 O.R. 579	385
Studds *v.* Watson	28 Ch. D. 305	594
Styles *v.* Cardiff Steamboat Co.	4 N.R. 483	30
"Swallow," The	1 Swab. 30	128
Syndicat Lyonnais du Klondyke *v.* McGrade.	36 Can. S.C.R. 251	575

T.

Talbot *v.* Guilmartin	30 Can. S.C.R. 482	491
"Tasmania," The	15 App. Cas. 223	539
Taussig *v.* Hart	58 N.Y. 425	614
Taylor & Scott *v.* Annand	17 Cutler 126; 18 Cutler 53	454, 455
"Telegraph," The	8 Moo. P.C. 167	433
Thacker *v.* Hardy	4 Q.B.D. 685	603
Thomas *v.* Wheeling Electrical Co.	8 Am. Elec. Cas. 528	30
Thomson *v.* American Braided Wire Co.	6 Cutler 518	455
Tibbs *v.* Wilkes	23 Gr. 439	377
Topliff *v.* Topliff	145 U.S.R. 156	453
Toronto, City of *v.* Bell Telephone Co.	[1905] A.C. 52	110
———, ———, *v.* Toronto Electric Light Co.	6 Ont. W.R. 443	30
———, ——— *v.* Virgo	[1896] A.C. 88	415
Trader's Bank *v.* Goodfallow	19 O.R. 299	196
Trites *v.* Humphrey	2 N.B. Eq. 1	415
Trotter *v.* McLean.	13 Ch. D. 574	518
Turcotte *v.* Dansereau	26 Can. S.C.R. 583	49
"Two Ellens," The	L.R. 4 P.C. 161	325

U.

NAME OF CASE.	WHERE REPORTED.	PAGE.
Union Bank of London *v.* Ingram	20 Ch. D. 463	142
Union Bank of Lower Canada *v.* Ontario Bank	24 L.C. Jur. 309	271
Union Colliery Co. *v.* The Queen	31 Can. S.C.R. 81	301
Union Stock Yards Bank *v.* Gillespie	137 U.S.R. 411	195
United States Bank *v.* Bank of Georgia	10 Wheat. 333	263

V.

Vaughan *v.* Richardson	17 Can. S.C.R. 703	209
"Veritas," The	[1901] P.D. 304	325
Vestry of St. Mary, Islington *v.* Hornsey Urban District Coun.	[1900] 1 Ch. 695	416
Viau *v.* The Queen	29 Can. S.C.R. 90	294
Vickers, Sons & Co. *v.* Siddell	7 Cutler 292	453
Vicksburg & Meridian Railroad Co. *v.* O'Brien	119 U.S.R. 99	295
"Virgil," The	2 Wm. Rob. 201	433
"Vivar," The	2 P.D. 29	313
"Volcano," The	2 Wm. Rob. 337; 3 Notes of Cases 210	128, 433

W.

Wakelin *v.* London & South Western Railway Co.	12 App. Cas. 41	97
Walcot *v.* Robinson	11 L.C. Jur. 303	44
Ward *v.* Æyre	2 Bulst. 323	541
Warner *v.* Willington	3 Drew. 523	594
Watson *v.* Sparrow	Q.R. 16 S.C. 459	429
Western *v.* Russell	3 Ves. & B. 187	594
White *v.* Lady Lincoln	8 Ves. 363	541
——— *v.* Tomalin	19 O.R. 513	590
Wild *v.* Holt	9 M. & W. 672	520
Wilde *v.* Watson	1 L.R. Ir. 402	589
Wilkins Shoe-Button Fastener Co. *v.* Webb	89 Fed. Rep. 982	454
Wilkinson *v.* Johnson	3 B. & C. 428	270
——— *v.* Stringer	16 Jur. 1033	589
"William Lindsay," The	L.R. 5 P.C. 338	433
Williams *v.* American String Wrapper Co.	86 Fed. Rep. 641	453
——— *v.* Grand Trunk Railway Co.	36 Can. S.C.R. 321	398
Windram *v.* Robertson	7 Ct. of Sess. Cas. 5 Ser. 665	184
Windsor & Annapolis Railway Co. *v.* The Queen	10 Can. S.C.R. 335; 11 App. Cas. 607	546, 549
Winn *v.* Bull	7 Ch. D. 29	590
Wood *v.* Morewood	3 Q.B. 440	528
Woodward *v.* Cotton	1 C.M. & R. 44	415

Y.

Young *v.* Adams	6 Mass. 182	270

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

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

ARMAND PRÉVOST AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

CHARLES ARTHUR PRÉVOST AND OTHERS (DEFENDANTS) .....

AND

VALMORE LAMARCHE ÈS QUAL. (MIS EN CAUSE) ..... } RESPONDENT.

1906

*Oct. 31.
*Nov. 15.

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

Construction of will — Usufruct — Substitution — Partition between institutes—Validating legislation—60 V. c. 95 (Q.)—Construction of statute—Restraint of alienation—Interest of substitutes—Devise of property held by institute under partition—Devolution of corpus of estate en nature—Accretion—Res judicata—Arts. 868, 948 C.C.

The effect of the statute, 60 Vict. ch. 95 (Que.), respecting the will of the late Amable Prévost, read in conjunction with the provisions of the will and codicils therein referred to, is to declare the deed of partition between the beneficiaries thereunder final

---

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

1906

PRÉVOST v. LAMARCHE.

and definitive and not merely provisional; the judgment of the Court of Queen's Bench, on the appeal side taken under that statute, has no other effect. Neither the statute nor the judgment referred to sanctions the view that the said will and codicils constitute more than one substitution; there was but one substitution created thereunder in favour of all the joint legatees and consequently accretion takes place among them within the meaning of article 868 of the Civil Code, in the event of any legacy lapsing, under the terms of the will, upon the death of an institute without issue prior to the opening of the substitution. In such case, the share of the institute dying without issue devolves to the other joint legatees, as well in usufruct as in absolute ownership, and, consequently, none of the institutes or substitutes have the right of disposing of any portion of the testator's estate, by will or otherwise, prior to the date of the opening of the substitution.

Judgment appealed from (Q.R. 28 S.C. 257) reversed. *DeHertel* v. *Goddard* (66 L.J.P.C. 90) distinguished.

APPEAL from the judgment of the Superior Court, sitting in review at Montreal (1), Loranger J. dissenting, whereby the judgment of the Superior Court, District of Montreal (Fortin J.), dismissing the plaintiffs' action with costs was affirmed.

The action was brought by the appellants, Armand Prévost and Adèle Prévost (wife of Azarie Brodeur) as co-heirs and beneficiaries under the will of the late Amable Prévost, deceased, against all other co-heirs, under the said will, and the respondent, Lamarche, in his capacity of testamentary executor of the last will of Louis Roméo Prévost (one of the co-heirs) deceased, for the partition of the share of the estate of the said Louis Roméo Prévost under the last will of the said late Amable Prévost. The defendants, other than the present respondent, did not contest the action, and the judgment appealed from was rendered upon the issues joined by the executor, under the circumstances following.

(1) Q.R. 28 S.C. 257.

1906

PRÉVOST v. LAMARCHE.

The late Amable Prévost, who died in 1872 leaving seven sons and daughters, made his last will on 26th December, 1844, and subsequently made codicils thereto, the material parts of which are as follows:— By his last will he gave and bequeathed to the child born and to the children to be born of his marriage with his wife (yet living) the enjoyment and usufruct during their lives of all the property, movable and immovable, of which he should die possessed, his said child and children to be born to enjoy said property in usufruct during their lives, subject to all the charges ordinarily imposed upon usufructuaries, the full ownership of his said property to belong, after the death of his said children or any of them to the children to be born of their respective marriages, and his grandchildren who were thereby substituted to his said children, as regards his said property, to enjoy, use, deal with, and dispose of the same as they may think fit, appointing them for that purpose his universal legatees.

It further provided that the revenues of said property should be received by the testator's children for their support and that of their children, and should, therefore, be neither transferable nor subject to seizure by creditors; that the property itself should pass to the grandchildren, and should not be sold even for their greater advantage; and that none of the grandchildren should alienate, incumber, or hypothecate their parts or rights or his or her part and rights in his said property before the extinction of the usufruct in such property bequeathed to his said children, or of the share thereof belonging to the father or to the mother of said grandchildren respectively.

One of the codicils contained the following provi-

1906

PRÉVOST v. LAMARCHE.

sions: "It is my will that if the child born or the children to be born of my marriage with * * * my wife, all die before her without leaving children or legitimate descendants, * * * my said wife shall have, during widowhood, the enjoyment and usufruct of all the property movable and immovable * * * except the land with buildings and dependencies which I have at Terrebonne, which I leave, in such case, to Louis Joseph Prévost, my brother, in full ownership, and as to my other property movable and immovable after the extinction of the usufruct thereof, which I have bequeathed to my said wife during widowhood, they shall return and belong to the said Louis Joseph Prévost and to Dame Edwidge Prévost, wife of Mr. Séraphin Bouc and Miss Anathelie Prévost, my sisters, if they are living, if not to their children," etc.

It was contended by the appellants that the said will and codicil should properly be interpreted as imposing on each of the testator's children an express substitution in favour of their children if any, and, in case of death without issue, an implied substitution in favour of the institute's surviving brothers and sisters or their children. The interpretation contended for by the respondent was that the will created as many substitutions as there were children of the testator; that each substitution was in favour of the children of the institute if any, and, failing children, in favour of the brother and sisters of the testator in the event of all the testator's children dying without issue before their mother; that upon the death of Louis Roméo Prévost (who died without issue, in the State of California, on the 19th of October, 1902), his share was subject only to the contingent substitution in favour of his uncle and aunts and in the meantime remained in his estate.

After having held possession of the estate of the late Amable Prévost, as usufructuaries in common, for about seven years after his death, the beneficiaries executed a deed of partition thereof among themselves by which the said estate was divided into seven separate shares and, since then, the said shares have been separately held and enjoyed by the respective beneficiaries to whom they were so allotted. Doubts having arisen as to the validity of the partition, upon petition of all the beneficiaries having interests on the 9th of January, 1897, a special statute(1) was enacted, as follows, by the Legislature of the Province of Quebec:

"An Act to declare the Partition of the Property of the Estate of the late Amable Prévost final and definite."

"Whereas by his testament, dated the twenty-fourth of December, one thousand eight hundred and forty-four, and by codicils, respectively dated the twenty-sixth day of December, one thousand eight hundred and forty-four, and the twenty-second day of January, one thousand eight hundred and sixty, received at Montreal before J. Belle and his colleague, notaries, the late Amable Prévost, in his lifetime of the same place, merchant, bequeathed to the children born and to be born of his marriage with Dame Rosalie Victoire Bernard, his wife, the usufruct and enjoyment, during their lifetime, of all his movable and immovable property, the full ownership of the said property to belong, after the death of the said children or of any of them, to the children to be born of their respective marriages;

"Whereas the said will and codicils constitute a substitution in which the children of the said late

(1) 60 Vict. ch. 95.

1906

PRÉVOST v. LAMARCHE.

Amable Prévost are the institutes and his grand-children are the substitutes; and whereas it is especially ordered by the said will and codicils that the real estate or immovables of the testator should pass in kind into the hands of the said grand-children without the children of the testator or even the grand-children, so long as the usufruct bequeathed to the children should exist, being able to alienate, sell, pledge or hypothecate the same for any cause whatsoever;

"Whereas the said late Amable Prevost died at Montreal on the ninth of February, one thousand eight hundred and seventy-two, without having revoked his said will and codicils, leaving as his survivors his wife, the said Dame Rosalie Victoire Bernard, and seven children;

"Whereas the said late Amable Prévost was common as to property with his said wife, Dame Rosalie Victoire Bernard, so that the said will affected only the share of the said late Amable Prévost in the said community and the property personally belonging to him;

"Whereas, after inventory was made of the property that was left by the said late Amable Prévost, his said children and their mother, the said Dame Rosalie Victoire Bernard, proceeded on the twenty-seventh of April, one thousand eight hundred and eighty-three, by deed passed before G. M. Prévost, notary, to the partition and liquidation of the said community of property and of the estate of the said late Amable Prévost; and, by the said partition, all the movable and immovable properties coming to them from their father were divided amongst the seven children of the said late Amable Prévost, his only heirs and legal representatives;

"Whereas the agreements and stipulations of the said partition have been carried out on both sides, and since the said day, the twenty-seventh of April, one thousand eight hundred and eighty-three, the heirs Prévost have separately enjoyed the property of the said estate according to the partition then made amongst them;

"Whereas, since the said partition, doubts have arisen as to the question whether the said partition was a provisional one, like that between institutes, under the provisions of article 948 of the Civil Code, or whether, on the contrary, it is final, in consequence of the special provisions contained in the will of the said late Amable Prévost;

"Whereas, the said institutes have consulted eminent legal authorities, but their opinions are divided on this point and even, in a non-litigious proceeding, to wit: an application made by Dame Marie Elizabeth Adèle Prévost, wife of Azaire Brodeur, Esquire, physician, of the City of Montreal, for the purpose of being authorized to expend a sum of money for the improvement of a property which devolved to her by the said partition, the Honourable Mr. Justice Jetté, by an order in chambers, dated the twenty-seventh of March, one thousand eight hundred and ninety-six, ordering the convening of a family council, declared that the said partition was not provisional, but final, that the said legatees, the institutes, were authorized to make it so by the very terms of the said will and codicils, and, consequently, that each institute definitely owned the share of the property bequeathed to him, on the sole condition of delivering it to his children, and that the other institutes have no interest in the property so allotted to one of them;

1906

PRÉVOST v. LAMARCHE.

"Whereas the said order, although it cannot constitute *res judicata,* causes serious doubts as to the nature, whether provisional or final, of the said partition; whereas such doubts cannot be solved except by a suit at law between the said heirs Prévost, which cannot but be very long and costly, and which would have the effect of dissipating the property of the said succession; whereas the legatees, the institutes, have divided the property of the said estate amongst themselves in a fair and equitable manner; whereas one of them, to wit: Amable Oscar Alexandre Prévost, in his lifetime of the City of Quebec, superintendent of the Government Cartridge Factory at Quebec, died on the sixteenth of September, one thousand eight hundred and ninety-five, leaving minor children, now represented by their mother, Dame Marie Louise Duchesnay, their tutrix, duly appointed in law, in favour of whom the said substitution is now opened, as regards their father's share, so that it is necessary to determine, without delay, the true character of the partition made on the twenty-seventh of April, one thousand eight hundred and eighty-three, of the property left by the said late Amable Prévost;

"Whereas all the testamentary executors appointed by the said late Amable Prévost are now deceased, and the interested parties have applied to the courts to have them replaced, but the Honourable Mr. Justice Taschereau, by an order, dated fifteenth of November, one thousand eight hundred and ninety-six, declared that the execution of the said will and codicil were completed, and that there was no occasion to replace the said testamentary executors;

"Whereas, Edouard Henri Armand Prévost, burgess, both in his quality of legatee and institute, and

as curator duly appointed in law to the said substitution, Louis Roméo Prévost, accountant, Toussaint Prévost, Benjamin Hector Prévost, broker, and Dame Marie Rhéa Berthe Prévost, widow of the late Joseph Elzéar Berthelot, all of the City of Montreal, being the majority of the legatees and institutes in the substitution established by the said late Amable Prévost, have, after alleging the facts above mentioned, represented, by their petition, that they are prepared to accept the principle laid down in the order of Mr. Justice Jetté, as aforesaid, and to acknowledge the partition of the property of the estate of the said late Amable Prévost, as having been final and definite; and whereas it is very important, in order to remove all doubts and avoid ruinous law suits for the heirs, that the said partition of the twenty-seventh of April, one thousand eight hundred and eighty-three, of the property of the estate of the said late Amable Prévost, be declared final and definite to all intents and purposes whatsoever; and whereas it is expedient to grant the prayer of the petitioners;

"Therefore, Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

"The partition of the property of the estate of the late Amable Prévost, in his lifetime merchant, of the City of Montreal, made by and between the legatees who are institutes in the substitution under the will and codicils of the latter, dated respectively the twenty-fourth and twenty-sixth of December, one thousand eight hundred and forty-four, and the twenty-second of January, one thousand eight hundred and sixty, before J. Belle and his colleague, notaries, by a deed of partition and liquidation before G.

1906

PRÉVOST v. LAMARCHE.

M. Prévost, notary, on the twenty-seventh of April, one thousand eight hundred and eighty-three, is declared to be and always to have been final and definitive; and, accordingly, the legatees who are institutes in the substitution established by the said late Amable Prévost are declared to be and always to have been the sole proprietors of the share of the said property which has respectively devolved to them, under the terms of the said deed of partition and liquidation, subject to the condition of handing over such share to their children at their death, as set forth in the said will and codicils; and the children, issue of the marriage of the said late Amable Oscar Alexandre Prévost with the said Dame Marie Louise Duchesnay, are declared to be and always to have been, since the death of their father, the sole owners of the property which devolved to the said late Amable Oscar Alexandre Prévost, in virtue of the said partition.

"Nevertheless any of the parties interested may, within two months following the passing of this Act, submit to the Court of Queen's Bench, sitting in appeal, the other heirs being duly notified, the question whether the said partition of the 27th April, 1883, made before Prévost, notary, is final and definitive, which may be done by taking an appeal to the said court by inscription in the ordinary way from the judgment rendered in chambers by the Honourable Mr. Justice Jetté, in March, 1896, and in such case the parties shall proceed as in a case in which the said partition shall have been declared definitive.

"If, by the judgment of the said court, the said partition is declared definitive, the said judgment shall be declared final and without appeal. If the contrary, the said parties shall immediately proceed to a

new partition and liquidation according to the ordinary rules of voluntary partitions, each interested party returning to the mass, according to law, all that he shall have received under the said partition of the 27th April, 1883. The partition thus made after the returns shall be final and definitive for all purposes, subject to the substitution enacted by the will of the late Amable Prévost."

On the 23rd of December, 1897, the Court of King's Bench, upon an appeal taken under said Act and to which Louis Roméo Prévost and the present parties, were parties, affirmed the judgment of Mr. Justice Jetté in the Superior Court and held that the testator had "bequeathed to each of his children an equal share of his property, and substituted to each of his children the children of the latter, to receive the share of the property which their father or mother would have received by means of the legacy to the latter; that the share of the property accruing to each of his said children had been fixed at the time of the testator's death and defined by the said partition for each of the children, within the language and according to the intention of said will'; and declared the partition final.

On the 19th of October, 1902, Louis Roméo Prévost made his last will in authentic form, thereby bequeathing to Marie Louise Bouthillier, during her natural life should she remain unmarried, an annuity of $1,200 per annum, to be paid out of his estate, consisting principally of the share he inherited under his father's will, and the residue to his brothers, Oscar Prévost, Arthur Prévost, Armand Prévost and Hector Prévost, and his sister, Mrs. Berthelot, or the survivors or survivor of them and to the lawful issue of

1906

PRÉVOST v. LAMARCHE.

any of them who might pre-decease him, in equal shares, constituting them his universal residuary legatees in absolute ownership. In his said will he also appointed the respondent his sole executor, extending his powers beyond the time limited by law and authorizing him to sell or dispose of all or any part of his said estate with the powers necessary to carry out that provision.

In the Superior Court, the appellants' action was dismissed with costs by Mr. Justice Fortin, who held that the effect of the will, codicils and the statute, read together, was the constitution of as many separate and distinct substitutions as there were children of the testator, and his judgment was affirmed by the judgment of the Court of Review(1), now appealed from.

The main questions upon the present appeal are as to the correct interpretation of the will of the late Amable Prévost and codicils thereto read in connection with the statute, 60 Vict. ch. 95 (Que.); the effect of the partition, and the right of the late Louis Roméo Prévost, dying without issue, to dispose of his share in the estate of the said late Amable Prévost as he did by his will.

Brosseau K.C. for the appellants. The will and the codicils do not provide for a partition and the whole estate is bequeathed in usufruct to the children and the property to the grandchildren *en bloc,* without assigning any shares to the children or grandchildren. The usufruct is declared inalienable and unseizable and the will expressly forbids alienation of the property until the end of the usufruct. The property must be delivered to the grandchildren *en nature*

(1) Q.R. 28 S.C. 257.

as at the time of the testator's death. The grand-children are the real legatees of the estate according to the testator's will. Roméo Prévost could not make a will and dispose of part of the estate which was given in express terms in usufruct to the children, without assigning any share, and in property to the grand-children of the testator. The testator's intention to preserve the whole estate for the grand-children is moreover expressly manifested in the codicil where it is provided that if all the children die without issue, the estate shall revert in usufruct to the widow and in property to the brother and sisters. Here again it is quite clear that the testator wished the estate to remain in the family, and that, in the case of only one grand-child surviving he should get the whole.

According to respondent's contentions, if of the seven children only one had married and had issue, that issue would have received only one-seventh of the estate; and six-sevenths would go to strangers, if the children chose to make wills to that effect. Such cannot be the proper interpretation of the will of the late Amable Prévost.

The statute had not the effect of changing the will as to the transmission of the estate. The only matter that it settles is the partition of the property and not the transmission, which will follow according to the will. The words of the first paragraph are: "And, accordingly, the legatees who are institutes in the substitution established by the said late Amable Prévost are declared to be and always to have been the sole proprietors of the share of the said property which has respectively devolved to them, under the terms of the said deed of partition and liquidation, subject to the condition of *handing over such share to their*

1906

PRÉVOST v. LAMARCHE.

children at their death, as set forth in the said will and codicils." The will provides that the property in the estate shall belong to his grand-children without assigning any particular share to any one of them. This general disposition of the estate makes it clear that the intention was that it should contain the clause of accretion. Roméo Prévost having died without issue, his shares accrued to his co-usufructuaries and to the grand-children.

The judgment of the Superior Court is based on the case of *DeHertel* v. *Goddard*(1), which was rendered by Loranger J., who states, in the present case, that there is no analogy between the two cases.

In the case of *Adèle Prévost* v. *Berthe Prévost*(2), on a motion to dismiss the appeal on the ground that Adèle Prévost, one of the appellants in this case, had no interest in her co-heir's share, because the partition had been declared final and definitive, the Court of King's Bench dismissed the motion and maintained the contentions of appellants herein on that point.

We also refer to 7 Aubry & Rau, nn. 714, 726 and 22 Demolombe, p. 349, no. 394.

Béique K.C. for the respondent. The statute and judgment of the Court of King's Bench are absolutely decisive. It is quite clear that the legislature intended to set at rest every question upon which judge Jetté had expressed an opinion. The summary of his opinion is given in the preamble;—the necessity of removing doubts and preventing litigation, the declaration, in the petition, that the petitioners were willing to accept judge Jetté's opinion, the granting of the

(1) Q.R. 8 S.C. 72; 66 L.J.P.C. 90.

(2) Q.R. 14 K.B. 309.

petition; and the safeguarding of the rights of the other heirs by means of an appeal from judge Jetté's order, put this beyond doubt. One of the questions upon which judge Jetté expressed an opinion, was the one in controversy here, viz., Whether or not any substitute had, after the partition, any interest in the property assigned by the partition to the other institutes. This question was answered in the negative, and the Court of King's Bench agreed with him. There is, therefore, *res judicata* on the point. The statute declares the partition to be and always to have been final and definitive; and accordingly the institutes to be and to always have been the sole proprietors of the property, respectively devolving to them under the deed of partition, subject to the condition of handing over such share to their children, etc. Here, as in the judgment of Mr. Justice Jetté, is found not merely a holding that the partition is final, but a declaration as to the consequences of such finality, that each of the institutes is and always has been proprietor but that his ownership was subject to the condition of handing over, etc. It is evident, both grammatically, and from the intention evinced by the recitals in the preamble that "the conditions" mean "the sole condition." The mere use of the definite article in connection with the word "condition" excludes the idea that there any other condition was contemplated.

The intention of the Act was that, as between the institutes, there should be but one final and definitive partition; either the one already affected, or the new one ordered by the Act in the event of the Court of Queen's Bench declaring it to have been provisional. The partition having been declared final, each co-petitioner must be "deemed to have inherited alone and

1906

PRÉVOST v. LAMARCHE.

directly all the things comprised in his share * * * and to have never had the ownership of the other property of the succession." Art. 746 C.C. Everything, therefore, is in the same position as if the will had specifically bequeathed to Roméo Prévost the property which actually fell to him under the partition, with a substitution in favour of his children.

Consider the position of the children of the deceased institute, Amable Oscar Alexandre Prévost. The partition having been final, they must be "deemed * * * to have never had the ownership of the other property of the succession"; they must be deemed to have been excluded from the ownership of the other property of the succession. Yet if appellants' contention be well founded, they are entitled to a part of this other property, and perhaps ultimately to the whole of it.

The case is concluded by the judgment of the Privy Council in *De Hertel* v. *Goddard*(1). Reference is also made to *Dumont* v. *Dumont*(2); *Joseph* v. *Castonguay*(3); Thevenot-Dessaules (ed. Mathieu) nos. 1003, 1004, 1005, 1006; 4 Mignault, Code Civil, 332.

The judgment of the court was delivered by

GIROUARD J.—Je partage entièrement le sentiment de Mr. le juge Loranger, qui a différé de la majorité de la cour de revision. Les motifs qu'il apporte à l'appui de son dissentiment me semblent si péremptoires que je serais disposé à les adopter purement et simplement. Mais comme la cause est importante, nous croyons devoir résumer les raisons qui nous ont

(1) Q.R. 8 S.C. 72; 66 L.J.P.C. 90.

(2) 7 L.C. Jur. 12.

(3) 3 L.C. Jur. 141.

engagés à arriver à cette conclusion, sans cependant récapituler tous les faits de la cause.

En cour supérieure, Mr. le juge Fortin admet que le testateur, Amable Prévost, a fait deux substitutions distinctes, l'une en faveur de ses enfans commé grevés, et de ses petits enfants comme appelés, et l'autre subsidiaire, si tous ses enfants décèdent sans postérité, en faveur de sa femme comme grevée et de certains collatéraux comme appelés. Mais, ajoute le savant juge, ceci a été changé en 1897 par un acte de la législature de Québec, 60 Vict. ch. 95, intitulé

Loi déclarant final et définitif le partage des biens de la succession de feu Amable Prévost.

La législature de Québec a si souvent modifié les testaments de ses habitants, que depuis longtemps on tient pour constant qu'il n'y a pas de testament qui soit à l'abri de ses coups. A cette même session de 1897, pas moins de huit testaments ont été revus, corrigés et surtout considérablement altérés. Si les substitutions sont préjudiciables aux familles et à la société, il vaut mieux les abolir, comme on a fait en certains pays, plutôt que de les laisser à la merci de la législature à la requête de certains usufruitiers qui trouvent toujours leurs revenus insuffisants pour supporter le fardeau de la vie moderne.

Mr. le juge Fortin et la majorité des juges en révision, sont d'avis que l'effect de la loi Prévost a été de créer autant de substitutions que le testateur a laissé d'enfants, chaque part formant une substitution distincte.

Mr. le juge Pagnuelo est d'avis que la portée du jugement de Mr. le juge Jetté, qui fait l'objet de la loi Prévost, est que

1906

PRÉVOST v. LAMARCHE.

Girouard J.

chaque grevé possède définitivement la part de biens à lui léguée, sous la seule charge de la rendre à ses enfants, et que les autres grevés n'ont aucun intérêt dans les biens ainsi attribués à l'un d'eux.

Le préambule de l'acte fait en effet mention de ce jugement dans ces termes. Il ajoute même que les grevés

sont prêts à accepter le principe formulé dans l'ordonnance du juge Jetté, tel que susdit.

Mais quel est ce principe et ce jugement qui l'a consacré? Etait-ce le principe invoqué aujourd'hui par l'intimé, qui n'était pas même en jeu? On ne peut pas supposer que le jugement porte au delà de ce qui était demandé, qu'il soit *ultra petita*. Que demandaient les grevés devant Mr. le juge Jetté et la législature? Simplement une déclaration que le partage qui avait été fait était non pas provisoire, mais définitif. Et c'est tout ce qui fut fait. Les parties comme le juge n'ont jamais voulu pourvoir à un cas qui n'existait pas, à l'époque du partage, ni à celle du jugement ou même celle de l'acte de la législature, savoir, celui où un ou plusieurs grevés—ils étaient au nombre de sept—décéderaient sans enfants. En exprimant son opinion sur l'effet du partage, Mr. le juge Jetté n'a considéré et ne pouvait considérer que les circonstances qu'il avait devant lui, savoir, que tous les grevés vivaient ou étaient representés par leurs enfants. C'était l'effet immédiat du partage que le savant juge avait en vue. Il eut été plus prudent de s'en tenir aux conclusions de la requête des grevés et de déclarer seulement que le partage était définitif. Peut-on supposer un seul instant que les grevés auraient accepté un effet de ce partage qui leur enlevait à eux et à leurs enfants, le droit d'accroissement, si l'un d'eux décédait sans enfants avant l'ouverture de la substitution? Ils

ont accepté le principe du jugement qui décrétait que la partage était définitif et non provisoire, voilà tout; et c'est ce qu'ils s'empressent de déclarer de suite comme la phrase complète le démontre, savoir:

qu'ils sont prêts à accepter le principe formulé dans l'ordonnance du juge Jetté, tel que susdit, et à reconnaître le partage des biens de la succession du dit feu Amable Prévost comme ayant été final et définitif.

Si le jugement de Mr. le juge Jetté laisse quelque doute sur la portée qu'il peut avoir sur le testament de Mr. Amable Prévost, celui de la cour d'appeal n'en souffre aucun. Cette dernière cour était autorisée à l'examiner et même à le casser par le statut que nous venons d'indiquer, 60 Vict. ch. 95. Le grevé Roméo Prévost était lui-même un des requiérants provoquant cette révision. La cour d'appel a-t-elle sanctionné l'-opinion du juge Jetté que les grevés n'ont aucun intérêt dans les biens attribués à l'un d'eux par le partage? Non, elle a purement et simplement déclaré le partage final et définitif. Comme la teneur de cet arrêt a jusqu'ici échappé à l'attention des juges et des avocats, il n'est pas sans à propos d'en rappeler le texte:

Considérant que le dit testateur a légué à chacun de ses enfants, une part égale dans ses biens, et substitué à chacun de ses dits enfants, les enfants de ces derniers, pour recevoir la part des biens que leur père ou leur mère aurait recueillie au moyen du legs fait à ces derniers, et, qu'en autant, la somme des biens, échue à chacun des dits enfants, a été fixée, lors de la date du décès du dit testateur, et définie par le dit partage, pour chacun des dits enfants, aux termes et suivant l'intention du dit testament;

Déclare et adjuge que le dit partage est définitif, et qu'il est par les présentes, décidé qu'il est définitif.

L'acte 60 Vict. ch. 95, décrète enfin que ce jugement sera final et sans appel.

1906

PRÉVOST v. LAMARCHE.

Girouard J.

Il faudrait un texte bien clair pour accepter un changement aussi radical que celui suggéré par l'intimé, et en cas de doute je le donnerai en faveur du testament. Le statut en question ne dit pas cela ni expressément, ni implicitement. Je suis heureux de le constater, la loi Prévost respecte l'invioliabilité des dernières volontés du père de famille qui dispose de sa succession. Le législateur le déclare d'une façon non équivoque et dans le préambule et dans le texte du statut; il légalise tout simplement un partage définitif, qui dans les circonstances était un avantage pour tous les intéressés, sans changer les dispositions testamentaires ou pour être plus précis sans modifier l'ordre de transmission de la substitution qu'il avait créée. L'acte 60 Vict. ch. 95 déclare dans son préambule que Mr. Prévost n'a fait qu'une substitution en faveur de ses enfants et petits enfants (et non pas sept) :

> Attendu que les dits testament et codicilles comportent une substitution dont les enfants du dit feu Amable Prévost sont les grevés et ses petits-enfants les appelés, et qu'il fut spécialement ordonné par les dits testament et codicilles que les biens fonds ou immeubles du testateur passeraient en nature aux dits petits-enfants, sans que les enfants du testateur, ni même les petits-enfants, tant que l'usufruit légué aux enfants ne serait pas éteint, puissent les aliéner, vendre, engager ou hypothéquer pour quelque cause que ce fût.

Puis dans le dispositif, section 1ère, le statut décrète que

> le partage des biens de la succession de feu Amable Prévost * * * fait par et entre les légataires grevés de substitution * * *, est declare etre et avoir toujours ete final et définitif, et en conséquence les légataires grevés de substitution du dit feu Amable Prevost sont déclarés être et avoir toujours été les seuls propriétaires de la part des dits biens qui leur est respectivement échue aux termes du dit acte de partage et liquidation, sous la charge de rendre cette part à leurs enfants, à leur décès, tel que porté aux dits testament et codicilles.

1906

PRÉVOST v. LAMARCHE.

Girouard J.

Mais si l'un des grevés meurt sans enfants, à qui ira sa part? Le statut n'en dit rien expressément. Peut-il en disposer par testament ou autrement? L'intimé prétend que ni le code, ni le testament, n'a prévu cette éventualité, et qu'il n'y a pas lieu à l'accroissement. Le testateur ne parle pas d'accroissement en termes formels. Mais le testament de Mr. Prévost, en créant une seule substitution en faveur de ses enfants et petits-enfants conjointement, qu'il institue ses légataires universels, ne dispose-t-il pas de cette part en faveur des colégataires survivants? C'est ce que veulent dire les termes du testament, la loi des substitutions et le statut, 60 Vict. ch. 95, particulièrement ces expressions qui se trouvent dans ce dernier document que les grevés de substitution seront tenus *de rendre* à leurs enfants, "tel que porté aux dits testament et codicilles," ou encore celles qui forment les dernières lignes du statut,

à la charge de la substitution créée par le testament de feu Amable Prevost.

Assurément lorsqu'un chef de famille déclare que l'usufruit de ses biens appartiendra à ses enfants et la propriété à ses petits-enfants, il n'entend pas que ce legs change de destination chaque fois qu'un enfant ou petit-fils, représentant une souche, décédera sans postérité avant l'ouverture de la substitution. Le legs reste toujours le même et de même effet, c'est-à-dire, qu'il sera toujours en faveur des enfants et petits-enfants quelque soit leur nombre. Par la force même du legs, il y a accroissement, même si l'article 868 du Code Civil n'existait pas. Cet article, à mon avis, n'est venu que confirmer la position des légataires faite au testament. Il déclare en effet:

1906

PRÉVOST v. LAMARCHE.

Girouard J.

Il y a lieu à accroissement au profit des légataires en cas de caducité lorsque le legs est fait à plusieurs conjointement.

Il est réputé tel lorsqu'il est fait par une seule et même disposition et que le testateur n'a pas assigné la part de chacun des co-légataires dans la chose léguée. L'indication de quote-part égale dans le partage de la chose donnée par disposition conjointe n'empêche pas l'accroissement.

On dit qu'ici le legs n'est pas caduc dans le sens de cet article. Pour quelle raison? C'est ce que je ne puis comprendre, à moins de décider que le testateur a fait autant de substitutions qu'il y a de grevés, proposition que nous ne pouvons accepter. Il n'a créé, selon nous, qu'une seule substitution en faveur de plusieurs conjointment, par une seule et même disposition, comme d'ailleurs le déclare la loi de 1897, et alors il y a accroissement.

Je ne puis concevoir qu'un legs fait aux enfants en usufruit, et à leurs petits enfants en propriété, ne devient pas caduc à l'égard du grevé, et de son appelé, et ce pour leur part, lorsqu'ils meurent sans enfants avant l'ouverture de la substitution. Caduc, du latin *cadere*, veut dire que le legs, d'ailleurs valide, tombe et demeure sans effet par le décès du grevé sans enfants avant l'ouverture de la substitution. Sa part accroit aux autres légataires conjoints, tant en usufruit qu'en propriété. C'est la volonté expresse du testateur qui l'exige. Personne autre n'est appelé. C'est la situation que l'art. 868 C.C. a en vue.

Enfin, lorsque l'on examine les diverses clauses du testament, l'on acquiert la ferme conviction que ce que le testateur voulait c'était avant tout de conserver dans sa famille, jusqu'à la deuxième génération après lui, la fortune opulente pour l'époque qu'il avait amassée. Les legs d'immeubles sont déclarés insaisissables et incessibles. Défense absolue de les aliéner est faite aux légataires en usufruit. Les appelés eux

mêmes, c'est-à-dire, les petits-enfants, ne peuvent pas non plus disposer de leur part ou de leurs droits durant la vie de leurs parents et des autres grevés. Je veux, dit-il

que mes biens fonds ou immeubles de quelques nature et qualité qu'ils soient, passent en nature à mes dits petits-enfants et qu'en conséquence ils ne puissent être en tout ou en partie vendus ou aliénés par quelque autorité que ce soit ni sous quelque prétexte que ce puisse être même sous celui de plus grand avantage de mes dits petits-enfants, car telle est mon expresse volonté à cet égard.

Que signifie encore la deuxième substitution en faveur des collatéraux qu'il nomme, si ses enfants meurent tous sans enfants? Aucune allusion n'est faite à cette substitution subsidiaire dans le statut de 1897. Il ne paraît pas que les intéressés à cette disposition aient été mis en cause ou appelés, probablement parce qu'en face du nombre des descendants de Mr. Prévost, on la considérait comme non avenue. Ses enfants existaient tous ou presque tous en 1860, quelques années avant sa mort, lorsqu'il fit son dernier codicille et il n'a pas songé alors à révoquer cette seconde substitution, sans doute pour mieux manifester sa volonté de conserver sa fortune dans sa famille.

Comment cette deuxième substitution serait-elle réalisable, si les biens étaient passés légalement à des mains étrangères? Tous les grevés auraient bien pu faire comme leur frère Roméo et aliéner ainsi toute la succession. Toutes ces dispositions démontrent l'absurdité des prétentions de l'intimé.

Il ne me reste plus qu'ajouter quelques mots à propos de l'arrêt du conseil privé dans la cause de *De Hertel* v. *Goddard*(1), 1896, qui semble avoir in-

(1) 66 L.J.P.C. 90.

1906

PRÉVOST v. LAMARCHE.

Girouard J.

fluencé quelques juges des tribunaux inférieurs. J'ai lu et relu cette décision et je dois avouer que la rapport qui en est fait est si raccourci—j'allais dire vague, il couvre deux pages—que je n'ai pu à sa lecture en saisir toute la portée. Comme dans cette cause, le conseil privé a confirmé le jugement de la cour de révision et celui de la cour d'appel, je suis allé chercher des renseignements dans les rapports de ces cours. Le jugement de la cour d'appel ne me parait pas avoir été rapporté, mais celui de la cour de révision l'est (1). Il couvre treize pages et ça n'a pas été sans un certain travail que j'ai pu comparer les deux espèces. Briévement, voici ce dont il s'agissait dans la cause de *De Hertel* v. *Goddard* (2). William P. Christie lègue la seigneurie de Léry en usufruit à Catherine Robertson, et à son décès à ses deux filles, Mary et Amelia Robertson, et à sa nièce, Elizabeth Tunstall, qu'il institue d'ailleurs ses légataires universelles en usufruit, pour en jouir par parts égales, aussi en usufruit leur vie durante et, apres leur décès, à leurs enfants en propriété; enfin, au cas du décès de deux d'entr'elles, sans enfants, la seigneurie descendait en propriété aux enfants de la survivante. Cette dernière éventualité arriva. La nièce mourut la dernière laissant un fils. Le conseil privé, la cour d'appel, et la cour de révision ont jugé que la propriété était dévolue à ce fils, à l'exclusion de la légataire universelle d'Amelia. Je ne puis conçevoir comment cet arrêt peut être de quelque secours à l'intimé. Je crois qu'il aide plus les appelants, car il maintient le principe de l'accroissement entre les grevés au deuxième dégré; il ne pouvait en être question quant aux appelés, puisqu'il n'y en avait qu'un seul. Ce qui est

(1) Q.R. 8 S.C. 72.

(2) 66 L.J.P.C. 90.

certain, c'est que les deux espèces sont bien différentes. D'abord la succession Christie a été ouverte et l'une des grevés est décédée avant le code civil. La succession de Mr. Prévost a été ouverte après. C'est peut-être pour cette raison—il n'en donne pas—que le conseil privé tient que

> the word "conjointly" cannot neutralize or control the plain meaning of the words "in equal shares" by which it is immediately followed.

C'est la règle toute contraire que l'article 868 du code consacre. Quoiqu'il en soit, les deux dispositions ne sont pas les mêmes. Le fils d'Elizabeth Tunstall n'a pas recueilli les biens légués par une seule et même disposition conjointe, tandis que les appelés Prévost doivent recueillir non seulement à ce titre, mais encore comme légataires universels. On ne trouve pas dans le testament Christie les prohibitions d'aliéner qui frappent dans le testament Prévost, ni les mêmes liens de parenté. Toutes ces circonstances tendent à faire connaître la volonté du testateur. Enfin, le testament Christie présentait une difficulté touchant la validité du legs à l'appelé, parce que, disait-on, il comprenait plus de dégrés que la loi ne le permettait, et cette difficulté en a soulevé une autre au sujet de l'interprétation de l'article 963 du code, qui ne se présente pas dans le testament Prévost. Sans entrer dans plus de détails, je conclus, avec Mr. le juge Loranger, qui a rendu la jugement de la cour de révision dans la cause de *De Hertel* v. *Goddard*(1), que les deux espèces n'ont guère d'analogie.

Pour ces raisons, nous sommes d'avis d'accorder l'appel et les conclusions de la demande des appelants,

(1) Q.R. 8 S.C. 72.

1906

PRÉVOST v. LAMARCHE.

Girouard J.

avec dépens contre le mis-en-cause, contestant et intimé devant teutes les cours, encourus depuis sa défense à l'action.

Appeal allowed with costs.

Solicitors for the appellants: *Brosseau & Holt.*

Solicitor for the respondent: *A. Lamarche.*

FRANCIS GLOSTER AN INFANT BY CORNELIUS GLOSTER HIS NEXT FRIEND AND THE SAID CORNELIUS GLOSTER (PLAINTIFFS)..... APPELLANTS;

1906

*Nov. 9.
*Nov. 23.

AND

THE TORONTO ELECTRIC LIGHT COMPANY (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Electric Light Co.—Wires on public highway—Proximity to bridge—Injury to child—Dedication.

Several years ago the owners of land in the Township of York built a bridge over a ravine for access to and from the City of Toronto and about 1894 the Toronto Electric Light Co. placed wires across the ravine about ten feet from the bridge. In 1904 the bridge was reconstructed and made wider, being brought to within from 14 to 20 inches of the wires, which had become worn and ceased to be insulated. G., a boy under nine years of age, while playing on the bridge, put his arm through the railing and his hand touching the wire he was badly injured.

Held, reversing the judgment of the Court of Appeal (12 Ont. L.R. 413), that the plans and deeds in evidence shewed a dedication as a public highway of the bridge and land of each side of it and such highway included the land over which the wires passed.

Held, also, that the wires in the condition in which they were at the time of the accident were dangerous to those using the highway and the company were liable for the injury to G.

APPEAL from a decision of the Court of Appeal for Ontario (1), setting aside the verdict for the plaintiffs at the trial and dismissing the action.

The facts are stated as follows by Mr. Justice Osler in the Court of Appeal.

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 12 Ont. L.R. 413.

1906

GLOSTER v. TORONTO ELECTRIC LIGHT CO.

The facts of the case lie in a comparatively narrow compass. Several years before the occurrence which gave rise to the action, a private corporation known as the Scottish Ontario Land Company were the owners of a large plot of ground in the Township of York near the City of Toronto, part of which they laid out into building lots, laying out streets thereon which connected with existing highways in the township. They had also in order to provide for access to and from the city built a substantial bridge 24 feet in width over a wide and deep ravine on their property. Neither the street (Glen Road) as laid down on the plan through the ravine nor the bridge over it had been assumed by the defendant township as a public highway though the latter as the settlement in the township grew up came into constant and extensive use. After the bridge was built and some nine or ten years before action, the defendants, the Toronto Electric Light Company, carried their wires west of the bridge across the ravine on poles along the sides and bottom of the ravine, the wire as it came up the incline at the north end of the bridge being between six and seven feet from the west side of the bridge according to the recollection of such witnesses as could speak to its position at that time. The right of the defendants to erect these poles and carry their wires across the ravine in this manner was not in dispute and they or some of them were connected with poles for arc lights a short distance beyond the north and south ends of the bridge.

In course of time the bridge became out of repair and dangerous and while it had become of great importance to a large section of the public in the city and township, the company who had built it had ceased to have much, if any, interest in its mainten-

ance and had put up a notice that persons using it did so at their own risk, and the township disclaimed any obligation to repair it. The legislature finally intervened and by the 3 Edw. VII. ch. 89, after reciting that the bridge had become to all intents a public highway, enacted that the township without passing any by-law for the purpose should re-construct and repair it as a local improvement, assessing the cost upon the property benefited as described in the Act. The works were to be performed under the supervision of a competent engineer to be appointed by the county judge, but their construction was not to impose upon the township any liability for their future maintenance and repair.

The new bridge thus built by the township under the authority of the Act was being practically used for traffic of all kinds by the end of the first week in August, 1904, though some work remained to be done upon it and it was not finally approved by the engineer in charge until the middle of September, subject to some painting being done upon it which seems not to have been completed before the 1st of October.

The bridge was an iron structure four feet wider on each side than the old one, or in all a trifle more than 32 feet wide. On each side it was protected by a lattice-work iron railing 4 ft. 1 in. in height above the side walk of the floor of the bridge with lozenge shaped openings therein $16\frac{1}{4}$ in. in height by $10\frac{1}{4}$ in. in width. The distance between the railing and the defendant company's wire as reduced by the widening of the bridge was variously stated as from 14 to 20 inches, the wire being at the place where the plaintiff touched it a little lower than half way between the top of the railway and the floor of the bridge.

1906

GLOSTER v. TORONTO ELECTRIC LIGHT CO.

On the 8th of October, 1904, the plaintiff, a boy of between 8 and 9 years of age, who was crossing the bridge or playing thereon with some companions, pushed his arm through one of the lower openings in the lattice work of the railing and touched or took hold of the wire. There was some reason to suppose from his examination before the trial that he was attempting to reach it with a small metal toy he had in his hand, but this he would not admit or did not remember when giving his evidence at the trial. The insulation of the wire being imperfect the result was that the boy's hand, where it had taken hold of the wire, and his head, which rested upon or touched part of the iron work of the railway, were very severely burnt.

Millar and *J. D. McDougall* for the appellants referred to *Nelson* v. *Branford Lighting and Water Co.*(1); *Thomas* v. *Wheeling Electrical Co.*(2); *Schweitzer's Administrator* v. *Citizens' General Electric Co.*(3).

Hellmuth K.C. and *G. L. Smith,* for the respondents. *Smith* v. *Hayes*(4), collects the cases on negligence to date of the decision.

Defendants had no notice of the widening of the bridge. *Styles* v. *Cardiff Steamboat Co.*(5); *City of Toronto* v. *Toronto Electric Light Co.*(6).

GIROUARD J. concurred in the reasons stated by Davies J.

(1) 8 Am. El. Cas. 542.
(2) 8 Am. El. Cas. 528.
(3) 7 Am. El. Cas. 571.
(4) 29 O.R. 283.
(5) 4 N.R. 483.
(6) 6 Ont. W.R. 443.

DAVIES J.—I am of opinion that this appeal should be allowed and the judgment ordered by the trial judge based upon the findings of the jury restored.

The action was brought to recover damages sustained by an infant boy of 8½ years of age through his hand coming in contact with an uninsulated wire of the defendant company carried near to a public bridge crossing a deep ravine in the outskirts of Toronto and over which bridge the boy was lawfully passing when the accident occurred.

This bridge had shortly before the accident been re-constructed and widened at the upper part over which the public passed by the Township of York under special legislation passed for the purpose.

Before the bridge was so widened the defendants' wires were stretched across this ravine, but at a distance from the bridge which prevented any such accident occurring, and it was the widening of the bridge which brought it and the wires to the close proximity which existed at the time the accident occurred.

The bridge as widened had been in use by the public for some months and there was evidence that the trimmer employed by the defendants crossed this bridge daily during that time in the discharge of his duties and ought to have seen and reported to his employers the danger.

The jury, after a charge to which no objection is made, found the defendants guilty of negligence and that there was no contributory negligence on the part of the boy.

There was an iron fence about four feet high along the sides of the bridge in which were lattice-work diamond-shaped openings 16¼ inches long by 10½ inches wide, and it was through one of these openings that

1906

GLOSTER
v.
TORONTO
ELECTRIC
LIGHT CO.

Davies J.

the boy put his hand which came in contact with the uninsulated wire.

The ground upon which the judgment of the Court of Appeal proceeded was that the bridge was the extreme width of the highway and that while if the wires had been so close to the bridge that any one lawfully crossing it might accidentally touch them, a jury might find negligence, such a finding could not be made where the wire was beyond the side of the bridge outside of the highway and

> could not be reached or touched by any one without intending to do so or without stretching out through the railing beyond the side of the bridge and therefore outside of the highway.

Without expressing any opinion as to whether this statement of the law could be upheld or not, it is sufficient to say that in some strange way the facts were misapprehended by the Court of Appeal.

The plan with the writings from the owners and others put in evidence at the trial dedicating the lands across the ravine as a highway shews the latter to be of the same width across the ravine as the streets leading up to the ravine on each side. This plan was before us, having been returned amongst the exhibits, and leaves no doubt upon that point. Coupled with the legislation authorizing the enlarging and widening of the bridge there does not seem to be any reasonable doubt either of the dedication of these lands as a highway, or their acceptance as such by the township or the fact that the highway was much wider than the bridge. If these facts had not been misapprehended by the Court of Appeal, I think from the language and reasoning used by them their judgment would have been different.

A question was raised as to whether the defendant

company had had notice of the widening of the bridge, but the bridge had after its re-construction been used by the public as a highway for several months, and I have no doubt under the evidence that they must be taken to have had knowledge or at any rate ample means of knowledge of the material facts.

The defendant company transmitting such a dangerous element as electricity through their wires thus strung along a public highway fall short of being insurers, but are bound to exercise the greatest possible care and to use every possible precaution for the protection of the public.

Their wires in the condition in which they were at the time and place where the boy was so badly injured constituted a danger to those using the highway and were in fact a nuisance. They had become worn and defective and had ceased to be insulated and to offer any protection in case they came into contact with any one. These uninsulated wires were within a few inches, between 14 and 20, of the railing of the bridge, and it ought to have been present to the minds of the defendant company that if not grown up people at any rate children crossing the bridge or playing upon it would be exceedingly likely to touch the wires. To my mind the maintenance of these dangerous uninsulated wires charged with deadly electricity within a few inches of the bridge over which a large number of people daily passed for some months after its re-construction had been completed, and coupled with the other facts proved, fully justified the findings of the jury.

The observations of the judges of the Court of Appeal which decided the case of *Harrold* v. *Watney*(1) are much to the point.

(1) (1898) 2 Q.B. 320.

1906

GLOSTER v. TORONTO ELECTRIC LIGHT CO.

Idington J.

IDINGTON J.—The appellant has taken before us a ground that seems to have been ignored in the court below.

Mr. Justice Osler, who writes the judgment of that court, says:

> the highway near which the wire was erected was a bridge. It extended to the width of the bridge and no further.

It seems to me that the return of the plans and deeds to the registry office, after the trial, kept out of sight of the Court of Appeal very important pieces of evidence, and hence, I am inclined to think, this conclusion of fact arrived at by Mr. Justice Osler, upon which his judgment rests.

In light of the documents I refer to I cannot arrive at the same conclusion of fact as Mr. Justice Osler proceeds upon, and hence I arrive at a very different result from that he concludes with.

Unquestionably the highway extended far beyond the side of the bridge at the time of the accident.

A company known as the Scottish, Ontario and Manitoba Land Co., Limited, acquired, in the Township of York, a tract of land to be developed as a residental district outside of Toronto. A part of this land was surveyed into lots and plans were registered, of which plan No. 661, filed herein was one that was registered by the company in 1886. The land thus surveyed stretched northerly from a point about 600 or 700 feet beyond the line dividing that township from the City of Toronto. A deep ravine filled the intervening space between this line and that land.

At about that time this company acquired a strip of land eighty feet wide, stretching across the ravine and connecting the land plotted, as in plan No. 661, and other plans referred to, with the end of Glen Road

(a street in Rosedale, now in the City of Toronto), which had run up to the boundary line between Toronto and York township.

The company opened from the ravine, through their land on the northerly side of the ravine, in the course of the surveys just referred to, a road running northerly under the same name of Glen Road.

Obviously, the acquisition by the company of the strip across the ravine was for the express purpose of using it as a highway and by means of building thereon a bridge (on a level high enough to make it easy of access to travellers), to connect thereby the Rosedale end of Glen Road and the extension of Glen Road on the surveyed lands of the company on the north side of the ravine. The bridge was built at a height of about 125 feet above the deeper parts of the ravine.

The conclusions I draw from all the facts before us relative to this strip of land, and especially the conformation of the ground; the improbability, if not impossibility, of its use for building purposes; that it was intersected by a public highway, and the temporary device of granting by deed the use of this bridge to each purchaser of a lot of these surveys, are that the company never intended to use it for any other purposes than to subserve the uses of a public highway; that the future appropriation of the entire strip, for such purpose, was intended by the company; and its dedication also intended so soon as the development of the settlement being created would induce some public authority to accept, for the public, such dedication and save the company from the burthen of maintenance of such a structure as this bridge.

As things progressed the settlement came to need light. The respondents furnished the light. They

1906

GLOSTER v. TORONTO ELECTRIC LIGHT CO.

Idington J.

were, under the law by virtue of which they had become incorporated, entitled to use any street, highway or public place subject to agreement between them and the municipality in which the street, highway or public place lay, for erecting poles and stringing thereon the necessary wires to conduct their electric current.

They used Glen Road, clearly then a public highway, on either side of this ravine, for stretching thereon the electric wire of which the connecting part is now in question.

This use of Glen Road is, I think, attributable to an exercise of the right I advert to. In process of exercising that right, I have no doubt, they stretched across this ravine alongside of the bridge and over the strip thus intended for dedication, the wire they were putting up on Glen Road, as already stated, under the impression that the strip referred to across the ravine formed part of the public highway. The place where they thus stretched the wire across the ravine, some ten years or more after the bridge was built, would present the appearance of a public highway to any one looking at it then, used as it was, as part of the public highway known as Glen Road.

It would be manifestly absurd to suppose that such a company as respondents, at every step, verified the public title to the highway, rather than accept the appearances as facts.

Such being the interpretation I put upon the facts as a matter of historical research gathered from the evidence, now in the case, what follows? Can the respondents claim that they are not bound by the events that followed as clearly as if they had built along and upon what was an actual public highway?

Whether built under license such as would be conformable to the purpose of the company, or as of right, looking at the place in question as part of the highway, the company are clearly subject, in light of what happened afterwards, to the liability that attaches to them in every case where they use the public highway.

What happened is this. The bridge was needing reconstruction; the public needs were growing; the company and other owners of lands were getting tired of so irksome a situation. They agreed to dedicate, and so far as they could dedicated, by making a plan, dated 28th July, 1902, and registered as No. 1,248, in the registry office on the 22nd July, 1903.

This plan bears upon it the following certificate:

> This plan shews the lands coloured pink which by this plan and registered plans numbers 528, 661 and 1135 are laid out as Glen Road, Pelham Place, Bin-Scarth Road, Scholfield Avenue, Edgar Avenue and Maclennan Avenue and all parts of the said roads, avenues and place which are not or have not already been dedicated as public highways *are hereby dedicated as public highways* and for such purpose all estate and interest therein *is hereby assigned and conveyed to the corporation of the Township of York*, as witness the hands and seals of the parties hereto. Dated the 28th of July, A.D. 1902. (Signed, sealed and delivered, in the presence of R. J. Maclennan.)

It is executed by the company affixing their seal and many other owners signing and sealing the same. It is certified to by a surveyor as correct. The roads or road allowances referred to as pink coloured include the eighty foot wide strip across the ravine which has been referred to so frequently already.

Lands were thereafter sold and deeds thereof registered in accordance with said plan in a way that, by the terms of R.S.O. ch. 181. sec. 39, constituted this strip of land a public highway.

But we find, side by side with these events, others

1906

GIOSTER v. TORONTO ELECTRIC LIGHT CO.

Idington J.

marching along to fit into and so supplement these acts as to complete the dedication of the entire strip.

That intended dedication was acted upon by the legislature of Ontario, by 3 Edw. VII. ch. 89, being "An Act respecting Glen Road Bridge, in the Township of York."

I think a good deal might be said in support of the position that this Act might be taken as a legislative declaration that the bridge had long before the passing of the Act which was assented to on the 12th June, 1903, become to all intents a public bridge, and, therefore, to be presumed as dedicated at an earlier stage than the date of this legislation.

I do not conceive it necessary to do more than indicate that a consideration of the various dates, and the order of events I have related might be taken to indicate that this legislation as well as this declaration, emanating from the company who owned the land, was in truth the fulfilment of a long settled purpose that something like this should happen to the bridge and the land in question. Clearly, as if it had been admitted on the pleadings, I take it these acts, at all events coupled with the action of the township council in obeying the mandate of the legislature by reconstructing the bridge, may be looked upon as a final and conclusive acceptance by the public of the proffered dedication.

Let us see how that bears on the company and its obligations now in question. It is not now, as the result of all this, the case of an owner of a highly dangerous wire adjoining or adjacent to the highway, but of an owner, whose highly dangerous wire has, by reason of neglect, become a public nuisance on the highway, even assuming it to have been in some way or other brought there in the first place lawfully.

1906

GLOSTER
v.
TORONTO
ELECTRIC
LIGHT CO.

Idington J.

The statute enabling the company to use the public highway enables them to maintain works so constructed and must, I think, be taken, by implication, to mean a maintenance in a proper manner so as not to become a public nuisance.

It seems needless to argue that a wire of the character in question, fourteen or twenty inches from a bridge, such as that in question, strung along and over a public highway, is a nuisance. Companies engaged in such operations must conduct them with due regard to the public safety when enjoying the liberty of using the public highway in common with the rest of the public.

This solution of the highway question changes the whole aspect of the case. The question of notice can hardly be said to arise upon such a solution.

The conceivable case of a company having a clear grant of right to use a piece of private property a distance from the public highway, and that highway being suddenly enlarged in width, so as to render a continuation of the wire dangerous, although on private ground, might raise the question of the necessity for notice in a way that is not now raised in this case.

This case is: The company believing all the time that they were on the public highway and for over a year, at least, before the accident actually being thereon, chose to set up that they had not notice of the changes of structure upon the highway. I think the company are not relieved from their duty to the public by simply constructing properly. They must observe what experience teaches them more than anybody else the possibility of wires of this character getting out of repair, breaking down, or in many other ways becoming a source of danger to the public. If they choose for a long period of time to neglect that

1906

GLOSTER v. TORONTO ELECTRIC LIGHT CO.

Idington J.

duty, I think they must, when on a public highway, in like manner as municipal corporations, be presumed to know that which it was their duty to know in relation to the want of repair of their property on the public highway. The obligation to repair in such a case is analogous to the obligation of a municipal corporation bound to repair. I think the analogy may well be, in relation to notice, treated as complete.

The facts are found by the jury, on evidence proper to be left to the jury, and I think the judgment of the learned trial judge thereon ought to be restored. The appeal should be allowed with costs; but I cannot help remarking that the proof adduced might well have been made clearer and ought to have been, when once made, kept before the court.

MACLENNAN and DUFF JJ. concurred with His Lordship Mr. Justice Davies.

Appeal allowed with costs.

Solicitors for the appellants: *Millar, Ferguson & Hunter.*

Solicitors for the respondents: *Smith, Rae & Greer.*

EMILE COTÉ (PLAINTIFF) ..... APPELLANT; 1906

AND

THE JAMES RICHARDSON COMPANY (INTERVENING PARTIES) .... } RESPONDENTS.

*Oct. 15, 16.
*Nov. 19.
*Nov. 29.

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

Appeal—Jurisdiction—Intervention—Matter in controversy—Judicial proceeding—R.S.C. c. 135, s. 29.

An intervention filed under the provisions of the Code of Civil Procedure of the Province of Quebec is a "judicial proceeding" within the meaning of section 29 of the Supreme and Exchequer Courts Act, and a final judgment thereon is appealable to the Supreme Court of Canada where the matter in controversy upon the intervention amounts to the sum or value of $2,000 without reference to the amount demanded by the action in which such intervention has been filed. *Walcott* v. *Robinson* (11 L.C. Jur. 303); *Miller* v. *Déchêne* (8 Q.L.R. 18); *Turcotte* v. *Dansereau* (26 Can. S.C.R. 578); and *King* v. *Dupuis* (28 Can. S.C.R. 388) followed. *The Atlantic and North-West Railway Co.* v. *Turcotte* (Q.R. 2 Q.B. 305); *Allan* v. *Pratt* (13 App. Cas. 780), and *Kinghorn* v. *Larue* (22 Can. S.C.R. 347) distinguished.

Girouard J. dissented.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Gaspé, by which the plaintiff's action was maintained with costs, the attachment before judgment therein quashed, an intervention by the present respondents maintained and the respondents declared to be owners of a quantity

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

1906

COTÉ v. THE JAMES RICHARDSON CO.

of spool-wood which had been seized under the provisional attachment.

On the appeal coming on to be heard, a motion was made on behalf of the respondents to quash the appeal on the ground that the sum or value demanded by the action being only $850.49 the judgment was not appealable to the Supreme Court of Canada, although the value of the wood seized and claimed by the intervention exceeded the sum or value of $2,000.

The questions raised upon the motion are fully discussed in the judgments now reported.

Stuart K.C. for the motion.

Flynn K.C. contra.

The judgment of the court, upon the motion, was delivered by

THE CHIEF JUSTICE.—The plaintiff Coté brought, in July, 1905, an action in the Superior Court, at Gaspé, against one Dionne to recover the sum of $804.49, and at the same time procured a writ to attach, by way of *saisie-arrêt* before judgment, the goods of his debtor on the alleged ground of fraud and secretion. Thereupon certain spool-wood was attached as the property of the defendant, and subsequently The James Richardson Company, Limited, applied for and obtained leave to intervene in the suit between Coté and Dionne, alleging that the wood seized was really their property. By the intervention and exhibits filed in support the value of the wood is alleged to be over $4,000.

The plaintiff in the main suit then became defendant on the proceedings in intervention. He contested

1906

COTÉ
v.
THE JAMES RICHARDSON CO.

The Chief Justice.

the claim of the intervenants to the wood and denied that they had any title to it.

On these issues the parties went to trial. After the evidence was practically all in, the grounds of intervention were, by leave of the court, amended and the amended intervention and a new plea were filed, but the issue as to the ownership of the wood remained substantially the same.

The defendant in the main action suffered judgment by default, but the attachment was set aside, the intervention maintained and The Richardson Company declared to be the owners of the wood seized.

On appeal to the Court of Queen's Bench this judgment was confirmed, Lacoste C.J. and Blanchet J. dissenting, and from this judgment the present appeal is taken.

On the appeal to this court the question of jurisdiction is raised. I take it to be settled now beyond doubt that the extent of our jurisdiction depends upon the amount in controversy and that, by the amendment 54 & 55 Vict. ch. 25, sec. 3, sub-sec. 4, is determined by the amount demanded.

On the issues now before us what is the demand? Undoubtedly that contained in the intervention. The suit between Coté and Dionne was disposed of by the judgment in the Superior Court and the judgment appealed from is that rendered by the court of appeal on the merits of the intervention in which the matter in controversy is the title of the intervening parties to the lumber seized. It was to assert this title that they intervened and the issue between them and the plaintiff, defendant in the proceedings in intervention, is as to the validity of that title. If the judgment appealed from is confirmed they, the intervening parties, re-

1906

COTÉ v. THE JAMES RICHARDSON CO.

The Chief Justice.

main in undisputed possession of the lumber; if on the contrary it is reversed then the property does not revert to the plaintiff, defendant in the intervention, to be disposed of as his interest may appear, but remains vested in the original defendant Dionne and liable to the claims of all his creditors, the plaintiff bringing his attachment securing to himself priority of satisfaction unless the debtor is insolvent, in which case he would only be entitled *pari passû* with the rest of the creditors. The course of proceeding when insolvency is alleged is to give notice to the creditors to come in and prove their debts by a particular day after which a final distribution of the property is made among them. Articles 672 and 673 C.P.Q.

An intervention is "a judicial proceeding" within the meaning of section 29 of the "Supreme and Exchequer Courts Act."

The intervening party stands in the same position as a plaintiff. *L'intervention n'est que l'exercise d'une action;* Rousseau & Laisney, Vol. 5, p. 494, n. 8(1). When, as in the present case, the intervenant is a third party who comes into the case, not to maintain nor contest the principal demand, but to assert a right personal to himself, new issues are raised which may be disposed of independently of the main suit: *Walcot* v. *Robinson*(2). The proceeding in intervention was to all intents and purposes an action in revendication; *Miller* v. *Déchène*(3). It has been held that the withdrawal of the principal demand does not put an end to the intervention: *Mulholland* v. *Benning*(4); Carré & Chauveau, Adolphe, T. 3, Q. 1273(4).

(1) Art. 220 C.P.Q.
(2) 11 L.C. Jur. 303.
(3) 8 Q.L.R. 18.
(4) 15 L.C.R. 284.

On doit distinguer le cas où la demande principale est repoussée par des motifs tirés du fond, de celui où elle est rejetée à raison d'une nullité ou d'une fin de non-recevoir.

Dans le premier cas, auquel se rapportent les deux espèces jugées par la Cour de Bourges, les 2 avril, 1828 (J. de cette Cour. 7e Année, p. 237; S.V. 29, 2, 248), et 13 mai, 1831 (J. Av. t. 42, p. 249; Devill., 1832, 2, 45), on decide, sans difficulté qu'un jugement défavorable à la demande principale n'empêche pas qu'il soit statué sur l'intervention.

En effet, l'intervention d'un tiers dans une instance n'a pas toujours pour objet de soutenir l'action principale; elle tend souvent à des intérêts particuliers, et forme ainsi une action différente et nouvelle, d'où il faut conclure que si le demandeur principal succombe, le tribunal n'en doit pas moins examiner les droits de l'intervenant.

S'il s'agit du rejet de la demande principale par un moyen de nullité ou par une fin de non-recevoir, les opinions se divisent.

The head note in *The Atlantic & North-West Railway Co.* v. *Turcotte*(1), would give the impression that the contrary doctrine was laid down there, but Bossé J. speaking for the court, at page 319, makes practically the same distinction as Carré & Chauveau, *loc. cit.* Mr. Justice Bossé said:

Ce n'est plus le cas d'une partie qui réclame sa chose dans un litige régulier devant un tribunal compétent entre deux autres parties qui se la disputent, et qui, en raison de son droit, se fait adjuger la propriété, objet du litige entre le demandeur et le défendeur. C'est le cas du tiers intervenant dans un litige qui, sans collusion entre les parties principales, est déclaré ne plus exister en raison d'un défaut d'autorisation de la part du demandeur principal, défaut d'autorisation équivalant au défaut de juridiction du tribunal pour décider sur cette même demande principale, et entrainant, partant, le même défaut de juridiction pour les demandes accessoires et leurs conséquences.

This case is one in which

la partie réclame sa chose dans un litige régulier devant un tribunal compétent entre deux autres parties qui se la disputent, et qui, en raison de son droit se fait adjuger la propriété, objet du litige entre le demandeur et le défendeur.

(1) Q.R. 2 Q.B. 305.

1906

COTÉ
v.
THE JAMES RICHARDSON CO.

The Chief Justice.

Here the proceeding in intervention is to all intents and purposes an action in revendication. *Miller* v. *Déchène*(1).

At the argument much reliance was placed upon *Allan* v. *Pratt*(2). In my opinion that judgment has no application in the present case. There the appeal was to the Privy Council from a judgment of the court of appeal for Quebec in a case in which the amount in dispute, that is to say, the amount of the judgment appealed from was $1,100 while the amount of the original demand was $5,000.

The question of want of jurisdiction turned in that case entirely upon article 1178 of the Quebec Code of Civil Procedure, now article 68, C.P.Q., which enacts that the judgment of the court of appeal of the province shall be final in all cases where the matter in dispute shall not exceed the sum or value of five hundred pounds sterling. Their Lordships held that in determining the question of the value of the matter in dispute upon which the right to appeal depends the correct course to adopt is to look at the judgment as it affects the interests of the parties who are prejudiced by it and who seek to relieve themselves from it by an appeal. But that rule does not apply to this court. 54 & 55 Vict. ch. 25, sec. 3, sub-sec. 4, fixes the mode of determining the amount in controversy and if the appeal in *Allan* v. *Pratt*(2) had been taken to this court we undoubtedly would have had jurisdiction to hear it because the amount of the original demand $5,000 must have been held to be the amount in controversy. The same principle had been previously applied by the Privy Council in the case of *Macfarlane*

(1) 8 Q.L.R. 18.

(2) 13 App. Cas. 780.

1906

COTÉ v. THE JAMES RICHARDSON CO.

The Chief Justice.

v. *Leclaire*(1). If in this case Coté had, on the principal demand, obtained judgment for an amount exceeding $2,000, but if the value of the wood seized and claimed by The Richardson Company's intervention was only $1,000, Coté's interest under the rule in *Allan* v. *Pratt*(2) would be of an appealable amount, but would there be an appeal here in such circumstances? Here I would draw attention to the significant observation of Taschereau J. in *King* v. *Dupuis* (3), at page 394, where referring to the cases of *Champoux* v. *Lapierre*(4), and *Gendron* v. *McDougall*(5), relied on by the respondent at the argument on the question of jurisdiction, he says, at page 394:

> It was at that time, I may premise, though perhaps unnecessarily, the amount in controversy upon the appeal to this court that ruled not, as it is now, the amount of the original demand, when the extent of our jurisdiction depends upon the amount in controversy.

By sub-section 4 of 54 & 55 Vict. ch. 25, sec. 3, Parliament, for the first time, fixes a statutory mode of determining the amount in controversy which was that laid down in *Joyce* v. *Hart*(6); *Levi* v. *Reed*(7), and apparently uniformly acted upon in this court until *Allan* v. *Pratt*(2); *Gilbert* v. *Gilman*(8), per Taschereau J. at page 195. This last case was decided in 1888 and the statute 54 & 55 Vict. was passed in 1891.

In *Kinghorn* v. *Larue*(9), at page 349, Taschereau J., rendering the judgment of the court, adopted the

(1) 15 Moo. P.C. 181.
(2) 13 App. Cas. 780.
(3) 28 Can. S.C.R. 388.
(4) Cout. Dig. 56.
(5) Cout. Dig. 56.
(6) 1 Can. S.C.R. 321.
(7) 6 Can. S.C.R. 482.
(8) 16 Can. S.C.R. 189.
(9) 22 Can. S.C.R. 347.

1906

COTÉ
v.
THE JAMES RICHARDSON CO.

The Chief Justice.

rule laid down in *Macfarlane* v. *Leclaire*(1), and said:

> I am of opinion that this appeal must be quashed according to the well settled jurisprudence on this point, viz., that it is the interest of the party appealing from a judgment that has to be taken into consideration, to determine whether the case is appealable or not.

Further, at page 351 Taschereau J. says: "54 & 55 Vict. does not affect this case." In *Kinghorn* v. *Larue* (2) the amount demanded and the amount granted were, as Taschereau J. says, not different. Kinghorn having obtained judgment against Hall & Co. for $1,129 seized under a writ of execution certain immovable property which realized at the sale the sum of $950. Larue, a judgment creditor of the defendants for the sum of $24,000 was collocated as a creditor *au marc la livre* on this sum of $950, hence the appeal by Kinghorn, and there was nothing in issue either below or here except the right of Larue to be collocated. The amount of Kinghorn's judgment was not within the appealable limit nor was the amount of the collocation. The amount of Larue's claim was appealable, but was not in controversy and could not be in any way affected by any judgment this court could render. So clearly there was no appeal here and from a casual observation of Taschereau J. in such a case, I do not draw the conclusion that this court has decided that the statute was not intended to apply a rule by which the amount in controversy was to be fixed whether that amount was demanded in the original declaration which accompanied the writ of summons or in the conclusions to an opposition or intervention or other like judicial proceeding.

(1) 15 Moo. P.C. 181. (2) 22 Can. S.C.R. 347.

1906

COTÉ
v.
THE JAMES RICHARDSON CO.

The Chief Justice.

Taschereau J. says in *King* v. *Dupuis*(1), at page 396:

> I do not see how, on this appeal, (upon what is clearly a judicial proceeding, *Turcotte* v. *Dansereau* (2)), it can be denied that the matter in controversy, and demanded by that opposition, is of the value of $2,000 or over.

Turcotte v. *Dansereau*(2) is very much in point here. By the declaration the plaintiff claimed from the defendant the sum of $1,997.92 with interest and costs, but when the opposition was filed the amount due on the judgment which it sought to have annulled amounted to upwards of $2,000, and it was held by this court that an opposition filed for the purpose of vacating a judgment entered by default is a "judicial proceeding," and that the appellate jurisdiction of this court depended on the matter in controversy in that proceeding without reference to the amount demanded by the action in the principal suit.

It is not necessary that the amount in controversy should be a sum of money. The statute was intended to cover also the value of the thing demanded, the object being to give this court jurisdiction to hear and decide appeals in cases where the issues involved a consideration of sufficient value to justify the appeal.

In *King* v. *Dupuis*(1), at page 395, Taschereau J. says:

> Here it is the ownership of $3,500 worth of lumber that is in question (as in the present case); the appellant, by his opposition intervened in the original case to assert his right to this lumber that the respondent had caused to be seized.

On the whole I am of opinion that this court has jurisdiction to try the issue as to the ownership of the lumber and that *King* v. *Dupuis*(1) and *Turcotte* v. *Dansereau*(2) are authority for this opinion.

(1) 28 Can. S.C.R. 388. (2) 26 Can. S.C.R. 578.

1906

COTÉ
v.
THE JAMES RICHARDSON CO.

Girouard J.

GIROUARD J. (dissenting).—This appeal raises a very nice question of civil procedure upon which it is my misfortune to have to dissent from the court. I quite agree with the learned Chief Justice that an intervention, which I believe corresponds to the "interpleader" or "third party" proceedings of the English practice under the modern Judicature Acts, is a demand, and in a case like the present one, it is to a certain extent distinct from that formed by the plaintiff. I say to a certain extent, for by its conclusion the intervening parties pray that the seizure before judgment made by plaintiff be declared illegal, and in this respect I think the intervening parties take the position of defendants in the case. But whether that be correct or not, it seems to me it cannot be denied that this intervention, or distinct demand, does not constitute a new suit, but is a mere incident in a pending suit. If there was any doubt upon this point under the old law of France, there is none under the new Code of Civil Procedure of the Province of Quebec.

In order to better understand its provisions, I think it is not out of place to make a short recapitulation of the laws governing interventions.

The authority of Carré & Chauveau, Vol. 3, p. 214, Q. 1273, is invoked to establish that the withdrawal of the principal cause does not put an end to the intervention. This may not be important, for there may be several different demands in a pending suit, and because one of them is decided before another, it does not mean that they do not all exist in the same suit. But Carré & Chauveau, if I understand them well, do not absolutely hold that the withdrawal of the principal demand does not put an end to the intervention. They make distinctions. They quote decisions both

ways. And how can it be otherwise when we consider the legislation upon the subject in France under and before the Code?

The old ordinance of Civil Procedure of 1667, Tit. 11, has only one short article (art. 28) upon the subject of interventions, which has been reproduced by the Code of Civil Procedure of France. Article 339:

> L'intervention sera formée par requête qui contiendra les moyens et conclusions dont il sera donné copie ainsi que des pièces justificatives.

The only difference from the ordinance of 1667 is to be found in article 340:

> L'intervention ne pourra retarder le jugement de la cause principale, quand elle sera en état,

that is, ready for judgment.

Under these various provisions it is not surprising to find a very conflicting jurisprudence upon questions connected with interventions. The decisions will be found in Gilbert sur Sirey, Carré & Chauveau, and the other annotators and commentators of the Code of Civil Procedure of France. They are of very little assistance to us. For over fifty years, the Province of Quebec has been governed by a very different Code of Procedure.

The want of new provisions was felt as early as 1849, when 12 Vict. ch. 38, sec. 82, was passed, and amended in 1853 by 16 Vict. ch. 194, sec. 22. These enactments are summarized in the Consolidated Statutes of Lower Canada, ch. 83, sec. 71. Under these statutes one decision was rendered by the court of appeal which I believe deserves some attention. That is *Mulholland* v. *Benning*(1) decided in 1864 by

(1) 15 L.C.R. 284.

1906

COTÉ
v.
THE JAMES RICHARDSON CO.

Girouard J.

Duval C.J., Meredith, Drummond, Mondelet and Badgley JJ., where it was held, reversing the judgment of Mr. Justice Smith in the Superior Court, that the withdrawal of the principal action did not put an end to an intervention filed for the purpose of revendicating the thing seized by the plaintiff.

In 1867 more complete enactments were introduced by the Code of Civil Procedure, articles 154-158. These articles form part of chapter 4, relating to "Incidents" in a pending suit. It is, I believe, the first time that the legislature did so declare, although it is pretty hard to conceive that an intervention could be anything else, as the very word means, that is, *inter venire,* to come between.

The provisions of the new Code are more comprehensive and more precise than any legislation we had before; in fact they are all given as new law, or amending the old law.

Article 220:

Every person interested in an action between other parties may intervene therein at any time before judgment. C.C.P. 154 amended 156, in part.

Article 222:

It cannot stay the proceedings in the principal action unless it is allowed by the judge. *New* C.C.P. 156.

Article 224:

The proceedings are subject to the same rules as the action during which they are made, and the delays for pleading are computed from the date of the service of the intervention. *New* C.C.P. 158 amended.

If an intervention is a mere incident, it seems to me impossible to conceive that it can survive the principal demand. The above articles shew that two causes then exist in a pending suit, that is the princi-

pal cause or the demand of the plaintiff, and the intervention. And so the Quebec courts have held even under the old code of 1867.

In 1884, Mr. Justice Torrance decided that where the principal action is of a summary nature, the proceedings on an intervention therein are governed by the same rules: *Stephen* v. *Montreal, Portland & Boston Rly. Co.*(1).

In 1890, Mr. Justice Mathieu decided that the contestation of an intervention, and the merits of the principal cause must be adjudged at the same time: *Stein* v. *Bourassa*(2).

Finally, in 1892, the court of appeal, Baby, Bossé, Blanchet, Hall and Würtéle JJ., held that where the principal action is dismissed for an irregularity, the intervention must likewise disappear, whatever may be the grounds on which it is based, the court holding that it does not introduce a new suit or *instance,* but that it is only an appendix to the principal demand: *The Atlantic and North-West Rly. Co.* v. *Turcotte*(3).

For these reasons, interventions, although constituting judicial demands, and subject to the same rules of procedure as the principal demand, are mere incidents in the principal suit, like incidental and cross demands, improbations, *inscriptions de faux,* disavowals of attorneys, and *reprises d'instance.* Articles 216, 219, 228, 233, 257, 271, C.P.Q. All these may happen in the same suit. In fact the case of *The Atlantic & North-West Co.* v. *Turcotte*(3) is an example of three or four incidents upon which issues were joined. The practice has been to dispose of them all by one final judgment as was done in this case.

(1) 7 Legal News 62. (2) 18 R.L. 484.
(3) Q.R. 2 Q.B. 305.

1906

COTÉ v. THE JAMES RICHARDSON CO.

Girouard J.

Even oppositions to judgment or to seizure and sale, or upon the distribution of moneys, known as oppositions *afin d'annuler, afin de charge, afin de distraire* or *afin de conserver,* which admittedly form distinct demands, are not incidents of the principal action(1), but they are so intimately connected with it that they bear the same title, the name of the opposant being only added. They are always the inevitable sequence of the judgment or of its execution; they constitute what may be called the last phase of the same law suit. All the parties in the original cause are entitled to a notice from the opposant that the opposition has been returned by the seizing officer, and they are all entitled to be heard and to have the same rejected or dismissed upon proper issues. Articles 650, 651, 653 C.P.Q.

Finally, in determining the actual interest of the party contesting an opposition, due regard is always had to the judgment he is endeavouring to execute. It is especially when estimating the appealable interest of a plaintiff in the main action, that courts of justice have invariably looked at the final judgment, irrespective of the interest of the opposing party, a proposition which the decisions quoted hereafter will amply demonstrate.

These observations will help us, I hope, to reach an intelligible interpretation of our statutes granting the right of appeal.

It is enacted by 12 Vict. ch. 39, sec. 82 (1849), that where

> the right of appeal from any judgment of any court is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different.

(1) Arts. 653, 751, C.P.Q.

This enactment is substantially reproduced in article 1142 of the Code of Procedure of 1867, and article 44 of the Code of 1897.

By 34 Geo. III. ch. 6, sec. 30, and 12 Vict. ch. 37, sec. 19, an appeal lies in several cases to His Majesty in His Privy Council, and among others "where the *matter in dispute* exceeds £500 sterling." This enactment is re-enacted in the code of 1867, art. 1178, and in the code of 1897, art. 68.

In 1851, in *Gugy* v. *Gugy*(1), the court of appeal, composed of Sir James Stuart C.J., and Rolland, Panet and Aylwin JJ., four of the ablest judges who adorned the Quebec Bench, held that the right of appealing to the Privy Council from a judgment upon an opposition made by the defendant to judgment, is settled by the nature and quality of the principal demand. The defendant, opposant, had alleged that the principal sum had been compensated by a sum due to him by the plaintiff, and far exceeding £500.

Sir James Stuart said:

Dans la présente cause, le jugement fut rendu pour une somme de £200, pour laquelle l'intimée fit émaner un bref (*writ*) d'exécution, et c'est sur une opposition faite à cette exécution par l'appelant qu'appel a été interjetté. L'exécution ici est la demande, et l'opposition n'est qu'une exception à cette demande.

The same principle has been adopted by article 1173 of the Code of Procedure.

"The Supreme Court Act," as amended and now in force, section 29, sub-section 1, in so far as it relates to the amount involved, says:

No appeal shall lie under this Act from any judgment rendered in the Province of Quebec, in any action, suit, cause, matter or other judicial proceeding, wherein the matter in controversy does not amount to the sum or value of two thousand dollars.

(1) 1 L.C.R. 273.

1906

COTÉ
v.
THE JAMES RICHARDSON CO.

Girouard J.

And in sub-section 4, added by 54 & 55 Vict. ch. 25, sec. 3, sub-sec. 4, the Act adds:

> Whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different.

It seems to me that only sub-section 1 applies to this case, as there is no difference between the amount demanded and the amount recovered. The appellant obtained a judgment for exactly the full amount of his demand.

I take it for granted that our own decisions, especially a long array of them, are binding upon us, especially when they follow those of the Privy Council. I do not hesitate to say, with due deference, that if we receive this appeal we reverse the well settled jurisprudence, not only of the Quebec courts, but also of this court and of the Privy Council.

It is contended that such a conclusion is supported by the authority of *Turcotte* v. *Dansereau*(1), and *King* v. *Dupuis*(2).

I cannot understand how *Turcotte* v. *Dansereau*(1) can be invoked at all. The appellant was not the plaintiff, but the defendant, whose interest was calculated at the time of the making of his opposition to judgment. Our decision was not based on the fact that the amount was not sufficient. Quite the reverse. Interest was allowed to make up the appealable amount, as the Privy Council had done in *Boswell* v. *Kilborn* (3), and *Bank of New South Wales* v. *Owston*(4). *Turcotte* v. *Dansereau*(1) may be at variance with *Gugy* v. *Gugy*(5), but this does not help the present appellant, as he is not an opposant to judgment.

(1) 26 Can. S.C.R. 578.
(2) 28 Can. S.C.R. 388.
(3) 12 Moo. P.C. 467.
(4) 4 App. Cas. 270.
(5) 1 L.C.R. 273.

In *King* v. *Dupuis*(1), which is a case somewhat similar to this one, a lumberman by the name of King was opposing by an opposition *afin de distraire,* the seizure and sale of a certain quantity of logs of the value of $3,500. The plaintiff, Dupuis, had obtained judgment for the amount of his demand, namely, $119.50. We decided that King could appeal, but we did not decide that the plaintiff, Dupuis, could, the point not being even involved in the case. Mr. Justice Taschereau, who rendered the judgment of the court, refers to the decisions in *McCorkill* v. *Knight*(2); *Kinghorn* v. *Larue*(3), and *Macfarlane* v. *Leclaire*(4), and when we read the judgments in these cases there cannot be any doubt what the learned judge had in his mind. His Lordship has in fact recapitulated the whole jurisprudence in *Kinghorn* v. *Larue*(3), which is a case exactly in point. The question of appeal came up on an opposition *afin de conserver,* which is a judicial proceeding or demand, perhaps more independent of the main action than any other opposition. It was contested by the plaintiff who had obtained judgment for $1,129, and the opposition was for $24,000. It was held that the plaintiff had no appeal. Mr. Justice Taschereau, for the court, said:

> Here the appellant's judgment is for $1,129, and to that amount and that amount alone, is he pecuniarily interested in the present case. The case of *Gendron* v. *McDougall* (5) is clearly in point. In that case Gendron had obtained a judgment against one Ogden for $231, and in execution thereof seized an immovable worth $2,000. McDougall filed an opposition *afin de distraire,* claiming the land so seized as his property. Gendron contested the opposition. The Court of Queen's Bench dismissed his contestation and maintained McDougall's opposition. Gendron then appealed to the Supreme Court, but, though the question at issue on McDougall's opposition was one

(1) 28 Can. S.C.R. 388.
(2) 3 Can. S.C.R. 233; Cout. Dig. 56.
(3) 22 Can. S.C.R. 347.
(4) 15 Moo. P.C. 181.
(5) Cout. Dig. 56.

1906

COTÉ
v.
THE JAMES RICHARDSON CO.

Girouard J.

of title to a piece of land, and that piece of land was worth $2,000, this court quashed Gendron's appeal, on the ground that his pecuniary interest on his appeal was limited to $231, the amount of his judgment. That case, which is binding upon us, seems conclusive upon the question.

And referring to the case of *Macfarlane* v. *Leclaire*(1), the learned judge observes that the Privy Council intimated, though, of course, without determining, that had the judgment been against Leclaire, a party just in the position of the present appellant, and of Kinghorn, Leclaire would not have had a right to appeal, as his pecuniary interest would not amount to £500 sterling. Finally, the learned judge concludes:

> The statute 54 & 55 Vict. does not affect this case. This is not a case where the amount demanded and the amount granted are different.

In *Allan* v. *Pratt*(2), an appeal decided in 1888 from the Quebec court of appeals, Lord Selborne said:

> Their Lordships are of opinion that the appeal is incompetent. The proper measure of value for determining the question of the right of appeal is, in their judgment, the amount which has been recovered by the plaintiff in the action and against which the appeal could be brought. Their Lordships, even if they were not bound by it, would agree in principle with the rule laid down in the judgment of this tribunal delivered by Lord Chelmsford in the case of *Macfarlane* v. *Leclaire*(1), that is, that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal.

True, *Allan* v. *Pratt*(2), in so far as this court is concerned, is no longer law in a similar case, that is, where the amount demanded is different from that recovered. This change has been effected in 1891 by 54 & 55 Vict. ch. 25. But out of the special case provided

(1) 15 Moo. P.C. 181. (2) 13 App. Cas. 780.

1906

COTÉ v. THE JAMES RICHARDSON CO.

Girouard J.

for by that statute, I cannot see that the general principle affecting the right to appeal, as laid down by the Privy Council, is not yet sound. Until the Privy Council declares the contrary, I do not intend to doubt its meaning and jurisprudence, especially in face of *Beauchemin* v. *Armstrong*(1) decided by this court in 1904. The action of Armstrong was for $2,217 and was dismissed by the trial court, whose judgment was confirmed in appeal, except as to certain costs amounting to $631, which were ordered to be borne by the defendant. The plaintiff acquiesced in this judgment. On appeal to this court by the defendant, which was quashed for want of jurisdiction, Chief Justice Taschereau, speaking for the court, said:

> This is not a case where the amount demanded originally governs as to the jurisdictional pecuniary limitation under sub-section 4 of section 29 of the "Supreme Court Act," but it is a case falling within the decision of the Privy Council in *Allan* v. *Pratt*(2), which was followed by this court in the case of *Monette* v. *Lefebvre* (3)
>
> The interest of the party appealing is for a sum less than $2,000, and, therefore, the appeal must be quashed.

The principal laid down in *Macfarlane* v. *Leclaire* (4) also clearly covers this case. Lord Chelmsford said:

> In determining the question of the value of the matter in dispute upon which the right to appeal depends, their Lordships consider the correct course to adopt is to look at the judgment as it affects the interests of the parties who are prejudiced by it, and who seek to relieve themselves from it by an appeal. If their liability upon the judgment is of an amount sufficient to entitle them to appeal, they cannot be deprived of their right because the matter in dispute happens not to be of equal value to both parties; and, therefore, if the judgment had been in their favour, their adversary might possibly have had no power to question it by an appeal.

(1) 34 Can. S.C.R. 285.
(2) 13 App. Cas. 780.
(3) 16 Can. S.C.R. 387.
(4) 15 Moo. P.C. 181.

1906

COTÉ
v.
THE JAMES RICHARDSON Co.

Girouard J.

In the present case only one judgment was rendered maintaining the plaintiff's demand for $804.49, quashing his *saisie-arrêt,* maintaining the intervention and declaring the respondents proprietors of the lumber so seized, admitted to be of the value of about $4,000.

It is suggested that the plaintiff, now appellant, represents the mass of the creditors. He does not so far, because he has not alleged insolvency or *déconfiture* of the defendant. The creditors are not parties to this case in any shape or form. We do not even know that there are other creditors. The allegation that the defendant, Dionne, has been secreting his goods

avec l'intention de frauder ses créanciers en général et le démandeur en particulier,

is not sufficient to put creditors in the case for distribution *pro ratâ*: Arts. 673, 694 C.P.Q. The plaintiff represents only himself, and to the extent of his judgment, that is $804.49, and nothing more. Moreover,—Where is the proof that the interest of all the creditors, if others exist, amounts to $2,000?

For these reasons I am of opinion that the motion to quash should be granted, and the appeal dismissed with costs.

Motion dismissed with costs.

Solicitor for the appellant: *Auguste Beaudry.*

Solicitor for the respondents: *A. S. Garneau.*

On the 29th of November, 1906, the appeal was heard upon the merits.

1906

COTÉ
v.
THE JAMES RICHARDSON CO.

Flynn K.C. appeared for the appellant.

Stuart K.C. and *Garneau K.C.* appeared for the respondents.

On the 29th of November, 1906, upon an equal division of opinion among the judges, the appeal stood dismissed without costs.

Appeal dismissed without costs.

1906

*Oct. 30.
*Nov. 22.

THE QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES (DEFENDANTS) AND ULRIC TESSIER AND OTHERS (ADDED PARTIES) } APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown—Breach of trust—Purchase of debentures out of Common School Fund—Knowledge of misapplication of moneys—Payment of interest—Statutory prohibition—Evasion of statute—Estoppel against the Crown—Action—Adding parties—Practice.

In an action by the Crown against the Quebec North Shore Turnpike Road Trustees to recover interest upon debentures purchased from them by the Government of the late Province of Canada (with trust funds held by them belonging to the Common School Fund), the defendants pleaded that the Crown was estopped from recovery inasmuch as, at the time of their purchase, the advisers of the Crown were aware that these debentures were being issued in breach of a trust and with the intention of misapplying the proceeds towards payment of interest upon other debentures due by them in violation of a statutory prohibition.

Held, affirming the judgment appealed from (8 Ex. C.R. 390) that, as there was statutory authority for the issue of the debentures in question, knowledge of any such breach of trust or misapplication by the advisers of the Crown could not be set up as a defence to the action.

APPEAL from the judgment of the Exchequer Court of Canada (1) maintaining the action with costs. The action was on information by the Attorney-General of Canada, to recover interest due upon debentures pur-

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 8 Ex. C.R. 390.

chased by the Government of the late Province of Canada, under the circumstances stated in the judgments now reported, from the defendants. In the Exchequer Court judgment was rendered in favour of the Crown, on 11th January, 1904 (1), on which an appeal was taken by the defendants to the Supreme Court of Canada. On 13th of May, 1904, when that appeal came on for hearing, the argument of counsel for the appellants was stopped and it was announced by the court that the appeal could not be further proceeded with until the other bondholders were made parties, and, on 16th May, 1904, it was ordered that the judgment then under appeal should be opened and the matter remitted to the court below for the purpose of having all necessary parties represented in the cause, according to the practice of that court, before final judgment should be rendered.

Subsequently, the other appellants, above named, were added (each for the purpose of representing certain classes of the other bondholders interested), and, on the 9th of October, 1905, the judgment now appealed from was rendered, in terms similar to those of the judgment referred to above and in the Exchequer Court report above cited. The said last mentioned judgment proceeded as follows:

"1. This court doth order, adjudge and declare that in any future payment or distribution of interest on the debentures, or any of them, issued by the defendants, His Majesty the King is entitled, in respect of the debentures held by him and mentioned in the information herein, to share in such payment or distribution of interest *pari passû* with other holders of debentures of a like class.

(1) 8 Ex. C.R. 390.

1906

QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES v. THE KING.

"2. And this court doth further order, adjudge and declare that with respect to the Montmorency Bridge debentures held by His Majesty the King, His Majesty is also entitled to payment of the arrears of interest for which the defendants have, pending the proceedings herein, made provision, unless it should appear that such provision has been made out of funds not applicable to the payment of such interest, and that on the proper taking of the accounts the tolls and revenues of the said bridge have not been sufficient to enable the defendants to make such provision therefrom.

"3. And this court doth further order, adjudge and declare that with reference to the bond for £5,000 mentioned in the information of the Attorney-General of Canada fyled herein, His Majesty the King is entitled to payment thereof when there are funds available for that purpose after provision is made for other prior charges upon the tolls and revenues of the said trust or of the said defendants, the Quebec North Shore Turnpike Road Trustees.

"4. And this court doth further order and adjudge that His Majesty the King do recover his costs of the action to be taxed."

The questions raised upon the present appeal are stated in the judgments now reported.

Stuart K.C., Lafleur K.C. and *C. E. Dorion K.C.* appeared for the several appellants.

Shepley K.C. for the respondent.

GIROUARD J.—I regret I have to dismiss this appeal. I say so intentionally, for I feel that the public who sought for investment in the Quebec Turnpike

Trust debentures had every reason to presume that the interest on the debentures was not to be supplied by the Crown directly or indirectly. I must confess that I have a strong sympathy for the ordinary bondholders who naturally looked upon these debentures as Government securities. But we are not here to administer sympathy or even equity, but the laws of the land. Their expectation is not sufficient to determine the right of the Crown to invest in these debentures the funds of which it was trustee, and to hold and claim under the same. All the statutes which have been quoted at the bar and in the factums, enact that the prohibition to the Crown is limited to the payment of the interest on the said debentures out of the Consolidated Revenue Fund.

In 1841, by 4 Vict. ch. 17, sec. 21, it is provided that the trustees may borrow money

> not to be paid out of or to be chargeable against the general revenue of the province.

In 1851, by 14 & 15 Vict. ch. 132, it is declared

> that no money shall be advanced out of the provincial funds for the purpose of paying the said interest.

During the same session of Parliament, by 14 & 15 Vict. ch. 133, sec. 2, the trustees are authorized to issue certain debentures with this proviso:

> And neither the principal nor interest of the debentures to be issued under this Act shall be guaranteed by the province or payable out of any provincial funds.

In 1853, by 16 Vict. ch. 235, sec. 7, the trustees may again issue debentures

> provided nevertheless that * * * no money shall be advanced out of the provincial funds for the payment of the said interest.

1906

QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES v. THE KING.

Girouard J.

Therefore, according to the old maxim *expressio unius exclusio est alterius,* the Crown had a perfect right to invest in and hold the debentures of the Turnpike Trust out of the funds of which it was trustee, for instance, the Common School Fund, even for the purpose of providing for the payment of interest on its debentures past or future.

The appeal should be dismissed, but, under the circumstances, without costs.

DAVIES J.—I am of opinion that this appeal should be dismissed and only desire to add a few words to the reasons given for his judgment by Burbidge J. I feel that I need not add anything to what that learned judge has said upon the point of the want of authority in the late Province of Canada to invest Common School Fund moneys in the appellants' debentures.

On the other point argued before us, that the issue of debentures for the purpose of raising money to pay interest on other debentures was *ultra vires* of the appellants and a breach of trust and that the Crown being a party to that breach of trust could not assert a valid title to the debentures the learned judge was of the opinion that, assuming the responsible advisers of the Crown to have had knowledge or means of knowledge of such an intended diversion by the appellants of the proceeds of the debentures, this could not affect the Crown's title because the issue of the debentures was clearly *intra vires* and such a breach of trust as that suggested could not be imputed to the Crown.

The appellants' argument before us substantially was that the transaction was really and truly an advance of moneys from the public chest to the trustees

for the payment of overdue interest on debentures previously issued; that the original ordinance of 4 & 5 Vict. ch. 72 of the then Province of Canada authorized such advances, and that the order in council of 1st September, 1857, under which the moneys now in question were paid, when read in connection with the applications made to the Government by and on behalf of the trustees, sufficiently shewed these facts. The order in council referred to is no doubt, so far as its introductory statements are concerned, couched in ambiguous terms which, if accepted as literally true and not qualified by the operative part of the order in council or otherwise explained, are calculated to mislead.

But an examination of the statutes and the previous order in council recited in that of September, 1857, shews that the statements in the latter relied on by the appellants were based upon several misconceptions and were altogether inaccurate. The ordinance to which it refers incorrectly as 4 & 5 Vict. ch. 72, was no doubt intended to be 4 & 5 Vict. ch. 17, sec. 27, and the provisions of sections 26 and 27 of that ordinance were, I think, clearly aplicable only to debentures issued under it and not to debentures authorized and issued under subsequent Acts. At the date of the order in council in question the Act of 12 Vict. ch. 15, and the two Acts, that of 14 & 15 Vict. ch. 132, and that of 16 Vict. ch. 235, had all been passed and are those under which the debentures now in question were issued. All of these Acts contained express prohibitions against paying interest on the debentures out of the public funds.

The order in question further assumed that what was done by the order of 3rd February, 1855, was an

1906

QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES v. THE KING

Davies J.

exercise of this supposed statutory authority to advance moneys out of the public funds to pay overdue interest which it plainly was not. The operative part of the order, however, authorizes the investment from time to time in the debentures of the trust of a sum not exceeding £11,500 out of the Common School Fund as the sales of the lands of that fund permitted.

The only possible conclusions to be drawn, therefore, from a study of these later statutes and documents is that the statutes under which the debentures in question were issued contained express prohibitions against the advance by the Government of moneys from the public funds towards the payment of overdue interest on the debentures authorized by them to be issued involving an entire change in public policy from that sanctioned by sections 26 and 27 of the earlier ordinance, 4 & 5 Vict. ch. 177, and that the order in council of 1857 authorizing the purchase of the debentures in question expressly limited the moneys to be paid for their purchase to those of the Common School Fund which the Crown held in trust merely. It is true these debentures were not amongst those which were expressly authorized as investments for these trust funds nor were they expressly prohibited. But even assuming the investments to have been unauthorized by the statutes creating the trust I cannot see how the appellants can for that reason successfully contend that they, as trustees of the turnpike trusts who issued the debentures, can repudiate liability on the debentures. The want of authority on the part of the Crown to invest in the particular manner it did cannot be a defence to an action on the debenture itself. At the utmost it would be a breach of trust for which the Crown might, in the event of the

loss of the money, be held liable by its *cestui que trust* the beneficiaries of the Common School Fund.

I do not think the inference drawn by the appellants from such documentary evidence as is forthcoming with respect to the application of the moneys received for the debentures in question an unfair one, but it is only an inference or suggestion. There is no direct evidence on the point. I agree, however, with the judgment appealed from that, accepting the suggestion or inference, it cannot be imputed to the Crown that it was a party to such breach of trust.

I do not see any evidence which justifies the assumption of the appellants that the transaction was not really and *bonâ fide* an investment of trust funds in the debentures of the turnpike trust.

As I have said all the Acts passed subsequently to that ordinance of 4 & 5 Vict. ch. 17, and under which the debentures in question were issued, contained express provisions prohibiting any advances from the public funds for the payment of overdue interest, and the Government of the day was advised by its Attorney-General at the very time the investment was made of the existence of these express prohibitions. The order in council of September, 1857, authorizing the investment of £11,500 in appellants' debentures expressly stated that the moneys to be advanced were those belonging to the Common School Fund and were to be made from time to time

> as sales of land shall be effected and payment made to the credit of the Common School Fund.

It is not, therefore, in my opinion, open to any doubt that the moneys intended to be invested and which were actually paid were those of the Common School Fund held by the Government in trust only.

1906

QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES v. THE KING.

Davies J.

Whatever claim the beneficiaries of the trust might have against its trustee for an improper investment of the funds in case there was a loss from the investment such an impropriety or wrongful act could afford no possible ground for a repudiation by the debtor of his debenture debt.

The statutory prohibition against the use of the public funds for the purpose of paying overdue interest and the express language of the order in council directing the advance from time to time out of the Common School Funds as they became available through the sales of land, constitute a sufficient answer to the assumption appellants ask us to make.

I think, therefore, the appeal should be dismissed.

IDINGTON J.—The Crown in the years 1855 and 1857 bought, from the appellants, debentures which they admittedly had power to issue and sell.

It is now set up as an answer to the claim of the Crown to enforce the payment of interest upon these debentures that the sales thereof were in truth made in violation of an express statutory prohibition against their raising money to pay interest, and bought by the Crown either with actual notice of this violation of the statute or with the intention of actually aiding in the evasion of the statute.

I do not see evidence to support any such contention.

It is contended that the frame of the applications to the Crown for advances coupled with the words of the orders in council prove this.

The first application to the Crown was in the nature of an appeal to the generosity of the Crown for an advance which would undoubtedly if given as asked have practically resulted in a total loss thereof.

It was not at first an application to the Crown to buy from appellants their debentures. The result of a full consideration of the application was that the Crown expressly refused to have anything to do with the payment of interest. The Attorney-General to whom the matter was referred, after an order in council had been passed, but before anything done under it, clearly advised that there could be no such dealing as a purchase of debentures issued to pay or raise money to pay interest. At the same time it was quite manifest that money was needed for other purposes than the payment of interest.

It appears by the application for the first advance that three thousand pounds was needed for interest. It also by the same application appears that £5,959 "for interest and other charges" was urgently needed.

What the Crown practically said in answer to this and after hearing the opinion of the Attorney-General was this: "We cannot entertain your application so far as it relates to interest, but as you evidently need in all £6,000 you must, as to interest, provide for that, but as to the other three thousand pounds we will buy from you, of your debentures that have become of less than par value to your contractors and others you owe, to the amount of three thousand pounds. This will relieve the financial situation by legal methods and thereby attain part of the results sought for." Such I infer quite clearly was the position taken by the Crown.

How can such a dealing be attacked as a violation of any statute or in any way vitiate the Crown's title to the debentures?

The order in council was not at all limited to interest, but the other charges were also within its very words and purpose.

1906

QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES v. THE KING.

Idington J.

No doubt it may be said that it would have been better to have avoided expressly the very shadow of the appearance of evil by rescinding the order and adopting another, limited to the execution of the secondly named and only purpose in hand, after the opinion of the Attorney-General was received.

That is, alike with the question of the propriety of using the Common School trust funds for so precarious an investment, a mere matter for criticism that in no way goes to the root of the matter now in hand, in such a way as to entitle the appellant to succeed. Both criticisms we have nothing to do with here.

The second purchase of similar debentures would seem to have originated in an application which is now lost. The orders in council under which the lot of debentures secondly in question herein were issued authorized the Receiver-General

> to invest from time to time in the debentures of the Trust, a sum not exceeding in the whole $11,500 as sales of land shall be effected and payment made to the credit of the Common School Fund.

The recitals in this order contain such a grossly mistaken statement of the first transaction and the basis on which it rests that I can attach no importance to its statements.

Its first recital might be read as if another application for aid to pay interest had as in the first instance been made to the Crown.

Assuming it so I cannot after what had transpired only about two years before infer that improper methods were resorted to.

The recital, coupled with the wording of the order looking to the future rather than the then immediate needs and purposes, may also be read as shew-

ing that such a balance sheet had been exhibited, that the appellants' debentures could be looked to as a safe investment of the funds referred to.

The utmost that can be said is that the wording of the recital is of doubtful import or the production of a hand that wrote the gross misconceptions of the facts that follows it in the next few sentences.

Then are we at this distance of time to impute to the Crown, even if permissible, the doing of what was improper? Are we when two very obvious courses, one clearly right and the other wrong, were open to the officers of the Crown to conclude that they selected the wrong course? Are we to suppose that they invested in prohibited debentures when the probabilities are that these free from taint of any such prohibition were available and just as serviceable for the purposes in hand?

I will not, on the slender basis of these recitals, so full and so very obviously full of error that one is surprised to find such errors in such a place, draw the conclusion it is necessary to draw in order that this appeal can have any support.

I would not under the like circumstances in the case of a private individual whose witnesses and papers and means of explanation as well as possibly he himself had all passed away, draw such conclusions.

I think the appeal should be dismissed with costs.

MACLENNAN J. concurred for the reasons stated by Davies J.

DUFF J. concurred for the reasons stated by Idington J.

1906

QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES v. THE KING.

Appeal dismissed with costs.

Solicitors for the appellants: *Caron, Pentland, Stuart & Brodie.*

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

JEAN MOREL (DEFENDANT) ..... APPELLANT; 1906

AND

*Oct. 29.
*Nov. 23.

ALEXANDRE LEFRANCOIS (PLAINTIFF) ..... RESPONDENT.

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

Construction of deed—Description of lands—License to cut timber—Ambiguitas latens—Evidence—Boundary.

A license to cut timber on a lot of land described the portion affected as bounded on the south by a river. The river almost crossed the lot at a point near its northern boundary and, at another point, about nineteen arpents further south, it again crossed the lot, completely. In an action to eject the licensee from the portion of the lot between the first and second bends of the river and to recover damages,

Held, that, under the circumstances, there was no ambiguity in the designation of the quantity of the land affected by the license and, in any event, the language of the instrument must be literally construed in favour of the grantee and the party bound thereby could not be permitted to shew a different intention by evidence of surrounding circumstances.

APPEAL from the judgment of the Court of King's Bench, appeal side (Lacoste C.J. and Hall J. dissenting), reversing the judgment of the Superior Court, sitting in review, at Quebec, and restoring the judgment of the Superior Court, District of Quebec, by which the plaintiff's action was maintained with costs.

The circumstances of the case and questions at issue on the present appeal are stated in the judgment of the court now reported.

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

1906

MOREL v. LEFRANCOIS.

C. E. Dorion K.C. for the appellant.

L. P. Pelletier K.C. for the respondent.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—The respondent brought an action in the Superior Court at Quebec to revendicate, as against the appellant, the western half of lot 36 in the Parish of Château Richer, County of Montmorency.

In answer the appellant admitted that he had no title to the land; denied that he had ever exercised or ever pretended to exercise any act of ownership with reference to it, and affirmatively alleged that he had acquired from the respondent, through one Vézina, the right to cut the standing timber on a certain portion of the property in question, and that he had not cut beyond the limits covered by the agreement *sous seing privé,* under which this right had been conveyed. On these issues the parties went to trial.

All the courts below held that Vézina's interest was vested in the respondent and the only doubt suggested turned upon the solution of the question—What are the true boundaries to be assigned to the *coupe de bois* conveyed by the respondent to Vézina? The appellant mainly relied on the literal construction of the words used in the *sous seing privé.* The respondent urged that the language used in delimiting the tract is equivocal and that the intention of the parties must be gathered from the surrounding circumstances.

There was a long and tedious *enquête*; many witnesses were examined, and each party employed a surveyor to make a plan of the locality.

1906

MOREL v. LEFRANCOIS.

The Chief Justice.

In my opinion the intention of the parties is to be gathered from the plain meaning of the words used by them in the document set up by the appellant and effect must be given to these words if possible.

The description of the property within the limits of which the wood is to be cut is:

borné au sud à la rivière Sault à la Puce, à l'ouest à M. Octave Gravel, à l'est à M. Amédé Lefrançois, et au nord au trait quarré, avec droit de passage jusqu'a chez M. Lapointe.

In my opinion this wording is clear and plainly describes the complete boundaries. There is no doubt on the evidence that Amédée Lefrançois is the proprietor of the land to the east—Octave Gravel of that to the west, and that the property extends to the *trait quarré* on the north has never been denied. What is the reason of the difficulty with respect to the southern boundary which is said to be a river? Does that river not exist, and is it not easily traceable on the ground? Is there not a part of the property of which it is the southern boundary; and were not both parties, at the time they made their agreement, aware of its existence and exact position? All these questions must be answered in the affirmative.

By the plans of both surveyors it appears that the River Sault à la Puce enters the land of the plaintiff at and recrosses its eastern boundary without touching its western limit and, after crossing the eastern boundary, again enters the plaintiff's land and traverses it in a westerly direction to the westerly boundary. The tract bounded on the south by that portion of the river intercepted between the eastern and western boundaries (and having the other boundaries described in the document in question) obviously answers the description we have to apply. If there

1906

MOREL v. LEFRANCOIS.

The Chief Justice.

is any doubt with respect to the description and designation of the premises sold it will be found on reference to the authorities cited in the judgment of Mr. Justice Andrews, in the Superior Court, that doubts in the circumstances of this case should be held against the respondent.

I agree with the three judges in review and the minority in appeal that there is no ambiguity in the language of the deed; that the respondent was entitled to rely on the literal construction of the words used; that the description does not bear more than one necessarily exclusive meaning; and that the appellant did not cut any timber beyond the limits of the tract covered by the agreement with Vézina.

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

Appeal allowed with costs.

Solicitors for the appellant; *Dorion & Marchand.*

Solicitors for the respondent: *Drouin, Pelletier, Baillargeon & St. Laurent.*

THE KLONDYKE GOVERNMENT CONCESSION (DEFENDANT)..... } APPELLANT;

AND

ALEXANDER McDONALD (PLAINTIFF)..... } RESPONDENT.

1906
*Oct 31;
Nov. 2.
*Dec. 11.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

Dominion mining regulations—Hydraulic mining—Placer mining—Lease — Water-grant — Conditions of grant — User of flowing waters—Diversion of watercourse—Dams and flumes—Construction of deed—Riparian rights—Priority of right—Injunction.

An hydraulic mining lease, granted in 1900, under the Dominion Mining Regulations, for a location extending along both banks of Hunker Creek, in the Yukon Territory, included a point at which, in 1904, the plaintiff acquired the right to divert a portion of the waters of the creek, subject to then existing rights, for working his placer mining claims adjacent thereto.

Held, that, under a proper construction of the tenth clause of the hydraulic mining regulations, waters flowing through or past the location were subject to be dealt with under the regulations of August, 1898; that the hydraulic grant conferred no prior privileges or paramount riparian rights upon the lessee, and that the grant to the plaintiff was of a substantial user of the waters which was not subject to the common law rights of riparian owners and entitled him, by all reasonable means necessary for the purpose of working his placer claims, to divert the portion of the flowing waters so acquired by him without interference on the part of the lessee of the hydraulic privileges.

APPEAL from the Territorial Court of the Yukon Territory, affirming the decision of the Gold Commissioner of the Yukon Territory, which maintained the plaintiff's action with costs.

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

1906

KLONDYKE GOVERNMENT CONCESSION v. MCDONALD.

The circumstances in which the action was instituted and the questions at issue on the present appeal are stated in the judgments now reported.

The judgment of the Gold Commissioner. which was affirmed by the judgment appealed from, ordered and adjudged that the plaintiff, McDonald, was entitled to the first 200 inches of water flowing into Hunker Creek, at the point in dispute, under his grant of 9th August, 1904, and that the defendant had no standing to raise the question whether or not the plaintiff was wasting water until the said defendant became the holder of a water-grant; that the defendant's counterclaim asking for an injunction enjoining the plaintiff from maintaining a dam on the land of the defendant and penning back the waters of Hunker Creek, and from maintaining a power-house and other buildings and a flume on said lands should be dismissed; that the defendant, its servants and agents should be restrained from diverting and conveying below the plaintiff's said dam the first two hundred inches of water from Hunker Creek at any place above or up-stream from the point at which the plaintiff is entitled to divert water and from interfering in any way with the plaintiff's right in virtue of his grant to divert water; that the defendant should permit at least two hundred inches of the said water of Hunker Creek to flow uninterruptedly to the point at which the plaintiff is entitled to divert such water, and that the defendant, its servants, workingmen and agents, should be and were thereby restrained from destroying the dam used by the plaintiff under his grant and from interfering with his flume.

Ewart K.C. and *Chrysler K.C.* for the appellant. There is no question that the defendant was entitled

to the water under the first lease. That lease has never been surrendered, except so far as a surrender is implied by the acceptance of the second lease, as the acceptance of a new lease is a surrender of a former lease of the same property, but if a lease covers two properties, acceptance of a new lease of one of them is not a surrender of the lease of the other. So here an acceptance of a new lease of the land is not a surrender of the right of the defendant to the water which is held under the first lease, unless by the second lease the water is re-granted to the defendant. *Lyon* v. *Reed*(1); *Baynton* v. *Morgan*(2); the cases cited in a foot note to *Beach* v. *The King*(3), at page 324; 12 Encyc. Laws of England, 56.

By the second lease the defendant has a right to use the water on or flowing over the land covered by the lease. There is in such lease no reservation of the water, although it has a provision by which the things demised are to be held subject to certain regulations. If the water is not granted by the second lease, then the defendant falls back upon the first lease and submits that his rights under it to the water have never been surrendered and that, as to the water, the first lease is still in force. In any case, the plaintiff has no right to build a dam on the defendant's land, and thereby to pen back and spread the water of the stream over the defendant's land.

We refer to the following authorities, in addition to those quoted by Mr. Justice Craig: Blackstone's Commentaries at p. 18; *Liggins* v. *Inge*(4), at page 692, *per* Tindal C.J.; *Mason* v. *Hill*(5), *per* Denman

(1) 13 M. & W. 285.
(2) 22 Q.B.D. 74.
(3) 9 Ex. C.R. 287.
(4) 7 Bing. 682.
(5) 5 B. & Ad. 1.

1906

KLONDYKE GOVERNMENT CONCESSION v. McDONALD.

C.J.; *Embrey* v. *Owen*(1); *Orr-Ewing* v. *Colquhoun* (2); *Bradford* v. *Ferrand*(3), *per* Farwell J. as to flow of stream; *Baily & Co.* v. *Clark, Son & Morland* (4); *Earl of Sandwich* v. *Great Northern Ry. Co.*(5); *Miner* v. *Gilmour*(6), *per* Kingsdown L.J., at p. 156.

A. Noel for the respondent.

THE CHIEF JUSTICE and DAVIES J. concurred in the reasons stated by Duff J.

IDINGTON J.—The appellants accepted, on 12th February, 1900, from the Crown, a lease of mining lands in the Yukon, in substitution for another lease of which they were then the assignees. I think they thereby surrendered the latter lease.

The lease of the 12th February, 1900, in its operative part, reads as follows:—

> Now this indenture witnesseth that in pursuance of the premises and in consideration of and subject to the rents, covenants, *provisoes, exceptions, restrictions* and conditions hereinafter reserved and contained, and by the lessee to be paid, observed and performed, Her Majesty doth grant, demise and lease unto the lessee the said tract of lands and the exclusive right and privilege of extracting and taking therefrom, by hydraulic or other mining process, all royal or precious metals or minerals from, in, under or upon the tract of lands hereby demised and leased, with regard to which the said rights and privileges are hereby granted, which said tract is described as follows; that is to say: * * * .

Then follows a description of the land thus demised and the usual habendum and redendum clauses.

Many provisions follow next after this redendum, but none of them, save that I am about to quote, need,

(1) 6 Ex. 353.
(2) 2 App. Cas. 839.
(3) [1902] 2 Ch. 655.
(4) [1902] 1 Ch. 649.
(5) 10 Ch. D. 707.
(6) 12 Moo. P.C. 131.

I think, be noticed, though touched upon in the argument. The one I refer to is the following:

> Provided, also, that this demise is subject to all other regulations contained and set forth in the said order in council of the third day of December, A.D. 1898, as fully and effectually to all intents and purposes as if they were set forth in these presents.

Amongst those regulations of the 3rd day of December, 1898, thus explicitly incorporated into this document is one which reads as follows:

> 10. The lessee's right to water on his location or to the diversion of water in connection with his operations thereon shall be subject to the regulations approved by order in council of the 3rd August, 1898.

Let us now read this demise (with the restrictive and excepting words), which are part of the sentence constituting it, together with this clear and explicit regulation, as if inserted next after the redendum.

Can we do so and find any difficulty in this case? The questions raised anent the ordinary presumptions in favour of a lessee or grantee of land upon or over which is running water, can have little or no existence or effect in such a document as this reading presents. These presumptions are, at any time, but *primâ facie* evidence of the meaning of the contract.

When the question raised is whether or not the water on the land demised went by virtue of such a restricted demise as this with the land as against all persons who might, by license from the Crown, procure under the water regulations then and there in force, the right to use the same, let us ascertain what water is referred to in the regulation just quoted. Can it, when forming part of this document, refer to water elsewhere than on the land described in the document of which it forms a part?

1906

KLONDYKE GOVERNMENT CONCESSION v. MCDONALD.

Idington J.

Why should any one concerned in such a lease provide for anything as to water elsewhere than on the land the lease covered?

If private waters were to be found elsewhere by these lessees, and brought on to this land, the Crown could have nothing to say to that.

And, if the waters of the Crown, to be got elsewhere, were intended to be referred to, we may ask;—Why should *they* be referred to? The waters of the Crown were the subject of acquisition only by and through the law of the land. It was entirely unnecessary to refer to such waters beyond the land in question.

It is clearly *because the waters on this land* so demised and no others are meant, that there is need to refer to them and thus lay down the rule that is to govern their use in relation to this contract and make clear that the usual presumptions relative thereto in an unrestricted demise must not arise.

Reading this exception in this way, and I think it can be read in no other way, the water that is thus to be applied for is not given without a further application in which the lessees, just as any other person concerned, must define what quantity they desire to use.

In the light of the clear restrictions put in this lease and probably all such leases in the Yukon, and of the nature of the general regulations of December, and the water regulations of August, which together constitute, in that regard, the law of the land there, no difficulty or misapprehension can arise.

In view of these considerations there is no injustice done the appellants by the Crown, though a serious loss to the appellants may arise from the granting of the water in question to their neighbour. The appel-

lants have only themselves to blame. They knew of the applications that have resulted so injuriously for them. The only step pretended to have been taken by the appellants for their protection is denied by the officer on whom blame was attempted to be put.

In none of the cases referred to on the question of presumptions were the operative part of the grant or demise restricted as here. In the case of *Lord* v. *The Commissioners for the City of Sydney*(1), there is a very instructive branch of it that deals with rights springing out of a Crown grant where the Crown had reserved, for specific purposes, and limited time, the right to use or apply the use of a part of the water that would have passed to the grantee but for the reservation. It was held this had the effect of preventing the grantee from claiming any compensation therefor though getting allowed compensation for riparian rights held by the same grantee by virtue of an unrestricted grant further down the same stream.

The case exemplifies both phases of such rights and also at page 497 lays down the rule to guide us in the interpretation of such grants, that intention should be the supreme rule.

Having no doubt of the intention in this case, I think the appeal should be dismissed with costs.

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

DUFF J.—The plaintiff is the holder of five hillside claims on Hunker Creek in the Yukon Territory, located under the regulations relating to placer min-

(1) 12 Moore P.C. 473.

1906

KLONDYKE GOVERNMENT CONCESSION v. MCDONALD.

Duff J.

ing. For the purpose of mining these claims he acquired on the 9th August, 1904, under the law in force in the Territory (embodied in the regulations passed 3rd August, 1898) a grant of the right to divert, at a point named in the grant, 200 miner's inches of the waters of the creek. The defendant is the lessee of a location for hydraulic mining extending two and a half miles along the valley of the same creek, including both of its banks, and embracing the point of diversion referred to, under a lease dated the 12th February, 1900, issued pursuant to the regulations governing the leasing of such locations, passed in December, 1896. The plaintiff, having constructed a dam and other works and machinery to divert the waters of the creek and convey them to the place of his mining operations, the defendant's manager, at a point above the point of diversion (but within the defendant's location), was proceeding to divert the creek from its natural course in such a way as to prevent it flowing into the plaintiff's flume when this action was commenced and an injunction was granted by the Gold Commissioner of the Territory restraining the defendant from effecting the threatened diversion.

The principal question in controversy between the parties is, whether or not the plaintiff's grant confers upon him the right, as against the defendant, to divert the waters of Hunker Creek at the place referred to for use in mining his hill-side claims. That he has such a right is undisputed, unless by virtue of its lease the defendant has a better right.

The defendant's lease provides:

> that this demise is subject to all other regulations contained and set forth in the said order in council of the third of December, A.D. 1898, as fully and effectually to all intents and purposes as if they were set forth in these presents.

1906

KLONDYKE GOVERNMENT CONCESSION v. MCDONALD.

Duff J.

By the regulations referred to it is enacted that leases granted under them may be in such form and contain such conditions, not inconsistent with them, as may be approved of by the Minister of the Interior.

It is not necessary to decide whether this clause authorizes the Minister of the Interior, by any such lease, to grant any right in respect of the Crown lands within the limit of the location demised regarding which the regulations themselves are silent. This much, I think, is clear, viz.: that where a particular subject matter is dealt with by the regulations, the rights of the lessee, as regards that subject matter, are governed by the provisions respecting it contained in the regulations.

The tenth clause of the regulations is as follows:

> 10. The lessee's right to water on his location or to the diversion of water in connection with his operations thereon shall be subject to the regulations approved by order in council of the 3rd August, 1898.

If, therefore, this clause applies to water flowing through or past an hydraulic location, it is to the regulations referred to in it that we must have recourse to ascertain the conditions to which the defendant is subject in diverting the waters of Hunker Creek for use in working its property and particularly for the purpose of determining the relative priorities of the defendant's rights under its lease and the rights of the plaintiff in respect of those waters under his grant.

It is argued on behalf of the defendant that the clause applies only to water brought upon the location from outside sources; and has no application to water flowing through or past it. It is sufficient to say, I think, with regard to this contention that all such flowing water is plainly within the language used, and

1906

KLONDYKE GOVERNMENT CONCESSION v. MCDONALD.

Duff J.

no satisfactory reason has been suggested for restricting its natural import in the manner proposed.

The view of Craig J., who delivered a dissenting judgment in the court below, requires a fuller examination. The law-making authority could not, the learned judge thinks, have intended to deprive the lessee of an hydraulic location of the right to divert and use such water for the purposes of mining his location; and must, therefore, in the absence of express reservation, be held to have left him the rights of a riparian proprietor in respect of such water subject to any rights granted under the regulations referred to in clause 10.

Turning then to the grant on which the plaintiff rests his right to divert the water in question here—(which, following the form prescribed by the regulations, contains the proviso,

> it is expressly the condition of this water right that the same is issued subject entirely to all rights subsisting at this date to the water in respect to which this right is issued,)

the learned judge concludes that, since the defendant's riparian rights were in existence at the date of the plaintiff's grant, the riparian rights are, by virtue of the proviso quoted, paramount.

This view, I think, proceeds upon an inadequate appreciation of the scope and object of the last mentioned regulations.

At the time these regulations came into force, the law provided for the acquisition by free miners of rights to mine, by various methods, the Crown lands in the Yukon Territory. One set of regulations (providing for the acquisition of "mineral claims"), conferred upon holders of such claims the right to mine

them for mineral in place, and the exclusive right of entry upon them for the purpose of such mining. A second set of regulations relating to placer mining, conferred the right upon holders of claims located under them, to mine alluvial deposits for the precious metals within the limits of their claims. A third set of regulations authorized the leasing of beds of creeks and rivers; and conferred upon the lessees the right to mine the alluvial deposits in such beds, by the process of dredging, for the precious metals. And a fourth set, those relating to the grant of the leases of locations for hydraulic mining, already referred to, became law a few months later.

The efficient exercise of any of these rights of mining would depend, in almost any given case, upon the existence of an available supply of water; and it was to secure the application of the water found in natural streams and lakes to practical use in mining and in the treatment of the products of mining, as well as its equitable distribution among those engaged in that industry, that the regulations of the 3rd of August, 1898, were passed. From that date those regulations, I think, constituted a code, subject to the exception presently to be mentioned, governing the acquisition of the right to divert and use such water for the purposes mentioned.

One exception is recognized. By the regulations relating to placer mining, the holder of a placer claim was given the right to use so much of the water flowing through or past his claim as the mining recorder should think necessary to enable him to work his claims. These provisions the regulations of August 3rd do not displace, and the rights of the grantee of a water privilege are by them expressly made subject

1906

KLONDYKE GOVERNMENT CONCESSION v. MCDONALD.

Duff J.

to the rights of placer miners working on occupied creeks above or below the point of diversion at the date of his grant.

But I do not agree that the language of the regulations justifies the view that grants made under them were intended to be subject to the common law rights of riparian owners respecting the flow of the waters to which such grants should apply.

The learned judge bases his view upon the proviso which I have already quoted from the form of grant prescribed by the regulations. This proviso has not, I think, any application to the rights of riparian proprietors as such.

> The natural rights of a riparian proprietor as such are not primarily rights of user (says Cotton L.J. in *Kensit* v. *Great Eastern Ry. Co.* (1), at page 133), but rights incidental to the ownership of property;

and such rights are not, I think, aptly described by the words of the proviso.

Moreover, the language of clause 5 of the regulations indicates, I think, that, both in the proviso and in the clause, the law-making authority was dealing with substantive rights of user and not such rights in respect of the flow of a stream as are merely incidental to a riparian proprietorship.

Substantive rights of user of the waters of particular streams may well have been vested in individuals at the time the regulations came into force. The regulations relating to quartz mining, for example,—the provisions of which in this respect were displaced by the last mentioned regulations—provided for the acquisition of such rights in connection with the working of quartz claims or operations incidental thereto.

(1) 27 Ch. D. 122.

And there may have been other cases. Such vested rights—at least so long as they are in exercise for a beneficial purpose—are protected. And, of course, prior grants under the regulations themselves are within the clause and the proviso.

The language of the provisions in question may, therefore, be given its full effect without extending it to embrace riparian rights—a class of rights, as I have said, to which it does not fitly apply.

It must be apparent, moreover, that if the rights of grantees of water privileges under the regulations are in every case subordinate to the existing common law rights of riparian owners the purpose of the regulations must in the practical administration of them be largely, if not wholly, frustrated. We ought not, unless compelled by intractable language, to attribute to the legislative authority an intention to promulgate a scheme so obviously futile, and a construction leading to that result must, I think, be rejected. See *Salmon* v. *Duncombe*(1), and *Martly* v. *Carson*(2), at page 658.

In this view of the regulations, on which the plaintiff's grant is based, no difficulty, I think, arises in the construction or application of clause 10 of the regulations respecting the leasing of hydraulic locations; that clause can only be read as a recognition that, notwithstanding the provisions of any lease of an hydraulic location, the natural waters on or flowing through or past such a location are subject to be dealt with under the regulations of August, 1898, relating to the diversion and use of water; and consequently that the rights conferred by such lessees are

(1) 11 App. Cas. 627. (2) 20 Can. S.C.R. 634.

1906

KLONDYKE GOVERNMENT CONCESSION v. MCDONALD.

Duff J.

subject to rights in respect of such waters granted under the last mentioned regulations.

A minor question arises upon the defendant's counterclaim, that is to say: Whether or not the defendant is entitled to an injunction compelling the plaintiff to remove his dam, flume and certain building and machinery he has erected within the limits of the defendant's location?

As to the buildings, the plaintiff alleges they were erected with the consent of the defendant's manager, and although upon this there is some conflict of evidence, there is, I think, so much in the circumstances pointing to acquiescence on the part of the defendant that we should not, as against the view of the two courts below, be justified in granting a mandatory injunction to compel the plaintiff to remove them. As to the flume, the construction of it appears to be expressly authorized by the plaintiff's grant.

The penning back of the water of the creek presents a case not quite so obvious. If it clearly appeared that, in constructing the dam, the plaintiff was exceeding the rights conferred by his grant, and there had been no other answer to the defendant's claim under this head, it might have been necessary to consider the question whether the defendant, by its lease, acquired any rights of occupation other than those defined by clause 9 of the regulations, and whether so long as its mining operations are not interfered with it has any rights of which the erection of such a structure would be an invasion. That question is, however, in my opinion, not presented by this appeal. The grant of the right to divert the waters of the stream at a place within the defendant's location, as well as a right to convey the water so diverted,

1906

KLONDYKE GOVERNMENT CONCESSION v. MCDONALD.

Duff J.

by flume through that location, would seem to involve the grant of the subsidiary right to use such reasonable means as may be necessary to turn the water from the bed of the creek into the plaintiff's flume. It is quite clear that the dam complained of does not affect the defendant's mining operations; and I am not satisfied that the plaintiff has done more than is necessary to enable him to take the benefit of his rights under his grant. In these circumstances the Gold Commissioner acted rightly in refusing the relief asked.

Appeal dismissed with costs.

Solicitor for the appellant: *C. W. C. Tabor.*

Solicitors for the respondent: *Noel, Noel & Cormack.*

1906

*Nov. 28, 29.
*Dec. 11.

THE WABASH RAILROAD COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ISABELLA MISENER AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Railway company—Findings of jury—"Look and listen."

M. attempted to drive over a railway track which crossed the highway at an acute angle where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing when he could have seen an engine approaching which struck his team and he was killed. In an action by his widow and children the jury found that the statutory warnings had not been given and a verdict was given for the plaintiffs and affirmed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal (12 Ont. L.R. 71), Fitzpatrick C.J. *hesitante*, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified.

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

In the judgment of the Court of Appeal delivered by Mr. Justice Garrow the facts are stated as follows:

"The facts are simple and not seriously in dispute. On 13th August, 1904, about 2 p.m., Robert Misener, aged 48 years, a farmer, was driving with a team of

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

(1) 12 Ont. L.R. 71.

horses and a waggon along a highway in the County of Welland, which is crossed by defendants' line of railway, and at the intersection he was struck by an engine in charge of defendants' servants and instantly killed, his horses killed and his waggon and harness destroyed.

"The engine was unattached and was running through from Niagara Falls to St. Thomas at a high rate of speed; one witness, Mrs. Louisa Pew, who had resided near the crossing for 13 years, stating that she had never seen an engine going so fast since she lived there, and even the trainmen admitted that they were going at from 35 to 40 miles an hour.

"Deceased, as he approached the track, was driving at a pace of about three miles an hour. Immediately behind him, going in the same direction was one William Locke, also driving, who was called as a witness by plaintiffs. Asked to tell what took place, Mr. Locke said; 'Well, the engine gave toot-toot and then the crash came about the one time.' The engine ran, after the collision, from a quarter to a half a mile. When it struck the waggon, it made it 'go up in splinters,' and deceased was thrown up the track 'out of our sight.' Locke did not stop because the sight had made his wife, who was with him, ill. He saw deceased as he approached the crossing look towards the 'Falls' (the direction from which the engine came) and then look the other way. He (the witness) also looked at the same time and saw and heard nothing on the track. At the time deceased looked, his horses 'were going on to the rails, I could not say how far.' On cross-examination he became a little more definite as to the exact place at which deceased looked, which was, he said, at the raise of the road to go up to

1906

WABASH RAILROAD CO. v. MISENER.

the track, which would be at least as far back as the railway fence. Until the line of the railway fence is reached, there are obstructions to a clear view, such as the fences themselves, an orchard which approaches but does not reach the corner, and a walnut tree, which was then in leaf, as was also the orchard. But when the fences are reached and passed, and before the rails are actually reached, there is an unobstructed view for a considerable distance, perhaps a quarter of a mile, along the track in the direction from which the engine came, and if deceased had looked again when at or past the fence and before he reached the rails, this witness deposed that he could have seen the approaching engine, and could, as his horses were going at a slow pace, have turned towards the side, and thus have avoided the collision.

"There was no evidence that deceased looked more than once, and the substantial point in the case is whether, under the circumstances, his failure to look again is fatal, the defendants contending at the trial and before us that such failure to look again was conclusive proof of contributory negligence, and that the case should have been withdrawn from the jury. The judge refused a motion for nonsuit, holding that there was evidence proper to be submitted to the jury.

"The jury in answer to questions found that the whistle was not sounded nor the bell rung, and that such neglect was the proximate cause of the injury, and that deceased could not by the exercise of ordinary care have avoided the injury. Other questions based upon the possibility of an affirmative answer to the question as to contributory negligence were also put and answered, but they apparently became of no consequence when contributory negligence was nega-

tived. And the jury assessed the damages as follows: To the widow, Isabella Misener, $800; daughter Ethel, $300; daughter Flossie, $500; son Norman Robert, $800; and the damages to personal property, $440."

Rose for the appellants. The evidence was not sufficient for submission of the case to the jury and the judge should have withdrawn it. *Giblin* v. *McMullen*(1); *Wakelin* v. *London & South West Railway Co.*(2).

The late case of *Andreas* v. *Canadian Pacific Railway Co.*(3) is in point.

German K.C. for the respondents referred to *Peart* v. *Grand Trunk Railway Co.*(4).

THE CHIEF JUSTICE.—This is certainly "as weak a case as can well be conceived" and almost involves the proposition that "given an accident at a railway crossing of a nature consistent with the absence of negligence, the company is presumed to be guilty of negligence in respect of it." I concur in the judgment, but with much hesitation. No specific defect in the roadbed or in the construction or equipment of the locomotive is complained of. The accident is alleged to have been occasioned through the negligence of the defendants' employees with respect to the ringing of the bell and blowing of the whistle. To ring the bell and blow the whistle at a highway crossing is a statutory duty, the neglect of which renders the engineer and fireman of a locomotive liable to a criminal prosecution. The legal presumption is, therefore, that

(1) L.R. 2 P.C. 317.
(2) 12 App. Cas. 41.
(3) 37 Can. S.C.R. 1.
(4) 10 Ont. L.R. 753.

1906

WABASH RAILROAD CO. v. MISENER.

The Chief Justice.

they performed their duty and, in the absence of evidence to the contrary, the plaintiff's action must be dismissed. The most that can be said in this case is that it is proved negatively, on behalf of the plaintiffs, that certain witnesses did not hear the bell or the whistle, and, affirmatively, it is proved by those best in a position to know, the engineer and the fireman, that the requirements of the statute in that respect were strictly complied with. In view of the cases, however, I assume that this is a question which must be submitted to the jury and by their answer we are bound.

But the onus is on the plaintiffs to shew, assuming that the negligence of the defendants is proved, that such negligence was the determining cause of the accident, and, on the evidence, I should have been strongly inclined to the view that the state of things existing at the time of the accident was consistent with the theory that the death was caused by the deceased's own negligence, and, at the most, that the event occurred through the joint negligence of the deceased and of the servants of the defendant company.

The question for the jury was: Could the deceased by a reasonable use of his senses have discovered the proximity of the approaching train in time to avoid the accident?

Approaching the line at one hundred feet from the crossing there is a clear view of the track for a distance of one thousand three hundred and fifty feet, and, at the railway fence, which is about seventy-two feet from the crossing, there is a clear line of sight to a point 1,700 feet away.

The plaintiffs' own witness, Locke, the only one

examined of the two persons who were eye-witnesses of the accident, proves that at any point between the railway fence and the southern rail there was a clear view in the direction from which the train was coming of 1,700 feet, and this same witness gives evidence to the effect that the deceased could, had he looked when there, have seen as far as the second whistling post, a quarter of a mile distant. He also admits, on cross-examination, that the horses of the deceased, which were then moving at a slow walk, could have been turned aside and the accident avoided. Approaching this crossing the deceased was bound "to use such faculties of sight and hearing as he was possessed of." If he did not do so he was negligent. If, having done so, he saw the train, as he must have done according to the evidence of the sole witness of the accident, and he went recklessly forward, then he voluntarily incurred the risk and must suffer the consequences. *Cooper* v. *The North Carolina Railroad Co.* (1); *Schmidt* v. *Missouri Pacific Railway Co.*(2); *Grand Trunk Railway Co.* v. *McKay*(3).

I assume, however, that to reach a conclusion as to which of the two parties is responsible for the accident, admitting that both were negligent, a comparison of the facts by the jury was necessary and, by their finding, the cases seem to hold that the court was bound.

For all these reasons I entertain grave doubt and, were it not for the conclusion reached by the careful and learned trial judge, adopted by the Court of Appeal, I would have held that the judge, on a

(1) 3 L.R.A. (N.S.) 391; 52 S.E. Rep. 932.

(2) 3 L.R.A. (N.S.) 196; 191 Mo. 215.

(3) 34 Can. S.C.R. 81.

1906

WABASH RAILROAD CO. v. MISENER.

The Chief Justice.

preliminary question of law, should have decided that there was no evidence on which the jury could properly find for the plaintiffs, but I defer to my brother judges and adopt their view.

DAVIES J.—I do not desire, even by implication, to cast a doubt upon the reasonable and salutary rule so frequently laid down by this court as to the duty which the law imposes upon persons travelling along a highway while passing or attempting to pass over a level railway crossing. They must act as reasonable and sentient beings and, unless excused by special circumstances, must look before attempting to cross to see whether they can do so with safety. If they choose, blindly, recklessly or foolishly to run into danger, they must surely take the consequences.

In the case at bar the jury found that the statutory requirements as to the engine sounding the whistle and ringing the bell before coming to the crossing had not been complied with, and further, that the deceased who was killed at the crossing had not been guilty of contributory negligence.

The appeal was not sought to be allowed because of anything wrong or misleading in the judge's charge except with respect to his direction as to looking and listening. That charge was very clear and, in my opinion, covered all the disputed points in a manner leaving nothing to be desired.

That learned judge did not indicate any disapproval of the findings of the jury. On the contrary he directed judgment to be entered upon them for the plaintiffs for the amount of the damages, having previously refused to nonsuit.

An appeal to the Court of Appeal for Ontario was

1906

WABASH RAILROAD CO. v. MISENER.

Davies J.

dismissed and we are now asked to reverse the judgment of two courts founded on findings of facts by a jury on matters peculiarly within their province.

The only question open to us to consider is whether the findings are such as, under the circumstances of the case, reasonable men might fairly find.

In deference to the strong argument pressed by Mr. Rose upon us, I have gone over the evidence with great care and the conclusion I reached was not one that the findings were such as, in the face of the conflicting evidence, reasonable men could not fairly have found.

There were two or three points in the case to which the appellants did not seem to me to attach sufficient importance. One was that the railway crossed at an acute angle and not at right angles and that a traveller going northwesterly, when crossing the railway tracks, would have his back turned almost to the approaching train. Another was the unwonted speed with which the unattached engine which killed the deceased approached the highway and another that he could not have seen the approaching train until he was past the railway fence at the crossing.

Now, assuming the findings of the jury as to the signals to be correct, the only question remaining would be as to the manner in which deceased discharged his duty of looking along the track behind him. At best the moments when he could have seen the engine at all might be counted by seconds and I think the evidence as to the degree of care exercised by him, in view of these facts, quite sufficient to justify the finding of the absence of contributory negligence. *Barry Railway Co.* v. *White*(1); and see Lord

(1) 17 Times L.R. 644.

1906

WABASH RAILROAD CO. v. MISENER.

Davies J.

Cairns' judgment in the *Slattery case*(1), at page 1166.

IDINGTON and DUFF JJ. concurred in the opinion of Mr. Justice Davies.

MACLENNAN J.—I am of opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *W. R. Riddell.*

Solicitors for the respondents: *German & Pettit.*

(1) 3 App. Cas. 1155.

JAMES J. RUTLEDGE (DEFENDANT) . . APPELLANT; 1906

AND *Nov. 29 *Dec. 5.

THE UNITED STATES SAVINGS AND LOAN COMPANY (PLAINTIFFS) . . . . . RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Practice—Revising minutes of judgment—Mistake—Costs of abandoned defences—Reference to trial judge.

The plaintiffs' action was maintained with costs in the courts below, but on appeal, it was dismissed with costs by the Supreme Court of Canada (37 Can. S.C.R. 546), no reference being made to certain costs incurred by the plaintiffs in respect of several defences which the defendant had abandoned in the trial court. On motion to vary the minutes, the matter was referred to the judge of the trial court to dispose of the question of the costs on the abandoned defences.

MOTION to vary minutes of judgment as settled by the Registrar.

The appeal to the Supreme Court of Canada in this case was allowed with costs(1), and the form of the minutes was settled accordingly by the Registrar in Chambers. It appeared by the record that several defences had been pleaded, on some of which the plaintiffs were obliged to issue commissions for the examination of witnesses abroad which had been duly executed. On the trial these defences were abandoned and the sole issue raised was as to the application of

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

(1) 37 Can. S.C.R. 546.

1906

RUTLEDGE v. UNITED STATES SAVINGS AND LOAN CO.

the statute of limitations. The plaintiffs were successful in the courts below, but the Supreme Court of Canada reversed their judgments with costs and held that the action was barred by the Yukon Ordinance, ch. 31, of 1890; that being the only question argued on the appeal.

The motion was to have the direction as to costs varied, as having been made inadvertently, and that the plaintiffs should be allowed to set-off their costs *pro tanto* upon the abandoned defences, or, alternatively, to have the matter remitted to be dealt with in the courts below.

Chrysler K.C. for the motion.

Ewart K.C. contra.

The judgment of the court was delivered by

MACLENNAN J.—After judgment in this case, allowing defendant's appeal with costs in this court and in the courts of the Yukon Territory, the respondent moved to vary the judgment by directing that the respondent should be allowed to set off, *pro tanto,* against the costs of the appellant, his costs of the issues raised by the 2nd, 3rd, 4th, 5th and 6th paragraphs of the statement of defence, and that the respondent should recover the costs properly incurred by him in the Yukon Territorial Court after the entering of the appeal to this court.

The action was upon a judgment recovered in the State of Washington, and the defences referred to are: No. 2, that the defendant was at no time subject to the jurisdiction of the courts of that state; No. 3, that he had never been summoned in the action; No. 4,

payment; No. 5, that the Washington Court had no jurisdiction over him; and No. 6, that he was only one of several debtors under the said judgment, and so only liable for a proportion of the debt.

At the trial the defence was rested upon the Statute of Limitations of the Territory, and that is the defence upon which the defendant has ultimately succeeded.

No witnesses were examined at the trial, but the defendant had been examined for discovery, and evidence appears to have been taken on two commissions, one in the State of Washington, and the other in the State of Minnesota, both at the instance of the plaintiffs.

We have no means of knowing what if any evidence or other proceedings were taken by reason of the several defences referred to, nor how far the taking of such evidence or proceedings was reasonable or necessary.

We therefore refer it to the learned trial judge to direct what disposition should be made of the costs of such evidence and proceedings.

There will be no costs on this motion.

Motion allowed without costs.

Solicitor for the appellant: *C. W. C. Tabor.*

Solicitor for the respondents: *J. K. Sparling.*

1906

*Nov. 26, 27.
*Dec. 11.

THE HAMILTON STREET RAILWAY COMPANY (DEFENDANTS). } APPELLANTS;

AND

THE CORPORATION OF THE CITY OF HAMILTON (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Agreement with Electric Street Ry. Co.—Use of streets — Payment for — Percentage of receipts — Traffic beyond city—Validity of agreement.

By agreement between the City of Hamilton and the Hamilton Street Ry. Co. the latter was authorized to construct its railway on certain named streets and agreed to pay to the city, *inter alia*, certain percentages on their gross receipts.

Held, following *Montreal Street Ry. Co.* v. *City of Montreal* ([1906] A.C. 100) that such payment applies in respect to all traffic in the city including that originating or terminating in the adjoining Township of Barton.

Held, also, that as, when the railway was extended into Barton the company agreed with that township to carry passengers from there into the city at city rates, the percentage was payable on the whole of such traffic and not on the portion within the city only.

Held, further, that the power of the company to construct its railway was not derived wholly from its charter, but was subject to the permission of the city corporation; the city had, therefore, a right to stipulate for payment of such percentages and the agreement therefor was *intra vires*.

The judgment of the Court of Appeal (10 Ont. L.R. 575), affirming that of Meredith J. at the trial (8 Ont. L.R. 455) was affirmed.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment at the trial(2) in favour of the plaintiffs.

---

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

(1) 10 Ont. L.R. 575. (2) 8 Ont. L.R. 455.

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

The questions raised for decision on the appeal are stated in the above head-note and in the judgments published herewith.

Nesbitt K.C. and *Armour K.C.* for the appellants. *Corbett* v. *South Eastern and Chatham Railway Companies Managing Committee*(1), at p. 20, gives the canon of construction to be adopted in this case.

A municipality has no common law rights; *Attorney-General* v. *Manchester Corporation*(2), and the validity of a by-law can be disputed at any time; *Mann* v. *Edinburgh Northern Tramways Co.*(3).

Blackstock K.C. and *Rose* for the respondents cited *Stiles* v. *Galinski*(4); *City of Montreal* v. *Montreal Street Railway Co.*(5).

THE CHIEF JUSTICE.—The appeal is dismissed with costs. I agree with the opinion stated by Mr. Justice Davies.

GIROUARD J. also concurred with His Lordship Mr. Justice Davies.

DAVIES J.—The appeal in this case is from a judgmen of the Court of Appeal for Ontario, confirming a judgment of Meredith J., holding that the by-laws of the city and the agreements between it and the street railway company were binding upon the company, so far as the disputes in question in this action were concerned, and obliged the company to continue to pay to

(1) [1906] 2 Ch. 12.
(2) [1893] 2 Ch. 87.
(3) [1893] A.C. 69, at p. 79.
(4) [1904] 1 K.B. 615.
(5) 34 Can. S.C.R. 459; [1906] A.C. 100.

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Davies J.

the city, yearly, during the term it had acquired the right to operate its street railway in Hamilton, certain percentages provided in these by-laws and agreements upon their gross receipts.

Several subsidiary questions also were raised and argued. One was as to the effect of certain legislation enacted subsequently to the by-laws and agreement which, it was contended, validated these documents, if that was necessary. Another was that the acceptance by the company of the city's consent to construct and operate a railroad on its streets, in the first instance, and an extension subsequently of the term of years during which they were permitted to operate the road, combined with their uniform practice for many years in paying voluntarily the percentages agreed upon precluded them from now setting up the invalidity of the bargain; and still another, that under the agreement itself they were only bound to account to the city for traffic which originated in the city and not for that which originated in the Township of Barton, even though it terminated in the city.

It was not contended by the city before us that the company was bound to account for any traffic which originated and terminated outside of the city limits, in the Township of Barton, but it was contended that for all traffic attributable to the operation of the railway in the city, wherever it originated or terminated, the company was accountable.

The authority of *The Montreal Street Railway Co.* v. *The City of Montreal*(1) is conclusive in favour of this contention, if authority was needed in its support.

The only debatable question, to my mind, on

(1) (1906) A.C. 100.

this branch of the case, was whether the company had to account for the whole receipts arising from traffic originating or terminating within the city limits, or only for a proportion of such receipts to be estimated in accordance with the rule approved of by the Judicial Committee in the *Montreal Street Railway Case*(1). I agree with the courts below that they have to account for the whole. The only outside municipality is that of the Township of Barton, and the proportion of mileage of the railway in that township to that in the city is very small.

The maximum fares permitted by the agreement to be charged between the city and the company have always been charged by the latter, and, when they extended their line into the Township of Barton, they entered into an agreement with that municipality to carry passengers from that township into all parts of the city *for the city rates.* Practically they agreed that there should be no charge for the short carriage to the city limits. There is, therefore, no basis for apportionment and nothing to apportion. The charge they make is that for the carriage within the city limits and that only, and the agreement with Barton makes no provision for the payment to that municipality of any percentage. These circumstances entirely distinguish the case on that point of apportionment from that of the City of Montreal.

I am also of opinion, concurring with the courts below, that all receipts for tickets sold must be accounted for, and that there is no possible means by which any deduction could be made for tickets sold, but alleged not to have been actually used. These receipts are clearly part of their gross receipts.

As to the main question argued, namely, the in-

(1) [1906] A.C. 100.

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Davies J.

validity of the by-laws and agreement so far as they make provision for the payment of the percentage of profits, I am unable to accept the appellants' reasoning. That reasoning, as I understand it, was that the company and city had no power whatever to contract together, except within the powers specifically given them; that all these powers are to be found in sections 7, 8 and 15 of the company's charter; and that the general words of section 7 authorizing the city to consent to the construction and operation of a street railway on its streets,

> under and subject to any agreement hereafter to be made between the council of the said city and the said company,

was controlled by and limited to the special subjects on which the city and the company were authorized by section 15 to enter into agreements. The radical defect underlying that argument is the assumption that the company had the power to construct and operate its railway in the municipalities by its charter and that the only control, or anything left to the city, related to the proper regulations of such powers.

Support was sought for this argument in the decision of the Privy Council in *The Bell Telephone Case*(1), but even a casual reference to that case and the language used by the Dominion Parliament in conferring powers upon that company shews how entirely inapplicable it is to the case now before us.

Here we have the legislature of Ontario conferring a naked power upon the company to construct and operate street railways in the City of Hamilton and the adjoining municipalities on such streets

(1) (1905) A.C. 52.

as the company may be authorized to pass along, under and subject to any agreement hereafter to be made between the council of the said city and of the municipalities, respectively, and the said company.

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Davies J.

The section goes on to provide that the operation of the railway shall be by such motive power as the city council may authorize.

Now, assuming for a moment, that the language "under and subject to any agreement" is ambiguous and must have some limitation put upon it, I utterly deny that there is any ground whatever for inserting, as such limitation, the enumeration of powers respecting the construction of the railway afterwards specified in section 15. The two sections had entirely different objects. The naked power of constructing and operating street railways given to the company in the first part of section 7 is subject to the limitation that it can only be exercised with respect to such streets as the city council might authorize and designate and only as to them subject to any agreement to be made between the city and the company. I construe that to mean that the city could impose such reasonable conditions within their municipal powers as they thought fit. I see no reasons for putting limitations upon the power of the city council to impose conditions under which alone they would authorize their streets to be used for street railways so long as these conditions are not such as would be altogether beyond and at variance with their municipal powers. There is nothing unreasonable or unjust in the conditions attached to the consent given in this case. On the contrary, they appear to be eminently fair and reasonable in their general character. Of course, I know nothing and say nothing about their details, but I speak of the principle of exacting some percentage

1906
HAMILTON ST. RY. CO. v. CITY OF HAMILTON.
Davies J.

on the gross profits from the company as a condition of conceding to them the privilege they were asking of turning their naked and useless power into a living and probably beneficial right. The denial of the power to impose any such condition as a percentage of profits necessarily involves a denial of the power to impose any limitation as to time. So that, if the argument of the company is sound, the city only could consent to a perpetual charter binding the citizens for all time and could not impose any condition whatever excepting such regulations as were within section 15.

The special subjects on which by section 15 the parties were authorized to agree were those which would naturally arise *after* the city had given its consent, after the powers of the company had been changed by such contract into a right, and relate, as will be seen, to the regulations of those rights, the paving of the streets, the construction of drains and sewers, the laying of gas and water-pipes, the particular streets along which the railway should run, pattern of rail, time and speed of cars, time within which the works were to be commenced, manner of proceeding with the same, and the time for completion and generally the safety and convenience of passengers, conduct of the agents and servants of the company and the non-obstructing or impeding of the ordinary traffic.

Now, each and all of these matters specified in section 15 are confined to necessary and proper regulations and arrangements on matters arising after the consent of the city had been first obtained to the construction within its borders at all of the street railway.

The agreement, however, which is authorized to

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Davies J.

be entered into between the parties by section 7, and under and subject to which alone they could enter into the city limits and construct their railway, by necessary inference, in my opinion, authorizes an agreement limiting as well the time during which the consent was to operate as a payment of money for the concession made. That such payment should take the form as well of a mileage payment for each mile of track laid as also for a percentage of the gross profits is, to my mind, neither unreasonable nor *ultra vires*.

The appeal should be dismissed with costs.

IDINGTON J.—The appellants are resisting payment of certain percentages of their "gross receipts" which, by an agreement of 26th March, 1892, they covenanted to pay to the respondents.

The case was tried by Mr. Justice Meredith, who gave judgment for respondent, and then appellants carried the case to the Court of Appeal for Ontario, and that court dismissed the appeal.

From that judgment appellants have appealed to this court.

The statement of claim sets forth the material parts of certain statutes, by-laws and agreements upon which respondent rested its claim.

The appellant's statement of defence consists of a denial of indebtedness under the by-laws, agreements and other matters thus set forth, and a counterclaim for recovery of over-payments by error or mistake

in excess of percentages on the receipts of the defendants (now appellants) *to which the plaintiff* (now respondent) *was entitled under the by-laws or agreements* referred to in the statement of claim, etc.

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Idington J.

The plaintiff (now respondent) replied to this by joining issue, and, as to the counterclaim, pleading the Statute of Limitations.

Not a word about the agreements being *ultra vires* appears in the pleadings which were thus closed on 14th May, 1903.

On 23rd June, 1904, counsel signed a memorandum of admissions for use on the trial. Nothing is there suggested of any of the by-laws or agreements, which are those in question here, being *ultra vires* or in any other way invalid.

One may see, in the frame of the pleadings and these admissions, that there was foreshadowed a contest or contests raising questions I will presently refer to over the construction of these documents, but could hardly expect the doctrine of *ultra vires* to be likely to arise.

It may be that in those pleadings it was open to the appellants to raise such questions. I am by no means so clear that when a party has solemnly made such an unconditional admission of by-laws and agreements that he can turn round and say that they are utterly void, and, if not entirely so, were so as to the clauses and paragraphs that the whole suit was about. I would incline to take it as an admission of a valid by-law.

This was not observed by me during the argument before us and no observations were made upon it.

The arguments were addressed to the questions of agreements and by-laws being *ultra vires* and the questions incidental thereto and the cases which the pleadings present.

I suggested during the argument that if there was anything in what appellants contended for, their

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Idington J.

rights on the streets of Hamilton had no legal ground to rest upon. Appellants' counsel sought to shew that this was not necessarily so. I think he was unsuccessful in that regard.

Of course, if the whole foundation of appellants' rights to operate on said streets an electric road are gone, or rather never existed, the cause of action in question may be gone also.

I think it will, however, enable a better apprehension of what is involved in this contention as to *ultra vires,* to consider the question first from the point of view I suggested.

Have the appellants any right to operate an electric railway in Hamilton?

If so, on what does such right rest? Can that right be rested upon something severable from the claim to a correlative right of the respondent such as it sets up herein?

The appellants were incorporated by 36 Vict. ch. 100 (Ontario), for the purpose of constructing and operating a street railway "in the City of Hamilton and adjoining municipalities." Section 7 thereof is as follows:

> The company are hereby authorized and empowered to construct, maintain, complete and operate *a double or single iron railway,* with the necessary side-tracks and turn-outs, for the passage of cars, carriages and other vehicles adapted to the same, upon and along streets and highways within the jurisdiction of the corporation of the City of Hamilton, and of any of the adjoining municipalities, as the company may be authorized to pass along, *under and subject to any agreement hereafter to be made between the council of the said city and of said municipalities respectively, and the said company,* and under and subject to *any by-laws of the said corporation of the said city* and municipalities respectively, or *any of them, made in pursuance thereof,* and to take, transport and carry passengers and freight upon the same, by the *force or power of animals or such other motive power as they may be authorized by the council of the said city and municipalities respectively by by-law to use* and to construct and

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Idington J.

maintain all necessary works, buildings, appliances and conveniences connected therewith.

It is conceded that, as a motive power, electricity, or rather electric force, thus applied, could not be within the contemplation of any one then.

Horses were used to carry out what the parties hereto then agreed upon and a road of that kind was operated until 1892.

What the terms of that agreement may have been, we are not able to say. It was swept away, or supposed by every one, up to the trial of this case, to have been swept away by the one now before us.

Counsel informed us in the course of the argument that the road itself and all its equipment had become pretty well worn out by 1892.

The need of a new and better system being felt, respondent's counsel, on the 26th March, 1892, passed a long by-law covering such terms as by this time had become of common use to define the relations between a municipal corporation and an electric railway company. Amongst other things it provided for the payment by the appellants to the respondents of the percentages of earnings designated "gross receipts" now in question by way of compensation for the use of the streets.

The last two clauses of this by-law are most significant and important for the purpose of understanding the questions now raised.

It is urged by appellants that the preceding paragraphs of this by-law, which contain most explicit provisions for the payment by appellants to respondents of the percentages intended to be covered thereby, were all *ultra vires,* and that any assent thereto by the appellants was also *ultra vires.*

Of these last two clauses of this by-law, No. 33 is as follows:

This by-law and the powers and privileges hereby granted shall not take effect or be binding upon the said city unless formally accepted by the said railway company, within ten days after the passing hereof, *by an agreement which shall legally bind the said company to pay to the city corporation the sums mentioned in this by-law,* and to perform, observe and comply with all the agreements, obligations, terms and conditions herein contained, and shall be approved by the city solicitors, or one of them, and such agreement, when so approved, shall also be executed under the city seal by the mayor or the chairman of finance and the city clerk.

It is followed by clause 34, repealing many named by-laws (I take it, all the former by-laws conferring rights upon the company to use the streets), and all others so far as inconsistent; such repeal to

take effect only upon and from the coming into force of this by-law and the agreement referred to in the last preceding paragraph.

Then follows, in same clause, a reservation of right to run with horses for six months.

The company immediately entered into an agreement, which recites what had been done and is intended, and the operative clauses following such recitals contain, first, a covenant binding the respective parties, and then proceeds as follows:

The company do hereby accept the said by-law and agree with the city corporation to pay the city corporation the sums mentioned in the said by-law and to perform; observe and comply with all the agreements, obligations, terms and conditions therein contained.

Now, in face of this, the appellants claim they have the right to reject part, and insist on accepting and acting under other parts. But they seem to overlook the comprehensive nature of this agreement.

They also seem to overlook that the destruction of any substantial part of the contract, such as that

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Idington J.

involved in the *ultra vires* issue raised, would tend to destroy the whole contract. But, more strange than all that, the powers and privileges granted by the by-law, as the above section 33 thereof shews, *were not to take effect or be binding upon the city*

unless formally accepted by the railway company, within ten days after the passing thereof, by *an agreement which shall legally bind the said company to pay to the city corporation the sums mentioned in this by-law.*

Now, if the agreement is, in this regard, not valid and binding, there never existed any concession on the part of the city to the company authorizing the use of the streets for the purposes of constructing thereon an electric road.

Section 7 would be the only authority. Clearly the first part of that, in itself and without relation to the authorizing power of the city at the close of the section, never could have conferred such a right.

It hardly needs to be stated that the construction and operation of an old system of horse-tramway (and that is all that was given and taken under the first part of section 7), is entirely a different thing from the construction and operation of an electric road. The appliances of the latter are of such a character that their use requires much to be guarded against. The establishment of it involves considerations of an entirely different character from those arising from constructing and operating a horse-tramway. A concession of a kind that would authorize the former is, and implies, so much of a different nature from that which the company had acquired authority to obtain, that I am surprised to find it assumed, as it evidently was by the contracting parties, that, without amendment, the city and company were supposed to have authority to

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Idington J.

act under section 7 and to enable the making of a contract to build and operate an electric road.

The appellants contended stoutly that the first part of the section gave a right to construct and operate a road unfettered by any restrictions of the city, save as to those matters within sections 8 and 15.

Before adverting further to the possible power derivable from the authorizing part at the end of section 7, I would call attention to cases distinguishing the effect of different powers.

The case of *Attorney-General* v. *Pontypridd Urban District Council*(1), cited by the appellants' counsel for another purpose, seems to apply to the point I am now taking.

I need not enlarge upon it, but refer to the judgment therein of Mr. Justice Farwell, and especially at pages 450 to 453. The substance of it is this, that a municipal corporation acting in the exercise of a power for one particular purpose, cannot be presumed to have thereby been exercising any other one of its powers. If it acquired land as for one particular purpose, even though that purpose may be made remotely to be adapted to supply some of the wants of the other purpose, it cannot be held to have acted in execution of the powers given to carry out the other purpose. See also the case of *Attorney-General* v. *Mersey Rly. Co.*(2), following *London County Council* v. *Attorney-General*(3).

Here, beyond peradventure, the appellants never intended, and could not have intended, when incorporated, the construction of such an unknown thing as an electric road. They applied for leave to operate a

(1) [1905] 2 Ch. 441. (2) 95 L.T. 387.
(3) 86 L.T. 161; [1902] A.C. 165.

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Idington J.

road whereon the force or power of animals would be used as the motive power. When they conceived it necessary in their interest to use some other power, they felt it incumbent upon them, as I am quite clear it was incumbent upon them, to apply to the city authorities to permit the adoption of some other motive power. It was a power inconceivable to the minds of ordinary men at the time when section 7 was enacted. It is not in the words of the section. It may be possible to rest its adoption on the words enabling to do what the city would agree to be done in that regard. It has no other existence in law.

Moreover, there is this to be observed in the reading of section 7 that the *subject matter over which the corporation of the city was given special control, was the application of the kind of motive power to be used.* The company were in any case to construct and operate, under and subject to any agreement to be made between the council of the city and the company, and they were to be subject to any by-laws of the said corporation made pursuant to such agreement. But beyond all that, and particularly germane to what has become the subject of discussion in this suit, they were

> to take, transport and carry passengers and freight upon the same (that is the road) by the force or power of animals or such other motive power *as they may be authorized by the council of the said city and municipalities respectively by by-law to use.*

It is quite clear that unless this latter part of section 7 can be relied upon to support the concession implied in the by-law and agreement now in question, that the company never had the slightest vestige of a right to construct upon the streets of Hamilton an electric street railway. By virtue of what authority did they do so?

The 7th section above quoted manifestly never conferred any such power unless by virtue of this power of authorization by the city. It might be held that this was put there to meet all future possible emergencies such as elsewhere discussed.

The doctrine of *ultra vires* in this case goes to the destruction of the whole contract, the whole concession, or is not operative at all.

I do not wish to say anything further to disturb. I will accept rather than do so, the theory proceeded upon by a number of the judges in the courts below, that there had come to be, by virtue of the several enactments relative to this agreement and this by-law, such a legislative recognition of its validity as at this distance of time, in light of all that has happened, might be relied upon to support the by-law and contract as duly established.

If ever circumstances existed that would entitle the inference to be drawn, in the absence of express and explicit words of enactment, of legislative confirmation of a by-law and agreement, this seems to be that case.

The fact that the legislature of Ontario had some years earlier, in regard to companies incorporated under the "Street Railway Act," given, by section 13 thereof, power to the municipalities to exact a license, might also be borne in mind. The power given municipalities to own and operate such roads is also illustrative.

These provisions are only of value here as shewing that the policy of that legislature was such that indirect confirmation, if possible to infer at all, was not so repugnant to that policy and prevalent opinion as to forbid such inference.

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Idington J.

Assuming the contract valid, as I think down at least to May, 1904, the parties all believed it to be, what is the true construction of it in relation to the accountability of the appellants to the respondents for the percentage of "gross receipts" agreed upon?

I accept the suggestion made in the courts below that the gross receipts must be confined to the receipts for traffic or passengers. I also see no difficulty in coming to the conclusion that if the instruments before us were intended to, and expressed the intention, that it was agreed between the parties to make the respondents account for the Barton fares as part of the gross receipts, they must do so. The percentage of gross receipts might well be taken as the measurement of the price the municipality were exacting for the franchise.

Is it, however, the correct construction of the documents in question that these fares must be accounted for? There can be, under the ruling in the Privy Council in the case of *City of Montreal* v. *Montreal Street Rly. Co.*(1), no doubt but that the appellants must account for the fares received in respect of passengers travelling over the Hamilton portion of the road, whether their journey originated in the township of Barton or in the City of Hamilton.

The contract in that case and the contract in this case, have so much in common in that regard, that I accept the authority of the Privy Council interpreting the Montreal contract as conclusive upon this point.

I think there is no foundation in reason for the contention that if a ticket happened to be sold in Barton, entitling a passenger to travel over the entire 18.796

(1) (1906) A.C. 100; 34 Can. S.C.R. 459.

miles of the appellants' track in Hamilton, though the passenger may only have used 50 feet of the track in the Township of Barton, his fare need not be accounted for. I state the proposition as I understand it was presented in argument, unillustrated of course by the contrast of distances I present. It refutes itself. I will not labour with it.

The accountability in respect of the earnings of the company beyond the city, in respect of fares for journeys not projected into the city, stands on a somewhat different footing. The circumstances, the expressions in the statute, in the by-laws, and in the agreement in this case, must be carefully looked at to see whether or not this case is distinguishable from that of *Montreal* v. *Montreal Street Railway*(1) in the Privy Council.

The Act of incorporation recites the appellants' charter members as petitioning the legislature for incorporation for the purpose of constructing and operating a *street railway in the City of Hamilton and adjoining municipalities.* Clearly this was one enterprise at its very inception.

The Montreal Street Railway at its inception, for the purpose of construction as an electric road, was confined by the language to the City of Montreal.

The company in this case is not confined to, and never was, but entitled to go beyond Hamilton and into any adjoining municipality. The adjoining municipalities are few. They do not extend far. It is not unreasonable to suppose that the parties to this contract perceived that it was a matter of very little consequence; too trifling to consider in light of the question of auditing and determining what amount of

(1) [1906] A.C. 100.

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Idington J.

fares might be collected for services in any one of the adjoining municipalities, as distinct from the fares collected for services rendered in the City of Hamilton.

Surrounding the City of Montreal there were and are populous suburbs, and a continuous stretch of municipal corporations of that character. It might shock one knowing the locality and knowing the condition as to population and business relations with Montreal, on the part of the inhabitants of these populous suburbs, to find a claim set up for earnings, through miles of such a district.

On the other hand, if it would not shock, but it would surprise any one to find that, when this contract was formed, any great stress was laid by either party to the contract as to the amount of fares possible to be collected for services in Barton alone as distinct from journeys by the inhabitants of Barton into the city. The amount involved was so trifling at the date of the accounting now in question, that the city solicitor seems to have been willing in the Court of Appeal to abandon the consideration of it, rather than face the expense involved in settling the trifling sum that would be coming to the City of Hamilton as the product of such investigation.

This surrender of counsel may have been an inadvertence. We are assured by the appellants' counsel that it has, by virtue of the small amount in question being added to the aggregate of services in Hamilton, brought about a total that passes the line at which an increased percentage is drawn.

In that way, the item is possibly an important one.

I doubt very much if such a consideration was ever present to the minds of anybody concerned in the

1906

HAMILTON ST. RY. CO. v. CITY OF HAMILTON.

Idington J.

framing of this by-law or contract. I would rather come to the conclusion that in consideration of being free from the trouble and annoyance of keeping separate accounts as to the earnings for Barton services, as distinguished from the earnings for Hamilton services, and all that that implies, the appellants had abandoned anything to be gained by making the distinction.

The foregoing considerations, along with the difference in the inception of the relations, between the Montreal case and this, and the interpretation put upon the contract by the contracting parties in this case for many years, seem to distinguish this case from that, as determined by the Privy Council.

I cannot say that this small branch of the case is entirely free from doubt. I have no doubt that the parties, if they really seriously considered it, intended that Barton fares should go with Hamilton fares as a basis for the percentage. My only doubt is as to whether the expressions used can in law fairly be so read as expressing that intention.

I also think the admission on which the case was tried implies a valid by-law.

I think the appeal should be dismissed with costs.

DUFF J. concurred for the reasons stated by Davies J.

Appeal dismissed with costs.

Solicitors for the appellants: *Gibson, Osborne, O'Reilly & Levy.*

Solicitor for the respondents: *Francis Mackelcan.*

1906

*Dec. 1.
*Dec. 11.

WILLIAM PAUL, THE YOUNGER (SUPPLIANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Negligence—Navigation of inland waters—Collision—Government ships and vessels—"Public work"—"The Exchequer Court Act," s. 16—Construction of statute—Right of action.

His Majesty's steam-tug "Champlain," while navigating the River St. Lawrence, at some distance from a place where dredging was being carried on by the Government of Canada, and engaged in towing an empty mud-scow, owned by the Government, from the dumping ground back to the place where the dredging was being done, came in collision with the suppliant's steam barge, which was also navigating the river, and the barge sustained injuries.

Held, affirming the judgment of the Exchequer Court of Canada, that there could be no recovery against the Crown for damages suffered in consequence of negligence of its officers or servants, as the injury had not been sustained on a public work within the meaning of the sixteenth section of the "Exchequer Court Act." *Chambers* v. *Whitehaven Harbour Commissioners* ([1899] 2 Q.B. 132); *Hall* v. *Snowden, Hubbard & Co.* ([1899] 2 Q.B. 136), *Lowth* v. *Ibbotson* ([1899] 1 Q.B. 1003), *Farnell* v. *Bowman* (12 App. Cas. 643) and *The Attorney General of the Straits Settlement* (13 App. Cas. 192), referred to.

APPEAL from the judgment of the Exchequer Court of Canada, dismissing the appellant's petition of right with costs.

The claim was for damages to the suppliant's steam-barge "Préfontaine" through coming in collision with His Majesty's steam-tug "Champlain" in the Contrecœur Channel, on the River St. Lawrence,

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

a short distance below the Harbour of Montreal, about half past eight o'clock in the evening of the 6th October, 1902. The night was clear, with a light south wind, regulation lights were shewn by both vessels, those of the tug indicating that she had a tow.

The suppliant charged that the injuries sustained by the "Préfontaine" were wholly caused by the negligence of the officers and crew of the steam-tug, then employees of the Crown acting within the scope of their employment, on, in and about a public work of the Dominion of Canada. At the time of the collision the "Champlain" was engaged in towing mud-scows laden with material which was brought up from the bottom of the channel in the course of dredging works being then carried on there by His Majesty's steam-dredge "Lady Minto." The method of the operations was for the tug to tow the loaded scows from the dredging ground to the dumping grounds, some distance away, on the other side of the channel, and then to tow the empty scows back to the dredge. It was while so engaged in towing an empty scow back from the dumping grounds, but still at a considerable distance from the place where the work of dredging was being carried on, that the vessels came in collision in the channel.

The defence blamed the suppliant, his officers and servants, for causing the collision by neglect to observe proper precautions in navigating the channel and also denied liability on the part of the Crown on the ground that the injury complained of did not arise upon a public work within the meaning of section 16 of "The Exchequer Court Act."

The petition was dismissed by the judgment appealed from on the ground that, under any circum-

1906

PAUL v. THE KING.

stances, no relief could be granted as the collision which occasioned the injuries had not occurred upon a public work within the meaning of the section above mentioned.

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

Mignault K.C. and *Martineau K.C.*, for the appellant, cited *The City of Quebec* v. *The Queen*(1), at page 450; *Filion* v. *The Queen*(2); *Letourneux* v. *The King*(3); *Ryder* v. *The King*(4), at pages 464-467.

Newcombe K.C., Deputy Minister of Justice, and *J. L. Decarie K.C.*, for the respondent, cited *The Hamburg American Packet Co.* v. *The King*(5); *Chambers* v. *The Whitehaven Harbour Commissioners* (6); *Fenn* v. *Miller*(7); *Back* v. *Dick, Kerr & Co.*(8); *The "Mentor"*(9); *The "Lord Hobart"*(10); *The "Athol"*(11); *The "Volcano"*(12); *The "Birkenhead"* (13); *The "Swallow"*(14); *The "Inflexible"*(15); *The "Siren"*(16); *The "Fidelity"*(17); *Filion* v. *The Queen*(2); *City of Quebec* v. *The Queen*(1).

GIROUARD J.—I quite agree that a navigable river, although under the control of the Dominion Government, is not a public work within the meaning of the

(1) 24 Can. S.C.R. 420.
(2) 24 Can. S.C.R. 482.
(3) 33 Can. S.C.R. 335.
(4) 36 Can. S.C.R. 462.
(5) 33 Can. S.C.R. 252.
(6) (1899) 2 Q.B. 132.
(7) (1900) 1 Q.B. 788.
(8) (1906) A.C. 325.
(9) 1 Rob. 179.
(10) 2 Dod. 100.
(11) 1 Wm. Rob. 374.
(12) 2 Wm. Rob. 337.
(13) 3 Wm. Rob. 75.
(14) 1 Swab. 30.
(15) 1 Swab. 32.
(16) 7 Wall, 152.
(17) 16 Blatch. 569.

"Exchequer Court Act." But to hold that a government dredge, operating on a navigable river, is not such a public work is more than I can understand. Likewise, I would feel inclined so to look upon the tug and scows used to carry away, within close proximity, the material excavated by the dredge, and, were it not for the English decisions quoted by Mr. Newcombe K.C., for the respondent, especially as to the meaning of similar clauses in the Imperial "Workmen's Compensation Act," 1897, and the "Public Works Act," and referred to by my brother Idington, I would probably so hold. In face of all these decisions, one by the House of Lords, I do not, however, see how I can dissent.

DAVIES J.—In my opinion this appeal must be dismissed on the ground stated by the Exchequer Court that the case does not come within the provisions of clause (*c*) of the 16th section of the "Exchequer Court Act" under which section alone could relief be given.

Before dealing with this point, however, I wish to say that the merits of the case have been argued at length before us, and that I desire to guard against any inference whatever being raised from our silence as to the disposition of the case we would have made upon these merits had it been competent for us to enter into them. When I speak of the merits I desire to be understood as including the amount of damages reported by the Registrar as well as the question of negligence.

The construction placed upon this section of the "Exchequer Court Act" by the Exchequer Court and this court has been that it created a liability as well

1906

PAUL
v.
THE KING.

Davies J.

as gave jurisdiction. *The City of Quebec* v. *The Queen*(1); *The Queen* v. *Filion*(2).

In the case of *Larose* v. *The King*(3) this court held that a rifle range under the control of the Department of Militia and Defence was not a public work within the meaning of section 16 (*c*). That section reads as follows:

> The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

In the case at bar the claim was for injuries to the suppliant's steamer "Préfontaine" arising out of a collision which occurred between her and the King's tug "Champlain" in the channel of the River St. Lawrence.

The steam-dredge "Lady Minto," also owned by the Crown, was at the time working in the Contrecœur Channel of the St. Lawrence River.

The tug "Champlain" was employed in towing the scows loaded with the mud dredged by the "Lady Minto" from the bottom of the channel to a convenient dumping ground. It was while so engaged and with one of the scows attached to her, but at a considerable distance from the dredge, that the tug was either run into by the suppliant's steamer or ran into her. The question as to whose negligence caused the accident is entirely apart from the one I am considering, of the construction of the clause.

In delivering the judgment of the court in *Larose* v. *The King*(3), Taschereau J., afterwards Chief Justice, said:

(1) 24 Can. S.C.R. 420. (2) 24 Can. S.C.R. 483.
(3) 31 Can. S.C.R. 206.

1906

PAUL
v.
THE KING.

Davies J.

It must not be lost sight of that the suppliant to succeed must come within the strict words of the statute.

The injury complained of must have arisen "on a public work," and must have resulted from the negligence of the Crown's officer or servant when acting within the scope of his employment.

This collision which caused the injury here complained of occurred between two steamers on the waters of the St. Lawrence River.

This court has already held in the case of *The Hamburg American Packet Co.* v. *The King*(1), confirming the judgment of the Court of Exchequer, that the channel of the St. Lawrence River after it had been deepened by the Department of Public Works did not, in consequence of such improvement, become a public work within the meaning of the section under consideration. An appeal taken from this judgment to the Privy Council was afterwards abandoned. This judgment is, of course, binding upon us and somewhat narrows the point now before us.

To hold the Crown liable in this case of collision for injuries to the suppliant's steamer arising out of the collision we would be obliged to construe the words of the section so as to embrace injuries caused by the negligence of the Crown's officials not as limited by the statute "on any public work," but in the carrying on of any operations for the improvement of the navigation of public harbours or rivers. In other words, we would be obliged to hold that all operations for the dredging of these harbours or rivers or the improvement of navigation, and all analogous operations carried on by the Government were either in themselves public works, which needs, I think, only

(1) 33 Can. S.C.R. 252.

1906

PAUL
v.
THE KING.

Davies J.

to be stated to refute the argument, or to hold that the instruments by or through which the operations were carried on were such public works.

If we were to uphold the latter contention I would find great difficulty in acceding to the distinction drawn by Burbidge J. between the dredge which dug up the mud while so engaged and the tug which carried it to the dumping ground while so engaged. Both dredge and tug are alike engaged in one operation, one in excavating the material and the other in carrying it away.

But, even if we could find reasons to justify such a distinction, which I frankly say I cannot, how could we hold in the face of the decided cases referred to above that the injuries to the "Préfontaine" were *on* a public work when they were admittedly sustained through a collision while she was steaming on the public waters of a public river.

I think a careful and reasonable construction of the clause 16 (*c*) must lead to the conclusion that the public works mentioned in it and "on" which the injuries complained of must happen are public works of some definite area, as distinct from those operations undertaken by the Government for the improvement of navigation or analogous purposes; not confined to any definite area of physical work or structure.

The cases decided as to the meaning of section 7, sub-section 1 of "The Workmen's Compensation Act, 1897," in which the words used are "on, in or about," are instructive on the point before us. See *Chambers* v. *Whitehaven Harbour Commissioners*(1), and the cases there cited and relied upon, and *Hall* v. *Snowdon, Hubbard & Co.*(2).

(1) [1899] 2 Q.B. 132.

(2) [1899] 2 Q.B. 136.

1906

PAUL
v.
THE KING.

Idington J.

For these reasons I would dismiss the appeal with costs.

IDINGTON J.—This appellant claims that his vessel, the "Préfontaine," was damaged by a collision with the vessel "Champlain," owned by the respondent.

He says this collision took place in the St. Lawrence and was entirely the result of the negligence of those servants of the respondent in charge of the "Champlain."

The "Champlain" was engaged at the time as tender to a dredge engaged in deepening or widening the channel of the St. Lawrence.

The "Champlain's" work as such tender was towing barges or scows, filled with material raised by the dredge, to dump it on the other side of the channel, or at all events some distance from the spot where the dredge operated.

The question is raised whether or not appellant can have, in the Exchequer Court, assuming all that he claims to be true, a remedy for the wrong he has suffered.

His claim was rested in the argument upon section 16, sub-sections (*c*) and (*d*) of the "Exchequer Court Act."

This sub-section (*c*) has been held not only to furnish a jurisdiction, but to create thereby a liability not otherwise existing for the wrongs done by servants of the Crown in such cases as the sub-section (*c*) covers.

If the claim can only be rested on these words used in sub-section (*c*), I am clear that it must fail. I cannot see how the words therein "*on* any public work" can alone be held to give relief in light of the interpretation put by the Court of Appeal in England

1906

PAUL
v.
THE KING.

Idington J.

upon even wider terms in the cognate legislation there embodied in the "Workmen's Compensation Act, 1897," See the cases of *Lowth* v. *Ibbotson*(1); *Chambers* v. *Whitehaven Harbour Commissioners*(2).

This latter case, in its facts, is very like that now in hand. There was a dredge working in a harbour and the material was being carried to sea to be dumped therein, by what were called "hoppers," a mile or so distant from the dredge. One of the men who worked on the dredge, but took his time to work on a hopper thus conveying the material to sea, was knocked overboard and drowned. Assuming negligence, it was held that though the spot where the dredge operated and the operating dredge might be "engineering work" within the meaning of the Act, yet the Act which gave a remedy for cases arising "on, in or about" a number of specified works of which an "engineering work" was one, was held not to extend to this case.

It was held that these much wider words were pointed to a definite locality. I fear the words in question here must be held also to point to locality unless we read them in connection with the rest of the section, in a way I am about to advert to.

We were referred to the interpretation given the words "public works" in the "Public Works Act." If the meaning given there could be used here then the appellant's right, if otherwise entitled to succeed, would be clear.

The only way in which that can be done is to put upon section 16 a much wider and more comprehensive construction than this court has ever yet seen its way to do, though invited on several occasions to try to do so.

(1) (1899) 1 Q.B. 1003. (2) (1899) 2 Q.B. 132.

1906

PAUL v. THE KING.

Idington J.

In *Ryder* v. *The King*(1), at p. 466 *et seq.*, I reviewed the authorities and dicta appearing in them.

I still think, as then, that the policy of Parliament, as shewn in this section 16 (as a group or as independent sub-sections) of the "Exchequer Court Act," was to put the relation between the Crown and its subjects and all issues springing therefrom, in regard to the several matters dealt with by such legislation, upon the same footing as between subject and subject.

No doubt, though the general trend of opinion, in and of this court, in this regard has been against such a wide, and as I conceive beneficial, interpretation of this section, yet it has never been in terms formally declared against.

However, even if such interpretation were ever open, it seems hopeless now to expect this court, after such a mass of opinion looking the other way, and in *Ryder* v. *The King*(1), coming to conclusions inconsistent with anything but a narrow or restricted construction, to put any such wide construction as would save this case for appellant. What force or effect now remains in this result for sub-section(*d*) I am at a loss to understand.

The language of the Acts respectively in question in the cases of *Farnell* v. *Bowman*(2), and *The Attorney-General of the Straits Settlement* v. *Wemyss*(3), was more apt than that in section 16 to execute what I have suggested was the purpose of Parliament in its enactment.

And in saying all this I am not by any means blind to the obvious difficulties. The section and its whole frame seem as if constructed as a puzzle.

(1) 36 Can. S.C.R. 462. (2) 12 App. Cas. 643.
(3) 13 App. Cas. 195.

1906

PAUL v. THE KING.

Idington J.

It certainly seems at this time of day unsatisfactory to find that one of the vessels, the property of which is in the Crown, engaged in the business of the Crown, can destroy through grossest negligence the property of a subject and he have no remedy at law unless against the possibly penniless man who has been thus negligent.

I am not implying that such gross negligence existed here, as I have not examined the evidence, but do imply that no matter how gross it may have been, if at all, there is in the result no proper remedy.

I think, therefore, the appeal should be dismissed with costs.

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

Appeal dismissed with costs.

Solicitors for the appellant: *Godin & Brassard.*
Solicitor for the respondent: *E. L. Newcombe.*

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS) ... } APPELLANTS;

AND

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

1906

*Dec. 5.
*Dec. 11.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Appeal—Jurisdiction—Discretion of Governor in Council—Stated case—Railway subsidies—Construction of statute—3 Edw. VII. c. 57—Conditions of contract—Estimating cost of constructing line of railway—Rolling stock and equipment.

Where the jurisdiction of the Supreme Court of Canada to entertain an appeal was in doubt, but it was considered that the appeal should be dismissed on the merits, the court heard and decided the appeal accordingly.

(Cf. *Bain* v. *Anderson & Co.* (28 Can. S.C.R. 481).

The provisions of the Act, 3 Edw. VII. c. 57, authorizing the granting of subsidies in aid of the construction of railways are not mandatory, but discretionary in so far as the grant of the subsidies by the Governor in Council is concerned.

On a proper construction of the said Act it does not appear to have been the intention of Parliament that the cost of rolling stock and equipment should be included in the cost of construction in estimating the amount of subsidy payable to the company in aid of the "Pheasant Hills Branch" of their railway under the provisions of that Act, notwithstanding that the said Act did not specially exclude the consideration of the cost of equipment in the making of such estimate as had been done in former subsidy Acts with similar objects, and that the Governor in Council imposed the duty of efficient maintenance and equipment of the branch as a condition of the grant of the subsidy.

APPEAL from the judgment of the Exchequer Court of Canada, on a referred case ordering judgment to be entered in favour of the respondent, defendant, and that there should be no costs to either party.

A stated case was referred to the Exchequer Court by the Minister of Railways and Canals, under section

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

1906

CANADIAN PACIFIC RY. CO. v. THE KING.

23 of the "Exchequer Court Act." It recited the Act, 3 Edw. VII. ch. 57; certain orders in council in respect of the Pheasant Hills branch of the company's railway mentioned in sub-section 72 of the second section of the Act and the agreement for its construction and operation.

The question to be decided was whether or not, on the proper construction of the said Act, contract and documents mentioned, the cost of the necessary rolling-stock and equipment of the line should be included in estimating the subsidy payable to the company under the Act.

By the judgment appealed from it was held that the Crown was under no obligation to pay subsidy estimated upon a basis including the cost of rolling-stock and equipment as part of the expense of constructing the line of railway.

The material parts of the documents mentioned and the questions discussed on the argument of the appeal are referred to in the judgments now reported. Objection was made to the jurisdiction of the Exchequer Court to review the discretion vested in the Governor in Council by the ninth section of the Act, 3 Edw. VII. ch. 57.

Lafleur K.C. and *Lewis* for the appellants.

Newcombe K.C., Deputy Minister of Justice, for the respondent.

GIROUARD J.—The appeal is dismissed with costs. I concur for the reasons stated by my brother Davies.

DAVIES J.—I entertain very grave doubts as to the jurisdiction of the Exchequer Court and consequently

1906

CANADIAN PACIFIC RY. CO. v. THE KING.

Davies J.

of this court to decide the questions submitted by the special case agreed upon between the parties.

In view, however, of the firm conclusion I have reached upon the merits and that my doubts as to our jurisdiction do not appear to be shared by all the members of this court and that the point does not seem to have been taken before the Exchequer Court, but arises under a case stated between the parties, I will shortly state my reasons for coming to the conclusion I have reached.

The question is one to my mind purely of the construction of the Act, 3 Edw. VII. ch. 57, granting railway subsidies.

The Act is not mandatory, but discretionary so far as granting the subsidies are concerned. The discretion is vested in the Governor in Council and the second section enacts that he may grant a subsidy. That discretion is limited to the objects and purposes designated by the statute and it is, of course, within those alone that he can exercise his discretion. If the statute means that the subsidies are to be limited to the cost of the construction of the road and its language does not include the cost of rolling stock or equipment the Governor in Council could not exercise any discretion beyond the statutory limitation. In exercising such discretion he could, I have no doubt, impose such conditions as to the subsidized company providing rolling stock and equipment as he deemed fit to ensure that the road would be an efficient one and that the subsidy would not be thrown away. That is what has been done in this case in the order in council passed and the agreement entered into in pursuance of it. But the imposition of any such condition relating to rolling stock or equipment can have no

1906

CANADIAN PACIFIC RY. CO. v. THE KING.

Davies J.

bearing upon the true construction of the subsidy Act. I mention this because the provisions in the agreement and specification attached thereto relating to rolling stock was pressed upon us as indicating that it was a railway line in operation and as a going concern that was contemplated. This is no doubt perfectly true. Anything else or less than such a railway line would be a fraud upon the public. But it by no means follows that because the Government stipulated for provision being made by the company for

> sufficient rolling stock to accommodate and conduct properly and efficiently the traffic and business of the line

that they agreed that the cost of such rolling stock or its efficient maintenance should be added to the cost of the line for the purpose of increasing the statutory subsidy.

On the contrary by turning to the agreement entered into between the Crown and the company on the 14th January, 1904, it will be seen that after reciting the second section of the "Subsidy Act of 1903," and the 72nd paragraph designating this particular branch railway, the agreement went on to provide in clause 1 that

> the company should make, build, construct and complete the line of railway mentioned and described in paragraph 72 of the 2nd section of the "Subsidy Act" above set forth, and all bridges, culverts, works and structures appertaining thereto in all respects in accordance with the specifications hereto annexed marked A.

Then follows clauses two to eight inclusive relating to location, plans, character of the work, time of completion of work, the kind of steel rails to be provided, and compliance with all statutory requirements.

Not a single word said or reference made to rolling stock or equipment, but the language used

make, build, construct and complete the line of railway * * * and all bridges, culverts, works and structures appertaining thereto in all respects in accordance with the specifications

under well-known rules of construction would exclude rolling stock.

Then immediately follows section 9, providing that upon the performance and observance by the company *of the foregoing clauses* 1 *to* 8 of the agreement His Majesty would, subject to and in accordance with the provisions of sections one, two and four of "Subsidy Act," pay to the company so much of the subsidies, etc.

Then follows clause ten, an independent clause,

that upon, *from and after the completion of the said line of railway* the company would faithfully and continuously operate and run the same maintaining the said railway and all structures thereon, and equipment thereof, in good condition, etc.

This covenant relates to the subsequent operation and maintenance of the railway and its equipment, and is followed by other clauses relating to the details of the operation of the road.

And so while the specification attached to the order in council makes provision for rolling stock and equipment, the agreement explicitly provides for the payment of the subsidy upon the performance of the company's covenant to construct and complete the line of railway mentioned in the "Subsidy Act," together with other specific matters not having the remotest reference to rolling stock or equipment, the provision for and the maintenance of which are provided for in independent clauses.

Turning back then to the second section of the "Subsidy Act of 1903," we find it makes provision for the granting of $3,200 per mile for the mileage specified

1906

CANADIAN PACIFIC RY. CO. v. THE KING.

Davies J.

towards the construction of each of the undermentioned lines of railway

of which this branch under consideration is one and

towards the construction of each of said lines of railways which shall cost more on the average than $15,000 per mile for the mileage subsidized a further subsidy beyond the $3,200 per mile of 50% on so much of the average cost of the mileage subsidized as is in excess of the $15,000 per mile, but not to exceed in the whole $6,400 per mile.

Not a word is said about rolling stock or equipment. But it is said and probably the whole argument of the company rests upon the fact, that whereas in former subsidy Acts the cost of rolling stock and equipment was specially excluded under the words "the cost of equipping the railway" as was also the cost of terminals and the right of way to cities and towns from the cost upon which the subsidy was to be estimated, in this Act the words excluding the cost of equipping the railway have been dropped.

It is, therefore, argued that the change of language indicates a change of intention and that the dropping of these words shews Parliament intended their cost should be added to the cost of the line in estimating the subsidy payable.

I am utterly unable to adopt the argument. The rule invoked respecting the construction of statutes is only invoked where the language to be construed is ambiguous and doubtful. As said by Mr. Hardcastle in his third edition, at page 119:

> Sometimes if an enactment is not plain, light may be thrown upon it by observing that certain words "have been" as Brett L.J. said in *Union Bank of London* v. *Ingram* (1882) (1) "designedly omitted."

Just so, but here it cannot be successfully contended that the language of the Act is not plain; it

(1) 20 Ch. D. 465.

does not require any light to be thrown upon it in order to understand its meaning. The words may have been designedly omitted by the draftsman, but it was probably because they were unnecessary. If they had not been inserted and, as I venture to think, *ex abundanti cautelâ,* in the earlier statutes and then dropped out in this one I would say that no one would have had the boldness to claim to add the cost of rolling stock and equipment to the cost of the road so as to obtain the larger subsidy.

The language of the "Subsidy Act of 1903" is, to my mind, plain and clear, and the language of the agreement entered into between the Crown and the company if possible still more clear. Their construction cannot be radically changed because certain unnecessary words inserted in former Acts by certain draftsmen are omitted in the Act under consideration. The reason for their omission is to my mind obvious, namely, that they were unnecessary, and the meaning of the statute without them is not doubtful or uncertain.

During the argument I put this question to Mr. Lafleur: Suppose the company had made a contract with a sub-contractor for the construction of this line of railway in the very words used in the agreement between the Crown and the company in section one respecting the subsidy above recited, could he argue that such contract involved on the part of the contractor the equipping of the line with rolling stock, etc? He was, of course, obliged to fall back upon the argument arising out of the change in the wording of the "Subsidy Act," and the meaning of the specification attached to the agreement with which I have already dealt.

1906

CANADIAN PACIFIC RY. CO. v. THE KING.

Idington J.

I think the appeal should be dismissed with costs and question 7 of the stated case answered in the negative.

IDINGTON J.—The claim of appellants being referred to the Exchequer Court in the way it was, I incline to the opinion that the case submitted there is neither more nor less than a mode of trying the questions in issue between the parties, arising out of the claim so referred. The evidence is documentary entirely, and, as I read this submission, such inferences of fact may be drawn therefrom as is usually done in any submission not purely restricted to the statement of a point of law.

The question, in one sense, is simply whether subsidy or double subsidy is what appellants are entitled to.

Clause 7 of the submission puts that in the foreground, but ends by these words

according to the true interpretation and proper construction of the "Dominion Subsidy Act of 1903," and of the contract *and other documents herein mentioned.*

I think the words leave the matter open to the view the learned trial judge has taken, and I do not dissent from the view he has expressed.

The rule 111, under which the submission is, on its face, made, makes it abundantly clear that such inferences, if the proper ones to draw, can in law be drawn by us on this appeal, as well as by the judge below, so far as the documents call for.

I prefer, however, to express my opinion on the construction of the "Subsidy Act," as I have, as the result of much consideration, formed a much more

decided opinion thereon than upon the ground taken in the judgment appealed from.

The following is section 2 of the "Subsidy Act" in question, followed by the grant now in question:

2. The Governor in Council may grant a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway (not exceeding in any case the number of miles hereinafter respectively stated) which shall not cost more on the average than $15,000 per mile for the mileage subsidized, and towards the construction of each of the said lines of railway not exceeding the mileage hereinafter stated, which shall cost more on the average than $15,000 per mile for the mileage subsidized, a further subsidy beyond the sum of $3,200 per mile of fifty per cent. on so much of the average cost of the mileage subsidized as is the excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile: * * *

72. To the Canadian Pacific Railway Company, for a branch line from a point on the main line between Moosomin and Elkhorn, northwesterly to a point in the neighbourhood of the Pheasant Hills, not exceeding 136 miles * * *.

Section 4 directs what fund the subsidy is to be payable from, and that it "be paid as follows:

(*a*) Upon the completion of the work subsidized; or

(*b*) By instalments, on the completion of each ten-mile section of the railway, in the proportion which the cost of such completed section bears to that of the whole undertaken; or,

Sub-sections (*c*) and (*d*) are mere detail and needless to refer to for our present purpose.

What is the plain, ordinary meaning of the words "construction of a line of railway?" I would not, nor do I believe any ordinary person would, take them to include not only the construction of the railway line, but also the equipment thereof when constructed.

They might by reason of the context in a document imply the equipment. Such a case is conceivable. It is not the case here. We have daily use for these words, in speaking of the contractors building such roads; in

1906

CANADIAN PACIFIC RY. CO. v. THE KING.

Idington J.

the construction of branch lines as here; in the building of a railway line to be run by some other body than the constructing parties; in the leasing of lines of railway, and, in short, in such a variety of ways that it seems a waste of words to try to make clear words that every intelligent man in this country, in the discussion of these very subsidies, is supposed to have understood (and I venture to think did understand), and that only in their primary meaning.

Used in relation, as here, to the building of a short branch line, to be run by a great railway corporation like appellants that could furnish equipment for running, they are, if possible, more clear.

It is true the executive power had a duty cast upon it to see that security was given for the use of the road when built, and power was given to contract in that regard, but no power was given to pay for the equipment or any part of it.

The rights of appellants as to the amount of subsidy were fixed by the "Subsidy Act," and not by the contract.

The executive could make many stipulations, but had no power to go beyond the very words I have quoted.

It is to be remarked, however, that these words, "lines of railway" seem to be used throughout the contract in many ways so as to distinguish them from anything implying equipment. The one or two parts of the contract, where a different meaning might be raised, arise from and are attributable to the future safeguards for running, rather than construction.

The two-fold purpose of the contract, to secure first construction and then running over it, must be borne in mind in reading the contract, so far as it may be of any value in interpreting the "Subsidy Act."

1906

CANADIAN PACIFIC RY. CO. v. THE KING.

Idington J.

An independent equipment in this case, as distinct from that to be used in the branch line, is not likely to have been in the eyes of the contracting parties in this case a very vital matter.

In regard to the exclusion of the words as to equipment, which had appeared in section 1 of previous Subsidy Acts, it can be of no importance where the meaning is plain and no connection between this subsidy and others.

In the legislative history of the appellants there is such a wealth of illustration of the meaning of "constructing a line of railway," as distinct from and not implying the equipment thereof, that it is hardly possible the parties here concerned misunderstood it in relation to this branch line, in the sense the appellants contend for. The case of *In re Branch Lines of the Canadian Pacific Railway; Canadian Pacific Railway Co.* v. *The James Bay Railway Co.*(1), furnishes much of it, and the key to a great deal more. The language of the contract, held to have become law, on which the appellants exercised the right to build the very branch line in question here, is to be found in the statutes referred to in that case, and it clearly distinguishes the meaning of the words "construct, equip and maintain."

I think the appeal should be dismissed with costs.

MACLENNAN J.—I agree in the opinion of my brother Davies.

DUFF J.—In my view of the merits of the questions submited for determination, it is unnecessary to decide—and, therefore, I express no opinion upon—

(1) 36 Can. S.C.R. 42.

1906

CANADIAN PACIFIC RY. CO. v. THE KING.

Duff J.

the point argued respecting the jurisdiction of the Exchequer Court.

In other respects, I agree with the judgment of my brother Davies.

Appeal dismissed with costs.

Solicitors for the appellants: *Lewis & Smellie.*

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

H. B. DODGE (DEFENDANT).....APPELLANT; 1906

AND *Dec. 5, 6.
*Dec. 15.

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation of land—Payment—Market value—Potential value—Evidence.

D. purchased at different times and in sixteen different parcels 623 acres of land, paying for the whole nearly $7,000, or about $11 per acre. The Crown on expropriating the land offered him $20 per acre, which he refused, claiming $22,000, which on a reference to ascertain the value was increased to $45,000. The referee allowed $38,000, which the Exchequer Court reduced to the sum first claimed.

Held, reversing the judgment of the Exchequer Court (10 Ex. C.R. 208), Girouard J. dissenting, that there was no user of the land nor any special circumstances to make it worth more than the market value, which was established by the price for which it was sold shortly before expropriation.

D. claimed the larger price as potential value of the land for orchard purposes to which he had intended to devote it.

Held, that as he had not proved the land to be fit for such purpose and the evidence tended to disprove it he could not receive compensation on that ground.

By 2 Edw. VII. ch. 9, s. 1, only five expert witnesses can be called by either side on the trial of a case without leave.

Quære. If more are so called without objection by the opposite party is the testimony of the extra witness valid?

APPEAL from a decision of the Exchequer Court of Canada (1) reducing the sum awarded to defendant by the referee as compensation for land expropriated from $38,00 to $22,649.

---

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 10 Ex. C.R. 208.

1906

DODGE v. THE KING.

The material facts are stated in the above headnote and fully set out in the judgment of Mr. Justice Idington.

Roscoe K.C. for the appellant.

Newcombe K.C. Dept. Minister of Justice, and *MacIlreith,* for the respondent.

GIROUARD J. (dissenting).—In my opinion, both appeals should be dismissed with costs. As to the main appeal, the record shews that the appellant claimed from the Crown $23,680, and that is about the amount which the Exchequer Court allowed him, namely, $22,649. The appellant contends that he is entitled to the full amount found by the referee. I do not see how he can be. He has only claimed the above $23,680, and he certainly cannot get more. True, the referee allowed him to increase it to $45,000, but the latter had no power to grant such an amendment. He was only authorized to take the evidence and make a report thereon to the Exchequer Court. I would, therefore, dismiss the main appeal, as the appellant has obtained almost everything he asked.

The judgment of the Exchequer Court judge commends itself to my mind, and I would require very clear reasons to induce me to reverse his findings of fact, especially in matters of this description in which he has a long experience.

Taking this view of the appellant's case, it is unnecessary for me to deal with the question of legal evidence, that is, if we can take notice of the testimony of more than five experts, as there was no leave from the court.

Finally, I see no reason why the cross-appeal of

the Crown should be allowed. As remarked by the learned Exchequer Court judge, even some of the witnesses for the Crown support his findings. Because the appellant got these lands at low figures I see no reason why he should not get the amount awarded him by the Exchequer Court.

As to the amount of the tender made by the Crown before taking possession, which the majority of this court declares sufficient, I do not see how it can be considered at all as the Crown has failed to call even one witness to support it.

Both appeals should be dismissed with costs.

DAVIES J.—Concurred in the judgment of Mr. Justice Idington.

IDINGTON J.—Six hundred and twenty-three acres of land in King's County in Nova Scotia having been taken on 13th September, 1903, under and by virtue of 52 Vict. ch. 13, proceedings were taken by the Attorney-General for the Dominion of Canada to have it declared that the same had vested in His Majesty the King and further that the sum of $20 an acre was sufficient and just compensation to the owners for all claim in respect of any damage or loss sustained or to be sustained by reason of such taking possession and expropriation of said lands.

The Exchequer Court referred the matters in question for inquiry and report under section 26 of the "Exchequer Court Act" and the referee reported amongst other things that the appellant as owner was entitled to $38,000 and interest from the said date.

On appeal from such finding Mr. Justice Burbidge cut the amount down to $22,649 and interest.

1906

DODGE v. THE KING.

Idington J.

The appellant appeals from that, and the respondent cross-appeals.

The preliminary objection of appellant, that Mr. Justice Burbidge could not interfere, seems in face of said section 26 and rule 19 of the general rules of his court, absolutely without any ground to support it.

The learned judge having very properly called attention to the entire disregard by the referee of 2 Edw. VII. ch. 9, amending "The Canada Evidence Act, 1893," the counsel for the Crown object here, that the appellant ought to be now restricted to five expert witnesses in support of his case as the amending Act requires. No objection having been taken at the trial may or may not be a bar to the right to take this objection. In the view I take of appellant's case, I prefer refraining from forming or expressing any opinion in anything arising from the point taken, save that the increased labour caused by disregard of the Act has been very great, and that such a mass of irrelevant evidence as appears in the case would probably not have appeared there if the provision of the Act had been observed.

The land in question is situated near Kentville, the county town of King's County. The town is a place of two thousand inhabitants. Its growth, and prospective growth, in population, as well as that of the county, is not of that rapid character that holding vacant land therein would be a good form of investment.

The land in question had, in some way unexplained, got divided up so that there were sixteen different parcels of it, owned by as many different sets of owners, in February, 1902, when appellant began to buy. He continued doing so until his last acquisition

in August, 1903. The following statement appears in Mr. Justice Burbidge's judgment and none of the facts it shews are questioned:—

Lot.	Acres.	
"A"—The Robinson land (May 5th, 1902)	206	$218.40
"B"—The Sheriff lot (July 21st, 1902)	30	110.00
"C"—Storrs lot (The Lord Bishop, Feb. 13th, 1903)	25	110.00
"D"—Walter Reid lot (Oct. 18th, 1902)	3	200.00
"E"—Carter lot (Oct. 13th, 1902)	1	120.00
"F"—Wilson Youngs (Nov. 24th, 1902)	12	120.00
"G"—Scott or Saml. Chipman (Nov. 27th, 1902)	1	20.00
"H"—Fanning lot (Dec. 30th, 1902)	31	400.00
"I"—The Hamilton lot (Oct. 20th, 1902)	10	20.00
"J"—The Burgess lot (Oct. 17th, 1902)	33	750.00
"K"—The Beckwith lot (Nov. 5th, 1902)	30	400.00
"L"—Norman Robinson lot (Feb. 2nd, 1903)	2	75.00
"M"—Rafuse lot (Feb 1st, 1903, and Aug. 3rd, 1903)	7	315.00
"N"—Driving Park (May 1st, 1903)	26	3,000.00
"O"—Sweet lot (May 2nd, 1903)	204	1,130.00
	623 acres	$6,978.40

This land is in the midst of, or beside, one of the oldest settlements in Canada. There are prosperous farmers near it. And the whole district is of that character, we are told by counsel and it is not denied, that suggests there must have been something that affected either the character or reputation of the land or it could not have been acquired by one man at such prices.

1906

DODGE v. THE KING.

Idington J.

The two largest parcels, the first and last on above list, were sold at different times by public auction in Kentville. The first was a remnant of an estate in which, at least, half a dozen people were interested, of whom one or two lived not far from it. It had evidently been held for some years, and probably so because unsaleable. They agreed to place it in the hands of an auctioneer and bound themselves to carry out the sale. No complaint is made of want of publicity or of manner of conducting the sale. Appellant's counsel sought to shew that the heirs had at one time not been harmonious. How that affected, or could affect, the price when all had thus agreed, I fail to see.

The last parcel on the list was sold as the result of the foreclosure of a mortgage.

It was, presumably, properly sold, and with due precaution against sacrifice, taken by way of upset price, or reserved bid, as in such cases law and good conscience require. There were several judgment creditors interested. There were bidders besides the mortgagee. But *"nobody really wanted the land."* Lot "C" may have been sold improvidently, and improperly, but I would require something more than the evidence of the man, acting as church warden, in the selling and then trying to lead the court to believe the price got was the result of such improvidence, before I would come to such conclusion.

He lived eight miles from it. I presume he knew the general reputation or character of the tract of land that included it, if he didn't know the precise part he sold, and acted more honestly than seemingly he desires the court to believe.

The lot "B" was bought at sheriff's public auction sale. The outstanding dower would affect its sale

somewhat as well as the known tendency of sheriff's sale. Lots "D" and "E" had each houses on them, estimated by one of appellant's witnesses at $150 each, and by another at $100 each. Lot "H" had buildings on it worth $450, and lot "M" buildings worth $650, according to the same two witnesses of whom one was accompanied in the inspection on which the estimates are based by the appellant himself.

Lot "H" had also another house worth $100 on it, according to one of these witnesses.

The Beckwith lot was sold because money was needed. The Driving Park had $920 worth of buildings on it.

I think I have thus set forth the facts relative to the chief sales that may have to be borne in mind, in applying these prices, as evidence of what the appellant is entitled to recover herein.

The market price of lands taken ought to be the *primâ facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession.

In this case there is nothing of that sort to be considered. The appellant had never used the land except to take some wood off it. He had expended nothing in improving or in the way of anticipating improvement for future use, special or otherwise.

Hence, *primâ facie,* the ordinary market price when ascertained ought to guide, and almost entirely govern.

1906

DODGE v. THE KING.

Idington J.

How can it be better ascertained than by means of the prices paid for it so recently, and up to the day before expropriation?

There may be added, as usually is added, a percentage to cover contingencies of many kinds.

Here the market price is clearly ascertained, as to two-thirds of the land, by exposure to sale in the public open market, where its true value is best known. As to the remainder the cost price furnishes a basis for ascertaining that market price. Some consideration may be given to the peculiar circumstances of each sale and purchase.

Bearing in mind all these considerations we have, in the sixteen different purchases made, evidence of the greatest value not only for determining the aggregate value, but also shewing the great variety of values in each parcel of land that goes to form such aggregate value.

This is not the case of a single sale, but of many sales of land in the same tract yet of widely varying values.

What is the net result? We find when the values of buildings fixed by agreement here at $2,740 are deducted from the total purchase money the value of the land is $4,238.40, equal to about $6.80 per acre.

The Crown offers nearly double this and the agreed value of buildings. Or take it as Mr. Justice Burbidge has put it as follows:—

> The value of the timber and buildings on the lands taken is reported by the learned referee to amount to a sum of a little more than $5,000, and the fairness of his valuation has not in that respect been challenged by either party. I accept it as correct, and that leaves only the value of the lands themselves apart from the timber and buildings to be ascertained. Deducting the $5,000 from the amount paid by the defendant for the whole we have a balance of less than $2,000 attributable to the value of the lands alone. That

gives for the 623 acres an average value per acre of a little more than $3. The $20 an acre that the Crown offered to pay included the value of the timber buildings. Excluding the latter the Crown's offer was equivalent to about $12 an acre.

The offer of the Crown involves for the bare land nearly four times the price paid.

In the three ways of looking at the cost price and comparing it with what is offered, we have: 1st, in gross, the profit of $5,485; 2nd, excluding buildings at agreed value, we have nearly double per acreage value; 3rd, excluding buildings and timber per reported value thereof, we have offered four times the per acreage value of the cost price.

The reason for this pressing and presenting of the acreage value is that the potential value per acre when values of buildings and timber are eliminated is the case presented by the appellant.

Surely, anyway we can consider the matter, either one of these alternatives covers, beyond a shadow of doubt, any fair allowances that may be due the appellant as a proprietor, turned out of such possession as he had, or for skill in bargaining, or for enterprise in anticipating the market, or for care and trouble in assembling the parts together or for all combined.

The case thus presented would seem insurmountable.

But the appellant says he is entitled to the potential value of these lands.

There are cases of that kind where, by sudden change of conditions, the prospect of a profit beyond the dreams of avarice may be conceivable, or where the land may be available for a special purpose and no other such land can be found. Neither such exists here.

What the appellant sets up as to the potential

1906

DODGE v. THE KING.

Idington J.

value in these lands is their adaptation for orchard purposes.

Here, no doubt, land quite as good as this can be got, in quantites suitable for orchard use, for a great deal less than the Crown, for sake of peace, offered for it. Perhaps one might find it troublesome in that old settled district to find so large a block of such bad land, at any price, but I hardly think that grievance is to be considered.

The compensation must rest, not on what such a block may be worth to the Crown for the peculiar purpose involved in its acquisition, but upon the loss the owner suffers by the Crown taking it.

Has he furnished evidence in support of his contention of such strength as to overthrow the case presented by the facts I have dealt with?

He has presented a mass of evidence all of which I have read with care to see on what it rests. I have not confined my reading to the skillfully arranged excerpts set forth in the factum, but have read everything, to see how such a remarkable case was built up and whether or not by reason.

If opinions, regardless of knowledge, or means of knowledge, and plainly without knowledge, of a witness must be accepted as fact, then I confess this appellant ought to succeed and the referee's finding be restored.

I will not stop to characterize each witness or dwell upon his fitness or right to express such opinion as he has expressed. It would be a waste of time.

The land in question had been, until acquired by the Crown, almost all waste lands, from part of which there had been, many years ago, taken some valuable timber. All but a small part of the original timber

of substantial value had thus been removed. In its place there had sprung up, in some places, a second growth of timber, likely in time to become valuable, and even in 1903, of some value worth considering. In other parts of this that was originally timbered land there had grown up scrubby bushes of inferior wood, of no value, but rather the reverse as an obstacle to improving the land.

About two hundred acres of the land was thus overgrown by this wood growth of all kinds. Perhaps more, but this is as far as I can find from direct statements in the evidence. Then a number of small holdings (including a 26 acre driving park), together amounting to a little over two hundred acres, were probably cleared land. On one of those holdings are some acres of bog—and outside of those was another bog. What the remaining two hundred acres consisted of I am at a loss to know. I find on the plan a goodly sized millpond within the areas, but nothing to indicate how many acres it covers.

No single attempt at description, of a definite character, regarding the external appearance, and condition, of this land in question appears in the evidence as one might expect to find in a case of this kind.

The same remark holds true of the soil itself of which so very much was said.

One witness describes the whole as a gravel loam ridge. Another tells about holes he dug, and he calls what he found sandy loam. Some places he found 10%, other places 20% of loam and all that was not loam was sand. I count thirteen holes he speaks of, but exactly where is impossible to say with certainty from his evidence. Trying to follow on the plan his

1906

DODGE v. THE KING.

Idington J.

steps, the utmost I can make of it is that these tests are worthless, as a guide to the character of anything but a fractional part of the whole land.

Another dug other holes, but how many or where he fails to tell so as to be of any value in the way of giving information.

Some others looked in some of these holes, and put their hands in and found loam or sand or both.

It is from such loose statements that we are left to conjecture the real nature of the soil on each and all of the many parts of this tract of land nearly a mile square in extent. Some of the witnesses brought to inspect and give such evidence lived eighteen or twenty miles away. They had no special qualification for such work. Why were they brought?

We are told two hundred acres had no water on it. How the rest was watered we are left uninformed as to, except that from one place the water ran one way, and then another stream ran another way, and that there were some springs some places.

The plan filed helps slightly, but shews no trace of a stream in a place where one witness speaks of one two feet deep. Which is right?

I have tried to trace the wanderings of those who try to tell of digging to discover the nature of the soil. The witness who did more than any other of this sort of exploration I venture to say did not cover but a very small part of the land. Others seem to have got to the same places or thereabouts. No sensible man who had the slightest conception of what such an inquiry involves, to be of any value, would invest in a 623 acre orchard on the strength of such explorations. They proceeded without system and, consequently, leave us without that means of testing their proceed-

ings or evidence that we ought to have had if value is to be given to the results.

As for the jaunty fellows who could discard all past history of these lands without trying to know why the land had lain so long waste yet see through the woods, the water, the bog, the bushes, the heather or grasses that covered the soil and form opinions, the less said the better.

There is not a single witness who has professed to have examined this 623 acres of land in such a way as to suggest that he had anything like a proper conception of the problem he had undertaken to solve.

It is common knowledge that land within the space of a very few acres may so vary in its essential qualities as to be eminently fitted in one part to produce a particular crop or grow a particular kind of tree or fruit and in all its other parts utterly unfit therefor.

So much more does that apply to the extensive tract of land now in question.

It would have required skill and knowledge of a very high order to have established after days and weeks of investigation the proposition that this entire tract of land was, as witnesses have assumed, save as to the bogs useful and likely to prove profitable for growing an immense orchard upon. Some of these lands were sixty feet above other parts. Hence, no doubt, one man talks of gravel loam and others of sandy loam.

No prudent man without the possession or use of such skill and knowledge and careful investigation would ever dream of investing $38,000 of his own money in such an enterprise as presented here, as a possibility, upon this imperfect investigation.

Money of the Crown is just as sacred as private

1906

DODGE v. THE KING.

Idington J.

property. I regret to think as I infer from Mr. Justice Burbidge's remarks that such is not thought generally to be the case.

Values it must be observed depend on the estimation of the ordinary man. The extraordinary man who makes great discoveries in such worthless spaces of ground has to wait until he has persuaded his fellow men of the reality of his discovery before he can enrich himself thereby, even when the needs of the public have required of and from him a deprivation of both property and the dream.

Until the dream becomes a concrete reality that men can grasp it is worthless for purposes of such a valuation.

This appellant, as a discoverer of wealth in the waste places, seems to have at first been modest enough to claim only $23,680 in his statement of defence.

It had to be amended to meet his growing knowledge, which reached that state when he placed it on oath at "$45,000 or more."

Much of the land in King's County has by reason of climatic conditions been found adapted to the growing of fruit and especially apples, and many of the farmers have turned their attention that way. As a result some men have made some orchards so highly productive as to render their orchard lands thus improved and developed very valuable.

Wherever any specialty in farming has become successful in a locality, there is, no doubt, a tendency to turn more land to use in that special direction and thus the values of undeveloped land may rise or shew a tendency to rise. The process is necessarily in the case of orchards a slow one. It has been going on in King's County possibly for generations and with each

new success gathering strength. But there is no evidence here that the land has there suddenly risen in value. I infer quite the contrary. There is no evidence that the available land for such a purpose has become scarce or that this particular land is of the quality that has rendered King's County orchards so noted. Indeed, quite the reverse. Only a fraction of each farm is as a rule so used. It is said to have been, in recent years, observed that even the inferior lands, such as this undoubtedly is, being sand for a depth of at least two feet according to tests of appellant's men who have given evidence (with only ten to twenty per cent. of loam) have been found capable, in some instances, by development and use of fertilizers of being made productive of fruit. How far this process of enhancing the worth of such inferior land and its consequent rise in price has gone, the evidence, from its diffusive character, has not instructed us much.

I am unable, therefore, to find that the movement upon which so much stress was laid has been such as to warrant much weight being given to inferences therefrom regarding the potential value of this land in question.

I think the appeal should be dismissed with costs, the cross-appeal allowed with costs, and that no costs of the proceedings, the reference, the appeals therefrom or otherwise, should be given either party in the court below.

I think the judgment should be as prayed and the price offered in the prayer of the petition of the Attorney-General be declared as prayed with interest on the amount thus arrived at from the 13th September, 1903.

MACLENNAN J. concurred.

1906

DODGE v. THE KING.

Duff J.

DUFF J.—The respondent undertook to establish as a fact that the land in question was in situation and in the character of the soil itself suitable to be utilized for fruit growing in a highly profitable degree; and that it was owing to ignorance of its character on the part of its owners that it had recently been sold to him at prices much below its real value. The learned judge of the Exchequer Court has taken the view that this case is substantially made out, and, although (the learned judge not having in this case had an opportunity to observe the demeanour of the witnesses) we are not in a position less advantageous than his, as regards the appreciation of the evidence, we would not, even in such circumstances, disturb such a finding, except upon coming to a clear opinion that it cannot be supported. There is, however, an appeal to this court on questions of fact as well as on questions of law, and having come to such an opinion it is our duty to give effect to it.

For the reasons given by my brother Idington, I agree that the learned judge's finding ought to be reversed and the amount of compensation reduced to the sum offered by the Government valuator.

Appeal dismissed with costs.
Cross-appeal allowed with costs.

Solicitor for the appellant: *W. E. Roscoe.*
Solicitor for the respondent: *R. L. MacIlreith.*

JOHN M. WOOD (DEFENDANT) .....APPELLANT; 1906

AND *Dec. 7, 10. *Dec. 15.

LEONARD ROCKWELL (PLAINTIFF) .RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Jury trial—Judge's charge—Practical withdrawal of case—Evidence —New trial.

On trial of an action against a surety, the defence was that he had been discharged by the plaintiff's dealings with his principal. The trial judge directed the jury that the facts proved in no way operated to discharge him; and that while, if they could find any evidence to satisfy them that he was relieved from liability they could find for defendant he knew of no such evidence and it was not to be found in the case.

Held, that the disputed facts were practically withdrawn from the jury, and as there was evidence proper to be submitted and on which they might reasonably find for defendant there should be a new trial.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the verdict at the trial in favour of the plaintiff.

The action was on a promissory note to which defendant pleaded *inter alia* that he only signed it as surety for the other maker, and was discharged by dealings with his principal. At the trial the jury were directed by the judge that they were at liberty to find for the defendant on this issue if there was any evidence, but that none was to be found in the case and that the facts proved did not operate as a discharge. A verdict was given for the plaintiff which the full court upheld, the Chief Justice dissenting.

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

1906

WOOD
v.
ROCKWELL.

Roscoe K.C. for the appellant.

J. J. Ritchie K.C. for the respondent.

The judgment of the court was delivered by

DAVIES J.—Much as I regret reaching the conclusion that there must be a new trial in this case I cannot help so finding.

The trial judge charged the jury explicitly: (1) that the defendant, Wood, was a principal debtor and not a surety on the note sued on; (2) that the facts proved in no way and no matter whom they believed operated to discharge Wood and that, while if they could find any evidence to satisfy them that Wood was relieved from liability they could find for defendant, he knew of no such evidence and it was not to be found in the case.

By this charge he practically withdrew from the jury all the disputed questions of fact.

I assume he must have held the view, afterwards expressed by Graham J., in which Townshend J. concurred, that there was no evidence in the case from which a jury could fairly find for the defendant.

The Chief Justice very emphatically dissented from this view, while Russell J. admitted that he had held different views, but finally determined to refuse a new trial.

At the argument before us it was conceded by Mr. Ritchie that the defendant Wood must be considered as only a surety on the note for one Porter, another maker, and that the questions open were whether he had been discharged from his suretyship obligation by any action of the plaintiff, Rockwell.

Mr. Roscoe contended there was ample evidence to

go to the jury to shew that time had been given to the principal debtor, Porter, by the acceptance from him of another note signed by himself and one D. E. Ross, at five months, for the full amount of the indebtedness.

Whether or not this note was so accepted depended entirely upon whose version of the facts was to be believed. We had the evidence, on one side, of plaintiff and his son supported, as it was argued, by the inherent probabilities. On the other side was the evidence of Porter and his wife and the defendant. If the evidence of these latter parties was accepted by the jury in preference to that of the plaintiff's witnesses, I cannot say that a verdict for the defendant on the question of the acceptance of the new note would be such as reasonable men, under all the circumstances, could not fairly find. It might not be such a verdict as I would find myself but that is another thing altogether.

The acceptance of the version of defendant's witnesses would relieve the defendant from any difficulty arising from the terms of the letter of Porter enclosing the note. If the story told by Porter and his wife is accepted as the true and correct one, then the offer which came from the plaintiff to Porter, the principal debtor, to send him back his note (which Rockwell admittedly had taken to Porter's house and left with Porter's wife), signed by Porter and some third party, no names being mentioned, was accepted when the note was returned into plaintiff's hands with D. E. Ross's name on it, and plaintiff's retention of it for four months without objection was corroborative evidence of his acceptance. I think there is evidence in these facts combined with Rockwell's subsequent as-

1906

WOOD
v.
ROCKWELL.

Davies J.

sumption of dominion over the new note in his conversation with the defendant Wood, which ought to have been submitted to the jury on the point, and I, therefore, refrain from further discussion so that neither party may be prejudiced on the new trial.

The appeal should be allowed with costs in this court and in the court *en banc* and a new trial ordered; costs of the first trial and new trial to abide the event.

Appeal allowed with costs, and new trial ordered.

Solicitor for the appellant: *A. E. Dunlop.*

Solicitor for the respondent: *W. P. Schaffner.*

THE SAINT JOHN PILOT COMMISSIONERS (DEFENDANTS)..... } APPELLANTS;

AND

THE CUMBERLAND RAILWAY AND COAL COMPANY (PLAINTIFFS)..... } RESPONDENTS.

1906

*Dec. 17.
*Dec. 26.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Pilotage—Port of St. John, N.B.—Ships propelled wholly or in part by steam—Coal barges towed—R.S.C. c. 80, ss. 58, 59.

Coal barges towed by steamers or tugs between the ports of Parsboro', N.S. and St. John, N.B., are exempt from compulsory pilotage at the latter port, even though under favourable conditions they could be navigated as sailing ships.

Judgment appealed from (37 N.B. Rep. 406), affirmed.

APPEAL from the judgment of the Supreme Court of New Brunswick (1) sustaining the verdict at the trial in favour of the plaintiffs.

The plaintiffs' barges were registered as schooners and built on the model of schooners of over 400 tons. They were not rigged for sailing, but had masts on which were fitted sails which could be used for sailing purposes in favourable weather. These barges were loaded with coal at Parsboro, N.S., and towed by steamers or tugs to St. John, N.B. The question for decision was whether or not they are exempt from being compelled to pay pilotage dues at St. John as being propelled wholly or in part by steam under "The

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

(1) 37 N.B. Rep. 406.

1906

SAINT JOHN PILOT COMMISSIONERS v. CUMBERLAND RY. AND COAL CO.

Pilotage Act," R.S.C. ch. 80, sec. 59 (R.S.C. (1906), sec. 477).

The trial judge held that they were exempt and his judgment was affirmed by the full court, Tuck C.J. dissenting.

McAlpine K.C. and *Coster K.C.*, for the appellants. The vessels on which pilotage dues are sought to be recovered are not of the class in question in the case of *The "Grandee"*(1).

By the "Pilotage Act," R.S.C. ch. 80, sec. 2(*b*), the expression "ship" includes every description of vessel used in navigation not propelled by oars. See also *The "Mac"*(1). There can be no doubt that these schooners or so-called barges are "ships" within the meaning of the Act. R.S.C. ch. 80, secs. 58, 59, leave only two questions to be considered: (1) Did these schooners or so-called barges navigate within the pilotage district of Saint John? (2) Had they motive power of their own, independent altogether of the tugs that towed them, and apart from steam altogether? These vessels are ships that navigated within the pilotage district of Saint John and come under the 58th section of the Act, and therefore must pay pilotage dues, unless exempt under the provisions of the Act, and that said ships or barges, with respect to their employment and only with respect to their employment, come under the exemptions of the 59th section of the said Act. The evidence abundantly proves that these vessels had motive power of their own, in and of themselves by their sails, apart altogether from the tugs which towed them. Fifteen witnesses testify that the schooners (or barges) in question, equipped

(1) 8 Ex. C.R. 54. (2) 7 P.D. 126.

as now, can sail from four to six and seven miles an hour, according to the wind, and that, if provided with greater sail area, which they could easily carry, they would sail as fast as any ordinary sailing vessel.

The words of the 59th section of the "Pilotage Act"(*c*), "propelled wholly or in part by steam," means steam power within the vessel itself and do not mean steam power within a tug that may be used to tow the vessel. The propelling power must be within the vessel itself to come within the meaning of the Act. By R.S.C. ch. 79, sec. 1(*c*), the expression "steamship" or steamboat includes every vessel propelled wholly or in part by steam, or by any machinery or power other than sails or oars. By the "Steamboat Inspection Act," R.S.C. ch. 78, sec. 2(*a*), the expression "steamboat" includes any vessel used in navigation or afloat on navigable water and propelled or movable wholly or in part by steam.

It is submitted further that the appellants being a corporation for certain public purposes only, possessed of no property or ability to acquire property, could not in their corporate capacity be sued or made defendants in this cause, and no Act or law authorizes such a suit.

Hugh H. McLean K.C., for the respondents, was not called upon for any argument.

The judgment of the court was delivered by

DAVIES J.—At the close of the argument of the appellants' counsel we intimated that we did not desire to hear respondents' counsel, as we were unanimously of opinion that the appeal must be dismissed and the judgment of the court below confirmed.

1906

SAINT JOHN PILOT COMMISSIONERS v. CUMBERLAND RY. AND COAL CO.

Davies J.

The judges who delivered the majority judgment below have, in their reasons, dealt at great length and quite satisfactorily with the questions at issue.

In deference, however, to the dissenting judgment of the Chief Justice and to the vigorous and strenuous argument at bar in this court, we desire to re-state very shortly the grounds on which we think the judgment appealed from is correct.

The action was one brought by the respondents to recover back from the Saint John Pilot Commissioners certain sums of money which they had been compelled to pay and had paid under protest for years past as "compulsory pilotage" upon their laden barges which were towed by a steamer or tug between Parsboro and Saint John, in the Bay of Fundy.

The Pilot Commissioners contended that these barges were ships within the meaning of "The Pilotage Act," ch. 80 of the Revised Statutes of Canada, which, under the 58th section of the Act "navigated within the pilotage district of Saint John," and, as such were liable to pay the pilotage fees and that they were not within the exemption of sub-section (*c*) of section 59, exempting from liability to pay such fees:

> Ships propelled wholly or in part by steam employed in trading from port to port in the same province or between any one or more of the provinces (of Canada) and any other or others of them or employed on a voyage between any port in any of the said provinces and the port of New York, or any port of the United States, on the Atlantic, north of New York.

Mr. McAlpine and Mr. Coster, for the appellants, contended that the plaintiffs' barges came clearly within the definition of ships contained in the interpretation clause of the Act and that the word "navigated" in the 58th section and on the true construction of which the liability for pilotage dues arose,

means "navigated by any way or means whatsoever," whether in itself or outside of itself, and, so must include a barge or ship being towed.

We think, however, that the true construction of the word, somewhat ambiguous in the place where used in the section, must be determined, not by its literal and technical meaning only, but by reading it in connection with its context, including the exemption section following.

To reach the true meaning of the word one must read, not alone the section imposing the liability, but also that creating and defining the exemptions.

But, reading section 58 by itself alone, and its own special exemption, it will be found that that liability only attaches to such ship on her inward voyage, in cases "where a licensed pilot offers his services as a pilot." In any case where such offer is not made liability does not attach. And so it might well be argued and maintained on the construction of this section alone, a section imposing a tax, that it clearly only contemplates such cases and ships as might require or could utilize a pilot's services, and did not apply to those cases where such services could not either be required or utilized. And so, in the case of one, two or three barges being towed from any one of the specified points to Saint John, each barge being a "ship navigating within the pilotage district" and separately liable to pilotage dues as contended, it would seem absurd for as many licensed pilots as there were barges to tender their services as pilots, and unnecessary and unrequisite in the case of one barge.

What would the two or three pilots do? Which would control and direct the tow, and which be responsible for wrongful orders and bad navigation?

1906

SAINT JOHN PILOT COMMISSIONERS v. CUMBERLAND RY. AND COAL CO.

Davies J.

These considerations would indicate that the ship navigating the pilotage district and so becoming liable for dues is a ship having independent practical moving or sailing powers which a pilot could direct and control, and not one or more barges towed by a tug and relying for its or their motion or propulsion practically and substantially, if not absolutely, upon the power generated and applied in the tug.

In point of fact, the barge, or ship if you like so to call her, when being so towed, either by a line behind the tug or lashed to the tug, is no different from a raft or congeries of logs or deals not coming within the statutory definition of a ship. Such a barge is not being "navigated" within the meaning of that word as used in this section.

But, if there were any doubts upon the point, they seem entirely to vanish in the light of section 59, the exempting clause. Here, by sub-section (*c*) "ships propelled wholly or in part by steam employed in trading" between any of the specified ports are exempt from liability to pilotage dues.

Now, these barges are admittedly ships, admittedly propelled in large part, if not altogether, by steam, and admittedly engaged in trading between the specified ports. They would seem, therefore, to come within the very letter as well as the spirit of the exempting section.

But, it is said by Mr. Coster, the propelling power which moves them must be a power within themselves and not in a steamer to which they may be lashed or which is towing them. Why? If Parliament desired to exclude barges being towed from the exemption, surely they would have used language shewing their desire. By what rule of construction could the courts

1906

SAINT JOHN PILOT COMMISSIONERS v. CUMBERLAND RY. AND COAL CO.

Davies J.

put an artificial and arbitrary meaning upon the words "ships propelled wholly or in part by steam," and confine it to ships in which the steam is generated and the power applied on board of itself? The barge or line of barges moves, navigates, is propelled, and except in certain favourable weather when they can use their small sails as auxiliary power, alone by steam generated and applied by the controlling tug which has them in tow or lashed to it, as the case may be.

The case seems to us a clear one, not admitting of reasonable doubt, and the fact so much relied upon that under certain favourable conditions of weather, wind and tide, the barges might, independently of a tug, move along at the rate of from three to five, and possibly, even six miles an hour cannot alter the conclusion we have reached.

If any such barge attempted to trade between any of the specified points independently and without a tug she, being a ship navigating the pilotage district and not moved or propelled by steam, would, of course, be liable, provided she successfully overcame the danger of navigation and reached Saint John.

But no such case occurred here or was suggested could reasonably occur.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *C. J. Coster.*

Solicitor for the respondents: *H. H. McLean.*

1906

*Dec. 7.
*Dec. 26.

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

AND

ALEXANDER RUDOLPH AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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

Shipping — Collision — Violation of rules not affecting accident — Steering wrong course.

The Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the local Judge unless the appellant can point out his mistake and shew conclusively that the judgment is entirely erroneous. *The Picton* (4 Can. S.C.R. 648) followed.

A steamer coming up Halifax harbour ran into a schooner striking her stern on the port side. No sound signals were given. The green light of the schooner was seen on the steamer's port bow and the latter starboarded her helm to pass astern and then ported. She then was so close that the engines were stopped but too late to prevent the collision.

Held, that the steamer alone was to blame for the collision.

Held, also, that though under the rules the schooner should have kept her course and also was to blame for not having a proper lookout neither fault contributed to the collision.

APPEAL from a decision of the local judge for the Nova Scotia Admiralty District of the Exchequer Court of Canada in favour of the plaintiffs.

The action was brought by the owners of the schooner "Alexander R.," sunk by in Halifax Harbour by collision with the SS. "Arranmore." It was tried

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

before the local judge for the Nova Scotia district assisted by Commander E. B. Tingling, as nautical assessor, who filed the following report.

"After carefully considering the evidence given by various witnesses, also the arguments used by counsel relating to the collision between SS. 'Arranmore' and the Schooner 'Alexander R.' in Halifax Harbour, on April 2nd, 1906, I beg to state that, in my opinion, the loss of schooner and cargo rests entirely on the 'Arranmore.' The reasons for this finding are based on the fact that the 'Arranmore,' by the evidence of Captain Couillard (which is very plain and straightforward) saw a green light about three points on the port bow (exonerating the schooner from not complying with article 10 as the 'Arranmore' was not an overtaking vessel); on seeing the light, although the 'Arranmore's' helm was starboarded to allow her to pass astern of the schooner, thereby bringing her a little on the 'Arranmore's' starboard bow, yet by meeting her with port helm and then giving her port helm he acted unwisely, thus bringing about the collision. Stopping the 'Arranmore's' engines to prevent going too far to westward when he altered his course was correct, but the fact of his placing the engines full speed astern within such a short period of stopping shews that he found himself so close to the schooner that he apprehended danger of a collision. Doubtless, by rule 21, the non-giving-way-vessel has to keep her course, yet there are occasions when a vessel finding herself in imminent danger has to depart from this rule (see article 27). In this case the schooner cannot be held in default for putting her helm down and coming in to the wind, as although she did not escape the collision, yet the fact of her receiving the blow on the port side of her stern shews that had she kept her

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

course the blow would have been delivered on her starboard side—a point entailing greater danger for the saving of the crew.

"One part of the evidence endeavours to shew that the 'Alexander R.' was filling on the starboard tack and had acquired stern way. The evidence to the contrary of this must be accepted as a heavily laden vessel would carry headway for a considerable distance whilst in stays, and if on starboard tack would be headed somewhere W. by N., bringing her port side to the 'Arranmore's' bow.

"Previous to the new edition of the rules and regulations for the prevention of collisions it was optional for vessels to use sound signals when in sight of one another, but the amendment of 1896 makes this rule compulsory. The 'Arranmore' ought to have sounded two (2) blasts of her whistle and then abided by the same. Halifax does not come under the heading of a narrow water. Nowhere, except passing George's Island, is the channel less than half a mile wide.

"Not seeing the 'Arranmore' reflects on the look-out kept on board the 'Alexander R.,' but does not materially bear on this case, as the sole cause of this disaster was the improper use of port helm on board the 'Arranmore.' "

The local judge found the "Arranmore" solely to blame for the collision and gave judgment for the plaintiffs, damages to be assessed by the registrar. The "Arranmore" appealed.

Harris K.C. and *Mellish* K.C. for the appellant. We contend that the schooner should have kept her course and speed. Articles 22 and 29 were violated by her. The local judge gave no opinion on these questions,

and he is mistaken in saying that the issue is merely technical and turns on the propriety of the handling of the respective vessels. The assessor did not answer the questions submitted to him, but undertook to decide, as a matter of law, which ship was at fault.

The burthen of proof is not on the steamship: *Inman* v. *Reck*(1); Marsden, pp. 33, 407, 409, 412; *The "Illinois"*(2). See also *The "Saragossa"*(3); *The "Highgate"*(4); *The "Khedive"*(5), at page 894, and *Belden* v. *Chase*(6).

It is taken as a fault against the "Arranmore" that she did not obey article 28 and indicate her course on her whistle. The rule only comes into operation when there is danger of collision and until the schooner was brought up in the wind there was no danger of collision. The signal would then be of no use, and the non-observance of this rule did not contribute in any way to the collision. *The "Cuba"* v. *McMillan*(7), at page 661. The great weight of testimony as well as the position of the vessels before and after collision even under the evidence of the plaintiff's witnesses shew that a collision would not have taken place had the schooner kept on her course. The assessor's finding that because the schooner received the blow on the port side, she would have received it on her starboard side if she had not come about is upon the face of it ill founded. The reasoning is only applicable to an otherwise stationary schooner turning on a pivot. His suggestion that the "Arranmore" was wrong in reversing her engines, or at least that the reversal of her engines can be regarded as an ad-

(1) L.R. 2 P.C. 25.
(2) 103 U.S.R. 298.
(3) 7 Asp. M.C. (N.S.) 289.
(4) 6 Asp. M.C. (N.S.) 512.
(5) 5 App. Cas. 876.
(6) 150 U.S.R. 674.
(7) 26 Can. S.C.R. 651.

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

mission of a previous mistake on behalf of the steamer, is disposed of by the consideration of the fact that the engines were only reversed after the schooner executed the unexpected manœuvre of "coming about."

We rely also on *The "Atlas"*(1), at pages 464-466; *The "Cape Breton"* v. *The Richelieu & Ont. Nav. Co.* (2), at page 576; *The "Agra"* v. *The "Elizabeth Jenkins"*(3); *The "Samuel Dillaway"*(4); *Malzard* v. *Hart*(5), and *The North British and Mercantile Ins. Co.* v. *Tourville*(6).

W. B. A. Ritchie K.C. for the respondents. The particular manœuvring of the "Arranmore" shews that it was her duty to keep out of the way, and if she kept her course until she was so close to the "Alexander R." as to cause well founded alarm to the schooner that she was being run down and must do something to save the lives of those on board, this was amply sufficient to establish plaintiff's case.

The assessor has found against the contention that the collision was caused by the schooner coming up in the wind, and that but for this action on her part the "Arranmore" would have gone clear of her, and he refers, as applicable to this case, to article 27, and that the judgment of the captain of the schooner was well founded, that if she had kept her course she would have received the blow on her starboard side, entailing greater danger to the lives of her crew. See Marsden (5 ed.), pages 3, 51, 52; *The "Bywell Castle"*(7), at page 219. The absence of a lookout had nothing to do with the collision; Marsden (5 ed.), pages 293, 394, 464; *The "Farragut"*(8).

(1) 10 Blatch. 459.
(2) 36 Can. S.C.R. 564.
(3) L.R. 1 P.C. 501.
(4) 98 Fed. Rep. 138.
(5) 27 Can. S.C.R. 510.
(6) 25 Can. S.C.R. 177.
(7) 4 P.D. 219.
(8) 10 Wall. 334.

Under the Canadian statutes, a vessel which has violated the rules is only deemed to be in fault if it appears to the court that the collision was occasioned by the non-observance of any of the rules prescribed. R.S.C. ch. 79, sec. 5; *The "Cuba"* v. *MacMillan*(1), pages 660-662; *The Hamburg Packet Company* v. *Des-Rochers* (2).

As to the "Alexander R." not having a stern light, this is an alleged violation of article 10. The assessor has found that the "Arranmore" saw a green light about three points on the port bow and exonerates the schooner from not complying with article 10, as the "Arranmore" was not an overtaking vessel.

The "Arranmore" violated article 28 in not sounding any blast on her whistle, and the question of whether the "Alexander R." was also to blame depends entirely upon whether her coming up in the wind was under the special circumstances a manœuvre reasonably necessary to avoid immediate danger. That is purely a question of fact, which the court below was peculiarly fitted to determine, and the finding of that tribunal should not be disturbed. *The "Picton"*(3), at page 653, *per* Ritchie, C.J.; *The "Sisters"*(4), *per* Mellor J.; *The "Esk"* v. *The "Niord"*(5), *per* Colville L.J., at page 440; *The "Santandarino"* v. *Vanvert*(6); *The Dominion Coal Co.* v. *The "Lake Ontario"*(7).

The judgment of the court was delivered by

THE CHIEF JUSTICE.—We are of opinion, although we get little or no assistance from his notes, that the

(1) 26 Can. S.C.R. 651.
(2) 8 Ex. C.R. 263.
(3) 4 Can. S.C.R. 648.
(4) 3 Asp M.C. (N.S.) 122.
(5) L.R. 3 C.P. 436.
(6) 23 Can. S.C.R. 145.
(7) 32 Can. S.C.R. 507.

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

The Chief Justice.

conclusion reached by the local judge in Admiralty as to the responsibility of the "Arranmore" for the collision complained of is justified by the evidence irrespective of the finding by the nautical assessor.

I must, however, observe that there is authority for the rule that this court will not (in a case involving difficult questions of navigation) interfere with the finding of a nautical assessor when adopted by the trial judge, unless the appellant can literally "put his finger" on the mistake and shew irresistibly that the judgment complained of is not only wrong, but entirely erroneous. *The "Picton"* (1); *The "Reliance"* v. *Conwell* (2), at page 657, and Lord Chelmsford in *Gray* v. *Turnbull* (3), page 54.

The collision out of which these proceedings arose occurred in the Harbour of Halifax at about 1.40 on the morning of April 2nd, 1906, between the "Alexander R.," a schooner of 74 tons burden and the "Arranmore," a passenger and freight steamer of about 900 tons burden.

The weather was fine and when first seen the schooner was proceeding across the harbour close hauled on the port tack, at a speed of about three knots, and on a course N.N.E. with a moderate breeze from the north.

The course of the "Arranmore" was about N. half W., her speed nine knots; the schooner bore about one point on her starboard bow and was distant about one cable and a half—both vessels had the regulation lights.

The channel at the place where the collision occurred is stated by the assessor to be over half a mile wide

(1) 4 Can. S.C.R. 648. (2) 31 Can. S.C.R. 653.
(3) L.R. 2 H.L. Sc. 53.

and does not come under the heading of a narrow water.

If both vessels kept on their respective courses there was danger of collision.

When those on board the "Arranmore" saw the schooner and ascertained the course she was pursuing then rules 20-23 and 28, which were the rules applicable to the circumstances, at once became binding on them and it was the duty of the steamer to keep out of the way of the schooner, and if necessary to slacken her speed, or stop or reverse, and to give proper sound signals. The co-ordinate obligation of the schooner was to keep her course. The contention on the part of the appellant is that if she had complied with this obligation the collision would have been avoided. The "Arranmore" has been found by the nautical assessor to be in fault in several respects, and he holds that the schooner was not in any way responsible for the accident.

When the "Alexander R." was first seen according to the preliminary act "the helm of the 'Arranmore' was put to starboard to go astern of the schooner and her engines were stopped for about a minute," and in his evidence the captain tells us that he then found it necessary to give this order to the man at the wheel, "starboard your helm—there is a vessel on the port side—starboard your helm—give her the helm quick," indicating that he must have found himself in dangerous proximity to the schooner. His duty then was to stop and reverse, that being the only manœuvre that could have prevented the collision which occurred within a minute or two afterwards. Instead of doing what prudence suggested he put his helm to starboard to pass under the stern of the

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

The Chief Justice.

schooner and then to port to steady her, or, as he says, "to prevent the sheer." When he attempted to pass, he admits he was so close that it was necessary to stop his engines to let the schooner get away from him which shews that in the circumstances his action was unjustifiable. If to this we add that no sound signal was given either when the steamer was directed to port or when her head was brought again to starboard to indicate her course, the conclusion seems irresistible that the "Arranmore" was in fault.

The next question is: "Was the 'Alexander R.' also in fault?" It has been strenuously argued before us that the failure to keep her course, thereby violating article 21, makes her responsible. The captain says that he brought his schooner up in the wind only to lessen the effect of the collision which was then inevitable and the nautical assessor finds as a fact that if this manœuvre had not been adopted "the blow would have been delivered on the starboard side at a point entailing greater danger for the saving of the crew," and there is nothing in the evidence that I have seen to satisfy me that this conclusion is erroneous.

I have carefully read the case of *"The Khedive"* (1), which was much relied upon and very properly so by the appellant, and I understand the rule in that case to be as explained by Bowen L.J. in *The "Benares"* (1888) (2), that it must be shewn conclusively that obedience to the regulations would and could not have avoided the collision: *Windram* v. *Robertson* (3), Court of Sessions Cases, affirmed in H.L. (Sc.), 1906 W.N. 140. I do not think it necessary to consider whether or not, as said by King J., in 26 Can. S.C.R. on page 661, it would be necessary under our statute

(1) 5 App. Cas. 876. (2) 9 P.D. 16.
(3) 7 F. Ct. of Sess. Cas. 5 Ser. 665.

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

The Chief Justice.

to consider whether the non-observance of the rules complained of did or did not in fact contribute to the collision. On the evidence I am convinced that to have kept her course would not have avoided the collision, and further that for the consequences of a step taken in the agony of a collision and due entirely to the imminence of the danger, the schooner must not be held in fault. Marsden 51 and 52 (5 ed.). I admit that *The "Khedive"* (1) in effect decides that the regulations issued as orders in council are law and consequently to disobey any article is to break the law, and when any article is involved the exact letter must be observed, but all the articles of the "Regulations for preventing collisions at sea" must be read together as one Code, and if article 21 requires a ship to keep her course, other articles prescribe that she shall take such action as will best aid to avert a collision and that due regard must be had to any special circumstances which may render a departure from the rules necessary to avoid immediate danger. As Lord Bowen said in the case of *The "Benares"* (2), a captain is not obliged to sail with his eyes open into the jaws of death. Here the captain tells us that to have obeyed article 21 meant almost certain death for his crew, and that to disobey that particular rule was the one chance left open to him to save their lives and in this he is confirmed by the nautical assessor.

With reference to the lookout the schooner was in fault, although it is quite true that the whole crew, consisting of four men, were on deck at the time of the collision. It has been laid down, however, that a man on the lookout should have no other duty and should not be called away to attend sheets or braces

(1) 5 App. Cas. 876. (2) 9 P.D. 16.

1906

STEAMSHIP "ARRANMORE" v. RUDOLPH.

The Chief Justice.

when a vessel is tacking. *The "Constantia"* (1). But in the circumstances I adopt the principle stated by Marsden, (5 ed.) page 464:

> But if the absence of lookout clearly had nothing to do with the collision, it will not be deemed to be a fault contributing to the collision.

Here the nautical assessor says:

> Not seeing the "Arranmore" reflects on the lookout kept on board the "Alexander R." but does not materially bear on this case, as the sole cause of this disaster was the improper use of port helm on board the "Arranmore."

On the whole I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

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

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

(1) 6 Asp. M.C. 478.

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

AND

EDGAR K. SPINNEY AND GEORGE B. CHURCHILL (DEFENDANTS) .. } RESPONDENTS.

1906

*Dec. 10, 11.
*Dec. 26.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Banks and banking—Security for advance—Assignment of goods—Claim on proceeds of sale—53 V. c. 31, s. 74 (D.).

A bank to which goods have been transferred as security for advances under sec. 74 of the Bank Act, 1890, can follow the proceeds of sale of said goods in the hands of a creditor of the assignor to whom the latter has paid them when the purchaser knew, or must be presumed to have known, that the same belonged to the bank.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the plaintiffs against the defendant Spinney.

The defendant Churchill carried on business at Yarmouth, N.S., as a wholesale purchaser of corn, manufacturing the same into cornmeal and other products and selling the same. He formerly did his banking business with the Bank of Nova Scotia and the Bank of Yarmouth, and raised money there by the indorsements of three persons of whom the defendant, Spinney, was one.

On the death of one of the three of these endorsers, he applied in June, 1902, to the manager of the plain-

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

1906

UNION BANK OF HALIFAX v. SPINNEY.

tiff bank for accommodation, and it was agreed that the plaintiff bank should advance money to Churchill on the security of the corn purchased by him, the bank taking security under section 74 of the "Bank Act," on the corn and on the indorsements of the defendant, Spinney, and two others, Wyman and Stoneman.

Advances were made by the bank to Churchill from time to time on the security of corn under section 74 of the Bank Act. The bank allowed Churchill to grind the corn into cornmeal and sell the meal for the bank, and take drafts, which were deposited with the plaintiff bank by Churchill and collected by the bank.

About the 26th September, 1903, Churchill was told by Allen, the agent of the plaintiff bank, that he would have to reduce his account, and the last of September or first of October he applied to Allen for a further advance on corn and was informed by Allen that he was instructed not to advance him any more money. At this time a cargo of corn had just arrived and there was a draft for $5,487.47 for this cargo in the Bank of Nova Scotia. Churchill urged Allen to pay this draft and said that he would pay in some securities and that he had accounts on his customers, which he would hand into the bank to cover the advance. Allen, relying on this promise paid the draft. At this time Churchill owed the bank a large sum and there was a large shortage in the corn which, however, was not known to the bank. Churchill had ground up the corn, sold the meal and applied the proceeds for other purposes, and he was then and for a long time had been insolvent.

On the same day that he induced Allen to pay the draft for $5,487.47, Churchill immediately went to Stoneman, one of his indorsers and told him how he

was situated and sold Stoneman a large quantity of meal, the product of corn pledged to the bank, a much larger quantity than Stoneman had been in the habit of buying—for the sole purpose of protecting Stoneman against his liability as indorser of a note then held by the plaintiff bank, and also, either on the same day or the next day he went to the defendant, Spinney, and says he reported to Spinney the position of affairs, and arranged to give Spinney drafts on the people to whom the corn meal of the bank had been sold for the amount due for such meal. Spinney knew that he had pledged all his corn to the bank—that he was short in his account and had not the corn—that Churchill was insolvent and that Churchill had induced Allen to pay the $5,487.47 draft by promising to hand in drafts for the corn meal that had previously been sold.

Churchill and Spinney thereupon arranged that Churchill should, instead of drawing the drafts payable to the bank on the form supplied by the bank, draw drafts to the order of Spinney, and instead of handing them to the bank hand them over to Spinney to secure him against his liability as indorser of a note then held by the plaintiff bank. There was no other consideration. Accordingly a number of drafts were drawn by Churchill on the persons who had purchased the bank's meal and these drafts were turned over and collected by Spinney to the amount of $2,011.77. This action is brought by the bank to recover these moneys so collected.

The action was tried at Yarmouth by Mr. Justice Graham without a jury, and he gave judgment for the plaintiff bank for the amount of the drafts, $2,011.77 with interest and costs. From this judgment an

1906

UNION BANK OF HALIFAX v. SPINNEY.

appeal was taken to the Supreme Court of Nova Scotia *en banc* and the appeal was allowed and the judgment of Mr. Justice Graham set aside.

The plaintiff bank appealed to the Supreme Court of Canada.

Harris K.C. for the appellant.

J. J. Ritchie K.C. for the respondents.

The judgment of the court was delivered by

DAVIES J.—This was an action brought by the bank against Spinney to recover from him the proceeds of certain drafts or bills of exchange drawn by one Churchill on certain of his customers for the price of meal sold to them and which drafts or bills had been handed by Churchill to Spinney, under the following circumstances and by him had been collected.

Churchill was a dealer in corn, in Yarmouth, N.S., which he placed, as purchased in his warehouse or small elevator and ground into meal, which meal he, afterwards, sold in lots to suit purchasers.

To enable him to make the necessary purchases of corn he obtained advances from the plaintiff bank from time to time, which advances he secured by signing to the bank, at the time they were made, the security provided for under section 74 of the "Bank Act" and by depositing his own notes for the amount of each advance and also notes indorsed by third parties, of whom Spinney was one, as collateral security.

The course of business followed for some year and a half between the bank and Churchill was for the latter to grind the corn into meal, sell the meal on

time to his customers and make drafts on them for the amount of their purchases in forms supplied him by the bank, and which drafts were made payable to the order of the bank. As between the bank and its customer it was well understood that the bank was entitled to these drafts, they representing the proceeds of the sale of the corn and meal which they held as security for their advances.

These drafts were accordingly, from time to time, deposited by Churchill with the bank and collected by it and the proceeds placed to Churchill's credit. As between the bank and Churchill it was the right of the bank to receive these drafts and, as between it and Spinney and the other indorsers of Churchill's notes held as collateral security it was the duty of the bank to place the proceeds of these drafts to the credit of the advances on the corn made by it.

About the beginning of October, 1903, Churchill was notified by the bank that the state of his account was unsatisfactory and that further advances would not be made to him. A cargo of corn had about that time arrived and a draft dated 2nd October, for $5,487 for its price was lying in another bank and, after some negotiations and relying upon certain promises made by Churchill, the plaintiff bank advanced the money to pay this draft. At this time Churchill was hopelessly insolvent and there was a large shortage in the corn and meal which should have been in the warehouse, but although these facts were known to himself the bank was in ignorance of both of them.

About a fortnight previously to this advance being made, namely, on the 26th September, 1903, Spinney had renewed in the bank, for three months, his indorsement of a note of Churchill's for 2,800, he had and which was then lying in the bank, overdue.

1906

UNION BANK OF HALIFAX v. SPINNEY.

Davies J.

He alleges that he was only induced by Churchill to indorse this renewal note by the latter's promise "to give him security of drafts for the payment of it." Churchill, on the contrary, says that his only promise was in general terms to "protect him (Spinney) in case I got into difficulties."

Immediately, however, Churchill obtained the advance of $5,487 from the bank, or within a few days afterwards, he went directly to Spinney and, after talking his financial condition over with him, and especially those with the bank, returned to his mill, made drafts upon his customers for meal sold by him to them sufficient to cover the amount of Spinney's liability and handed these drafts to Spinney which the latter, subsequently, collected and with the proceeds paid off the note for $2,990 which he had indorsed to the bank about a fortnight previously.

Churchill also took care, after getting the latter advance of $5,487, by similar and analogous practices to protect his other indorsers and creditors, thus leaving the bank with only a fraction of the grain and meal they should have had as security and a similar fraction of the proceeds of the sales of the meal.

The learned trial judge found, on evidence which to my mind fully justified his finding, that Spinney knew from the first that the bank held security upon Churchill's corn and meal and that

he was being paid out of corn the price of every particle of which should have been applied to the reduction of Churchill's indebtedness to the bank. He knew it was the bank's corn, that money had been obtained from the bank's agent to pay for the cargo of the "Josie" on a special promise to repay the advance by collections, and he diverted those collections to his own pocket at the expense of the bank. He knew that Churchill was insolvent and could not pay off the bank in any other way; that he had been making losses.

The question is whether these findings are sustainable by the evidence. It seems quite clear and to be the only fair and reasonable inference to be drawn from the evidence of both Spinney and Churchill, or at any rate from their evidence if read both together, that almost immediately after the large advance of $5,487.47 was made to Churchill he, knowing the desperate condition of his affairs, went to Spinney and discussed his whole financial situation with him. Spinney had been intimately connected with Churchill in business and had been indorsing Churchill's notes to the bank for advances made to buy this corn for over a year. Spinney then knew of the bank's security on the corn and meal, knew Churchill was then hopelessly insolvent and it was, then and there, arranged between them that Churchill should make drafts on his customers for meal sold them and hand them to Spinney to secure him as Churchill's indorser.

Churchill expressly states that after his conversation with Spinney he returned to the mill, made the drafts, of course payable to Spinney's order and not to the bank's, and handed the drafts over to Spinney by whom they were collected and who, with their proceeds, paid off the collateral note he had indorsed to the bank.

The only conclusion I have been able to draw is that a gross and manifest fraud was carried out by Churchill upon the bank and that the proceeds of the meal which Churchill was bound to pay over to the bank were fraudulently diverted from the bank to Spinney and Churchill's other indorsers and creditors, and that, so far as Spinney is concerned, with whom alone we have to deal, he had either full knowledge of all the essential facts which went to make up the

1906

UNION BANK OF HALIFAX v. SPINNEY.

Davies J.

fraud, or, at the very least, such knowledge as put him upon inquiry. The authorities seem to be quite plain that, when it is said a person is from the circumstances put to inquiry, as Lord Herschell said in *London Joint Stock Bank* v. *Simmons*(1), at page 220:

> the reason in point of law is that he is deemed to know the facts which he would have ascertained if he had made inquiry. He cannot better his position by abstaining from doing so.

See, also, *The Earl of Sheffield* v. *London Joint Stock Bank*(2); and *Boursot* v. *Savage*(3).

I am utterly unable to agree with the following statement of the law by Russell J., in his reasons for judgment:

> Assuming it to be true that Spinney knew down to the minutest particular, the method by which the bank was accustomed to recoup itself for the moneys advanced on the security of the corn and thus effect the object for which the Bank Act is, in itself, not sufficient, namely, that of extending the lien of the security to the proceeds of the sale as well as to the property itself in specie, I do not yet see under what principle the possession of this knowledge would prevent him from competing with the bank in the effort to secure a share of these proceeds.

I should say that the principle was that his knowledge of the facts made it inequitable and unjust for him to conspire with Churchill to divert the proceeds of the meal sold by Churchill from the bank where he should have placed them and where he was bound by his obligation to the bank to place them, to the pockets of a third person. Churchill's action in so diverting these proceeds was, in my judgment, fraudulent, and the knowledge which Spinney either actually had or which the law imputes to him under the circum-

(1) (1892) A.C. 201 (2) 13 App. Cas. 333.
(3) L.R. 2 Eq. 134.

stances makes it contrary to all equity that he should be allowed to retain moneys which he knew or ought to have known belonged to the bank.

The meal being admittedly the bank's, the conditional authority it gave to Churchill to sell the same to his customers and turn over, either the moneys received in payment or the drafts made upon the customers for the price of the meal sold them, gave the bank an equitable right to these proceeds and these drafts as between it and Churchill.

A payment to Churchill either of the price of meal bought or the draft given for the price by a *bonâ fide* purchaser for value without notice would, no doubt, discharge the purchaser from further liability.

But Spinney was not such a *bonâ fide* purchaser or a purchaser at all. He was a volunteer simply. A man who had incurred a collateral liability to the bank for advances made on the security of certain meal, the proceeds of the sale of which he knew or must be held under the circumstances to have known, the bank was entitled to receive from Churchill whom they had authorized to sell the meal and, with this knowledge, conspired with Churchill to divert these proceeds into his own pocket without, as far as I can see, any consideration.

The authorities, English, United States and Canadian, are alike uniform and I think conclusive upon the law.

As Mr. Justice Brewer says in delivering the judgment of the court in *The Union Stock Yards Bank* v. *Gillespie*(1):

> Justice demands that the bank receiving from a factor in payment of a debt from the factor to itself, moneys which it must have

(1) 137 U.S.R. 411.

1906

UNION BANK OF HALIFAX v. SPINNEY.

Davies J.

known were the proceeds of the property received from his consignor and principal account to that principal for the money so received and appropriated.

See, also, Lewin on Trusts (11 ed.), pp. 1074-5; *Re Hallett's Estate*(1); *Harris* v. *Trueman*(2), *per* Manisty J., at page 356; *Hancock* v. *Smith*(3); *Trader's Bank* v. *Goodfallow*(4).

The cardinal error, if I may say so, underlying the judgments of the court below is that the bank's security did not, under the circumstances, cover the proceeds of the sale of their corn and meal, but only the corn and meal in specie. They failed to appreciate the effect of the conditional authority to sell given to Churchill upon those persons who were either purchasers of the meal without valuable consideration or with notice actual or legal of the facts or were mere volunteers, such as Spinney was here.

The full protection of the court will be extended to *bonâ fide* purchasers without notice either express or constructive, but it will not be extended, under such circumstances as exist in this case, to persons who purchase with full knowledge of the facts or obtain, as Spinney did, the proceeds of the sales with such knowledge.

If Churchill had held this meal subject to the bank's claim, as is admitted, or the proceeds of the meal, when sold, subject to his obligation to pay them to the bank as the owner of the meal, as I hold he then did, it is clear beyond reasonable doubt that no one, not being a *bonâ fide* purchaser for value and without notice, could succeed by an agreement with Churchill in diverting such proceeds into his own pocket. It

(1) 13 Ch. D. 696, 707.
(2) 7 Q.B.D. 340.
(3) 41 Ch. D. 456.
(4) 19 O.R. 299.

1906

UNION BANK OF HALIFAX v. SPINNEY.

Davies J.

would be a fraud, deliberate and manifest, on Churchhill's part, and ignorance alone would enable the party agreeing with him to escape liability for the fraud; but if the alienee was a mere volunteer, such as Spinney, he would be liable for the funds which came to his hands, with or without notice.

I think the appeal should be allowed with costs and the judgment of Graham J. restored.

Appeal allowed with costs.

Solicitor for the appellant: *Lewis Chipman.*
Solicitor for the respondents: *Sandford H. Pelton.*

1906

*Dec. 14.
*Dec. 26.

ALEXANDER McNEIL (DEFENDANT) . . APPELLANT;

AND

WILLIAM S. FULTZ AND PATRICK E. CORBETT (PLAINTIFFS) . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Breach of contract—Breach of trust—Assessment of damages—Sale of mining areas — Promotion of company — Failure to deliver securities—Principal and agent—Account—Evidence—Salvage—Indemnity for necessary expenses—Laches—Estoppel.

The plaintiffs transferred certain mining areas to the defendant in order that they might be sold together with other areas to a company to be incorporated for the purpose of operating the consolidated mining properties, the defendants agreeing to give them a proportionate share of whatever bonds and certificates of stock he might receive for these consolidated properties upon the flotation of the scheme then being promoted by him and other associates. In order to hold some of the areas it became necessary to borrow money and the lender exacted a bonus in stock and bonds which the defendant gave him out of those he received for conveyance of the properties to the company. After deducting a ratable contribution towards this bonus, the defendant delivered to the plaintiffs the remainder of their proportion of stock and bonds, but did not then inform them that such deductions had been made, and they, consequently, made no demand upon him for the balance of the shares and bonds until some time afterwards when they brought the action to recover the securities or their value.

Held, affirming the judgment appealed from, that whether the defendant was to be regarded as a trustee or as the agent of the plaintiffs, he was not entitled, without their consent, to make the deductions, either by way of salvage or to idemnify himself for expenses necessarily incurred in the preservation of the properties; and that, under the circumstances, their failure to demand delivery of the remainder of the securities before action did not deprive the plaintiffs of their right to recover.

---

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

If the defendant is to be considered a trustee wrongfully withholding securities which he was bound to deliver, he is liable for damages calculated upon the assumption that they would have been disposed of at the best price obtainable. If, however, he is to be regarded as a contractor who has failed to deliver the securities according to the terms of his agreement, he is liable for damages based on the selling price of the securities at the time when his obligation to deliver them arose. *Nant-Y-Glo and Blaina Ironworks Co.* v. *Grave* (12 Ch. D. 738); *The Steamship Carrisbrooke Co.* v. *The London and Provincial Marine and General Ins. Co.* ((1901) 2 K.B. 861) and *Michael* v. *Hart & Co.* ((1902) 1 K.B. 482) followed.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1) which affirmed the judgment of the Chief Justice of Nova Scotia ordering judgment to be entered for the plaintiffs for $1,350, with interest and costs.

The circumstances of the case and the questions at issue on this appeal are stated in the judgment now reported. The learned Chief Justice, at the trial, without entering into any consideration of the facts proved in evidence, merely directed a reference. Upon this reference it appeared that the price paid for the mining properties in question was $444,444 in bonds and stock of the company formed for the operation of the mines, which, at ninety cents in the dollar, amounted to the value of $400,000. The referee reported that the price obtained for the three areas in dispute was $27,000, in bonds and stock of the company, from which the plaintiffs claimed the right of deducting $1,000 as the plaintiffs' proportion of the expenses incurred in order to obtain money he was compelled to raise by way of the loan for the benefit of the plaintiffs as well as of all others interested in the scheme. The Chief Justice refused to allow

(1) See *Fultz* v. *Corbett*, 1 East. L.R. 54.

1906

MCNEIL v. FULTZ.

this deduction, found that the price of the areas in dispute was $27,000 and directed that the plaintiffs should have judgment against the defendant for $1,350 with interest from the 1st of April, 1903, with costs. The judgment appealed from affirmed this decision.

Nesbitt K.C. and *Gormully K.C.* (*Terrell* with him), for the appellant.

Mellish K.C. for the respondents.

The judgment of the court was delivered by

DUFF J.—In the year 1899 the defendant (being, with others, interested in some coal lands near Port Hood, C.B.) acquired on behalf of himself and some associates three licenses to search for coal in three several submarine areas in the vicinity of those lands. The licenses were acquired under an arrangement with the defendant's associates, including one Buckley, the plaintiffs' predecessor in title, by which the licenses were to be held in the name of the defendant in trust for all concerned, Buckley being entitled to an undivided one-sixth share of the whole.

Subsequently it was agreed between the defendant and his associates that, in the event of a consolidation and sale of coal areas near Port Hood, then in contemplation, being carried out, the submarine areas in which Buckley was interested should be included in it at the price of $27,000 to be paid in the securities of a company to be formed to acquire the consolidated properties.

The consolidation and sale, promoted by the defendant and some associates, were effected and the

whole property was transferred to the Port Hood Coal Co., Limited.

The learned judges of the court below, agreeing with the trial judge, the Chief Justice of Nova Scotia, have found that the consideration for this transfer consisted of bonds of the company of the face value of $444,444, these being regarded by the promoters concerned as equivalent to $400,000 in cash, which the sale of the bonds at 90 cents on the dollar was expected to realize; with a bonus of shares in the capital stock of the company of a like face value which were not regarded as likely to be immediately saleable.

Notwithstanding some obscurity in the evidence relating to the transaction, I am not satisfied that this finding ought to be disturbed.

I think, moreover, that the fair inference from McNeil's evidence is that, by the arrangement between McNeil and his co-promoters, providing for the distribution of these securities and shares, the owners of the areas in question were to receive the equivalent of $27,000 cash; that is to say, bonds of the face value of $30,000 and shares of a like value. The plaintiff being the owner of an undivided one-sixth share of this property would seem on the face of this state of facts to be entitled to receive a like share of the securities; that is to say, bonds of the value of $5,000 and shares of the same value. They did, in point of fact, receive bonds of the face value of $3,500 and shares of an equivalent amount; and the question of substance raised by this appeal is whether or not the defendant is accountable for the difference.

It is plain that the defendant had no general authority to deal with the plaintiffs' property.

The plaintiffs acquired Buckley's interest after

1906

McNEIL v. FULTZ.

Duff J.

the negotiations looking to the consolidation and sale were under way; and—if not in express words, at least by their conduct—approved of the disposal of that interest for the sum of $27,000 payable in bonds and shares of the purchasing company. But there is no evidence that the defendant was, at any time, authorized to transfer that interest on terms less advantageous to the plaintiffs.

It is argued that the parties had in contemplation bonds and shares of the face value of $27,000 only; and the evidence is not explicitly directed to point whether, as between the plaintiffs and the defendant, the price was to be securities of the face value of the sum mentioned, or securities which should be equivalent to that sum in cash.

I pass without further comment the inherent weakness of the suggestion that a price expressed in bonds and shares in the capital stock of a company to be formed should be fixed without reference to their saleable value or to the total amount of the capital stock or of the bond issue. It is sufficient, on this point, to say that it is not disputed that McNeil was bound to account for the securities actually allotted and received by him in respect of the areas in question; and my view of the evidence being, as I have said, that the bonds and shares which, under the arrangement among the promoters, were to be allotted in respect of these areas, were to be the equivalent of $27,000 in cash, it follows that McNeil is accountable on that basis unless, at all events, it should appear that the agreement was not in point of fact as between him and his co-promoters carried out. On this the evidence is not explicit; but the information being in McNeil's keeping, I think the court below was justified in in-

ferring, in the absence of any denial by him, that it was carried out. McNeil admits that the division of the securities was made under his direction and he is, I think, accountable on the assumption that those to which the plaintiffs were entitled came into his hands.

But the contention is made on the defendant's behalf that he was entitled to retain out of the plaintiffs' securities a proportionate part of them as a contribution to a bonus which, it is said, it became necessary to give, in the circumstances to be presently mentioned, after the purchase price of the consolidated properties had been fixed and the allotment in respect of the areas in question agreed upon.

The facts on which this contention is based are said to be these.

At one stage of the transaction it became necessary to borrow money to meet payments required to be made to prevent the lapse of one or more options under which some of the lands affected by the consolidation were held; the failure to make these payments, it is said, would have been fatal to the success of the scheme, including the sale of the areas in which the plaintiffs were interested.

The defendant succeeded in obtaining the necessary loan; but, it is said, the lenders exacted as a bonus, the delivery to them of bonds of the face value of $12,500; and—it is argued—this bonus, being in the nature of a salvage payment of which the defendant's property got the benefit, that property ought, with the other properties benefited, to supply its proportional contribution. The argument is ingenious; but the principles of the maritime law governing the liability to contribution by way of general average in respect of properties sacrificed or moneys expended

1906

MCNEIL v. FULTZ.

Duff J.

for the common safety have obviously no application to the case of a trustee or agent dealing with property under a strictly limited authority and in constant communication with his *cestuis que trustent* or principal. Nor is there, in my opinion, any room in this case for the application of the principles under which a trustee is entitled, out of the trust property, to indemnity for moneys expended in preservation of it.

The bonus was, in my opinion, simply an item in the expense of flotation the burden of which, in the circumstances disclosed by the evidence, the promoters had no right to cast upon the owners of the properties transferred. McNeill admits that out of the sum of $400,000 paid by the company, the sum of $200,000 was allotted to the promoters alone in respect of profits and expenses of flotation; and with the exception of those interested in the areas referred to, there is no evidence that it was suggested that any owner of any of the consolidated properties should contribute to this bonus out of the proceeds of the sale of his property.

McNeill had plainly no authority from the plaintiffs to charge against the proceeds of the areas in question any such contribution; and in view of the share of the purchase price allotted by the promoters to themselves, it is highly unlikely that, with a knowledge of the facts, they would have assented to such a charge had it been proposed. The deduction is one which, in my opinion, cannot, in the absence of evidence of the plaintiffs' consent, be justified.

The plaintiffs are, therefore (subject to the question, which I will deal with, whether or not by laches they have lost their right), entitled to recover the difference between that which the defendant received and that which he accounted for; that is to say, bonds of the face value of $1,500 and shares of a like amount.

1906

McNEIL v. FULTZ.

Duff J.

The judgment of the court below is also impugned on the ground that, while the court has given judgment against the defendant for the cash value of the bonds and shares unaccounted for, calculated upon the basis of their selling value at the date of the defendant's default, he can be properly called upon only to deliver these bonds and shares in specie; and in default (since no demand was made for the delivery of them before the commencement of the action) to pay damages based upon their value at that date. On this point also, I think, the judgment below is right. The evidence of the plaintiffs, which the court below seems to have accepted, is that they were told that the bonds and shares delivered to them were all that had been received by the defendant on their account; and the fair inference is that they made no demand because they were ignorant of the facts. On the other hand the defendant was under an obligation to account to the plaintiffs at once for that which he received as trustee for them. Treated as a trustee wrongfully withholding property which he was bound under his trust to deliver to his *cestuis que trustent,* he is liable to make reparation for the loss suffered by the trust by reason of his breach of trust; and (every presumption being made against him as a wrongdoer), that loss must be calculated on the assumption that the securities would have been sold at the best price obtainable. *Nant-Y-Glo and Blaina Ironworks Co.* v. *Grave*(1) at page 750; *The Steamship Carisbrook Co.* v. *The London and Provincial Marine and General Ins. Co.*(2), at page 866; and in appeal, *Michael* v. *Hart & Co.*(3), *per* Collins L.J., at page 488.

(1) 12 Ch. D. 738. (2) (1901) 2 K.B. 861.
(3) (1902) 1 K.B. 482.

1906

MCNEIL v. FULTZ.

Duff J.

Treated simply as a contractor who had agreed to deliver the bonds he is clearly liable to pay damages for the breach of his contract based upon the selling price of the bonds at the time when the obligation to deliver arose. Mayne on Damages, at page 195.

There remains the contention that the plaintiffs by their laches have lost their right to relief. The defence is not raised by the pleadings; and it may be that the state of the pleadings accounts for the fact that the evidence does not clearly shew when the plaintiffs first became aware of their rights. The evidence, as I have said, does, I think, fairly lead to the conclusion that at the time of the delivery to them of the shares and bonds which they received they were told and believed that the defendant was giving them all he had got on their account.

In the absence of evidence shewing when they became aware of the facts there seems to be no basis of fact to support the defence suggested.

Appeal dismissed with costs.

Solicitor for the appellant: *James Terrell.*

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

JOSIAH GILBERT..... APPELLANT; 1907

AND *Feb. 1.

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH WEST TERRITORIES.

Criminal law—Crown case reserved—Appeal—Extension of time for notice of appeal—"Criminal Code" s. 1024—Order after expiration of time for service of notice—Jurisdiction.

The power given by section 1024 of the "Criminal Code" (R.S.C. (1906) ch. 146) to a judge of the Supreme Court of Canada to extend the time for service on the Attorney-General of notice of an appeal in a reserved Crown case may be exercised after the expiration of the time limited by the code for the service of such notice. *Banner* v. *Johnston* (L.R. 5 H.L. 157) and *Vaughan* v. *Richardson* (17 Can. S.C.R. 703) followed.

APPLICATION, on behalf of the prisoner, for an order extending the time for the service of a notice of appeal from the judgment of the Supreme Court of the North-West Territories, affirming the conviction of the prisoner, Wetmore J. dissenting.

The prisoner was convicted, on 16th November, 1906, on the charge of murdering one Barrett Henderson, and sentenced to be hanged on the 18th of January, 1907. Pursuant to the provisions of section 743 of "The Criminal Code, 1892," the case was reserved for the opinion of the Supreme Court of the North-West Territories, *in banc,* and was heard on the questions reserved in the said court on the 9th of January, 1907, at Calgary, in the Province of Alberta, and judg-

*PRESENT:—Mr. Justice Davies, in Chambers.

1907

GILBERT v. THE KING.

ment was reserved. Subsequently, on the 15th of January, 1907, judgment was pronounced on the reserved case affirming the decision of Newlands J., at the trial, in respect to the matters objected to, by the majority of the said court *in banc,* Wetmore J. dissenting.

An application was then made to the Minister of Justice, at Ottawa, for a new trial under the provisions of section 748 of the "Criminal Code, 1892," and, owing to the time occupied in correspondence, travelling from Regina to Ottawa, and obtaining a reply from the Minister, more than fifteen days elapsed after the date of such affirmance of the conviction, and, in the meantime, no notice of appeal therefrom had been served upon the Attorney-General as required by the provisions of section 1024 of the "Criminal Code," R.S.C. (1906) ch. 146. In consequence of the expiration of the time so limited, the application was made, in Chambers, for an order to extend the time for the service of the necessary notice.

Bethune and *Balfour* appeared in support of the application.

DAVIES J.—An application was made to me, at Chambers, to-day on behalf of the prisoner for an order under the 750th section of the "Criminal Code of 1892," now section 1024 of the "Criminal Code," R.S.C. (1906), ch. 146, to extend the time for service of notice of appeal from the judgment of the Supreme Court of the North-West Territories refusing a new trial.

As the court of appeal was not unanimous in af-

firming the conviction of the prisoner he had a right, on serving notice on the Attorney-General

within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

to appeal to the latter court against the affirmance of such conviction.

For reasons set out in the affidavits and exhibits produced before me, he did not give the notice of appeal and now, after the expiration of the fifteen days, applies for an extension of the time.

The only question upon which I had any doubt was as to my power to grant the extension after the expiration of the fifteen days. A construction requiring the application to be made within the fifteen days would, in a section such as this dealing with the criminal law and where sometimes, as in the case before me, the prisoner's life is at stake, be a very narrow one and might in many cases which can be conceived of in a country of the extent of the Dominion of Canada, if adopted, defeat the object which Parliament seems to have had in view. I, therefore, felt strongly inclined to adopt the broader construction and to hold that the power of extension is exercisable under the section even after the expiration of the prescribed period.

There are two authorities which seem to be conclusive upon the point. One is that of *Banner* v. *Johnston*(1), at pages 170 and 172, and the other that of *Vaughan* v. *Richardson*(2).

Reference is also made to *The North Ontario Election Case; Wheeler* v. *Gibbs*(3), which was discussed

(1) L.R. 5 H.L. 157. (2) 17 Can. S.C.R. 703.
(3) 3 Can. S.C.R. 374.

1907

GILBERT
v.
THE KING.

Davies J.

by Sir William Ritchie C.J., in *The Glengarry Election Case*(1), at page 460.

I have had the advantage of consulting with the Chief Justice and with Mr. Justice Girouard, who agree with me that in view of these authorities, there can be no doubt of my power to make the order.

Ordered accordingly.

Solicitor for the applicant: *James Balfour.*

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

THE CANADIAN PACIFIC RAILWAY COMPANY (SUPPLIANTS) .. } APPELLANTS;

AND

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

1906

*Nov. 30.
*Dec. 5.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Navigation—Trent canal crossing—Swing bridge—Cost of construction—Maintenance—Order in council.

The C.P. Ry. Co. applied for liberty to build a bridge over the Otanabee, a navigable river, undertaking to construct a draw in it should the Government deem it necessary. An order in council was passed providing that "the company * * shall construct either a swing in the bridge now in question * * the cost to be borne by themselves or else a new swing bridge over the contemplated canal (Trent Valley Canal) in which case the expense incurred over and above the cost of the swing itself and the necessary pivot pier therefor shall be borne by the Government."

A new swing bridge was constructed over the canal by agreement with the company.

Held, that the words "the cost of the swing itself and the necessary peir" included, under the circumstances and in the connection in which they were used, the operation and maintenance also of the swing by the company.

APPEAL from a judgment of the Exchequer Court of Canada in favour of the Crown.

The suppliants by their petition of right claimed a return of moneys expended in the operation and maintenance of the swing bridge over the Trent Valley Canal and a direction that the expense thereof should be borne by the Crown in future. The circumstances

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

1906

CANADIAN PACIFIC RY. CO. v. THE KING.

under which such claim arose are set out in the above head-note and in the judgment on this appeal.

Chrysler K.C. for the appellants.

Newcombe K.C., Dep. Minister of Justice, for the respondent.

GIROUARD J. concurred in the opinion of Mr. Justice Davies.

DAVIES J.—I think this appeal should be dismissed. I do not share the doubts suggested as to the meaning of the agreement with respect to the cost of the operation of the swing in the bridge. The railway company in the first instance applied for liberty to build a bridge over the Otanabee River, which was navigable, undertaking to construct a draw in the bridge should the Government at any time consider this necessary. The order in council granting the application recited the application and that the engineer in charge of the works for the improvement of the navigation while holding the construction of a swing in the proposed bridge unnecessary owing to the proposed construction of a canal, urged that provision should be made for the construction of a swing bridge over the contemplated canal on the Peterborough section of the improvements.

The order in council then went on to give the necessary consent to the construction of the bridge over the river on the plans submitted, *conditionally*

the company at the time within two months after being called upon by the Minister of Railways shall construct either a swing in the bridge now in question * * * the cost to be borne by them-

selves, or else a new swing bridge over the contemplated canal in which case the expense incurred *over and above the cost of the swing itself and the necessary pivot pier therefor* shall be borne by the Government.

An agreement was then entered into between the Government and the company in which, after reciting the application of the company for permission to construct the bridge over the river, the recital went on to declare that in case of the carrying out of the proposed canal for the improvement of the Trent River navigation, a swing in the said bridge might not be necessary, but in that case there should be a swing bridge over the canal. The agreement then recited the conditional permission of the Governor in Council for the construction of the bridge and "for the fulfilment of certain of the said conditions" and went on to provide

that the company should either construct a swing in the proposed bridge or a new swing bridge over the proposed canal (and that) in case of a new swing bridge over the said canal the cost of the swing itself and the necessary pivot pier should be borne by the company and the balance by the Government.

I think there can be no doubt that the balance here spoken of means the balance of the cost of the construction of the bridge, abutments, approaches, etc.

No special words are used as to who shall pay for the cost of operating the swing. The learned counsel for the company frankly concedes that if the swing had been required by the Crown to have been put in the river bridge the cost of operating it would have had to be borne by the company. He does so because as he says its operation would be required for the purposes of navigation. He denies, however, that such concession applies to the swing in the canal bridge.

1906

CANADIAN PACIFIC RY. CO. v. THE KING.

Davies J.

The latter swing was an alternative and substituted one for the river bridge swing. Its object was precisely the same for the purposes of navigation. It was expressly for the purposes of improving the navigation at the point of the river that the canal was constructed and the condition on which the permission to build the river bridge was given at once applied. The same provision as to the construction of a swing in the river bridge which admittedly involved its maintenance and operation must, in my opinion, necessarily carry the same obligation when the alternative and substituted canal bridge was built.

The objects of the swing in both cases were the same, the facilitation of navigation and the prevention of its obstruction. The provision for it was expressly made for that object with the privilege left with the Government of choosing in which bridge the swing should be put. The obligations arising as to the operation of the swing are the same in each case and are necessarily involved in the language used.

The canal was substituted for the river and the swing in the former bridge substituted for that originally contemplated in the latter. If the construction of the latter necessarily involved its operation, as conceded, so must the substitution of the canal swing carry the same obligation, the object the parties were seeking to attain being the maintenance and improvement of the navigation and the consent to the creation of the river bridge being given conditionally on that paramount right being maintained by means of a swing in whichever bridge the Government elected it should be placed.

In short I think "the cost of the swing itself and the necessary pivot-pier" which the agreement pro-

vided the company should bear included under the circumstances and in the connection in which they were used, the operation and maintenance of the swing.

IDINGTON J.—I agree that this appeal should be dismissed. I agree also in the general reasoning of my brother Sir Louis Davies, in his judgment herein, but cannot find, as he does, in the closing sentence thereof, that the operation and maintenance of the swing are covered by the expressions used in the agreement.

I fail rather to find any obligation upon respondent to bear such costs of operation and maintenance or any part of it.

MACLENNAN and DUFF JJ. concurred in the opinion of Mr. Justice Davies.

Appeal dismissed with costs.

Solicitors for the appellants: *Scott & Curle.*
Solicitor for the respondent: *E. L. Newcombe.*

1906

*Nov. 22, 23.
*Dec. 11.

THE HAMILTON BRASS MANUFACTURING COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

THE BARR CASH AND PACKAGE CARRIER COMPANY (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Account — Statute of limitations — Agents or partners—Reference.

By agreement between them the Hamilton Brass Mfg. Co. was appointed agent of the Barr Cash Co. for sale and lease of its carriers in Canada at a price named for manufacture; net profits to be equally divided and quarterly returns to be furnished, either party having liberty to annul the contract for non-fulfillment of conditions. The agreement was in force for three years when the Barr Co. sued for an account, alleging failure to make proper returns and payments.

Held, reversing the judgment of the Court of Appeal, Girouard and Davies JJ. dissenting, that the accounts should be taken for the six years preceding the action only.

On a reference to the Master the taking of the accounts was brought down to a time at which defendants claimed that the contract was terminated by notice. The Court of Appeal ordered that they should be taken down to the date of the Master's report.

Held, that this was a matter of practice and procedure as to which the Supreme Court would not entertain an appeal.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of Mr. Justice Street, who upheld the ruling of the Master in taking accounts.

---

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

The facts are sufficiently stated in the head-note and in the judgment of Mr. Justice Idington on this appeal.

Lynch-Staunton K.C. for the appellants.

Gamble and *Boultbee* for the respondents.

THE CHIEF JUSTICE and DUFF J. concurred in the judgment of Mr. Justice Idington.

GIROUARD and DAVIES JJ. (dissenting).—For the reasons given by Chief Justice Moss, in the Court of Appeal for Ontario, we are of opinion that this appeal should be dismissed with costs.

IDINGTON J.—These parties entered into the following agreement:

This memorandum of agreement, entered into this 10th day of August, A.D. 1892, between the Barr Cash and Package Carrier Co., of Mansfield, Ohio, hereinafter for brevity called the first party, and the Hamilton Brass Mfg. Co., of Hamilton, Ontario, Canada, hereinafter for brevity called the second party. Witnesseth—

Said first party appoints said second party its sole agent for the sale and lease of the Barr Cash & Package Carriers in the Dominion of Canada, on the terms following, to wit:—

Said second party is to manufacture the Barr Cash & Package Carriers at a cost of not over four dollars ($4.00) per line for Cash Carriers, and not over nine dollars ($9.00) per line for Package Carriers.

Said second party, in addition to the cost of manufacturing as above ($4.00 for Cash Carriers, and $9.00 for Package Carriers), shall charge to the joint account the cost of any material furnished for erection, such as gas pipe, wire etc., but all other expenses, such as salaries and travelling expenses, shall be borne by the said party of the second part.

A report of the business done shall be made quarterly, and at such accounting the balance of profit shewn shall be divided equally, one-half going to the credit of the party of the first part, and the other half to the credit of the party of the second part.

1906

HAMILTON BRASS MANUFACTURING CO. v. BARR CASH AND PACKAGE CARRIER CO.

Idington J.

Said party of the first part to have the right for any representative it may appoint to audit the account of the party of the second part, in so far as any Cash or Package Carrier business may be transacted by said second party.

For the non-fulfillment of any of the requirements of this agreement, either party can annul the same by serving notice on the other party.

THE HAMILTON BRASS CO., LIMITED,
T. J. Carroll,
General Manager.

THE BARR CASH & PACKAGE CARRIER CO.,
F. W. Pierson,
General Manager.

They acted under it, and accounts were rendered as it provides for, and settlements were had of these accounts, up to some time in August, 1895.

This mode of proceeding ceased, and the respondents brought this action on the 13th July, 1900.

The late Mr. Justice Street, who tried the action, referred the taking of accounts to the Master in Hamilton, and he proceeded therewith. By virtue of a clause in the judgment he was entitled and bound to have regard to the defence of the Statute of Limitations, which had been set up by appellants.

He ruled that the Statute of Limitations barred accounting for anything beyond six years next preceding the action.

The appellants had attempted at the trial also to shew that the contract above set forth had been terminated, but this contention was not upheld by the learned trial judge.

Amongst other things he pointed out that the appellants had no right to terminate it save for cause, and then only by electing to do so, and giving notice. The chief cause assigned to justify termination was that respondents had invaded territory covered by the agreement, by making sales directly, from their own office or place of business, and not through the appel-

lants. They had in fact, when complaint was made on this score, agreed to account to and with appellants for profits so received. And I would infer that that branch of the differences between them was at an end, or very easy of solution, if other things had gone forward in an agreeable manner.

At all events, the appellants asked for and got in this action judgment for an account of the dealings they had so complained of.

Without waiting for any further or future breach they wrote, immediately after the judgment, a letter of which the following is a copy:

HAMILTON, November 13th, 1901.

TO THE BARR CASH AND PACKAGE CO.,
Mansfield, Ohio:

Take notice that, whereas it has recently been held in an action in the High Court of Justice wherein you, the Barr Cash and Package Company, are plaintiffs, and we, The Hamilton Brass Manufacturing Company (Limited), are defendants, that the agreement dated the 10th day of August, 1892, made between you of the first part and ourselves of the second part, for the sale and lease of the Barr Cash and Package Carriers, was not annulled, cancelled and put an end to as was by us contended in said action, therefore, although we do not relinquish our contention that the said agreement was put an end to, to protect ourselves against any future claim being made hereafter, we hereby give you notice that we hereby annul, cancel and put on end to the said agreement.

Dated at Hamilton this 13th day of November, 1901.

HAMILTON BRASS MFG. CO., LTD.
T. J. Carroll, General Manager.

They then contended before the Master that this terminated the contract, and also any accounting beyond the date of the service of the letter.

The Master upheld this contention. On appeal to the late Mr. Justice Street against these rulings of the Master, the appeal was dismissed.

1906

HAMILTON BRASS MANUFACTURING CO. v. BARR CASH AND PACKAGE CARRIER CO.

Idington J.

The respondents appealed from that decision to the Court of Appeal for Ontario.

The latter court allowed the appeal, and held that the Master should not have had regard to the Statute of Limitations, but should have taken the accounts from the beginning of the dealings arising out of the above agreement and continued the same to the date of his report.

I have no hesitation in coming to the conclusion that the holding of the Court of Appeal as to the taking of the accounts down to the date of the Master's report is correct.

It is to my mind a matter of practice and procedure. Even though jurisdiction may exist to hear such an appeal, this court has uniformly refused, unless where natural justice was violated, to entertain such an appeal.

The Master would not seem to have had any right to try such an issue as this notice of termination involved. He was merely directed to take accounts, which the court below hold, as matter of practice and procedure of that court, was to extend to the date of his report.

The reasons assigned by the learned Chief Justice on this and other grounds touching this branch of the appeal seem to me entirely satisfactory.

I am not so fortunate in regard to the other branch of this appeal. It is by no means so easily disposed of.

I cannot read the contract between these parties as the learned Chief Justice of the Court of Appeal reads it. Even if I could do so, I am by no means convinced that the case so comes within any exception to the operation of the Statute of Limitations as to enable me to maintain the results arrived at.

1906

HAMILTON BRASS MANUFACTURING CO. v. BARR CASH AND PACKAGE CARRIER CO.

Idington J.

With the greatest respect, I must differ, and say I can neither accept the process of reasoning by which the learned Chief Justice comes to the conclusions he does, nor see how that conclusion is a necessary result of the train of reasoning he has adopted and set forth.

The *Pongola Case*(1) seems clearly distinguishable.

The continuous relationship is a feature common to that case and this, but almost all else seems different in the two cases.

It is to be observed that the above quoted agreement makes no reference to patents or rights thereunder.

It may further be observed that there are many posible things respecting which such a contract could have been formed, in the language used, and yet not rest on patent or have anything to do with rights under a patent.

A very slight modification, such as a contract based on a requirement for the use of a piece of wire, made by the respondents, entering into the construction of machines to be made by them, and giving thereto some value they could not otherwise have, though not the subject of a patent, is a conceivable case.

The incorporating in such a contract the use of a label or badge of any kind to identify each machine thus contracted for, as approved by the party of the first part, and give it a standing, so to speak, in the market place, would be another.

How could the relationship this contract before us creates, if based upon some imaginary thing of that kind, apart from patent altogether, constitute a partnership or agency relation of any kind, that would take the periodical breaches of such a contract (no matter how continuing the contract might be or the

(1) 73 L.T. 512.

1906

HAMILTON BRASS MANUFACTURING CO. v. BARR CASH AND PACKAGE CARRIER CO.

Idington J.

relation it created), out of the Statute of Limitations? How much further can an interest in a patent carry it?

The relationship created is not in the ordinary sense a partnership. Nor is it a fiduciary relationship, though as in *Knox* v. *Gye*(1) the elements of faith and trust in the ordinary sense may have existed and may be found provided for, or rather unprovided for.

Where is agency other than that of a fiduciary character or that concrete form of agency that exists in a partnership, excepted from the Statute of Limitations? And how is it there?

The origin of the exception as regards partners is explained by Lord Chelmsford in the case of *Knox* v. *Gye*(1), at p. 684, as follows:

> The statute 21 Jas. 1, ch. 16, sec. 8, which limited actions of account to six years after the cause of action, contains an exception of such accounts as concern the trade of merchandise "between merchant and merchant, their factors and servants", as to which there was no statutory bar till the 19 & 20 Vict. ch. 97, the 9th section of which Act enacts that all actions and suits for such accounts shall be commenced and sued within six years after the cause of such actions or suits. Now, although the action of account at the time of the passing of the statute of James was one of a peculiar description in the courts of common law (which has since become obselete), the courts of equity, upon bills for an account, considered "that they were bound to act"—not merely by analogy to the statute, but, in the words of Lord Redesdale in *Hovenden* v. *Lord Annesley* (2), "in obedience to it"; and he adds: "I think the statute must be taken virtually to include courts of equity, for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore it must be taken to have virtually enacted in the same cases a limitation for courts of equity also."

He proceeds to shew by cases I need not refer to, how this was observed; for the cases are covered by *Knox* v. *Gye* (1), and the discussions therein.

(1) L.R. 5 H.L. 656. (2) 2 Sch. & Lef. 607, 631.

Lord Westbury in the same case referred to the statute as follows (1):

By the Statute of Limitations (21 Jas. 1, ch. 16), it is enacted that all actions of account and upon the case (with an exception which has been since repealed) shall be commenced and sued within six years next after the cause of such action or suit, and not after. This enactment is, in effect, repeated in the 9th section of the 19 & 20 Vict. ch. 97 (passed in 1856), with this additional provision, namely, that "no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit." I deem this provision most material, and therefore I will call your Lordships' particluar attention to it. It forbids any claim in respect of a matter which arose more than six years before the action.

The statutes of limitations having been introduced into Upper Canada (now Ontario), amendments to the law relating to limitations of actions were made from time to time, but without expressly repealing the Statute of James above referred to. These amending enactments are now consolidated in R.S.O., [1897] ch. 72, and the second section thereof contains what is almost identical with section 9 of the "Mercantile Amendment Act" upon which Lord Westbury put such stress in the above quotation.

This section 2 of R.S.O., [1897] ch. 72, is as follows:

2. All actions of account or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of such actions arose; and no claim in respect of a matter which arose more than six years before the commencement of the action, shall be enforceable by action by reason only of some other matter or claim comprised in the same account, having arisen within six years next before the commencement of the action.

It would seem as if very much of the basis, upon which the exception of partnership dealings out of the statute rested, had passed away.

(1) At p. 672.

1906

HAMILTON BRASS MANUFACTURING CO. v. BARR CASH AND PACKAGE CARRIER CO.

Idington J.

It is not necessary to go further just now in regard to that than to say that these considerations of the matter leave the operation of the exception within very narrow limits.

So far as the relations of partners in this regard are concerned, I would adopt the rule laid down by Mr. Justice Lindley in his work on partnership, as follows (p. 552):

> But now by 19 & 20 Vict. ch. 97, sec. 9, merchants' accounts are placed on the same footing as other accounts; and partnership accounts, whether they are or are not merchants' accounts, are within the Statute of Limitations; and those statutes are a bar to an action for an account extending to a period more remote than six years before the commencement of the action, unless there has been a breach of an express trust, or fraud, or payment, or an acknowledgment, such as required by Lord Tenterden's Act, or unless the partnership articles are under seal. So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the statute of limitations has, it is conceived, no application at all; but as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the statute begins to run.

I find this last sentence met with the approval of Malins V.C. in *Noyes* v. *Crawley*(1), at p. 39.

Does this last sentence of the quotation from Lindley not mean that there can be no cause of action as between partners *as such* whilst the relation exists? So long as there is no cause of action there can run no time against it. So far from the argument pressed upon us as to the special forms of so called partnerships, that have not in them the usual elements of any legal definition of partnership, supporting any widening of this exception of partnership from the statutes of limitations, it suggests the possibility in these specialized forms, so to speak, of the relation, con-

(1) 10 Ch. D. 31.

taining in them covenants between such partners out of which causes of action might arise and the statute become operative.

I do not express any opinion as to that, but desire by way of noticing the chief argument presented to us, and of illustrating my meaning, to suggest the tendency of the law since the amendment referred to.

This contract now in question, as clearly as possible, anticipates a quarterly reckoning, and accruing liability to pay, and payment, or such a breach, by reason of default of payment or default to report, as will give a right to sue therefor. Each such breach comes within the very words of the section just quoted above.

I think the appeal, so far as it relates to the right of appellants to set up the Statute of Limitations, should be allowed, and effect be given to said statutes. Giving effect thereto does not imply that if there were fraud the account could not go beyond the six years. No case of fraud, however, was presented or pressed on us. It would seem as if the omission to report, or defective report, had arisen from a misunderstanding or misconstruction of the contract.

As success seems thus divided, there should be no costs either here or in the Court of Appeal. And especially so as the ground on which I proceed was not raised or argued.

Appeal allowed without costs.

Solicitors for the appellants: *Staunton & O'Heir.*

Solicitors for the respondents: *Denton, Dunn & Boultbee.*

1906
*Dec. 13.

LEANDER C. MANNING (DEFENDANT) ..... APPELLANT;

AND

JAMES NAAS (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Trespass—Horse racing—Intruder upon race track—Carelessness.

After the first heat of a trotting match in which N. had been a competitor he was seated in his sleigh and walking his horse upon his proper side of one of the tracks, laid out by the ploughing away of the snow on the ice of a public harbour, while waiting to be called for the next heat. M., who had not been a competitor in that race, came along the same track, from an opposite direction to that in which N. was going, driving his vehicle at excessive speed and, in attempting to pass in a narrow space between the ridge formed by the snow and N.'s sleigh, collided with it, causing injuries to N. and damaging his sleigh and harness.

Held, affirming the judgment appealed from (39 N.S. Rep. 133) that even if M. was lawfully upon the track in question he was responsible for damages as the accident was solely attributable to his improvident carelessness and want of judgment.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1), by which, on an equal division of opinion, the judgment of Meagher J. at the trial, in favour of the plaintiff, was affirmed.

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

---

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

(1) 39 N.S. Rep. 133.

1906

MANNING v. NAAS.

James A. McLean K.C. and *Mellish K.C.* for the appellant.

W. B. A. Ritchie K.C. and *Kaulbach* for the respondent.

The judgment of the court was delivered by

DAVIES J.—At the close of the appellant's argument we did not think it necessary to call upon the respondent, plaintiff's counsel. No such *primâ facie* case was made out as would warrant our reversing the judgment of the trial judge, although the judges of the court in banc were equally divided. On the contrary, we thought that judgment perfectly sound.

Assuming for the sake of argument the appellant's contention to be correct, that on the horse-race day in question (which took place in winter on a public harbour frozen over, there being five straight tracks lying alongside of each other, divided by ridges of snow 18 to 20 inches wide and less than a foot high, with sloping sides) he, the appellant, was in the exercise of his rights driving along No. 4 track at a speed of about 2.50, does that exonerate him from responsibility for the collision?

The question is not, was he a trespasser in driving on that track at the time he did but whether he so exercised and used his rights as not to injure his neighbour who was also there possessing equal rights.

It was not necessarily an act of negligence *per se* to drive at the rate of 2.50 per mile. But it was clearly negligence under the circumstances of this case, even adopting the appellant's own evidence as a correct account of the accident.

1906.

MANNING v. NAAS.

Davies J.

The defence consisted solely in the assumption of contributory negligence by the plaintiff. In what did that negligence consist? We asked during the argument time and again for evidence of that.

Plaintiff was driving along at a walk on No. 4 track, by the evidence of himself and his witnesses, and on his proper side of the track. Defendant was meeting him driving at a great speed, shewing to some friends what his horse could do as a trotter. He says he saw plaintiff a couple of hundred yards ahead of him coming along with his horse. He says he slackened

> his horse's speed as they approached, but could not rightly say how far away from him. I did not think there was going to be a collision. I certainly thought I was going to go right past him.

Now appellant was not charged with wilfully causing the collision, but with negligently causing it. He may have been rightly where he was, but if he drove at the rate he admits under the circumstances, and while thinking he would go past all right found he had entirely misjudged, and collided with and injured the plaintiff, how could the latter be held responsible?

It was, under the circumstances, the improvident carelessness and want of judgment of the appellant which caused the accident, and not any negligence of the plaintiff who was walking his horse, on his own side of the track and, at any rate, leaving in defendant's judgment, as stated by himself, plenty of room, so that he thought he could safely pass. He must take the consequences of his own carelessness and bad judgment.

We have stated shortly the grounds of our decision in deference to the differences of opinion in an equally

divided court below. Otherwise we were quite ready to dismiss the appeal for the reasons given by Meagher J. who tried the case.

Appeal dismissed with costs in this court.

Appeal dismissed with costs.

Solicitor for the appellant: *James A. McLean.*

Solicitor for the respondent: *R. C. S. Kaulbach.*

1906

*Dec. 18, 19.
*Dec. 26.

THE TEMISCOUATA RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

JOHN CLAIR (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Order extending time—Jurisdiction—R.S.C. c. 135, s. 42—Practice — Trespass — Possession — Evidence — Expropriation—Railway.

The court refused to entertain a motion to quash the appeal on the ground that it had not been taken within the sixty days limited by the statute and that an order by a judge of the court appealed from after the expiration of that time was *ultra vires* and could not be permitted under section 42 of the Supreme and Exchequer Courts Act, R.S.C. c. 135.

The casual use of land for pasturing cattle in common with other persons does not constitute evidence of possession sufficient to maintain an action for trespass.

Judgment appealed from (1 East. L.R. 524) reversed.

APPEAL from the judgment of the Supreme Court of New Brunswick (1) refusing to set aside a verdict for the plaintiff and enter a nonsuit or make an order for a new trial.

The action was for trespass by the railway company by constructing and operating their railway across lands in the Parish of St. Hilaire in the County of Madawaska, N.B., without taking proceedings for its expropriation and making compensation for the

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

(1) 1 East. L.R. 524.

land taken by the company for their line of railway. The company denied the plaintiff's title and also contended that, even if he was in possession of the land in question at the time of their entry and the construction of the railway thereon, he had acquiesced and stood by without objecting for fifteen years before action and that he could not, at so late a date, bring an action for trespass or claim damages.

Upon the answers of the jury to questions put to them at the trial, Mr. Justice Landry entered judgment in favour of the plaintiff and gave him damages assessed at the rate of ten dollars per annum for the six years preceding the institution of the action.

By the judgment appealed from the Supreme Court of New Brunswick, in banc, refused to set the verdict aside and enter a judgment of nonsuit or to order a new trial.

The judgment in the court below was rendered on the 15th of June, 1906, and notice of appeal to the Supreme Court of Canada was given on the 21st June, 1906. No proceedings towards the prosecution of the appeal were taken until the 17th of August, 1906, when a summons was taken out, returnable on the 23rd of that month, to settle the case on appeal and, on 27th August, 1906, Mr. Justice McLeod, one of the judges of the court appealed from, made an order under section 42 of the "Supreme and Exchequer Courts Act," granting leave for the appeal and approving the security bond filed by the appellants.

On the present appeal coming on for hearing a motion to quash was made on the ground that the appeal had not been properly taken within the sixty days limited by the statute and that the order so made

1906

TEMISCOUATA RY. CO. v. CLAIR.

by Mr. Justice McLeod, after the expiration of the sixty days, was *ultra vires* and could not then be made under or in virtue of said section 42.

Hazen K.C. for the motion.

Stevens K.C. contra.

The court ordered that the appeal should be heard upon the merits.

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

Stevens K.C. for the appellants.

Hazen K.C. for the respondent.

The judgment of the court was delivered by

DAVIES J.—At the conclusion of the argument I was strongly of the opinion that the plaintiff (respondent), whose only claim to the lands, for trespass upon which he brought this action, was alleged possession, had entirely failed to make out a case to go to the jury and should have been nonsuited. Mr. Hazen, for the respondent, submitted that there was some evidence, however slight, for the jury and urged very strongly that the evidence subsequently given by the appellants shewed that there had been some negotiations on the part of the railway company with the plaintiff to buy out his claim, and that the Government of New Brunswick had a year or two ago recognized plaintiff's claim to the remainder of the block of land not taken by the railway company, and that all this evidence, combined with the plaintiff's user of

that block of land for the last fourteen or fifteen years, together constituted sufficient evidence to warrant the finding of the jury that, at the time the railway company entered upon and took possession of the strip of land required by them for the track of their railway the plaintiff was in possession of it.

The question upon which the case largely, if not entirely, turned was whether or not the plaintiff was at the time of the taking of the land in question by the railway company its actual possessor. If he was not, then no other question need be considered and he must be nonsuited.

The evidence shews to my mind, beyond any doubt, that plaintiff was not only not in possession of the land at the time referred to, but that he knew that he was not, and that it was not till many years afterwards that the idea first entered into his mind that he could have any claim for damages for the land against the appellants. In his evidence he says he was working with Ritchie, a sub-contractor of the railway, near, but not on, the locus and goes on to say:

There was no question about them taking possession. I never said a word. I didn't think I had possession of the point at the time.

And then, being asked the question:

Q.—And you didn't think so until just here about a year ago when this question came up about selling it to the Government?

A.—Yes. I had a notion two or three years ago, four or five years ago. I always thought I would try and get my pay out of them. I have had that in my mind the last seventeen years, and Mr. Laforest was going around getting persons to sign the deeds, and Denis Hebert, next door neighbor, paid him a hard $100.

Later, being asked as to whether Daniel Chisholm was not in possession at the time the railway was built. he said:

1906

TEMISCOUATA RY. CO. v. CLAIR.

Davies J.

Yes; when I would go on there, Chisholm wouldn't interfere with me and I didn't with him. I knowed my father gave Chisholm permission to go on and use the point and I didn't interfere with Chisholm and he didn't with me. I guess everybody had a hand in the soup then; they would go on there and I didn't bother any body and nobody bothered me.

Not a single overt act of possession was attempted to be proved by plaintiff before and up to the time the railway company entered beyond the vague claim that he had used the land for pasture one summer in common with Chisholm and others. As the land was vacant and admittedly being used also for pasture by Chisholm and others at the same time, it would be difficult to hold such vague evidence of casually pasturing cattle on it as evidence of possession.

The fact was that such evidence as there was of actual possession in any one of the land in question at the time the railway entered shewed it to have been in Chisholm who paid rent for it to another man.

Chisholm left there and abandoned the possession in 1893, two years after the railway company had entered and built their track and with respect to such part of the "point" as the railway company had not taken, it was after that possessed and occupied by plaintiff.

Such rights as he had in these lands outside of the railway belt and specially excepting that belt, were purchased from the plaintiff by the provincial Government about a year or more before this action was commenced.

It would be impossible, however, to infer possession by the plaintiff of the railway belt at the time the railway company entered on the land under the evidence given by the plaintiff himself, from the subsequent user by him of the remainder of the land or

from the purchase of his squatter's rights in such remainder by the Government.

His possession previously to defendants' entry seems to have been purely imaginary and such as he did have arose subsequently and never embraced the railway track which has been fenced off for the past fifteen years or more. The finding of the jury on the point was not one which reasonable men could fairly have come to under the evidence and must be set aside and the appeal allowed with costs and a judgment of nonsuit entered as proposed by Chief Justice Tuck in the court below.

Appeal allowed with costs.

Solicitors for the appellants: *Stevens & Lawson.*
Solicitors for the respondent: *Laforest & Jones.*

1907

*Feb. 19.
*Feb. 21.

THE CANADIAN BREWERIES COMPANY (OPPOSANTS) ..... } APPELLANTS;

AND

ONÉSIME GARIÉPY (PETITIONER) ... RESPONDENT.

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

Vacating judgment—Appeal—Jurisdiction—Matter in controversy—Tierce opposition—Arts. 1185-1188 *C.P.Q.—R.S.C. c.* 135, *s.* 29.

A creditor of an insolvent with a claim for $600 filed a *tierce opposition* to vacate a judgment declaring the respondent to be the owner of the business of a restaurant and the liquor license accessory thereto, alleged to be worth over $5,000. The opposition was dismissed on the ground that, under the circumstances of the case, the company had no *locus standi* to contest the judgment. On motion to quash an appeal to the Supreme Court of Canada,

Held, that as there was no pecuniary amount in controversy an appeal would not lie. *Coté* v. *The James Richardson Co.* (38 Can. S.C.R 41, distinguished.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal (Archibald J.), which dismissed the company's *tierce opposition* with costs.

On petition by the present respondent the curator of one Herschon, an insolvent, was, by judgment of the Superior Court, District of Montreal, on 29th June, 1905, ordered to transfer to the respondent the right to carry on the business of a restaurant with

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

the license to retail liquors in connection therewith, the said business being considered worth $5,000 or upwards. The appellants, being creditors of the insolvent to the amount of $600, filed a *tierce opposition* asking to have the license restored to the curator to be disposed of by him for the benefit of the creditors generally. In the Superior Court, Mr. Justice Archibald held that, under the circumstances of the case, the appellants were estopped and dismissed the opposition with costs. This decision was affirmed by the judgment now appealed from.

Murphy for the motion.

Atwater K.C. contra.

THE CHIEF JUSTICE.—This case is easily distinguishable from *Coté* v. *The James Richardson Co.* (1), upon which the appellant chiefly relied to support his contention that this court has jurisdiction to hear this appeal. In that case the direct issue between the parties was as to the ownership of a certain quantity of spool wood admittedly of a value exceeding $2,000.

Here the appellant, a creditor of one Herschorn for the sum of $600, by a proceeding known under the Quebec Code of Procedure as a *tierce opposition* asked that a judgment rendered *ex parte* seven months before, and to which the curator to the estate was a party, be set aside. By the judgment to which this opposition was fyled the respondent was declared to be entitled to the possession as owner of certain property then in the hands of the curator to Herschorn's estate, and the question in issue on the *tierce opposi-*

(1) 38 Can. S.C.R. 41.

1907

CANADIAN BREWERIES CO. v. GARIÉPY.

The Chief Justice.

tion was the right of the present appellant to have the *ex parte* judgment rendered in favour of the respondent set aside. On that issue there was no matter in controversy involving directly a question of money and this court is without jurisdiction.

See *Noel* v. *Chevrefils*(1).

GIROUARD J.—Without agreeing that this case is distinguishable from *Coté* v. *The James Richardson Co.*(2), I concur in the result.

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

Appeal quashed with costs.

Solicitors for the appellants: *Archer, Perron & Taschereau.*

Solicitors for the respondent: *Murphy & Roy.*

(1) 30 Can. S.C.R. 327.

(2) 38 Can. S.C.R. 41.

THE CITY OF HAMILTON (DEFENDANTS) ..... } APPELLANTS;

AND

THE HAMILTON DISTILLERY COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

1906
*Nov. 5, 6.
*Nov. 8.
1907
*Feb. 19.

THE CITY OF HAMILTON (DEFENDANTS) ..... } APPELLANTS;

AND

THE HAMILTON BREWING ASSOCIATION (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Action for declaration and injunction—60 & 61 V. c. 34, s. 1(d.)—Municipal corporation—Water rates—Discrimination.

The Act 60 & 61 Vict. 34(D.) relating to appeals from the Court of Appeal for Ontario does not authorize an appeal in an action claiming only a declaration that a municipal by-law is illegal and an injunction to restrain its enforcement.

A by-law providing for special water rate from certain industries does not bring in question "the taking of an annual or other rent, customary or other duty or fee" under sec. 1(*d*) of the Act (R.S. 1906, ch. 149, sec. 48(*d*).

By 24 Vict. ch. 56, sec. 3 (Can.) the city council of Hamilton was "empowered from time to time to establish by by-law a tariff of rents or rates for water supplied or ready to be supplied in the said city from the said water works."

Held, affirming the judgment of the Court of Appeal (12 Ont. L.R. 75) which sustained the verdict at the trial (10 Ont. L.R. 280) that the rate for water supplied to any class of consumers must

---

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

1906

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

be an equal rate to all members of such class and a by-law providing for a rate on certain manufacturers higher than that to be paid by others was illegal. *Attorney General* v. *City of Toronto* (23 Can. S.C.R. 514) followed.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment at the trial(2) in favour of the plaintiffs.

By Act of the Ontario Legislature in 1856(3), a Board of Water Commissioners for the City of Hamilton was established, and sections 9 and 10 provided that:—

(Section 9) "The Board of Commissioners for the time being shall regulate the distribution and use of the water in all places and for all purposes where the same may be required, and from time to time shall fix the prices for the use thereof and the times of payment, and they may erect such number of public hydrants and in such places as they shall see fit, and direct in what manner and for what purposes the same shall be used, all of which they may change at their discretion. * * ."

(Section 10) "The owner and occupier of any house, tenement or lot shall each be liable for the payment of the price or rent fixed by the Commissioners for the use of the water by such occupier, and such price or rent so fixed shall be a lien upon the said house, tenement or lot in the same way and manner as other taxes assessed on real estate in the said City of Hamilton are liens, and shall be collected in like manner if not previously paid to the Commissioners."

By an amendment in 1860(4) it was provided that

(Section 1.) "The Water Commissioners for the City of Hamilton shall, in addition to the powers con-

(1) 12 Ont. L.R. 75.
(2) 10 Ont. L.R. 280.
(3) 19 & 20 Vict. ch. 64.
(4) 23 Vict. ch. 87.

ferred upon them by the said Act, have full power and authority to levy and raise such a yearly or other rate or assessment or water rent on all and singular the real property within the said City, whether owned by private individuals or bodies corporate, by, near or contiguous to which the water pipes may pass, and upon the stock in trade, household furniture and goods and chattels belonging to or in possession of the owners or occupants of such real estate (save and except always the property, real and personal, of any railway company) as shall, in the opinion of the Commissioners, be sufficient to pay the yearly interest, at a rate not to exceed four per centum per annum on the cost of the said water works and the yearly expenses thereof, or such portion of such interest and expenses as in their judgment should be levied and raised in each year and be borne by such owners and occupants; and the Commissioners shall have power and authority from time to time to fix the rate or rates such owner or occupant or both such owner and occupant shall pay, having due regard to the advantages derived by such owner or occupant or conferred upon him or his or their property by the water works and the locality in which the same is situated * * *."

In 1861 by the Act 24 Vict. ch. 56, the water works were vested in the City which was given all the powers formerly vested in the Commissioners. Sections 3 and 4 of that Act provide as follows:

(Section 3) "The Corporation of the City of Hamilton shall, through its Council, have full power and authority to exercise all the powers conferred upon the said Commissioners (save as aforesaid), and in addition thereto it shall be lawful for the said cor-

1906

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

poration, through its council, from time to time to establish by by-law a tariff of rents or rates for water supplied or ready to be supplied in the said City from the said water works; which said tariff of rents or rates shall be payable at the times and in the manner established in the said by-laws, by all proprietors, occupants or others supplied with water from the said works, or whom the said council may be prepared and ready to supply with water; which said tariff of rates shall and may be made payable by all such proprietors, occupants or others as well by those who refuse as by those who consent to receive into their houses, stores or other buildings the water-pipe to supply the said water; but such tariff of rents or rates shall not be payable by the proprietors or occupants of any such house, store or other building until after the said council shall have notified them that they are prepared and ready to supply the same with water, and if from the time of such notification to the next period appointed for the payment of such tariff, rents or rates there shall be any broken period, then such tariff shall be payable *pro ratâ* for such broken period as if accruing and due day by day * * ."

(Section 4) "The council shall not have power to impose a special rate as provided for by (section 1, 23 Victoria, chapter 87), other than the water rate or rent hereinbefore referred to; but any sum required to pay the interest of the debentures issued for the said water works and the yearly expenses thereof, which the water rents may be insufficient to meet, shall be levied by a general assessment in the same manner as assessments for other purposes under the general assessment laws."

In 1902 the city passed two by-laws which occa-

sioned the litigation in these cases. The first was by-law No. 224, which provides that—

"(1). From and after the first day of January, 1903, all water supplied to manufacturing establishments in the City of Hamilton that apply for meters under this by-law, or now have meters approved by the manager of the water works, shall be charged for at the rate of seven and one-half cents per thousand gallons, as shewn by meters supplied by the city corporation, the applicants for such meters to pay for them and for their introduction, and also to pay meter rent, to cover the cost of inspection and repairs as follows:

For ½ inch and ¾ inch meters..$3.00 per annum.
For 1 inch meters.....$3.40 per annum."
Etc., etc.

"(3). Railway premises, breweries, distilleries and premises where aerated waters are made shall not be included under the term manufacturing establishments used in this by-law, and in the case of any applicant for the supply of a meter under this by-law, where there is a doubt as to the premises in respect of which it is applied for being a manufacturing establishment within the meaning of this by-law, the Assessment Commissioner shall make an investigation and shall report the result to the manager of the water works."

At the time of the passing of this by-law the respondents had a water meter on their premises approved of by the manager of the water works, and which had been put in and maintained at the expense of the respondents.

And by-law No. 237 was as follows:

"(1). From and after the first day of January,

1906

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

1903, all waters supplied to breweries, distilleries and premises where aerated waters are made shall be charged for at the rate of 12 cents per thousand gallons, as shewn by the meters supplied by the City Corporation, the occupants of the premises to pay for such meters and for their introduction, and also to pay meter rent to cover the cost of inspection and repairs at the rate specified in By-law No. 224: the water rates and meter rents imposed by this by-law to be payable in the manner and at the times mentioned in section 7 of said By-law No. 224, and to be subject to the penalties therein provided."

The respondents paid, under protest, the rates imposed under the latter by-law for the years 1903 and 1904, and in December, 1904, they respectively took action against the city by which they prayed—

(1) That it be declared by this Honourable Court that by-laws numbers 224 and 237 of the defendant Corporation are illegal and invalid in so far as they authorized the defendant Corporation to levy and collect from the plaintiffs water rates in excess of the general rates charged by the defendant Corporation to manufacturers in the City of Hamilton.

(2) And that it may be declared that the defendant Corporation has no power or authority to levy and collect water rates at the rate specified in such by-laws.

(3) A mandamus commanding the defendant Corporation to repeal such by-laws or the portions thereof complained of.

(4) And an injunction to restrain the defendant Corporation from levying on or seeking to collect from the plaintiffs water rates calculated at a higher rate than that charged generally to other manufacturers in the City of Hamilton.

(5) And such further and other relief as may be just.

Mr. Justice Street, who tried the case, was of opinion that the city was bound to supply water to all consumers without discrimination as to rates as decided in *Attorney-General* v. *The City of Toronto*(1), and gave judgment declaring the by-laws illegal in so far as they purported to authorize the city to collect from the plaintiffs a higher rate than that imposed on other manufacturers and restraining the city from levying or seeking to collect any higher rate (2). This judgment was affirmed by the Court of Appeal for the same reasons(3). The city appealed to the Supreme Court of Canada.

Blackstock K.C. and *Rose*, for the appellants.

Shepley K.C. and *Bell*, for the respondents, were heard on the merits and also raised the question of jurisdiction to hear the appeals.

The judgment of the court on the question of jurisdiction was delivered by

MACLENNAN J.—The appeals are by the City of Hamilton from judgments in these cases, in similar terms, declaring to be invalid certain by-laws of the city authorizing the levying and collecting from the respondents, water rates, at a higher rate than those imposed upon other manufacturers in the city, and restraining the city from recovering or levying from the respondents, respectively, any greater rates.

(1) 23 Can. S.C.R. 514. (2) 10 Ont. L.R. 280.
(3) 12 Ont. L.R. 75.

1906

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

Maclennan J.

The judgments appealed against are of the Court of Appeal for Ontario whereby judgments at the trial were affirmed.

On opening of the appeals, objection was made by the respondents to the jurisdiction of this court to hear the appeals, no leave having been obtained from the Court of Appeal, or from this court.

No relief is sought in the action but the declaration and injunction above mentioned; and no return of rates already paid is sought. Therefore, the only clause of the Act, 60 & 61 Vict. ch. 34, regulating the right to appeal to this court from the Court of Appeal for Ontario which could be invoked, as possibly permitting an appeal, is clause (*d*), which allows it:

> Where the matter in question relates to the taking of an annual or other rent, customary and other duty or fee, or a like demand of a general or public nature, affecting future rights.

We are of opinion that these cases cannot be held to come within the language of that clause, and that, without leave, this court has no jurisdiction.

We, however, allow the appeals to stand to afford the appellants an opportunity, if so advised, to apply to the Court of Appeal for leave to appeal.

The appellants afterwards filed an order of the Court of Appeal granting leave to appeal to this court, and on a subsequent day judgment was given on the merits as follows.

THE CHIEF JUSTICE.—I am of opinion that these appeals should be dismissed with costs.

DAVIES J.—I think these appeals must be dismissed. I recognize the force of much that was said

on argument in support of the principle that a municipality constructing water works and providing dwelling houses, manufactories and citizens generally with such supplies of water as they found necessary for their domestic or trade or other purposes should have the same power to regulate their water rates as an ordinary incorporated water company has in supplying its customers.

That argument, however, is one to be directed more to the legislature which confers the powers and determines their extent and limits than to this court whose duty it is simply to construe the language the legislature has used.

I do not see what bearing the case of *Fortier* v. *Lamb*(1) can have on these cases, and I do not agree that it in any way modifies or affects the judgment of this court in *Attorney-General of Canada* v. *City of Toronto*(2).

As to the latter case I agree that there is much in the reasoning of the court there which is applicable to the cases at bar. But I do not think that case absolutely concludes those now before us because the question arose on a statute differently worded and presented a somewhat different point for decision.

Alike, however, in that case as in these there is involved the validity of a city by-law claiming in one way or another to confer upon the city the power to differentiate or discriminate in the prices actually charged as between different members of the same class of customers for water supplied.

As to the power of the legislature to confer such powers upon a civic corporation I do not entertain any doubt. It falls within those plenary powers vested

(1) 25 Can. S.C.R. 422. (2) 23 Can. S.C.R. 514.

1907

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

Davies J.

in those bodies by the "British North America Act, 1867," and if any of them in attempting to confer such powers used apt and proper language I conceive it would be the duty of this court to give the language its full and proper effect. The question would be and ought to be simply whether such language has been used as confers the power claimed.

To determine whether it has been used in the legislation under discussion is the duty now before us. We have been referred to the history of the legislation with regard to the water works of Hamilton and I have gone carefully over the several statutes to which our attention has been called.

It seems to me, however, that the power of the city if found anywhere must be found in the statute of 24 Victoria, ch. 56. The 3rd section of this statute while expressly retaining to the city council power and authority to exercise all the powers of the former Commissioners goes on to say: "And in addition thereto it shall be lawful for the said corporation through its council from time to time to establish by by-law a tariff of rents or rates for water supplied or ready to be supplied in the said city from the said water works." The section goes on to enact provisions necessary to enable the general words I have quoted to be effectively carried out.

The 4th section declares that "the council shall not have power to impose a special rate as provided for by section 1 of 23 Vict. ch. 87, other than the water-rate hereinbefore referred to, but any sum required to pay the interest for the debentures issued for the said water works and the yearly expenses thereof which the water rates may be insufficient to meet shall be levied by a general assessment in the same manner

as assessments for other purposes under the general assessment laws."

Comparing these two sections with the previous legislation conferring powers upon the former Commissioners, it seems clear to me that the power to pass the by-laws in question must be found in these sections and in these alone.

It was pressed strongly upon us by Mr. Blackstock that the use of the phrase "tariff of rates or rents" by the legislature indicated a clear intention of giving to the municipal council the powers of differentiating or discriminating claimed by them. In interpreting this legislation I would not desire to apply the technical or strict canons of construction sometimes applied to legislation authorizing taxation. I think the sections are, considering the subject matter and the intention obviously in view, entitled to a broad and reasonable if not, as Lord Chief Justice Russell said in *Kruse* v. *Johnson*(1), at p. 99, a "benevolent construction," and if the language used fell short of expressly conferring the powers claimed, but did confer them by a fair and reasonable implication I would not hesitate to adopt the construction sanctioned by the implication. I cannot, however, find in the special phrase quoted or in any other of the language used, anything which by any fair and reasonable construction could be held by implication to contain the power to discriminate as between manufactories in establishing the tariff of rents or rates. I have assumed all through my argument that the appellants' factories were manufacturing establishments within the meaning of these words as used in the by-laws. The argument that they were not was not strongly pressed, and

(1) [1898] 2 Q.B. 91.

1907

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

Davies J.

I could see little ground to support it. If they were, the question became reduced to the simple one of the power of the city under the two sections of the statute I have specially quoted to discriminate in its charges for water as between one manufacturing establishment and another. As I have already said, to possess such power by the city the legislature must either have expressly conferred it or used language which fairly and reasonably implied it. I cannot find it has done either and so must hold the by-law which assumes the power and attempts to exercise it, invalid to the extent it professes to discriminate.

By-laws passed by municipalities in Canada which are partial and unequal in their operation as between the classes affected by them must to be held *intra vires* be supported by legislation which expressly or by necessary implication sanctions and authorizes the inequality.

IDINGTON J.—These cases both depend on the validity of the same by-laws of the appellants, for both respondents come within the class specially singled out for what is claimed by them to be an illegal discrimination in regard to water rates.

They fall so far within the principles upon which the decision of this court in *The Attorney-General of Canada* v. *The City of Toronto* (1), proceeded, that I am surprised to find an appeal here on the subject.

The by-law in question in that case was attempted to be supported upon the ground that service of water to those who did not pay the ordinary taxes of the municipality could not be expected at the same rates as in the cases of those who bore the taxes, and out of

(1) 23 Can. S.C.R. 514.

1907

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

Idington J.

those taxes the risks and burthen of procuring and vending or supplying the water.

Mr. Justice Osler, who wrote the judgment of the Court of Appeal for Ontario in that case, said therein:

> I also agree with the learned judge below, that the price, rent or rate paid for the water is not a tax or in the nature of a tax, at all events, where it is actually supplied to a consumer and not attempted to be charged upon property under sec. 12 of the 35 Vict. ch. 79, whether used or not. Under the by-laws in question the water is sold and what is paid by or charged to the consumer is the price.

These sentences put tersely the reasons why the Court of Appeal did not think the by-law, in the Toronto case, infringed the principles of law that forbid a municipal corporation passing an unreasonable or discriminating by-law.

Though plausible, these reasons did not prevail here nor in the Privy Council.

The appellants have not been able to put forward here, in support of the by-law now in question, anything possessing even the semblance of such plausibility. There is in Hamilton a general water rate that is based on a percentage, according to the assessed value of the property, and is imposed upon all property which is upon the appellant's mains, and can be served by appellants therefrom.

The respondents must pay that water-rate, even though they should have the facility to get their supply of water elsewhere at a cheaper rate.

But if they want water they cannot, being of a specified class, get it by paying the water-rate until they have installed a meter to measure it. And when they have so installed the meter, they cannot get the water unless they pay a special rate far beyond the general water rate, and nearly double what any other

1907

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

Idington J.

class of manufacturers (save those of aerated waters) have to pay.

And yet it is urged that there is no *improper* discrimination.

Some people would no doubt be glad to make the test for discrimination rest upon religious faith, or want of faith, and be able to shew, or at least to argue, that there was no improper discrimination in that.

In Hamilton they seem to apply the test of the relative profits, derivable from the different kinds of manufacturing business, or possibly the relative moral character of each, or perchance the relative economic results from the point of view of the production of general material wealth.

None of these, or any other grounds I have heard suggested, justify in law the clear discrimination that exists in the provisions of this by-law.

It was urged, however, that inasmuch as the origin of the city owning these works was that a company long ago had built and owned the works, or part of them, now in question, and had powers given them which, it is alleged, would uphold such discrimination, and these powers were, with the transfer of the works by a process needless to dwell upon, acquired therewith by the city, hence the discrimination in question can and must be upheld.

I do not unreservedly accede to the proposition that such a general and comprehensive transfer of powers (as alleged and in language appears here) to a municipal corporation would, regardless of the general purview of the statutes transferring plant and powers, of necessity transfer and invest the municipal corporation with something in the nature of a power that in its hands might become most oppres-

sive, though innocuous in the hands of the private corporation.

I must also be permitted to doubt the existence, in a private corporation of the character of the one in question, which was intended to serve the public in a way that gave it a practical monopoly, of any very wide powers of discrimination.

The purview of its character manifestly was against such a power of reckless or unlimited discrimination. Unless given, by more express terms than appears, in the statutes in question for consideration in this case, I would not be disposed to hold it was intended to be given. I think entirely too much importance was attached in argument to this transfer of powers and to the use of the word "tariff," and the plural terms "prices," "rents," and "rates" in these statutes.

Analagous terms appeared in the statutes in question in *The Attorney-General of Canada* v. *The City of Toronto*(1). Moreover, the general history of the development of the water supply, powers and duties, was much alike in the two cases.

First a private company, and then water commissioners and then the municipal corporation, are in each case parallel leading features.

There may be cases wherein the cost of supplying the water may render an even rate per gallon most inequitable. I can conceive of cases, where the uniform charge of a flat rate per gallon might be in itself a grave discrimination against some of those supplied, in possession of properties having great natural advantages, and in favour of those whose properties had corresponding natural disadvantages, to supply whom might cost double that of the former.

(1) 23 Can. S.C.R. 514.

1907

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

Idington J.

I will not go further than to say that I have not overlooked possible modifications of rates that might exist and yet not be improperly discriminating in character.

If the "uniformity of rates" spoken of by Sir Henry Strong in his judgment in the *Toronto Case* (1) excludes the possibility of giving due consideration to such possible conditions, then I cannot in that regard agree with it. I do not, however, so read it. The general principles it enunciates, and at some length elucidates, I heartily agree in. I would regret to see them impaired.

I think these appeals must be dismissed with costs.

MACLENNAN J.—The question in these appeals is whether or not the City of Hamilton, in administering its water works, can lawfully charge one class of manufacturers a higher price for water supplied than another, both classes being supplied by meter, and the only difference between them being the nature of their business.

The city has passed by-laws assuming to charge the one class 7½ cents per thousand gallons, and the other class, of which the plaintiffs are two, twelve cents per thousand gallons.

The waterworks were constructed, and are maintained and administered, at the expense of the city, and as one of its departments. It is not an independent company selling a commodity to customers, and which can sell to one and refuse to sell to another or which can sell at one price to one customer and exact a different price from another. The works and the water are the property of the inhabitants, who are

(1) 23 Can. S.C.R. 514.

1907

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

Maclennan J.

the corporation, maintained and provided for their benefit, and ought to be administered with all possible equality; and it would in my opinion require very clear and unambiguous language on the part of the legislature to authorize the discrimination attempted by these by-laws.

In *Attorney-General of Canada* v. *City of Toronto* (1), it was held that under the authority given to municipal corporations to fix the rate of rent to be paid by each owner or occupant of a building supplied by the corporation with water, the rates imposed must be uniform.

The language of the Acts governing that case gave the city power

> from time to time to fix the price rate or rent which any owner, etc., shall pay as water rates, or rent * * * from time to time shall fix the price for the use thereof and the times of payment,

while in the present case the power conferred is

> from time to time to establish by by-law a tariff of rents or rates for water supplied, or ready to be supplied in the said city from the said water works. 24 Vict. ch. 56, s. 3 (Can.).

I am unable to perceive that the power conferred in the present case is any wider, or more extensive, than in the *Toronto Case* (1), and I think the words fall far short of conferring the power of fixing one rate for one kind of business, and another rate for another kind of business.

In that case Strong C.J. used the following language, at page 519:

> The water works were not constructed for the benefit of the rate-payers alone, but for the use and benefit of the inhabitants of the city generally whether tax payers or not.

(1) 23 Can. S.C.R. 514.

1907

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

Maclennan J.

And referring to section 480(3) of the "Municipal Act," he adds:

> That provision makes it a duty obligatory upon the city to furnish water to all who may apply for it, thus treating the corporation not as a mere commercial vendor of a commodity but as a public body entrusted with the management of the water for the benefit of the whole body of inhabitants, and compelling them as such to supply this element, necessary not merely for the private purposes and uses of individuals but indispensable for the preservation of the public health and the general salubrity of the city. It must, therefore, have been intended by the legislature that the water was to be supplied upon some fixed and uniform scale of rates, for otherwise the city might by fixing high and exhorbitant prices in particular cases, evade the duty imposed by this section. In other words, the city * * * is in a sense a trustee of the water works, not for the body of ratepayers exclusively, but for the benefit of the general public, or at least of that portion of it resident in the city; and they are to dispense the water for the benefit of all, charging only such rates as are uniform, fair and reasonable.

To the like effect and with equal emphasis, is the judgment of Mr. Justice Gwynne in the same case, at pages 525-6, holding that in such a case there may not be any inequality or discrimination in price.

It was argued that the power to establish a tariff of rents or rates distinguished the present from the *Toronto Case*(1), and imported a power to discriminate between users of water. But even tariffs of customs, for example, do not discriminate in the duty exacted upon goods of the same kind and quality, but only upon those of different kinds or qualities.

I am clearly of opinion that these appeals must be dismissed, with costs both here and below.

DUFF J. concurred in the judgment dismissing the appeals with costs.

(1) 23 Can. S.C.R. 514.

1907

CITY OF HAMILTON v. HAMILTON DISTILLERY CO.

CITY OF HAMILTON v. HAMILTON BREWING ASSOCIATION.

Appeals dismissed with costs.

Solicitors for the appellants: *Francis Mackelcan.*

Solicitors for the respondents,
Hamilton Distillery Company: *Crerar, Crerar & Bell.*

Solicitors for the respondents,
Hamilton Brewing Association: *J. J. Scott.*

1906
*Nov. 12-14.
1907
*Feb. 19.

THE BANK OF MONTREAL (DEFENDANT)..... APPELLANT;

AND

HIS MAJESTY, THE KING (PLAINTIFF), AND THE QUEBEC BANK, THE SOVEREIGN BANK OF CANADA AND THE ROYAL BANK OF CANADA (THIRD PARTIES)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Crown—Banks and banking—Forged cheques—Payment—Representation by drawee—Implied guarantee — Estoppel—Acknowledgment of bank statements — Liability of indorsers — Mistake — Action—Money had and received.

A clerk in a department of the Government of Canada, whose duty was to examine and check its account with the Bank of Montreal, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the drawee to the several other banks, on presentation, and charged against the Receiver General on the account of the department with the bank. None of the cheques were marked with the drawee's acceptance before payment. In the meantime, the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques and charged against the Receiver General:

Held, affirming the judgment appealed from (11 Ont. L.R. 595) that the bank was liable unless the Crown was estopped from setting up the forgery.

Per Davies, Idington and Duff JJ., that estoppel could not be invoked against the crown.

Per Girouard and Maclennan JJ., that, apart from the question of the Crown being subject to estoppel, under the circumstances of

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

this case a private person would not have been estopped had his name been forged as drawer of the cheques.

Per Davies and Idington JJ.—The acknowledgment by the accountant of the department of the correctness of the statements furnished by the bank, being made under a mistake as to the facts, the accounts could be re-opened to have the mistake rectified.

The defendant bank made claims against the other banks, as third parties, as indorsers or as having received money paid by mistake, for the reimbursement of the several amounts so paid to them, respectively. On these third party issues, it was held,

Per Girouard and Maclennan JJ.—The drawee, having paid the cheques on which the name of its customer was forged, could not recover the amounts thereof from holders in due course. *Price* v. *Neal* (4 Burr. 1355) followed.

Per Davies and Idington JJ.—As the third party banks relied upon the representation that the cheques were genuine, which was to be implied from their payment on presentation, and subsequently paid out of the funds to their depositor or on his order, the drawee was estopped and could not recover the amounts so paid from them either as indorsers or as for money paid to them under mistake.

In the result, the judgment appealed from (11 Ont. L.R. 595) was affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario(1) affirming the judgment of Anglin J. at the trial(2), whereby it was adjudged that His Majesty the King should recover from the said appellant the sum of $71,731.75 and costs, and whereby the claim of the said appellant against the above-named third parties (except as to the sum of $5.06 which they were adjudged to be entitled to recover against the Quebec Bank) was dismissed with costs.

The questions in this action arise on twelve instruments in the form of bankers' cheques. The Government of Canada employs the Bank of Montreal as its banker, and at the bank's Ottawa branch keeps a large number of bank accounts under distinc-

(1) 11 Ont. L.R. 595. (2) 10 Ont. L.R. 117.

1906

BANK OF MONTREAL v. THE KING.

tive titles, one of which is known as the "Department of Militia and Defence Account." The cheques in question purported to be drawn on this account between 18th December, 1901, and 17th October, 1902. They were apparently all drawn on the regular printed official forms of cheques used by the Department of Militia and Defence, and purported to be signed in the customary manner by the proper officers of that department. They were of three classes:

Six of them, aggregating $20,005, made payable to the order of Chas. Coté (a fictitious name assumed by one Abondeus Martineau, the supposed forger), were indorsed by the latter in the name "Chas. Coté," and were delivered by him to the Quebec Bank, which thereupon credited the amounts thereof to him in an account opened by him in that name in said Quebec Bank, and which afterwards collected the amounts thereof from the Bank of Montreal through the Ottawa clearing house.

Four of them, aggregating $30,200, made payable to the order of Chas D. Coté (a fictitious name assumed by said Martineau), were indorsed by the latter in the name of "Chas. D. Coté," and were by him dealt with in a similar manner in the Sovereign Bank of Canada, and the proceeds were afterwards collected by that bank from the Bank of Montreal through said clearing house.

Two of them, aggregating $25,500, were drawn payable to the order of said Martineau, and indorsed and delivered by him to the Royal Bank of Canada which thereupon placed the proceeds thereof to his credit in said bank, and which afterwards collected the amounts thereof from the Bank of Montreal through said clearing house.

All these cheques were paid as aforesaid by the Bank of Montreal shortly after their respective dates, and were forthwith charged and debited in said Department of Militia and Defence account, and also in the pass-book sheets, which, in accordance with the usual course of business with all the departments, were sent almost daily to the Department of Militia and Defence.

The learned trial judge found the facts substantially as above stated, and further, that all the cheques were forged by Martineau, who fabricated the official signatures of the signing officers by means of tracings from real signatures; that with one exception all these cheques purported to be regularly signed by the two proper signing officers of the Department of Militia and Defence; that one cheque, however, for $3,819.04 was signed by only one officer of the department; and that the Bank of Montreal was not guilty of any negligence or want of care in paying the cheques, with the exception of the one cheque for $3,819.04.

The learned judge also found that in the pass-book sheets rendered to the department the cheques in question were charged by the bank against the department as paid on its account, and that the cheques themselves were also sent to the department with the pass-book sheets containing charges for the same as the vouchers for such charges; that the cheques in question, after being duly received by the department, were lost or destroyed whilst in the possession of the Crown officers, and were not produced by the Crown at the trial; and further, that the cheques were in fact destroyed by Martineau to whom they were handed for examination by the accountant of the department; that receipts were given periodically for the cheques

1906

BANK OF MONTREAL v. THE KING.

in question, which receipts also contained an acknowledgment of the correctness of the balances shewn at the credit of the department in the pass-book sheets; such balances having been arrived at after making the charges aforesaid in respect of the cheques in question.

Shepley K.C., and *Gormully K.C.*, for the appellants. As against the Crown the bank's case rested on contract by an account settled between them and on the customer's obligation to take reasonable care against exposing the bank to unnecessary danger of loss. See *Schofield* v. *Lord Londesborough*(1), at p. 523.

The acknowledgment by the department of the correctness of the accounts furnished by the pass-book sheets sent to it almost daily precludes the Crown from now denying that they were correct. *Bank of England* v. *Vagliano Bros.*(2); *Blackburn Building Soc.* v. *Cunliffe, Brooks & Co.*(3).

As to the third parties, these banks on presenting the cheques to the appellants warranted their genuineness. Chalmers on Bills, 6 ed., p. 211; *East India Co.* v. *Tritton*(4).

Apart from warranty the appellants paid these cheques on a mistake as to the facts, and can recover the amount so paid. The case of *Imperial Bank* v. *Bank of Hamilton*(5), is not against this position, but was decided on the ground that *Cocks* v. *Masterman*(6) did not apply to a case of simple forgery. But see *Kelly* v. *Solari*(7).

(1) [1896] A.C. 514.
(2) [1891] A.C. 107, 115.
(3) 22 Ch. D. 61.
(4) 3 B. & C. 280; 27 Rev. Rep. 353, 360.
(5) [1903] A.C. 49.
(6) 9 B. & C. 902.
(7) 9 M. & W. 54.

The third party banks did not present these cheques for payment as Martineau's cheques, but as their own, claiming to be holders in due course. See *Capital & Counties Bank* v. *Gordon*(1).

Aylesworth K.C., Attorney-General of Canada, and *J. H. Moss*, for the respondent cited *Schofield* v. *Lord Londesborough*(2); *Colonial Bank of Australasia* v. *Marshall*(3).

Lafleur K.C., and *Matheson*, for the Quebec Bank, third party, referred to *Gaden* v. *Newfoundland Savings Bank*(4).

J. A. Ritchie for the Sovereign Bank, relied on *Price* v. *Neal*(5), and also referred to *United States Bank* v. *Bank of Georgia*(6).

Geo. F. Henderson and *A. Greene*, for the Royal Bank of Canada, cited *Bavins, Junr. & Sims* v. *London & South-Western Bank*(7).

GIROUARD J.—As I understand these appeals I do not think it is necessary to review all the authorities quoted at bar upon forgery of negotiable instruments. The "Bills of Exchange Act," in my opinion, covers nearly the whole case, and as the House of Lords observed in *The Bank of England* v. *Vagliano Brothers* (8), with respect to the "Imperial Bills of Exchange Act," in construing a statute that expressly codifies

(1) [1903] A.C. 240.
(2) [1896] A.C. 514.
(3) [1906] A.C. 559; 75 L.J. C.P. 76.
(4) [1899] A.C. 281.
(5) 3 Burr. 1355.
(6) 10 Wheat. 333.
(7) [1900] 1 Q.B. 270.
(8 [1891] A.C. 107.

1907

BANK OF MONTREAL v. THE KING.

Girouard J.

the law, the court cannot interpret it by the light of previous decisions, except in the case of words of doubtful import or other exceptional circumstances. I accept this rule as a guide and intend to base the conclusions I have arrived at mainly upon the enactments of the statute, especially sections 24 and 54.

Section 24, par. 1, as amended by 60 & 61 Vict. ch. 10,—amendments which I believe are partly peculiar to Canada,—says that, subject to the provisions of the Act, where a signature on a bill is forged the forged signature is wholly inoperative, unless the party whose signature is forged is precluded from setting up the forgery. It further provides that if a cheque payable to order is paid by the drawee upon a forged indorsement out of the funds of the drawer, the latter shall have no right of action against the drawee for the recovery back of the amount so paid, unless he gives notice in writing of such forgery to the drawee within one year after he has acquired notice of the forgery.

This proviso does not meet the case of payment by the drawee upon a forged signature of the drawer, but only upon a forged indorsement, because in the former case he is supposed to know the signature of the drawer, and, in the latter one, is not presumed to know the signature of any indorser. I think the main action of the King against the Bank of Montreal is clearly covered by this first paragraph of section 24.

Is the King *precluded* from setting up the forgery? I do not propose to consider this question from the point of view intended by the "Audit Act" or arising out of any prerogative of the Crown. I do not think it is necessary to do so, to arrive at a correct solution of the question. I propose to examine the situation as

between mercantile men. Of course I do not lose sight of the relations of mandator and mandatary which undoubtedly exist between the drawer and the drawee so much so that, on the continent of Europe, cheques are generally called *mandats*. In fact the Act, sec. 74, declares that the duty and authority of a bank to pay them are terminated by notice of the customer's death.

But where is the estoppel in this case, either by language or conduct? Where is the negligence on the part of the Crown? A very clever scheme—as amusing as it was cunning—had been devised and carried out by one of its employees, who for months braved the watching eyes of employees of four banks and the government. He has frankly told the story in his examination in the penitentiary, and it is admitted that it is true in every respect. It is conceded that he obtained the large sum of money involved in these appeals by a series of crimes, always drawing the cheques upon government forms, forging the signature of the drawer, and using the name of a fictitious payee and indorser.

The Bank of Montreal claims that, in view of the daily and monthly statements and so-called settlements made with the departments of the government, the Crown is precluded from setting up the forgery. How these documents can amount to a ratification is more than I can conceive. The forgery was not known, not even suspected by any one. This is a very different case from *Ewing* v. *Dominion Bank*(1), decided by this court on the ground that appellants had, by their conduct, precluded themselves from setting up

(1) 35 Can. S.C.R. 133.

1907

BANK OF MONTREAL v. THE KING.

Girouard J.

the forgery, in which the Privy Council refused leave to appeal(1).

In face of the facts proved, I do not see how the Bank of Montreal can succeed, unless we hold that the employer is responsible for the crimes of his servants. The Crown may have certain privileges and safeguards provided for by the "Audit Act" and other prerogatives, but certainly it cannot be in a worse position than ordinary business men. I cannot see that the government has omitted any duty which it owed to the bank, and I must confess that none has been suggested at the argument which commends itself to my mind.

I would therefore dismiss the main appeal of the Bank of Montreal with costs.

Now with regard to the third party actions taken by the Bank of Montreal against three banks which, for value, in good faith and in the ordinary course of business, had received the amounts of the forged cheques from the Bank of Montreal, and handed them over to the forger or his order, I believe that these actions must also fail.

Paragraph 2 of the same section 24 has been quoted in support of the claim of the Bank of Montreal. It declares that if a bill bearing a forged indorsement is paid in good faith and in the ordinary course of business, by or on behalf of the drawee or acceptor, the person by whom or on whose behalf such payment is made, shall have the right to recover the amount so paid from the person to whom it was so paid, provided that notice of the indorsement be given, etc.

(1) [1904] A.C. 806.

But this enactment does not apply to a bill where the signature of the drawer is forged. In such a case there is no bill (section 3), and the section does not apply. In the latter case, the necessary inference of the section is that the drawee who pays the amount of such paper has no remedy whatever, except, of course, against the forger.

It is argued that the law of mistake applies to a case like this. In my humble opinion it does not, because it is governed by special rules established by the law merchant.

The appellants have invoked the authority of the *Imperial Bank of Canada* v. *The Bank of Hamilton* (1), confirmed by the Privy Council (2). But that case has no similarity to the present one. There the signature of the drawer was genuine and only the body of the cheque had been altered. Whatever was the jurisprudence in old days, it has been settled by the "Bills of Exchange Act," sec. 54, which limits the liability of the acceptor to the genuineness of the signature of the drawer, thus impliedly excluding his liability of the forgery of the body of the bill.

Section 54 provides that

> the acceptor of a bill, by accepting it, is precluded from denying to the holder in due course the existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill.

True, in this case, the cheques were not accepted, although cheques may be accepted like bills of exchange. True, also, the statute does not say: The drawee who accepts or pays is precluded, etc.; but is it necessary? Is it not to be implied? Paying a bill seems to me to be a stronger evidence of the above

(1) 31 Can. S.C.R. 344. (2) [1903] A.C. 49.

1907

BANK OF MONTREAL v. THE KING.

Girouard J.

facts or presumptions, than a mere acceptance. I cannot imagine that any authority is necessary to establish the soundness of this proposition. However, the decisions are not wanting upon this point.

Ever since *Price* v. *Neal*(1) has been decided, the jurisprudence has been considered as well settled at least so far as the present case is concerned. Lord Mansfield, stopping counsel from going on with his argument, saying that this was one of those cases that could never be made plainer by argument, continued:

> It was incumbent upon the plaintiff to be satisfied "that the bill drawn upon him was the drawer's hand," before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill, he actually accepts; after which acceptance, the defendant innocently and *bonâ fide* discounts it. The plaintiff lies by for a considerable time after he has paid those bills, and then found out "that they were forged;" and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself, for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first; and he paid the whole value, *bonâ fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man.

It may be said that this decision is old. It was rendered the year before this country became part of the British Empire, in 1762. Moreover, it seems to lay down a principle not involved in its determination which may be considered as an *obiter dictum* as to the forgery of the body of the bill. But in respect of the forgery of the signature of the drawer, I venture to say that its soundness has never been questioned.

The trial judge in these cases, Anglin J., expresses

(1) 3 Burr. 1355.

doubts that it is yet law. I entertain no such doubts. Its principles are sanctioned by the Civil Code of Quebec and all the European Codes. They are embodied in the "Bills of Exchange Act," sec. 54, except as to the genuineness of the body of the bill.

Like nearly all the other decisions of Lord Mansfield, the true founder of commercial law in England, it has stood the attacks of both the bar and the bench for a century and a half. It is yet the leading case in England, the United States and Canada, when the facts are as in the present case. It is only when the forgery affects the body of the instrument by raising the amount that its soundness has been doubted or denied, although that point was not involved. The principal and in fact the only question was whether or not the drawee who accepts or pays a forged bill can recover the money back from the holder in due course. The jurisprudence seems to be overwhelming that he cannot.

In 1871, Mr. Justice Allen, speaking for the Court of Appeals of New York, in the *National Park Bank* v. *Ninth National Bank*(1), reviewed the whole jurisprudence:

> For more than a century (he says) it has been held and decided, without question, that it is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondent; and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act and can neither repudiate the acceptance nor recover the money paid.
>
> The doctrine was broached by Lord Raymond in *Jenys* v. *Fawler* (2), the Chief Justice strongly inclining to the opinion that even actual proof of forgery of the name of the drawer, would not excuse the defendants against their acceptance. In 1762, the principle was flatly and distinctly decided by the Court of King's Bench,

(1) 46 N.Y. 77.

(2) 2 Strange 946.

1907

BANK OF MONTREAL v. THE KING.

Girouard J.

in the leading case of *Price* v. *Neal*(1), which was an action to recover money paid by the drawee to the holder of a forged bill. Lord Mansfield stopped the counsel for the defendant, saying that it was one of those cases that never could be made plainer by argument; that it was incumbent on the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted and paid it, but it was not incumbent for the defendant to inquire into it. This case has been followed, and the doctrine applied, almost without question or criticism, in an unbroken series of cases, from that time to this, and it has been distinctly approved in very many cases, which have not been within the precise range of the principle decided. See *Ancher* v. *Bank of England*(2); *Smith* v. *Mercer*(3); *Wilkinson* v. *Johnson*(4); *Cocks* v. *Masterman*(5); *Cooper* v. *Meyer*(6); *Sanderson* v. *Collman*(7); *Smith* v. *Chester*(8); *Bass* v. *Clive*(9); *Bank of Commerce* v. *Union Bank*(10); *Goddard* v. *Merchant's Bank*(11); *Canal Bank* v. *Bank of Albany*(12).

Cases have been distinguished from *Price* v. *Neal*(1) and its applicability to a transfer of a forged instrument, between persons not parties to it, has not been extended to forgeries of indorsements or handwriting of parties to negotiate instruments other than the drawer. But, as applied to the case of a bill to which the signature of the drawer is forged, accepted or paid by the drawee, its authority has been uniformly and fully sustained, and the rule extends as well to the case of a bill paid upon presentment, as to one accepted and afterwards paid. *Bank of St. Albans* v. *Farmers' and Mechanics' Bank*(13); *Levy* v. *Bank of the United States*(14); *Bank of United States* v. *Bank of Georgia*(15); *Young* v. *Adams*(16); *Gloucester Bank* v. *Salem Bank*(17).

A rule so well established, and so firmly rooted and grounded in the jurisprudence of the country, ought not to be overruled or disregarded.

Any number of decisions might be added to the foregoing. I will content myself with a reference to a few of them: *Salt Springs Bank* v. *Syracuse Savings*

(1) 3 Burr. 1355.
(2) 2 Doug. 637.
(3) 6 Taunt. 76.
(4) 3 B. & C. 428.
(5) 9 B. & C. 902.
(6) 10 B. & C. 468.
(7) 4 Man. & Gr. 209.
(8) 1 T.R. 654.
(9) 4 M. & S. 13.
(10) 3 Comst. 230.
(11) 4 Comst. 147.
(12) 1 Hill, 287.
(13) 10 Vt. 141.
(14) 4 Dall. 234.
(15) 10 Wheat. 333.
(16) 6 Mass. 182.
(17) 17 Mass. 32, 41.

Institution, 1863, (1); *Howard & Preston* v. *Mississippi Valley Bank of Vicksburg,* 1876, (2); *First National Bank of Marshalltown* v. *Marshalltown State Bank,* 1899, (3); *Crocker-Woolworth National Bank of San Francisco* v. *Nevada Bank of San Francisco,* 1903, (4). See also *Union Bank of Lower Canada* v. *Ontario Bank,* 1880, (5); *Ryan* v. *Bank of Montreal,* 1887, (6).

For these reasons I am of opinion that all the appeals should be dismissed with costs.

DAVIES J.—The nature of the plaintiff's case is of the simplest. The defendant has been acting for many years as banker for the plaintiff's government in Canada and has from time to time large sums of money standing to the credit of the plaintiff's government account against which certain government officials are authorized to draw cheques.

The defendant during the years 1901 and 1902 paid certain alleged cheques aggregating $75,705, and charged the same against the plaintiff's said account. These alleged cheques were proved at the trial, and found by the trial judge, to be forgeries and the amount represented by them has therefore been charged by the defendant against the plaintiff wrongfully and without authority.

Under these facts the plaintiff has a right to recover back the amount of the forged cheques sued for and improperly charged against him unless by some acts or series of acts or conduct on the part of the plaintiff's officials, the King has been estopped from

(1) 62 Barb. 101.
(2) 28 La. Ann. 727.
(3) 107 Iowa, 327.
(4) 139 Cal. 564, 573.
(5) 24 L.C. Jur. 309.
(6) 14 Ont. App. R. 533.

1907

BANK OF MONTREAL v. THE KING.

Davies J.

denying the genuineness if the cheques or unless as contended by the defendant the accounts rendered from time to time by the bank to the Department of Militia must be treated under the circumstances as having been settled by agreement and cannot be re-opened.

It appears that the account of the Department of Militia and Defence upon which the forged cheques were drawn was an active one, a very large number of cheques being paid and charged against it daily, and during the period in question the practice was adopted by the defendants of making out what were called "pass-book sheets" which were sent frequently, and sometimes daily, by registered letter addressed to the accountant of the department with which were also enclosed the original cheques. At the end of each month a complete statement was sent shewing all cheques paid during the month, and the letters of credit and moneys received during the month by the bank and the balance at the credit of the department. With this monthly statement was sent a blank form of receipt to be signed by the accountant acknowledging that he had received the cheques entered in the statement and had examined the same and found the balance to be correct.

The accountant of the department assigned to Martineau (the forger of the cheques in question) the duty of comparing these statements with the cheques and the books of the department, and on his reporting them to be correct the accountant or his assistant was in the habit of signing the receipt and returning it to the bank. Martineau was, of course, on the lookout for the forged cheques as they were sent up from the defendant's bank, and immediately destroyed them,

but, as they were included in the pass-book sheets, he reported them along with the genuine cheques as being duly vouched and they were accordingly receipted for by the accountant along with the genuine cheques. The balances for each month which were thus acknowledged to be correct during the period in question included and charged against the Militia Department the forged cheques.

It is urged on behalf of the defendants that these facts as above outlined constitute a breach on the part of the plaintiff of a duty owing to the defendants and that by reason of such breach of duty the plaintiff is debarred from recovering.

The natural and logical legal basis for such a defence is the principle of estoppel and, indeed, Mr. Gormully invoked the application of this principle on the facts proved as a good defence. The trial judge, however, held that estoppel could not prevail against the Crown; the appeal court of Ontario sustained that ruling and then an ingenious attempt was made by defendant's counsel to shift the ground of the defence and it was argued that by accepting the pass-book sheets and acknowledging their receipt and by acknowledging the correctness of the monthly balances shewn by the defendants, a contractual relation was established by implication and that the plaintiff was bound by the signature of the accountant of the department as by a settled account.

I agree with the courts below that the ordinary doctrine of estoppel cannot be invoked as against the Crown in any such case as this and on any such facts as are proved here.

With regard to the argument that a contractual obligation arose between the Crown and the bank out

1907

BANK OF MONTREAL v. THE KING.

Davies J.

of the officer's signature to the acknowledgment of the correctness of the pass-book sheets as rendered, I am quite unable to appreciate it apart from the doctrine of estoppel.

Why the signature as to the correctness of these pass-book sheets should have a different effect from the signature of settlement to any ordinary account so as to prevent it being re-opened in case of the discovery of a mistake, I am at a loss to understand. The officer signing the account as correct was deceived into doing so by a clever forger. The same forger deceived the bank by the forged signatures. If the circumstances under which the accounts were acknowledged to the bank could be held to be an estoppel well and good. But the doctrine cannot be applied as against the Crown and outside of it I cannot find any contract settling the accounts as between the government and the bank and prohibiting their being re-opened in case of mistake.

The bank became the plaintiff's debtor for the money had and received and, outside of estoppel, nothing but payment, accord and satisfaction or a release under seal would be an answer to plaintiff's demand.

I assent to the argument of the Attorney-General that the "Audit Act" prescribes and defines the only means by which accounts between banks and the government can finally be settled and that no departmental officer has any authority outside of this Act to sign any settlement binding the Crown. The Crown cannot be estopped by the act of clerk or official.

In this case the pass-book sheets daily sent from the bank to the department were so sent as a matter of convenience to the respective officers of the bank and the department. Such a course would seem business-

like and proper; but it is quite outside of the "Audit Act" and I do not concede the argument of the defendant as to the limited usage of that Act or that it is to be strictly confined to the internal arrangements between the government departments and does not cover the dealings with the banks mentioned in it.

I am therefore of opinion that the appeal of the Bank of Montreal as against the King must be dismissed with costs.

The next question we have to deal with is the right of the Bank of Montreal to recover back these moneys from the several banks to which they paid the cheques respectively, notwithstanding the change of position to their prejudice which the delay had caused through these banks having in the meantime paid out the moneys received to the forger relying upon the payment of the cheques by the payee as representation of their genuineness. I have reached the conclusion that on this branch of the case also the judgment and reasoning of the Court of Appeal must on the findings of fact of the trial judge be sustained.

I have read the judgment prepared by Mr. Justice Girouard in which he also agrees with the conclusions of the Court of Appeal, but upon the sole ground that the cases of the three banks are governed by the principles laid down in the case of *Price* v. *Neal*(1), and *Smith* v. *Mercer*(2), principles emphatically affirmed by the Supreme Court of the United States and many of the states courts in the cases he cites.

The general doctrine asserted and supported by such very high authorities is that the acceptor of a

(1) 3 Burr. 1355. (2) 6 Taunt. 76.

1907

BANK OF MONTREAL v. THE KING.

Davies J.

bill or cheque is presumed to know the handwriting of the drawer; that it is rather by his fault or negligence than by mistake if he accepts or pays on a forged signature, and that once paid he cannot on discovery of the forgery recover back the money irrespective of equities.

The rule contended for makes no distinction between the *bonâ fide* holder of a bill or cheque ignorant of the forgery who has discounted or paid money for the bill or cheque before he presents it for payment, and one who does so only after the payee has honoured the bill or cheque relying upon the representation of its genuineness which may be said to be made by the payee, and before having any notice or knowledge of the forgery.

In the one case it is obvious that the holder having first paid out his money on the faith he himself had in the genuine character of the bill or cheque or in the credit and responsibility of the person from whom he received it, could not be said to have relied upon the subsequent act of the payee in paying the bill or cheque, while in the other case he may well have done so. But no such distinction was made in the case of *Price* v. *Neal*(1), relied on. As a matter of fact the holder of the first bill in that case appears to have paid for it to the person from whom he received it before it was presented to and paid by the drawee. The rule proceeds upon the idea that a banker's supposed duty to know his customer's signature can be invoked as well by a third party (the holder of the bill) as by the banker's customer. So far as the rule has been held applicable to the case of a holder who cannot be said in any way, in parting with his money, to have

(1) 3 Burr. 1355.

relied upon any act or representation of the drawee in paying the bill or cheque on presentation and not to have altered his position or been prejudiced in any way in consequence, it has been subjected to much criticism and challenge.

The rule has only been embodied in the "Bills of Exchange Act" so far as acceptances are concerned, nothing being said as to the effect of payment. The extent to which that section 54 of the Act applies with regard to acceptances is not now before us. If the rule laid down so broadly in *Price* v. *Neal*(1) is to be held in force now it must be as part of the law merchant, and it is at least significant that the Act is limited to declaring the effect of acceptances of bills while the effect of payment is not referred to.

There is a distinction between the facts in the cases of the Royal Bank and the Quebec Bank on the one hand and on that of the Sovereign Bank on the other. In the case of the first two banks the forger deposited the cheques in dispute in the savings bank branch of the bank and under the special conditions set out in the evidence. In the one case the depositor was precluded from drawing the money out for three days and in the other for fifteen days, ample time in each case to ensure that the cheques would be presented for payment and either paid or refused payment before the depositor had any right to withdraw any of the moneys. I would not think that the decision of the House of Lords in the case of *Capital & Counties Bank* v. *Gordon*(2) was applicable to a deposit on such special conditions or that it could be held under the authority of that case that the crediting of the cheques to the depositor's account made the

(1) 3 Burr. 1355.

(2 (1903) A.C. 240.

1907

BANK OF MONTREAL v. THE KING.

Davies J.

money his. It was, in the circumstances of the deposit and credit made in these two banks, merely a conditional credit and subject to the special terms to which the depositor must be taken to have assented when he deposited his money. *Gordon's Case*(1) does not go further than to determine that, in the absence of special agreement to the contrary, the crediting a depositor with the amount of cheques deposited by him makes that credit a fund upon which the depositor has a right to draw. But, of course, the parties by special agreement can alter that and this I would hold was done. In that case these two banks would be merely collecting agents for the payee of the cheques, and not having indorsed the cheques, but having collected the moneys for the payee and paid it out to him before they had any notice of the forgeries would not be liable to refund the moneys to the Bank of Montreal.

As there is no indorser on any of these cheques to whom notice of dishonour had to be given in order to hold them liable, and the rule laid down in *Cocks* v. *Masterman*(2), as explained and qualified in *Imperial Bank of Canada* v. *Bank of Hamilton*(3), cannot be invoked, I prefer to rest my judgment in the case of all of the three banks substantially upon the ground on which the Court of Appeal determined them, namely, that by paying the cheques to the persons presenting them the Bank of Montreal represented to them that the cheques had in fact the genuine signatures of the drawers, and if upon the faith of that implied representation the holders of the cheques received the moneys, as I think they did, and subse-

(1) (1903) A.C. 240. (2) 9 B. & C. 902.
(3) [1903] A.C. 49.

quently paid them away to the person who deposited the cheques with them or otherwise had their positions altered to their prejudice respectively, in consequence of such implied representations and in ignorance of the forgeries, they cannot be compelled subsequently by the drawee who paid the money on discovering that the cheques were forgeries to pay back the money.

For these reasons I think the appeal should be dismissed with costs, as well against the King as against the three several banks.

IDINGTON J.—I am unable to find any contract in the facts presented here that would preclude the Crown from the right to have rectification of such a clear mistake or series of mistakes as occurred in one or more of its subordinate officers assenting to a stated account and incidentally thereto, in some instances, assenting erroneously to the number of cheques alleged in the statement as correctly representing the number chargeable. I see nothing, but the possible something that might rest on the doctrine of estoppel, not binding on the Crown, that could be considered if the case were one between private persons or corporations, that in law could by any possibility support the appellant's defence to this action. I think, therefore, the appeal as to the Bank of Montreal against the Crown must fail.

In regard to the rights of the appellants to recover back from each of the third parties such respective sums as either got by reason of their presentation for payment of one or more of the forged cheques, there arise some more difficult questions.

Upon the facts presented in this case the right to recover cannot rest on any implied guarantee.

1907

BANK OF MONTREAL v. THE KING.

Idington J.

Nor do I see how the contention, set up here for the first time, that sub-section 2 of section 24 of the "Bills of Exchange Act," 1890, as amended by 60 & 61 Vict. ch. 10, entitles the appellants to recover can be maintained.

It seems to me that the liability covered by, if not created by, this sub-section is only applicable to the case of the forged indorsement of a genuine bill of exchange. It surely never was intended to be extended to the case of a forged bill, which in law is no bill.

The remaining ground taken on which to rest these claims is the right to recover money paid by mistake.

Let us bear in mind that the action for money had and received by means of which this right has usually been asserted, rests upon the principle that *primâ facie* it is against equity and good conscience that the party who received it should retain it, and remember further that in many instances this *primâ facie* case is answered by virtue of conditions existing at the time of payment, or subsequent events creating, so to speak, a countervailing equity that would make it against equity and good conscience to insist on the return of the money.

A mere messenger, for example, receiving money by mistake, and handing it over to his employer, occupies a position that no one would think should render him liable in an action for money had and received once he has in good faith discharged his duty of paying it over. The banker collecting bills of exchange is in somewhat the same position.

The whole business of bankers dealing with negotiable securities presents many phases somewhat analogous to the cases of agency, wherein it would be in-

equitable to ask for a return of the money from the very hand that received it.

The case here is clearly not that of an agent collecting, but of a bank discounting what was a forgery, but supposed to be a genuine bill, and placing to the credit of its customer the supposed value of such discounted bill.

But when the question of pure agency is thus eliminated how much nearer are we to a solution of the question before us?

Wherein does the actual position of the banker when he has, for a trifling percentage given credit for the proceeds of a discounted bill, substantially differ from that of the mere agent?

The case of the *East India Company* v. *Tritton*(1) was held to be a case of agency. But the reasoning upon which the court proceeded was that when the agent had received the money he had no anwser to his principal, then asking it from him.

Apart from special rules of business the banker may have relative to particular accounts or classes of accounts, what answer can he make (to a demand by his customer for the money credited to him), in the absence of all knowledge or means of knowledge of fraud, or wrong, and in face of the fact that the discounted bill has been paid him, and the assurance thus been given by the drawee that the bank may rely on it? When the nature of the banker's business is thus considered, his position in such a matter (even when he is not acting as a mere agent), is such that he can but seldom be supposed to have the money, paid him by mistake, remain with him. The equity to recover it back soon ceases, as a general rule. The attempts

(1) 3 B. & C. 280.

1907

BANK OF MONTREAL v. THE KING.

Idington J.

to harmonize the requirements, in this regard, of reason and justice, with settled rules of law as set forth in decided cases, may not have been uniformly successful.

I will not venture upon the unnecessary task, where so many have failed, of formulating as was done in *Cocks* v. *Masterman*(1) a hard and fast rule applicable to all cases of the kind.

I have no doubt, however, that there are many cases, including those in question here, where the delay in discovery and consequent demand for rectification, coupled with change of position by reason of such delay, and the recipient banker having paid over in good faith, and in due course of business the moneys received in payment of forged bills, would render it manifestly unjust that the bankers who were in duty bound to pay such bills, if genuine, and made the mistake of assuming them so, should recover as claimed here.

The case of *The Imperial Bank* v. *Bank of Hamilton*(2) has clearly rendered the hard and fast rule laid down in *Cocks* v. *Masterman*(1) no longer a safe guide, in the wide form there given, and possibly shaken some other cases.

The result, however, leaves untouched the reasoning and principles of law upon which such equities as arise here rest, and I think furnish an answer to the appellants' claims in question.

It enables us to affirm that, in law, there is a wide distinction between the cases, where of necessity the money paid by mistake must pass from the hand receiving it, and the cases where it has not and by reason of the nature of the dealing is not intended to do so.

(1) 9 B. & C. 902.

(2) (1903) A.C. 49.

The Imperial Bank had in fact paid away its money to the forger before it presented the forged cheque to the Bank of Hamilton.

The case did not give rise to any such equities as exist here.

The judgment, as I read it, implies that notice of the mistake must be given within a reasonable time, and before loss has been occasioned by the delay in giving it.

I need not repeat the fact in question here bearing upon these points, for they are so fully and clearly set forth by Mr. Justice Anglin in his judgment as to render further attempted elucidation of them useless.

I think the appeals should be dismissed with costs.

MACLENNAN J. concurred with Girouard J.

DUFF J.—I agree for the reasons stated by Chief Justice Moss in the court below.

Appeal dismissed with costs.

Solicitors for the appellant: *Gormully, Orde & Powell.*

Solicitors for the respondent,

His Majesty, the King: *Barwick, Aylesworth, Wright & Moss.*

Solicitors for the respondent,

The Quebec Bank: *Nellis, Matheson & Thompson.*

Solicitors for the respondent,

The Sovereign Bank of Canada: *Belcourt & Ritchie.*

Solicitors for the respondent,

The Royal Bank of Canada: *MacCraken, Henderson & McDougal.*

1907

*Feb. 25, 26.
*Feb. 28.

JOSIAH GILBERT ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Criminal law—Practice—Crown case reserved—Reserved questions—Dissent from affirmance of conviction—Appeal—Jurisdiction—Criminal Code, 1892, *ss.* 742, 743, 744, 750—*R.S.C.* (1906), *c.* 146, *ss.* 1013, 1015, 1016, 1024—*Admission of evidence—Res gestæ.*

Evidence of statements made by a person, since deceased, immediately after an assault upon him, under apprehension of further danger and requesting assistance and protection, is admissible as part of the *res gestæ,* even though the person accused of the offence was absent at the time when such statements were made. *Reg.* v. *Beddingfield* (14 Cox 341); *Rex* v. *Foster* (6 C. & P. 325) and *Aveson* v. *Kinnaird* (6 East 188) followed.

Statements not coincident, in point of time, with the occurrence of the assault, but uttered in the presence and hearing of the accused and under such circumstances that he might reasonably have been expected to have made some explanatory reply to remarks in reference to them, are admissible as evidence.

On the trial of an indictment for murder the evidence was that the deceased had been killed by a gun-shot wound inflicted through the discharge of a gun in the hands of the accused and the defence was that the gun had been discharged accidentally.

Held, that, in view of the character of the defence and the evidence in support of it, there could be no objection to a charge by the trial judge to the jury that the offence could not be reduced by them from murder to manslaughter but that their verdict should be either for acquittal or one of guilty of murder.

Two questions were reserved by the trial judge for the opinion of the court of appeal but he refused to reserve a third question, as to the correctness of his charge on the ground that no objection to the charge had been take at the trial. The court of appeal

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

1907

GILBERT
v.
THE KING.

took all three questions into consideration and dismissed the appeal, there being no dissent from the affirmance of the conviction on the first and third questions, but one of the judges being of opinion that the appeal should be allowed and a new trial ordered upon the second question reserved. On an appeal to the Supreme Court of Canada,—

The majority of the court, being of opinion that the appeal should be dismissed, declined to express any opinion as to whether or not an appeal would lie upon questions as to which there had been no dissent in the court appealed from, but it was held,—

Per Girouard J.—That the Supreme Court of Canada was precluded from expressing an opinion on points of law as to which there had been no dissent in the court appealed from. *McIntosh* v. *The Queen* (23 Can. S.C.R. 180) followed. *Viau* v. *The Queen* (29 Can. S.C.R. 90); *The Union Colliery Company* v. *The Queen* (31 Can. S.C.R. 81) and *Rice* v. *The King* (32 Can. S.C.R. 480) referred to.

APPEAL from the judgment of the Supreme Court of the North-West Territories, affirming the conviction of the appellant at the trial on an indictment for murder, upon a reserved case stated by the judge who presided at the trial.

The case reserved was stated by the trial judge, Mr. Justice Newlands, as follows:—

"STATED CASE."

"The above named Josiah Gilbert was charged before me with the murder of one Barrett Henderson on or about the 15th day of August, A.D. 1906, near Regina in this judicial district. The accused pleaded not guilty and was tried before me with a jury at Regina on the 13th, 14th, 15th and 16th days of November, 1906, and was convicted and sentenced to death by hanging at Regina on the 18th day of January, 1907.

"At the trial the annexed evidence was admitted after being objected to by counsel for the accused.

1907

GILBERT v. THE KING.

"After the verdict the counsel for the accused applied to have the following questions reserved and I have decided to reserve the same under section 937 of the Criminal Code for the opinion of the court.

"1. Were the statements of the deceased made while running towards Dick and Koch and thereafter on joining them admissible?

"2. Were the statements made by the deceased to McKinnon on arriving at the house on the deceased's farm admissible?

"Said counsel for the accused also applied to have the following question reserved:—

"3. Was the learned trial judge right in stating to the jury in his charge that there was no evidence to justify them in reducing the verdict from murder to manslaughter and that the case warranted only a verdict of murder or not guilty?

"In my charge to the jury I said, 'As far as manslaughter is concerned the Code states that culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation. As far as this case is concerned there has been absolutely no evidence put before you of provocation. As far as I can see in the case there is nothing that has been given in evidence that would justify a reduction of this charge from murder to manslaughter. The verdict as far as I can see can either be one of not guilty, or that of guilty of murder. Those are the only two verdicts, as far as I can see, that are open before you.'

"No objection was taken to this charge at the trial so I declined to reserve this question."

"Regina, December 14th, 1906."

"H. W. NEWLANDS, J.S.C."

1907

GILBERT v. THE KING.

After hearing the arguments of counsel, the court, in banc, affirmed the conviction, the opinion of the court being unanimous as to the first and third questions. Mr. Justice Wetmore dissented from the opinion of the majority of the court as to the points of law involved in the second question.

His Lordship Chief Justice Sifton and their Lordships Justices Newlands and Stuart concurred in the following opinion delivered by His Lordship Mr. Justice Harvey.

HARVEY J.—"The accused was charged with murder and tried by my brother Newlands with a jury and convicted, and the matter now comes before this court by way of a reserved case as to the admissibility of certain evidence which was given on the trial.

"Two men were passing near the scene of the alleged murder about the time it was supposed to have been committed and their attention was drawn to the accused whom they saw running with something in his hand, which they took to be a gun and which the subsequent evidence shews was a gun. At almost the same moment they heard a shout and saw the deceased apparently fleeing from the accused and waving his hands and calling to them to stop. The gun was dropped, but the pursuit continued until the deceased reached the witnesses, and on his way to them and when reaching them, he shouted more than once, 'Hold on, hold on; he shot me and he will shoot me again. Hold on, boys, hold on.' The first question which is reserved is whether the evidence of these statements was properly admitted, and I am of the opinion that this question should be answered in the

1907

GILBERT v. THE KING.

affirmative. Apart altogether from whether the words were uttered in the presence of the accused, it appears to my mind clear that the circumstances, including the utterance of the words used, were so closely connected with the shooting as to be properly admissible for, although the witnesses in question did not hear the sound of a shot, another witness did hear such sound and almost immediately after saw the two men running as they were when they first attracted the attention of the two witnesses first mentioned.

"The strongest case which could be referred to against the admissibility of this evidence was *Reg.* v. *Bedingfield*(1), in which Chief Justice Cockburn refused to receive the evidence of a statement made by the deceased to a person whom she met after coming out of the house where the accused was and where the murder was alleged to have been committed. It is easy to see a difference in principle between the two cases. In the present case there was a continuity of circumstances of which the shooting was part and in which the accused was a participant, which did not exist in the *Bedingfield Case*(1). So that for the purpose of this case it is not necessary to dissent from Chief Justice Cockburn's view though some of the text writers, Taylor, par. 583; Phipson, p. 49, express the view that he interpreted the rule too strictly.

"In *Rex* v. *Foster*(2) the court, consisting of three judges, held as admissible a statement made by the deceased in answer to a question by a witness who did not see the act which was the cause of the death but came up after. This case appears to have been accepted as authoritative, and the principle is given by Taylor, par. 583, as follows: "The principal points

(1) 14 Cox 341.

(2) 6 C. & P. 325.

for consideration are, whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object or to form in conjunction with it one continuous transaction."

"It appears to me beyond question that the present case falls within this principle and the authority of *Rex* v. *Foster*(1).

"The second question reserved is as to the admissibility of evidence of an expression of the deceased at a later time and in no way connected with the *res gestæ*. An exchange of conveyances was being made by the deceased and the accused, and the witness states that while the deceased was being helped by him across, he turned around and saw the accused who was about five or six feet behind, whereupon 'he made a big jump into the buggy and said, 'Don't let him knife me."

"This utterance appears to me to be nothing more than an unequivocal exclamation indicating fear of injury from the accused on the part of the deceased. The principle on which an exception to the rule that hearsay evidence is inadmissible is made in the case of statements made in the hearing of an accused, or in a civil case in the hearing of an opposite party, is that he has an opportunity of denying it, and if he fails to do so, it is some evidence as against him of the truth of the statement. When one considers that the utterance in question is not a statement of fact at all and is not susceptible of denial by the accused, it is at once evident that the principle has no application and at the same time the principle of exclusion as hearsay has no application. The question appears to

(1) 6 C. & P. 325.

1907

GILBERT v. THE KING.

me to be one then simply of whether the state of mind of the accused in this respect is material, and if it is, there is no rule as far as I am aware that requires the exclusion of this remark. It seems to me that the evidence of the witness when he said that when deceased saw accused near him 'he made a big jump into the buggy' stands in exactly the same position as the evidence of what deceased said, for each indicates the same thing, viz., fear of accused, and nothing more except that the spoken words are less equivocal than the act.

"The charge is one of deliberately shooting the deceased while the defence is that the shooting was purely accidental. If it were shewn that after the shooting the state of mind of the man shot were one of friendliness to the accused, it surely would be deemed to have an important bearing on the question in issue, and in the same way evidence indicating aversion and fear have as important a bearing in the opposite direction. Wigmore, in his work on Evidence, points out very fully the difference between the admission of utterances as proof of the truth of the facts stated and their admission to prove a state of mind which he terms their circumstantial use as opposed to the other or testimonial use, and states, in par. 1790, that to the use circumstantially the hearsay rule makes no opposition 'because the utterance is not used for the sake of inducing belief in any assertion it may contain.'

"For the reason stated I am of opinion that this evidence was properly admitted.

"A third question, though not reserved, was argued by counsel, viz., that the learned judge erred in charging the jury that there was no evidence to justify them in finding a verdict of manslaughter.

"No one gave evidence of the actual shooting except the accused himself, and his evidence and evidence of admissions made by him before the trial was the only evidence of the actual occurrence. These all concurred in maintaining that the shooting was purely accidental. If the jury had believed this evidence, the only verdict they could have found would have been one of acquittal; but if they did not believe it, the only conclusion from the evidence was that the shooting having been established the intention to effect the natural consequence of the act existed and that the act was one of murder. It is quite easy to see that a hypothesis could be advanced that the actual facts made the case one of manslaughter, but that the accused, being the only eye witness of the shooting, determined to concoct a story which would enable him to escape the consequence of even that act; but this would be simply a hypothesis, and the jury were bound to bring in a verdict on the evidence and not on hypothesis. I am of opinion that the judge's charge was right in this respect.

"In the result therefore the learned trial judge's rulings on the two questions reserved and on the other question which was argued should be confirmed and the conviction should be affirmed."

The opinion of Mr. Justice Wetmore was delivered, as follows:—

WETMORE J.—"I agree with my brother Harvey that the evidence of the statements made by the deceased Henderson to the witnesses Koch and Dick while coming towards them and after he arrived there was properly admitted as being part of the *res gestæ*. I also agree that there was no misdirection in the case.

1907

GILBERT v. THE KING.

But I am of opinion that the statement made by the deceased and testified to by McKinnon, namely, 'Don't let him knife me,' was improperly received in evidence. This statement was offered in evidence as a statement made in the presence and hearing of the accused and only upon that ground. It was not pretended that it was admissible on any other ground.

Evidence of this character is admissible because the jury or judge of fact is able to draw an inference from the conduct, the language, or the silence of the other party in whose presence and hearing the statement is made. Evidently, if the statement was not heard by such party, no inference could be drawn from his conduct, language or silence. In this case I may say that any reference that might be drawn was to be drawn from the silence of the accused. In order to render such testimony admissible I think that the judge ought to be thoroughly satisfied that the party accused heard the statement. I will concede that, ordinarily, if it is established that the statement was made in the presence of the accused and that he was at such a distance at the time that the statement would likely be heard by him, this would be sufficient to admit the evidence of the statement. But if the circumstances are of such a character that render it possible that the statement might not have been heard by him or render it doubtful whether it was heard by him, evidence of the statement ought not to be received. In this case the witnesses Koch and Dick were not very far distant from where the deceased and the accused were at the time the statement was made, and I think they would have been likely to hear it. Now, if they did not hear it, I think it is open to doubt whether the accused heard it. I am not prepared, however, to state that I would

hold that the evidence of this statement was improperly received if there was nothing further in the case than what I have stated. But it was developed at a subsequent stage of the proceedings that the accused was hard of hearing, and he distinctly swore that he did not hear the statement made by the deceased and testified to by McKinnon. This state of facts having come out, in my opinion rendered the testimony of McKinnon as to the statement inadmissible, or in other words improperly received. It is urged that inasmuch as the testimony when received was admissible, it is not rendered inadmissible by testimony subsequently given. I dissent from that proposition. If testimony of this character is received under a mistaken apprehension of facts it must be considered none the less inadmissible if future developments of facts shew that it ought not to have been admitted. In a case of that sort I am of opinion that either the jury should be discharged from giving a verdict or the objectionable testimony expressly withdrawn from their consideration by the trial judge. I am inclined to think that the latter course would have been quite sufficient for the purpose. It was further urged that no substantial wrong or miscarriage was occasioned by the admission of this testimony. I cannot accede to this proposition either. It is very difficult to state what will or will not influence the mind of a juryman. The remark 'Don't let him knife me' had no direct reference to the shooting; it must be remembered that when the remark was made the accused had no gun with him and a remark such as 'Don't let him shoot me' would not be pertinent as he had no means of shooting. The words, 'Don't let him knife me' might be pertinent however, and it was a remark from which a juryman might

1907

GILBERT v. THE KING.

infer 'Don't let this man who shot me, as I told you, knife me.' Nor can I bring my mind to the conclusion that this was a mere exclamation of fear alone. Doubtless it was an exclamation of fear, but it was an exclamation which not only expressed fear but expressed fear of the accused. I am of opinion, for the reasons above stated, that the conviction should be quashed and a new trial ordered."

Chrysler K.C. and *James Balfour* for the appellant. The statutory provisions affecting the case are to be found in the "Criminal Code, 1892," sections 742, 743, 744 and 750, and in the new Code as consolidated in the Revised Statutes of 1906, sections 1013, 1015, 1016 and 1024.

The court of appeal, the Supreme Court of the North-West Territories, in banc, was not unanimous in affirming the conviction, Mr. Justice Wetmore being in favour of allowing the appeal and ordering a new trial; therefore, we comply with the condition of section 742 of the old Code. We come to this court upon a judgment as entered there and we appeal against the affirmance of the conviction by a judgment which was not unanimous; it is of no consequence what might have been the individual reasons of any of the judges for their opinions which led to that judgment.

We refer to the *Queen* v. *Cunningham* (1), which is referred to in *McIntosh* v. *The Queen* (2), by Taschereau J., at page 185. The question has been since discussed in the case of *Viau* v. *The Queen* (3), in the

(1) Cout. Dig. 401; 18 N.S. Rep. 31; Taschereau Criminal Law (3 ed.), page 866.

(2) 23 Can. S.C.R. 180.

(3) 29 Can. S.C.R. 90.

judgment of the court by Taschereau J. In the present case the third question, although not reserved, was argued and decided in the court below which treated the point of procedure as having been waived. See also *Rice* v. *The King*(1), per Strong C.J.

We rely upon *Reg.* v. *Bedingfield*(2), on which Lord Cockburn subsequently wrote a pamphlet which will be found in the Law Journal for 1880, at page 5. See also Best on Evidence(3). Archbold in his work on Criminal Evidence, concludes that *Reg.* v. *Bedingfield*(2), was affirmed by the decision in *Goddard's Case*(4). See also remarks on *Rex* v. *Foster* (5), in Roscoe on Criminal Evidence(6), and cases discussed at pages 48 and 49; *Reg.* v. *McMahon*(7); *Eastman* v. *Boston & Maine Railroad Company*(8); *Vicksburg and Meridian Railroad Company* v. *O'Brien*(9), and Greenleaf on Evidence(10), at pages 192 and 262.

Latchford K.C. for the respondent.

CHIEF JUSTICE:—The appellant in this case was tried at Regina, Province of Alberta, in the month of November, 1906, and found guilty of the murder of one Barrett Henderson; thereupon he was sentenced to death.

The learned judge before whom the case was tried, at the request of counsel for the prisoner to reserve some questions as to the admissibility of evidence,

(1) 32 Can. S.C.R. 480.
(2) 14 Cox, 341.
(3) 10 ed., p. 410.
(4) 15 Cox 7.
(5) 6 C. & P. 325.
(6) 12 ed., pp. 23, 24.
(7) 18 O.R. 502.
(8) 165 Mass. 342.
(9) 119 U.S.R. 99.
(10) Vol. I., 16 ed.

1907

GILBERT v. THE KING.

The Chief Justice.

stated a special case for the opinion of the court of appeal. The questions reserved for the opinion of the court were:

1. Were the statements of the deceased made while running towards Dick and Koch and thereafter on joining them admissible?

2. Were the statements made by the deceased to McKinnon on arriving at the house on deceased's farm admissible?

The counsel for the accused also applied to have the following question reserved:

3. Was the learned trial judge right in stating to the jury in his charge that there was no evidence to justify them in reducing the verdict from murder to manslaughter and that the case warranted only a verdict of murder or not guilty?

The judge in the case, as reserved, says:

In my charge to the jury I said: "As far as manslaughter is concerned the Code states that culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation. As far as this case is concerned there has been absolutely no evidence put before you of provocation. As far as I can see in the case there is nothing that has been given in evidence that would justify a reduction of this charge from murder to manslaughter. The verdict, as far as I can see, can either be one of not guilty or that of guilty of murder. Those are the only two verdicts, as far as I can see, that are open before you.

No objection was taken to this charge at the trial so I declined to reserve this question.

The court of appeal, Wetmore J. dissenting, held that the statements made by the deceased to McKinnon on arriving at the house on the deceased's farm were admissible. The court was unanimously of opinion that the statements made by deceased while running towards Dick and Koch and after joining them were properly admitted and also that there had been no misdirection.

A question was raised here as to whether an appeal

lies to this court on the question reserved as to which there was no dissent in the court of appeal, but as we all agree that the appeal should be dismissed we do not think it necessary to express any opinion on that point of practice nor as to whether or not the question of misdirection was ever properly before the court below. Section 1016, Criminal Code; *McIntosh* v. *The Queen*(1).

The first statement of the deceased was made immediately after the assault. The only evidence as to the actual shooting was given by the accused, but a witness, Vine Brooks, heard the sound of a shot and immediately afterwards saw two men whom she describes as running away from the barn one apparently pursuing the other. Koch and Dick to whom the statement admitted in evidence was made were passing on the highway not far from the barn in which the fatal shot was fired. When first seen by the witnesses the accused was running through the field with something in his hand, which subsequent evidence shews was a gun, and, almost immediately, their attention was drawn to the deceased who was running from the accused towards them shouting, as they afterwards ascertained, for protection. The pursuit continued, although the gun was dropped by the accused, until the deceased reached the witnesses when he shouted to them several times as he approached—

> Hold on, hold on, he shot me and he will do it again; hold on boys, hold on.

When Koch and Dick were examined their evidence as to what occurred under these circumstances when the deceased approached them and immediately there-

(1) 23 Can. S.C.R. 180, 185.

1907

GILBERT v. THE KING.

The Chief Justice.

after when with them in the vehicle was objected to. The trial judge held it to be admissible and his ruling was sustained by the unanimous judgment of the court of appeal, and, as was intimated at the close of the argument here, we entertain no doubt that the evidence was properly admitted.

At the trial, in the court of appeal and at the argument here, counsel for the accused relied in support of their objection on the case of *Reg.* v. *Bedingfield*(1), wherein the admissibility of this kind of evidence was discussed and Cockburn, C.J. excluded all testimony of declarations after the act was done. This ruling was much criticized at the time and led to a vigorous discussion of the whole subject by Judge Pitt Taylor, in England, and Professor Thayer, in the United States, in the course of which the chief justice issued a pamphlet in defence of his ruling wherein he defines the term *res gestæ*:

> Whatever act, or series of acts, constitute, or in point of time immediately accompany and terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final completion, or its prevention or abandonment,—whether on the part of the agent or wrong-doer in order to its performance, or on that of the patient or party wronged, in order to its prevention,—*and whatever may be said by either of the parties, during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive,—as e.g., in the case of flight or applications for assistance,—form part of the principal transaction, and may be given in evidence as part of the res gestæ, or particulars of it.*

There can be no doubt that under this definition the statement of the deceased to Koch and Dick would be admissible as

(1) 14 Cox 341.

having been used under the apprehension of further danger and when asking for assistance and protection even if the accused was absent.

It will be observed further that in the *Bedingfield Case*(1) when the woman Eliza Rudd came out of the house with her throat cut all action on Bedingfield's part had ceased and she was not fleeing as in the present case from her assailant.

In *Rex* v. *Foster*(2), the court, consisting of three judges, held as admissible a statement made by deceased in answer to a question by a witness who did not see the act which was the cause of the death but came up after.

The case of *Aveson* v. *Lord Kinnaird*(3) bears strongly upon the point, Park J. and Patterson J. concurring. In that case Lord Ellenborough said

if at the time she fled from the immediate personal violence of the husband I should admit what was said.

The admissibility of the second statement to McKinnon is not so clear. It was made under these circumstances: After the deceased running up to Koch and Dick in the road where they were joined by Gilbert had given his first explanation of the shooting and asked for their protection; the parties then present separated, Koch and Gilbert going to the latter's barn to get his team while Dick and the deceased went over to the shack in which Henderson lived with his hired man McKinnon who, on their arrival, very naturally asked for an explanation of the occurrence which has not been given in evidence. Subsequently, however, Gilbert appeared on the scene with Koch; then ensues a conversation with McKinnon during the

(1) 14 Cox 341.
(2) 6 C. & P. 325.
(3) 6 East 188.

1907

GILBERT v. THE KING.

The Chief Justice.

course of which Gilbert attempted to explain that the shooting was due to an accident. The deceased who was being placed in a buggy, to be conveyed to the hospital at Regina for medical treatment, perceiving the accused who stood about six feet away from him made a jump exclaiming, "Don't let him knife me."

It has been argued that this statement of the deceased is not admissible as part of the *res gestæ* not being coincident in point of time with the main facts to be proved. However that may be we are all of opinion that the words spoken on this occasion are admissible on the ground that they were uttered in the presence and hearing of the accused, and under such circumstances, in the light of what he had previously stated to McKinnon, that he might have been reasonably expected to make some answer or remark in reply thereto or explaining that his proximity to deceased did not involve any such danger as he seemed to feel.

The presumption, even taking the previous statement of counsel as to the condition of accused's hearing as a fact, would be that he might reasonably be presumed to have heard. And the learned and careful trial judge has in the exercise of a discretion vested in him decided the preliminary fact and allowed the evidence on the ground that the necessary conditions had been fulfilled.

The later statement of accused when giving evidence denying having heard the statement, could not have any effect on the previous ruling or become a test of its correctness.

The charge in view of the character of the defence and evidence in support of it cannot be complained of in so far as we can express an opinion in the ab-

sence of the text of the charge which is not before us.

There was no case of culpable homicide of less degree than murder presented on the evidence. And the accident testified to by the accused would have, if credited, entitled him to acquittal.

The appeal should be dismissed.

GIROUARD J.—Following the decisions of this court in *McIntosh* v. *The Queen* (1); *Viau* v. *The Queen*(2); *The Union Colliery Co.* v. *The Queen*(3); *Rice* v. *The King*(4), I feel that I have no jurisdiction to express any opinion upon the points of law involved in questions one and three. It was decided in those cases that no appeal lies to this court on questions as to which there was no dissent in the court of appeal. For that reason I agree that the appeal must be dismissed as to those two points.

As to the second question, I concur in the reasons given by the learned Chief Justice. I wish to add merely a word. The trial judge was undoubtedly the sole judge as to the admissibility of the statement or exclamation to McKinnon. He could not suppose that the prisoner, when standing within four or five feet, did not hear it. When, subsequently, the prisoner, being examined, disclosed the fact that he did not hear the deceased, the counsel for the prisoner does not appear to have requested the trial judge to leave the veracity of this statement to the jury. Perhaps he did, and it may be that the judge left the question to the jury. We have no means of knowing. At all events, the point is not reserved, and is not even

(1) 23 Can. S.C.R. 180.
(2) 29 Can. S.C.R. 90.
(3) 31 Can. S.C.R. 81.
(4) 32 Can. S.C.R. 480.

1907

GILBERT v. THE KING.

Girouard J.

mentioned by the learned judge. I, therefore, believe that, as to this second question also, the appeal should be dismissed.

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

Appeal dismissed.

Solicitor for the appellant: *James Balfour.*

Solicitors for the respondent: *Latchford & Daly.*

THE SHIP "D. C. WHITNEY" (DEFENDANT) ..... APPELLANT;

AND

THE ST. CLAIR NAVIGATION COMPANY AND THE SOUTHERN COAL AND TRANSPORTATION COMPANY (PLAINTIFFS) ..... RESPONDENTS.

1906
*Nov. 20, 21.
1907
*Feb. 19.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA TORONTO ADMIRALTY DISTRICT.

Admiralty law — Foreign bottoms — Collision in foreign waters — Jurisdiction of Canadian courts.

A foreign vessel passing through waters dividing Canada from the United States under a treaty allowing free passage to ships of both nations is not, even when on the Canadian side, within Canadian control so as to be subject to arrest on a warrant from the Admiralty Court.

A warrant to arrest a foreign ship cannot be issued until she is within the jurisdiction of the court.

Quœre. Have the Canadian Courts of Admiralty the same jurisdiction as those in England to try an action *in rem* by one foreign ship against another for damages caused by a collision in foreign waters?

Judgment of the Exchequer Court, Toronto Admiralty District (10 Ex. C.R. 1) reversed, Idington J. dissenting.

APPEAL from a judgment of the local judge for the Toronto Admiralty District of the Exchequer Court of Canada (1) in favour of the plaintiffs.

The action arose out of a collision between the ship "D. C. Whitney" and the ship "Monguagon,"

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

(1) 10 Ex. C.R. 1.

1906

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

owned by the St. Clair Navigation Company, and upon which there was a cargo of coal owned by the Southern Coal and Transportation Company, on the night of the 28th of November, 1901, at the Baltimore & Ohio coal dock at Sandusky in the State of Ohio, one of the United States of America.

The following facts are admitted:

(*a*) The ship "Monguagon" was lying securely fastened at the Baltimore & Ohio dock with about three-quarters of a cargo of coal which she had taken on board awaiting to be supplied with the balance of the cargo on the following morning.

(*b*) The "D. C. Whitney" was coming into the Port of Sandusky light claiming to be making for the same dock.

(*c*) The steamer "D. C. Whitney" came into collision with the "Monguagon," her bow striking the stern of the "Monguagon" with sufficient force to part her line and drive her some three hundred feet forward where her bow went ashore and she shortly afterwards sank.

(*d*) The owners of the "Monguagon," the St. Clair Navigation Company, are an incorporated company, incorporated under the laws of the State of Michigan. The ship "Monguagon" is an American bottom; the other plaintiff, the Southern Coal and Transportation Company, is an incorporated company, incorporated under the laws of West Virginia, and the Inland Star Transit Company is a company incorporated under the laws of the State of Ohio and the ship "D. C. Whitney" is an American bottom.

The plaintiffs in their claim allege that the collision occurred through the negligent navigation of the "D. C. Whitney;" the "Monguagon" was lying along-

side the dock and having all necessary lights required in that condition displayed.

The "D. C. Whitney" for a defence claim that the trial court had no jurisdiction to try the case for the reasons before set forth that the ship and parties to the action were all Americans and the collision occurred in American waters; that the damages were due to inevitable accident; that the "Monguagon" did not exhibit proper and sufficient lights and did not have a proper and sufficient watch on deck making an effort to avoid the collision or to lessen the consequences thereof; and that the "Monguagon" had no business at the said dock and should not have been there.

The ship "D. C. Whitney" was found in Canadian waters and she was seized on a process issued out of the Toronto Admiralty District of this court, by a marshall of this court or by a deputy marshall of this court at or near Amherstburg, Ontario, and in Canadian waters.

The defendants, the owners of the "D. C. Whitney," consequently provided a bond in which the bondsmen submitted to the jurisdiction of this court and agreed to abide by any judgment that might be recovered against the ship "D. C. Whitney."

The local judge held that the court had jurisdiction and the action was tried, resulting in a judgment for plaintiffs, the damages being assessed by a referee. The defendants appealed to the Supreme Court of Canada.

W. D. McPherson for the appellants. The learned counsel contended first that the jurisdiction of the Exchequer Court in Admiralty was derived wholly from "The Colonial Courts of Admiralty Act, 1890,"

1906

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

and "The Canada Admiralty Act, 1891," and was thereby limited to cases of Canadian ships in Canadian waters. Secondly, even if the court had jurisdiction it should not be exercised in a case like this where the parties could resort to their own courts, citing *The "Ida"*(1); *The "Belgenland"*(2).

Hanna for the respondents.

THE CHIEF JUSTICE.—I am of opinion that the appeal should be allowed.

DAVIES J.—This was an action in the Toronto Admiralty District of the Exchequer Court of Canada, commenced on the 30th day of October, 1902, by a writ of summons *in rem* against the ship "D. C. Whitney."

The summons was subsequently amended as to the names of the plaintiffs and a copy of the amended summons served upon the captain of the ship on the 24th day of November, 1902, some two days after she had been arrested under a warrant of arrest.

The affidavits which led the warrants were sworn to in Detroit, United States, on the 10th, 12th and 13th days of November, by the respective secretaries of the two plaintiff companies, the owners, respectively, of the ship and cargo of the ship "Monguagon."

These affidavits simply state that the plaintiffs, respectively, had claims as owners of the ship and cargo against the ship "D. C. Whitney" for damages for collision in a certain amount and that the collision occurred on the 27th November, 1901, in the port

(1) 1 Lush. 6.

(2) 9 Fed. Rep. 576; 114 U.S. R. 355.

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Davies J.

of Sandusky in the State of Ohio. No statement is made that the ship "D. C. Whitney" was, at the time of the making of the affidavit, in Canadian waters or within the Canadian jurisdiction, or that its owners or any of them resided or were domiciled in Canada nor could, of course, any such statement have been made, under the facts.

The warrant itself must either have been issued on the 13th or 14th of November, as the ship was arrested under it on the latter date. The warrant is not returned with the papers, it appearing by the affidavit of the officer who arrested the ship that he served the original as well as the copy upon the captain.

As appears by the record and as admitted on the argument, both ships were American bottoms and registered and owned in the United States, and the Inland Star Transit Company, the owner of the ship "D. C. Whitney," as also the plaintiff companies, were all American corporations carrying on their business in the United States.

At the time of her arrest, the "D. C. Whitney" was on a voyage from one port of the United States to another port of that country, and had actually entered the River Detroit on her voyage and was arrested in that river nearly opposite the Town of Amherstburg.

The channel of the river where she was sailing when arrested was on the Canadian side of the international line and ran between the Canadian shore and an island on the river belonging to Canada and was, in fact, Canadian waters.

The ship had not entered and it was not pretended that she was entering any Canadian port or

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Davies J.

haven or doing anything else than exercising her right of innocent passage up the river.

The waters where she was arrested are by the seventh section of the Ashburton Treaty of 1842 made between Great Britain and the United States declared to be equally free and open to the ships and vessels of both countries. The article reads as follows:

> Article VII. It is further agreed that the channels in the River St. Lawrence on both sides of the Long Sault Islands and of Barnhart Island, the channel in the River Detroit on both sides of the island Bois Blanc, and between that island and both the American and Canadian shores, and all the several channels and passages between the various islands lying near the junction of the River St. Clair with the lake of that name, shall be equally free and open to the ships, vessels and boats of both parties.

The ships which collided, therefore, being both American ships, the owners companies incorporated in the United States, not doing business in Canada and the collision having occurred in the harbour of Sandusky, State of Ohio, the only pretence for the exercise of jurisdiction on the part of the Toronto Vice Admiralty Court was the presence of the "D. C. Whitney" in one of the channels of the Detroit River, on the Canadian side of the international boundary line, while in the exercise of her right of innocent passage along that channel on her voyage to and from American ports. The defendant appeared under protest and subsequently pleaded that the court had no jurisdiction under the circumstances, and again, at the opening of the trial, formally took the objection, the evidence being received subject to it.

The local judge in admiralty held, after argument, that he had jurisdiction to hear the case, relying upon certain English decisions quoted in his judgment, which do not, however, in any way touch the ground on which I think our judgment must rest.

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Davies J.

Without, however, dealing with the general jurisdiction of the admiralty or expressing any opinion as to whether or not "The Canadian Admiralty Act of 1891" imposes any limitation upon the extent of the jurisdiction of the court thereby created, as argued by Mr. Macpherson, or whether the powers and jurisdiction of this colonial court are not rather those conferred by the Imperial Act, "The Colonial Courts of Admiralty Act, 1890," as maintained by the judgment appealed from, I am of the opinion that, under the circumstances of this case, jurisdiction never attached.

This is not a personal action but one entirely *in rem,* and while it is enough to confer jurisdiction in an action *in rem* that the property should be in the lawful control of the state under the authority of which the court sits, and that the sovereign authority has conferred jurisdiction as stated by Lord Chelmsford in the case of *Castrique* v. *Imrie*(1), at page 446, I do not think that the "D. C. Whitney," a foreign ship, while sailing from one port of a foreign country to another port of that country and passing through, in the course of her voyage, one of the channels declared by convention or treaty to be equally free and open to the ships, vessels and boats of both countries, can be said to be within any jurisdiction conferred on any Canadian court by the sovereign authority in the control of the Dominion of Canada, even though that channel happened to be Canadian waters.

If the *res* had entered into any of the ports, harbours or havens of Canada for safety, shelter or commercial purposes of any kind, she might then fairly be said to have submitted to any Admiralty jurisdiction the courts of Canada had a right to exercise

(1) L.R. 4 H.L. 414.

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Davies J.

towards her. In such case, the point argued by Mr. Macpherson as to the limited character of the admiralty jurisdiction conferred upon the Exchequer Court of Canada might have arisen.

In the facts and circumstances of this case I do not think it does arise. At the time the suit originated and the summons *in rem* issued, and also when the affidavits which led the warrant issued and at the time of the issue of the warrant also, I cannot see how there could be a pretence of jurisdiction. Neither owners nor ship were, at any of these times, within the limits of Canada or the waters thereof. The wrongdoing for which she was arrested took place (if at all) in a foreign port a year previously, and the ship's arrest while exercising her right of innocent passage in Canadian waters in accordance with the treaty rights of her nation from one foreign port to another cannot, of itself, justify the attempted exercise of jurisdiction.

The summons, the affidavits and the warrant were all issued and made before even the ship came into Canadian waters.

To uphold this exercise of jurisdiction, therefore, we should be obliged to hold that the moment after a collision takes place in any part of the world, whether within or without the British Empire, each and every vice admiralty court throughout the Empire is immediately seized of jurisdiction over the case and a suit may be instituted in any of them at the instance of one of the colliding ships against the other even if both are foreign bottoms and owned by foreigners and the collision took place in a foreign port or river and that, in such suit, warrants to arrest may be issued ready to be executed in case the offending ship after-

wards came within the territorial waters of the colony, Dominion or place whose court so assumed jurisdiction and that such warrants may be executed afterwards if and when such ship comes within those waters.

Nay, we would have to go further and hold that the arrest of the ship would be legal even if she was exercising her right of innocent passage through the territorial waters.

I do not think that that is the law. Jurisdiction only attaches over the *res* when it comes or is brought within the control or submits to the jurisdiction of the court and not till then. Such jurisdiction does not exist against a ship passing along the coast in the exercise of innocent passage or through channels or arms of the sea which, by international law or special convention, are declared free and open to the ships of her nationality, unless expressly given by statute. I do nor think it is possible successfully to argue that the right to initiate an action, make affidavits and issue a warrant, can exist before the foreign ship even comes within our territorial jurisdiction.

The jealousy with which Parliament legislates on such a question is to be seen in the legislation of the Imperial Parliament, section 688 of the "Merchant Shipping Act, 1894," authorizing a foreign ship which has injured a *British* ship or property in any part of the world, to be *detained* if found within three miles of the coasts of the United Kingdom, so as to compel her owners to abide the result of any action in the courts of that kingdom. See observations of Lord Chief Justice Cockburn in *The Queen* v. *Keyn*(1), at pages 218 and 219.

(1) 2 Ex. D. 63.

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Davies J.

But where is the law authorizing the arrest or detention of a foreign ship while passing within three miles of the coast for injuries alleged to have been done by such ship to another foreign ship outside of the British territorial waters? Supposing one of the great foreign transatlantic steamers collided with an American ship while going out of the harbour of New York on her way to Antwerp or some other foreign port. Could it be contended seriously that the several vice admiralty courts of Nova Scotia and Newfoundland immediately became seized of jurisdiction over the collision and that the owners of the injured ship could at once issue warrants of arrest in these courts and seize the liner if, perchance, she came afterwards within three miles of the coast of either that province or that colony? And yet the argument as to jurisdiction in this case, if sound, must go that far. It does not seem to me, with great respect, open to serious argument.

It is not necessary to discuss the question raised as to the jurisdiction of the court over the owners of the *res* until and unless they were served within the jurisdiction because no service was made or attempted to be made on such owners nor indeed was any application made to serve them abroad.

The plaintiff relied upon his arrest of the ship as sufficient to give jurisdiction so far as the *res* was concerned.

On the question of personal service out of the jurisdiction, the cases seem conclusive that neither under the old law nor under the rules under the "Judicature Act" would the court have possessed jurisdiction *in personam* over the owners of the *res,* unless they could have been served within the territorial jurisdiction

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Davies J.

and this even in the case where a foreign ship collided with and injured a British ship on the high seas. *In re Smith* (1), and *The "Vivar"* (2).

I am of opinion that the affidavits were made and the warrants issued in the case before jurisdiction attached; that the arrest was, under the circumstances, illegal; and that the defendant, appearing under protest and objecting to the jurisdiction, was within and protected his rights; that the Toronto Admiralty District Court had no jurisdiction over the case and that the case, on that ground, should have been dismissed.

The appeal should be allowed with costs in both courts.

IDINGTON J. (dissenting).—The appellant has been properly found, as I think, by the learned judge, upon the facts, liable for having run against and sunk a vessel of respondents moored in the harbour of Sandusky, in the State of Ohio.

The proceedings were had in the Toronto Admiralty District of the Exchequer Court of Canada. They were begun by a writ of summons issued on the 30th of October, 1902, and the appellants' ship was arrested on the 14th of November, 1902, by the sheriff of Essex, in the Province of Ontario and within the Toronto Admiralty District.

The arrest was made in one of the channels of the Detroit River. The channel in question is wholly within Canada, being bordered both on the east and west sides by Canadian soil.

The appearance was entered herein by the appellants' solicitor on the 29th November, 1902. He served

(1) 1 P.D. 300. (2) 2 P.D. 29.

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Idington J.

the plaintiffs' solicitors with notice thereof, of which, omitting the style of cause, the following is a copy:

> TAKE NOTICE that I appear under protest for the ship "D. C. Whitney," of Cleveland, Ohio, in this action.
>
> Dated at Toronto, this 29th day of November, A.D. 1902.
>
> W. D. MCPHERSON,
> Solicitor for defendant.

The preliminary act of the respondents is dated at Windsor, 8th December, 1903. That of the appellant is not dated and appears as a notice addressed to the respondents and their solicitor. It contains no allusion to the protest as to jurisdiction.

The statement of claim was delivered 22nd February, 1904. The statement of defence was delivered 7th March, 1904. This latter begins by alleging in the first five paragraphs in continuation of the protest lodged in these proceedings where an appearance was entered that each of the plaintiff companies were incorporated under the laws of a state of the United States, with head offices there, and neither was authorized according to the laws of Ontario to do business there or in the Dominion and, in fact, did not do so; that the plaintiffs' ship is of American register; the appellant ship also of that register, and the company owning her incorporated under the laws of Ohio with head office there and transacting no business in the Dominion of Canada; that from the time of the occurrence in question the appellant had at all times been engaged, to the knowledge of the plaintiffs, in her usual occupation of sailing in American waters, in the Great Lakes, between American ports, and that if plaintiffs or either had preferred a claim, it could and would have been adjudicated upon without delay

in a court of competent jurisdiction in the United States of America.

Then, the sixth paragraph submits that, under the circumstances, the honourable court had no jurisdiction to try and adjudicate the action; or if the court should be of the opinion that it had jurisdiction, then, in the discretion of the court, it should refuse to exercise it or compel appellants to submit thereto.

The seventh paragraph says

> if the honourable court upholds the jurisdiction to try and adjudicate this action, then, for a defence, but under protest as aforesaid, the company owning the appellant say, etc., etc.

The defence on the merits is then in the remaining part of such seventh paragraph and eleven following paragraphs fully set forth.

The trial took place at Windsor on 29th, 30th and 31st of March, 1905.

At the opening of the trial appellants' counsel objected to going on with the trial and submitted that the court had no jurisdiction to investigate the matter *as the collision took place in American waters and the two ships in question were American ships.*

The court ruled that the evidence be taken subject to the question of jurisdiction. The trial proceeded and appellants' counsel took part contesting ably every foot of ground.

Mr. Justice Hodgins, the local judge in admiralty, having thus tried the case, of which he was in this way seized, gave judgment on the 21st of June, 1905, holding he had jurisdiction, condemning the appellant to pay damages and referring the assessment thereof to the local deputy registrar of the court at Windsor, who was also directed to tax the costs.

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Idington J.

Formal judgment was entered of record on the 22nd of June, 1905, in accordance with these findings.

On the 5th of December, 1905, the inquiry was begun before the local deputy registrar at Windsor, as directed, in presence of counsel for each of the parties and was so continued that day and the next and on the 5th February, 1906.

On the 14th February, the local deputy registrar made his report to the judge. By that he assessed the damages in favour of one plaintiff at $3,751.35 and the other at $463.60, and certified that, in his opinion, the plaintiffs were entitled to the costs of the reference.

It is to be observed that the counsel for appellant not only appeared and contested vigorously throughout the trial before the learned judge, after having made the protest above set forth, but also appeared before the local registrar on the reference, *without any further protest or objection* and contested the claim in every way that he might be entitled to do as if he had never protested.

It is further to be noted that no motion was ever made to set aside the proceedings or any of them.

Appellants' counsel contented himself with resting upon his protest and now avers that he did so advisedly and gives as his reason therefor that if he had made an application to the learned judge to set the proceedings aside and failed he could not hope to carry an appeal therefrom to this appellate court, but hoped to bring the question of jurisdiction here by appeal from the findings when his case would be appealable as of right.

Instead, however, of doing so at the earliest opportunity, he took another chance throw by appeal-

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Idington J.

ing from the report to the learned local judge, who heard his appeal, evidently at length, and, as he remarks, on several questions not set forth specifically in the notice of appeal.

The learned judge, on the 25th April, 1906, gave judgment on this appeal, reviewing at length the many contentions set up by the appeal and made some unimportant allowances that appellant got the benefit of.

Formal judgment with these variations was entered accordingly, on the 25th April, 1906. From that judgment the appellant brings this appeal and seeks thereby a judgment declaring all these proceedings null and void by reason of want of jurisdiction in the court below.

It certainly is not a contention to be encouraged in the slightest degree, after all the vast expense the respondents have incurred, largely increased no doubt by the contentious part, taken as of right, by the appellant.

The appellant chose to run the risk of doing so advisedly and not by accident or pressure for want of time or opportunity to adopt the simpler course of moving to set aside the proceedings.

The appellant had a fairly arguable case that might have been presented to the local judge at the earliest stage of the case for the exercise of the discretion of the court. He asks us to act or to direct the learned judge to act upon that discretion now.

I apprehend that, under such circumstances, there can be no possible right to appeal on the ground of want of jurisdiction unless it appear clear beyond all peradventure, that the court appealed from had no jurisdiction whatsoever.

On the 1st day of July, 1891, 54 Vict. (Imp.), ch.

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Idington J.

27, known as the "Colonial Courts of Admiralty Act, 1890," was brought into force in Canada.

Section 3 provides as follows:

3. The legislature of a British possession may by any colonial law,—

(*a*) Declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession, to be a colonial court of admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit territorially or otherwise the extent of such jurisdiction; and—

(*b*) Confer upon any inferior or subordinate court in that possession such partial or limited admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit;

Provided that any such colonial law shall not confer any jurisdiction which is not, by this Act, conferred upon a colonial court of admiralty.

The Canada "Admiralty Act, 1891," was enacted pursuant to the powers given in the section I have just quoted. Sections three and four thereof enact:

3. In pursuance of the powers given by "The Colonial Courts of Admiralty Act, 1890" aforesaid, or otherwise in any manner vested in the Parliament of Canada, it is enacted and declared that the Exchequer Court of Canada is and shall be, within Canada, a colonial court of admiralty and as a court of admiralty shall, within Canada, have and *exercise all the jurisdiction conferred by the said Act* and by this Act.

4. Such jurisdiction, powers and authority shall be exercisable and exercised by the Exchequer Court throughout Canada and the waters thereof, whether tidal or non-tidal, or naturally navigable or artificially made so, and all persons shall, as well in such parts of Canada as have heretofore been beyond the reach of the process of any vice-admiralty court, or elsewhere therein, have all the rights and remedies in all matters (including cases of contract and tort and proceedings *in rem* and *in personam*), arising out of or connected with navigation, shipping, trade or commerce, which may be had or enforced in any colonial court of admiralty, under the "Colonial Courts of Admiralty Act, 1890."

It is within the meaning of the last two sections and all that they imply that we must seek for the jurisdiction of the learned trial judge to try this cause

and for the proceedings in his court leading up to the trial.

One or two observations may be made upon these sections as it is urged that in some way or other the Exchequer Court of Canada, in the exercise of its powers, must be held to be upon a different footing from the High Court in England. I am unable to find any reasons for such a contention. The jurisdiction of the court must be exercised within Canada. Again it must be exercised throughout Canada and the waters thereof. These terms designate the place *within* which the jurisdiction is to be exercised; and the place within which the appellant came and was seized clearly and indisputably was within the area thus designated. That by no means implies that the offences or the contract out of which the necessity for proceedings may arise, *in rem* or *in personam,* must have taken place within Canada or upon the waters thereof.

The subject matter with which the court thus constituted has to deal may arise out of or be connected with

> navigation, shipping, trade or commerce which may be had or enforced in any colonial court of admiralty under the "Colonial Courts of Admiralty Act, 1890."

Then turning to sub-section two of section 2, of the "Colonial Courts of Admiralty Act, 1890," we find it reads as follows:

> 2. (2) The jurisdiction of a colonial court of admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the colonial court of admiralty may exercise such jurisdiction in like manner and

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Idington J.

to as full an extent as the High Court in England, and shall have the same regard as that court to international law and the comity of nations.

Could anything be more comprehensive? Could language be more explicit in the way of authorizing the constitution of a court within Canada for the purpose of exercising this jurisdiction? It seems to me as if to all intents and purposes the result is just the same as if the Parliament and sovereign power that enacted the "Colonial Courts of Admiralty Act, 1890," had constituted the Canadian court a branch of the High Court in England, for convenience sake, to exercise the powers which that court might at the time of the passing of the Act have been endowed with.

Whether the limits of that jurisdiction are fixed as found by the law when the Dominion exercised the right thus conferred and established courts within that right or are liable to their being shifted from time to time as the parent parliament may determine by later legislation regarding the Admiralty Division of the High Court of Justice, without express reference to the colonial courts, may become an interesting inquiry. But, in the view I take of this case, the necessity for following such inquiry and considering the "Merchant Shipping Act" of later date, does not arise.

Having thus looked at the nature of the jurisdiction thus existing here, we can suppose this arrest of the appellant to have taken place on the Thames in England, and all I have related to have transpired in the Admiralty Division of the High Court in England, instead of in the court below; is it for a moment conceivable that, having ignored the uniform practice of moving against the proceeding, as was done in the

case of *Borjesson & Wright* v. *Carlberg*(1), and the second case, page 1322, or *The "Jassy"*(2), or *The "Vivar"*(3), and numerous other cases, an appellant would be heard after trial and reference, as here, to raise questions of the jurisdiction, unless in a case where the jurisdiction never could have existed?

There are cases of such absolute want of jurisdiction in a court that nothing can cure and bind. There are cases of another sort where the objection must be taken by plea or otherwise and be determined or waived. This case is, I conceive, of the latter.

Suppose the appellant had been acquitted in these proceedings and the respondents' action dismissed and they had in such event sought a remedy for their alleged grievance in an American court having jurisdiction, could they have hoped to succeed? Could the appellant, in such case, not have set up the supposed dismissal in the court below as a bar?

Most assuredly it seems to me so. And yet, on what could such a plea of *res judicata* rest if there was no jurisdiction in the court below?

The objection to the jurisdiction was rested neither in pleading, nor at trial, nor in factum here upon the narrow ground of practice that a ship in motion cannot or ought not to be proceeded against, but upon the broad ground that a foreign ship having offended by colliding with another foreign ship in foreign waters could not be proceeded against when it came within Canadian waters. At this stage appellant ought not to be heard on either of the narrow grounds of practice.

It is said, however, that actual seizure and taking

(1) 3 App. Cas. 1317. (2) 95 L.T. 363.
(3) 2 P.D. 29.

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Idington J.

possession is necessary to exercise of jurisdiction. Is that so? The case of *The "Nautik"* (1) seems against such notions of jurisdiction. See also cases cited therein.

The relation of seizure to jurisdiction is fully and learnedly set forth by Jeune J. in the case of *The "Dictator"* (2), at pages 311 and 312.

The need for seizure was to enforce the appearance and bail.

And we find here bail was given and in form it of necessity must be, as it was, as appears by bonds on file, as given without being under protest.

I conclude that, once there was bail given, and an appearance made, though under protest, but that protest not followed up by an effective motion to challenge the jurisdiction, there was an end to the question of jurisdiction in the case, by thus passing the means by which it might have been raised, if there existed on the facts a case in which jurisdiction could, in any circumstances, be asserted.

In short, all that is involved in these objections and considerations are merely matters of practice and in no way going to the root of jurisdiction and should not prevail here or be heard here.

That brings us to the consideration of the law upon which such jurisdiction rests.

The case of *The "Diana"* (3), and of *The "Courrier"* (4), in the same volume at page 541, seem absolutely decisive of the matter.

In the former case Dr. Lushington says:

> The decision of this question depends mainly, if not exclusively, upon the construction which the court ought to give to the seventh

(1) [1895] P.D. 121.
(2) [1892] P.D. 304.
(3) Lush. 539.
(4) Lush. 541.

section of 24th Vict. ch. 10:—"The High Court of Admiralty shall have jurisdiction over any claim for damages done by any ship." The object of the Act, as stated in the title and preamble, is "to extend the jurisdiction" of the court. The seventh section, which deals with the subject of damage, does not particularize any circumstances to which the jurisdiction of the court is to extend, but gives the court jurisdiction in the widest and most general terms; and there can be no doubt that the present case falls within those terms.

He then proceeds to point out that but for this amending Act the former state of the law might have presented some difficulties in the way of asserting jurisdiction over matters arising in foreign waters.

And in the latter case it appears that, as here, the parties were both foreigners and the collision in question had arisen in the Port of Rio Grande and thus beyond British waters.

I am unable to distinguish this case from those and I may observe that but for the attack made upon the assertion of jurisdiction based upon proceedings arising from the service or arrest in a place where presumably the vessel was in motion, I should have satisfied myself with the citation of these authorities, the statute on which they rest and the relations of the jurisdiction in the court below to that statute.

The recent case of *The "Jassy"*(1), is noteworthy though not a decision of the point raised here, yet shewing a recognition of the law I rely on as if undoubted. The "J.," a vessel owned by the State of Roumania, on 30th April, 1905, collided with the Greek steamship "C." at Sulina, in Roumania. On the 18th March, 1906, the owners of the "C." arrested the "J." in an action *in rem*. The "J." was then at Liverpool.

Through inadvertence an appearance was entered

(1) 95 L.T. 363.

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Idington J.

unconditionally. It was shortly afterwards discovered that the Roumanian Government claimed *The "Jassy"* was one of the public vessels of that state and that this fact had been overlooked by the agents who instructed the appearance. A motion was made to dismiss the action on the ground of the public ownership by a foreign state of the arrested vessel and it was dismissed accordingly.

No one seems to have thought of taking any such objection to the jurisdiction as is raised here, though the facts there presented exactly the identical case before us, except that the arrest was made in port and that port Liverpool instead of in the waters of a Canadian channel, as herein, whilst the vessel is *assumed, but not proven to have been in motion.*

Indeed, it seems so far from that to have been assumed by solicitors, counsel and the court (as a thing impossible of question), that, but for this fact of a foreign state owning the vessel, the action was brought in a court having jurisdiction to try it.

I have perused a great many cases and authorities cited and arising from such citation, that seem to me quite irrelevant to the questions in issue here.

This case rests upon the maritime lien that arises from a collision and attaches to the offending vessel by virtue of such collision and the resulting damages in favour (to the extent thereof) of the owners of the innocent and damaged vessel.

Wherever the offender goes, she is subject to that lien, and it becomes the duty of the court having such right to enforce a lien of that kind whenever the offender comes within its jurisdiction, upon being applied to, to take steps to enforce the lien. To refuse it would be a denial of justice.

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Idington J.

Yet questions might in the exericse of such jurisdiction so arise that a proper discretion might lead to refusal to exercise it.

The collision with a vessel which is the property of a foreign power, even if that vessel be a wrong-doer, is by the comity of nations removed from any such jurisdiction, unless at the request of the foreign power so owning.

The right to navigate carries with it no exemption from such jurisdiction.

The right and the duty of an admiralty court are not in conflict.

The cases of crimes committed abroad or of damages resulting to persons therefrom, or of sailors' rights to assert their claims for wages, or of material men or others supplying necessaries to a vessel, and all cases in the nature of actions *in personam,* stand on an entirely different footing from the cases arising from collision and consequent lien *ipso facto,* as it were. The cases of life salvage is specially provided for in 24 Vict. ch. 10, sec. 54. In all these cases no lien exists as is shewn by the cases of *The "Two Ellens"*(1); *The "Veritas"*(2), and other cases though the result of adjudication upon such claims may create a lien.

The wrong done by the trespasser in a collision case may in law and fact transfer by means of the resulting lien arising from the act so done virtually the most valuable interest in the vessel from the owner to the persons entitled to the lien. It seems idle in such a case to set up the possible wrong to be done such an offender by her arrest and ignore the rights

(1) L.R. 4 P.C. 161. (2) [1901] P.D. 304.

1907

THE SHIP "D. C. WHITNEY" v. ST. CLAIR NAVIGATION CO.

Idington J.

her wrongdoing has created and vested in others suffering therefrom.

I think the appeal should be dismissed with costs.

MACLENNAN and DUFF JJ. concurred in the judgment of Davies J.

Appeal allowed with costs.

Solicitor for the appellants: *W. D. McPherson.*

Solicitor for the respondents: *J. W. Hanna.*

THE TORONTO RAILWAY COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

ALEXANDER MULVANEY AND MARY MULVANEY (PLAINTIFFS) } RESPONDENTS.

1906
*Nov. 23.

1907
*Feb. 19.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Street railway—Excessive speed—Gong not sounded—Contributory negligence—Damages.

A passenger on a street car in Toronto going west alighted on the side farthest from the other track and passed in front of the car to cross to the opposite side of the street. The space between the two tracks was very narrow and seeing a car coming from the west as she was about to step on the track, she recoiled, and at the same time the car she had left started and she was crushed between two, receiving injuries from which she died. In an action by her father and mother for damages the jury found that the company was negligent in running the east bound car at excessive speed and starting the west bound car and not sounding the gong in proper time. They found also that deceased was negligent, but that the company could, nevertheless, have avoided the accident by the exercise of reasonable care.

Held, that the case having been submitted to the jury with a charge not objected to by the defendants and the evidence justifying the findings the verdict for the plaintiffs should not be disturbed.

The plaintiffs should not have had the funeral and other expenses incurred by the father of deceased allowed as damages in the action.

APPEAL from a decision of the Court of Appeal for Ontario maintaining the verdict at the trial in favour of the plaintiffs.

---

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

1906

TORONTO RY. CO. v. MULVANEY.

The Court of Appeal in delivering judgment stated the facts as follows:

The action was brought by the plaintiffs, the father and mother of Lillian Mulvaney, to recover damages for the death of their daughter, caused by the alleged negligence of the defendants in operating their street railway.

The facts are, that on the 23rd March, 1905, at about 8 o'clock in the evening, the deceased, Lillian Mulvaney, aged twenty years, was a passenger on a west bound car, and alighted from it at the corner of Queen and Soho streets, intending to go south across Queen street. She, after alighting, crossed in front of the car which she had left, and while upon or near the south track was struck by an east bound car and so injured that she shortly thereafter died. She was seen by the motorman in charge of the west bound car to pass in front of his car, but she was not apparently seen by the motorman of the east bound car until he was within about 12 feet away. After the deceased had passed in front of the car which she had left it was moved forward a short distance. The east bound car was then coming at a rapid rate estimated by some of the witnesses up to as high as twenty miles an hour. When upon the devil strip, as it is called, that is the strip between the two tracks, or possibly when she had actually stepped upon the south track, some one shouted and this apparently directed her attention to the rapidly approaching east bound car, with the result that she attempted to retrace her steps, but her retreat had then been cut off by the forward movement of the west bound car.

On the trial questions were submitted to the jury which, with their answers, were as follows:

1. Were the injuries which resulted in the death of Lillian Mulvaney caused by any negligence of the defendants?

Answer—Yes.

2. If so, wherein did such negligence consist?

Answer—The excessive rate of speed of the eastbound car, and the moving of the westbound car and the gong not sounding in the proper time.

3. Or, were such injuries caused by the negligence of the said Lillian Mulvaney?

Answer—No.

4. Was the said Lillian Mulvaney guilty of contributory negligence?

Answer—Yes.

5. If you find that she was guilty of contributory negligence, nevertheless could the defendants by the exercise of reasonable care have avoided the accident?

Answer—Yes.

6. If the plaintiffs are held to be entitled to succeed, at what sum do you assess the damages?

Answer—$2,000.

First—To Alexander Mulvaney, $500.

Second—To Mary Mulvaney, $1,500.

The trial judge directed a verdict to be entered for plaintiff with the damages assessed by the jury. An appeal to the Court of Appeal was dismissed.

Nesbitt K.C. for the appellants. The negligence immediately causing the accident was that of the plaintiff, and the fifth question should not have been left the jury. *Butterfield* v. *Forrester*(1); *Davies* v. *Mann*(2); *Halifax Street Railway Co.* v. *Inglis*(3).

The damages were excessive considering the relation of the deceased towards support of the family. Certainly the funeral expenses should not have been allowed. *Clark* v. *London General Omnibus Co.*(4).

(1) 11 East 60.
(2) 10 M. & W. 546.
(3) 30 Can. S.C.R. 256, 261.
(4) 22 Times L.R. 691, reversing 21 Times L.R. 505.

1907

TORONTO RY. CO. v. MULVANEY.

N. Ferrar Davidson for the respondents. The findings of the jury should not be disturbed, especially when approved by the Court of Appeal. *George Matthews Co.* v. *Bouchard*(1); *Grand Trunk Railway Co.* v. *Rainville*(2); *Price* v. *Ordway*(3).

The gong was not sounded on the east bound car nor the speed slackened both of which were required by the rules. See *Grand Trunk Railway Co.* v. *Hainer* (4); *Sims* v. *Grand Trunk Railway Co.*(5).

The damages assessed were reasonable and proper. *St. Lawrence & Ottawa Railway Co.* v. *Lett*(6); *Lambkin* v. *South Eastern Railway Co.*(7); *Johnston* v. *Great Western Railway Co.*(8).

The judgment of the court was delivered by

MACLENNAN J.—Action for damages for the death of their unmarried daughter, by the father and mother of Lillian Mulvaney, about twenty years of age, who was injured so that she died within a week afterwards, by the appellants' cars at a street crossing in the City of Toronto. Verdict of the jury of $500 for the father and $1,500 for the mother. Judgment affirmed by the Court of Appeal, and now appealed to this court.

The deceased was a passenger on a car of the defendants going west upon Queen street, intending to alight, and to go south upon Peter street, which intersects Queen street on its south side. The time was about eight o'clock in the evening of the 23rd of

(1) 28 Can. S.C.R. 580.
(2) 29 Can. S.C.R. 201.
(3) 34 Can. S.C.R. 145.
(4) 36 Can. S.C.R. 180.
(5) 10 Ont. L.R. 330.
(6) 11 Ont. App. R. 1; 11 Can. S.C.R. 422.
(7) 5 App. Cas. 352.
(8) [1904] 2 K.B. 250.

1907

TORONTO RY. CO. v. MULVANEY.

Maclennan J.

March. The line on Queen street is double tracked, the space between tracks being very narrow, little more than sufficient to allow meeting cars to pass each other with safety. The west bound car on which the deceased was riding ran upon the north track so that she required to cross the south track to go to Peter street. The company's practice is to stop at the near side of crossings, and passengers may alight either at the front or rear, but on the right or outer side of the car. The car in question stopped at the near side of Peter street; and the deceased alighted at the front of the car, and proceeded to cross in front of the car towards Peter street. At this moment another car was coming from the west on the south track, by which the deceased was struck and received the injury from which she died. The east bound tram passed at a high speed, and was not stopped until it had proceeded a number of car lengths eastward. The injuries to the deceased were about the head and feet, and she was found lying at the rear of the west bound car with one foot pinned under a wheel. There was evidence that when the deceased was about to step from the south track she recoiled and drew back seeing the east bound car approaching, and at that moment the west bound car started forward, the result being that she was crushed between the two.

After a very full and careful charge by the learned Chief Justice, questions were submitted to the jury, which, with their answers are as follows:

1. Were the injuries which resulted in the death of Lillian Mulvaney caused by any negligence of the defendants?

Answer—Yes.

2. If so, wherein did such negligence consist?

Answer—The excessive rate of speed of the eastbound car, and

1907

TORONTO RY. CO. v. MULVANEY.

Maclennan J.

the moving of the westbound car and the gong not sounding in the proper time.

3. Or, were such injuries caused by the negligence of the said Lillian Mulvaney?

Answer—No.

4. Was the said Lillian Mulvaney guilty of contributory negligence?

Answer—Yes.

5. If you find that she was guilty of contributory negligence, nevertheless could the defendants by the exercise of reasonable care have avoided the accident?

Answer—Yes.

6. If the plaintiffs are held to be entitled to succeed, at what sum do you assess the damages?

Answer—$2,000.

First—To Alexander Mulvaney, $500.

Second—To Mary Mulvaney, $1,500.

In submitting the questions the learned Chief Justice carefully explained to the jury the meaning of contributory negligence, and used the following language:

The question for you to consider is: Was it after all the negligence of the Street Railway Company, or was it her own negligence in going around the front of that car to cross when she ought to be, you would thing probably, and probably was, looking right west? No doubt she would be looking southerly also crossing the tracks, but one would think that she would be looking westward. However, if is for you to say. Then there is the minor degree of negligence, not exactly negligence causing the accident, but negligence which contributes to the accident which the law says disentitles people to recover. Our technical name for that is contributory negligence and it is not so high a degree of negligence as the negligence which I have just spoken of, but it is negligence which contributes to the accident in the sense that it is the proximate and immediate cause of the accident, even if somebody else may be at fault and commit a breach of duty. The defence argues that at any rate even if she was not guilty of negligence that caused the accident, she was guilty of negligence which contributed to the accident in the sense which I have mentioned, and that is the question which I am putting to you here. It goes on round in a circle again, and the law says that even though a person was guilty of contributory negligence, yet if the person or corporation which was guilty

1907

TORONTO RY. CO. v. MULVANEY.

Maclennan J.

of the original negligence could have prevented the accident the person is still entitled to recover. What is meant is this: We will assume there is a primary negligence on the part of the street railway, then you find there was such primary negligence. Then we will suppose, just for the sake of argument, that you find she was guilty of contributory negligence, that is to say, that she contributed to her own accident to such an extent that her negligence was the immediate cause of the accident, although the railway company was negligent. Then the question arises: Is there anything more that the railway could have done, notwithstanding her negligence, is there any secondary negligence which caused the accident, even though she was negligent? It is not very easy to make it clear. It is one of these legal matters that are a little involved, but I have endeavoured to make it as clear as it can be. What secondary negligence is there here? Nothing exactly of a definite nature, but the argument is that the car was not under proper control, and if it had been even when she was going into the danger, that it might have been averted; so that with reference to that fifth question if you find she was guilty of contributory negligence, nevertheless could the defendant, by the exercise of reasonable care, have avoided the accident?—The argument for the plaintiff still is that the two causes again came in there to make a secondary kind of negligence, namely, the alleged excessive rate of speed, and the moving of the westbound car, if those things existed.

No objection was taken to this charge by counsel for the defendants, except that after the jury's answers to the questions were received, Mr. Bain submitted that on those findings the judgment should be entered for the defendants, and that the contributory negligence of the deceased was such as to disentitle the plaintiffs to succeed.

That was the main ground of the argument before us. It was strongly pressed that the final and ultimate negligence which caused the accident was that of the deceased and that the fifth question was improper and tended to confuse the jury. We do not think there is anything in this objection having regard to the evidence and the careful explanation of the nature of contributory negligence which the learned Chief Justice had made in his charge. It is plain also that the jury

1907

TORONTO RY. CO. v. MULVANEY.

Maclennan J.

must have been led by the evidence to believe that but for the starting of the west bound car, when the deceased was, in the full view of the motorman of the car, in a place of great danger, having regard to the rapidly approaching car from the west, also in full view, the deceased would not have been hurt, notwithstanding her negligence.

The verdict, therefore, cannot be disturbed by reason of any objection to the manner in which it was presented to the jury.

It was also objected that the damages were excessive. But although they are large, I do not think them so excessive as to warrant us in setting the verdict aside.

It was, however, contended by counsel for the defendants, both in their factum and on the argument before us, that the damages allowed to the father ought to be reduced by a sum of $193, being the amount of the funeral and other expenses incurred by the father as a consequence of his daughter's death.

When evidence of these expenses was offered at the trial it was distinctly objected to by the defendants' counsel. Plaintiffs' counsel, however, supported his contention by the authority of a recent decision of *Clark* v. *The London General Omnibus Co.*(1), and to this authority the learned Chief Justice yielded and received the evidence.

In his address to the jury the learned Chief Justice told them that this part of the claim amounting to $193 was part of the damages, and belonged to the father and added:

> Then whatever small sum you like to add to that for him will be what you would give the father.

(1) 21 Times L.R. 505.

1907

TORONTO RY. CO. v. MULVANEY.

Maclennan J.

I think we ought to agree with defendants' counsel that this sum of $193 must have been included by the jury in the $500 allowed by them as the father's damages. That this was improper, and that the charge of the learned judge was wrong is now not disputed inasmuch as the decision followed by the learned judge at the trial has since been reversed by the Court of Appeal (1), and it has been decided that such expenses cannot be recovered in such an action.

If the point had been taken in the Court of Appeal, doubtless effect would have been given to it either by directing a new trial, or by deducting the sum of $193 from the sum allowed by the jury to the father. The objection not having been taken in the Court of Appeal, I think we cannot give effect to it.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondents: *Henderson & Davidson.*

(1) 75 L.J. K.B. 907; 22 Times L.R. 691; [1906] 2 K.B. 648.

1906
*Dec. 11-13.
1907
*Feb. 19.

JAMES HERBERT BARTLETT (PLAINTIFF) ..... APPELLANT;

AND

THE NOVA SCOTIA STEEL COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to land—Plan of survey—Evidence—Onus of proof—Findings of jury—Error—New trial.

Where it appeared that in directing the jury, at the trial, the judge attached undue importance to the effect of a plan of survey referred to in a junior grant as against a much older plan upon which the original grants of the lands in dispute depended and that the findings were not based upon evidence sufficient in law to shift the onus of proof from the plaintiff and were, likewise, insufficient for the taking of accounts in respect to trespass and conversion of minerals complained of.

Held, affirming the order for a new trial made by the judgment appeal from (1 East. L.R. 293), that in the absence of evidence of error therein, the older grants and plan must govern the rights of the parties.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1), setting aside the judgment entered upon the findings of the jury at the trial by Russell J. and ordering a new trial.

The judgment appealed from was rendered on an appeal from the judgment at the third trial of the action upon an order for a new trial affirmed by the Supreme Court of Canada(2) upon a former appeal.

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

(1) 1 East. L.R. 293.

(2) 35 Can. S.C.R. 527.

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

W. B. A. Ritchie K.C. and *J. J. Ritchie K.C.* for the appellant.

Newcombe K.C. and *Harris K.C.* for the respondents.

THE CHIEF JUSTICE.—This appeal must be dismissed with costs. I agree in the opinion of His Lordship Mr. Justice Maclennan.

GIROUARD J.—I concur in the judgment of Mr. Justice Maclennan.

IDINGTON J.—This case has been tried three times and the Supreme Court of Nova Scotia has directed a fourth trial and from that order the plaintiff, who secured last verdict, being his first success of the kind, appeals.

Thorough search for plans and proper means to produce them in evidence, and when produced, a supplementing of the evidence thus furnished by comprehensive surveys of river, side lines and rear lines, that would have applied, and so to speak, fitted the original plan to the ground, as it was settled upon, ought to have determined by one trial, once and for all, the questions in issue.

The angles and courses setting forth on this plan the many lots, are of such a character, and so varied, that the means of checking such surveys are abundant.

Unless the river is one of those that shifts its

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Idington J.

course every few years, the main courses of it furnish, I would suppose, a key to the whole.

It may be more amusing to follow the games of chance arising, from trying how little evidence, or what kind of evidence, may be available, admissible or effective in a case of this sort, than to settle down to a thorough investigation of the historical and mathematical problems I suggest.

The new trial has been granted because of misdirection by the learned trial judge in his charge to the jury.

It seems to me that the learned trial judge misunderstood the effect of what was said in the report of this case in 35 S.C.R. 527. All that this court had to do on that occasion was to dismiss an appeal against an order for a new trial. That duty done, and I conceive properly done, the court could not go further and direct anything. The remarks in doing so bound nobody. They might be considered of weight or not as an exposition of the law.

It is the decision of the case, and in that decision the determination of some point of law necessarily involved therein, that governs as a precedent, or binds in a new trial.

There was nothing of that kind in the remarks to which the learned trial judge attached so very much importance.

The parties were entitled to have had the new trial herein proceed as if the case had never been tried before. In such cases the less the jury hears of former trials or hints of former results, the better.

I am forced to conclude that the learned trial judge erred in referring to a part of the case, a possible turning point of the case, as decided here, and

as if the remarks made here on the point in question bound the jury unless and until the defendants had established something which might well have been impossible or inconvenient. It seems as if the learned trial judge detected the fallacy but felt bound, in a way he was not, by what transpired here.

Exception is taken also to the learned trial judge's charge relative to the north boundary of, or the location of the Finlay Cameron lot, and the alleged trespasses immediately north of it. The remarks made in regard to the river and Mount Horeb road as bearing on this branch of the case, certainly tend to produce an impression beyond what, after some consideration, I think is warranted by the evidence of McKenzie, which I will deal with later on.

Stripped of sophistries and needless verbiage, the mining lease in question here only attempts to give the right to minerals in the lands lying between Peter Grant's land on the north as granted to him, and the lands of James Fraser on the south, both being granted by the same patent, in the lease said to be in or of 1784, but in reality dated 3rd Nov., 1785.

This patent granted in all 3,400 acres to seventeen different grantees, but apportioned the land intended for each amongst the grantees, in quantities set forth in the habendum. The grant is expressly made of

> three thousand four hundred acres situate, lying and being on the East River emptying into Pictou Harbour, within the County of Halifax and province aforesaid and abutted and bounded according to the plan annexed, three thousand four hundred acres. And hath such shape, form and marks as appears by a plat thereof, hereunto.

The plan is thus incorporated with the deed. The width and area of each grant is marked on the plan corresponding to the area allotted by the patent to

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Idington J.

each grantee. As minerals, now in question, were not reserved to the Crown, the vacant space, appearing between the Peter Grant and James Fraser grants is all that was left for any miner's lease to operate on. In common with other vacant spaces, between the grants, according to this plan, it had not written across it anything to indicate the width or area.

According to the scale upon which this plan is drawn, there would be only thirty-five chains between these grants. And as by this plan appears, a grant ten chains wide, to Finlay Cameron, not so long as these grants in depth, from the river, but the same depth as plaintiff's lease, there would only be twenty-five chains width in this vacant space for this lease, though claiming 64.03 chains to operate upon.

I am unable to understand why, as suggested, but not proved, the measurement by scale of these vacant spaces should, necessarily, be unreliable.

The vacant spaces were doubtless left ungranted, as counsel conceded, because less desirable for settlement than others. It is hardly likely that such selection was left to the sole judgment of the surveyor. Each man would, for himself, by self or friends, I should say, judging from the greatly varying size of the grants, here laid out, have to decide that. No doubt there was much said and done in the way of investigating, and allotting before the settlement assumed the remarkable shape this plan indicates, and though the surveyor has not put down, on the plan, figures to indicate the areas of ungranted lands, it does not follow, he omitted to chain across them. It would be most remarkable, if the surveyor should have omitted to ascertain and report the width of these

intervening spaces, for the information of the Government, and the proposed settlers.

And when I apply the scale to the tier of parallel lots, on the west side of the river and the same scale to those opposite, and on the east side of the river, including vacant spaces in both cases, and in the latter case, going to the southerly line of the Fraser 350 acre grant, in making such a test, the results are such, after making allowances for the overlappings of the two blocks, on either side, as they appear on the plan, that I am convinced, that the whole plan was, *including vacant spaces,* worked out on a scale.

Such approaches to accuracy do not exist in some of the other numerous plans, before us, and such results are not merely accidental.

I am further unable to understand how the error, if error there be, in the width of this vacant space, can so enure to the plaintiff's benefit, as to entitle him on an investigation of the facts, as to the width, to have a jury told by the learned trial judge, at the close of the case, that a *primâ facie* case exists in plaintiff's favour.

I proceed to consider the story of this survey from the above mentioned grant down.

The improbable supposition that so wide an area would be passed, by those settlers, especially as we find it coveted, and settled afterwards, meets us at the first step in our investigation.

A vacant space at the north end of the same side was taken by one McDonald in 1803.

In 1811, John Holmes had granted to him the following part of the space now in question.

The lot described in the said plan number three on the said branch of the said East River, beginning at the upper bounds of lands

1907

BARTLETT
v.
NOVA SCOTIA STEEL CO.

Idington J.

claimed by a certain Alexander Grant, from thence to run north seventy degrees east, four hundred and seventy rods, along the line of Alexander Grant, thence south twenty degrees east sixty-eight rods or *until it comes to the farm lot of said Fraser,* thence south seventy degrees west *five hundred and twenty rods along the line of said James Fraser farm lot* until it comes to the river, thence following the several courses of said river down stream, until it meet the place of beginning containing in the whole two hundred acres.

And we find, at that time, no trace of any James Fraser farm lot, except the one which forms the southerly boundary of lands in this mining lease, unless we look at the deed in 1799 from the heirs of Finlay Cameron, to one James Fraser; the same man I imagine. Now it is as clear as anything possibly can be that the Holmes grant came south to one or other of these James Fraser lots. I will refer to this again presently, and possibly shew how an error occurred.

Who was the neighbor on the northerly side of Holmes? No one else than Alexander Grant, the son of Peter Grant, whose land was the northerly boundary of this vacant space and this mining lease.

And Alexander Grant is recognized, by this grant to Holmes, as a claimant in 1811, to the land next north of Holmes' grant, so much so, that his land was the northern boundary line of that surveyed out for Holmes. Nothing else happened until Alexander Grant, five years later, 25th January, 1816, got his claim finally recognized by the Crown granting him the following:—

Beginning on the eastern side of the east branch of the East River of Pictou, on the south eastern angle of Peter Grant's farm lot, from thence to run north seventy degrees east along the southern side line of said farm lot four hundred and seventy rods, thence south twenty degrees east on ungranted lands sixty-five rods, or until it *meets the north-eastern angle of John Holmes' lands,* thence south seventy degrees west along the northern side line of said lands *four hun-*

dred and eighty rods, or until it meets the river, thence by the different courses of the same down stream until it meets the place of beginning.

In an ordinary case, we would say that these two grants covered all the vacant space between the farm lot of James Fraser, the original grantee, and the southern line of Peter Grant now the subject of inquiry. But this is an extraordinary case.

If we take the farm lot of James Fraser to mean his own original grant, or the line of his acquisition from the heirs of Finlay Cameron, of his lot, the result is the same, for both had been granted by the Crown, without reserving such metals as now in question.

The two descriptions I copy clearly cover the vacant space. It is not a question of accuracy of measurements of width, for that is expressly provided against by the terms, in each case, used alternatively to the chains of distance; by the words in the first *"or until it comes to the farm lot of James Fraser";* and in the next grant "or until it meets the north eastern angle of John Holmes' lands." Generally speaking one would be unable to find any more space upon which there could be found anything for a further grant of the Crown to operate.

But here it is said, true that may be so, but we find there was according to the scaling of this plan only twenty-five chains to operate upon, and there must be an error, and as there was an error it must enure to the benefit of discoverers in a future century.

I think the ground of error can easily be found if we follow the surveyor along in the survey of Holmes' lot.

He ran along, as that shews, the south boundary

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Idington J.

of Alexander Grant's claim 470 rods. That took him seventy rods at least past the east end of Finlay Cameron's grant and, if allowance is to be made for the bend in the river, about fifty rods more. I say fifty rods, because there is that difference between the length of the north and south boundaries caused by the bend of the river. The surveyor crosses south to the farm lot of said Fraser. Being so far easterly beyond rear end of Finlay Cameron lot, are we to assume that he had in mind that lot? Fraser had acquired the lot from Finlay Cameron's heirs twelve years before. This is not expressed to be the line of *an extension of the north line* of Fraser farm lot, as assuming knowledge in the surveyor of the fact of this acquisition, it might have been well described to be. It is to the farm lot "or until it comes to the farm lot of said Fraser." Then he runs *from the extreme east point to which that had brought him* "along the line of said James Fraser's farm lot." How could he? Only one way, and that was *along the north line of the original James Fraser farm lot* which possibly shewed then blazed trees. And as he may not have known anything of the Finlay Cameron lot or Fraser's acquisition of it, he proceeded west in way he says. It is to be remembered there were only twenty-five chains between the Cameron and Alexander Grant lines and if the latter claimed two hundred acres, his southerly line would be only eighteen chains from James Fraser's original grant of farm lot. He sought a blazed line and found it, one chain further on. Instead of giving Holmes seventeen chains he would be giving him eighteen chains. That might appear as nothing in the woods, of any value.

Assuming such an error either discovered and rec-

tified or undiscovered, I cannot see how we can infer from either discovery and rectification or oversight of it, a widening of the space between Fraser and Peter Grant so as to find 64.03 chains to meet the needs of this lease.

The obvious thing is that two surveyors in 1811 and 1816, surveyed the very space in question and could not find even the width there previously supposed to exist.

It was only twenty-six years after the original survey was made and when the marks of that work could no doubt, in many places, if not in all, be traced on the ground, that this claim of Alexander Grant was recognized and this grant to Holmes shewing its recognition was made.

To discard evidence which all that, together with the grant, in 1816, confirming Alexander Grant's claim, furnishes because of an error of description, in one or other, that may involve at the worst a width of about eight chains and adopt another hypothesis that there was a width of 64.03 chains; enough for nearly four 200 acres farms of the length of Grant and Fraser farms; when the eyes, then looking on the ground, only found there a width for two at most, and not even that except by the error I refer to; seems to border on the absurd.

Yet we are told that there was the grant in this same patent, that gave Alexander Grant his land, of another part to James Fraser, and that it shews a width of eighteen chains including the Finlay Cameron lot. It plainly includes the latter. Its bounds are as follows:

> That certain tract of land marked "B" on the annexed plan containing three hundred acres and is abutted and bounded as follows,

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Idington J.

viz., northerly and easterly by the said John Holmes' lands and ungranted lands, southerly by lands heretofore granted him, the said Fraser, and westerly by the said east branch of the East River.

I fail to see how being bounded by Holmes' land on the north, this explains anything, in a way to help plaintiff. I observe it comes in the patent next after Alexander Grant's grant, and by reason thereof, as well as by the Holmes land, lying between, it could not disturb Grant in any way. James Holmes says this Fraser was the son. The language above quoted, written before he was born, fails to confirm his statement.

The issue of a grant to Fraser, including the land already granted Cameron, and claimed by him (Fraser), through Cameron, suggests speculation as to what was meant by this.

These lands were all subject to settlement duties and he may have desired confirmation in view of possible lapses both on his own part and that of Cameron. Or the fact may be that he had located too far south, and that it only shews one or two more blunders in this world.

The utmost that can be said if the plan of 1816 be absolutely correct is that there was a space of forty-one chains and twenty links between the southerly line of Peter Grant's grant and the northerly line of Fraser's 1785 grant. And out of this comes ten chains granted Finlay Cameron, leaving thirty-one chains and twenty links. To get this result lots, as laid down in the original plan, and this later one of 1816, have to be transposed to conform to a theory.

Surely if ever Crown surveys and grants conclusively settled anything, the inference to be drawn from this grant and plan and measurements thereon

is against this lease. In any event, it is left only thirty-one chains and twenty links to operate upon, instead of sixty-four chains and three links. Eight of these chains would be in the undiscovered, perhaps undiscoverable territory south of Holmes' lot, more probably south of Finlay Cameron's grant as Holmes comes up to that at least, and the remainder would be in Holmes' and Alexander Grant's territory.

When we apply these facts and considerations to the charge in question, what foundation had the charge to rest upon?

Is it not, with the greatest respect, obviously unfair to the defendants to have presented to the jury a presumption, existing at the close of the case, as against them, upon facts which left little further, they could do at this distance of time to shew their rights, when upon these facts the presumption or *primâ facie* case if it ever existed, had thus been dispelled.

What are the facts upon which presumption for appellant rests? He got a mining lease of lands surveyed by Holmes in 1872. Nothing came of the project upon which that was initiated, save and except a survey by him; a placing of stones, a marking of a maple tree; and a *fir tree supposed to be in the southerly line of Peter Grant's land;* and a survey or inspection in 1875 for a similar purpose, of which nothing came. In 1875 the stones were gone, but the maple tree stood, as also the fir. In 1889 the plaintiff came, and re-survey or inspection took place. But the maple had passed. Yet there was a stump supposed to be its stump. The plaintiff got the lease then, which is now in question.

This action began on the 12th July, 1900, and hav-

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Idington J.

ing been tried, this Mr. Holmes, who conceived the idea that there was such a wide area of mining land, yet vested in the Crown, appeared as a witness and told, that when he went to survey in 1872 he met Mr. William Grant, the grandson of Peter Grant, and questioned him. One is tempted to ask, why he should have inquired of Grant, what he, Holmes, born and brought up so short a distance away and bred to the profession of a surveyor probably knew so much better than Grant.

However, the following is what he relates as taking place:—

> Q. How do you find this particular point No. 1, was it at random? A. I went to William Grant. He owned the land. He told me I knew the line as well as he did. William Grant shewed me his north line * * * Having found what Grant told us was the north line, we took a line from the main road and extended it up to the top of the hill a quarter of a mile. We came across at right angles, twenty chains, what the grant called for * * * When we came to the twenty chains, Peter Ross and I told Grant that was the complement his grant gave him, and if he shewed another line we would go there. He said he claimed up to the Holmes line * * * When I shewed Grant where the twenty chains were, we told him we would go where he chose; he would not give us any line. We gave him his complement, and ran from there to the maple tree down at the river.

In 1875 Grant was evidently determinedly hostile and nothing he said then can be construed as any admission of anything.

Holmes, having acted upon this alleged admission of William Grant, we are told defendants are *bound* by what he said.

The Crown cannot any more than a private individual can go, by means of a surveyor armed with such powers as the law gives a surveyor, to execute a commission given him, and planting stakes where he

sees fit, create a presumption in favour of such line as the surveyor sees fit to adopt.

It is said, however, that this proceeding rests upon the admission of William Grant made in disparagement of his title under which the defendants claim.

The land spoken of, is not confined to the original Peter Grant lot, and if he or William had encroached upon neighbouring land to the north of the original north line, this answer could in no way affect this title even if such loose expressions can be of value as to a boundary line.

In fairness the whole conversation must be considered. In effect it seems to say "that is my north line and Holmes' line is my south line." No regard is paid in the statement to what the space covered, and the difference of title in the several parts of it.

The cases of *Mountney* v. *Collier* (1853) (1), and *Crease* v. *Barrett* (2), at p. 931, are all I find in regard to statements of boundary lines and that presented by former is a clear cut case of fact, not shewn here, and latter case is not unlike this.

I do not think such admission as made here can be a safe basis to rest the *primâ facie* case the learned trial judge directed the jury had been made here, and required to be rebutted or displaced.

But in the last trial the witness Holmes shifted his ground, and said he really believed, from what Alexander Grant had told somebody, in his presence in 1836, when he (Holmes) was a youngster sixteen years of age, that he had been mistaken and a line four chains or more further south, was the right line of Peter Grant's grant, and that would throw his south line that much further south.

(1) 22 L.J.Q.B. 124. (2) 1 C.M. & R. 919.

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Idington J.

I will deal presently with the plan he produced and spoke to, and another made by McKenzie, together, as the latter is founded on the former.

The plaintiff rested his case upon that evidence, and plan of Holmes, and after the defendants had given much evidence, as to what is known in the case as the elm tree line, respecting which I will say nothing, and other matters, Mr. McKenzie was called in rebuttal and testified to the correctness of a plan, that he produced, which was the result of his visiting the locality, under the guidance of Mr. Holmes in 1889. He spoke of a recent visit in 1901, to refresh his memory, I take it, and from which his impressions as set forth in the plan were confirmed.

I merely wish to deal with the plan, which is of the same general character as the plan produced by Mr. Holmes and to refrain from dealing at length with the evidence of McKenzie.

The remarkable feature of both, is that the lands in question have spread out and grown, in a way that is quite inconsistent with all I have related, as to the original plan and the plan annexed to the 1816 grants. There appear two new strips of land in both, and two new proprietors in the Holmes plan between the James Fraser original grant and the Holmes grant.

One of these is the Finlay Cameron grant, clearly covered in the grant of 1816 to Fraser, as part of his 300 acres, 72 rods in width, but now appearing south of and alongside the same.

Another is that of "Fraser Saddler grant 1816" lying between the James Fraser grant of 1816, and the Holmes grant, though the north line of the James Fraser 1816 grant is, as shewn above, bounded on the north by the same land.

If gross error existed, in widths originally expressed, as given them, I could understand an expansion of the Holmes and Alexander Grant's grant, which filled the whole vacant space in question.

If, for example, each of them had been found to have in fact, respectively, a width of twenty-seven chains, and twenty-six chains twenty-five links, instead of seventeen chains, and sixteen chains twenty-five links, respectively, their grants having minerals reserved to the Crown, and subject to such a mining lease as that in question, the lease would operate thereon.

Expansion of that sort I could conceive of, if evidence shewed it as possible, but I decline to accept intercalations of the sort put before us in plain violation of the descriptions given in the grant of 1816 without direct evidence. And to write across it words "granted 1816" when no such grant appears in the evidence is, to say the least, confusing.

There is a deed Ex. W.W.C. given by James Fraser Senior to James Fraser Junior on 9th February, 1816, fifteen days after the Crown grant of 1816 which certainly is, in light of what preceded it, a sort of puzzle. It appears in defendants' claim of title. It purports to cover 420 acres more or less. It has John Holmes' farm lot for north boundary

> for five hundred and sixty rods or until it comes to the rear line of said James Fraser Senior's farm lot from thence to run south twenty degrees east along said rear line one hundred and thirty rods or until it comes to the said line of said James Fraser Senior's farm lot, from thence to run south seventy degrees west along said line five hundred and ten rods until it comes, etc.

We have Holmes' farm lot, given in his grant, at five hundred and twenty rods, along his southerly

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Idington J.

line; so this Fraser deed runs forty rods past it. We have Fraser's lot given at 660 rods (see plan) and the given area confirms that as correct. And we have the entire Fraser line of that date, consisting of two parcels, one 18 chains and other 22 chains wide or a total of thirty chains.

What is this rear line? What is the southerly line referred to in this lastly quoted description?

The Holmes plans, Ex. W.W. /9 & W.W./5, give the Finlay Cameron grant, the Fraser Sadler grant, and the Holmes grant, as of the same length and forming part of a rectangular block of land.

We know Finlay Cameron grant was 100 chains, and Holmes grant one hundred and thirty chains, and that Fraser grant of 1816 extended far beyond either.

It is not necessary that I should solve this puzzle.

The deed from Fraser Senior to Fraser Junior, being subsequent to the Crown grants, can have no effect on the question I am dealing with just now.

It may or may not be necessary for the purpose of their title, for defendants herein to clear up this and the elm tree line.

I am only concerned with what obviously has a bearing on the judge's charge, and just now with the fundamental part of it, which at the beginning and at the close presented a *primâ facie* case, in favour of the plaintiff. Did it exist? I remark on this Fraser deed to shew I have not overlooked it, and that it cannot form any basis for a *primâ facie* case in favour of the plaintiff.

Turning from the Holmes plan to the McKenzie plan, Ex. W. W. /6, we find, though it shews Finlay Cameron lot, and some other person's narrow strip,

lying between Fraser grant of 1816, and his original grant of 1785, that they are not alike in the rear lines.

The cross measurement, however, of the McKenzie plan is more important, so I pass these minor differences of which some explanation, perhaps involving minor inaccuracies, may exist. Their disregard of accuracy, in measurement of lines from river to rear will appear presently, in what to me is much more formidable, in estimating the strength of this corroborative evidence of Mr. McKenzie.

To begin with, there is a clear issue of fact, presented by the comparison of the McKenzie plan, with the original plan.

Measured on the east side of the river, from the north line of plotted lands, to the south line of the original Fraser grant, there is by scale in the original plan presented a width of 115 chains and by the McKenzie plan when scaled a width of 152½ chains. Which plan is right? Who has blundered? They cannot both be right.

We were asked to believe the vacant spaces were inaccurate. I have said why I do not think so. Are these the only inaccuracies? Are these the only sources of differences of results? Have they anything to do with the enormous difference of results over so comparatively short a space of ground? Was the surveyor of the work appearing on the original plan systematically accurate or the reverse?

Whatever he was, his plan has left abundant means of demonstrating inaccuracy if it existed. The configuration of the ground with its river running through it and of the plotting done thereof make his plan an easy mark. Has the river changed? Is it in soil that would render change probable? Has it still

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Idington J.

those sharp bends and those long divergences starting from one or other of those bends first in a general course one way, and then another, alternating as it were?

To destroy confidence in the original plan is absolutely necessary to have any in McKenzie's fragmentary plan. No such general line of attack was made. I assume the original plan as to the river correct. I assume, when Finlay Cameron's grant of 100 acres appeared thereon, south of a most marked bend in the river, and so far past that bend, as it were, that the man surveying and placing it south of this river bend knew what he was doing.

I cannot conceive why he would place it there if, in truth and fact, he had surveyed and laid it out further north as McKenzie and Holmes plainly put it in their plans.

By his plan the end of this lot, butting on the river, is so nearly straight, that he has placed 100 chains as length of rear, and the consequent result of 100 acres is the given area. The north line must have been found about equal to the south as indeed the plan shews.

The other plans I refer to, place the west end of the Finlay Cameron lot, so that it abuts on the acute slant of the river, where the north and south boundaries cannot be equal.

It moreover occupies that slant so much that there was no place to fit in Holmes' lot, as I purpose shewing it was fitted in, south of the apex of the bend in question.

The north line of Peter Grant's lot, is on the McKenzie plan identical, in scale length, with that of the north line of the Peter Grant lot in the original plan,

doubtless copied according to scale. The north line according to Holmes' plan is ten chains longer, according to scale, than the north line of the original lot. The end butted on the river, according to the original plan at a part of the river, where there would not be so much difference between north and south lines, as to make it worth considering. At least the south line or short one being found 150 chains and the rear width 20 chains, the area was 300 acres. It is not so in other and especially Holmes' plan.

The rear of Peter Grant's line and that of the James Fraser original grant appear to the eye, on the original plan when tried by the same perpendicular or meridian line, as if Grant's rear projected easterly over the Fraser original rear line, yet, on these McKenzie and Holmes plans, the original Fraser rear line projects easterly beyond that of Peter Grant.

What does this mean? Fraser's original south line was 158 chains and Peter Grant's 150 chains. Why do these lines and the relative position of these lands differ so much though the plans are a hundred years apart? Has the river changed? Or has the shifting of the location of Peter Grant's land, by the intercalations I have referred to, of twenty to thirty chains further north, on the river, had anything to do with it? Let any one look at the plans and compare them in light of the course of the river. I leave it there, for I have not the instruments or means at hand to acquire more accurate results. A tracing of the original on the same scale placed over McKenzie's plan will shew curious results.

Is the whole work, on the ground, on both sides of the river, actually, in corresponding parts throughout, as diverse as the results got on the east side, by tests?

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Idington J.

If such comparative tests were applied to both sides of the river and there were found corresponding errors or inaccuracies as the case may be, they should go far to settle this conflict between the different plans.

If confidence still exists in Holmes' and McKenzie's locations, as an interpretation of the original plan, I would like to know how the plan remained so absolutely accurate as to the original grants of James McDonald, and of James Fraser, which are yet respectively, exactly 20 chains and 22 chains wide, and all else, for the most part, so extravagently in error, save in the case of Peter Grant's grant which comes out within thirty links, in width of the original. But if the second edition of Holmes' relations were to be applied then where would Peter Grant be in McKenzie's plan? Where would the intercalations go?

I cannot understand this absolute accuracy of width at the north and at the south and the intervening gross inaccuracies.

Men inaccurate by nature or habit continue inaccurate, and the most accurate of men, in the same way, though seldom shewing absolute accuracy, shew a general approach thereto, with remarkable uniformity.

This original plan will even at the distance of a hundred and twenty years, if thoroughly investigated, be found accurate or the reverse.

Where, according to this plan in 1785, Cameron and Peter Grant's lands were, they must now be. Their acts of locating them only furnish some evidence to interpret the plan. If the work on the ground upon which the plan was founded gave more or less than the figures on the plan indicate that might govern.

It may be inferred, for example, from the case of the Hugh McDonald lot, found to be 11.27 chains instead of 10 chains that he got more. Others may have got more, or less, though owing to the general aim of the Crown surveys to give full measure very unlikely less.

It does not follow that, if over a wide range a surplus width, counting by figures on a plan, be found, it of necessity falls to the Crown or its lessees, still less in one place. All the errors of that sort cannot of necessity fall in one place. Yet is not that what Mc. Kenzie's evidence comes to?

Finding extra width disturbs but settles nothing.

Test the matters in question by the Holmes' grant, of 17 chains wide, as it stood in 1811 on the south side of the apex of the bend in the river, and next Finlay Cameron, when it was 470 rods on the north line, and on the south 520 rods. Fit it into the angle that was left in the river when Finlay Cameron's land was allotted him, and see how exactly such delimitation would suit the facts.

It is removed by McKenzie to the north side of the apex and there the north line must be the longer one, and the south one the shorter one, for the mathematical results of fitting it into the northerly line of the triangle in the river, obviously must be so. Yet when I scale them I find about $5\frac{3}{4}$ inches equal to 112 chains or 448 rods of north line as against $4\frac{5}{8}$ inches equal to $92\frac{1}{2}$ chains or 370 rods for south line.

Certainly these are not the same boundary lines or these lots the same.

Without, so far as I can see, observing this, explaining it, or alluding to it, the learned trial judge on the strength of the following in McKenzie's evidence

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Idington J.

The Court:—Q.—Are the angles and turns of the river correctly represented on this plan—G. 3 ? A.—Very nearly so.

made the impressive remarks as to roads and rivers that are complained of.

The Mount Horeb road I certainly understood counsel in answer to repeated questions, to concede, lay on the south side of the Finlay Cameron grant. If so then we have that part of the learned trial judge's charge going in the wrong direction.

If the intercalations are omitted from the plan and ought to appear as substitutions or superpositions, so to speak, as the evidence of some witnesses indicates, then the Mount Horeb road may be still on the south line of where Finlay Comeron's 100 acre lot lay. In that, however, McDonald Roy and his corroborators would be right, and the learned trial judge's original impression be right, but what he got from McKenzie be absolutely wrong, and the impression left on the jury correspondingly so.

If these observations are nearly correct, though touching only a fringe of the case, there is much to complain of in the possible effect of the learned trial judge's charge in this regard.

There appear on the later plans brooks that do not appear on the original. One of these brooks might have fitted this Holmes lot, in either place chosen to set it down. Whether the brook attracted the settling man, or the eye of the artist saw no difference, in later times, as to which brook should be used, I know not. I pass the coincidence. I note only this, that the brook may have in a hundred years transformed the apex of the river so much by its wearings and deposits, that some of, or some part of, the inferences I

have been drawing, may not be justifiable. There is no evidence of it however.

I cannot usefully add much more on the issue now before me which is the concrete, or possibly concrete effect, of Mr. Justice Russell's charge relative to the alleged *primâ facie* case, of the plaintiff, at the beginning and ending of his charge and that part I have just dealt with.

I cannot share Mr. Justice Graham's abstract theories as to it.

I cannot accept, as he has apparently been able to do, the evidence as to so wide a vacant space as conclusive, and I am therefore less inclined to adopt his abstract proposition as to the possible meanings of such a charge. The evidence of McKenzie shews that his method of cross measurements was dependent upon hearsay as to lines, and at the offsets he makes errors may have crept in. And though he swears to having had plans with him that ought to have so startled him, when contrasted with his results, as to have put him to some more systematic method of checking his work than is observable in the evidence, yet we are left to guess at explanations.

I am clear not only that the charge was technically erroneous, but that it must of necessity be destructive of the defendants' case, unless jurors are in Nova Scotia, of a class by themselves, above impressions from the Bench.

I have not read any of the numerous affidavits filed on the application to amend the notice. The plans filed therewith as well as the argument here indicate a probability that the course of the river may have been dealt with in the affidavits in such a way as to change or confirm my present impressions.

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Idington J.

I have purposely abstained from the reading of them, as I think this motion ought to be disposed of upon the case that was presented to the minds of court and jury at the trial. A careful reading of the evidence, of the charge, of the opinion judgments below and of the appellants' factum, and a careful consideration of all that is apparent to me therein, has produced the results I have written and led me to the conclusion that this appeal should be dismissed with costs.

I am by reason of what has transpired in regard to the last appeal herein to this court in this case, constrained to say, that however much there may be incidentally in what I have said helpful or hurtful to either side in the method of investigation I have followed and I think in part should be followed in such a case, yet I have dealt only with one aspect of this case, and only part of it, and that nothing herein should be presented to a future jury as the decision of this case beyond the result that a direction involving any presumption of law, as presenting at the close of the trial a *primâ facie case,* in favour of such a case as plaintiff at last trial presented is not good law.

A presumption of law in favour of a junior grant as against a senior grant wherein the respective plans conflict and the senior grant has had the original plan incorporated with the grant as here is perhaps possible in human experience, but hardly likely to arise here.

There is another phase of the trial that to my mind is against this appeal.

The parties were agreed that if judgment must go for plaintiff in the case, the damages must be assessed by a named referee.

All else, however, that would entitle the plaintiffs to judgment must be found by the jury.

Now all that was left to and got from the jury on this trial were the following questions and answers:

1. Were any ores mined by the Pictou Charcoal & Iron Company and sold to the Nova Scotia Steel Company taken out south of the south line of Peter Grant's grant dated Nov. 3rd, 1785?

Ans.—Yes.

2. Is the property described in the agreement between the New Glasgow Coal & Railway Company and James Fraser and others covered by the Finlay Cameron grant in 1785?

Ans.—No.

3. Has it been proved that the line claimed to run from the elm tree is the north line of the lot granted to Peter Grant in 1785?

Ans.—No.

I am at a loss to know how a verdict, in an action of trespass, can be entered on such findings, and so followed by judgment that the scope of the referees' duties may be definitely ascertained.

In view of the difficulty I have in this regard I asked counsel on argument if any such rule existed in Nova Scotia as in Ontario where the judge can submit parts of the case as he sees fit by question to a jury, and reserve the rest for himself to deal with, and they were agreed that there is not. I, therefore, in absence of such rule or any power, without consent of parties, in a trial judge to deal with anything but the answers on issue raised, would desire before adopting the Pudsey decision and applying it to this case, to consider further if I found it necessary to decide the point. I would not be disposed to think that order 38, rule 10, of the "Nova Scotia Judicature Act" could be stretched so far as to cover the omissions here.

I think the appeal should be dismissed with costs.

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Maclennan J.

MACLENNAN J.—After considering this case very fully in all its bearings, I think the order for a new trial should stand.

I do so substantially for the reasons given in the Court of Appeal by Mr. Justice Longley. I say substantially because Mr. Justice Longley has fallen into one or two inaccuracies in his statement of the evidence. He states that the description and survey made by Holmes of the land in 1872 defined it by corner stones, as described in the plaintiff's lease, whereas Holmes himself says that he marked the corner with wooden stakes, and not with stones, and that although he saw stones in 1875, where he had put stakes no stones were there in 1889, the date of the lease, and he thought they had not been there for 12 or 16 years before. The evidence is that when the lease was made there was neither a marked maple tree, nor corner stones, by which the demise could be located. It follows that the only means of doing so was by ascertaining the Peter Grant south line. The description of the lease does not begin where a marked maple tree and marked corner stone had stood at some former time, but at a point where these objects were to be found at the making of the lease.

Not only was there no corner stone at the supposed point of commencement, at the making of the lease, but there was none at any of the other three corners as described in the lease, and the only part of the description, by which the land could be located, either at the making of the lease, or at any time afterwards, was the Peter Grant line, and the bearings and measurements.

The tree and stones might be rejected as *false demonstratio,* but the Grant line, and the bearings and measurements, would still be sufficient to save the

lease from being void. Under these circumstances I think the onus was cast upon the plaintiff to establish the Grant line, and to shew that the workings were south of that.

I also agree with Mr. Justice Longley in his opinion of the great importance of the grant of 1785 (called by him 1784), and the plan annexed thereto, in their bearing upon the case. I think both plan and grant must be taken to be accurate, and to shew correctly the position, relative to each other, of the several parcels, as well as their respective dimensions and acreage and the bearings of their boundaries.

It is inconceivable that a plan, annexed to and forming part of a Crown grant, intended to exhibit sixteen different parcels of land, differing much from each other in length, breadth and area, all fronting upon a river, winding and irregular in its course, and granted to sixteen different persons, should not have been prepared with great care, so as to shew with correctness the relations of the parcels to each other, or in other words, have been drawn to a scale, and that it should not have been the result of a correct survey of the whole tract.

And here I may express surprise that there is no mention in the case, from first to last, of the field notes of that old survey. It may be that it was shewn in the former trials that they had been searched for, and were not found, and that the absence of all reference to them is thus accounted for. There is a memorandum upon the old plan which might perhaps help a search in the Crown Land Department for the field notes of the survey on which it was made. That memorandum is as follows, "B. 17, page 83," and is written upon the Peter Grant parcel, and upon one other.

But in the absence of the field notes, which if pro-

1907

BARTLETT v. NOVA SCOTIA STEEL CO.

Maclennan J.

duced might have shewn an error in the scale, I think the plan must be taken to be correct and that the breadth of the ungranted land between Peter Grant's 300 acre parcel and Finlay Cameron's 100 acre parcel, must be taken to be what is indicated on that plan, by the scale, namely, 26¼ chains and not 64.03 chains, as claimed by the plaintiff's lease.

It was argued that the grant to John Holmes in 1811 of a parcel 17 chains wide, and a grant to Alexander Grant in 1816 of another parcel 16¼ chains wide, making together 33¼ chains in width between the Peter Grant and the Finlay Cameron land, was evidence that the old plan of 1785 was wrong, and that there was at least 33¼ chains in width included in the plaintiff's lease.

I do not think, however, that is so. The old grant and plan being earlier must still govern in the absence of evidence of error in the plan.

The subsequent grants to Holmes and Alexander Grant of 33¼ chains, or any other subsequent solemn act or declaration of the Crown, could have no effect in displacing the grants to Peter Grant and Finlay Cameron respectively, made years before.

I am also of opinion that the questions submitted to the jury and answered by them, are insufficient to enable the master to take an account, because both the Peter Grant and the Finlay Cameron lines are left undefined.

DUFF J.—I concur in the opinions stated by Mr. Justice Maclennan.

Appeal dismissed with costs.

Solicitor for the appellant: *Henry C. Borden.*
Solicitor for the respondents: *Robert E. Harris.*

WALTER L. ALLCROFT AND GEORGE D. PRESCOTT (DEFENDANTS) ..... APPELLANTS;

AND

DANIEL L. ADAMS (PLAINTIFF) ..... RESPONDENT.

1906
*Dec. 17, 18.
1907.
* Feb. 19.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Contract of hiring—Manager or expert—Dismissal.

The manager of a veneer company having heard of plaintiff as a man who could usefully be employed in the business wrote him a letter in which he stated that "what we want is a man who is a good veneer maker and who knows how to make all kinds of built up woods that are salable, such as panels. * * * We want you to take full charge of the mill, that is, the manufacturing." In reply plaintiff said: "Would say I understand fully the making of the articles you speak of as well as numerous others with proper machines and proper men to run them." And in a subsequent letter he said: "I feel from all the experience I have had I have mastered the entire principle of it (the veneer business), knowing machines required for various work, what veneer has got to be when completed." Having been hired by the manager he was discharged six weeks later and brought an action for wrongful dismissal.

Held, reversing the judgment of the Supreme Court of New Brunswick (37 N.B. Rep. 332) that he was not hired as a business manager but as an expert in the veneer business and as the evidence established that he was not competent he was properly discharged and could not recover.

APPEAL from a decision of the Supreme Court of New Brunswick(1) affirming by an equal division of the judges a verdict for the plaintiff at the trial.

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

(1) 37 N.B. Rep. 332.

1907

ALLCROFT v. ADAMS.

The facts are sufficiently set out in the above headnote and fully stated in the judgments published herewith.

Teed K.C. and *Jonah,* for the appellants.

Fred R. Taylor, for the respondent.

THE CHIEF JUSTICE.—This appeal must be dismissed with costs.

DAVIES J.—This was an action for wrongful dismissal tried before Mr. Justice Landry without a jury in which he found for the plaintiff and awarded him damages in the nature of a *quantum meruit* for the time he was in defendants' employment before being dismissed, of $375, and for the wrongful dismissal, $625, in all, $1,000.

The decision of the trial judge and also of the full court in New Brunswick turned upon the question as to whether or not the plaintiff's dismissal was wrongful.

The court was equally divided, Landry J. upholding his own decision as trial judge and Chief Justice Tuck and Hanington J. concurring with him, while Barker, McLeod and Gregory JJ. were of the opinion that in view of the specific knowledge and qualifications required by the defendants of the man they wanted with respect to the special line of veneering goods in the manufacture of which they were engaged as shewn in the letters written by Prescott, one of defendants, to plaintiff, and of the specific representations made by the plaintiff to the defendants in his replies of his knowledge and qualifications on these special matters and on the faith of which he was en-

gaged; and in view of the actual qualifications which a fair test extending for six weeks of employment shewed him to possess, he was rightfully and properly dismissed.

A careful perusal of the judgment of the learned trial judge has convinced me that he failed to appreciate from the correspondence and evidence the real and substantial purpose for which the plaintiff was engaged and the special knowledge and qualifications required of him and which he represented himself to possess.

The learned judge seemed to think that the plaintiff had been engaged as a general manager of defendants' business, and that his general knowledge of the veneer business rendered him competent to discharge the duties of such general manager; and that his special representations of knowledge and ability had not been put to the test.

I am quite unable to agree in these conclusions. What was wanted by the defendants was not simply a general manager of their business which might not necessarily imply a man able himself to manufacture the veneering they were making and selling, but a practical man who knew himself how to do the work and could teach workmen who did not.

In the first letter to defendant Prescott tells him the kind of man wanted. He says:

> What we want is a man who is a good veneer maker and knows how to make all kinds of built-up woods that are salable, such as panels, dresser drawer fronts, chair seats, etc. Now, if you are open later on to talk with us, please state your side of the question. We would want you to take full charge of the mill, that is the manufacturing.

Plaintiff sends a lengthy reply, but the part to which I specially call attention is that which seems to be a direct answer to defendant's demands. He says:

1907

ALLCROFT v. ADAMS.

Davies J.

I understand fully the making of such articles as you speak of as well as others, with proper machines and proper men to run them, and ordinary intelligent man can be brought to become quite expert.

That seems to be quite clear and explicit except, perhaps, the last sentence, which it might be argued does not necessarily imply ability on his part to teach the "ordinary intelligent man" to do the necessary work.

Any doubt upon that point is, however, removed entirely by a subsequent letter from plaintiff in which the following sentences occur:

This gave me my ideas of going into the veneer business to learn it thoroughly, and although there is no end to learn in it I feel from all the experience I have had I have mastered *the entire principle of it*, knowing machines required for various work, what veneer has got to be when completed, etc. To be frank with you I have had in mind sometimes and intended eventually to connect myself with a young veneer business that I might promote the growth and work it up to the best of my ability to a large business. While I have a fine position with the Gale Manufacturing Co. here, I am of course looking into the future somewhat, and would make a change I thought later on might benefit me. I can at all times, I believe, lay my hands on good competent machine men who know their business *as also instruct those who do not.* I give almost my entire time and attention to all the work done in the Gale factory which is as I previously wrote you one of the largest and best equipped in the United States.

Here is a man who is told that what the inquirer required was

a man who is a good veneer maker and knows how to make all kinds of built up woods that are salable,

replies first by saying that "he fully understands the making of such articles," and follows that up with another letter in which he says:

I feel from all the experience I have had I have mastered the entire principle of it;

and further with reference to the difficulties defendants had stated they had had with respect to getting practical workmen:

> I can at all times, I believe, lay my hands on good competent machine men who know their business as also instruct those who do not (adding), I give almost my entire time and attention to all the work done in the Gale factory which is as I previously wrote you one of the largest and best equipped in the United States.

He not only claims to have practical knowledge and to have mastered the entire principle of the manufacture of veneering, but such knowledge as entitled him to instruct ignorant and inexperienced workmen, and in his closing sentence leads defendant to believe that he occupied a practical and important post in one of the largest veneering factories in the United States which he would be loath to give up.

This was just the kind of man the defendants required, and after a personal interview the plaintiff was, after Prescott had consulted his partner, engaged by telegram and went to the factory.

At this personal interview plaintiff repeated to Prescott the statement he had previously made by letter

> that he held a good position with the Gale Co., which he could hold and he would be loath to leave it.

No denial as to having made this statement is given by plaintiff or apparently any explanation, but as a matter of fact it was utterly untrue as this interview was held on the 15th July, at Portland, and he had left the Gale's factory on the 17th June previously, and was not at the time of the conversation in Gale's employment.

With reference to this point I may here say that Gale and his foreman, Anna, were both examined by

1907

ALLCROFT v. ADAMS.

Davies J.

commission and their evidence shews beyond reasonable doubt that the plaintiff's representations as to his employment with them and the nature of that employment as also as to his practical knowledge of the business were utterly fallacious and misleading.

Now with reference to the possession by the plaintiff of the actual practical knowledge and qualifications which it seems to me clearly were required of him and which he as clearly represented he possessed, it is hardly contended that if this was the basis and purpose on which and for which he was employed, that he could succeed.

Originally the claim was framed that plaintiff was hired as "foreman." At the trial it was amended so as to read "superintendent" and the case proceeded and was argued before us by the respondent upon the assumption that he was so hired, and that this meant a business manager and superintendent and did not include a practical foreman.

If he was hired as the latter no possible doubt could exist as to the result.

He himself admits in his examination that he had had no practical working knowledge or experience and that such knowledge as he did possess had been picked up by observation solely and the evidence shews clearly that as a practical foreman capable of doing the work himself or instructing ignorant workmen how to do it he was quite incompetent. The question was therefore reduced down to the nature of the employment he was engaged for.

As before stated I cannot entertain any doubt upon that point in view of the correspondence between the parties as a result of which he was employed.

Mr. Justice McLeod, who delivered the leading

judgment for the appellant below, has with great care and thoroughness analyzed the evidence alike as to plaintiff's representations of qualifications and actual qualifications.

I fully agree in all he has so fully and so well said in his judgment and have only thought it desirable to go into the questions as fully as I have done because of the great difference of judicial opinion in the court below and the misconception as I thought of the true nature of the hiring.

At the argument before us it was suggested by one of my colleagues from the bench that the agreement was one within the Statute of Frauds for a yearly service not to be completed within the year and was not in writing and could not therefore be sued on. The point was not adopted or relied upon by counsel, however, for either appellant or respondent and does not seem to have been mentioned at the trial nor in the court below, and we do not think it open on this appeal.

In the result I think the appeal should be allowed with costs and judgment entered for the defendants with costs.

IDINGTON J.—This is an appeal from the Supreme Court of New Brunswick affirming the judgment (for plaintiff, now respondent) of Mr. Justice Landry in an action for wrongful dismissal of the respondent and also for work and labour.

The action is at common law and under a system of practice and pleading provided by the Supreme Court Act of that province.

The Act is as to pleading framed upon the lines of the English Common Law Procedure Act, 1854, and the pleadings in this case are framed just as they

1907

ALLCROFT v. ADAMS.

Idington J.

would have been in a similar action under the latter Act.

The issue of whether or not there has been shewn by the plaintiff a contract that complies with the Statute of Frauds, which is in force in New Brunswick, is distinctly raised by the non-assumpsit plea on record here.

The authorities are collected in Mews Digest, Vol. 11 at foot of column 832 and top of column 833, and are too clear for argument, though since the Judicature Act in England the Statute of Frauds must, in cases of intended reliance on its provisions, be there specifically pleaded.

Before such introduction the equity rule required the statute to be pleaded, but the common law rules did not.

Applying this and its consequent application of the Statute of Frauds to the first count of this declaration there is not the necessary note in writing to enable the plaintiff to succeed.

The parties had a great deal of correspondence on a variety of matters preliminary to any contract and then Mr. Prescott, one of the defendants (now appellants), met the plaintiff at Portland in the State of Maine, where they talked over many things, relating to a possible agreement, but separated without forming any contract, as Mr. Prescott wished to consult his partner, now co-defendant, then in England.

The following telegram and letter are all that appear in the written evidence which in any way can be said to form part of the contract:

Albert, N.B., July 29, 1902.

To Daniel Adams, care Cushing Adams,
B. Falls, Vt.
accept your offer; when can you come?
APTUS VENEER CO.

West River, N.B., July 29th, 1902.

Daniel Adams, Esq.:

Dear Friend Adams,—I simply got cable from Mr. Allcroft saying engage Mr. Adams at $3,000 a year. Am sailing early in August. Now I will try and instruct you so you will be able to find us. You will take the train from St. John about 12 o'clock, "noon," on Intercolonial Railway. You can get a ticket direct to Albert. You will change cars at Salisbury Station. While in St. John put up at Hotel Dufferin and mention to the manager or clerk that you are coming up to Albert to see me. They will then see that you get the correct train. It is no use to take any other as you would not connect and we only have one train a day. All the chair seats you want to bring ship to Aptus Veneer Co., Hillsboro, N.B. I can work the customs there better.

Yours,

(Sgd.) GEORGE D. PRESCOTT.

I do not think it can be successfully contended that these form such an agreement, or memorandum or note thereof, in writing, as to enable the plaintiff, in this case, to recover.

The intended agreement, set up in the declaration, was to extend for a year. It was not intended in any way, to begin to operate until some time after this telegram and this letter of the same date were signed. The signature of Allcroft is wanting and if we can find it covered by the signature to the telegram, yet it does not appear to the letter, and if we assumed authority to put it there Mr. Prescott has failed to do so.

But if want of signature could by some ingenuity be overcome, then how can it be said that any agreement appears on those documents? The consideration does not appear in the telegram at all. That is fatal to it as an agreement. But what of the letter? What was the man to do? Where is the contract for breach of which suit is brought by the first count? Doubtless it was verbal and that is no use. Indeed, the long

1907

ALLCROFT v. ADAMS.

Idington J.

argument as to what plaintiff's position was to be, shews not only that it was verbal, but the need of a writing to define it.

I think the case of *Harper* v. *Davies*(1) is clearly in point and that the plaintiff fails in the first count, but is entitled to succeed on the common counts.

I find since writing the foregoing that the plaintiff's letter of 25th June stated 1st of August as the time he would be free. That and the date in declaration seem as regards the Statute of Frauds conclusive against there being in law a contract.

Since writing foregoing opinion I have also had the pleasure of reading the judgment of my brother Maclennan.

I have reconsidered the whole case and read the evidence of those who could alone tell what the contract was, but cannot change the result arrived at above.

I find that the term "at $3,000 a year" used in Prescott's letter of 29th July is repeated in the oral evidence, but nothing more by which to fix any definite term of the length of engagement.

It is exceeding doubtful, if this with what the correspondence suggests as possible purpose of the parties, where they have not stated anything definite can within the later authorities be held more than a general hiring, requiring reasonable notice before dismissal, unless for cause. See *Creen* v. *Wright*(2), and the cases referred to in *Bain* v. *Anderson*(3).

It was counsel for appellant who answered me in argument as to the statute, and his answer was that there was in the case a mass of correspondence which

(1) 45 U.C.Q.B. 442. (2) 1 C.P.D. 591.
(3) 27 O.R. 369.

he had no doubt would be found to comply with the requirements of the Statute of Frauds. I have no doubt his reply was in perfect good faith, and that as he had not been of counsel at the trial, he overlooked the point.

Even if this might, as my brother Maclennan suggests, be held a waiver by defendant of the statute, I fail to see how defendants' waiver, by failure to argue it, can be a dispensation with the need for a defendant in an action, on the common counts, to shew if he can shew, as a defence thereto, that the work was done under a special contract, which on the authorities must comply with the statute.

See the cases of *Case* v. *Barber* in Sir T. Raymond's reports(1); *Foquet* v. *Moor*(2), and remarks in *Snelling* v. *Huntingfield*(3), at end.

Appellant's counsel distinctly took the ground that by virtue of the misrepresentation inducing defendants to contract they were entitled to rescind the contract. I assume they were justified in doing so by the evidence as presented in argument here. I infer that what took place was a rescission and that the parties stood then as if the express contract had never existed.

I think the following expression of the law applicable to a contract obtained by fraud as Mr. Justice Blackburn expressed it in *The Queen* v. *Saddlers' Co.* (4), at pp. 420 and 421, applies:

> And the reasoning seems to me to amount to laying down the principle that, inasmuch as a man cannot take advantage of his own wrong every act or thing brought about by his fraud or wrong is as against him to be treated as if it never had existed. In this I can-

(1) T. Raym. 450.
(2) 7 Ex. 870.
(3) 1 C.M. & R. 20.
(4) 10 H. L. Cas. 404.

1907

ALLCROFT v. ADAMS.

Idington J.

not agree. Fraud, as I think, renders any transaction voidable at the election of the party defrauded; and if when it is avoided nothing had occurred to alter the position of affairs the rights and remedies of the parties are the same as if it had been void from the beginning; but if any alteration has taken place, their rights and remedies are subject to the effect of that alteration.

See also Leake(1), and cases cited.

Whatever goods a defrauded party gets, by such a contract, he must on electing to avoid it return or pay for.

I am unable to see any distinction between a contract of hiring which well might have coupled with it, the element of a sale, or delivery of goods into it, and any other.

This plaintiff assuredly did work worth paying for. He was engaged, as the evidence of Prescott shews, when asked if he could not have got a cheaper man merely to do veneering,

> I don't know. I wanted a man who could make table tops, extension tops, cheffoniers, drawer fronts and other things. I wanted a man that could do the whole thing, and that is the kind of man I thought I was hiring. I wanted a man to take the responsibility off my shoulders. I wanted to go into the office and do the financing.

A man hired to perform such manifold duties as required and "to do the whole thing" in a factory producing a great variety of goods as this was intended for, might do many well, and fail in others, and fail in some of the material parts he had misrepresented himself capable of.

He either was called on to perform those duties, he was incapable of, early or he was not. If he was then he ought to have been dismissed long before he was, to entitle the defendants to rescission.

(1) 4th ed., p. 256.

1907

ALLCROFT v. ADAMS.

Idington J.

I think it ought to be assumed, as he was not dismissed, that he was doing useful work in some of the many other things he was capable of doing, than veneering in which he was not an expert.

I incline to think there is a great deal in what the trial judge found, as to other motives for discharge. I would, in light of what followed, be inclined to assign amongst such motives this, that as the result of learning from plaintiff the knowledge picked up by him in other factories, the defendants found the undertakings they had in view in hiring him likely to grow too vast for them.

In this, if no other regard, the plaintiff is entitled at defendants' hands to consideration.

In law, the motives impelling a man to rescind a voidable contract cannot, if otherwise entitled to rescind, avail to refuse him relief.

I do not think the appellants have succeeded in bringing this case within *Harmer* v. *Cornelius*(1), That was the case of a single duty undertaken where clearly the service done if the servant incompetent to do what he represented must necessarily be worthless.

The cases where, as in the *Panama & South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha & Telegraph Works Co.*(2), and *In re The Bodega Company* (3), the element of fraud, of necessity permeated and rendered the work done worthless, are also distinguishable.

I may remark that the ground upon which *Tibbs* v. *Wilkes*(4) relied upon by plaintiff, rightly goes, is on the facts here entirely against him. If he could have

(1) 5 C.B.N.S. 236.
(2) 10 Ch. App. 515.
(3) (1904) 1 Ch. 276.
(4) 23 Gr. 439.

1907

ALLCROFT v. ADAMS.

Idington J.

shewn a monthly hiring, or term of payment his case might have been different.

But that and all cases of dismissal for misconduct stand on an entirely different footing from this, which is not one of misconduct, after engagement and duties entered upon. In that class of cases plaintiff has no right to recover for a *quantum meruit* because the contract stands and has not been fulfilled.

In conclusion whilst I agree in dismissing the action raised by the first count, I submit with great respect, the duty devolves on us when we come to the common counts, to give effect to the Statute of Frauds; and if the court below had not assumed a contract for a year existed, I should have said, we must infer there was none, and in any event hold that, the defendants having rescinded, and been justified in rescinding, for misrepresentation, the services must be compensated on a *quantum meruit* basis.

I would adopt the basis of the learned trial judge as to the amount to be allowed though with some doubt, but as I am in the result not in accord with the rest of the court, I need not pursue the subject further as to costs, etc.

I would refer to the case of *Stock* v. *Great Western Railway Co.*(1), and the same case in 9 U.C.C.P. 134; *Copper Miners Co.* v. *Fox*(2); *Pulbrook* v. *Lawes*(3) and notes to *Cutter* v. *Powell*(4), at pages 9 *et seq.*; *Prickett* v. *Badger*(5).

MACLENNAN J.—Appeal by the defendants in an action for work and labour, and wrongful dismissal.

(1) 7 U.C.C.P. 526; 9 U.C.C.P. 134.
(2) 16 Q.B. 229.
(3) 1 Q.B.D. 284.
(4) 2 Sm. L.C. (11 ed.) 1.
(5) 1 C.B.N.S. 296.

1907

ALLCROFT v. ADAMS.

Maclennan J.

At the trial, without a jury, the plaintiff had a judgment for $1,000, being $375 for his actual services, and $625 damages for wrongful dismissal.

The judgment was affirmed on appeal, the judges being equally divided in opinion.

The plaintiff's declaration contains two counts, the first upon an agreement for service in the capacity of a foreman, to continue for a year from the 8th of August, 1902, at a yearly salary of $3,000 a year, payable monthly, broken by dismissal before the expiration of the year; and the second for work as a hired servant.

The pleas to the first count are three; namely, first, non assumpsit; 2nd, agreement obtained by the plaintiff by misrepresentation of his skill and ability to perform the duties and service required of him; and thirdly, defendants induced to enter into the agreement by fraud of the plaintiff. The only plea to the second count is never indebted.

At the opening of the trial the learned judge permitted the plaintiff to amend the first count by substituting the word "superintendent" for "foreman."

The pleadings are framed under a procedure similar to the old English common law procedure, under which the plea of non assumpsit has the effect of setting up the Statute of Frauds, which declares that no action may be brought upon a contract not to be performed within a year, unless the contract or some memorandum or note thereof in writing is signed by the party to be charged.

I think that if the statute had been relied upon at the trial I should have been obliged to hold that no contract or memorandum or note thereof in writing such as declared upon had been signed by the de-

1907

ALLCROFT v. ADAMS.

Maclennan J.

fendants, and that they should succeed upon their plea of non assumpsit.

But so far as appears the defendants did not either at the trial or in the court of appeal claim the benefit of the statute.

It is optional with a defendant to plead the statute, and if he do not, a recovery may be had although the contract be one not to be performed within a year. If this is so it follows that even if pleaded that defence may be waived.

I think it was waived in this case in the courts below, and at page 2 of the appellant's factum in this court he says:

> Allcroft cabled his authority to engage the respondent, and he accordingly was engaged on or about the 29th day of July at the yearly wages of $3,000.

And when attention was called to the statute, from the bench, on the argument before us, counsel did not take up the point.

I, therefore, think the case must be considered irrespective of the statute, and I am of opinion that, having regard to the whole of the evidence both written and oral, the proper conclusion is, as was assumed by the parties themselves, and by the courts below that a contract such as declared on in the first count was made out, although not by signed writing alone.

The question then remains whether the defendants have proved the second plea to the plaintiff's first count, and whether the agreement was obtained by the plaintiff from the defendants by misrepresentation of the skill and ability to perform the duties required of him.

1907

ALLCROFT v. ADAMS.

Maclennan J.

At the conclusion of the argument I had a strong impression that the defendants had proved that plea, and a subsequent careful consideration of the evidence has confirmed that impression, and I find my views so well expressed by my brother Davies that I forbear repeating them.

The existence of the special contract excludes any contract to be implied from the performance of service, and the plaintiff's failure upon the express contract involves failure in his whole case, and it follows that the appeal must be allowed and the action dismissed with costs, both here and below.

DUFF J. concurred with Davies J.

Appeal allowed with costs.

Solicitors for the appellants: *Trueman & Jonah.*
Solicitor for the respondent: *H. H. McLean.*

1907

*Feb. 19.
*March 13.

J. SAUNDERS AND OTHERS.....APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Disorderly house—Common betting house—Place for betting—Betting booth—Race-course of incorporated association—Crim. Code, 1892, *ss.* 197, 204—*Crim. Code,* 1906, *ss.* 227, 235.

A perambulating booth used on the race-course of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto as defined in sec. 197 of the Criminal Code, 1892 (Crim. Code, 1906, sec. 227).

Sub-sec. 2 of sec. 204 of the former Code (now sec. 235) which exempts from the provisions of the main section (dealing with the recording or registering of bets, etc.), bets made on the race-course of an incorporated association does not apply to the offence of keeping a common betting-house. Girouard and Davies JJ. dissenting.

Judgment of the Court of Appeal (12 Ont. L.R. 615) affirmed, Girouard and Davies JJ. dissenting.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming the conviction of the appellant by the police magistrate of Toronto for keeping a common betting house.

The appellants were operating as bookmakers at the annual spring meeting of the Ontario Jockey Club, an incorporated association. In a building near the public stand they had a number of booths on castors which they moved about the building or in fine

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

(1) 12 Ont. L.R. 615.

1907

SAUNDERS v. THE KING.

weather on the lawn in front for the purpose of making bets with persons attending the races. Having been convicted of the offence of keeping a common betting house the magistrate at their request, stated a case for the opinion of the Court of Appeal which contained the following:

"1. That the Ontario Jockey Club is a duly incorporated race association.

"2. That the common betting house herein referred to was opened, kept and used by the defendants during the actual progress of a race meeting.

"3. That the defendants kept a betting booth placed in that part of the grounds of the Ontario Jockey Club specially set apart for betting purposes.

"4. That such betting booth was opened, kept and used by the defendants for the purpose of betting with persons resorting thereto.

"5. That all the defendants were engaged in conducting the business of the said betting booth, which was leased by the defendant Saunders and under his immediate superintendence.

"6. That a very large number of bets were made by the defendants against certain horses winning the different races, with persons resorting to said booth.

"7. That in the enclosure specially set apart by the Ontario Jockey Club for betting purposes as aforesaid there are 36 betting booths, including the one above mentioned, known as two dollar books, which were leased to persons called bookmakers for the purpose of betting as aforesaid.

"8. That the defendants conducted and managed a betting booth as aforesaid during the whole of the race meeting, and the defendant Saunders paid there-

1907

SAUNDERS v. THE KING.

for and for the betting privilege the sum of $100 for each day.

"9. That the betting booths in question are of the following dimensions, six feet two inches in length, five feet two inches in width, and four feet seven and one-half inches high, and are equipped for the purpose of carrying on betting therein, and are supplied with castors so that in fine weather they may be moved from under the covered part of the betting section of the grounds to a distance of a few feet from the roof.

"10. The defendants' position was changed daily from booth to booth, there being a daily drawing for position among the bookmakers, but during each day these defendants occupied the same booth, where they made bets with persons resorting thereto.

"The questions submitted are:

"(*a*). Am I right in holding that a betting booth as aforesaid falls within the terms of section 197 of the Criminal Code as a house, office or other place?

"(*b*). Am I right in holding that the provisions of sub-section (2) of section 204 of the Criminal Code do not apply to the offence of which the defendants are found guilty?"

The Court of Appeal having affirmed the conviction the defendants appealed to the Supreme Court of Canada.

C. H. Ritchie K.C. and *Godfrey* for the appellants, contended that a wooden booth such as was used in this case was not an "office" or "place" for making and recording bets, under section 197 of the Criminal Code, 1892 (now sec. 227); and if it was it was within the exception of section 204 (now 235), being on the

course of an incorporated association citing Tremeear, Cr. Code, pp. 146, 152; *Stratford Turf Association* v. *Fitch*(1).

Cartwright K.C., Deputy Attorney-General, for the respondent, referred to *Powell* v. *Kempton Park Racecourse Co.*(2).

THE CHIEF JUSTICE.—This case comes before us by way of appeal from a judgment of the Court of Appeal for Ontario, which confirmed a conviction by the police magistrate for the City of Toronto on a case reserved for the opinion of that court.

A statement of the facts will be found in 12 Ontario Law Reports, page 615.

The offence with which the defendants were charged before the police magistrate was, as stated in the reserved case, that of keeping a disorderly house, to wit, a common betting house. Section 197 of the Criminal Code defines a common betting house as

> a house, office, or *other place* opened, kept or used for the purpose of betting between persons resorting thereto and the owner, occupier or keeper thereof.

Section 198 enacts that every one is guilty of an indictable offence and liable to one year's imprisonment who keeps a common betting house as hereinbefore defined.

It has been found as a fact by the police magistrate, admitted by all the judges below and not seriously denied by counsel for defendants at the argument here, that the betting booth used by the defend-

(1) 28 O.R. 579. (2) [1899] A.C. 143.

1907

SAUNDERS v. THE KING.

The Chief Justice.

ants must be held upon the authorities *Powell* v. *Kempton Park Racecourse Co.*(1), and *Brown* v. *Patch*(2), to be a *place* within the meaning of section 197. The defendants were convicted by the police magistrate on the ground that to use such a betting booth as was described by the witnesses for the purpose of betting between persons resorting thereto, and the owner, occupier or keeper thereof, is an indictable offence under sections 197 and 198 of the Criminal Code. On a reserved case the conviction was upheld by the Court of Appeal for Ontario, Meredith J. and Garrow J. dissenting. It was not denied that the defendants used the booths in question for the purpose of betting with all comers, but it was put forward as a defence to the charge that the booths or moveable stands having been erected on the premises of an incorporated racing association to be used for the purpose of making bets during the actual progress of a race meeting brought the defendants within the proviso of section 204.

Section 204 declares every one guilty of an indictable offence, who:

(*a*) Uses or knowingly allows any part of any premises under his control to be used *for the purpose of recording or registering any bet or wager* or selling any pool; or

(*b*) Keeps, exhibits or employs in any part of any premises under his control any device or apparatus *for the purpose of recording any bet or wager,* etc.; or

(*c*) Becomes the custodian or depositor of any money * * * wagered; or

(*d*) Records or registers any bet or wager.

By sub-section 2 of section 204, it is expressly declared that the provisions of the section shall not extend to bets between individuals or to *bets made on*

(1) [1899] A.C. 143. (2) [1899] 1 Q.B. 892.

the race-course of an incorporated association during the actual progress of a race meeting. These words were added as an amendment when the Criminal Code was enacted in 1892.

Bets between individuals are not illegal at common law and the provisions of this section do not extend to bets between individuals or to bets made on the race course of an incorporated association during the course of a race meeting. I quite agree that the amendment of 1892 was intended to reserve the race courses of incorporated associations as places where bets might be recorded and registered, and any apparatus or structures used for the more conveniently recording such bets or wagers provided this was done during the actual progress of a race meeting, were exempted from the operation of that section.

But to use a place for the purpose of recording or registering bets or wagers is something entirely different from using a place for the purpose of betting between persons resorting thereto and the owner or occupier thereof.

Bets between individuals or bets made on the race course of an incorporated association during the actual progress of a race meeting can be recorded in any place used for that purpose, but to keep a place whether within or without the grounds of a racing association for the purpose of betting whether during the progress of a race meeting or not, is an offence under section 197.

In my opinion two distinct and separate statutory offences are created by sections 197 and 204, and that which may be invoked successfully as a defence in one case cannot avail in the other. To keep a place for making bets which may be recorded at that place or

1907

SAUNDERS v. THE KING.

The Chief Justice.

elsewhere and to keep a place for recording bets wherever made are distinct and separate acts, each of which has been made an offence and each of which is declared to subject the offenders to a different penalty. The exception created by sub-section 2 of section 204 with respect to anything therein, does not apply to those places that are kept for the purpose of betting. I do not understand the rule of construction to be that all the sections of the Code dealing with nuisances are to be read together to see how they can be made to harmonize any more than the sections dealing with offences against the person or against property. Distinct and separate acts are by these sections declared to be common nuisances and the only question to be considered is: Do the facts proved in evidence support the charge as laid in each particular case?

No useful purpose can be served by going over the ground already covered by the Chief Justice of Ontario in the Court of Appeal. I quite agree with him that the intention of Parliament, which can only be gathered from the language it has used, was to exempt from the operation of section 204 betting on race courses controlled by incorporated associations during the actual progress of a race, but not to sanction the existence of betting houses on such race courses at such times and under such circumstances. Section 197 makes no exception; at all times and under all circumstances betting houses are prohibited and it is not for this court to introduce into this clause qualifying expressions which the legislature has not chosen to put there.

The appeal is dismissed with costs.

GIROUARD J. (dissenting).—I concur in the reasons given by Mr. Justice Davies for his dissent.

1907

SAUNDERS v. THE KING.

Davies J.

DAVIES J.—While I concur with the judgment of the Court of Appeal in their answer to the first question of the case submitted, that a betting booth such as that described in the case falls within the terms of section 197 of the Criminal Code as "a house, office, room or other place," I am not able to concur with the majority of that court in holding that the provisions of sub-section 2 of section 204 do not apply to the offences of which the defendants were found guilty so as under the circumstances and conditions to exempt them from liability to conviction.

Mr. Justice Osler concurred with the majority on this point considering himself bound by previous decisions of the same court, but without, as he himself says, being called upon to consider whether these decisions were sound or not. Apart from him the court was equally divided.

I concur in the conclusions reached by Garrow and Meredith JJ. that the conviction should be quashed on the ground that the provisions of sub-section 2 of section 204 must be read as applying to the offence of which the defendants were convicted.

I agree with Garrow J. when he says:

> The proper construction in a word is in my opinion to hold that sections 197-198 have no application to the case of betting carried on upon the race-course of an incorporated association during the actual progress of a race meeting whether or not such betting takes place within or without doors or in any particular "house, office, room or other place," so long as it is within the boundaries of the race course and so long as the betting is confined to the races then in progress upon that race course.

The history of the two sections 197 and 198 and of section 204 of the Criminal Code, so far as it seems desirable to know it for the purposes of this argument, is that section 204 formed a part of the criminal

1907

SAUNDERS v. THE KING.

Davies J.

law for years before 1892 when the Code was enacted but without the latter words of the exempting subsection on which this controversy turns, namely, betting when "made on the race course of an incorporated association during the actual progress of a race meeting." These words were added to section 204 at the time the Code was enacted and sections 197 and 198 were also then for the first time introduced into our criminal law.

These two new sections 197 and 198 define a common betting house and declare it to be illegal and a disorderly house.

It is a defined place

> opened, kept or used for the purpose of betting between persons resorting thereto and the owner, occupier or keeper, or opened, kept or used for the purpose of any money being received or on behalf of any such person as and for the consideration of any bet on any race, etc.

The object and purpose of Parliament in enacting the several sections of the Criminal Code under review was no doubt the suppression of betting and poolselling between professional bookmakers and poolsellers and their patrons. To that end sections 197 and 198 defining and penalizing the keeping of a common betting house *for the purpose* of betting or *for the purpose* of receiving any money by the keeper of such house for or in connection with any bet were no doubt introduced into the Code when it was passed in 1892. To more effectually insure the carrying out of the same objects section 204 of the then criminal law was retained penalizing the using of any part of any premises under his control by any one for the purpose of recording any bet or wager or for the purpose of becoming the custodian or depositary of any money staked or wagered upon the result of any election, race

or trial of skill or endurance, but it was so retained with an additional and important exemption added. That exemption included three specific kinds of betting even when done by the class of persons struck at in the penalizing parts of the section. First, betting when the bet or stake was payable to the *winner* of any race or game, or to the *owner* of any horse engaged in a lawful race, and not to the bookmaker or poolseller; secondly, betting between individuals. These still remained perfectly lawful. So long as the person struck at (the poolseller or bookmaker using a defined place to carry on his calling) was not a party to the bet or a possible beneficiary of the bet, so long as the practices by or through which such person carried on his calling which Parliament aimed to suppress were not involved, neither the bet or anything incidental to it was prohibited; and, thirdly, introduced for the first time as an exemption, betting

made on the race course of an incorporated association during the actual operation of a race meeting.

This latter exemption covered bookmakers as well as other individuals and left betting with bookmakers and poolsellers using premises under their control to record bets and to receive stakes, legal, when carried on within the limitations specified in the exempting words.

But if the substantive act of using part of any premises to receive deposits or stakes of a bet as well as to record such bet or any number of such single bets were thus permitted when done at the special places, times and on the races specified in the exemption, how can it be contended successfully that any other necessary or ordinary incident or act in the carrying on of

1907

SAUNDERS v. THE KING.

Davies J.

the main substantive thing permitted such as holding himself out at a particular place for the purpose of doing the act, continued to be an offence?

It must be conceded that the using of a part of the race premises such as a betting booth or house for the purpose of recording bets and there receiving stakes and deposits or the money representing the bets upon the result of any race when the betting and recording and money received were all done and happened on the race course of an incorporated association during the actual progress of a race meeting and with reference alone to one of the races at that meeting was permitted by sub-section 2 of section 204. Now what are these limited acts as to time, place and event so permitted and not prohibited but the keeping of a common betting house, on the race-course but exclusively for the races being run there.

I think for the purpose of construing the exemption clause the three sections must be read together, and that so far as that exemption clause extends to sanction or allow any act which otherwise would be illegal it must be read as covering that act even if the act is made an offence by both sections.

In my opinion the special privilege or permission conceded by the sub-section to carry on betting in a special place at a special time and with reference to special races, necessarily permitted all acts ordinarily essential to the carrying out of the substantial purpose.

If the amendment made to the exempting sub-section contemporaneously with the introduction of the new sections 197 and 198 penalizing the common betting house did not operate to exempt betting made and recorded at such house or place when confined within

the limitations expressed in the amendment then it appears to me to be quite meaningless because all betting made between individuals had already been exempted as also all bets which were payable to the owner of the horse racing. The only effect of the amendment could be to extend the sanction of the clause to betting at the common betting house made between the keeper of the house and outside parties when erected on the race grounds and which betting was confined within the special limitations expressed in the amendment.

Keeping a house or place for the purpose of betting between persons who resort thither to bet with the keeper of such house or place is an indictable offence within section 197 of the Code, but it is not such an offence when it is kept on the grounds of an incorporated race association and the sole and exclusive purpose for which it is kept is for the special classes of betting defined and limited by the sub-section of 204.

I would, therefore, allow the appeal and answer the first question of the case submitted in the affirmative and the second in the negative.

IDINGTON, MACLENNAN and DUFF JJ. agreed with the Chief Justice.

Appeal dismissed.

1907

*March 19, 20.

*March. 21.

IN RE PLACIDE RICHARD.

CASE REFERRED BY MR. JUSTICE DUFF IN CHAMBERS.

Canada Temperance Act—Conviction—"Criminal case"—R.S.C. c. 135, s. 32—Habeas corpus—Penalty—"Not less than $50"—Conviction for $200.

A commitment on conviction for an offence against Part II. of the Canada Temperance Act is a commitment in a criminal case under sec. 32 of R.S.C. ch. 135 (R.S. 1906, ch. 139, sec 62) which gives a Judge of the Supreme Court of Canada power to issue a writ of habeas corpus.

By 4 Edw. 7, ch. 41 (R.S. 1906, ch. 152, sec. 127) for a first offence against Part II. of the Canada Temperance Act a fine may be imposed of "not less than $50" and for a second offence of "not less than $100."

Held, that for a first offence the justice cannot impose a fine of more than $50. Maclennan J. dissenting.

On application to a Judge for a writ of habeas corpus he may refer the same to the Court which has jurisdiction to hear and dispose of it. Idington and Maclennan J. dissenting.

APPLICATION to His Lordship Mr. Justice Duff in Chambers for a writ of habeas corpus and referred by him to the court.

The application for the writ was made on behalf of Placide Richard, who was confined in the common gaol at Dorchester, N.B., on commitment under a conviction for an offence against Part II. of The Canada Temperance Act. The ground on which his discharge was claimed was that for a first offence against the Act a fine of $200 had been imposed while the penalty authorized by the Act was "not less than $50" which,

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

it was contended, meant neither more nor less than $50. Or if the magistrate had authority to impose a greater penalty than $50 he could not go beyond $100, the minimum for a second offence.

J. A. Ritchie, who opposed the application, took the preliminary objection that a judge only could grant a writ of *habeas corpus.* Mr. Justice Duff had no power to refer the case and the court could not deal with it.

Masters K.C. and *C. Lionel Hanington* were heard *contra.*

The court took time to consider the objection and it was overruled. The following opinions were presented on the point.

THE CHIEF JUSTICE.—For the course adopted by Mr. Justice Duff under the circumstances explained in his reasons for judgment and of which course the majority of the court fully approves, there is ample authority in the case of *In re Sproule*(1).

It is quite impossible to add anything of value to the very learned discussion of the whole subject in that case by three such eminent lawyers as Ritchie C.J., Strong C.J., and Taschereau C.J.

In Mr. Justice Duff's conclusions on the merits, we also concur and for his reasons.

GIROUARD J.—Mr. Justice Duff, to whom an application for *habeas corpus* was made by the petitioner under section 62 of the "Supreme Court Act," has re-

(1) 12 Can. S.C.R. 140.

1907

IN RE RICHARD.

Girouard J.

ferred the same to the full court. Mr. Ritchie, counsel for the City of Moncton, New Brunswick, from which province the case comes, raised objection that we have no jurisdiction to hear the application and that the jurisdiction is limited to the judge individually. He admits that a prisoner could go before every judge separately, but he cannot go to the full court and get the opinion of all the judges as forming the court. Of course, no one can dispute that this court is a statutory one, but it has never been disputed that it is a superior court and as such has jurisdiction over every proceeding in the court whether sitting as such or in chambers. This rule is not new; it was fully discussed *In re Sproule*(1) by Ritchie C.J., Strong and Taschereau JJ., Fournier and Henry JJ. dissenting.

Chief Justice Ritchie said:

> That this is a matter pertaining to the court, and one with which it can deal, and not a jurisdiction conferred on a judge of the court outside of and independent of the court, and that the judge has no independent jurisdiction unconnected therewith, is, I think, very obvious from the fact that he can only act as a judge of this court through the instrumentality of the writ of this court, obedience to which could not be enforced by authority of the judge but by the court, which alone could issue an attachment for contempt of the court in not obeying its process, the contempt being contempt of the process of the court, not of the fiat of the judge authorizing its issue, and therefore the impossibility of enforcing obedience to the process of the court without the assistance of the court, seems to me to prove, conclusively, that the matter is within the jurisdiction of the court.

And further on, at page 181, the learned Chief Justice said:

> The writ of *habeas corpus* is not the writ of a judge on whose fiat it issues. It is a high prerogative writ which issues out of the Queen's superior courts, and, in my opinion, is necessarily subject to the control of those courts, not necessarily by way of appeal, but by virtue of the power possessed by the court over the process of the court.

(1) 12 Can. S.C.R. 140.

1907

IN RE RICHARD.

Girouard J.

Mr. Justice Strong and Mr. Justice Taschereau expressed their opinion in the same sense. Therefore if a judge of this court had jurisdiction to hear the application, I am of the opinion that the full court had also.

I agree with Mr. Justice Duff on the merits.

DAVIES J. concurred.

IDINGTON J. (dissenting).—In pursuance of the powers given by the "Supreme Court Act" respecting habeas corpus, my brother, Mr. Justice Duff, made an order upon the keeper of a common goal in Westmoreland, in New Brunswick, to return Placide Richard, with cause of his detention, if any, to him, the Honourable Mr. Justice Duff, in his chambers, at Ottawa, and by the order fixed Saturday, the 16th of March instant at said chambers, for hearing the application for the discharge of said prisoner.

That order has been returned and fully heard before the learned judge who has referred the matter of the disposal thereof to the full court. Objection has been taken, upon the opening of the motion before us, to our right to take up such reference and hear the motion.

I understand that a majority of the court, after consideration, have come to the conclusion that the objection should be overruled.

I am unable to agree with the majority of the court in regard either to the power to hear this motion, or the expediency of adopting such a practice as enlarging into the full court any motion which the statute gives a judge in chambers power to hear and deter-

1907

IN RE RICHARD.

Idington J.

mine, but fails to provide for being enlarged into the full court.

Assuming for a moment that, in the absence of any express prohibition, such a course were open to us, I think, with the greatest submission and respect, that its adoption would be, to say the least, highly inexpedient.

Section 83 of the "Exchequer Court Act," section 44, sub-section 3 of the "Canadian Railway Act," and sections 104 and 106 of the "Winding-up Act," each confer power upon a single judge to give leave to appeal to this court.

Other similar powers are given to a single judge of this court.

I know not where, if we establish in this case a precedent for doing so, we can stop the practice of hearing chamber motions by the full court.

Those concerned in, and pressing for or opposing such motions, most of which, arising under such statutes as I refer to, are quite as important as this one, will be very astute in suggesting and magnifying the importance of the point to be decided.

We held in the case of *Williams* v. *Grand Trunk Railway Co.*(1), that no appeal would lie to us from a refusal of a single judge to give leave to appeal. This was upheld in the Privy Council.

But if we can hear this motion by way of acting in an advisory capacity, and we can hear it in no other way, why not in the same way hear any other?

If permissible, we might thus overcome the want of an appeal from the single judge in the cases I have enumerated.

It might be urged, moreover, that as there was no

(1) 36 Can. S.C.R. 321.

1907

IN RE RICHARD.

Idington J.

appeal, it would improve matters to have the judge, who for the time being might be holding chambers, aided in this way.

In the case now in hand, I am happy to think that my brother Duff is, if I might be permitted to say so, quite able to do without the light to be got from the proposed argument before the full court. Moreover, the prisoner is entitled to his judgment in the matter.

Again there is an appeal given by the statute to the court from the learned judge's judgment, in case he refuses the writ or remands the prisoner.

There is much more reason for an anticipatory hearing of the subject matter (of what might well be subject for an appeal), where no appeal exists, than in the case where such relief can be given.

The matter may be summed up in a few words; the statute creating this court did not give, nor has any amendment thereto given, us the power, either directly or indirectly, to adopt the proceeding about to be entered on. Moreover, such a thing has never been done before, except where the statute expressly empowered the court to make the order.

The statute has, in some cases where Parliament chose to distinguish, given the power either to judge or court, as the case might be.

It is said, however, that the case of *Re Sproule*(1) is to be relied on as establishing a precedent in this court supporting the practice about to be adopted.

I am with due respect, utterly unable to comprehend how. I repeat what has been so often said that to constitute the decision in a case a precedent to bind, there must have been something decided thereby necessary to the determination of the case or matter

(1) 12 Can. S.C.R. 140.

1907

IN RE RICHARD.

Idington J.

under consideration, and that must be something properly under consideration.

All beyond is *obiter dicta.*

If I understand *Re Sproule* (1) in light of that, all it did decide and all it stands for, as good law, is that this court has jurisdiction to set aside an order made, or quash a writ improvidently granted, by one of the judges thereof, and that the order was so made and writ so issued when going beyond what was involved in

> an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada

as shewn by the facts of that case.

I have not had time to read since this motion was launched the ninety pages of the report of *Re Sproule.*

I see, however, that the motion there was to quash and nothing more decided on such motion than I have stated. I agree therewith. I do not think it at all applicable to this case. We have not heard of anything like it in this case. And I have no doubt we will not in this case, hear of anything like it.

The decision was given on a substantive motion to quash.

How can a decision, granting a motion to quash, bind this court to sit in full court, to hear a motion for discharge?

If there are opinions expressed in the judgments in that case that go the length some of the head notes of the report suggest, I beg respectfully to differ.

But I see nothing even there to warrant our sitting to consider the motion now pending.

(1) 12 Can. S.C.R. 140.

1907

IN RE RICHARD.

Idington J.

Section 62 now in question of the "Supreme Court Act" is as follows:

> Every judge of the court shall except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the courts or judges of the several provinces, to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.
>
> 2. If the judge refuses the writ or remands the prisoner, an appeal shall lie to the court.

It, as plainly as language can express it, gives to the judges of this court, singly, and only to each of them so sitting singly, and not to the court

> concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum*.

But for the second sub-section of the clause it might be fairly arguable, having regard to the past history of the writ of habeas corpus, that its return might be made to the court though issued by a single judge.

The second sub-section giving an appeal seems to destroy any such implication as within the purview of this section.

With every respect for the opinions that may have led to the head-notes I have referred to, I submit that in trying to find the limits of the jurisdiction of this court, which is only the creature of a statute, we ought to keep to the plain meaning when we find it so clearly written as expressed above.

It confides to the judge the right to issue the writ, and to determine the result of its issue. If he cannot grant it or release the prisoner he says so, and then appeal clearly lies. If appeal is not given in case of discharge any opinions given by us in relation thereto

1907

IN RE RICHARD.

Idington J.

would be *obiter dicta* and can receive no consideration, for we would be deciding nothing.

In the past history of the writ of habeas corpus we find it a moot point whether at common law it could have been issued by a judge in chambers; that it always could have been issued by the court and that when, in the troublous times of Charles I., its issue with greater certainty and expedition was found necessary the statute 16 Car. I. ch. 10, was enacted to give the writ, in cases named, to bring the body of any person restrained before the Court of King's Bench or Common Pleas.

It was found necessary to amend this and 31 Car. II. ch. 2, gave power where the commitment was not for treason or felony, plainly and specially expressed in the warrant of commitment, that the prisoner should be brought before the Lord Chancellor, the Lord Keeper of the Great Seal or the judges or barons of the court from which the writ should issue or such other person or persons before whom the writ *should be made returnable.*

Section 3 of that Act made it clear that any of these judges could in the cases specified hear the motion in vacation as well as in term.

I need not follow the next important Act of 56 Geo. III. ch. 100, expanding the remedies of such writ, or later amendments of the law, relative to habeas corpus.

This outline of legislation is referred to here to indicate how differently these Acts present the legal functions of judge and court from that which section 62 of our Act presents the duties to be done by each of us and this court, and how when the former are studied historically the cases shew strict adherence to the statutes in giving effect to them.

1907

IN RE RICHARD.

Idington J.

It is most instructive to trace the history of the legislation on the subject of habeas corpus. Its development shews how careful the courts and judges have been, not to arrogate to themselves any power as inherent in any one beyond that expressly given by statute, or coming down as part of the common law.

Every step taken beyond the common law has been rested upon statute. And it seems to me, when we are asked to go beyond that which the statute expressly empowers us in this statutory court, we are invited to err.

There seems to be abundant reason for constituting and separating the respective powers and duties of judge and court in the way that section 62 has done.

The moot point of the common law right of a judge in vacation to grant the writ was finally settled by the Canadian prisoner's case reported in 9 A. & E. 731.

The writ which, on the facts there and the nature of the charge, had to rest on the common law had been issued in vacation. The return was not heard until term, and then *only by consent of counsel as the report indicates;* and after an exhaustive argument by Sir John Campbell, then Attorney-General, in support of the objection that, at common law a judge could not in vacation direct the issue of the writ, the court decided that the practice had *always been* that a judge could grant the writ in vacation returnable before himself or the court.

No two of the provinces present, by legislation, identically the same procedure.

The statute giving the judges of New Brunswick or court power is chapter 133 of the Consolidated Statutes of New Brunswick (1903).

1907

IN RE RICHARD.

Idington J.

The judge is entrusted with nearly all the duties created by this Act.

In certain cases, specified and provided for, he can refer to the court. None of these touch what is being done here. A consideration of this Act, however, shews why the jurisdiction given by section 62 above quoted confers on every judge of this court concurrent jurisdiction with the courts or judges of the several provinces.

In Ontario the judge can make the writ returnable to the Divisional Court. I refer to this to shew that jurisdiction given a judge or court differs in each case.

I assume that the word "concurrent" in section 62 must be interpreted distributively; and that this case coming from New Brunswick must be governed by the Act of New Brunswick referred to. The Act in New Brunswick must be that to which we must look for the basis of the concurrent power; a power, however, limited as section 62 expresses.

It seems clear to me that the motion should not be heard.

Having at the close of the argument on the preliminary objection had the opportunity of considering the same and come to this conclusion, I took no part in the hearing on the merits and take no part in the decision thereof.

MACLENNAN J.—I concur in the opinion of my brother Idington, and having heard the argument on the merits I am of opinion that the conviction was right.

Mr. Ritchie also raised the objection that the applicant was not committed "in a criminal case," which

it had to be to empower the judge to issue the writ. The court did not wish to hear counsel for the applicant as to this.

The argument then proceeded on the merits.

Masters K.C. and *Hanington,* in support of the application. The expression "not less than 50" as the penalty for a first offence means "$50 and no less" as said by Armour C.J., and held by the court in *Reg.* v. *Smith*(1). The Supreme Court of Nova Scotia in *Reg.* v. *Porter*(2) has held the same, and the Supreme Court of New Brunswick also in *Reg.* v. *Rose*(3). In *Stimpson* v. *Pond*(4) Judge Curtis, an associate judge of the United States Supreme Court, expressed the same view of a similar expression.

If the magistrate has jurisdiction to impose a greater penalty than $50 his discretion must be exercised reasonably and the statute has fixed the limit at the penalty for a second offence, namely, $100. See *Reg.* v. *Smith*(1), *per* Falconbridge J.

J. A. Ritchie, contra. The words "not less than $50" should be construed according to their grammatical sense, which is, $50 or more and the excess is in the discretion of the magistrate. See *Reg.* v. *Cameron*(5).

DUFF J.—Application under section 62 of the "Supreme Court Act" for habeas corpus to procure the discharge from custody of a prisoner convicted of an offence under section 100 of "Canada Temperance Act," as amended by section 1 of 4 Edw. VII. ch. 41.

(1) 16 O.R. 454.
(2) 20 N.S. Rep. 352.
(3) 22 N.B. Rep. 309.
(4) 2 Curtis Cir. Ct. 502.
(5) 15 O.R. 115.

1907

IN RE RICHARD.

Duff J.

The warrant under which the prisoner is held recites that he was convicted at Moncton, N.B., of the offence of unlawfully keeping intoxicating liquors for sale contrary to the provisions of Part II. of the "Canada Temperance Act," for which offence he was condemned to pay a fine of $200 and costs; and that having made default in payment of these sums he was committed to the common gaol of the County of Westmoreland for one month unless they should in the meantime be paid.

The argument on the return of the order *nisi* disclosing a conflict of judicial opinion respecting the construction to be put upon the enactment under which the prisoner was convicted—which had been construed by the Supreme Court of New Brunswick in one sense and by a Divisional Court in Ontario in the opposite sense—it seemed in order to set the question at rest desirable to, and I accordingly did, refer the application to the court.

On the point raised respecting the jurisdiction of the court to hear and adjudicate upon the application, I agree with the views expressed by the Chief Justice and Girouard J.

Two questions arise: First, does section 62 of the "Supreme Court Act" confer in such a case jurisdiction in habeas corpus? In other words, are the proceedings leading to a conviction for such an offence within the meaning of the words "criminal case" used in that section?

This question seems to be now presented for the first time. In *Ex parte McDonald*(1) an application for an order directing the issue of a writ of habeas corpus on behalf of a prisoner convicted

(1) 27 Can. S.C.R. 683.

under the same enactment, was heard before Girouard J. and disposed of on its merits. No objection to the jurisdiction was taken and no opinion was expressed upon the point before us. But the point I think is concluded by the language of the Judicial Committee in *Russel* v. *The Queen*(1), at page 838. Sir Montague Smith, referring to the enactment in question, there says:

> Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects "property and Civil Rights." It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things as well as intoxicating liquors can, of course, be held as property, but a law placing restrictions on their sale, custody or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same consideration the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights.

Their Lordships, it is true, abstain from deciding the question whether the competence of Parliament to pass the enactment can be supported on the ground

(1) 7 App. Cas. 829.

1907

IN RE RICHARD.

Duff J.

that it was passed in exercise of the exclusive power to legislate respecting the criminal law conferred by section 91 of the "British North America Act, 1867." But it seems to me that there is no good ground for holding that—where Parliament under its power to make laws for the peace, order and good government of Canada declares in the interests of public order that certain acts shall be offences punishable by fine or imprisonment—the proceedings by which such laws are enforced are any the less proceedings in a "criminal case" because in enacting them Parliament did not formally profess to be dealing with the criminal law.

The second question is whether in imposing a fine of $200 the convicting magistrate has exceeded the powers conferred by the statute under the authority of which he acted. The material provision (section 100, amended as above mentioned) is as follows:

> 100. Every one who, by himself, his clerk, servant or agent, exposes or keeps for sale, or directly or indirectly, on any pretence or by any device, sells or barters, or in consideration of the purchase of any other property, gives to any other person any intoxicating liquor, in violation of the second part of this Act, shall, on summary conviction, be liable to a penalty for the first offence of not less than fifty dollars, or imprisonment for a term not exceeding one month, with or without hard labour, and for a second offence to a fine of not less than one hundred dollars, or imprisonment for two months, with or without hard labour, and for the third and every subsequent offence, to imprisonment for a term not exceeding four months, with or without hard labour.

The point to be determined is whether or not this section in conferring the power to impose a penalty of "not less than $50," authorizes the imposition of a penalty greater than $50. I have come to the conclusion that it does not.

The construction of the language is not unattended

with difficulty. But on the whole, the reasoning of Armour C.J. in *Reg.* v. *Smith*(1), convinces me that this interpretation—which was adopted by the majority of the court in that case—does no violence to the words used, and is that most consonant with the probable intention of Parliament as one may gather it from the scope and purpose of the enactment as a whole.

The power to impose fines unlimited in amount in respect of the offences created by this Act is clearly a power which, not being conferred expressly, can only be held to be conferred at all if plainly and necessarily implied in the language used. There is, I think, in the section quoted, no such plain and necessary implication. There is nothing in the section or, I think, in the Act as a whole, which would justify us in imputing to the words referred to any meaning other than that which they literally convey, namely, that the penalty imposed shall not be less than the sum mentioned. One may concede that the use of the phrase "not less than $50" is an unhappy way of providing for a penalty of $50 precisely; but beyond that, except in the case of a second offence, no power is given to the magistrate by the terms of the statute; and one cannot presume an intention to authorize the magistrate to inflict any penalty he pleases. The point is compactly put by Curtis J. in *Stimpson* v. *Pond*(2) in a passage cited by Armour C.J., which I quote:

> Power to inflict a particular penalty must be conferred by Congress in such terms as will bear a strict construction. The only power expressly given by this Act is to impose a penalty of not less than one hundred dollars. This power may be exhausted by imposing a

(1) 16 O.R. 454.

(2) Curtis Cir. Ct. 502.

1907

IN RE RICHARD.

Duff J.

penalty of just one hundred dollars. The terms of the Act do not authorize the infliction of a penalty greater than one hundred dollars. Is there a safe implication that authority to inflict a greater penalty was intended to be conferred? The objections to this seem to me too strong to be overcome. In the first place, mere implication can hardly ever be safe ground on which to rest a penalty and when penalties of unlimited magnitude are the subjects of the implication, the danger of making it, and the improbability of the implication, are proportionately increased.

Application granted.

THE CARLETON WOOLLEN COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THE TOWN OF WOODSTOCK (DEFENDANTS) ..... } RESPONDENTS.

1907

*Feb. 26, 27.
*March 13.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Municipal corporation—Exemption from taxes—Resolution of council—Discrimination—Establishment of industry—36 V. c. 81, s. 1 (N.B.).

By sec. 1 of 36 Vict. ch. 81, the New Brunswick Legislature authorized the Town Council of Woodstock from time to time to "give encouragement to manufacturing enterprises within the said town by exempting the property thereof from taxation for a period of not more than ten years by a resolution declaring such exemption." In 1892 the council passed the following resolution: "That any company establishing a woollen mill in the Town of Woodstock be exempted from taxation for a period of ten years."

Held, per Davies, Idington and Maclennan JJ. that this resolution provided for discrimination in favour of companies and against individuals who might establish a woollen mill or mills in the town and was therefore void. *City of Hamilton* v. *Hamilton Distillery Co.* (38 Can. S.C.R. 239) followed.

Held, per Davies J.—The resolution exempting any company and not any property of a company was too indefinite and uncertain to be the basis for a claim for exemption.

In 1893 a woollen mill was established in Woodstock by the Woodstock Woollen Mills Co., and operated for some years without taxation. In 1899 the mill was sold under execution and two months later the Carleton Woollen Co., (appellants) were incorporated and acquired the said mill from the purchaser at the sheriff's sale and have operated it since.

Held, that the appellants could not by so acquiring the mill which had been exempted be said to have "established a woollen mill"

*Present:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

1907

CARLETON WOOLLEN CO. v. TOWN OF WOODSTOCK.

without shewing that when it was acquired it had ceased to exist as such which they had not done.

Judgment appealed from, affirming that of Barker J. at the hearing (3 N.B. Eq. 138) affirmed.

APPEAL from a decision of the Supreme Court of New Brunswick(1) affirming the judgment of the judge in equity(2) who allowed a demurrer to the plaintiffs' bill.

An Act of the Legislature of New Brunswick, 36 Vict. ch. 81, sec. 1, authorized the council of the Town of Woodstock to exempt the property of manufacturing enterprises from taxation for ten years. The council passed a resolution providing that any company establishing a woollen mill in the town would be so exempt. The Woodstock Woollen Mills Co. established a mill and operated it without taxation until they got into financial difficulties when it was sold under execution and purchased by one White. Shortly after this the appellant company was incorporated and acquired the mill and machinery which they have operated ever since. For three years the company was not taxed but in 1902 and the two years following they were. In 1904 executions were issued for the taxes of 1902 and 1903 and a quantity of the company's goods were seized to satisfy the same. The company then filed a bill in equity to restrain the town from selling said goods to which the latter demurred. On argument of the demurrer it was allowed on the ground, not taken by defendants, that the resolution for exemption passed to the council discriminated between companies establishing a woollen mill and individuals doing the same. The plaintiffs bill was, therefore, dismissed. This judgment was affirmed by the full court and the Company appealed to the Supreme Court of Canada.

(1) 37 N.B. Rep. 545. (2) 3 N.B. Eq. 138.

Carvell for the appellants. It was not necessary to state in the bill the authority under which the town council passed the resolution of exemption as all Acts of New Brunswick are by law public acts of which judges must take judicial notice without being specially pleaded. C.S.N.B. (1903) ch. 1, sec. 6; *Henderson* v. *The Mayor of St. John*(1); *The King* v. *City of St. John*(2); *Kiely* v. *Kiely*(3).

The appellants either established a woollen mill or continued the old one established in the spring of 1893. If they established the mill they were entitled to the exemption for ten years. If they simply continued the old one, they were entitled to the exemption until and including the year 1903 which would include the taxes for the years for which the goods were seized.

The resolution creating the exemption was within authority under the Act above referred to. The statute is stronger than any of the Ontario statutes referred to by Barker J. in his judgment and specifically states that the council may from time to time, at their discretion, give encouragement to any manufacturing enterprises by exempting their property from taxation by resolution. The council is not prevented from extending the exemption to any other person or company and if they consider the existing resolution too narrow, they can rescind it at any time. Up to the present time it has not done so.

The expression "any company" in the resolution should be construed to mean and include "person" C.S.N.B. (1877) ch. 118, sec. 1 (31).

It might be open to a rival manufacturer or other

(1) 14 N.B. Rep. 197. (2) 1 N.B. Rep. 155.
(3) 3 Ont. App. R. 438.

1907

CARLETON WOOLLEN CO. v. TOWN OF WOODSTOCK.

tax-payer to attack the validity of this resolution on the grounds set forth by Barker J. in his judgment and followed by the court appealed from, but not to the municipality itself. The respondent is estopped from denying that the appellants are entitled to the exemption claimed, when relying upon the existence of the resolution; see 11 Am. & Eng. Encyl. (2 ed.) page 43. *Carr* v. *London and Northwestern Railway Co.*(1); *Pickard* v. *Sears*(2); *Freeman* v. *Cooke*(3); *Peoples Bank of Halifax* v. *Estey*(4).

Vince and *Hartley* for the respondent. The Act authorizes the council to exempt the property of manufacturing enterprises for a period not exceeding ten years, but the resolution purports to give exemption for ten years to any company establishing a woollen mill, and thus unfairly discriminated between companies and individuals, between woollen enterprises already established and companies which might afterwards establish such enterprises. The council exceeded its authority in exempting any company establishing a woollen mill when it was authorized by the Act to exempt only the property of manufacturing enterprises used in the actual prosecution of any such enterprise.

All municipal taxation must be imposed equally and uniformly and those who claim exemption must accept the onus of shewing clearly that they are entitled to it. The exemption should be denied unless it is so clearly granted as to be free from fair doubt. Such statutes must be construed most strongly

(1) L.R. 10 C.P. 307.
(2) 6 A. & E. 469.
(3) 2 Ex. 654.
(4) 34 Can. S.C.R. 429.

1907

CARLETON WOOLLEN CO. v. TOWN OF WOODSTOCK.

against those claiming the exemption. Dillon on Municipal Corporations, (3 ed.) sec. 776; *Jonas* v. *Gilbert*(1) *per* Ritchie C.J.; *Pirie* v. *Town of Dundas*(2); *Reg.* v. *Pipe*(3); *Re Nash and McCracken* (4); *Reg.* v. *Johnson*(5) at page 556; *People's Milling Co.* v. *Meaford*(6); *Rossi* v. *Edinburgh Corporation*(7); *City of Toronto* v. *Virgo*(8).

The appellants have not alleged positively and with precision what is essential to their rights and within their knowledge. *Trites* v. *Humphrey*(9) at page 24; *Macnamara* v. *Sweetman*(10); *Woodward* v. *Cotton*(11); 1 Daniels' Chan. Prac. (5 ed.) 569; *Arcot* v. *East India Co.*(12); *Carnatic* v. *East India Co.*(13); *Bailey* v. *Birkenhead L. & C. Junction Ry. Co.*(14); *Foss* v. *Harbottle*(15). The bill is not sufficient; it does not set up the Act by authority of which the claim under the resolution was made.

The allegations in the appellants' bill do not shew that they did establish a woollen mill in the town and the facts disclosed shew that their business was conducted in the same building with the same plant and machinery and with part of the same manufactured and unmanufactured goods as had been owned and used by the Woodstock Woollen Mills Co. These facts are not sufficient to support the contention that the appellants established a woollen mill in the town. 1 Bouvier (ed. 1897) 691. *Hornsey Local Board* v.

(1) 5 Can. S.C.R. 356.
(2) 29 U.C.Q.B. 401.
(3) 1 O.R. 43.
(4) 33 U.C.Q.B. 181.
(5) 38 U.C.Q.B. 549.
(6) 10 O.R. 405 at p. 413.
(7) (1905) A.C. 21.
(8) (1896) A.C. 88.
(9) 2 N.B. Eq. 1.
(10) 1 Hogan 29.
(11) 1 C. M. & R. 44.
(12) 3 Bro. C.C. 292 at p. 308.
(13) 1 Ves. 371 at p. 393.
(14) 12 Beav. 433 at p. 443.
(15) 2 Hare 461.

1907

CARLETON WOOLLEN CO. v. TOWN OF WOODSTOCK.

Monarch Investment Building Society(1); Hardcastle on Statutes 77. If the construction contended for by the appellants is to prevail, all that need be done by a company enjoying the exemption is, to reorganize or sell out every nine or ten years and so enjoy perpetual exemption.

For definition of "company" see *Smith* v. *Anderson* (2). As to estoppel see *Vestry of St. Mary, Islington* v. *Hornsey Urban District Council*(3) at page 705. As to loss of exemption on sale of property see *Polson* v. *Town of Owen Sound*(4); *Morgan* v. *State of Louisanna*(5). The exemption must be unmistakable. *Erie Ry. Co.* v. *State of Pennsylvania*(6) at page 498; 1 Cooley on Taxation (3 ed.) pp. 343, 356-361.

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

DAVIES J.—The appellants claimed exemption from taxation by the Town of Woodstock for a period of ten years under a resolution passed by the Town Council of that town in the year 1892, as follows:

> That any company establishing a woollen mill in the Town of Woodstock be exempted from taxation for a period of ten years.

The authority under which the council assumed to act was a proviso added to sec. 1 of 36 Vict. ch. 81 [N.B.] (1873). This section which relates to the method of assessment within the town, contained the following:

(1) 24 Q.B.D. 1.
(2) 15 Ch. Div. 247.
(3) (1900) 1 Ch. 695.
(4) 31 O.R. 6.
(5) 93 U.S.R. 217.
(6) 21 Wall. 492.

Provided also that the council may from time to time at their discretion give encouragement to manufacturing enterprises within said town *by exempting the property thereof* from taxation for a period of not more than ten years by a resolution declaring *such exemption.*

The trial judge held on a demurrer to the plaintiff's bill that the resolution under which the plaintiffs claimed exemption was bad because it violated the fundamental principle that municipalities in levying taxation or exempting property therefrom cannot discriminate between the same classes of tax payers within the municipality unless the legislative authority to do so is clear and explicit.

We had occasion very recently to consider this question in the cases of *The City of Hamilton* v. *Hamilton Distillery Co. and The Hamilton Brewery Association*(1), and reached the same conclusion on reasoning which we need not now repeat.

I agree that the principle prohibiting discrimination of the character referred to has been violated in the resolution under which the plaintiffs claim exemption and for that reason the resolution cannot be invoked to support plaintiff's contention.

It might be possible under legislation and resolution as crude and hard to construe as those under consideration for persons or companies to claim exemption from taxation, but I think the difficulties are very great and amending legislation is required to render the object in view effective.

The resolution professes to exempt "companies" establishing woollen mills in Woodstock from taxation. It does not extend to or include persons or individuals establishing such mills as distinct from companies. I do not know whether it means that the "companies" exempted were to be exempt from all

(1) 38 Can. S.C.R. 239.

1907

CARLETON WOOLLEN CO. v. TOWN OF WOODSTOCK.

Davies J.

taxation of every kind for the ten years whether on real estate, personal property, or income, and irrespective of the purposes for which the property was held or used. I suppose the idea may have been to exempt real estate actually used for manufacturing purposes only and not to include other real estate which might be owned by the company but used for workmen's houses or purposes of speculation. As a fact the resolution does not exempt any property *per se* but the company itself, and under that resolution, if held to be good and effective, a court has not the means of defining or deciding what particular property the company owned was exempt from taxation or what particular property remained liable. The statute under which the council professed to act did not authorize them to exempt any special class of citizens from taxation. What it did authorize was the exemption of *the property* (real and personal, I assume) of manufacturing enterprises by whomsoever carried on for a limited period. It was the property not the person or the company that was authorized to be exempted and the resolution to be effective under that statute or proviso must in some way have defined or described or identified the property intended to be exempted. It could not be successfully contended that the exempted property whatever it was could be ascertained or determined on by the assessors. They had no discretion in the matter and no means of determining on the property exempted. The only body in whom a discretion was vested and on the proper exercise of which alone the exemption could be created was the Town Council. That discretion was bound to be exercised in such a way as to avoid unfair discrimination between manu-

facturers at least of the same class, and I think also with sufficient certainty to enable the property exempted to be ascertained by the assessors and others upon whom the duty of levying and collecting the assessments fell.

In my judgment the resolution is quite inoperative and ineffective on these essential points, and is too indefinite and uncertain to found an exemption upon.

It is not necessary for me to express any opinion on the other questions argued as to whether this company did as a fact establish a woolen mill within the meaning of the proviso relating to exemptions.

I think for the reasons given the appeal should be dismissed with costs.

IDINGTON J.—This is an appeal from the Supreme Court of New Brunswick unanimously upholding the judgment of Mr. Justice Barker in finding that the alleged resolution of respondents' council improperly discriminates and is therefore void and gives no such exemption from taxation as appellants claim.

I agree in that finding and therefore think the appeal must fail.

To prevent misapprehension, I may observe that the statute empowering the respondents to exempt from taxation in certain cases expressly authorizes the exercise of the power in question here by resolution of respondents' council, instead of, as usually is the case, by way of by-law.

I consider, however, that the same rule against improper discrimination is applicable to either by-law or resolution of a municipal council.

The rules of interpretation, that the pleading must

1907

CARLETON WOOLLEN CO. v. TOWN OF WOODSTOCK.

Idington J.

be read most strongly against the pleader and that statutes conferring powers are to be strictly and literally carried into effect, applied to this case should also lead, I think, to a conclusion in favour of the dismissal of the appeal.

A special privilege such as the appellants claim must be legislatively expressed in language clear beyond reasonable doubt and made so to appear on the pleading setting it up before it can be held entitled to prevail.

The appeal should be dismissed with costs.

MACLENNAN J.—I am of opinion that the appeal should be dismissed.

Whatever may be said of the want of precision and certainty in the statute, I am clearly of opinion that the resolution is invalid as an unlawful discrimination. What the council was authorized by the statute to do was to encourage *manufacturing enterprises* by exempting the property thereof, etc. Such an enterprise might be by an individual or a partnership, or an incorporated company, but the resolution is confined to *companies*. An individual could get no benefit from it, no matter how meritorious his enterprise might be. See recent decision in the *Hamilton Brewery and Distilling Cases*(1).

On this simple ground I think the appeal should be dismissed.

DUFF J.—The appellant's bill does not, in my opinion, sufficiently allege a compliance with the condition prescribed by the resolution upon which the suit is based. The resolution provides: "That any

(1) 38 Can. S.C.R. 239.

company establishing a woollen mill in the Town of Woodstock be exempted from taxation for a period of ten years." This resolution must, on well-known principles, as against any claim to obtain the benefit of the exemption provided for, be construed strictly; that is to say, of two alternative constructions that which is the less favourable to the claim must be adopted.

Now, I think it would be a very liberal reading of this language which would support a claim to an exemption by one company in respect of a woollen mill which as a woollen mill had been established by another company, and in respect of which that other company had already had the benefit of the resolution.

Ex hypothesi the mill was already established; and although it may be that the language will bear a construction under which the putting into operation of a mill—which, having enjoyed the benefit of the exemption has ceased to operate—could be treated as a compliance with the condition, that I think is not the result of a strict reading of the words. In such a case I think the claimant must under the terms of the resolution strictly construed make out that the mill (in respect of which the exemption had been enjoyed) had, when acquired, ceased to exist as a woolen mill; not merely that its owners had ceased to operate it.

Upon the other questions discussed in the judgments below, I express no opinion.

Appeal dismissed with costs.

Solicitor for the appellants: *F. B. Carvell.*
Solicitor for the respondents; *J. C. Hartley.*

1907

*March 5.
*March 13.

THE MONTREAL STREET RAILWAY COMPANY (DEFENDANTS). } APPELLANTS;

AND

THE MONTREAL CONSTRUCTION COMPANY, AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

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

Vendor and vendee—Sale of securities—Interpretation of contract—Arts 1018, 1019 *C.C.—Railways—Debtor and creditor—Right of way claims—Legal expenses incurred in settlement.*

The plaintiffs sold the defendants stock and bonds of the P. & I. Ry. Co. with an agreement in writing which contained a clause stipulating as a condition that the vendees might declare the option of paying a further sum of $30,000, in addition to the price of sale, in consideration of which the vendors agreed to pay all the debts of the P. & I. Ry. Co. except certain specially mentioned claims, some of which were in respect of settlement for the right of way. The final clause of the agreement was as follows:—"After two years from the date hereof the Montreal Street Railway Company will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years or required by the purchasers so to be, shall be paid over to the vendors at the end of the said period, it being understood that the purchasers will not stir up or suggest claims being made." The vendees exercised the option and paid the $30,000 to the vendors who reserved their right to any portion of the $5,000 to be contributed towards settlement of the right of way claims which might not be expended during the two years. An unsettled claim for right of way, in dispute at the time of the agreement,

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

1907

MONTREAL STREET RY. CO. v. MONTREAL CONSTRUCTION CO.

was, subsequently, settled by the vendors within the two years. The question arose as to whether or not this claim, then known to exist, and legal expenses connected therewith was a debt which the vendors were obliged to discharge in consideration of the extra $30,000 so paid to them, and whether or not the $5,000 was to be contributed only in respect of right of way claims arising after the date of the agreement.

Held, affirming the judgment appealed from, that the agreement must be construed as being controlled by the provisions of the last clause thereof; that said last clause was not inconsistent with the previous clauses of the agreement and that the vendees were bound to contribute to the payment of such claims and legal expenses in respect of the right of way to the extent of the $5,000 mentioned in the last clause.

APPEAL from a decision of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, in favour of the plaintiffs for the sum of $2,164.14 with interest and costs, Sir Alexander Lacoste C.J. and Blanchet J. dissenting.

The case is stated, as follows, by His Lordship Mr. Justice Trenholme, in the court appealed from:

"TRENHOLME J.—The question to be determined is whether the respondents (plaintiffs) are entitled to recover this sum ($2,164.14) from appellants (defendants) in virtue of the agreement formed by correspondence between the parties of 20th June, 1901, invoked in the case.

"On that date, the respondents, acting by Mr. H. S. Holt, by letter addressed to appellants offered to sell to appellants for one million odd dollars almost the entire stock and bonds of the Park and Island Railway Co., and added:

'A further condition of these presents is that in accepting the present offer of sale you may declare your option of paying a further sum of $30,000 to the

1907

MONTREAL STREET RY. CO. v. MONTREAL CONSTRUCTION CO.

vendors, in consideration whereof the vendors will undertake to liquidate and pay all the debts of the Montreal Park and Island Railway Co., except the following:

'1. A sum of $500, on which the interest is payable in perpetuity to the Maison St. Joseph du Sault, for the right of way.

'2. A mortgage on the Shamrock property, $1,455.00, part of the lots only being used for the right of way.

'3. A mortgage on the car-barn property and adjoining lots for $9,179.54.

'4. The balance remaining due on the lot, corner Mount Royal Avenue and Park Avenue, $2,666.67.

'5. A mortgage in favour of T. A. Dawes, Jr., for $3,128.13 for right of way at Lachine, with the current interest accrued on the said several sums.

'6. The debt and costs (if any) which may be due to the plaintiffs or their attorneys, in the suits of the Royal Electric Co. against the Montreal Park and Island Railway Co. and the Montreal Construction Company, which suits are contested.

'7. Any arrears of interest due on the 58 bonds not held by the Syndicate.

'8. Any amount which may be payable to the Town of St. Louis as the price of the road of the Turnpike Trust, which amount (by reason of the judgment annulling the franchise and the contract) is not considered payable.

'9. All amounts payable for coal under contract for future delivery or in stock.

'10. Amounts payable on current and future newspaper advertisements, $490.

1907

MONTREAL STREET RY. CO. v. MONTREAL CONSTRUCTION CO.

'11. The current monthly account for supplies; on 27th April last it amounted to $3,363.78.'

"The offer closed with the following clause:

'After two years from the date hereof, the Montreal Street Railway Co. will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle, and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years or required by the purchasers so to be shall be paid over to the vendors at the end of said period, it being understood that the purchasers will not stir up or suggest claims being made.'

"On the same day the offer was accepted by appellants as follows:

'Montreal, June 20th, 1901.

'H. S. Holt, Esq.,
City.

Dear Sir,—

'On behalf of the Montreal Street Railway Company, I hereby accept the proposal contained in your letter of June 20th, to sell to this company nine hundred and sixty-seven bonds, three thousand one hundred and fifty preferred shares, and four thousand two hundred and eighty-nine ordinary shares of the Montreal Park and Island Railway Company, on the terms and conditions set out in your letter. On behalf of the company I also declare this company's option of paying the sum of $30,000 to the vendors, in consideration of the vendors undertaking to liquidate and pay all the debts of the Montreal Park and

1907

MONTREAL STREET RY. CO. v. MONTREAL CONSTRUCTION CO.

Island Railway, except those mentioned in your letter.

Yours truly,

F. C. Henshaw,
Acting President.'

"On the 30th July, 1901, the respondents granted a receipt to appellants for the consideration price and the $30,000 payable under the option accepted by them, and in the receipt respondents expressly reserved their right to claim from appellants under the contract any part of the $5,000 which the appellants agreed to contribute towards the settlement of right of way claims and which might not be so expended during the two years from date of the contract, 20th June, 1901.

"As this reserve shews, as do also the contributions of the appellants to the settlement of two other right of way claims, the Lindsay and Larue right of way claims, out of the $5,000, both parties evidently understood and acted in the view that the acceptance of the option by appellants did not relieve appellants from contributing the $5,000 over and above the $30,000 and the other consideration payable by them under the contract.

"The appellants in fact in their pleas and factum do not deny, but admit that they contracted to pay the $5,000 towards settlement of right of way claims in addition to the other considerations of the contract. But they contend that the $2,164.14 which they have been condemned to pay, which was incurred for right of way over the Grand Trunk Railway property, was not a right of way claim mentioned in the last clause of the contract towards payment of which they agreed

to contribute, but was properly a debt which respondents were bound to pay in discharge of their obligation to liquidate and pay all the debts of the Park and Island Railway Co. in consideration of the $30,000 paid them under the option to that effect accepted by appellants.

"The question thus is: Was the claim for right of way over the Grand Trunk Railway property a right of way claim within the meaning of the last or $5,000 clause of the contract, to payment of which appellants must contribute out of the $5,000, or is it a debt which respondents must pay under the option accepted by appellants?

"A reference to the $5,000 clause shews that the right of way claims therein meant were claims to be settled and, therefore, unsettled claims and were not restricted, as appellants pretend, to right of way claims that only came to light for the first time after the date of the contract. It may be questioned if there were any such unknown claims at the time of the contract, as the road had been built and in operation for several years. Claims that at the time of the contract had been settled by being reduced to a definite obligation were debts and were payable by respondents under the option, but claims that were not then settled and reduced to a definite obligation were not debts within the meaning of the option. Any unsettled claims for right of way that respondents were called on to settle within two years from date of contract, were to be settled by respondents, and the appellants were to contribute $5,000 towards the settlement of such claims, or so much thereof as was required therefor, and to pay to respondents at the end of two years any balance of the $5,000 not so required. All un-

1907

MONTREAL STREET RY. CO. v. MONTREAL CONSTRUCTION CO.

settled claims for right of way which respondents were not called on within the two years to settle were to be settled by appellants.

"The appellants say that the right of way claim for crossing the Grand Trunk Railway in question herein was not only known at the time of the contract, but had been reduced to a definite debt or obligation long before the date of the contract.

"It is a fact that an arrangement had been agreed upon for right of way between the Grand Trunk Railway Co. and the Park and Island Railway Co. in 1897, but at the time of the contract in question, the 20th June, 1901, the Grand Trunk Railway Company had consented to depart from that arrangement which had never been carried out, and at the time of the contract the two companies, Grand Trunk Railway Company and Montreal Park and Island Railway Co. were engaged in effecting a new and different settlement which was completed between the parties within the two years. The record shews that respondents were called on to settle and did settle this right of way claim of the Grand Trunk Railway within the two years from date of contract and it is the only settlement of that claim that was ever carried out.

"The majority of the court think therefore that this right of way claim of the Grand Trunk Railway Co. is one appellants are bound to contribute to the settlement of, and that the judgment *a quo* is correct and should be confirmed, and it is accordingly confirmed with costs.

"The item for legal expenses in effecting the settlement of the claim is a part of the cost of securing the right of way, and is properly included herein as are the notarial charges."

1907

MONTREAL STREET RY. CO. v. MONTREAL CONSTRUCTION CO.

Hague, for the appellants, referred to Arts. 1018, 1019 C.C.; *Fair* v. *Dolan*(1); *Watson* v. *Sparrow* (2); Larombière, art. 1162 C.N. No. 6, and the maxim, *"exceptio probat regulam de rebus non exceptis."*

We therefore respectfully submit that: (1) There are two alternative constructions of the contract, and if either be adopted respondents' action must fail; (2) According to the first, respondents having paid $30,000 can ask nothing further in any event; (3) According to second, respondents may ask a contribution of $5,000 from appellants for the purpose of settling certain claims, but the claims in question are not of the class entitled to such contribution.

Dandurand K.C. for the respondents.

The judgment of the court was delivered by

GIROUARD J.—I think this appeal should be dismissed. It seems to me that the last paragraph of the agreement of the 20th June, 1901, controls the whole instrument, and I must say that I cannot see any inconsistency between that paragraph and the former one, relied upon by the appellants. The first provides for a general case, that is, the payment of the debts of the respondent company, and the last for a special one, namely, the settlement of the right of way claims. The respondents agreed to settle all these claims which might be presented within two years from the date of the agreement whether existing and determined before that date or after, and towards this settlement the appellants agreed to contribute $5,000

(1) 2 Legal News 395.

(2) Q.R. 16 S.C. 459.

1907

MONTREAL STREET RY. CO. v. MONTREAL CONSTRUCTION CO.

Girouard J.

by way of compromise. They contend that the so-called Grand Trunk claim for right of way was a debt assumed by respondents under the first clause of the agreement. We do not understand the latter in this way. The letter of Mr. Ross, secretary-treasurer of the company, appellants, shews that the right of way claims did exist and were enforceable as such, although the company, respondent, in the first clause had assumed all the liabilities and debts, less some specified. The right of way claims therefore form an independent and special provision in the deed which the appellants had to satisfy to the extent of $5,000. The sum of money which they were condemned to pay in this case by the two courts below forms part of the said sum.

I think, therefore, the appeal should be dismissed for the above reasons which are more fully set up by the said courts, the whole with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Campbell, Meredith, Macpherson & Hague.*

Solicitors for the respondents: *Dandurand, Brodeur & Boyer.*

THE SHIP "WANDRIAN" (DEFENDANT) ..... } APPELLANT.

AND

BENJAMIN HATFIELD (PLAINTIFF) ..... } RESPONDENT.

1907
*Feb. 22, 25.
*April 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, NEW BRUNSWICK ADMIRALTY DISTRICT.

Maritime law — Collision — Negligence — Tug and tow — Negligence of tow.

A tug with the ship "Wandrian" in tow left a wharf at Parsboro', N.S., to proceed down the river and get to sea. The schooner "Helen M." was at anchor in the channel and the tug directed its course so as to pass her on the port side when another vessel was seen coming out from a slip on that side. The tug then, when near the "Helen M." changed her course, without giving any signal and tried to cross her bow to pass down on the starboard side and in doing so the "Wandrian" struck her, inflicting serious injury. In an action against the "Wandrian" by the owners of the "Helen M." the captain of the former insisted that the schooner was in the middle of the channel, which was about 400 feet wide, but the local judge found as a fact that she was on the eastern side.

Held, affirming the judgment of the local judge (11 Ex. C.R. 1) that the navigation of the tug was faulty and shewed negligence; that if the "Helen M." was on the eastern side of the channel as found by the judge there was plenty of room to pass on her port side, and if, as contended, she was in the middle of the channel she could easily have been passed to starboard; and that in attempting to cross over and pass to starboard when she was so near the "Helen M." as to render a collision almost inevitable was negligence on the tug's part; and that the "Helen M." exercised proper vigilance and was not negligent in failing to slacken her anchor chain as the "Wandrian" was too close and had not signalled.

Held, also, that the tow was liable for such negligence in the navigation of the tug.

---

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

1907

THE SHIP "WANDRIAN" v. HATFIELD.

APPEAL from the judgment of the local judge for the New Brunswick Admiralty District of the Exchequer Court of Canada (1), holding the "Wandrian" to blame for collision with the respondent's schooner "Helen M."

The facts of the case sufficiently appear from the above head-note and are fully stated in the opinions published herewith.

Hugh H. McLean K.C. for the appellant. This case was tried on the preliminary acts without pleadings; see Williams & Bruce's Admiralty Practice, (1886), p. 368. The court will never allow a party to contradict his own preliminary act at the hearing and an application to amend a mistake in his preliminary act will not be entertained. *The "Miranda"* (2); *The "Frankland"* (3); *The "Marpesia"* (4).

The fault attributed to the "Wandrian" was in not keeping in the centre of the channel. Had she done so she would have passed the "Helen M." to port and to the westward. It was the duty of the "Wandrian" to keep clear of the "Helen M."

The faults attributed to the "Helen M." were:

"(*a*) She was at anchor in the channel of the river.

"(*b*) No lookout.

"(*c*) Collision could have been avoided if "Helen M." had slackened her anchor chains."

The plaintiff by his preliminary act asked the court to determine that the "Wandrian" was in fault in not keeping in the centre of the channel. Our answer as stated, in our preliminary act, was that

(1) 11 Ex. C.R. 1.
(2) 7 P.D. 185.
(3) L.R. 3 A. & E. 511.
(4) L.R. 4 P.C. 212.

the "Helen M." was at anchor in the channel, about the centre of the channel, and it was impossible for us, the channel being blocked by the "Helen M." and the "Roberts," to have gone down on the western side of the channel. The fault of the "Helen M." anchoring where she did prevented us taking the proper course down the river.

There was "No Lookout" on the "Helen M." and she made no attempt to get out of the way even upon the order, given several times from the tug, to slacken out the chains. Nor did she attempt to put the jib up so as to assist in preventing the collision. There was plenty of time to slacken out chain or to put up the jib.

If the "Helen M." had dropped down the river a few feet the collision would have been avoided.

The collision was an inevitable accident, as laid down in the case of *The "Europa"*(1); *The "Marpesia"*(2); *The "Virgil"*(3); *The "Volcano"*(4).

We also rely upon *The "Shannon"*(5); *The "William Lindsay"*(6); *The "Sisters"*(7); *The "Industrie"*(8); *The "Telegraph"*(9); *The "Ogemaw"*(10); *The "Sapphire"*(11); *The "S. Shaw"*(12).

There is error in the judgment below holding that the tug was merely the servant of the tow and that, therefore, the tow was liable. No general rule of that

(1) 14 Jur. 627.
(2) L.R. 4 P.C. 212.
(3) 2 Wm. Rob. 201.
(4) 3 Notes of Cases 210.
(5) 1 Wm. Rob. 463.
(6) L.R. 5 P.C. 338.
(7) 1 P.D. 117.
(8) 3 Ad. & Ecc. 303.
(9) 8 Moo. P.C. 167.
(10) 32 Fed. Rep. 919.
(11) 11 Wall. 164.
(12) 6 Fed. Rep. 93.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

kind can be laid down, *The "Quickstep"*(1) *per* Brett J. at page 200; *The "Devonian"*(2), at pages 229-230; *The "Niobe"*(3), at page 60; *The "American"* and *The "Syria"*(4).

We refer also to *Jones* v. *Corporation of Liverpool*(5); *Mabey* v. *Cooper*(6); *The "Niobe"*(7), on appeal.

Coster K.C. for the respondent. The application for amendment of the preliminary act was refused in this case; it would have defeated the object of preliminary acts. *The "Frankland"*(8).

In reply to the contention that the "Helen M." was improperly anchored in the channel, we submit that in the absence of local regulations there was no particular place in the river where the "Helen M." should have been anchored. The preponderance of evidence is that she was anchored near the eastern bank of the channel. Even if she was anchored in the middle of the channel, there was no possible excuse for the "Wandrian" colliding with her in broad daylight, as there would have been ample room to pass on either side in the channel, which is four hundred feet wide at the place of the collision. *The "Lancashire"*(9); *The "Meanatchy"*(10); *The City of Peking"*(11); *The "Batavier"*(12).

There was a lookout on board the "Helen M." who saw the "Wandrian" leave Huntley's Wharf and watched her until the time of the collision. Every

(1) 15 P.D. 196.
(2) (1901) P.D. 221.
(3) 13 P.D. 55.
(4) L.R. 4 Ad. & Ecc. 226; L.R. 6 P.C. 127.
(5) 14 Q.B.D. 890.
(6) 14 Wall. 204, at p. 212.
(7) (1891) A.C. 401.
(8) L.R. 3 Ad. & Ecc. 511.
(9) 29 L.T. 927.
(10) (1897) A.C. 351.
(11) 14 App. Cas. 40.
(12) 10 Jur. 19.

possible effort was made on board the "Helen M." to avoid the collision.

As to whether or not the collision could have been avoided if the "Helen M." had slackened her anchor chains;—

No signal was given by the tug or tow (Art. 28, "Merchant's Shipping Act, 1897"), that they were changing their course, and as the "Wandrian" had some of her head sails hoisted, which would have the effect of keeping her head over to the western bank of the channel, the "Helen M." would not have been justified in slackening the anchor chains until the collision was so imminent that it could not have been averted by so doing.

The contention that the tug alone was liable was not set up in the preliminary act, but it is absolutely answered by the judgment in the court below and cannot be maintained. The master of the "Wandrian," hired the tug to tow his vessel to sea. The tug was, therefore, the servant of the "Wandrian," and the "Wandrian" was liable. In matters of collision, the tug and the tow are one vessel. Towed as the "Wandrian" was, the motive power is in the tug, and the governing power in the ship. *The "Cleadon"*(1); *The "American"* v. *The "Syria"*(2); *The Devonian"* (3); *The "Niobe"*(4).

Under these circumstances, the "Wandrian" has not relieved herself of the responsibility placed upon her, or shewn that this accident was inevitable and she must be held to be entirely in fault.

We would also refer to *The "Mary"*(5); *The "Sin-*

(1) 14 Moo. P.C. 92.
(2) L.R. 6 P.C. 127.
(3) (1901) P.D. 221.
(4) 13 P.D. 55.
(5) 5 P.D. 14.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

quasi" (1), *and The "American" and The "Syria"* (2), at page 133.

THE CHIEF JUSTICE.—As explained by my brother Davies who has made a detailed statement of the evidence there is little, if any, difference between the parties to this appeal as to the facts connected with the collision except possibly with reference to the exact location of the respondent's schooner in the channel.

By consent of parties the evidence was taken under the rule on the preliminary acts and no pleadings were filed. The defence of inevitable accident which was urged most strenuously here does not appear to have been averred. *The "E. Z."* (3).

The collision occurred at three o'clock on the afternoon of the 28th November, 1904. The schooner "Helen M." of 62.25 tons burden was lying at anchor, somewhat above the most frequented part, in the Parrsboro River about the middle of the channel as alleged by the appellant, and on the eastern side of the channel as found by the trial judge. In my view of the case the exact location is not material. The channel at this point is about 400 feet wide. The tide was within half an hour of flood; the current flowing up the river at the rate of about half a mile an hour; the wind was N.N.E. blowing a good breeze, about four miles an hour, down the river.

The steam tug "Flushing" with the "Wandrian" in tow started from a place called Huntley's Wharf about two thousand feet distant up the river from the "Helen M." to go down the river and out to sea. To

(1) 5 P.D. 241. (2) L.R. 6 P.C. 127.
(3) 33 L.J. (Adm.) 200.

do this it was necessary to pass the "Helen M." which lay in full view of both tug and tow from the time they started on their voyage. It is to be noted that the head sails of the "Wandrian" were set and she was drawing about 17 feet of water. The total length of tug, tow line and tow was 420 feet (tug 125, hawser 150 and tow 145).

The theory of the appellant is that the "Helen M." was anchored about the centre of the channel and the course the tug was bound to follow with her tow after passing the small island called "The Middle Ground" was to the west over towards the Newville wharf and then down the starboard side of the river; that in attempting to do so the tug saw the channel was blocked by reason of the fact that a schooner called the "Roberts" was hauled out from the beach on the west side into the starboard channel 160 feet and lay in this position at a distance of about 160 feet to 200 feet below the "Helen M." and if the tug with her tow had passed the schooner at anchor on her port side she could not get between her and the "Roberts" without risk of collision and because of these conditions the tug was obliged to cross over with her tow to the eastern side of the channel under the bow of the schooner at anchor and in attempting to carry out this manoeuvre the collision occurred.

The captain of the "Wandrian" at page 116 of the case says that the only chance of avoiding a collision on that day was to pass down on the eastern side, and in his opinion that was the proper course to take. Why this course was not taken at an earlier stage does not appear and no satisfactory explanation of the delay has been offered. If, as found by the judge, the schooner was at anchor upon the eastern

1907

THE SHIP "WANDRIAN" v. HATFIELD.

The Chief Justice.

side of the channel then there was ample room to pass on her port side without danger. If, on the contrary, she was, as alleged by the appellant, anchored in the centre of the channel there was ample room to go down passing starboard to starboard and the fault on the part of the tug and tow consists on their own theory in not having attempted this sooner and having delayed too long the collision happened.

Admitting as contended by the appellant that under ordinary circumstances the starboard side after leaving the island was the proper side to take and that channel being blocked by the "Roberts" the tug and tow were forced to go over to the eastward or port side, and to do so were obliged to cross under the bows of the "Helen M." was this not an extremely hazardous undertaking? In view of the condition of the tide, the direction and strength of the wind, the head sails carried by the "Wandrian," the fact that she drew 17 feet of water, the attempt of the tug with a long mass behind her to cross the bows of the schooner was not only hazardous but under the circumstances quite unnecessary and the result was inevitable. The people on board the tug and tow should have realized the position sooner and directed their course at an earlier time to the eastern side of the channel. Of course this assumes the accuracy of appellant's statement of conditions which is at variance with the facts as found by the trial judge, and a careful examination of the evidence has confirmed the conviction left with us when the argument closed that the findings of fact by the trial judge were justified by the evidence, and as he tells us he had the great advantage, which is in such a case as the present unappreciable, of hearing all the witnesses and observing their demeanor.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

The Chief Justice.

There are really but two questions to be considered: First, did the schooner "Helen M." keep a vigilant lookout and take all the precautions to avoid the collision which the circumstances of the anchorage required?

The trial judge found: First, that proper vigilance was exercised by those on the schooner to avoid the collision: Secondly, that the tug gave no signal to indicate her intention to alter her course and cross over from the western to the eastern side of the channel: Thirdly, that when the two men on the "Helen M." became first aware of the change in the direction of the tug they went forward to let out the chain but the "Wandrian" was too close to do anything and that their explanation of the failure to let out the chain was adequate. If in consequence of the change in the course of the tug the schooner at anchor was expected to take action to avoid the collision, such change in her course should have been indicated by proper sound signals.

In the *"Batavier" Case*(1), Lushington J. says:

> The principle of law where a vessel is run down by another I take it to be this: That the vessel running down the other must shew that the accident did not arise from any fault or negligence on her own part * * * and it is the duty of every vessel seeing another at anchor whether in a proper or improper place and whether properly or improperly anchored to avoid, if it be practicable and consistent with her own safety, any collision.

The second question: Is the tow responsible for the consequences of the collision in the circumstances? It was laid down in *The "Energy"*(2), that the master and crew of the tug are the agents of the owners of the ship and for damage done to a stranger

(1) 10 Jur. 19.

(2) L.R. 3 Adm. & Ecc. 48.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

The Chief Justice.

solely through the fault or incapacity of the crew of the tug both parties are answerable.

In the case of *The "Niobe,"* (1) Sir James Hannem suggests that possibly if the collision had been brought about by sudden manoeuvring on the part of the tug which the tow could not control that the tow might be held blameless, but for the purposes of this case it is sufficient to adopt the language of the Privy Council in *The "American" and The "Syria"* (2):

> The tug is in the service of the tow, the tow is answerable for the negligence of her servants, and is for some purposes identified with her.

And there is no evidence to shew that the manoeuvre which resulted in the collision was adopted without the concurrence of the tow. The contrary would appear to be the case. Those in command of the tow might have refused to execute the orders of the tug as they would in case of gross negligence by a pilot. *The "Duke of Manchester"* (3).

In the appellants' factum the circumstances out of which the collision arose are thus given:

> The tug finding the starboard channel blocked changed her course to the eastward and on her starboard helm so as to take the "Wandrian" across the channel in front of the "Helen M." and go down on the port side of the channel or to the eastward of the "Helen M." The captain of the "Wandrian" was at the wheel and as soon as the tug changed her course he put his helm hard a-starboard and put it in the becket. The tug was drawing about nine feet of water and the "Wandrian" drawing sixteen feet ten inches. The "Wandrian" being loaded could not, of course, answer her helm as quickly as the tug. The tug put her helm hard a-starboard so as to assist the "Wandrian" to swing to the eastward.

(1) 13 P.D. 55. (2) L.R. 6 P.C. 127.
(3) 2 Wm. Rob. 470, 479.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

The Chief Justice.

In the case of *The "Energy"* (1), Sir Robert Phillimore says:

> So long ago as the 23rd of November, 1867, this court decided that a vessel called the "Lizzie Aisbitt," in tow of a tug called the "Energy" was alone to blame for a collision with a vessel called the "Mary." The case was argued before me by the present Mr. Baron Cleasby and Mr. Justice Brett; and I was assisted by Trinity Masters. The collision took place in St. Clement's Reach, in the River Thames, between 9 and 10 a.m. of the 1st of April, 1867. In that suit the pilot on board the "Lizzie Aisbitt" and the master of the tug "Energy" were both examined on behalf of the "Lizzie Aisbitt," but the evidence of the pilot was that the collision was caused by the misconduct of the tug, *for which, of course, so far as concerned the "Mary," the "Lizzie Aisbitt" was responsible.*

I have not been able to find that the law as stated by Sir R. Phillimore has ever been doubted.

The appeal should be dismissed with costs.

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

DAVIES J.—This appeal is from the judgment of Mr. Justice McLeod, the local judge in Admiralty for the District of New Brunswick, condemning the ship "Wandrian" for damages to the schooner "Helen M." caused by a collision between the two ships in the Parrsboro river on the 28th November, 1904, about three o'clock in the afternoon and about half an hour before high water.

The "Wandrain" was at the time being towed from Huntley's wharf where she had loaded, down the river to the sea.

The main questions in dispute were: First, whether the collision was caused by the negligence

(1) L.R. 3 Adm. & Ecc. 48, 51.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

Davies J.

and want of care and skill on the part of the tug or was due, as contended by the "Wandrian," to inevitable accident; Secondly, if due to the want of care, judgment and skill on the part of the tug, was the "Wandrian" responsible?

After hearing the argument of Mr. McLean on behalf of the "Wandrian" we were all of the opinion that the collision was not the result of inevitable accident but of the unskilful and improper management and manoeuvring of the tug. A careful examination of the evidence since the argument has convinced me that we were right and that the findings of the trial judge were proper.

The evidence has been carefully analysed and reviewed by the trial judge and agreeing as I do with him generally I do not see that any good purpose would follow a repetition of the reasoning he has adopted.

The collision took place in broad daylight in fine weather with hardly any tide running and only a few hundred yards from the wharf from which the tug had taken the "Wandrian" in tow.

The schooner "Helen M." was lying at anchor in the channel of the river which at that place was about 400 feet wide, and some distance below the "Helen M.," a vessel called the "Roberts" was being kedged or hauled from the flats on the western side into the channel and was lying almost her entire length in the channel.

Both the "Helen M." and the "Roberts" were in full view of the "Wandrian" and her tug while starting from Huntley's wharf on the river and there was nothing to obscure or prevent the lookouts on both tug and tow from seeing the relative positions of both

these vessels from the time the "Wandrian" started until the collision occurred a few hundred yards down the river.

A copy of an official plan or chart shewing the river with its channel and the flats on either side and the depth of water on the flats and in the channel at "average high water ordinary spring tides" was in evidence.

From the plan or chart it appears that the depth of water in and across the channel at about 300 feet south of the collision was almost uniform and was between 23 and 24 feet, while on the flats it was somewhat less.

No evidence was given shewing that there was any difference between the depth at the actual spot where the collision occurred and the line a few hundred feet further down where the soundings were marked on the plan.

The weight to be attached to the argument of Mr. Maclean that the tug and tow were obliged owing to the alleged shallowness of water on the eastern side of the channel after passing the shoal or island called the Middle Ground marked on the plan to hug the western side of the channel obviously depended upon the existence of evidence shewing this shallowing of the channel at that particular spot, and that it would consequently have been unsafe for the tug to have towed the "Wandrian" down the centre of the channel or along the eastern side of the channel which from his contention barring shallowness was perfectly clear and open.

Time and again during the argument we asked for the evidence or proof of this fact so essential for the defendant's case, but no evidence was or could be

1907

THE SHIP "WANDRIAN" v. HATFIELD.

Davies J.

produced, the only evidence to which our attention was called being that of witnesses who spoke of the necessity of vessels after passing the Middle Ground keeping towards the eastern shore because the flats ran out a little and formed a small point there and there was somewhat of a bend in the channel. Not a single witness however stated or proved that so far as the channel itself was concerned its depth was not the uniform depth marked on the chart a few hundred feet lower down.

The theory of the counsel for the "Wandrian" was that the "Helen M." was anchored on the western side of the channel and that the tug proceeded with her tow down the river and after passing the Middle Ground kept to the western side of the channel intending to pass between the "Helen M." and the western edge. That the tug had almost reached the "Helen M." when the captain suddenly discovered he could not safely pass down on the port side of the "Helen M." and determined to pass on the starboard side, starboard to starboard.

That to effect this he put his helm a-starboard, crossed the bows of the "Helen M." and fearing that his tow might not successfully do so pressed his helm hard-a-starboard so as to pull her up the river and escape collision.

He was not successful, however, in executing this manoeuvre and his tow with her head sails up came into collision with the anchored vessel and caused the damage complained of.

The initial mistake in the navigation of the tug and tow was in proceeding as far as the spot where a sudden change of course was determined upon and the mistake was duplicated in then attempting to cross as

was attempted the bows of the "Helen M." there lying at anchor. As it was evident from the evidence of the captain of the tug that this manoeuvre was a somewhat hazardous one the keeping of the head sails on the "Wandrian" with the wind blowing down the river and the chances of collision so strong, seems to indicate carelessness and want of judgment on the part of those in command of that ship.

When the captain of the tug had reached the position when he concluded he could not safely continue his course between the "Helen M." and the western bank of the river, it might have been better for him to have made the best of a situation created by his want of judgment, and to have taken her to the Newville wharf, abreast of which he was, as suggested by the trial judge. In our opinion, however, if the "Helen M." was anchored where the defendant contends she was, on the western side of the channel, the tug and tow should have passed down on the eastern side and not have crossed over to the western at all. Why, granting the position of the "Helen M." in the river to have been where defendant contends, this was not done we cannot understand. The road was open, everything clear, and the depth of water ample with the risk of collision nil. If, on the contrary, the position the "Helen M." was anchored at was on the eastern side of the channel as found by the learned trial judge then the sudden change of course on the part of the tug and tow across the bows of the anchored vessel in order to pass her on her starboard side was at the moment it was taken, altogether too late and indefensible. They should, in that case, have passed down on the western side of the "Helen M."

1907

THE SHIP "WANDRIAN" v. HATFIELD.

Davies J.

as the trial judge has found and granting he has correctly found the anchored location of the schooner his conclusion seems irresistible.

I am utterly unable to accept the theory of inevitable accident. On the contrary I am of opinion that the collision was caused by the want of skill and judgment of those in charge of the tug and tow.

On the second question as to the liability of the tow for a collision between it and the anchored ship caused by the unskilful navigation of the tug, I have reached the conclusion that in the circumstances of this case the tow is liable.

There may be a difference in the application of the legal rules and principles governing such cases between the English and American courts, and it does seem difficult if not impossible to reconcile all the authorities. But we are bound to follow the English decisions and we think they clearly indicate liability on the part of the tow for such a collision as this. Of course we have nothing to do with the rights and liabilities of the tug and tow *inter se*.

The question is confined to the liability of the tow for damages caused by a collision between her and a third ship even if brought about by the faulty navigation of the tug.

Here there were no exceptional circumstances to take the contract of towage out of the ordinary rule. That rule I deduce from the authorities to be that under an ordinary contract of towage the tow has control over the tug and the latter is bound to accept the directions and orders of the former. There are exceptions to this rule notably in the cases of dumb barges and canal boats having little or no control over their own movements and where, by custom,

contract or necessity, the control of the tow is in the tug. But in the absence of any such factors I take it to be clear under the English authorities that the control is in the tow.

Mr. Marsden in his work on Collisions (5th ed.) after a review of the English Admiralty Cases has reached that conclusion; see pp. 169 and 173.

In the case of the *Union Steamship Company* and *The "Aracan," The "American"* and *The "Syria"*(1), the Judicial Committee reversing the decision of the High Court of Admiralty held that having regard to the exceptional circumstances under which the towing in that case was undertaken the governing as well as the motive power being wholly with the tug the tow was not liable to be condemned in damages occasioned by the collision. At page 132 their Lordships say:

> The question remains whether the "Syria," though free from blame in fact, must nevertheless be held to blame by intendment of law. The decision of the learned judge upon this point appears to be based upon the principle shortly stated by Lord Kingsdown in the passage which has been before cited as that on which *The "Cleadon"* (2), was decided, viz., that the motive power was in the tug, the governing power in the ship towed. The judge of the Admiralty Court applying this principle to the present case, held that the "American" and the "Syrian" constituted one vessel in intendment of law. This is no doubt an accurate representation of the relations usually subsisting in this country between the tug and the tow. The tug is in the service of the tow, the tow is answerable for the negligence of her servant, and is for some purposes identified with her. Some American cases have been cited which, though differently decided, illustrate this principle.

The case of *The "Niobe"*(3), is also in point. There it was held by the President, Sir James Han-

(1) L.R. 6 P.C. 127. (2) 14 Moo. P.C. 97.
(3) 13 P.D. 55, 59.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

Davies J.

nen, that where a tug with a vessel in tow came into collision with another vessel which was seriously injured by the tug but not by the vessel in tow, and where the collision might have been avoided had there been a good lookout on the vessel in tow and had she warned the tug that the latter was in danger of collision by continuing on her course, the owners of the tow were liable.

In the case before us the scope of hawser was about 25 fathoms only and there are no circumstances whatever to indicate any difficulty on the part of the tow in directing the control of the tug's movements. The evidence of the captain of the tow makes it plain that he took no pains in the matter at all, but left the tug to manoeuvre as it pleased. This, however, cannot absolve his vessel from liability if the control was in him. His duty was to exercise that control and his failure to exercise that duty cannot enable him to escape liability where a collision occurred through the tug's fault.

In the later case of *The "Devonian"* (1), where the tow was held liable for the fault of the tug in exhibiting misleading lights the relative liabilities of tug and tow are discussed.

Sir F. H. Jeune P. who heard the case, in his judgment, at page 230, says:

> It appears to me the tow is responsible for the conduct of the tug so far, at least, as she can practically and reasonably exercise the control.

On appeal Lord Chief Justice Alverstone delivering the judgment of the Court of Appeal holding the tow liable, says:

(1) [1901] P.D. 221.

With regard to her responsibility, (that is the tow's), apart from the statute, I do not think there is any doubt about the law, though there was difficulty about its application until the case of *The 'Cleadon"* (1) (in 1860), when it was recognized that where one ship is in tow of another the two ships are by intendment of law for some purposes to be regarded as one, the commanding or governing power being with the tow, and the motive power with the tug.

The contract of towage in this case before us being a general one, there being no special circumstances shewing the control to have been in the tug the action of the master of the tow in hoisting and keeping up his head sails and the short distance between the two ships shewing the exercise of control by the tow to have been both practical and possible and to some extent at least to have been exercised all combine to remove this case from the exceptions which appear to exist in the towage of dumb barges and canal boats or such cases as *The "American" and The "Syria"* (2), from the judgment of the Judicial Committee which I have quoted above and where it was held that the motive power and the control were alike in the tug.

I think we are bound to apply in this case the general rule laid down by the Privy Council in the cases of *The "Cleadon"* (1), approved of by the Court of Appeal in 1901; in *The "Devonian" Case* (3) and in the case of *The Union Steamship Co.* and *The "Aracan"* (2) quoted above.

The appeal should, therefore, be dismissed with costs.

MACLENNAN J. concurred with Davies J.

DUFF J.—I agree with the Chief Justice.

(1) 14 Moo. P.C. 92, 97. (2) L.R. 6 P.C. 127.
(3) [1901] P.D. 221.

1907

THE SHIP "WANDRIAN" v. HATFIELD.

Appeal dismissed with costs.

Solicitor for the appellant: *Fred R. Taylor.*

Solicitor for the respondent: *C. J. Coster.*

THE COPELAND-CHATTERSON COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

JEAN PAQUETTE AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

1907

*Feb. 28
*April 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent of invention — Infringement — Want of novelty—New and beneficial results — Subject matter of invention — Purchase of patented device—Estoppel.

The plaintiffs were patentees of a device intended to cheapen and simplify former methods of keeping and rendering statements of accounts by merchants and others, as was claimed, by providing for making entries and invoices by one and the same act on manifolding sheets so folded as to occupy the entire platen of standard typewriters and, at the same time, without waste, to provide a binding margin for the leaf with the book-keeping entry to utilize it as a page in a permanently bound book. The sheets manufactured and sold by the plaintiffs accomplished these ends through being folded so as to form two or three leaves, as required; with two-leaf sheets the upper leaf forming an original or invoice and the lower leaf the duplicate and book-keeping entry; with three-leaf sheets, the third leaf serving either as a duplicate or to be used as an original duplicated on the reverse side of the centre leaf. In each case the leaves are connected together so as to form one integral sheet with vertical and transverse score lines enabling the invoices, etc., to be easily detached, leaving the permanently retained page and folded margin with perforations to fit binders. The specifications of the patented device succinctly described and illustrated various forms of folding the sheet to secure these advantages. An action for infringement by the defendants using, manufacturing and selling sheets similar to the above described device was dismissed in the Exchequer Court. On appeal to the Supreme Court of Canada:

Held, affirming the judgment appealed from (10 Ex. C.R. 410) that there was neither subject matter nor novelty in the above device claimed as an invention and, consequently, that it was not patentable.

---

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

1907

COPELAND-CHATTERSON Co. v. PAQUETTE.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the plaintiffs' action with costs.

The action was brought against Parquette, trading under the name of "The Montreal Plumbers' Supplies" and Victor Guertin and Henri Guertin, trading as "The Guertin Printing Co.," to recover damages for infringement of the patent referred to in the headnote and for an injunction against their making, selling or using fold-over bill and charge blanks made on the principle of, or on any principle colourably only differing from, the plaintiffs' alleged inventions, unless the same were manufactured by the plaintiffs or by some person duly licensed by them. It was alleged that Paquette had purchased a quantity of the blanks and afterwards procured the other defendants to manufacture and supply him with blanks manufactured according to said inventions or upon principles only colourably differing therefrom, at less cost than they could have been purchased from the plaintiffs and had used such infringements in his business to the prejudice and damage of the plaintiffs, although warned against doing so and with full knowledge of the existence of said patents; and that the other defendants had likewise infringed the patents and caused damages to the plaintiffs by so manufacturing and making sales of similar sheets for like purposes. On the issues joined, the judge of the Exchequer Court, by the judgment appealed from (1), dismissed the plaintiff's action with costs.

Raney for the appellants. The judgment appealed from is erroneous in holding that there was lack of

(1) 10 Ex C.R. 410.

subject matter and lack of invention and utility. The patent itself is *primâ facie* proof of utility; *Ehrlich* v. *Ihlee*(1) at page 449, *per* Cotton L.J. And there is cogent evidence of substantive utility in the case. There is also novelty as the prior acts referred to do not cover the special matters constituting our inventions. Walker on Patents (4 ed.) pars. 56, 57, 64, 65, 66, 75, 76; *Topliff* v. *Topliff*(2); *Fawcett v Homan* (3), *per* Rigby L.J. at page 410; Terrell on Patents (4 ed.) page 99; *Hoe* v. *Cottrell*(4), at page 603; *Potts* v. *Creager*(5); *Marvin* v *Gotshall*(6). There is a presumption in favour of novelty which should not be disregarded in the absence of clear proof.

There is no evidence to support the defence of want of novelty and want of subject matter of invention. The court should not, therefore, presume what are matters of fact requiring proof as such. *Lancashire Explosives Co.* v. *Roburite Explosives Co.*(7); *Longbottom* v. *Shaw*(8); *Lyon* v. *Goddard*(9); *Reiter* v. *Jones*(10); Simplicity is no objection; *Vickers, Sons & Co.* v. *Siddell*(11); *Hinks* v. *Safety Lighting Co.*(12); *Perry* v. *Société des Lunetiers*(13); *Williams* v. *American String-Wrapper Co.*(14). The courts uphold patents where there is an appreciable germ of invention; Fulton on Patents, (3 ed.) p. 59. The merit is in conceiving the

(1) 5 Cutler 198, 437.
(2) 145 U.S.R. 156.
(3) 13 Cutler 268, 398.
(4) 1 Fed. Rep. 597.
(5) 155 U.S.R. 597.
(6) 36 Fed. Rep. 908.
(7) 12 Cutler 470.
(8) 8 Cutler 333.
(9) 10 Cutler 334.
(10) 35 Fed. Rep. 421.
(11) 7 Cutler 292.
(12) 4 Ch. D. 607.
(13) 13 Cutler 664.
(14) 86 Fed. Rep. 641.

1907

COPELAND-CHATTERSON CO. v. PAQUETTE.

idea; *per* Rigby L.J. in *Fawcett* v. *Homan*(1), at p. 410. See also *Taylor & Scott* v. *Annand*(2), per Romer L.J. at p. 136. We have a new device with a new mechanical operation involving the exercise of original thought, although the separate parts or elements may be old; *Wilkins Shoe-Button Fastener Co.* v. *Webb*(3); *McMichael & Wildman Mfg. Co.* v. *Stafford*(4); *Rubber Tire Wheel Co.* v. *Columbia Pneumatic Wagon Wheel Co.*(5); *The Grip Printing and Publishing Co.* v. *Butterfield*(6); *Carter Crume Co.* v. *American Sales Book Co.*(7).

The defendant Paquette purchased from the appellants sheets made according to the specification of the patent in suit and was still using those sheets when the action was brought, and when he was examined for discovery in the action. When he purchased those sheets he became the licensee of the appellants, and he remains their licensee as long as he continues to use the sheets. As a consequence, it is not open to him to dispute the validity of the patent; *Crossley* v. *Dixon*(8); *Clark* v. *Adie*(9). So long as he remains a licensee, that is to say so long as he continues to use articles of the appellants' manufacture, and does not repudiate their license, he cannot avail himself of the defence of his co-defendants. Terrell on Patents, (4th ed.), p. 217 *et seq.*; Fulton on Patents, (3rd ed.), p. 201 *et seq.*

We also refer to Trudeau (4th ed.), p. 107; *Lucas*

(1) 13 Cutler 398.
(2) 17 Cutler 126.
(3) 89 Fed. Rep. 982.
(4) 105 Fed. Rep. 380.
(5) 91 Fed. Rep. 978.
(6) 11 Can. S.C.R. 291.
(7) 124 Fed. Rep. 903.
(8) 10 H.L. Cas. 293, 310.
(9) 2 App. Cas. 423.

v. *Miller*(1); *Reynolds* v. *Herbert Smith & Co.*(2); *Smith* v. *Goldie*(3), per Gwynne J. at pages 69, 71; *Dansereau* v. *Bellemare*(4); *Thomson* v. *American Braided Wire Co.*(5); *Anti-vibration Electric Co.* v. *Crossley*(6); *Ashworth* v. *The English Clothing Co.* (7); *Taylor & Scott* v. *Annand*(8); *Heugh* v. *Chamberlain*(9), *per* Jessel M.R.

Mignault K.C. and *Perron K.C.* for the respondents. We contend that the invention claimed lacks novelty and patentability and is merely a result of mechanical skill, a substitution of known equivalents for parts of existing devices and a mere duplication of old elements without change of function and a mere change in form or size without the result of any new mode of operation. The industrial design was not susceptible of being patented. The letters-patent, by a needless multiplicity of claims, embarrass and deceive the public, and the specifications and drawings contain more than is necessary for obtaining the end for which they purport to be made. See *Case* v. *Cressy*(10).

On the question of combination or no combination, we refer to Terrell on Patents (4th ed.), p. 151, and Frost on Patents (2nd ed.), p. 61. See also *Kynoch & Co.* v. *Webb*(11).

As to subject matter of invention, the cases referred to by the appellants are based upon the peculiar

(1) 2 Cutler 155.
(2) 20 Cutler 123.
(3) 9 Can. S.C.R. 46.
(4) 16 Can. S.C.R. 180.
(5) 6 Cutler 518.
(6) 22 Cutler 441.
(7) 19 Cutler 463.
(8) 17 Cutler 126; 18 Cutler 53.
(9) 25 W.R. 742.
(10) 17 Cutler 255.
(11) 17 Cutler 100.

1907

COPELAND-CHATTERSON CO. v. PAQUETTE.

circumstances of each case and do not decide more. They really condemn the patent which is nothing more than a sheet of paper with a score line placed half an inch from the line of fold. The fallacy of the claim as to saving paper and fitting the ordinary typewriter is shewn by merely folding the margin (which of course it is open to any one to do) of the sheet made according to claim 1, or figures 2 and 9, when such sheet becomes of the same width as the other sheets filed. See remarks of Buckley J. in *McNaught* v. *Dawson*(1).

THE CHIEF JUSTICE.—The appeal is dismissed with costs. I concur for the reasons stated in the court below.

GIROUARD J.—I quite agree with the court below that there was nothing to patent. The appellant contended for the first time before this court that it was a patent of combinations. This alleged combination is not to be found in his application for the patent, nor in the patent itself, nor in the statement of claim. Their contention is clearly unfounded. I think there is no error in the judgment appealed from.

DAVIES J. also concurred.

IDINGTON J.—I agree with the learned trial judge that there is nothing new in folding a sheet of paper from right to left or left to right or in having score lines in one or some of such leaves or placing such score lines so as to produce when separation takes place at the score line, one leaf larger than the other

(1) 22 Cutler 389.

or in utilizing the margin of a sheet of paper to bind it in a book if desired.

I may add that I am unable to find anything new in the folding of a margin of a sheet of paper to be used in the process of typewriting. Typewriters have been doing that ever since the typewriting machine was invented. And I suspect many have done so with sheets of letter paper, of which copies would be mailed, and one copy would be put away in a portfolio for preservation, and even in the way of filing upon posts. I cannot see what, if one desired to put away such preserved copies gathered together in a more permanent form, is to be invented, that would not occur to any ordinary mind accustomed to do such work, or needing it to be done. It was urged that the wide spread use of such goods, as made after the patent in question, was proof of their utility, and being so useful, it is said, we must infer from this utility that something has been invented. The business push and energy that may present to business men the utility of such things and bring them into use must not be so confused with the question of utility as to be the sole test of that utility, which must be inherent in a patentable invention.

The appellant's counsel urged before us that their patent consisted of a combination and the application of it to book-keeping all of which was new and hence a subject matter for a patent.

It was stoutly maintained by respondent's counsel that this was not set up before the learned trial judge and I incline to doubt if it was strongly pressed upon his attention though evidently present to the mind of counsel during the trial.

There seem, however, to be two answers to this

1907

COPELAND-CHATTERSON CO. v. PAQUETTE.

Idington J.

claim, assuming it now open to appellants before us, when and if discarded by appellant below.

The claims set forth in appellant's specification do not specificially claim any such combination, nor as it appears to me, do the specifications substantially claim to rest the alleged invention on the ground of a combination, either of old things or old combined with a something new.

It also was plausibly urged that there was such a combination which was applied to a new purpose.

This of itself would not be patentable. It would leave the appellant's case within the line of cases of which *Harwood* v. *Great Northern Railway Co.* (1), is a leading one. And to escape such result the appellant's counsel sought to claim the feature of folding, so as to leave a margin of suitable width to bind in a book, with least waste of paper, as a something that would not be obvious or so obvious to anyone in relation to keeping of accounts as to remove it beyond the field of patentable invention.

I cannot assent to this. The manifolding of anything by means of typewriting and the preservation of a copy in case, or book, or file, with posts to bind or without, has so long been the common property of mankind that I cannot find anything needed to be done that was not obvious to any one of ordinary intelligence.

Indeed the enterprise that undertakes to sell paper ready prepared for use in any such way is worthy of praise, but I hardly think that enterprise is yet patentable.

Some things within the sphere of human intelligence are yet left free from such restraints.

(1) 35 L.J.Q.B. 27.

1907

COPELAND-CHATTERSON CO. v. PAQUETTE.

Idington J.

I cannot find that Paquette by his purchase from appellants of paper duly prepared by methods they have adopted bound himself (as a licensee is in some actions bound) not to deny the validity of this patent.

The appeal should be dismissed with costs.

MACLENNAN J.—I agree in the result of the judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Mills, Raney, Hales and Colquhoun.*

Solicitors for the respondents: *Archer, Perron and Taschereau.*

1907

*March 1, 4.
*April 2.

MATHILDA MAYRAND, (PLAINTIFF). ..... } APPELLANT.

AND

ARSÈNE DUSSAULT, (DEFENDANT). ..... } RESPONDENT.

AND

DENIRE DUSSAULT AND OTHERS, MIS-EN-CAUSE.

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

Revocation of will — Testamentary capacity — Findings of fact — Practice — Improper suggestion — Undue influence—Captation—Bounty taken by promoter — Fraudulent representations — Evidence—Onus of proof.

While the testator was suffering from a wasting disease of which he died shortly afterwards, the defendant, his brother, took advantage of his weakness of mind and secretly obtained the execution of a will, in which he was made the principal beneficiary, by fraudulently suggesting and causing the testator to believe that his malady was caused and aggravated by the carelessness and want of skill of his wife in the preparation of his food. The testator and his wife had lived together in harmony for a number of years and, shortly after their marriage, had made wills by which each of them, respectively, had constituted the other universal residuary legatee and the testator's former will, so made, was revoked by the will propounded by the defendant.

Held, that, as the promoter of the will, by which he took a bounty, had failed to discharge the onus of proof cast upon him to shew that the testator had acted freely and without undue influence in the revocation of the former will, the second will was invalid and should be set aside.

The judgment appealed from was reversed, on the ground of captation and undue influence, but the Supreme Court of Canada refused to interfere with the concurrent findings of both courts below against the contention as to the testator's unsoundness of mind.

---

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

1907

MAYRAND v. DUSSAULT.

APPEAL from the judgment of the Superior Court, sitting in review, at the City of Montreal, which affirmed the judgment of His Lordship, Mr. Justice Doherty, in the Superior Court, District of Montreal, dismissing the plaintiff's action with costs.

The late Joseph Dussault, of Maisonneuve, District of Montreal, married the appellant, plaintiff in the case, on the 3rd of March, 1897, with ante-nuptial contract stipulating that the consorts should be separate as to property, and with donation of all the husband's personalty to the wife. Three days later he made a will whereby he instituted his wife universal legatee; his wife making, at the same time, a will in his favour in similar terms. Joseph Dussault died without issue, on the 9th of April, 1904, after having, on the 5th of March, 1904, made another will, under the circumstances mentioned in the head-note, devising the bulk of his estate to other legatees and constituting the respondent, his brother, universal residuary legatee. The widow brought the action to set aside the second will on the grounds that, at the time it was executed, deceased was suffering from physical weakness, mental aberration and delusions, and that he was under duress and incapable of making a valid will. Both courts below decided against the plaintiff's contentions and maintained the second will.

The questions at issue upon the appeal are stated in the judgment of His Lordship, Mr. Justice Girouard, now reported.

Bisaillon K.C. and *H. R. Bisaillon* for the appellant.

Mignault K.C. and *Bonin K.C.* for the respondent.

1907

MAYRAND v. DUSSAULT.

The Chief Justice.

The CHIEF JUSTICE.—After having carefully read all the depositions I have, as a matter of inference from the facts in evidence, come to the conclusion that the natural affection of the deceased for his wife, the appellant, had been poisoned and his sense of right perverted by the fraudulent artifices practiced upon him by the respondent. We all concur in the opinion of my brother Girouard.

The testator would not, in my opinion, have disposed of his estate as he did were it not for the improper influence exercised by the respondent, at the time the will was made, over his mind weakened by the wasting disease which eventually caused his death. The suggestion repeated day after day for weeks and months that his malady was caused or aggravated by the negligence or want of skill in the preparation of his food by his wife was, under the circumstances, the most insidiously effective method that could be used to improperly influence the testator who should, at the time, have had a reasonable expectation of a prolonged life during which to enjoy the reward of his industry and business capacity. Convinced that his death was caused or hastened by the poor food which his wife prepared, his natural impulse would be to deprive her of the benefits accruing to her under his previous will, and the respondent seems to have directed his efforts to the fostering of this false impression.

Under the circumstances I am of opinion that the appeal should be allowed, the judgment appealed from set aside and the action maintained with costs.

GIROUARD J.—Il s'agit d'une demande en nullité de testament formée par la veuve du testateur pour deux motifs: 1° pour cause d'insanité du testateur, et

1907

MAYRAND v. DUSSAULT.

Girouard J.

2° pour cause de suggestion et de captation, pour me servir des expressions du droit français, ou d'influence indue, d'après le droit anglais, d'où nous vient la faculté illimitée de tester. D'après les règles de droit des deux pays, c'est toujours la fraude qui caractérise la suggestion et la captation ou l'influence indue.

Cette cause soulève donc deux questions de fait.

Sur les deux questions, nous avons apparemment le sentiment unanime de la cour supérieure, Doherty J., et de la cour de revision siégeant à Montréal, Taschereau, Pagnuelo et Charbonneau JJ.

Le savant juge de la cour supérieure n'a pas laissé de notes, et en dehors du jugement formel où il se contente de nier les allégations de la demande, il est impossible de connaître son appréciation raisonnée des faits assez nombreux et souvent contredits qu'une longue enquête, couvrant 325 pages imprimées, a déroulés devant lui. Nous savons, cependant, qu'il n'a jetté aucun soupçon sur le caractère ou la véracité d'aucun témoin, et pour cette raison, son jugement, ou plutôt la conclusion générale à laquelle il est arrivé, nous laisse autant de latitude que la cour de revision en avait.

La cour de revision a confirmé ce jugement sur les deux moyens; mais le juge Pagnuelo, qui seul nous a transmis des notes, constate que le motif tiré de l'insanité est le seul qui fût considéré par les savants juges. Il observe même que le moyen de la suggestion et de la captation a été abandonné, faute de preuve. Les avocats des deux parties s'accordent à dire que le savant juge voulait dire par là que l'appelante n'avait pas insisté sur ce moyen. Elle avait évidemment plus de confiance dans le moyen tiré de

1907

MAYRAND v. DUSSAULT.

Girouard J.

l'insanité. Devant cette cour, sa position n'est plus la même au sujet de la démence. Il y a concours de deux cours sur un même fait. Elle insista donc sur le second moyen comme sur le premier, et dans son factum et à la plaidoirie orale. L'intimé, de son coté, le discute dans son factum au lieu de le considérer comme abandonné.

La preuve de démence faite par l'appelante est forte. Il n'y a pas de doute que de temps à autre durant sa maladie depuis juin, 1903, jusqu' à sa mort, le 9 avril, 1904, le defunt a déliré. Le Dr. Rottot qui l'a vu en janvier ou février, 1904, affirme que c'était un ramolli. Le 2 mars, 1904, le Dr. Damien Masson, un spécialiste de grande réputation de Montréal, le trouva en plein délire à son bureau où il s'était cependant rendu seul, et prédit son décès à courte échéance. Il délira aussi à Deschambault où il était en visite en mars et avril, 1904, sous les soins du Dr. Lord. Cependant on ne peut nier qu'il eût des intervalles lucides.

Mr. Bisaillon, C. R., n'a pas pu s'empêcher d'admettre que le testament n'était pas sans preuve. Les prêtres qui ont vu le testateur à l'époque où il le fit, n'ont aucune hésitation à le déclarer sain d'esprit. Les notaires qui ont reçu le testament sont du même avis. Plusieurs personnes avec qui le testateur était en contact assez fréquent partagent la même opinion. Comme toujours, les medecins sont divisés. Mais même le plus fort témoin de l'appelante, le Dr. Masson, n'est pas certain que le 5 mars, 1904, il ne pouvait pas faire un testament.

> Le 2 mars, jour de l'examen (dit il), il ne pouvait faire son testament *avec toute son intelligence.*

Ceci n'est pas requis par la loi.

Q. Vous ne jurez pas que le 5 mars, il n'était pas en état de faire son testament?

R. Je crois que sa maladie, comme je l'ai dit tantôt, a dû s'aggraver jusqu'à sa mort et que son état d'intelligence n'a pas dû s'améliorer.

Cette réponse, et celles qui la précèdent et la suivent et le témoignage du Dr. Rottot, laissent bien quelques doutes sur l'état mental du testateur; mais ça n'est pas sur des doutes que nous pouvons décider. Ces doutes disparaissent devant les témoignages positifs des témoins de l'intimé, des Dr. Quintal, Dr. Bruneau, Dr. Lord, des prêtres, notaires et autres personnes mentionnées plus haut. Voilà pourquoi nous avons annoncé durant la plaidoirie que le moyen tiré de la folie n'était pas fondé et que de ce chef l'appel était renvoyé. Nous avons déclaré dans maintes occasions que nous ne devons pas renverser deux cours sur de simples questions de fait, à moins d'être parfaitement satisfaits qu'il y a eu erreur évidente ou incontestable de la part des tribunaux inférieurs. *Sénésac* v. *Vermont Central Railway Co.* (1); *Paradis* v. *Municipality of Limoilou* (2); *Granby* v. *Ménard* (3); *D'Avignon* v. *Jones* (4). Dans cette dernière espèce, cette cour a posé la règle an ces termes:

This appeal involves findings of fact by two courts. Both parties charge fraud, forgery and perjury. The two courts below have unanimously found in favour of the respondents. It is conceded that the evidence is contradictory. Therefore, the appeal should be dismissed with costs.

Si nous ne pouvons renverser pour cause de démence, un fait saillant qui résulte de toute la preuve de part de d'autre, c'est qu'à l'époque du testament,

(1) 26 Can. S.C.R. 641.
(2) 30 Can. S.C.R. 405.
(3) 31 S.C.R. 14.
(4) 32 Can. S.C.R. 650.

1907

MAYRAND v. DUSSAULT.

Girouard J.

le défunt était extrêmement faible et de corps et d'esprit, souffrant depuis quelques mois de la tuberculose pulmonaire et cérébrale aiguë, qui affectait sérieusement ses facultés mentales et qui devait l'emporter à brève échéance et de fait l'emporta un mois après. On conçoit que cette circonstance est toujours un élément important pour découvrir l'influence indue. Cette régle est ainsi posée dans *l'American and English Encyclopœdia of Law* (2 ed.), vol. 29, page 111, où tous les précédents sont cités, et ils sont nombreux:

> Weakness of mind not amounting to absolute disqualification, though not alone sufficient evidence of undue influence, is nevertheless, an important circumstance as going to shew a subject susceptible to undue influence.

Enfin, il est en preuve que, même en santé, le défunt était d'un tempérament très faible et facile à influencer. Mr. Lesage, qui fut son notaire pendant plusieures années, dit qu'il était très timide et qu'en dehors de ses affaires personnelles, il ne connaissait absolument rien.

> J'étais obligé (ajoute-t-il), de le guider, de le conduire comme un enfant.

On conçoit maintenant que l'intimé qui, s'il faut croire les allégations du plaidoyer de l'intimé, était son associé et son confident, à la date de son mariage et jusqu'à sa mort, ait conçu l'idée, dès le début de sa maladie, de s'emparer de son esprit et de le tourner contre sa femme.

Nous touchons au second moyen de l'action en nullité, qui, selon moi, doit triompher.

En effet, à l'égard du moyen tiré de la fraude et de l'influence indue, nous sommes en face d'une autre

1907

MAYRAND v. DUSSAULT.

Girouard J.

situation. Nous n'avons que le jugé pur et simple du juge de première instance et c'est notre devoir de le renverser si nous le croyons contraire à la preuve qui est devant nous, même si elle est contradictoire. Nous devons le peser comme aurait pu faire la cour de revision, et décider si elle justifie le jugement de la cour de première instance. Nous ne sommes plus gênés par l'autorité de la chose jugée par deux cours sur une simple question de fait.

La suggestion et la captation ou l'influence indue, c'est-à-dire la fraude, doivent être prouvées comme dans les cas ordinaires, c'est-à-dire, par preuve directe verbale ou écrite, ou par des présomptions. (Fuzier-Herman, codes annotés, art. 901, *t.* 2, *n.* 108, 109.) C'est généralement par ce dernier mode de preuve que l'on procède pour découvrir les menées frauduleuses toujours conduites dans le secret. (C.C. art. 839, 993.) Les auteurs et les tribunaux ont posé certaines règles qui servent de guide. Baudry-Lacantinerie, Précis, *t.* 2, *n.* 774, nous dit que le dol existera et la captation ou la suggestion deviendra une cause de nullité si, par exemple, le donataire a calomnié les héritiers présomptifs du donateur, ou si, par de détestables artifices, il a irrité le donateur contre ses parents, dans le but de se faire donner ce qui aurait dû légitimement leur revenir. Laurent, vol. 11, *n.* 132, ajoute que la suggestion suppose que celui qui suggère le fait dans son intérêt et en abusant de l'influence qu'il a sur l'esprit et la volonté du testateur. Puis, au *n.* 134, il cite avec approbation un arrêt de la cour d'Aix où les moyens de captation sont analysés. Ils varient peu, d'après cet arrêt; ils sont pour ainsi dire stéréotypés. Le légataire a recours à la ruse, au mensonge, aux plus odieuses calomnies contre l'héritier présomptif du testateur,

1907

MAYRAND v. DUSSAULT.

Girouard J.

cherchant à lui enlever son affection pour lui ravir plus sûrement son héritage. On dénonce, ajoute Laurent, citant d'autres arrêts, les héritiers présomptifs comme ingrats et méchants, impatients de saisir une fortune qui tarde trop à leur échoir. Enfin Laurent, *n.* 135, conclut:

> Un fait dont les tribunaux doivent tenir compte, c'est le poison de la calomnie que des mains perfides versent goutte à goutte dans l'esprit du vieillard.

Marcadé, t. 3, art. 901, page 407:

> Mais si la captation ou la suggestion sont frauduleuses; si l'on n'a fait adopter que par le mensonge et l'astuce la résolution qui dépouille les héritiers; si c'est par de coupables manœuvres, par d'indignes inventions, par de fausses apparences qu'on est parvenu à perdre les héritiers dans l'espirit de leur parent et à y prendre leur place, alors on peut dire que l'acte de libéralité n'est pas l'expression exacte de la volonté libre et vraie du disposant, mais bien plutôt l'expression de la volonté de celui qui l'a fait faire.

Le droit anglais a toujours été très jaloux de la liberté entière et éclairée requise pour tester. En 1838, dans *Barry* v. *Butlin*(1), le conseil privé a rendu une décision dont l'autorité n'a jamais été mise en doute et qui a été souvent invoquée depuis comme faisant loi, particulièrement dans *Fulton* v. *Andrew* (1875) (2); *Brown* v. *Fisher* (1890) (3).

Lord Hatherly disait dans *Barry* v. *Butlin*(1):

> A matter which appears to me deserving of some remark and upon which the Lord Chancellor has already fully commented is *the supposed existence* of a rigid rule by which when you are once satisfied that a testator of a competent mind has had his will read over to him and has thereupon executed it, all further inquiry is shut out. No doubt these circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator.

(1) 2 Moo. P.C. 480. (2) L.R. 7 H.L. 448.
(3) 63 L.T. 465.

Still circumstances may exist which may require that something further shall be done in the matter than the mere establishment of the fact of the testator having been a person of sound mind and memory and also having read over to him that which had been prepared for him and which he executed as his will. It is impossible, as it appears to me, in the cases where the ingredient of fraud enters to lay down any clear and unyielding rule like this.

Et plus loin, Lord Hatherly conclut:

There is one rule which has always been laid down by the courts having to deal with wills and that is that a person who is instrumental in the framing of a will and who obtains a bounty by that will is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory and capable of comprehending it. But there is a farther onus upon those who take for their own benefit after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of shewing the righteousness of the transaction.

Voyons si ces éléments se trouvent dans l'espèce qui nous occupe.

Les faits transcendants de la cause sont deux testaments faits par le testateur et les circonstances qui en ont amené l'exécution. Le défunt, Joseph Dussault, et son épouse, l'appelante, étaient tous deux natifs de la paroisse de Deschambault, en haut de Québec, de parents cultivateurs et possédant, paraît-il, une éducation élémentaire, car tous, parents et enfants, savaient lire et écrire, et ont signé au contrat de mariage de Joseph. Ils se connaissaient depuis leur plus tendre jeunesse, et comme tout le monde se connait dans nos paroisses de campagne, Joseph devait savoir si l'appelante lui ferait une bonne femme et une bonne ménagère; ils étaient même apparentés, car l'acte de célébration du mariage constate qu'il y a eu dispense de parenté au 4e dégré, ainsi que de la

1907

MAYRAND v. DUSSAULT.

Girouard J.

publication de deux bans. La famille Dussault comptait pas moins de sept fils, et Joseph et son frère Arsène se décidèrent à apprendre un métier, celui de tailleur de pierres, et d'aller tenter fortune à Montréal. En 1896, ils se firent bouchers en société à Maisonneuve de Montréal. La société se livra aussi aux achats et ventes de propriétés foncières. Ils eurent du succès, et bientôt Joseph se trouva valoir une couple de mille piastres. C'est alors, à l'âge de 29 ans, qu'il songea à prendre femme et à cette fin tourna ses regards vers la paroisse natale, où le 2 mars, 1897, de l'agrément des parents de part et d'autre, il épousa l'appelante, agée de 24 ans, aussi fille d'un cultivateur, intelligente, laborieuse et possédant une certaine éducation élémentaire. Le mariage fut précédé d'un contrat de mariage passé à Deschambault où, contrairement à la coutume généralement suivie dans nos campagnes, la communauté de biens fut exclue et la séparation de biens stipulée, la future épouse renonçant au douaire et ne recevant d'autre avantage que la donation, à condition de survie, du petit ménage au domicile conjugal à Maisonneuve. C'est son notaire de Montréal, Mr. Lesage, qui lui avait conseillé la séparation de biens. C'est ce que le notaire déclare. L'appelante, qui fut examinée deux jours avant lui, donne plus de détails sur cet incident.

> Mon mari (dit-elle) m'a déclaré que c'était préférable pour lui que nous nous mariions sous l'acte de la séparation de biens, car, advenant une mauvaise affaire, il pourrait se servir de mon nom; j'ai accepté cela à condition qu'il me ferait un testament me donnant tous ses biens.

Le 5 mars, 1897, devant le notaire même qui avait reçu le contrat de mariage, les deux époux firent un

testament mutuel et réciproque instituant le survivant le légataire universel du prédécédé. Au dernier vivant les biens, telle fut donc la règle de succession arrêtée entr'eux, qu'il y eut des enfants ou non. Les deux testaments, il est vrai, ne lient personne; chacun pouvait légalement le révoquer en aucun temps; mais il me semble qu'ils créent une obligation morale qui doit avoir quelque valeur dans une cause comme celle-ci. Il me faudrait une preuve bien claire de la volonté contraire du testateur pour pouvoir ignorer une semblable obligation et en sanctionner la violation.

Ayant ainsi pourvu à l'éventualité de la mort, les époux allèrent résider à Maisonneuve où, dit sa veuve, "nous avons vecu heureux jusqu'en juin, 1903." C'est aussi ce qu'observe la tante Marie Louise Morissette qui passa quelques jours avec les Dussault en juin de la même année. Une de ses voisines, Mme. Fausse, qui habita pendant cinq mois au premier étage de la même maison jusqu'au 1er. mai, 1903, et qui voyait les Dussault presque tous les jours, constate le même fait. "J'ai toujours trouvé," dit-elle, "qu'ils étaient bien heureux."

Et comment pouvait-il en être autrement. L'appelante était entièrement dévouée à son mari et à ses intérêts. Jamais le moindre soupçon d'infidélité de paresse ou de frivolité, n'a plané sur sa tête. Elle s'occupait des détails du ménage, faisant la cuisine, le lavage et tous les travaux domestiques sans être aidée d'une servante. Elle n'eut pas d'enfants, et lorsque ses occupations ordinaires le lui permettaient, surtout le samedi soir lorsque l'achalandage se faisait le plus sentir, elle aidait à la *shop* ou boutique des deux frères, soit à la caisse ou aux ventes, et cela sans

1907

MAYRAND v. DUSSAULT.

Girouard J.

rémunération aucune. Elle trouva même le temps de pensionner son beau-frère Arsène, l'intimé, depuis les premiers jours de leur mariage, et de verser par là durant sept années dans la caisse de son mari au moins $2 par semaine ou $100 par année, car bien que le prix de sa pension ne paraîsse pas au dossier, il ne devait pas payer moins que son frère Laurent, qui pensionna avec eux pendant un mois du 15 février au 15 mars, 1904, à $2 par semaine. Elle trouva même le moyen de faire de petites économies en fabriquant au temps de Noël et de Pâques, des rosettes et autres décorations dont les bouchers ornent leurs boutiques et voitures à l'occasion de ces grandes fêtes, économies qu'elle déposait toujours en banque, pour plus tard les placer entre mains sûres à un taux d'intérêt plus élevé que celui des banques d'épargnes. Au décès de son mari elle valait $303, $58 en banque, et le reste en bons billets.

En 1903, Joseph Dussault valait $6,000 si nous prenons l'estimation d'Arsène, $8,000 d'après celle de l'appelante. Je suis surpris que l'inventaire qui fut fait après le décès de Joseph, par le notaire Lesage, n'ait pas été produit ou consulté, car en le parcourant, on aurait probablement pu s'assurer de la valeur exacte de la succession du défunt. A défaut de cette preuve, il résulte des documents produits que Joseph et Arsène possédaient alors des immeubles, clairs de toutes dettes, d'une valeur de $12,100, dont $6,050 appartenant à chaque, ce qui ajouté à $1,400 déposées par Joseph en banque, et $450 pour sa part dans le commerce, forme les $8,000, ou à peu prés.

La vie heureuse et prospère des époux Dussault fut soudainement brisée en juin, 1903. Le mari com-

mença alors à se plaindre qu'il était souffrant d'indigestions, insomnies, manques d'appétit, épuisements, etc. Lorsqu'il alla consulter le médecin pour la première fois le 15 août, 1903, le Dr. Quintal, c'était encore ses sujets de plainte.

La malade (dit le docteur) est venu chez moi et il se plaignait d'abord de dyspepsie et de faiblesse.

Arséne, comme tout le monde d'ailleurs, ne manqua pas de s'aperçevoir que son frère était sérieusement malade. Voici ce qu'il dit lui même à ce sujet:

Q. Pendant combien de temps, votre frère Joseph a-t-il été incapable de travailler avant de mourir?
R. Dans les 6 ou 7 mois.
Q. Qu'est-ce qu'il disait pour ne pas travailler?
R. Il se plaignait qu'il n'était pas capable parce qu'il était malade.

Pas plus que Joseph, Arsène ne connaissait dès le début le caractère de la maladie, mais il pouvait en mourir et il savait à tout évenement qu'il avait une femme sans enfants en faveur de laquelle il pouvait tester, s'il ne connaissait pas l'existence du premier testament. Il voit de suite une belle chance de doubler ou au moins d'augmenter considérablement sa fortune et il la saisit sans retard. Il faut irriter le mari contre la femme, lui inspirer la haine contre elle, et comme dans tous les cas de captation, il eut secours à la calomnie; il fallait le convaincre qu'elle est la cause de sa maladie. Son frère souffre d'indigestions, il le convaincra à force de le lui dire et de le répeter, qu'elles sont dûes à la mauvaise nourriture préparée par sa femme.

Arsène affirme que Joseph s'est plaint de la mauvaise cuisine dès les premiers jours de son ménage, et

1907

MAYRAND v. DUSSAULT.

Girouard J.

qu'elle fut toujours mauvaise. Il est le seul témoin qui parle de cette façon et son témoignage n'est pas même vraisemblable. Autrement, comment expliquer le fait qu'Arsène, qui était simple pensionnaire, soit resté à manger à cette mauvaise table pendant sept ans, à part un intervalle de 4 mois, lui qui, célibataire et en moyens, n'y était retenu par aucun lien. Et lorsqu'il alla pensionner ailleurs, vers 1900, pendant ces quatre mois, ce ne fut pas à cause de la nourriture, mais parce que la *shop* de boucher était fermée. Puis, pourquoi n'est-il pas parti lorsque Joseph alla passer deux mois à la campagne en 1903? Il allègue dans son plaidoyer que le défaut de soins de la part de sa femme lui fut signalé par des parents de cette dernière. C'est une assertion toute gratuite. Arsène est contredit par plusieurs temoins, d'abord par l'appelante et puis par sa sœur Hélène, institutrice, qui passa avec elle sa vacance de juillet et août, 1903.

Le témoignage de l'appelante a été rendu sans hésitation, ni contradiction, et avec la plus grande franchise. Elle n'hésite pas à relater la première des choses désagréables à son égard, par exemple que, durant sa maladie, son mari s'est plaint en sa présence de sa cuisine à son frère Arsène, au Dr. Rottot et à d'autres. Mais ce qui est plus important, ce qui me fait adopter son témoignage de préférence à celui de l'intimé, c'est que non seulement il n'est pas contredit, mais il est corroboré sur le point le plus saillant de la cause, la calomnie, tandis que c'est tout le contraire à propos du témoignage de l'intimé.

Voyons ce qu'elle dit au sujet de la date des plaintes contre la nourriture et de celui des deux frères qui les porta le premier.

Q. Qui le premier a commencé à se plaindre de la nourriture?
R. C'est Arsène Dussault le défendeur.

Et avant:

Q. Monsieur Arsène Dussault, s'est-il plaint à votre mari durant le mois de janvier, 1904?
R. Oui, monsieur.
Q. S'est-il plaint avant?
R. Depuis le mois de juin, 1903.

Transquestionnée par M. Bonin C.R.:

Q. Vous nous avez dit que votre mari était tombé malade le 3 juin, 1903?
R. Je n'ai pas cité le 3 juin, j'ai dit aux environs du mois de juin, Je n'ai pas cité de quantième.
Q. Vous n'avez pas cité de quantiéme, c'est aux environs du mois de juin?
R. C'est dans le cours du mois de juin.
Q. Et puis, du moment qu'il est tombé malade, il a commencé à se plaindre de la nourriture?
R. Ce n'est pas lui-même qui a commencé à se plaindre.
Q. C'est Arsène?
R. Oui, monsieur.
Q. Aussitôt que votre mari est tombé malade?
R. Oui, monsieur.

Hélène Mayrand, institutrice, la sœur de l'appelante sans intérêt dans la cause, qui passa avec elle la vacance de juillet et août, 1903:

Q. Est-ce que monsieur Joseph Dussault se plaignait d'être malade?
R. Monsieur Dussault commençait à être malade.
Q. Est-ce que monsieur Arsène Dussault se plaignait de la nourriture?
R. Oui, très souvent, 3 ou 4 fois par semaine.
Q. A qui?
R. Il se plaignait de la nourriture à monsieur Joseph Dussault,
Q. A son frère?
R. Oui, monsieur.
Q. Combien de fois par semaine?
R. 3 ou 4 fois par semaine.
Q. Pendant tout le temps que vous avez été là?
R. Oui, monsieur.

1907

MAYRAND v. DUSSAULT.

Girouard J.

Q. Qu'est-ce que monsieur Dussault disait?

R. Monsieur Joseph Dussault ne disait pas grand'chose, ça le portait à se plaindre lui aussi.

Q. Qu'est-ce que disait monsieur Arsène Dussault à son frére?

R. Un jour, au mois d'août, il a dit que, s'il continuait à rester chez lui, il allait mourir, que sa femme ne faisait pas de la nourriture assez bonne.

D'après la propre version de l'intimé, il ne cessa de parler de la mauvaise cuisine durant tout le temps de la maladie.

Q. Est-ce que votre frère vous en parlait que la nourriture n'était pas bonne?

R. Oui, monsieur.

Q. Vous en parliez vous aussi?

R. Je disais que je ne pouvais pas manager la nourriture qu'elle nous donnait.

Q. Vous avez dit que vous étiez pour partir?

R. Non, monsieur.

Non, il n'est pas parti, bien qu'invité à le faire par l'appelante, d'après ce qu'il dit; il ne pouvait lâcher sa victime; il aurait peut-être manqué son coup.

Et dire que toutes ces jérémiades étaient absolument sans fondement. Un pensionnaire, à $2 par semaine, ne pouvait guère s'attendre à une fine cuisine. Tous les témoins, qui ont goûté les mets préparés par l'appelante, lui rendent le témoignage qu'ils étaient bons et quiconque connait les femmes et les filles de nos cultivateurs sait qu'en général elles savent faire à manger. Si la nourriture était si mauvaise, comment expliquer qu'après le départ de Joseph pour Deschambault durant l'été et l'automne de 1903, et en mars, 1904, Arsène soit resté avec sa femme jusqu'au moment où elle alla le rejoindre vers le 15 mars. Laurent, qui arriva le 15 février, 1904, pour remplacer son frère Joseph, ne dit pas un mot de la nourriture. Joseph et Arsène désiraient beaucoup le garder avec

1907

MAYRAND v. DUSSAULT.

Girouard J.

eux; mais ils craignaient l'opposition de la femme; elle consentit cependant et Laurent pensionna chez elle pendant un mois, jusqu'à son départ pour Deschambault, le 15 mars, bien que son frère lui dit qu'il paierait sa pension là où ça lui plairait de l'avoir.

Avant la maladie de Joseph, pendant cinq mois consécutifs, Mme. Fausse, une voisine, était dans l'habitude de visiter le foyer des époux Dussault presque tous les jours; elle y a vu souvent le mari, qui ne paraît pas s'être plaint des repas. Et comment cela pouvait-il arriver? Voici son appréciation de la table:

Q. Est-ce que vous avez remarqué la nourriture et les repas que préparait madame Dussault?

R. J'y suis allée quelquefois à l'heure des repas et j'ai trouvé que la table était une table ordinaire dans les familles.

Q. Est-ce que la cuisine était bien faite?

R. Oui, j'ai mangé une fois là, et madame Dussault m'a servie d'un morceau de pâté et je l'ai trouvé bien bon.

Marie Louise Morrissette, la tante de l'appelante, agée de 60 ans, celle-là même dont l'intimé invoque le témoignage, a passé quelques jours avec les Dussault en juin, 1903, et voici ce qu'elle dit sur le sujet:

Q. Est-ce que sa nourriture était bonne?

R. Oui, monsieur..

Q. Est-ce qu'elle faisait une bonne cuisine?

R. Oui, monsieur.

Elle ajoute que le mari avait déjà commencé ses plaintes au sujet de la nourriture. Il se plaignait aussi qu'il avait le rhume. C'était évidemment le commencement de la maladie.

Dès le début, ces plaintes ennuyèrent profondément l'appelante, qui ne comprenait rien à ce nouveau langage. Elle invita sa sœur Hélène à venir passer

1907

MAYRAND v. DUSSAULT.

Girouard J.

ses vacances avec elle. L'énigme fut bientôt expliquée, car la maladie augmentait et les plaintes aussi. Voici d'abord ce que raconte la demandresse, et elle répète les mêmes faits à plusieurs reprises:

R. J'ai eu très bien soin de mon mari; la nourriture que je préparais était bonne à sa maladie, même pour le satisfaire, j'ai fait venir une de mes sœurs.

Q. Est-ce qu'll était satisfait de sa nourriture?

R. Aux mois d'août et juillet, 1903, monsieur Arsène Dussault pourvu que l'ordinaire fut préparé par ma sœur, il se trouvait satisfait.

Q. Tous les deux?

R. Tous les deux, quand c'était moi, les reproches commencaient.

Voici maintenant le témoignage de la sœur;—

Q. Est-ce que votre sœur faisait une bonne nourriture, quelle nourriture faisait-elle votre sœur?

R. Elle faisait une bonne nourriture, une nourriture bien ordinaire.

Q. Faisiez-vous la nourriture aussi?

R. Oui, il est arrivé quelquefois que j'ai préparé les repas et quand monsieur Joseph Dussault et monsieur Arsène Dussault savaient que c'était une autre que madame Dussault, qui avait préparé les repas, ils étaient contents, ils ne se plaignaient pas; quand ils savaient que c'était madame Dussault, ils disaient que la nourriture n'était pas bonne.

Par le juge:

Q. Tous les deux?

R. Oui, monsieur.

Ce témoignage, répété plusieurs fois, peint la situation, savoir qu'Arsène n'avait qu'un but lorsqu'il souleva le cri de mauvaise nourriture; c'était d'influencer indûment Joseph; dès juillet et août, 1903, il avait entièrement réussi. La captation augmentera avec le temps. La suggestion viendra plus tard nécessairement.

Nous avons signalé assez de la preuve pour constater que la plainte de la mauvaise nourriture,

imaginée et lancée par Arsène, eut un effet terrible sur l'esprit faible et malade de Joseph. Il paraît plus calme après avoir été à la campagne pendant une couple de mois chez ses parents à Deschambault, éloigné d'Arsène. Il en revint en novembre, 1903, se sentant un peu mieux. "Il n'y avait pas beaucoup de différence," observe son medecin d'alors, le Dr. Quintal. Il cessa, cependant, de voir les medecins. Mais la maladie que le Dr. Quintal appelle "Duplicas pulmonaire aigu," faisait son œuvre sourdement, mais sûrement; elle devient formidable en janvier et février, 1904. Il va consulter le Dr. Rottot, un ancien praticien très en vue à Montréal, et plus tard d'autres spécialistes. Il leur dit à tous que c'est la cuisine de sa femme qui le tue, d'abord au Dr. Rottot en janvier ou février, 1904, au Dr. Masson le 2 mars, 1904, au Dr. Bruneau le lendemain ou le surlendemain, aux prêtres de sa paroisse et enfin à tous ceux qui venaient en contact avec lui. Qu'il me suffise de citer quelques témoins.

Le Dr. Masson, qui fit un examen du malade à son bureau le 2 mars, 1904, dit, notes écrites en mains:

> J'ai dit tantôt que la maladie dont souffrait monsieur Dussault était le délire; il délirait quand il est venu me voir, c'est dire qu'il souffrait d'un affaiblissement intellectuel considérable, il était dans un état de stupeur et puis en même temps suivait une crise de larmes et il devenait excité pas mal, il fallait aller jusqu'à le secouer un peu pour l'amener à donner quelques réponses. Je lui ai demandé ce qu'il avait, il revenait toujours au même sujet, le sujet de sa femme. Il se plaignait amèrement de sa femme, il disait.—j'ai très bonne mémoire de ces faits, ça m'avait frappé, c'est là-dessus que je base le fait du délire chez lui,—il disait que sa femme ne lui donnait pas une nourriture suffisante, qu'elle l'avait abandonné pour travailler dans une fabrique et bien des choses; c'était toujours le sujet de sa femme qui venait dans ses paroles.

Il n'y a pas l'ombre de preuve qu'elle l'abandonna ou parlât de le faire. Arsène l'admet lui même. Seule-

1907

MAYRAND v. DUSSAULT.

Girouard J.

ment, comme son mari lui reprochait toujours de le nourrir mal, elle lui proposa d'aller tous les deux se mettre dans une bonne pension; mais il trouvait que ça coûterait trop cher, et dans son bon cœur elle lui offrit d'aller travailler dans une manufacture pour l'aider à payer la pension. Ils n'allèrent pas à une pension et les époux continuèrent de tenir maison au domicile ordinaire à Maisonneuve.

Le Dr. Bruneau, le medecin d'Arsène à qui il l'envoya le 3 ou 4 mars, dit:

> Q. Pouvez-vous nous dire * * * vous souvenez-vous ce que Joseph Dussault vous a dit? ne s'est-il pas plaint de sa femme à vous?
>
> R. Certainement.
>
> Q. Qu'est-ce qu'il vous a dit?
>
> R. Eh, bien, l'impression qui me reste, c'est qu'il avait des troubles de famille.
>
> Q. Est-ce qu'il ne vous a pas dit que sa femme ne lui donnait pas la nourriture dont il avait besoin? Ne s'est-il pas plaint devant vous?
>
> R. Il s'est plaint devant moi de la nourriture.

Le jour même où il fit son testament ou le lendemain, avant son départ pour Deschambault, le 6 mars, il va dire bonjour à son curé, Mr. Dugas, et dans le cours de la conversation lui fait la déclaration suivante:

> R. Il m'a dit que s'il mourrait, c'était par manque de soins, que son épouse avait refusé de la traiter convenablement.
>
> Q. A-t-il parlé de la nourriture que son épouse lui donnait?
>
> R. Oui, qu'elle ne voulait pas lui faire la nourriture qu'il lui demandait; il m'a dit qu'il lui avait même offert d'avoir une cuisinière, et qu'elle avait refusé, qu'elle n'avait pas voulu en prendre, que c'était la raison pour laquelle il avait souffert.

Tous ces avancés étaient faux; non, elle n'a pas refusé une cuisinière, en février elle en fit venir une Mme. L'Heureux.

Enfin, le 13 mars, lorsque Joseph était avec ses parents à Deschambault, voici le langage qu'il tint au Dr. Lord:

Il m'a dit que s'il était comme cela, s'il était dans cet état-là, cela dépendait qu'il avait manqué de bonne nourriture, que sa femme ne savait pas faire la nourriture, qu'il avait souffert, depuis qu'il était tombé dans un état de déchéance complète qui l'avait conduit à ce point-là.

Q. Vous a-t-il dit autre chose?

R. Il m'a dit qu'il avait consulté les médecins à Montréal et qu'ils lui avaient déclaré que cette insuffisance de nourriture là pouvait être la cause de son état.

Il se fait encore illusion. Pas un medecin n'est venu jurer cela. Même si c'était vrai, l'opinion ne vaudrait rien, étant appuyée sur des faits imaginaires qui n'existèrent pas en dehors de l'imagination d'Arsène et de Joseph.

On comprend qu'un esprit faussé et monté, comme était celui de Joseph Dussault, ne pouvait librement disposer de ses biens et révoquer un testament, particulièrement si l'on considère son état de faiblesse de corps et d'esprit. Nous pourrions laisser la preuve ici et conclure que l'intimé a obtenu le testament du 5 mars, 1904, par fraude, captation et influence indue. Mais l'histoire de la suggestion n'est pas moins instructive, car elle nous fait connaître le motif de ces menées frauduleuses, l'objet qu'Arsène poursuivait.

Son but était d'obtenir la révocation du premier testament et l'exécution d'un autre en faveur des siens, et de lui même avant tout. Il ne paraît pas avoir abordé ce sujet au commencement de la maladie durant l'été ou l'automne de 1903. Arsène craignait peut-être que Joseph soupçonnerait son jeu, s'il montrait son intérêt. Il attendit donc que la captation fut bien complète. Ce fut l'œuvre de quelques mois.

1907

MAYRAND v. DUSSAULT.

Girouard J.

Arsène jure qu'il n'a jamais connu l'existence d'un testament antérieur avant l'occasion où il fut question de faire le testament dont la nullité est demandée, c'est-à-dire, vers le 4 mars, 1904, mais il ajoute que, même à cette date, il ne savait pas comment il était fait. Joseph lui a dit qu'il était séparé de biens, mais rien de plus:

Q. Vous jurez qu'il ne vous a pas dit qu'il avait donné ses biens à sa femme le lendemain de son mariage?

R. Non, monsieur.

Q. Vous jurez cela?

R. Oui, monsieur.

Comment croire en la vérité de ces réponses. L'intimé habite constamment pendant sept ans avec son frère à leur place d'affaires et au domicile privé; ils se voyaient le jour et la nuit; ils sont non seulement frères mais associés en toutes choses; il est même son confident, s'il faut croire ce qu'il allègue dans son plaidoyer, mais il ne lui a jamais parlé du testament fait à sa femme. Cette histoire est bien invraisemblable, et il ne faut pas s'étonner si elle est contredite. Voici d'abord ce que dit l'appelante:

Q. Est-il à votre connaissance que monsieur Arsène Dussault savait qu'il y avait un testament de votre défunt mari en votre faveur?

R. Oui, il le savait au commencement d'août.

Q. De quelle année?

R. Au commencement d'août, 1903, mon mari a déclaré devant Arsène Dussault et devant ma sœur Hélène Mayrand qu'il m'avait tout donné ses biens et que je pouvais être tranquille, que j'étais certaine qu'après sa mort tous ses biens me reviendraient; quelque temps après, il a dit encore devant les mêmes personnes qu'après la mort de la femme les biens devaient retourner au mari, et que les biens du mari devaient retourner à la femme.

Puis vient le témoignage d'Hélène Mayrand:

Q. Est-il à votre connaissance que monsieur Arsène Dussault savait qu'il y avait un testament en faveur de madame Dussault?

R. Ils ont parlé du testament un jour, au commencement d'août, 1903, monsieur Joseph Dussault a dit à sa femme devant monsieur Arsène Dussault que sa femme pouvait être tranquille, que les papiers étaient passés entre les deux, qu'elle pouvait être certaine que tous les biens qu'il possédait lui retourneraient à sa mort; dans une autre occasion que les biens du mari devaient retourner à la femme et que les biens de la femme devaient retourner à son mari.

Q. C'était dans le mois d'août?

R. Oui, au commencement d'août.

Q. 1903?

R. Oui, monsieur.

Transquestionnée par M. Bonin C.R.:

Q. Maintenant, recontez donc madame ce qu'a dit monsieur Joseph Dussault, de quelles expressions il s'est servi quand il a dit que la femme devait laisser les biens au mari et que le mari devait laisser les biens à la femme, vous rappelez-vous à peu près comment est venue cette conversation?

R. C'est venu sur une question insignifiante.

Q. Dites-le toujours?

R. Il s'agissait des biens, il y avait une autre personne de morte et ses biens retournait à d'autres personnes et c'est sur cette question-là qu'il a répété que les biens du mari devaient retourner à la femme. Monsieur Joseph Dussault trouvait la chose bien injuste de ne pas laisser les biens à sa femme et de les donner à un autre, alors il a dit, ce qui appartenait à la femme devait retourner au mari, et ce qui appartenait au mari devait retourner à le femme, qu'il devaient se donner cela l'un à l'autre.

Arsène a dû comprendre par là qu'en août, 1903, le moment n'était pas encore arrivé de parler de la révocation du premier testament. Joseph avait des idées trop arrêtées sur le sujet, puis que dans son testament à sa femme il ne fait aucune réserve au cas où ils auraient des enfants. Arsène n'avait pas d'autre chose à faire qu'à attendre et il attendit, continuant toujours ses lamentations sur la nourriture.

En janvier et février, 1904, la maladie avait pris une nouvelle phase, elle marchait rapidement. Joseph, accompagné de sa femme, va voir le Dr. Rottot trois

1907

MAYRAND v. DUSSAULT.

Girouard J.

ou quatre fois. Le Dr. le trouve ramolli, que ça fut causé par la tuberculose ou par d'autre chose, il ne peut pas se rappeler, n'ayant pas pris de notes. Il était très malade et toussait beaucoup. L'abbé Chaussé le rencontre dans la rue et lui recommande d'aller voir le Dr. Masson. Il s'y rend seul le 2 mars. Le patient était dans le délire. Le docteur télephone de suite à Mr. Chaussé que Joseph Dussault avait perdu la tête et qu'il serait mort dans trois semaines. Le même jour, le 2 mars, Mr. Chaussé communique cette réponse à Arsène, qui évidemment ne pensait comme le docteur, surtout qu'il fût fou. Il l'envoie de suite, le 3 mars, chez son propre médecin, le Dr. Bruneau, qui le trouve sain d'esprit, capable de faire un testament, mais il ajoute qu'il était gravement malade, souffrant de tuberculose pulmonaire aiguë, avec des signes d'épuisements nerveux et une fièvre de 103 dégrés, et qu'il n'irait pas loin. Enfin, le lendemain, le Dr. Bruneau donne communication à Arsène du résultat de sa consultation par l'entremise de son frère Laurent. De suite il comprend qu'il n'y a pas de temps à perdre. Il ne dit rien à l'appelante de ce qu'il venait d'apprendre. Il ne songe pas à l'envoyer à confesse. Il y était allé il est vrai deux fois à la fin de février ou dans les premiers jours de mars. D'ailleurs Joseph était un bon chrétien qui communiait tous les mois. Non, ce n'était pas le prêtre qu'Arsène désirait. C'était un notaire, non pas un du voisinage, mais son propre notaire, Mr. Lesage, qui avait son bureau à trois ou quatre milles et qui avait toujours été aussi le notaire de Joseph. Arsène saisit l'occasion où il était dans le bureau de la boutique, le 4 mars. A cette entrevue, on parle de faire un testament. Impossible de dire ce qui se passa et ce qui fut dit, à moins de croire Arsène et son frère Laurent, un autre bénéficiaire,

présent une partie du temps, qui ne se rappelle de rien, si ce n'est que Joseph voulait donner ses biens à sa famille, faire une plus large part à Arsène et laisser à sa femme une rente viagère de $75. C'était tout naturel après le travail qui avait été fait. Arsène dit tout naïvement:

> Il (Joseph) m'a dit: "De quelle manière vais-je faire mon testament?" Je lui ai dit: "Fais ton testament de la manière que tu voudras et ce que tu feras sera bien fait, ne te trouble pas, ne t'inquiète pas de cela."

Mais il vaut mieux laisser parler les faits. Ils sont plus éloquents que les paroles. Le jour même où Arsène reçoit le rapport du Dr. Bruneau, il parle de testament avec Joseph. Il va de suite prévenir son propre notaire, Lesage, qui connait bien les affaires de Joseph. Il lui recommande de garder le secret de ses mouvements, car Joseph ne veut pas que sa femme sache ce qui se passe. Il va louer une chambre dans le restaurant "La Boule D'or," situé dans le voisinage, et il offre d'en payer le loyer lui même. Le 5 mars au matin, vers les dix heures, il attend le notaire qu'il dirige vers le restaurant. Puis il rentre prévenir son frère Joseph et l'invite à sortir pour prendre l'air. Il le dirige aussi vers le restaurant, le suivant de prés. Tous trois montent le premier escalier, Joseph avec beaucomp de peine, tant il était faible. Joseph passe ses papiers au notaire. On fait l'estimation des biens. Joseph dit au notaire comment les distribuer, puis il se couche sur un sofa en attendant que le notaire écrive son acte. Tout le temps, Arsène est là qui ne le lâche pas de vue, exceptè le temps qu'il fallait pour téléphoner au second notaire Paquin, l'associé de Lesage, pratiquant dans le même bureau, de venir servir de second notaire. Par une étrange dis-

1907

MAYRAND v. DUSSAULT.

Girouard J.

position, arts. 843, 844, le code civil permet à un associé d'agir ainsi comme témoin et seul témoin en sa qualité de second notaire, tandis que les clercs et les serviteurs du notaire instrumentant ne le peuvent.

Paquin fut longtemps à venir. Arsène, impatient, sort de nouveau et l'attend à la porte. Il le voit venir du coté de la maison de Joseph. Le notaire lui expliqua qu'il n'avait pas bien compris son rendez-vous et qu'il était allé chez Joseph pour se renseigner. Arsène s'alarme à cette nouvelle. Le secret allait-il s'éventer? Arsène, revenu auprès du notaire et de son frère avec Paquin, mentionne le fait et tous conviennent, à la suggestion de Joseph, dit-on, de dire que les notaires étaient venus pour signer des papiers concernant une propriété de la rue de Montigny que les deux frères venaient de vendre. Le testament fut de suite lu et signé. Le testateur pleura et remarqua à Arsène qu'il regrettait de ne pas lui laisser plus. Il avait révoqué formellement son premier testament et institué Arsène son légataire universel, à la charge de quelques legs particuliers à ses père et mère, frères et sœurs. Sa femme était déshéritée. Il ne lui donna même pas la rente de $75. A sa place, le notaire le persuada de lui donner une police d'assurance de $1,000 dont elle était déjà la propriétaire et bénéficiare. Il pousse le farce encore plus loin. Il confirme le don du ménage qui avait été fait à la femme par le contrat de mariage. Pourquoi cette référence à la femme? Un rayon de lumière était-il venu frapper le cœur et l'esprit de Joseph? Fallait-il satisfaire sa conscience d'honnête homme tout en ne donnant rien? Je suis convaincu que le testateur n'a pas compris que par ses ratifications, il faisait des libéralités à sa femme. Il était tellement irrité con-

tre elle qu'il lui aurait enlevé tout, police et ménage, si la chose avait été possible. Le notaire ne lui a rien expliqué à cet égard. Le tour avait réussi à merveille. Joseph était consentant à signer le testament tel que préparé, et cela suffisait.

Le notaire Lesage lorsqu'il fut examiné, déclare que Joseph était trop faible pour signer; mais en regardant à sa minute, il constata le contraire. Arsène resta présent à l'exécution du testament du commencement à la fin et jura d'abord qu'il l'avait signé. Il n'est pas moins certain qu'il fut témoin de ce testament comme le notaire Lesage et bien plus que le notaire Paquin. La loi annulle les legs faits aux témoins comme présumés faits en fraude(1). Ici la fraude et le dol sont prouvés et c'est tout le testament qui est frappé(2).

Le testament terminé, chacun se rendit chez soi. Tout fut gardé dans le plus profond secret. Le lendemain après midi, Joseph partait pour Deschambault accompagné de ses deux frères jusqu'à la gare et de Laurent seulement durant le voyage par le chemin de fer jusqu'à Deschambault. La femme *forçait* pour descendre avec lui, pour me servir de son expression, mais son mari ne voulut pas. Vers le 15 mars, son beau-père la fit mander, et à compter de ce jour elle ne cessa de lui prodiguer ses soins les plus assidus, jour et nuit, soins qu'il n'a pu apprécier, car il délirait presque tout le temps. Il est décédé le 9 avril, 1904, à Deschambault, où il fut inhumé deux jours après. Arsène n'assista pas à ses funérailles; il ne le vit plus après son départ de Maisonneuve le 6 mars. La vue de ses deux victimes aurait probablement augmenté ses remords.

(1) C.C. art. 846.

(2) C.C. art. 839, 991, 993.

1907

MAYRAND v. DUSSAULT.

Girouard J.

Ce n'est que quelques jours après son retour à Maisonneuve, vers le 15 avril, que l'appelante fut informée de l'exécution du deuxième testament. De là la présente action que nous croyons devoir maintenir pour cause de suggestion et de captation ou d'influence indue.

Non seulement l'intimé n'a pas repoussé la présomption de fraude du droit anglais, consacrée par les décisions des plus hautes cours du Royaume-Uni, que nous avons signalées en commençant, présomption de fait que je serais disposé à reconnaître dans notre droit comme affectant la liberté de tester qui nous vient des lois anglaises (*Renaud* v. *Lamothe*(1); art. 1238 C.C.) Qu'elle existe ou non dans notre droit, la preuve, que nous venons d'analyser, établit une chaîne de circonstances graves, précises et concordantes qui ne laissent aucun doute qu'il a obtenu ce testament par le dol et la fraude et par conséquent ne justifient pas d'autre alternative que celle de renverser le judgment dont est appel, même s'il avait été rendu par deux cours après délibérations; car comme cette cour l'a déclaré en maintes occasions, nous sommes les juges des faits comme du droit et c'est notre devoir de renverser deux ou même trois cours, lorsque nous voyons clairment qu'il y a eu erreur. *Russell* v. *Lefrançois*(2); *North British and Mercantile Co.* v. *Tourville* (3); *Lefeuntéum* v. *Beaudoin* (4); *Dempster* v. *Lewis*(5); *The Canadian Asbestos Co.* v. *Girard*(6). C'est la conclusion à laquelle nous sommes tous arrivés après avoir donné à l'étude

(1) 32 Can. S.C.R. 357.
(2) 8 Can. S.C.R. 335.
(3) 25 Can. S.C.R. 177.
(4) 28 Can. S.C.R. 89.
(5) 33 Can. S.C.R. 292.
(6) 36 Can. S.C.R. 13.

de cette cause toute l'attention que son importance exigeait.

Pour ces raisons, l'appel est accordé, le testament du 5 mars, 1904, passé devant Mtre. Lesage et confrère, notaires, est annulé et l'action de l'appelante maintenue avec dépens contre l'intimé devant toutes les cours.

IDINGTON J. concurred in the judgment allowing the appeal.

MACLENNAN and DUFF JJ. also concurred for the reasons stated by Girouard J.

Appeal allowed with costs.

Solicitors for the appellant: *Bisaillon & Brossard.*
Solicitors for the respondent: *Taillon, Bonin & Morin.*

1907

*March 12.
*April 2.

ROBINSON, LITTLE AND COMPANY ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF THE DEFENDANT MCGILLIVRAY (PLAINTIFFS) ..... APPELLANTS;

AND

M. MCGILLIVRAY AND J. W. SCOTT & SON..... DEFENDANTS;

AND

J. W. SCOTT & SON (DEFENDANTS) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal — Amount in controversy — Creditor's action — Transfer of cheque—Preference.

An action was brought by creditors, on behalf of themselves and all other creditors, of an insolvent to set aside the transfer of a cheque for $1,172.27 made by the insolvent to S. & Son as being a preference and therefore void. At the trial the action was dismissed and this judgment was affirmed by the Divisional Court (12 Ont. L.R. 91) and by the Court of Appeal (13 Ont. L.R. 232). On appeal to the Supreme Court of Canada:

Held, Girouard J. dissenting, that the only matter in controversy was the property in the sum represented by the cheque and such sum being more than $1,000 the appeal would lie.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment of a divisional court(2) which maintained the judgment at the trial dismissing plaintiffs' action.

---

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

(1) 13 Ont. L.R. 232; sub nom. *Robinson* v. *McGillivray*.

(2) 12 Ont. L.R. 91.

1907

ROBINSON, LITTLE & CO. v. SCOTT & SON.

The plaintiffs had judgment against the insolvent McGillivray for over $1,000 which had, however, been reduced by payment to less than that amount. They sued on behalf of all creditors for a declaration that a transfer by McGillivray to the respondents Scott & Son of a cheque for $1,172.27, as being preferential and void and to recover the proceeds thereof for distribution among all the creditors. The action having been dismissed, plaintiffs took an appeal to the Supreme Court.

Shepley K.C. for the respondents moved to quash. We move to quash on the grounds that, in this case, there can be no right of appeal without special leave and such leave was refused by the court appealed from, and there being no pecuniary demand involved. If, however, there can be said to be some pecuniary amount involved, then the appellants' interest is below $1,000 and there can be no appeal *de plano*. The appellants' suit could be put an end to by paying less than $1,000, the limitation in cases of appeals from Ontario. In any case, the respondents, (defendants) are likewise creditors of the estate in question and thus would be entitled to about one-half of any amount that might be involved in the subject matter in controversy, the amount of the cheque sought to be brought back into the estate, consequently, any issue on this appeal must involve less than the appealable amount. It does not fall within section 48(*c*) of the "Supreme Court Act." We rely upon *Talbot* v. *Guilmartin*(1); *Donohue* v. *Donohue*(2); *Clément* v. *La Banque Nationale*(3); *Lachance* v. *La*

(1) 30 Can. S.C.R. 482. (2) 33 Can. S.C.R. 134.
(3) 33 Can. S.C.R. 343.

1907

ROBINSON, LITTLE & CO. v. SCOTT & SON.

Société de Prêts et de Placements(1); *The Canadian Breweries Co.* v. *Gariépy*(2); *Driffill* v. *Ough*(3); *Commercial Bank* v. *Wilson*(4). The case of *Coté* v. *The James Richardson Co.*(5) must be distinguished from this case, because there was in that case a third party claiming all the property in dispute which exceeds $3,000 in value. The case of *The City of Ottawa* v. *Hunter*(6) is similar to the present.

Chrysler K.C. contra. The original amount of the appellants' claim was over $1,000, although it has been reduced since the action was instituted by payment of $100 on account, and the amount in controversy upon the appeal must govern jurisdiction. The balance of the debt claimed carried interest, and, this interest being added, would bring the amount to a sum in excess of $1,000 at the time of the appeal in the court below. The suit is on behalf of all creditors and all claims, exclusive of that of the defendants, being added would considerably increase the amount. *The City of Ottawa* v. *Hunter*(6) is not incompatible with our position and *Lachance* v. *La Société de Prêts et de Placements*(1) was a case from the Province of Quebec where the appellant sued only for his personal claim and where the conditions governing appeals to this court are regulated by the amount of the demand and not by the sum in controversy on the appeal.

(1) 26 Can. S.C.R. 200.
(2) 38 Can. S.C.R. 236.
(3) 13 Ont. L.R. 8.
(4) 3 E. & A. (U.C.) 257.
(5) 37 Can. S.C.R. 41.
(6) 31 Can. S.C.R. 7.

1907

ROBINSON, LITTLE & Co. v. SCOTT & SON.

The Chief Justice.

THE CHIEF JUSTICE.—The appellant, a creditor of the defendant McGillivray for the sum of $900, brought a suit on behalf of himself and all other creditors against the respondents to have it declared that a transfer of a cheque for the sum of $1,172.27, made by McGillivray to Scott, was preferential and void and to recover for purposes of distribution among all the creditors the proceeds of such cheque.

The action was dismissed by the High Court and this appeal is from the judgment of the Court of Appeal for Ontario which confirmed the judgment of the High Court.

A preliminary question of jurisdiction is raised.

What is the matter in controversy between the parties upon which the right to appeal depends? (Section 48, sub-section *c*, "Supreme Court Act"). Undoubtedly the cheque the proceeds of which it is sought by the action to bring into the estate for distribution. In this proceeding that is the only issue. If the appellant succeeds here, the result will be in so far as the judgment of this court is concerned to set aside the transfer as fraudulent and void, and condemn the defendants to pay over the proceeds of the cheque for distribution among all the creditors in whose interest the suit is brought. There is no controversy as to the amount of plaintiff's claim, he sues as one of a class. In *Canadian Breweries Co.* v. *Gariépy*(1), to which reference was made at the argument, there was no pecuniary amount in controversy. All that the *tierce-opposant* asked for and that which he was denied by the judgment appealed from was the permission of the court to come in and by a subsequent proceeding contest a judgment previously

(1) 38 Can. S.C.R. 236.

1907

ROBINSON, LITTLE & CO. v. SCOTT & SON.

The Chief Justice.

rendered. The only question in issue was his right to institute a proceeding which was denied him by the judgment appealed from. There was no matter in controversy which could be appreciated in money and if that appeal had been allowed the result of our judgment would have been not a condemnation to pay a sum of money but a mere declaration that in the circumstances the opposant had an interest sufficient in that proceeding to justify the filing by him of *"an opposition to judgment."*

My brother Idington deals in his notes with the case of *Coté* v. *The James Richardson Co.*(1).

Motion to quash dismissed with costs.

GIROUARD J. (dissenting).—I think the motion to quash should be granted. I cannot distinguish this case from *The Canadian Breweries Co.* v. *Gariépy*(2), decided this term. Relying upon that case, and also upon the decisions of this court quoted in my dissenting judgment in the case of *Coté* v. *The James Richardson Co.*(1), I respectfully dissent from the judgment of the majority.

DAVIES J. concurred in the judgment of the Chief Justice.

IDINGTON J.—This is a motion by the respondents for an order quashing the appeal herein.

The action was brought by the appellant on behalf of themselves and all other creditors of defendant McGillivray to have it declared that the transfer by McGillivray to the respondent Scott of a certain

(1) 38 Can. S.C.R. 41. (2) 38 Can. S.C.R. 236.

1907

ROBINSON, LITTLE & CO. v. SCOTT & SON.

Idington J.

cheque was as against the creditors of McGillivray preferential and void and to recover for purposes of distribution amongst the creditors of defendant McGillivray the proceeds of the said cheque.

The action was tried before the Hon. Chief Justice Falconbridge on the 7th November, 1905, and dismissed. An appeal was taken to the Divisional Court of the High Court of Justice for Ontario and by that court dismissed. The later appeal from such dismissal was taken to the Court of Appeal for Ontario and also dismissed. It is from this dismissal by the Court of Appeal that the plaintiff, now appellant here, proposes an appeal to this court. The questions raised on this motion are whether or not such an appeal will lie as of right. It is said and not denied that the judgment got by the appellant against the debtor McGillivray was for a sum exceeding $1,000, but since the recovery of that judgment, $100 has been paid thereon reducing the amount now due below the sum $1,000. It is shewn that the cheque in question was for an amount exceeding $1,000. It appears that McGillivray's total liabilities are much in excess of the sum of $1,000.

The question raised is shortly, whether or not the amount of the judgment against the debtor or the amount of the security sought to be recovered and made applicable to pay said judgment debt, and all other debts of the said McGillivray, is to be looked at as the test of the amount of the matter in controversy in appeal within the "Supreme Court Act," R.S.C. [1906] ch. 139, section 48, sub-section (*c*).

It seems difficult if not impossible to reconcile all the decisions upon the jurisdiction of this court.

It is exceedingly desirable that any decision in

1907

ROBINSON, LITTLE & CO. v. SCOTT & SON.

Idington J.

regard thereto should proceed upon the broad ground of whether or not the particular case for sonsideration comes within the purview of the Act conferring jurisdiction rather than by refining upon the possible meanings that may be attributable to a few words in the Act to be considered.

The words, when isolated, may be susceptible of many diverse meanings. Some of these meanings may be found quite inapt when viewed in light of the general scope and purpose of the Act in which they are found.

In the judgment of this court in the case of *Coté* v. *The James Richardson Co.*(1), at p. 49, the following language was used:

> It is not necessary that the amount in controversy should be a sum of money. The statute was intended to cover also the value of the thing demanded, *the object being to give this court jurisdiction to hear and decide appeals in cases where the issues* involved a consideration of sufficient value to justify the appeal.

If we apply this broad ground of the purview of the Act and this language to the consideration of the questions raised by this motion, can there be any doubt that the principles upon which the decision in *Coté* v. *The James Richardson Co.*(1) proceeded and that decision, must lead to holding that the Court has jurisdiction to hear the appeal now presented.

In substance *Coté* v. *The James Richarson Co.*(1) was only what in Ontario would be called an interpleader.

The creditor there, if successful ultimately, would have had to share the fruits of his victory with other creditors.

(1) 38 Can. S.C.R. 41.

1907

ROBINSON, LITTLE & CO. v. SCOTT & SON.

Idington J.

The claimant of the goods in that case had succeeded in the court below.

The creditor, contesting that, came here with a judgment insufficient in amount, if that amount were to govern the right of appeal, so as to give it as of right.

We held the value of the goods attached, which all hung upon the same title, must decide the matter in controversy.

It was more difficult to reach that conclusion in a case like that coming from Quebec, than it would have been in an interpleader case coming from Ontario.

The provisions of the Act relative to the appeals from Quebec rendered it so, and the many decisions (hard to reconcile) upon those provisions, rendered it still more so.

What we have here in question is the title of the respondent as against creditors to a cheque which was liable to seizure to satisfy the claims of creditors of the payee, if respondent's title was void as against them.

Had the cheque been seized by the sheriff, as the wood in *Coté* v. *The James Richardson Co.*(1) by the bailiff, the cases could not have been by any possibility distinguished, so as to enable us to refuse to hear the appeal of the creditor.

The procedure by which the attack on the title is made certainly cannot in reason and justice make any difference.

But when we consider what the nature of the action here in question is, and the judgment we would

(1) 38 Can. S.C.R. 41.

1907

ROBINSON, LITTLE & CO. v. SCOTT & SON.

Idington J.

be bound to render if the appeal should succeed, can there be any doubt in the matter?

The appellant sues on behalf of himself and all other creditors, and if he succeed in his proposed appeal, the judgment here must be that the respondent *account for the full amount* of the cheque to answer the claims of the creditors.

These claims it appears as stated above exceed in the aggregate the amount in controversy necessary to give jurisdiction.

It is no answer to this to say that the appellant may as *dominus litis* drop his appeal for any reason he see fit, as he could have dropped his action for any reason he might have seen fit.

Even in this light of the amount involved the appellant suing so as to represent an aggregate sum, over $1,000, has much to support him.

I would prefer, however, to test and to rest the right of appeal upon the value of the property in question.

It will, if adhered to, work out much more satisfactorily than the test suggested by respondent as a test of jurisdiction in a large class of cases possible to arise in Ontario and those provinces and territories which have the same system of law and have adopted the same sort of legislation as Ontario, for the realization of the rights of creditors in many ways as against those seeking to defeat creditors or the majority of creditors.

It would seem anomalous to have appellant deprived of right of appeal in this case and right of appeal allowed an assignee representing all creditors though the security in question were the same.

In this connection the Act respecting assignments

and preferences by insolvent persons R.S.O., 1897, ch. 147, must be borne in mind.

The mode of attacking an alleged fraudulent assignment adopted in this case is not perhaps so usual as that of a creditor who cannot after an assignment under said Act, persuade his fellow creditors to venture to make the attack, but is given, no matter how small his claim, the right under conditions to attack in the name of the assignee what may be fraudulent on a large scale when that is tested by the value of the property in question.

It seems to me that the decision in *Coté* v. *The James Richardson Co.*(1) should not be lightly frittered away.

The case of *The Canadian Breweries Co.* v. *Gariépy*(2) was clearly distinguished and though in view of the ultimate results which the appellant sought there to reach might seem in reason and justice a proper case to be placed on the same footing as *Coté* v. *The James Richardson Co.*(1) it would have been legislating rather than adjudicating to have so applied the latter.

The status of an appellant in relation to any possible right to be acquired over a thing by pursuing it in litigation as a means of testing the amount in controversy, is not only in principle distinguishable but by a long line of authorities in this court, distinguished from the test afforded by the possible fruits he may hope to reach by such pursuit.

The motion should be dismissed with costs.

DUFF J. concurred with the Chief Justice.

(1) 38 Can. S.C.R. 41. (2) 38 Can. S.C.R. 236.

1907

ROBINSON, LITTLE & CO. v. SCOTT & SON.

Motion dismissed with costs.

Solicitors for the appellants: *Gibbons, Harper & Gibbons.*

Solicitors for the respondents: *Blewett & Bray.*

M. A. PIGOTT AND J. C. INGLES TRADING UNDER THE STYLE OF PIGOTT & INGLES, (SUPPLIANTS). ..... APPELLANTS.

1907

*Mar. 15, 18
*April 2.

AND

HIS MAJESTY, THE KING, ... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Public works—Contract—Change in plans and specifications—Waiver by order in council—Powers of executive—Construction of statute —Directory and imperative clauses — Words and phrases — "Stipulations"—Exchequer Court Act, sec. 33—Extra works— Engineer's certificate—Instructions in writing—Schedule of prices —Compensation at increased rates—Damages—Right of action— Quantum meruit.

The suppliants, appellants, were contractors with the Crown for the widening and deepening of a canal and, by their petition of right, contended that there were such changes from the plans and specifications and in the manner in which the works were obliged to be executed as made the provisions of their contract inapplicable and that they were, consequently, entitled to recover upon a *quantum meruit*. In order to afford relief, an order in council was passed waiving certain conditions, provisoes and stipulations contained in the contract. By the judgment appealed from, the judge of the Exchequer Court held (10 Ex. C.R. 248) that there had been no such changes as would entitle the contractors to recover on the *quantum meruit*, as in the case of *Bush* v. *The Trustees of the Town and Harbour of Whitehaven* (52 J.P. 392; 2 Hudson on Building Contracts (2 ed.) 121); that the words "shall decide in accordance with the stipulations in such contract" in the thirty-third section of "The Exchequer Court Act" might be treated as directory only and effect given to the waiver in respect to the absence of written directions or certificates by the engineer in regard to works done, but that the remaining clauses of the section were imperative and there could be no valid waiver whereby a larger sum than the amount stipulated

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

1907

PIGOTT & INGLES v. THE KING.

in the contract could be recovered, *e.g.*, on prices for the classes of work, so as to give the contractors a legal claim for higher rates of compensation without a new agreement under proper authority and for good consideration. On appeal to the Supreme Court of Canada:

Held, per Girouard, Davies and Maclennan JJ., that the decision of the judge of the Exchequer Court was correct.

Per Idington and Duff JJ.—That the word "stipulations" in the first part of the section referred to, should be construed as having relation entirely to the second part of the section and as applying to the rates of compensation fixed by the contract; that, on either construction, the result would be the same in so far as the circumstances of the case were concerned; that it did not warrant an implication that the executive could without proper authority, exceed its powers in relation to a fully executed contract or confer the power to dispense with the requirements of the statute, and that, consequently, there could not be a recovery upon *quantum meruit*.

APPEAL from the judgment of the Exchequer Court of Canada(1), by which the petition of right of the suppliants was in part allowed and certain items of the claim made by them were dismissed, the question of costs being reserved.

The suppliants claim was for works executed in widening and deepening a portion of the Grenville Canal, a public work of Canada, under a contract with the Crown, acting through the Minister of Railways and Canals for Canada, which referred to certain plans and specifications describing the works to be done. The claim was for $154,244.93, with interest, for construction works, including dry masonry walling, most of which had been disallowed by the engineer in charge of the works, and was classified as follows according to the grounds upon which the items were based, namely:

(1) The contract and specifications contemplated that the work should be done in open season and un-

(1) 10 Ex. C.R. 248.

watered and required performance in such a way as could be done only during the summer season and could not properly be done during the season of frost. The contractors were nevertheless required to carry out the work in the winter season and claimed for the increased cost of its execution. (2) The contractors claimed that there was mutual error and misunderstanding in respect of a part of the material to be excavated, much of which was "hard pan," and a special price ought to have been and, if it had been known, would have been fixed for excavation of this material. The contract ought to be reformed in this respect or other relief granted so as to allow for such price. (3) The specifications provided for a higher price and quality of stone and masonry in the walls of the weir than for the side-walls. The engineer required them to furnish the higher quality of stone for the side-walls and to execute that work in the same manner as the weir-walls and they were allowed for this work at the lower rate instead of the higher prices. (4) They claimed for delays and damages caused by reason of the fact that the work had to be done during the season of frost and during winter and by reason of mistakes, alterations and erroneous directions of the resident engineer.

These claims were represented to the Minister of Railways and Canals, who, thereupon, reported to the Governor-General in Council and, upon his recommendation, there was passed an order in council which recited the four grounds of claim and directed that, in the event of a petition of right being preferred, the provisions of the contract and specifications which would or might bar any of the claims in so far and in so far only as they would prevent a consideration of any such claims on its merits aside from such

1907

PIGOTT & INGLES v. THE KING.

provisions should be waived; and particularly also all provisions and conditions in respect to the fixing of prices by the engineer the requirements and the directions in writing and certificates from him and the finality of his decisions referred to in certain clauses and all similar provisions and conditions in other clauses of the contract.

The judgment appealed from allowed part of the amount claimed and dismissed the petition as to the remainder, holding, in effect, as stated in the head-note of the report.

Watson K.C. and *Neil Sinclair* for the appellants. The suppliants contend that the circumstances under which the works were executed were so changed from those contemplated that the special conditions of the contract were inapplicable and that the contractors were therefore entitled to recover upon a *quantum meruit;* that it was contemplated that the works should be done in open season and with the canal unwatered, whereas, with the exception of short periods in the spring after the frost was out of the ground and before the canal was open to navigation and shorter periods in the autumn after navigation closed and before winter set in, the work was done either in winter or with the water in the canal; that the work of unwatering was a part of the work, which could not be done without unwatering, and a condition precedent to the proper performance of the work.

In accordance with the order in council, the claims stood for consideration upon a *quantum meruit,* and so the trial judge states, but, through error he further states that the appellants contended that they were entitled on two grounds—one of which existed at the

time the final estimate was made, while the other had arisen since. Here the learned trial judge misconceived the position of the appellants and their rights under the order in council. He was not asked to review or consider the circumstances and conditions which led to the granting or passing of the order in council. Those circumstances and conditions had been fully considered, passed upon and approved by His Excellency in Council and the order formed the basis of the claim and the foundation of the petition.

It was not for the judge at the trial to consider and determine whether the appellants were entitled to claim upon the *quantum meruit;* that had been previously considered and passed upon by the Crown and the petition came before the court to be determined upon the *quantum meruit.*

The judgment below considers the circumstances and conditions and passes upon the question as to whether the appellants were entitled to recover upon a *quantum meruit,* refers to provisions and clauses of the contract and paragraphs of the specifications and concludes that the case is not one in which the contractors are entitled to treat the contract as at an end and to recover upon a *quantum meruit,* which conclusion was not warranted. It is wholly inconsistent with the position of the appellants and of the respondent and at variance with the whole basis and foundation of the petition of right.

The judgment decides that it is not possible for it to give effect to the contention of the appellants based upon the order in council, even if it were thought to be well founded, because the provisions of the "Exchequer Court Act," section 33, would stand in the way of that being done and that the waiver of the clauses of the contract may not, therefore, be

1907

PIGOTT & INGLES v. THE KING.

properly regarded by the court. We submit that the court should have proceeded in accordance with the order in council having regard to the fact that provisions of the contract and specifications had been waived and were not then being set up in answer to the claim, and, on the other hand, that such claim was to be disposed of without regard thereto and therefore upon a *quantum meruit*.

It was quite competent for the Crown to make this contract, to vary the same, to modify or waive provisions and conditions and so to fix a basis of determination of the rights as they existed between the Crown and the subject in litigation, and it is erroneous to hold that the relation of the parties should be based solely upon the original contract without regard to modifications therein intended to have full force and effect and to govern in the adjudication of the claim which was founded upon the highest legal consideration. Work and services had been done and material supplied to the Crown, the benefit of which had been obtained and received by the Crown, the value of which had not been paid.

The rulings of the learned trial judge throughout were quite consistent, and the result substantially a dismissal of the claim. With regard to almost every item the conclusion was that there was no ground in law for allowing the claim; that the terms of the original contract must prevail and that the order in council should be disregarded as illegal and not binding. In this respect the judge should not have taken any higher or different ground in considering the claim upon its merits than was presented to him or urged and taken by the respondent.

We submit that, in so far as the claims have been

dismissed, disallowed or only partially allowed, such dismissal and disallowance or partial allowance are contrary to law and the weight of evidence and that the judgment in respect thereto should be set aside and reversed and judgment pronounced upon the merits of the claim; that all items of claim should be considered and determined as upon the *quantum meruit* for the amount as claimed in accordance with the evidence or, in the alternative, that a new trial should be directed or provision made by reference for the ascertainment and determination of the amount proper to be allowed as upon the *quantum meruit.*

Chrysler K.C. for the respondent upheld the judgment appealed from upon the terms and conditions of the contract and for the reason stated by the Exchequer Court judge. It was also urged that the order in council was not intended to have the effect of altering the terms of the contract and, in fact, did not do so. Section 33 of the "Exchequer Court Act" was relied on.

GIROUARD J.—This appeal is dismissed with costs. I agree in the reasons stated by His Lordship Mr. Justice Burbidge in the court below.

DAVIES J.—For the reasons given by the learned judge of the Exchequer Court, I am of opinion that this appeal should be dismissed with costs.

IDINGTON J.—This is an appeal from the judgment of the Exchequer Court upon a petition presented therein by the appellants to recover from the respondent for certain work alleged to have been done on

1907

PIGOTT & INGLES v. THE KING.

Idington J.

a public work and damages sustained by the suppliants (now appellants) in doing that work.

I agree in the results arrived at by the learned trial judge and in the general reasoning by which he reached such results in a careful and exhaustive judgment.

This appeal turns upon the construction of section 33 of the "Exchequer Court Act" which is as follows:

> 33. In adjudicating upon any claim arising out of any contract in writing, the court shall decide in accordance with the stipulations in such contract, and shall not allow compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein.

I am not quite sure that the learned trial judge's interpretation or mode of interpreting this section is absolutely correct.

At first I was disposed to think the first part severable from the latter as the learned judge seems to hold; that is, the one directory and the other imperative.

I am, however, disposed now, upon full consideration, to think that the word "stipulations" in the first part is to be read as relating entirely to the second part.

Reading the section as a whole and considering the obvious purpose and scope of it, are not the "stipulations" referred to those which refer to the compensation fixed by the contract?

The result of either interpretation is the same so far as it concerns this case; and possibly in almost all cases may be the same.

I can, however, conceive of cases arising wherein the interpretation I suggest might lead to other re-

sults than the interpretation of the learned trial judge.

I cannot add beyond this anything useful regarding his judgment.

The argument of the appellant's counsel here, I think, possibly calls for one or two observations.

He pressed upon us the view that his client was entitled to compensation as upon a *quantum meruit,* for the whole work done. He put this on alternative grounds. He claimed that the case comes within *Bush* v. *The Trustees of The Town and Harbour of Whitehaven*(1), and such cases, or that the order in council, in effect, so directed the case to be treated at trial that the basis of a *quantum meruit* must be adopted as to all the appellants' claims, else the order would have no effect; or that it should be read as if amending the contract and forming one that would be deleted of everything statutory or otherwise affecting appellants' claims to their right to have these allowed upon the *quantum meruit* basis.

I cannot see how on the facts the *Bush and Whitehaven Case*(1) can apply. Nor can I read the order in council as capable of either of these several interpretations.

It has been given by the learned trial judge all the effect it expresses. I do not think we should seek in it an implication that might exceed the powers of the executive in relation to a contract fully executed, or an assertion, without parliamentary sanction, of a dispensing power over the imperative requirements of a statute.

The appeal should be dismissed with costs.

(1) 52 J.P. 392.

1907

PIGOTT & INGLES v. THE KING.

MACLENNAN J. concurred in the opinion of Davies J.

DUFF J. concurred with Idington J.

Appeal dismissed with costs.

Solicitors for the appellants: *Watson, Smoke & Smith.*

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

THE JAMES BAY RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS.

AND

SAMUEL W. ARMSTRONG (PLAINTIFF) ..... } RESPONDENT.

1907

*Mar. 18, 19.
*April 1.

ON APPEAL FROM THE COMMON PLEAS DIVISION OF THE HIGH COURT OF JUSTICE.

Appeal—Railway Act—Expropriation—Appeal from award—Choice of forum—Curia designata.

By sec. 168 of 3 Edw. VII. ch. 58 amending the Railway Act, 1903, (R.S.C. (1906) ch. 37, sec. 209) if an award by arbitrators on expropriation of land by a railway company exceeds $600 any dissatisfied party may appeal therefrom to a Superior Court which in Ontario means the High Court or the Court of Appeal (Interpretation Act R.S. [1906] ch. 1, sec. 34, sub-sec. 26).

Held, that if an appeal from an award is taken to the High Court there can be no further appeal to the Supreme Court of Canada which cannot even give special leave.

APPEAL from a decision of Meredith C.J. of the Common Pleas Division of the High Court of Justice for Ontario(1), increasing the award of arbitrators in proceedings for expropriation of plaintiff's land by the defendants.

The arbitrators awarded the plaintiff $1,170 which he considered insufficient, and appealed to the High Court where it was increased to $2,250. The Railway Co. then took an appeal to the Supreme Court of Canada asking to have the original award of $1,170

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

(1) 12 Ont. L.R. 137.

1907

JAMES BAY RY. CO. v. ARMSTRONG.

restored. The plaintiff by cross-appeal claimed that the increase allowed by the High Court was insufficient and that he was entitled to a much larger sum.

Armour K.C. and *R. B. Henderson* for the appellants after arguing the case for a time on the merits were called upon to support the jurisdiction of the court to hear the appeal.

For purposes of an appeal from an award under the Railway Act the High Court and Court of Appeal are on an equal footing. See Railway Act Amendment 3 Ed. VII. ch. 58, sec. 168 and Interpretation Act R.S. [1906] ch. 1, sec. 34(26). If an appeal is taken to the High Court there is no further appeal to the Court of Appeal, *Birely* v. *Toronto, Hamilton and Buffalo Railway Co.*(1), and the High Court becomes the highest court of last resort in the province for these cases. *Farquharson* v. *Imperial Oil Co.*(2).

DuVernet and *Kyles* for the respondent referred to *Atlantic and North-West Railway Co.* v. *Judah* (3), *The Province of Ontario* v. *The Province of Quebec; In re Common School Fund and Lands*(4).

The judgment of the court was delivered by

MACLENNAN J.—This is an appeal by a railway company and a cross-appeal by a landowner, in respect to the compensation to be allowed to the latter for land taken by the railway company for its track, and also for severance.

(1) 25 Ont. App. R. 88.
(2) 30 Can. S.C.R. 188.
(3) 23 Can. S.C.R. 231.
(4) 30 Can. S.C.R. 306.

1907

JAMES BAY RY. CO. v. ARMSTRONG.

Maclennan J.

Arbitrators were appointed in the usual manner, and a majority award was made on the 29th December, 1905, in favour of the respondent for the sum of $1,170.

From this award an appeal was taken by the respondent, in pursuance of sec. 168 of the Railway Act, 3 Ed. VII. ch. 58.

That section provides that whenever such an award exceeds $600 any party

> may appeal therefrom upon any question of law or fact to a superior court; and upon the hearing of the appeal, the court shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators, as in a case of original jurisdiction.

Subsection 2 provides that:

> Upon such appeal the practice and proceedings shall be, as nearly as may be, the same as upon an appeal from the decision of an inferior court to the said court, subject to any general rules or orders from time to time made by the said last-mentioned court, in respect to such appeals, which orders may amongst other things provide that any such appeal may be heard and determined by a single judge.

By sec. 2(*f*) of the Railway Act, the expression "Court" means a superior court of the province or district, and by the Interpretation Act, R.S.C. [1906] ch. 1, sec. 34(26), "Superior Court" means, in the Province of Ontario, the Court of Appeal for Ontario, and the High Court of Justice for Ontario.

By sec. 65 of the Judicature Act of Ontario, it is provided that every action and proceeding in the High Court, and all business arising out of the same, except as hereinafter provided, shall, so far as is practicable and convenient, be heard, determined and disposed of before a single judge.

In pursuance of these enactments, the landowner, who had the option of taking an appeal from the

1907

JAMES BAY RY. CO. v. ARMSTRONG.

Maclennan J.

award, either to the High Court of Justice, or to the Court of Appeal in Ontario, took it to the High Court, and it was heard before a single judge, viz., before Meredith C.J., who increased the compensation due from the company to the sum of $2,250.

From that judgment the present appeal was brought by the company, whereupon the landowner, by way of cross-appeal, claimed in his factum, that the sum awarded to him by the Chief Justice, was insufficient and should be largely increased.

Upon the opening of the appeal, a question was raised by the court with respect to its jurisdiction, and an opportunity was given to counsel to argue that question, as well as the merits.

Having heard the argument and also an application for leave to appeal, we are all of opinion that there is no jurisdiction to hear the appeal, either with or without leave, and that the appeal should be quashed.

Precisely the same question arose in this court in 1901, on a motion for leave to appeal to this court from a judgment of a judge of the High Court of Ontario, increasing the sum awarded by arbitrators to a landowner against a Railway Company, and the application was refused. That was the case of the *Ottawa Electric Co.* v. *Brennan*(1).

The case of *Birely* v. *The Toronto, Hamilton and Buffalo Ry. Co.*(2), was there referred to with approval in which it was held that no appeal lay from the judge of the High Court to the Court of Appeal in such a case, both those courts being designated by the statute as special tribunals, to either of which the appellant might resort.

(1) 31 Can. S.C.R. 311. (2) 25 Ont. App. R. 88.

1907

JAMES BAY RY. CO. v. ARMSTRONG.

Maclennan J.

The appeal and cross appeal, and also the motion for leave will therefore be dismissed without costs.

Appeal dismissed without costs.

Solicitors for the appellants: *Boyce and Henderson.*

Solicitors for the respondent: *Bull and Kyles.*

1907

*March 11.
*May 7.

CHARLES LAMB AND H. L. MILLER (DEFENDANTS) ..... } APPELLANTS;

AND

SAMUEL T. KINCAID AND ANTHONY KROBER (PLAINTIFFS) .. } RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

Placer mining—Disputed title—Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts—Sinister intention—Conversion—Blending materials—Accounts—Assessment of damages — Mitigating circumstances — Compensation for necessary expenses—Estoppel—Standing-by—Acquiescence.

After a favourable judgment by the Gold Commissioner in respect to the boundary between contiguous placer mining locations and while an appeal therefrom was pending, the defendants, with the knowledge of the plaintiffs, entered upon the location and removed a quantity of auriferous material from the disputed and undisputed portions thereof, intermixed the products without keeping any account of the quantities taken from these portions respectively and appropriated the gold recovered from the whole mass.

In an action for damages, taken subsequently, the plaintiffs recovered for the total value of the gold estimated to have been taken from the disputed portion of the claim, without deduction of the necessary expenses of workings and winning the gold.

Held, affirming the judgment appealed from, Davies J. dissenting, that a correct appreciation of the evidence disclosed a sinister intention on the part of the defendants, that they had deliberately blended the materials taken from both parts of the location, converted the whole mass to their own use and thereby destroyed the means of ascertaining the respective quantities so taken and the proportionate expense of recovering the precious metal therefrom, and that, consequently, they were liable in damages for the total value of so much of the intermixed products as were not strictly proved to have come from the undisputed portion of the location.

---

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

1907

LAMB v. KINCAID.

Quære. Does the English rule governing the assessment of damages in respect of trespasses in coal mines supply a method of assessment applicable in its entirety to placer mining locations?

APPEAL from the judgment of the Territorial Court of the Yukon Territory affirming the judgment of Dugas J., at the trial, by which the action of the plaintiffs was maintained with costs.

The action was brought, under the circumstances stated in the judgments now reported, to recover damages for the invasion of the plaintiffs' placer mining location by the defendants and the value of a quantity of gold which the defendants had removed therefrom and converted to their own use.

At the trial His Lordship, Mr. Justice Dugas, decided against the defendants, on the grounds that the trespass had been wilful and that there had been no account kept of the gold taken or the cost of getting it, and awarded the plaintiffs, as damages *in pœnam,* the value of all the gold shewn to have been taken from the plaintiffs' location and declined to make any deductions for the necessary cost of the workings and winning the gold from the material taken. Upon appeal to the court in banc, His Lordship Mr. Justice Craig agreed with the trial judge, while His Lordship Mr. Justice Macauley considered that the damages should have been assessed according to the milder rule applicable to trespasses committed under *bonâ fide* belief in validity of title. The trial court judgment, therefore, stood affirmed and the defendants appealed to the Supreme Court of Canada.

Ewart K.C. for the appellants. The element of a wilful taking with sinister intention is entirely absent in this case. *Livingstone* v. *Rawyards Coal Co.*

1907

LAMB v. KINCAID.

(1); *McArthur* v. *Cornwall*(2); *Bulli Coal Mining Co.* v. *Osborne*(3), at page 364.

Hilton v. *Woods*(4); *Jegon* v. *Vivian*(5); *Ashton* v. *Stock*(6); *Kirkpatrick* v. *McNamee*(7); Mayne on Damages, (7 ed.) pages 46, 47, 418-419.

The word "wilful," as applied to trespass to land, has been explained, in a recent case, by Wetmore J. as meaning a trespass committed deliberately and intentionally, with a knowledge that there was no right whatever to do the act; *Fleming* v. *H. W. McNiell Co.*(8), at pages 314 and 315. The onus of proving that a trespass is fraudulent or unscrupulous is in each case upon the plaintiff. *Trotter* v. *Maclean*(9) at pages 586, 587. There is no obligation to refrain from dealing with property which one believes to be his own merely because somebody else claims it, and it cannot be asserted that there is a duty of abstention when a judge has decided in his favour merely because the claim continues to be asserted on appeal. In this case, abstention would have been detrimental to the defendants and would have entailed inconvenience and expense.

The plaintiffs did not ask for an injunction against the proposed operations, but stood by, allowed the defendants to proceed without protest, and now claim that the defendants were "wilful trespassers." It cannot be contended that, during the thirteen months between the judgments, the defendants should have abstained from using the disputed property in conjunction with their workings in that which it adjoined.

(1) 5 App. Cas. 25.
(2) [1892] A.C. 75.
(3) [1899] A.C. 351.
(4) L.R. 4 Eq. 432.
(5) 6 Ch. App. 742.
(6) 6 Ch. D. 719.
(7) 36 Can. S.C.R. 152.
(8) 23 Can. L.T. (Occ. N.) 312
(9) 13 Ch. D. 574.

If the courts below had decided the first point in the defendants' favour, they would not have awarded exemplary damages merely for absence of an account of takings and expenses. Aggravation is immaterial. Whether an account is or is not kept an unscrupulous trespasser receives no consideration, but the fact that an honest trespasser does not keep separate that which he firmly believes to be his own from his other property does not make him an unscrupulous trespasser.

Holman K.C. and *Gwillim,* for the respondents. The evidence justifies the findings of the trial judge and the damages are not excessive and should not be disturbed by this court. *Montreal Gas Co.* v. *St. Laurent*(1); *Sénésac* v. *Central Vermont Ry. Co.*(2).

The contention that the trespass was "innocent" or "inadvertent" is completely negatived and all presumptions must go against the defendants who deliberately omitted to keep accounts necessary to establish what quantities might come from the disputed area and the costs of getting out the dirt and separating the gold. *Attorney-General* v. *Boyd*(3). The doctrine of *per confusionem* applies; *Lupton* v. *White* (4); *Attorney-General* v. *Lansell*(5); *Band of Hope and Albion Consols* v. *Young Band Extended Quartz Mining Co.*(6); Morrison on Mining Rights, pages 280, 292. The trespasser prevents the owner working his own mine in his own way; *Munro* v. *Sutherland* (7).

The English rule as to cases of trespass in coal

(1) 26 Can. S.C.R. 176.
(2) 26 Can. S.C.R. 641.
(3) 3 Aust. Jur. Rep. 99.
(4) 15 Ves. 432.
(5) 10 Vict. L.R. 84.
(6) 8 Vict. L.R. 277.
(7) 4 Aust. Jur. Rep. 75, 139.

1907

LAMB v. KINCAID.

mines cannot be applied to placer mining claims; the former are uniform in production while the latter are variable and the whole methods and systems complicated both as to cost, quantity and value of the gold recovered. This is pointed out in *Attorney-General* v. *Lansell*(1).

We also refer to *Wild* v. *Holt*(2) *per* Parke B.; and Armstrong on Gold Mining (7 ed.), page 88.

THE CHIEF JUSTICE.—I agree with the reasoning of Mr. Justice Duff.

GIROUARD J.—I agree in the opinion of Mr. Justice Duff.

DAVIES J. (dissenting).—The question we have to decide is as to the measure of damages to be applied to the trespasses committed by the appellants on the plaintiffs' mining area, and for which they were sued.

Are these damages to be assessed according to the severe rule, the rule *in pœnam,* whereby the trespasser is to be held liable for the full value of the gold taken by him out of the property trespassed upon without making any allowance whatever for the cost either of taking out the pay dirt or afterwards of washing and mining the gold from this pay dirt, or are they to be assessed according to the milder rule by which the necessary expense which it would have cost plaintiff to obtain the gold had he mined and obtained it himself, would be allowed to the trespasser?

The trial judge declined to make any allowance to defendants for these necessary expenses and upon appeal the court was equally divided, Craig J. holding

(1) 10 Vict. L.R. 84. (2) 9 M. & W. 672.

with the trial judge, and Macauley J. deciding in favour of the application of the milder rule and allowing these necessary expenses.

The grounds upon which Craig J. supports his judgment are that the trespass was a wilful and deliberate invasion of the plaintiff's property. He proceeds upon the assumption that plaintiff was a wilful trespasser and incorporates, from Armstrong on the Law of Gold Mining, a definition of wilful trespasser as one

> not in possession under any colour of title and not under any mistake as to facts though misapprehending the law.

In another place he says that

> after reading Lamb's (defendant's) evidence carefully he had reached the conclusion that * * * he deliberately made up his mind to have this ground in spite of any body and that with wilful intent to obtain an unfair advantage, he entered upon this ground, took out the pay dirt, and deliberately confused it with his own.

Having reached such a conclusion that the trespass was simply a deliberate fraud, of course there could not be any doubt as to the proper rule to apply in measuring the damages. I have, bearing in mind the very strong language of Craig J., read carefully over Lamb's evidence, but I have not been able to reach any such conclusions from it as the judge seems to have done. On the contrary, I think his evidence, read with all the other evidence in the case, shews that so far from being a wilful trespasser without any colour of title, the defendants entered upon the disputed claim only after it had been judicially determined by the Gold Commissioner, after a trial, to have been their property and within the bonds of their mining lease; that they carried on their operations of taking out the pay dirt from the disputed territory during the

1907

LAMB v. KINCAID.

Davies J.

winter and spring after judgment had been given in their favour, tunnelling into the territory across a tunnel of plaintiffs, and that these operations must have been known to the plaintiffs who stood by and saw the property being worked by defendants and contented themselves simply with appealing from the judgment of the Gold Commissioner, without applying for an injunction restraining the defendants from working the disputed territory.

It is true the judgment of the Gold Commissioner was more than a year afterwards reversed by the court of appeal, Craig J. stating on that appeal that it was "merely a question of boundaries and consideration of the weight of evidence." Before this appeal was determined all that is complained of by the plaintiffs was done. It does not, therefore, seem to me proper to speak of the plaintiff as a wilful trespasser, or deal with him as one in possession "not under any colour of right."

He was in possession under the judgment of a court of competent jurisdiction which declared the disputed territory to form part of his mining claim, and I cannot see that he ought to be treated as acting fraudulently or dishonestly, simply because he went on exercising rights declared to be his without any attempt to restrain him from doing so by his opponent who had appealed from the judgment simply. In the absence of any positive evidence to the contrary, and drawing reasonable inferences from the facts proved, I would conclude that what defendants did was done openly under a claim of right and *bonâ fide,* though in the ultimate result proved to be wrongful.

In his judgment in the case of *Trotter* v. *MacLean* (1), Fry J., at p. 587, after reviewing the different

(1) 13 Ch. D. 574.

classes of cases in which the milder rule or the punitive rule was applied, cited with approval from the observations of Lord Hatherley in *Jegon* v. *Vivian*(1) the following:

I think that the milder rule of law is certainly that which ought to guide this court subject to any case made of a special character which would induce the court to swerve from it; otherwise on the one hand a trespass might be committed with impunity if the rule *in pœnam* were not insisted upon; so on the other hand persons might stand by and see their coal worked, being spared the expense of mining and getting it.

Fry J then goes on to say:

These observations are material in two ways. In the first place they express the view of the Lord Chancellor that the milder rule is to be assumed when the propriety of applying the contrary rule is not shewn, and *they throw the burden on him who asserts that the severer rule ought to be applied;* and so his language has been interpreted by V.-C. Bacon, in, I think, more than one case. In the next place, Lord Hatherley points out that the milder rule should be applied where persons *stand by and see their coal worked.*

I think the plaintiffs here have failed to discharge the burden cast on them and that they should, under the circumstances, be classed with those who stand by and see their property worked.

In the case of *Livingstone* v. *Rawyards Coal Co.* (2), in the House of Lords, Lord Blackburn stated the general rule where an injury is to be compensated by damages to be that

you should as nearly as possible get at that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. That must be qualified by a great many things which may arise, such for instance as by the consideration whether the damage has been maliciously done or whether it has been done with full knowledge that the person doing it was doing wrong.

(1) 6 Ch. App. 742 at p. 763. (2) 5 App. Cas. 25.

1907

LAMB v. KINCAID.

Davies J.

I can see no evidence whatever of malicious action on defendants' part and cannot, as before stated, reach the conclusion that the defendants, with the judgment of the court of first instance in their favour, and with the plaintiffs in the position of persons looking on at defendants' operations and contenting themselves with a simple appeal, must necessarily be held to have had "full knowledge" that they were doing wrong at the time the only court that had passed upon the question had determined they could legally do what they were doing. Until evidence is given forcing the court to that conclusion of wilful wrongdoing the plaintiffs have not discharged the onus which Lord Hatherley thought lay upon them.

My attention has been called by my brother Duff to the case of *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*(1), at p. 167, decided in the House of Lords. In that case it was held by Lords Watson and MacNaghten, after an elaborate and instructive review by Lord MacNaghten of many of the cases alike at common law and equity bearing upon the question now under discussion, that on general principles the defendants, though they had illegally detained the plaintiffs' property, were entitled to repayment of the expenses properly incurred by them on account of freight and landing charges.

Whatever strength there might have been in the argument denying the right of the defendants to have any expenses allowed them for taking the pay dirt out of the disputed territory into the dump heap, I can see no just rule or reason which should preclude them from the reasonable expense of washing the gold out of the dump heap. In any event that would have had

(1) (1892) A.C. 166.

1907

LAMB v. KINCAID.

Davies J.

to be incurred by plaintiffs, if they themselves had taken out the pay dirt, and the cost can easily be estimated. To confirm the judgment appealed from would deny even that to the defendants.

I do not think the explanation of the reasons why they did not keep a separate account of the working of the portion of the mining area under dispute, or why they mixed the pay dirt from that area with that from their undisputed area, unreasonable as was contended. It would no doubt have been better, and proper, had it been possible, to keep these accounts and not to have mixed the pay dirt with other. But on the statement, uncontradicted so far as I can see of the extremely limited extent of dumping ground which defendants had, and the great expense of separating the pay dirt from the disputed area with that from the undisputed area, I am unable to draw the conclusion that this mixing of the two was necessarily a wilful mixing which ought to be punished by the application of the punitive rule of damages. There might have been some difficulty in reaching a proper estimate of the whole expenses to be properly allowed defendants from the evidence already in, and without a further reference. But, as counsel for the plaintiffs, respondents, pressed us, if we reached the opinion that the defendants were entitled to be allowed such expenditure as it would undoubtedly have cost the plaintiffs if they had mined and won the gold from the disputed area, not to refer the case back for further evidence but to make such estimate from the evidence already in, I think we may under that consent adopt the conclusion of Macauley J. and allow them 40 per cent. of the gross proceeds, as and for such necessary expenditure, and as being under the evidence a fair, just and reasonable allowance.

1907

LAMB v. KINCAID.

Davies J.

I would, therefore, allow the appeal with costs to that extent.

IDINGTON J.—I agree in the opinion of Mr. Justice Duff.

DUFF J.—The appellants and one Randall were, in 1901 and 1902, the owners of a placer claim known as the "Miller" on Bonanza Creek in the Yukon Territory adjoining a claim known as the "Krober" owned by the respondents.

A dispute as to the boundary between the claims was determined in February, 1903, by a judgment given in favour of the respondent by the Territorial Court of the Yukon Territory reversing the judgment of the Gold Commissioner which had been delivered 11th January, 1902. Between the last mentioned date and the date of the delivery of the judgment of the Territorial Court, the appellants entered upon the area in dispute and abstracted large quantities of auriferous material, from which, after intermixing it with similar material taken from the "Miller," they extracted the gold which it contained. The respondents brought this action to recover damages for the invasion of their claim by the appellants and the trial judge awarded them $7,306.56, which the learned judge found to be the value of the gold recovered by the appellants from the respondents' claim.

On appeal, Craig J. agreed with the trial judge, while Macauley J. took the view that this sum should be reduced by a deduction equivalent to the expenses incurred by them as well in separating the gold bearing material from its natural bed as in removing it from the mine and in recovering the mineral it contained.

Before us, the appellants' principal contention was that, not having entered upon the disputed area until they had first obtained the decision of the Gold Commissioner in their favour, they are entitled to the benefit of an allowance in accordance with the view of Macauley J.

It has for some years been the settled law applicable to cases of coal mining trespass, where the trespass is not wilful, that in estimating—when that forms an element in the damages to which the plaintiffs is entitled—the value of the coal abstracted, the coal is to be treated as *in sitû* and from its value at the mouth of the pit is to be deducted the cost of severing it from its natural bed and of bringing it to bank; where the trespass is wilful, the cost of severance is not allowed although as a general rule the cost of bringing it to bank is.

It was not argued and, I think, cannot be maintained, that a trespasser upon a placer mining claim held under the mining regulations of the Yukon Territory is in a position more favourable than a coal trespasser under this rule. Whether he is in a less favourable position, it is, in the view I take of the facts, unnecessary to consider. I have come to the conclusion that, assuming the rule to apply in its entirety, the appellants are within that branch of it which governs cases of wilful trespass and are, consequently, not entitled to the benefit of the allowance claimed.

No attempt, so far as I can find, has yet been made to define with precision the circumstances in which the court will treat a trespass as wilful within the meaning of the rule; but this much is sufficiently clear upon any examination of the cases—that, upon that point, the existence or non-existence in the mind of a

1907

LAMB v. KINCAID.

Duff J.

trespasser of a belief in his title to the locus is not necessarily conclusive.

In the leading case *Wood* v. *Morewood*(1), for example, the test which Baron Parke instructed the jury to apply was: Did the defendant act

> fairly and honestly (not honestly only) in the *bonâ fide* belief that he had a right to do what he did?

(not merely that he owned the coal taken). If the title is in dispute and the dispute is in course of active litigation an abstraction of mineral may be innocent or non-innocent, according to the circumstances; according, for example, to its effect upon the trespasser's adversary in respect of his position in the dispute, or upon the adversary's rights, in the event of his success in litigation. If, in that event—the adversary's success—the trespasser can compensate him fully in money and if the trespass places him at no disadvantage either in the dispute itself or in the ascertainment of compensation or otherwise, then the trespass may be perfectly innocent in all but a legal sense. Apparently such a case, in the opinion of Lord Hatherly, was disclosed by the circumstances of *Jegon* v. *Vivian*(2), although I venture to think there will be few cases in which the appropriation by one party to a litigated dispute of the subject matter of the litigation, will not place upon that party a heavy burden of explanation.

If on the other hand the act is an adverse act, designed to put the adversary at a disadvantage in the dispute, the mere fact that the trespasser believes he is acting within his legal rights will not, I think, bring him within the category of the innocent. *Peruvian*

(1) 3 Q.B. 440n. (2) 6 Ch. App. 742.

1907

LAMB v. KINCAID.

Duff J.

Guano Co. v. *Dreyfus Bros. & Co.*(1), *per* Lord Watson at page 171. At least as effectively, would it appear to me, is he excluded from that category, if his act of trespass is designed, in the event of his own defeat, to deprive his adversary of, or to embarrass him in obtaining the whole or part of that to which he shall prove to have been entitled. In such a case he cannot be said to act "fairly and honestly," to use the language already quoted from the charge of Parke B. in *Wood* v. *Morewood*(2); or "wholly ignorantly and innocently," in the language of Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.*(3) at page 40; or without any "sinister intention" in the language of Lord Cairns, in the same case at page 31. He is in a word, a wrong-doer *in foro conscientiæ*—not in the eye of the law merely.

That the design of the defendants in committing the trespass complained of was to frustrate the plaintiffs' appeal by depriving them, in the event of their success, of the fruits of success, is in my opinion the only view fairly consistent with the whole of the facts in evidence.

A glance at the salient facts in the history of the controversy respecting the boundaries of the "Miller" and the "Krober" is necessary to enable us fully to appreciate the bearing of the evidence on this question.

The controversy began in the year 1900. The "Miller" had been located by one J. A. Miller on the 11th June, 1898, and the "Krober" on the 21st of the same month.

The "Miller" being the senior location, and the whole of the disputed territory being admittedly with-

(1) (1892) A.C. 166. (2) 3 Q.B. 440.
(3) 5 App. Cas. 25.

1907

LAMB v. KINCAID.

Duff J.

in the lines of the "Krober," the question of title to that territory necessarily rested upon the determination of the boundaries of the "Miller" as originally located.

In October, 1899, the owners of the "Miller" (of whom the defendant H. I. Miller was then one) had a survey and plan of it made by one T. D. Green. The plan, which so placed the boundaries of the claim as to embrace only a part of the area in question, was signed by J. A. Miller, the locator, and filed in the office of the Gold Commissioner. In May, 1900, J. A. Miller, the locator, the present defendant H. I. Miller, and one Bowhay, who were then the owners of the "Miller," commenced in the Gold Commissioner's Court a proceeding against the present plaintiff Krober, as owner of the "Krober," claiming to have the boundaries of the "Miller" established in accordance with the survey. A date was fixed for the hearing, which, however, never took place, and the proceeding was afterwards discontinued. In the same year—the precise date is not disclosed by the evidence—the same persons made an attempt to establish the same boundaries through the procedure provided by a regulation promulgated in March of that year; under this regulation, if, after public notice of a survey of a placer claim for the period and in the manner prescribed by the regulation, there should be no protest against it lodged with the Gold Commissioner, the boundaries of the claim became defined for all purposes in accordance with the survey. Green's plan and survey were advertised, but a protest being lodged the plan and survey were withdrawn.

A fact of cardinal importance in connection with

this survey is that it was based upon the theory that the initial post of the "Miller" as located by J. A. Miller, was a post (described in the subsequent proceedings before the Gold Commissioner as post B.) which had already been placed, in locating the "Newman," an adjoining claim; on the same theory another survey of the "Miller," made by one Barwell, apparently in 1900, at the instance of the same persons, seems to have proceeded.

On the 15th June, 1901, a third survey was made at the instance of the present defendants—then the owners of the claim—by Barwell. This survey proceeded on a new theory. Barwell took as his starting point a place pointed out to him on the ground by J. A. Miller, the locator of the claim, as the situation of the initial post; and the claim as surveyed from that starting point embraced an area within the limits of the "Krober" (the area in dispute, that is to say) very much larger than that falling within the lines of Green's survey.

On the day following the completion of this survey the action was commenced in the Gold Commissioner's Court by the present defendants against the present plaintiffs which resulted in the judgment of the Gold Commissioner of the 11th January, 1902, already referred to.

The plaintiffs on the same day gave notice of appeal to the Territorial Court. The defendants having in the preceding November begun mining on the "Miller"—which had up to that time remained unworked—extended their operations after the Gold Commissioner's decision into the disputed territory, and before the hearing of the plaintiffs' appeal (on the 17th September, 1902) had removed from it the mineral bearing

1907

LAMB v. KINCAID.

Duff J.

material it contained. The defendants kept no account of this material (as to either its quantity or its value), or of the cost of mining, removing or washing it. On the contrary, they—as I have already mentioned—intermixed it with similar material taken from parts of the "Miller" not in dispute and appropriated the gold recovered from the whole mass. On the 28th September, 1902, the day after the hearing of the appeal, the defendants having completed the washing of this material, discontinued operations and afterwards sold the unworked part of their claim for $10,000.00.

Quo animo then did the defendants commit these trespasses? We have here no question of inadvertence or negligence. That the defendants deliberately invaded the territory in litigation is now conceded. One of two things must therefore be clear. The defendants either rested on the decision of the Gold Commissioner as conferring on them a title of absolutely assured validity and proceeded with no misgiving as to the result of the appeal; or they disposed of the product of the property with a clear perception that, if the plaintiffs should succeed, that would happen which has happened, namely, that the plaintiffs in spite of their success would find that the subject matter of the litigation had disappeared and with it all reliable evidence of its extent and value.

The first of these alternative propositions, Mr. Ewart, if I understood him, asked us to adopt. The facts, I think, make it clear that it should be rejected.

This view of the state of mind of the defendants seems hard to reconcile with the nature of the case presented before the Gold Commissioner. The case turned in substance upon the point whether J. A.

Miller in locating the "Miller" had taken as his initial post the post "B." to which I have referred, or had placed an initial post in the situation pointed out by him to Barwell for the purposes of the third survey, in June, 1901. The plaintiffs' success depended upon their ability to maintain the latter proposition. The Gold Commissioner had accepted that view; but considering the evidence as disclosed by the materials before us in the light of the previous history of the dispute, one finds little pointing to *bona fides* on the part of the defendants; on the contrary, I regret to say there is much to suggest a case inherently unworthy of credit. The record of the trial is not in evidence; but we have the reasons given by Craig J. for his judgment on appeal, in which Macauley J. concurred; and from some observations made in the course of the judgment of Craig J. in this action, I assume that the view expressed by him had also the concurrence of Dugas J., although it appears that the last mentioned judge proceeded also on the ground that the defendants, by their course of action respecting the Green survey, were estopped from disputing the plaintiffs' contention respecting the position of the initial post. The learned judges in appeal did not of course see the witnesses; but subject to that, we may, I think, assume—otherwise doubtless the record would have been put in evidence—that, so far as it could be got from the record, the effect of the evidence is fairly stated by Craig J. The learned judge says:

> I have read the evidence in this case most carefully, and I have come to the conclusion that I cannot follow the learned Gold Commissioner on his finding on the facts. Miller, the first witness, is a most unsatisfactory witness, hesitating and uncertain and contradicdictory; he was on the ground once for a short time after he was sick, and the staking was done, and he paid very little attention to what he did. Christie, the important witness against him, was on

1907

LAMB v. KINCAID.

Duff J.

the ground for a long time prior, knew it intimately, and had gone over it, and marked out the features of the ground. Warren, who confirms to a certain extent, is forced to admit upon examination that an affidavit made by him is untrue, and that he will not now support it, proving either that he was willing to sign anything laid before him without reading it, or that, having read it, he was willing to swear to it anyhow, in either case being a most unscrupulous witness. Then, again, Warren, in his evidence, swears that he can recognize a stake after it has been cut off by seeing the stem five inches from the ground. Any man who will swear to that state of things is not worthy of belief. Bowhay, who confirms Miller as to the stakes, was willing to have the plan of Green and Barwell adopted, which is not the contention which he now sets up, and it is singular that he should have done that if he knew better at the time. Miller himself signs the Green plan and approved of the Barwell plan. Against this we have the direct evidence of Hawkins, who made the first survey and found post B. with Miller's name upon it, being the only post which had the name. We have Sinclair's evidence of conversation where Miller draws a plan and shews the claims exactly as Korber now contends they are, with the "Newman" claim jutting up into the "Miller" claim. We have the evidence of Green who found the post B. We have the evidence of Jephson, who found that post. We have the evidence of Krober who saw the post. We have also the evidence of Kincaid, Ware and Rost, who either saw the post or had conversation with Miller and admitted the evidence is preponderatingly in favour of Kroeber's contention as to what the "Miller" survey was.

With the transactions of 1899 and 1900 in their minds—the Green plan signed by J. A. Miller, the Barwell plan approved by him, the proceedings (in the Gold Commissioner's office and by public notice) to establish Green's survey—can we assume that Miller and Lamb regarded as inexpugnable the case described by the learned trial judge in the passage I have quoted?

At least it would seem that their conduct in disposing of the product of the encroachment as they did calls for some explanation in addition to the suggestion that they acted on a blind faith in an unimpeachable title. Two explanations are offered by counsel. It was impracticable, it is said, first, to distinguish the

material removed from the disputed area; and secondly either to deposit it as a separate mass on the dump or separately to sluice it. It is not necessary I think to consider the exculpatory validity of these explanations; they fail because they have no basis of fact. As to the first, the evidence shews clearly that the defendants' workings crossed at three places only the boundary between the territory admittedly within the "Miller" and that in dispute. It is obvious that every carload of material excavated from the last mentioned territory must have passed one of these three points. That the points could have been ascertained with exactitude and marked on the ground by any competent surveyor is also obvious. Lamb, having in his examination in chief sworn that in order to distinguish the cars proceeding from the disputed area the constant attendance of a surveyor under ground would be necessary, in cross examination admits—what must be very plain—that the marking of the underground boundary would have involved very little expense or trouble. As to the other explanation offerred, there is some evidence given by Frank Miller in support of it; but we are relieved from considering in detail the evidence of this witness by the admissions made on cross-examination on this point also by the defendant Lamb himself, who says that the sole obstacle in the way of the suggested precaution was a little additional expense.

It is to be observed that while these explanations are put forward by counsel to account for the action of the defendants in blending the material, we have no such explanation from the lips of the persons who were directly concerned in it.

There are three persons whose *bona fides* in com-

1907

LAMB v. KINCAID.

Duff J.

mitting the trespasses under consideration is in question. No one of these offers any explanation of his conduct. The defendant Miller and Randall (who owned a one-fourth interest and acted as foreman in charge of the operations down to 22nd July, 1902), were not called as witnesses; they were both, it seems, absent from the territory during the trial; but why was their evidence not taken in the way usually followed in such cases? Lamb, the only one of these persons who gave evidence at the trial, not only attempts no justification of the trespass, but professes ignorance of the fact of the trespass.

The proceedings in the present action indeed seem to me to afford some light upon this question of intention. A scrupulously honest man, having in full belief that he was exercising his rights, taken that which has proved to belong to another, would, speaking generally, evince some desire to make restitution. The defendants—being as they say in that case—first, by their pleadings denied their act of trespass; then, to shew that this was no formality of pleading, by their counsel at the trial, in answer to the court, said that the fact of the trespass was seriously put in issue; and the defendant Lamb in the witness box thus fences with the question:

Q. What was done with the gravel and other pay material taken from the ground in question?

A. *If we had anything to do with it*, it was sluiced with the rest.

* * * * *

Q. The first ground taken out would be the ground nearest the encroachment or the encroachment *if you took it?*

A. Yes, it would be the first to come out.

Q. What was done with the first ground that was taken out?

A. Sluiced.

Q. When?

A. I think somewhere about June.

Q. 1902?

A. Yes.

1907

LAMB v. KINCAID.

Duff J.

Q. Had you then finished your operations in the vicinity of the ground in dispute or did you continue them on after June?

A. They worked continuously right along.

Q. Was the ground included in the disputed ground worked out up to June?

A. *I don't know anything about it.*

This conduct lends no support to the theory that the defendants acted without any sinister intention. Indeed the course of the defendants throughout the whole controversy, the proceedings in 1900—the volte face of 1901—the nature of the case before the Gold Commissioner—the intermixture of the products—the failure to keep separate accounts—the conduct of the present litigation—would appear not to be reconcilable with the hypothesis that they acted with the intention of taking the benefit of that only which should prove to be rightfully theirs.

But it is contended that the plaintiffs are within the principle stated by Lord Hatherly in *Jegon* v. *Vivian* (1) and by Fry J. in *Trotter* v. *McLean* (2), which, it is said, precludes the owner from disputing the defendants' right to deduction for the expenses of severance, where he, having a knowledge of the trespass, has taken no steps or has been dilatory in taking steps to stop it. It is said that the failure of the plaintiffs to apply for an injunction brings them within these cases.

It is plain that the conduct of the owner in standing by inactive while the trespass proceeds may bear upon the trespasser's right to claim the deduction in one or both of two ways. The owner's inactivity or dilatoriness may, in the circumstances of particular cases, be an element of some importance to be considered in deciding upon the character of the trespasser's

(1) 6 Ch. App. 742. (2) 13 Ch. D. 574.

1907

LAMB v. KINCAID.

Duff J.

intention. On the other hand, independently of any question of the trespasser's intention, the owner may by his laches disentitle himself to the full measure of relief which the court might otherwise award. In *Trotter* v. *McLean* (1) Fry J. found that the conduct of the owners during a certain period amounted to acquiescence in the trespass, but he held that this period of acquiescence came to an end upon a simple notice to the trespasser unaccompanied by legal proceedings.

In *Jegon* v. *Vivian* (2), the trespass was held in the circumstances not to be a wilful trespass; and the actual decision turned upon that, although no doubt the dilatoriness of the owner's proceedings was an element which influenced Lord Hatherly's mind in the consideration of the question of *bona fides*.

On the other hand, Lord Hatherly does lay down or suggest what seems to be a clear principle—viz.: that where the owner has stood by inactive and allowed a trespass to proceed, especially if it is proceeding under a *bonâ fide* belief in title, it would be wrong to refuse the trespasser the benefit of the allowance.

My difficulty is to apply to the circumstances of this case anything decided or any principle enunciated by Lord Hatherly or by Lord Fry.

The plaintiffs did not stand by inactive; on the contrary they promptly launched their appeal and it cannot be suggested, nor is it, that the prosecution of the appeal was dilatory. Such a case is, I think, very remote from anything within the scope of Lord Hatherly's language. Still less can it be maintained that there is any evidence that anything done by the defendants misled the plaintiffs into the belief that the defendants were acquiescing in the course taken

(1) 13 Ch. D. 574. (2) 6 Ch. App. 742.

by the plaintiffs. The evidence upon which the fact of the defendants' knowledge of the trespass rests is meagre, and not without ambiguity. But if that evidence proves anything, it proves this, that Randall, a co-owner with the defendants and the foreman in charge of the operations, informed the plaintiff Kincaid that the defendants did not intend to work the disputed territory until after the determination of the appeal. Had it been suggested at the trial that the plaintiffs ought to have proceeded in the manner now suggested, it is impossible to say what might have proved to be the explanation of the fact that the plaintiffs did not so proceed. Many explanations occur to one, but such speculation is profitless; and I do not think the plaintiffs can be called upon properly at this stage to justify their course from the evidence upon the record. A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it. *Browne* v. *Dunn*(1) at p. 76; *Connecticut Fire Ins. Co.* v. *Kavanagh*(2) at page 480; *The Tasmania*(3) at page 225; *Ex parte Firth*(4) at page 429; *Karunaratne* v. *Ferdinandus*(5) at page 409; *Loosemore* v. *Tiverton and North Devon Ry. Co.* (6) at page 46; *Page* v. *Bowdler*(7); *Borrowman Phillips & Co.* v. *Free and Hollis*(8) at page 68.

But it is contended that the defendants are, at least, entitled to the expenses incurred in removing and washing the product of their trespasses. It is, I

(1) 6 R. 67.
(2) [1892] A.C. 473.
(3) 15 App. Cas. 223.
(4) 19 Ch. D. 419.
(5) (1902) A.C. 405.
(6) 22 Ch. D. 25.
(7) 10 Times L.R. 423.
(8) 48 L.J.Q.B. 65.

1907

LAMB v. KINCAID.

Duff J.

think, for the purposes of this appeal, a sufficient answer to this contention to say—in accordance with the view of Macauley J.—that the defendants have, by their own wrongful acts, made it impossible to ascertain these expenses. The court is not called upon to speculate in such a case for the benefit of deliberate wrong-doers; they come within the wholesome rule, that if a man by his deliberately tortious act destroys the evidence necessary to ascertain the extent of the injury he has inflicted, he must suffer all the inconvenience which is the result of his own wrong. *Armory* v. *Delamirie*(1). In such a case, to quote the language of Sir Lancelot Shadwell, V.C., in *Duke of Leeds* v. *Amherst*(2) at page 596:

> In my opinion this case is to be judged not merely by the simple circumstances of evidence which are found in it, but the reference to those great principles of justice, which, as I apprehend, have always governed mankind, and have been acknowledged from the earliest times. It appears to me that it is a very right thing to hold in one's contemplation, on deciding such a case as this, what has been the uniform opinion of mankind upon such a general case as the one now presented in this cause. I take it, that the general wisdom of mankind has acquiesced in this; that the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effects of it recoil upon himself. * * * "All those who take the sword shall perish by the sword." "The mischief-maker shall suffer for the mischief he has created."

I do not overlook the method followed by Macauley J. but, having regard to the views I have expressed, it is obviously inapplicable. The allowance of 40 per cent. made by that learned judge must be taken to include the cost not only of removing and treating the deposits but of drifting and digging as well; and

(1) 1 Strange 505.

(2) 52 Eng. Rep. 595; 20 Beav. 239 at p. 242.

further indeed—if the analogy of the terms upon which the laymen worked was consistently pursued—of all the excavations required to work the ground. There is absolutely nothing before us by which, assuming that in the view taken by the learned judge his method of ascertaining the whole cost of working the deposits is a valid method, one can distinguish the cost of removing or washing from the other expenses.

The case calls for a further observation.

The learned trial judge seems to have proceeded on the assumption that the burden was upon the plaintiffs to prove the value of the mineral taken from their claim. The burden which by this course was placed upon the defendants was much lighter than, in the circumstances of this case, they had a right to expect. In the view I have taken of their conduct, they were, under the long settled doctrine of the English law, accountable for as much of the mixed products of the two claims as they did not strictly prove to have come from their own.

Warde v. *Æyre* (1); *White* v. *Lady Lincoln* (2); *Lupton* v. *White* (3); *Re Oatway* (4); *Cook* v. *Addison* (5); Story on Bailments, 41; *Spence* v. *Union Insurance Co.* (6); *Hart* v. *Ten Eyck* (7); *Attorney-General* v. *Lansell* (8); *Last Chance Mining Co.* v. *American Boy Mining Co.* (9).

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Wilson & Stackpoole.*
Solicitors for the respondents: *Pattullo & Tobin.*

(1) 2 Bulst. 323.
(2) 8 Ves. 363.
(3) 15 Ves. 432; 2 Kent 365.
(4) (1903) 2 Ch. 356.
(5) L.R. 7 Eq. 466 at p. 470.
(6) L.R. 3 C.P. 427.
(7) 2 Johns. (N.Y.) 62 at p. 108.
(8) 10 Vict. L.R. 84.
(9) 2 Martin's M.C. 150.

1907

*Mar. 11, 12.
*May 7.

NORMAN McLEAN (SUPPLIANT).....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Subaqueous mining—Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice—Statement of claim—Demurrer—Cause of action.

A statement of claim which alleges that the Crown, after granting a lease of areas for subaqueous mining and while that lease was in force, in derogation of the rights of the lessee to peaceable enjoyment thereof, interfered with the rights vested in him by transferring the leased area to placer miners who were put in possession of them by the Crown to his detriment, discloses a sufficient cause of action in support of a petition of right for the recovery of damages claimed in consequence of such subsequent grants.

Judgment appealed from (10 Ex. C.R. 390) reversed, Davies and Idington JJ. dissenting.

Davies J. dissented on the ground that there was no sufficient allegation in the petition either of interference with the submerged beds or bars of the stream, which alone were included in the dredging lease, or of such active interference by the Crown as would justify an action.

APPEAL from the judgment of the Exchequer Court of Canada(1) which maintained a demurrer to the suppliant's petition of right.

The circumstances of the case, material to this appeal, are stated in the judgments now reported.

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

(1) 10 Ex. C.R. 390.

1907

MCLEAN v. THE KING.

The Chief Justice.

Shepley K.C. for the appellant.

Chrysler K.C. for the respondent.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Exchequer Court maintaining a demurrer to a petition of right in which the petitioner (now appellant) alleges that:

1st. By indenture made in duplicate 23rd March, 1898, at Ottawa, Her late Majesty did grant, demise and lease unto the petitioner (now appellant) for a period of twenty years, the *exclusive* right and privilege of taking and extracting by *subaqueous* mining and dredging all royal and base metals other than coal to be found within a certain defined area on Dominion Creek in the Yukon Territory.

2ndly. The grant was made subject to the mining regulations of January 18th, 1898, which are incorporated in it; and also provides that if that portion of the creek covered by the lease is subsequently found to have been granted to another then there shall be priority according to the record. There is also exclusion of warranty as to sufficiency of water, and there is to be no claim for compensation if it is found impossible for that or any other reason to carry on operations under the lease which is declared to be taken entirely at the lessee's risk.

After setting out the lease and regulations in full the petitioner alleges:

That subsequent to the granting of the said lease, and while the same was in full force, the Crown, through the Gold Commissioner at Dawson, granted to free miners the said area covered by said suppliant's lease as placer mining claims and had placed in possession of the same the said placer miners.

The petitioner further alleges that, having paid

1907

McLEAN v. THE KING.

The Chief Justice.

the stipulated rental, Her Majesty refused his demand to give him possession of the areas granted.

To this petition the respondent chose to plead by way of demurrer.

By the judgment of the Exchequer Court the demurrer was allowed and the petition dismissed with costs. In effect the judgment appealed from decides that:

The mining regulations incorporated in the lease permitted a grant to be made to placer miners of the areas covered by the lease, and if the result of the alleged grant to the placer miners was to prevent the suppliant from carrying on his operations, the petitioner had no right to any compensation under the final paragraph of the lease which provides that:

> Her Majesty does not in any way warrant that there shall be a sufficient quantity of water in the said portion of the said river to admit of operations under this lease, and that the lessee, his executors, administrators and assigns shall have no right to compensation should it be found impossible *for that or for any other reason* to carry on such operations, it being hereby declared and agreed that this lease is taken by the lessee entirely at his own risk.

With this judgment I cannot agree.

The demurrer assumes and is predicated upon the assumption that all the facts alleged in the petition are true. It cannot, therefore, be argued in this proceeding that the act of the Gold Commissioner was the unauthorized act of a public servant for the consequences of which the Crown is not responsible. The fact which must for the purposes of this appeal be taken to be as stated by the appellant is, that the Crown, through the Gold Commissioner, granted the areas in question to free miners and maintained them in possession. By the pleading the action of the Gold Commissioner in the premises is not repudiated, it is,

1907

McLEAN v. THE KING.

The Chief Justice.

on the contrary, adopted by the Crown. In my opinion it is equally impossible to hold, with the judge of the Exchequer Court, that a conflicting subsequent grant would be a reason *ejusdem generis* with insufficiency of water sufficient to defeat the suppliant's claim under the last paragraph of the lease.

What is the true effect of the document declared upon, whether it be called a lease, a grant or a license? Considered in its entirety it is in my opinion clearly an exclusive grant made for good and valid consideration of all the royal and base metals except coal which the grantee might extract during twenty years by *subaqueous* mining and dredging from the submerged beds or bars in the river below low water-mark with a license to go upon the premises for that purpose, and also to cut such ungranted timber belonging to the Crown as was necessary to carry on his operations.

The complaint is that the Crown in derogation of the right of peaceable enjoyment, during the continuance of the agreement, interfered with rights vested in the suppliant by transferring the areas granted to placer miners who were put in possession of them by the Crown, the grantor, to the detriment of the suppliant, the grantee.

On the issues raised by this demurrer, and these are the only issues before us, we are not called upon to consider whether or not it was as a fact possible to carry on dredging operations because of the insufficiency of the water.

The suppliant's complaint—that the Crown has disposed of the area embraced within his lease in the manner described—does not, I think, involve an allegation that the area has been granted to free miners under the regulations relating to placer mining or by the Gold Commissioner professing to act under

1907

McLEAN v. THE KING.

The Chief Justice.

them. It is, therefore, unnecessary to consider how far the suppliant's rights under this lease are subject to those of free miners holding placer mining claims under those regulations.

The general policy of the Act of Parliament and regulations is to encourage gold mining by giving a certain fixity of tenure to all persons who are willing under a lease to occupy Crown lands for that purpose, and to carry on their operations efficiently and continuously, and this policy would obviously be defeated if the exclusive rights granted to the suppliant for a valuable consideration, payment of rent and royalty, might be revoked or impaired at any time during the continuance of the grant at the will of the minister.

In the *Windsor & Annapolis Railway Company* v. *The Queen and the Western Counties Ry. Co.*(1), at page 366, Chief Justice Ritchie said:

> I think the true construction of this agreement or grant is, and the clear intention of the parties as indicated thereby was, that the suppliants should have the full, beneficial and continuous enjoyment of the privileges thereby granted for a continuous period of twenty-one years, and that they should not be disturbed by the Crown in such enjoyment, and as a consequence, to enable the agreement to operate according to the intention of the parties, there is an implied undertaking on the part of the Crown not to do anything to derogate from its grant so to enjoy, the Crown, in my opinion, being no more entitled to act in derogation of its grant or to defeat its own act and not to be liable for a breach of its agreement, expressed or implied, than a subject.

I am of opinion that the appeal should be allowed with costs.

GIROUARD J. agreed with the Chief Justice.

(1) 10 Can. S.C.R. 335.

DAVIES J. (dissenting).—The regulations under which the lease in question in this action was expressly issued provide that it

> was subject to such regulations and should be deemed to contain all such stipulations, provisoes and conditions on the part of Her Majesty and the lessee and all such exceptions and restrictions as are provided and contemplated by such regulations.

One of these stipulations and restrictions provides that the rights granted by the lease extend "only to the submerged beds or bars below low water-mark" within the area generally described in the lease.

The petition does not allege that there were any such submerged beds or bars within the leased area, or that, if there were, that the placer miners' grants complained of covered them or parts of them. I think, under any circumstances, the absence of such an allegation would be fatal.

But, apart from that altogether, I think the appeal must fail and the judgment of the Exchequer Court be confirmed, because of the absence of any allegation of active interference by or on the part of the Crown or with its authority in the doing of the acts complained of by the suppliant.

He took the lease expressly, as it says, at his own risk. It covered an area or disconnected areas which might or might not be capable of being operated. In my opinion the Crown would not be liable in damages because some placer miners' licenses granted subsequently to such a lease as that of the suppliant overlapped or impinged upon some or more of the areas which suppliant might be entitled to the exclusive right of dredging in. The suppliant had his remedy against such placer miners if they interfered with his prior rights of exclusive dredging in any such

1907

McLEAN v. THE KING.

Davies J.

areas leased to him. The Crown did not remove suppliant from or interfere with his possession of the areas demised by the lease. It would be a novel and dangerous doctrine to lay down that the mere giving of a subsequent lease or license to a placer miner under cover of which the subsequent licensee might occasion prejudice to a prior grantee entitled the latter to sue the Crown for all damages he might suffer. The result in all cases of overlapping, if such a doctrine was upheld, would be, I venture to think, without precedent and productive of the greatest and gravest injustice. The lessee would probably conclude that an action for damages against the Crown in any such case for alleged damages would be much more profitable than carrying on the operation of dredging the river.

The Crown acts and must necessarily act through its officers. For their personal wrongdoing it is not responsible, and I do not see how we could, consistently with the uniform jurisprudence of this court, hold the Crown responsible in damages if the officials authorized to act within the law and the regulations, by error, inadvertence or sheer negligence in violation of the regulations gave a second lease or license to a miner the boundaries of which overlapped a prior license, without any further act or interference by the Crown.

The remedy of the holder of a legal license against a trespasser or wrongdoer or subsequent lessee of the lands leased to him is plain. But his rights do not embrace a right of action for damages against the Crown simply and merely because one of its officials wrongfully or inadvertently granted licenses to miners containing descriptions of areas in whole or in part already granted. Such subsequent licenses to the extent

that they infringe upon prior legal ones and as against them are simply inoperative and of no legal force.

In this case it is not alleged that the Crown actively or directly interfered with any rights the suppliant had under his grant. It is not alleged that the Crown gave any special or other authority to the Gold Commissioner in the Yukon to give placer mining leases of any part of the area of the river or stream granted to the suppliant. If it had done so a question of its liability would of course have at once arisen, as it did arise in the case of the *Windsor and Annapolis Railway Co.*(1). But no allegation of the kind is alleged in suppliant's claim demurred to. The Gold Commissioner who is alleged to have granted the placer mining leases complained of must be held to have done so by virtue of his general powers and subject to the regulations by which he was bound. The petition does not contain any statement of any special action, authority given or interference by the Crown in the matter. If the Gold Commissioner acting under his general powers and subject to the regulations inadvertently or negligently violated these regulations and gave placer mining licenses on areas previously granted for *subaqueous* mining, that would not make the Crown in any way liable. It would simply be the tortious act of the Crown's officer for which the Crown would not be liable.

In the *Windsor and Annapolis Railway Case*(1), which I venture to think has no application at all to this case before us, Lord Watson delivering the judgment of the Privy Council, at page 615, after reciting the facts shewing that the forcible taking of possession of the road was not simply the tortious act

(1) 11 App. Cas. 607.

1907

McLEAN v. THE KING.

Davies J.

of Mr. Brydges alone, as contended for by the Crown, said:

> *It is plain, therefore, that Mr. Brydges acted with the full authority of the Government and merely carried out their instructions* which were issued in the belief that it was within their legal right to put an end to their agreement with the appellant company.

It is not possible, in my opinion, on the statements made in the suppliant's petition, to make any such contention with regard to the Gold Commissioner in this case, and I, therefore, am of opinion that the appeal should be dismissed and the judgment below confirmed.

IDINGTON J. (dissenting).—This is an appeal from the Exchequer Court against a judgment maintaining a demurrer to a petition of right.

The petition set forth at length a lease made by Her late Majesty granting, demising and leasing to the petitioner

> the exclusive right and privilege of taking and extracting by subaqueous mining and dredging all royal and base metals, other than coal from the land covered by water * * * commencing at a stake planted at the mouth of Sulphur Creek, where it empties into Dominion Creek, thence down stream five miles.

This grant and demise was made "subject to the rents, stipulations, provisos and conditions" thereinafter "reserved and contained," and was to be held for twenty years from 23rd March, A.D. 1898.

The instrument in the very first sentence of it, states that it is made

> under and by virtue of the regulations of January 18th, 1898, governing the issue of leases *to dredge* for minerals in the beds of rivers in the provisional district of Yukon.

And immediately following the *habendum* and *reddendum* clauses were the following provisos:

Provided always that this demise is subject to all and every the provisions of the said regulation of January 18th, 1898, a copy of which is hereinunder appended and shall be deemed to contain all such stipulations, provisos and conditions on the part of Her Majesty and the lessee, and all such exceptions and restrictions as it is provided or contemplated by the last mentioned regulations, that leases issued thereunder shall contain which regulations for this purpose shall be read so that the word "lessee" therein shall be taken to include the executors, administrators and assigns of the lessee.

* * * * * * * * * * *

Provided further that if in consequence of any cause whatsoever a lease is found to comprise a portion of a river included in another lease the lessee whose application was first recorded in the Department of the Interior shall take priority. Provided further that Her Majesty does not in any way warrant that there shall be a sufficient quantity of water in the said portion of the said river to admit of operations under this lease, and that the lessee, his executors, administrators and assigns shall have no right to compensation should it be found impossible for that or for any other reason to carry on such operations, it being hereby declared and agreed that this lease is taken by the lessee entirely at his own risk.

The regulations thus above referred to and incorporated into the lease are set out in the petition.

Nos. 3 and 4 of the said regulations have an important bearing on the questions raised herein. They are as follows:

3. The lessee's right of mining and dredging shall be confined to the submerged beds or bars in the river below low water mark, that boundary to be fixed by its position on the first day of August in the year of the date of the lease.

4. The lease shall be subject to the rights of all persons who have received or who may receive entries for claims under the placer mining regulations.

The second and third paragraphs of the petition contain the suppliant's grievances, and are as follows:

2. That subsequent to the granting of the said lease, and while the same was in full force, the Crown, through the Gold Commissioner at Dawson, granted to free miners the said area covered by said suppliant's lease as placer mining claims and had placed in possession of same the said placer miners.

1907

McLEAN v. THE KING.

Idington J.

3. Although your suppliant paid a yearly rental as mentioned in the said lease, at the dates and times mentioned and has demanded possession of said areas mentioned in said lease, and was entitled to the same, yet Her Majesty, represented by the Minister of the Interior of Canada, refused to give up the same to your suppliant, whereby your suppliant was deprived of the same by granting of the same to placer miners and has sustained damages thereby.

The prayer is

that he recover such damages as were sustained by reason of the *lands mentioned in the said lease being granted to free miners* as above mentioned.

A careful consideration leads me to conclude that the lease gives only that which cannot be granted by law to others under the placer mining regulations.

I have set forth above the material parts of lease, regulations and pleading that I think justify my coming to that conclusion.

To discourse upon these extracts to one reading them with the eyes of a lawyer would seem a waste of time.

If my conclusion is the result of an erroneous reading I cannot cure it—by more words.

That brings us, however, only part of the way.

The question then arises, do the paragraphs, Nos. 2 and 3 of the petition mean in law more than that grants to free miners have been made since the lease was given to the suppliant?

The presumption is in favour of the Gold Commissioner having acted legally. If anything further occurred to rebut this, it should be set forth so that the court, asked to pass upon this pleading, might understand wherein the officer of the Crown had erred, and how the Crown might be held responsible for such error. Much stress has been laid upon the words "the said area covered by said suppliant's lease."

It may, for aught set forth in the pleading, have been found out on the 1st of August, 1898, when the five miles of the river came to be delimited as provided by the regulation No. 3, that there was then no river; or at all events, no "*submerged beds or bars below low-water-mark,*" in that part of the river now in question.

The beds in the river may have become subjects of operation for a placer miner.

How are we to interpret this pleading? Must it not be against the pleader? If the systems that the names of Stephen and Mitford respectively stand for are inapplicable, and ancient rigidity is not to be applied, surely the pleader must yet set forth his claim with a reasonable degree of certainty.

If we use the words "area covered by the suppliant's lease" in the popular sense, it might fairly be read as that area which, at the execution of the lease, was covered by a large stream and was supposed by all parties concerned as likely to have on the first of the then ensuing August a volume of water wherein dredges might move or be moved about and usefully operate.

If that is to be taken as the area, meant in the pleading, as it reasonably may be in the plain ordinary meaning, then it may in the legal result have vanished and given legal place to another use and right that could legally be created over the same supposed area.

The taking possession, even physical possession, of the same area might be in such case justifiable. But the word "possession" does not always in law mean physical possession.

If we are to read the words "granting" and "granted" in their original strict legal meaning together with the meaning that the word "possession" in

1907

McLEAN v. THE KING.

Idington J.

such a connection bore, then it meant anything but land in possession. It was some incorporeal hereditament that lay in grant. A reversion for example, might lie in grant.

Such I take it, is all the appellant is strictly entitled to claim as the meaning here of the words "granted * * * possession" in this paragraph 2.

The meaning of the word "possession" being thus properly restricted, when we are asked, without any facts set forth in the pleadings to justify us in doing so, to impute to the officer or officers of the Crown an improper and illegal course of conduct, the appellant must fail to derive any benefit from the word "possession" used in this paragraph.

He fails, if the popular meaning is given some of the words relied on, and fails when the strictly legal meaning is given others. And if he can claim throughout a popular meaning for all he still fails.

Again, paragraph 2 may be fairly read as counsel for the appellant seemed willing to concede, as if the word "thereby" had been inserted in the third line before the words "had placed in possession." The prayer being only for damages by reason of the lands * * * being granted * * * as above mentioned, seems to make this clearly so.

Assuming that to be the correct reading, I cannot find any claim for damages that can be founded on issuing such a license as a placer miner is entitled to get—even if over the same area. It would only operate therein when the appellant's rights, if any, ceased, and so far as they ceased.

It would be just what the 4th Regulation incorporated into the lease allowed the Crown to do. The 2nd proviso above quoted covers what this 4th Regulation may not in this regard.

1907

McLEAN v. THE KING.

Idington J.

The line of cases cited by appellant's counsel seem distinguishable, if not quite inapplicable to such a grant, as this so called lease more aptly described I venture to think as a license, implies; unaccompanied by any actual physical possession, taken by anybody or if supposed to have been taken, yet not shewn to have been either directed by or adopted by the Crown in derogation of the appellant's rights.

Paragraph 3, I think, must fail with paragraph two for the essential part of it relies on paragraph two in using the words

> whereby your suppliant *was deprived of the same by the granting* of the same to placer miners, etc.

It is useless unless rested upon paragraph two, or shewn that the Crown was bound to put appellant in possession. No authority was cited for binding the Crown, merely by the force of the grant or demise, to free land granted or demised from mere trespassers.

I would, however, if I found *Coe* v. *Clay*,(1), followed by *Jinks* v. *Edwards*(2) (cited for this purpose and pressed upon us), at all applicable to this case and this instrument (even if treated as far as possible as a demise) with the implied covenant that word carries with it in a lease, have to consider the force and binding effect of these cases in relation to such an interest as created here.

The express language of the first proviso above quoted, relieves me from all such necessities and considerations. It plainly says that the regulations

> shall be deemed to contain all such stipulations * * * on the part of Her Majesty * * * as it is * * * contemplated * * * that leases issued thereunder shall contain.

(1) 5 Bing. 440.

(2) 11 Ex. 775.

1907

McLEAN v. THE KING.

Idington J.

If it be said that this is reading these words, quoted thus, from the proviso in too literal and narrow a sense, I say, read them as speaking as part of what the whole scope and purpose of the instrument expresses, and we are brought back to the regulations as a whole as expressing what is intended or can be intended by any instrument made, as I have shewn this to be, pursuant thereto.

I cannot find in these regulations anything warranting the proposition that the Crown ever undertook to put the appellant in the physical possession of anything.

I cannot help saying that the omission in the 3rd paragraph of a date or anything to indicate at what stage in the order of events the alleged demand was made, is unsatisfactory and the frame of both paragraphs 2 and 3, generally embarrassing.

I think the appeal should be dismissed with costs.

DUFF J. concurred with the Chief Justice.

Appeal allowed with costs.

Solicitor for the appellant: *D. Donaghy.*

Solicitors for the respondent: *Chrysler, Bethune & Larmonth.*

ALEXANDER BLACK (DEFENDANT) . . APPELLANT;

AND

KATE HIEBERT (PLAINTIFF) . . . . . RESPONDENT.

1907

*April 5.
*May 7.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Mortgage—Money advanced to construct buildings—Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagor's rights—Redemption—Costs.

A building and loan company advanced money to an illiterate woman for the purpose of aiding in the construction of a house to be erected upon lands mortgaged to it to secure the loan. The mortgage contained no provision for advances to contractors, etc., as the work progressed, beyond the following:

"And it is hereby agreed between the parties hereto, that the mortgagees, their successors and assigns, may pay any taxes, rates, levies, assessments, charges, moneys for insurance, liens, costs of suit, or matters relating to liens or incumbrances on the said lands, and solicitors' charges in connection with this mortgage, and valuator's fees, together with all costs and charges which may be incurred by taking proceedings of any nature in case of default by the mortgagor, her heirs, executors, administrators or assigns, and shall be payable with interest, at the rate aforesaid, until paid and, in default, the power of sale hereby given shall be forthwith exerciseable. And it is further agreed that monthly instalments in arrear shall bear interest at the rate aforesaid until paid."

In a suit for redemption,

Held, first, that the clause in the mortgage did not justify the mortgagees in making advances to contractors and persons supplying material, without the express order of the mortgagor.

Secondly, that the mortgagees ought not to have recognized an order in favour of the contractor for the total amount of the loan when they knew that the contractor had not completed his contract and was, therefore, not entitled to the money when the order contained no name of a witness, and shewed that the mortgagor was unable to sign her name.

---

*PRESENT:—Fitzpatrick C.J. and Girouard, Idington, Maclennan and Duff JJJ.

1907

BLACK
v.
HIEBERT.

The payment having been made by the loan company to a lumber company supplying material to the contractors for the building, without the express authority of the mortgagor, and the lumber company having taken an assignment of the mortgage, and attempted to enforce it against the mortgagor the transaction was declared fraudulent as against the mortgagor, and the payment to the lumber company disallowed.

Held, also, that the only costs the assignees of the mortgage were entitled to add to the mortgage debt were the costs of an ordinary redemption suit consented to by a mortgagee.

Judgment appealed from varied, and appeal dismissed with costs.

APPEAL from the judgment of the Court of King's Bench for Manitoba reversing the judgment of Perdue J. at the trial, whereby the plaintiff's action for redemption was dismissed with costs, and ordering that the plaintiff should be let in to redeem.

The circumstances of the case and the questions at issue on the present appeal are stated in the judgment now reported.

Hellmuth K.C. for the appellant.
Ewart K.C. for the respondent.

The judgment of the court was delivered by

IDINGTON J.—This is a redemption action in which the first question to be solved is whether or not the mortgagee advanced the moneys agreed to be advanced to an amount greater than fairly covered by the terms of a tender made the appellant, who is the assignee of the mortgage.

If these questions are, or either is, resolved in favour of respondent, many others raised need not trouble us.

The learned trial judge disposed of the questions raised before him on a ground, I think, untenable in law.

The respondent appealed from his judgment to the Court of King's Bench for Manitoba. That appeal was allowed by the court and usual redemption judgment pronounced with some variation as to costs.

The circumstances raising these questions are as follows:

The respondent's husband on the 21st October, 1903, applied to the Great Western Permanent Loan and Savings Co., carrying on business in Winnipeg, for a loan of $1,500 upon property in Winnipeg, stated in the application to be owned by him and upon which were being erected buildings which it was expected, when completed, would be worth $2,400. Part of the money, it was stated, would be needed when the roof was on the building. This application was not complied with, but a mortgage was arranged for on the same property for $1,000 which was to be secured by first mortgage, to be given by the respondent.

I do not find that she signed any application. On the 28th November, 1903, she executed the mortgage which is now in question to secure the $1,000. It was apparently intended to carry out what is appropriately described as a building loan. The mortgage, however, does not represent what one would expect to find in such a security. There is no appropriate provision enabling the mortgagees to advance to contractors and material men, what might be required for the purposes of paying them, so far as the loan would extend.

The mortgagees had absolutely no authority to advance without instructions from the mortgagor, save that which is contained in the following provision of the mortgage:

> And it is hereby agreed between the parties hereto, that the mortgagees, their successors and assigns, may pay any taxes, rates,

1907

BLACK v. HIEBERT.

Idington J.

levies, assessments, charges, moneys for insurance, liens, costs of suit, or matters relating to liens or incumbrances on the said lands, and solicitors' charges in connection with this mortgage, and valuator's fees, together with all costs and charges which may be incurred by taking proceedings of any nature in case of default by the mortgagor, her heirs, executors, administrators or assigns, and shall be payable with interest, at the rate aforesaid, until paid and in default the power of sale hereby given shall be forthwith exerciseable. And it is further agreed that monthly instalments in arrear shall bear interest at the rate aforesaid until paid.

The difference between the parties has arisen out of the combined want of some provision of a more extensive kind than this; and a want of business methods in making such advances as were made.

The following copied from appellant's factum is a statement of the advances claimed to have been made by the mortgagees upon the mortgage:

A.	Dec.	9	To cheque, G. West dues and valuation....	33.00	
B.	"	23	To cheque, W. Higginson.....	8.30	
C.	"	23	To cheque, Wiebe and Jardine.....	57.00	
D.	"	23	To cheque, Standard Sash and Door Factory.	50.00	
E.	"	24	To cheque, 1 mos. dues.....	13.00	
F.	"	24	To cheque, Ins. premium.....	45.00	
G.	"	29	To cheque, Wiebe & Hebert.....	40.00	signed
H.	"	30	To cheque, Frederick Arnot.....	22.00	signed
	1904.				
J.	Dec.	18	To cheque, 1 mos. dues..... 13.00		balance)
K.	"	30	To cheque, 2 mos. dues 2nd loan.. 13.00		705.70
					(500 new loan
L.	Feb.	2	To cheque, F. Wiebe and Jno. Sharpe.....	20.00	signed 1,185.00
M.	"	2	To cheque, F. Wiebe & Rat Portage Sash Co.....	37.00	signed 1,148.70
N.	"	2	To cheque, F. Wiebe & Geo. Black.	30.00	signed 1,118.70
O.	May	6	To cheque, Gt. West, 4 mos. dues 1st loan.....	52.00	1,066.70
P.	"	6	To cheque, Gt. West, 4 mos. dues 2nd loan.....	26.00	1,040.70
Q.	"		To cheque, the Beehive Stores...	35.00	
R.	"	17	To cheque, John Robertson.....	35.00	970.70
S.	"	17	To cheque, 1903 taxes.....	2.25	968.45
T.	Nov.	2	To cheque, Alex. Black Lumber Co.	414.78	553.67
U.	"	2	To cheque, costs of loans.....	41.25	512.42

Were such advances, or any of them, and which, ever properly made on this mortgage? Such are the issues raised here.

It becomes necessary to examine the evidence bearing on each item or class.

Part (*i.e.* $7.00) of A. and all of H.J.M.N. and S. amounting to $158.25 are admitted to have been properly paid.

Items B.C. and D. are disputed and we have to determine whether in fact they were authorized.

To satisfy my mind on this point I have found it necessary to read nearly all the evidence in the case. It is conflicting.

A bias appears in each one of the witnesses (except Mr. Crichton, a solicitor employed by respondent) on either side of this question.

Interest and hate are both represented.

The only authority for these payments is the following order:

EXHIBIT 7.

Messrs. Taylor and Laidlaw.

Please pay to Wiebe and Jardine the proceeds of my loan in the Great West Permanent Loan & Savings Company, amounting to $1,000, less costs.

Witness. (Signed)
her
KATE X HIEBERT.
mark.

On the face of this order it is executed, if at all, by a mark, and there is no attesting witness, though it evidently was intended there should have been one. It was drawn up by a clerk in the office of the Loan Company's solicitors and it is addressed to them. The Loan Company had then deposited with them $400 of the loan to pay over as needed. They knew respond-

1907

BLACK v. HIEBERT.

Idington J.

ent to be illiterate, as she had executed the mortgage by her mark.

The firm of Wiebe and Jardine named in Ex. 7 had the contract to build the house which the respondent was having built on the mortgaged land, when the mortgage was executed.

They had got some cash from respondent to begin with and were entitled to $470 when the roof was on, but no more until their contract was completed. The contract never was fulfilled and no other payment ever fell due. I assume, though it is not clear, that the roof was on and this $470 due and payable when this order was written.

The least inquiry then would have disclosed the fact that not only was $470.00 all that they could be entitled to but also that material supplied by the lumber company of which appellant was then president remained unpaid to an amount exceeding this sum.

Evidently an order to pay the sum of $1,000.00 over to Wiebe & Jardine was a thing that should not have been countenanced by the solicitors under such circumstances.

Whoever in the solicitor's office drew it and gave it to Jardine ought in any case to have made clear to Jardine that he should in dealing with this illiterate person get a witness to see that before she made her mark she understood what she was doing.

None of these things that ought to have been done were done, and thus Exhibit 7 must therefore be supported by clear extraneous evidence before it can be relied upon by appellant.

Have we got that?

Upon the best consideration I can give the conflicting evidence on the point I cannot find that what is

given in support of appellant's contention outweighs that presented by the respondent.

Exhibit 7 was taken by Jardine to respondent's house about (I infer) four or five p.m. of 23rd December, 1904, and he says was there executed, by respondent in his presence.

He says, of course, that he "explained it to her," but when he tells, as he does, that when she had signed it by making her mark thereto she folded it up and was putting it away in her cupboard to keep, we can realize how little his explanation was worth.

She swears she did not understand what she signed, that she understood it related to a trifling matter of eight dollars and that on reflection she became doubtful and alarmed and told her husband the same evening.

The story of Jardine rather confirms hers of want of understanding. The action of herself and husband going at the earliest practicable moment to a solicitor to complain and with him to Taylor, the company's solicitor, and the result shewn below presents further confirmation. The inherent improvidence of the alleged order also tends to confirm an entire want of understanding it, when we bear in mind the state of facts above related.

The witnesses for the appellant swear that she referred the same evening to having signed an order, but they each gave varying shades of meaning as to her understanding of it from that of an order such as Exhibit 7 is, to an order for some money, or to one for some part of the loan.

These witnesses belong to one household and are contradicted by respondent and her husband who were present on the same occasion.

1907

BLACK v. HIEBERT.

Idington J.

They were all at the time friendly. They supped together that night, immediately after Jardine got Exhibit 7 out of her hands.

The statement, respecting which such diverse stories are told, was made on the said occasion of supping together.

These witnesses for appellant have quarrelled since, rather bitterly, with respondent and her husband.

Wiebe, who is the only one of them swearing to a definite admission of Mrs. Hiebert, was not bold enough to maintain such contention, before them, next morning in Mr. Taylor's office. He seems to have then assented to their story. Why does he now change?

However all this may be the onus of establishing "Exhibit 7" as a valid authority rested upon those setting it up and they have failed to satisfy me of its validity.

Respondent and her husband accompanied by a solicitor called next day (24th Dec.) upon Mr. Taylor to complain of what had taken place.

Wiebe, the partner of Jardine, was also there, and took part in what followed.

Mr. Taylor on hearing the story very properly cancelled Exhibit 7.

He then wrote out what is Exhibit 8 in the case, and had it executed in presence of all parties I have named as present at this meeting.

This Exhibit 8 is as follows:

EXHIBIT 8.

To the Great West Permanent Loan and Savings Company, pay the proceeds of current loan from you to me to Cornelius Hiebert and Franzes Wiebe.

(Signed)

her

KATE X HIEBERT.

mark.

Witness,
W. Madely Crichton,
C. Hiebert.

It is to be observed that this does not in terms cover or in any way ratify what had been done under Exhibit 7 and cannot in any way be used to justify the payments of items B. C. D. The cheques for C. and D. were only paid on the 24th and 26th December respectively.

It is also to be observed that Taylor, without any explanation for doing so, retained Exhibit 7 though cancelled.

In justice to Mr. Taylor, I think he never acted upon it. I would infer that he gave the cheques anticipating the signature and that somebody in his office blundered.

I know he puts it in one place as if he were positive that Exhibit 7 was got before cheques issued. Other places shew he had no recollection. On such evidence I would prefer finding that a solicitor or some one he was responsible for, committed an error, rather than impute to him deliberately acting on such a document as this Exhibit 7 presents on its face, without inquiry and evidence to establish it.

It seems to me that the substituted authority of Exhibit 8 under the circumstances must be taken as an agreement between all concerned that unless in the case of some inevitable necessity such as payment of taxes or expenses the company would not attempt to deal with the moneys for which they had taken the mortgage unless by the joint direction of the parties named in the order Exhibit 8.

I am unable to comprehend why so simple a method should ever have been departed from, but it was.

It seems as if suggestions of Jardine or of Wiebe without any reference to Cornelius Hiebert or his sanction were followed by the Loan Company through Mr. Taylor.

1907

BLACK v. HIEBERT.

Idington J.

Items Q. and R. were paid without complying with Exhibit 8 and Mr. Taylor in regard to these and similar items falls back upon the alleged right he had to pay out sums he saw fit for work or material that "had gone into the building."

The following evidence given by Mr. Taylor shews what mistaken notions he had of the law and facts that should have controlled him:

Q. And beyond what Wiebe told you you don't know whether that had any relation to the building or not?

A. It is likely I relied on his statement that it was stuff supplied to him.

Q. You got no authority whatever from Hiebert?

A. No.

Cheque referred to marked as Exhibit No. 14.

Q. Now, if it should happen—that cheque (14) was given, I believe, for material?

A. Yes, he hauled in stone and lime, John Sharpe did, and it was given for material of some kind.

Q. Now, if it should happen that the contractor would fail in the construction of his work so that this material man would not be entitled to the loan (amount) you would still advance the mortgage money without the authority of the mortgagee, would you?

A. No, Wiebe and Jardine had an order.

Q. No, their order was cancelled and substituted by Hiebert and Wiebe?

A. I don't think that they could cancel it, and I didn't think so at the time.

Q. You would not think so, and you did not think so?

A. No, not without Jardine's consent.

Q. And you still acted under the order, Exhibit No. 7, and the authority therein contained, did you?

A. The thing was a little mixed and we did the best we could to put the material in to the building.

Q. You still acted under the authority contained in Exhibit 7?

A. Yes, still regarded that.

Q. And still acted on the strength of that?

A. Yes.

Q. Don't you recollect both Mrs. and Mr. Hiebert tell you that she hadn't seen or authorized the order, Exhibit 7?

A. No, I don't recollect of him telling me that.

Q. Would you say that they did not do so?

A. Oh, I couldn't say that they didn't do that. They were in a good many times, and had a good deal of conversation.

Q. Don't you recollect Mr. Crichton telling you that Mrs. Hiebert had not seen or authorized her mark to be affixed to the first order, Exhibit 7?

A. *I think I heard something about it in some way, but I didn't think there was much in it, though I think she authorized it all right.*

Q. You didn't think there was much in it?

A. No.

Q. Your wisdom dictated to you that Mr. Crichton, a solicitor, and Kate Hiebert the mortgagor, and Cornelius Hiebert her agent, came to you often and told you that she had neither signed or authorized the signature to Exhibit No. 7, that still you would rise superior to that, and recognize the orders for the payment of the mortgage moneys?

A. *I considered it a good order.*

Q. Notwithstanding what they told you?

A. *Yes, but I tried to keep the money going into the building notwithstanding the difficulties.*

* * * * * * * * * * *

Q. You had known that the building was tied up because there was not sufficient money to complete it?

A. Yes, we got a message that this lien was filed, and of course, we stopped them.

Q. In respect of the Jardine order, Exhibit No. 7, do I understand from you that you acted on that, notwithstanding that you had written "cancelled" over the front of it?

A. We continued to put the money into the building at the request of either *Wiebe or Jardine.*

Q. Who was really doing the business?

A. *Which business?*

Q. All, the building.

A. *Well, Mr. Wiebe appeared to have the most to do with it, although Jardine continued to take some interest in it, I don't know how much.*

This attitude of Taylor towards the business in hand is shewn in other parts of his evidence and has a bearing on nearly all he did including his later dealings with Black and the lumber company, to which I will presently refer.

His allegation that Jardine did not assent to the cancellation of Exhibit 7, and substitution therefor of Exhibit 8, is remarkable. A solicitor should not

1907

BLACK v. HIEBERT.

Idington J.

have assumed that the act of one partner could not bind the other in a matter of that kind, and should not have presumed without inquiry, if tempted to so assume, that the other partner had complained or had a right to complain.

I have not overlooked the clause relative to repairs, etc., pleaded but not relied on before us.

Needless to say, the facts do not permit of its application here.

Item F. is a claim set up of an advance of $45 for an insurance premium. I infer from the evidence that this was in respect of an insurance of $3,000. The application for the loan provided for an insurance of $1,500. The buildings were expected to be, when finished, of $2,400 in value. If any such insurance were procured as $3,000 and this $45 as premium is to be taken as paid in respect of that insurance, and no other is shewn, then I have no difficulty in saying that it was entirely unauthorized. Whatever rights such insurance may have created between the mortgagees and the insurance company it is inconceivable that any such insurance could have enured to the benefit of the mortgagor.

It was an over-insurance. It was unnecessary, as the land was worth $400 for the protection of the mortgagees at the time that it was effected. I do not think it was warranted as coming within the authority I have quoted. There had been no advance whatsoever made on the faith of this mortgage unless we are to treat the expenses incidental to the loan as such.

The item for the reasons I have stated must be disallowed.

There is now item "T." of November 2nd, 1904,

which is claimed to have been paid by cheque to the Alex. Black Lumber Co. for $414.78, to be considered.

The appellant's company had advanced material to the contractors. On their default liens were registered by the lumber company and others.

The respondent attempted to arrange matters by means of a second mortgage for $500.00 to the loan company.

There never was anything advanced on this mortgage though Mr. Taylor saw fit to blend it with the account of the first, and thereby made it appear in the statement as if an advance had been made.

The lumber company on the 2nd February, 1904, took steps to enforce their lien.

The respondent denied that so much lumber as claimed had gone into her buildings.

It was the 2nd February, 1905, before judgment was given, and when credit was given for what respondent, independently of mortgagees, had paid, there was only $270.00 due by respondent to the contractors.

The mechanics' liens against the property could not in law exceed what the contractors were entitled to recover from the owner. This Mr. Taylor admits was the legal position as he understood it. The respondent had nothing to do with the lumber company or its claim except in this way.

There might be claims of thousands of dollars registered. That did not make these claims such liens as a mortgagee could pay off within the meaning of above clause I quote.

In October, 1905, the appellant seemed to conceive that if he could induce the loan company to advance him on account of his company's claim for lumber they could charge it up to the loan and then he could buy

1907

BLACK v. HIEBERT.

Idington J.

the mortgage; and he accomplished all this, in order, as he says, to protect his company. Perhaps he might have safely added, by fraud, or force, or both, if need be.

The very essence of the scheme was a fraud. It was designed thus to improperly over-reach the respondent and defeat her right to resist the claims of her defaulting contractors, by so juggling with figures and facts as to make the contractors' claim neither due nor accruing due, wear the appearance of a mortgage or part of a mortgage in Black's hands. The rest of the plan was to rank as a lien holder also, at least for the balance, to continue this lien suit and rank with other lien holders, and recover against respondent the $270.00 out of her property.

All the lien holders were entitled to be treated equally. This appellant and loan company decided to ignore law and facts.

The October arrangement between the loan company and the lumber company was unique.

An assignment is made from the loan company to the appellant of the mortgage and is dated 28th October, 1904. The cheque by which the consideration for the transfer to Black was paid, is dated 13th October, 1904, by the lumber company for the sum of $1,032, though no such sum due.

Then a cheque is given to the loan company by Taylor on behalf of the company. It is dated 2nd November, 1904, for $414.78.

It is pretended now, despite the facts I have referred to, that this was an advance to pay off a lien held by the lumber company.

It is pretended further, and the evidence of some gentlemen concerned in carrying the arrangement out

is, if not expressly so stated, clearly intended to leave the impression on the mind of the court that the one transaction was quite independent of the other; that there was no understanding that one would depend on the other; and that the appellant was making an independent investment of his own. For a time during the course of this suit the respondent's claim that he was merely the trustee of the company of which he was president was denied. I am glad to say that this position of denying such trusteeship was not taken before us. I regret the other as untenable was not clearly abandoned and these transactions allowed to stand as they really were.

The whole was simply a dealing between the two companies whereby the loan company got rid of a troublesome affair on such profitable terms as it never could expect otherwise, for no such sum as $1,032 was due, and the lumber company acquired an instrument that it was so ill-advised as to suppose would enable it to crush or squeeze the respondent, and others concerned in the property in question in such a manner as to promote the recovery, by indirect methods, of what it claimed to be, but was not, entitled to receive out of the property.

In pursuit of such purpose, the notice (which bears date the 4th of November, 1904), of exercising power of sale was immediately set in motion, and served on respondent on 11th November, 1904. All these proceedings, it must be observed, were as needless as oppressive.

If there really existed a lien to be enforced the lumber company could have relied upon that to enforce their rights and had no necessity to adopt the circuitous method I have outlined.

1907

BLACK v. HIEBERT.

Idington J.

If there was no lien then there was not the slightest ground for the loan company's pretending to pay on account of an advance on the mortgage the cheque for $414.78.

I do not find that steps were taken by the loan company to try to verify the question of lien or no lien or how much it amounted to or if any of it was due or accruing due. I do not find that anything was done to find out the relation of the lien holders to each other or how or in what proportion they might be entitled to rank or claim; or in any way in short to determine whether it would be prudent to exercise their alleged rights as mortgagees under the clause above quoted.

The payment to the lumber company cannot rest therefore on the right given to pay off liens. It was not acted upon. It paid off no lien. The $270.00 lien, part of which appellant's company was entitled to, remained and yet remains.

It was not so intended to pay this $270.00 when they made the payment. The attempt to set it up now as discharging a lien is unfounded and is to support a tainted dealing no mortgagee can maintain.

In some way, I cannot understand how, under an instrument in the form of this mortgage Mr. Taylor, the solicitor in acting for the company seemed to imagine, or desire the court to suppose he imagined, that the company had a right to pay out of the loan for anything going into the building, as he phrases it, regardless of what Exhibit 8 meant, and of whether a lien existed therefor or not.

It is entirely needless to refute such crude notions of this loan company's rights under this mortgage and on the facts surrounding it.

Yet to shew that Mr. Taylor had this view, we have

1907

BLACK v. HIEBERT.

Idington J.

only to read his evidence above in which he avows that he acted under Exhibit 7 and felt he had a right to rely upon it to justify payments of the kind I refer to, long after it had been cancelled by his own hand.

I conclude that the alleged advance of $414.78 was a mere idle form, indeed a sham, gone through between Taylor and Black for the respective purposes I have indicated and, for that and other reasons I have just given, cannot be treated as an advance on this mortgage.

If the facts already recited do not establish this, I may add that I have failed to find any application beyond the idle form in the way of liquidating the lien which the lumber company alleged it had.

I have searched in vain for relief respondent got or any trace of any application of the cheque till after the appellant had gone through the form of sale under the power of sale, or before respondent had made her tender and instituted this action.

It was urged before us that inasmuch as the learned judge had in the lien action credited this sum of $414.78 plus something more on the 2nd February, 1905, it must be taken into account in governing this case launched in 1904.

All I can see in this point is that the appellant instead of awaiting the results of his company's pending action on the lien, he claims his company had, he tried by the form I am dealing with to forestall those who would probably share with him in and for anything the liens attached to.

It is quite impossible to uphold the contention that the respondent gained, or had reduced for her, any liability she was under by the application of this cheque in reduction of the lumber company's lien.

1907

BLACK v. HIEBERT.

Idington J.

She was not concerned beyond seeing that the $270.00 which was the total amount charged on her property was not exceeded, and incidentally that the court was advised of all she had paid amongst or to the lien holders. If any one like the lumber company for purposes of their own saw fit to reduce their claim that was none of her business. It only enured to the benefit of other lien holders, creditors of the contractors, and not to her in any way. Her property was only subject to a lien if at all for $270 when this $414.78 cheque was handed over *and it remains so yet.*

If the appellant got hurt in the results it neither adds to nor subtracts from the proper amount due under her mortgage.

The result is that the claim of this item "T." must be disallowed entirely.

The items (as to $26.00) of A. and all of E. J. K. O. and P. are without any foundation in law and ought never to have been claimed, and must be dissallowed.

The notion of a right to charge such an item as the $26.00 of A. when a mortgage loan has gone through may be maintainable, yet I think doubtful unless more expressly provided for than here, but the charging it up, when a mortgage is executed, and continuing it there when the whole transaction has fallen through as here is quite unjustifiable.

The items admitted and tendered are all I can find due. There is nothing of accounting left to refer but the computation of interest and fixing the charges proper to allow in connection with the loan. If the parties cannot agree the computation must be made by the officer to whom the matters in question were referred by the court below, who will have to deal with subsequent encumbrances and tax costs as dealt with in the court below.

1907

BLACK v. HIEBERT.

Idington J.

As to the absence of the alleged purchaser as a party there is no difficulty. The purchase was never completed by registration, so as to entitle the purchaser to make any claim that he took anything.

The Manitoba Real Property Act makes this plain. If he has any right it is as against the vendor only. The title is in the vendor and he is bound to submit to redemption.

The *lis pendens* bound all taking under him. From *Bishop of Winchester* v. *Paine*(1); to *Robson* v. *Argue*(2), where the authorities are reviewed and thence down, the law has been so. I asked for authority to shew how or why that was not so in Manitoba. I have not been furnished with any.

I had occasion to review in *Syndicat Lyonnais du Klondyke* v. *McGrade*(3), the authorities preceding the earlier of those cases, and consider the principles upon which the proposition I put forward rests.

I have no doubt that these principles are applicable here especially as the *lis pendens* is registered in compliance with the local law.

In the case of a completed sale where it could be argued that by the exercise of a power paramount to all such considerations, the title had passed, (if as I conceive such a case be possible), I would reserve to myself further consideration of the rule to be applied.

I am disposed to think the court below overlooked some matters of costs, such as proceedings for sale up to tender, and imposing on respondent the costs she has to pay although in result I find of tender being enough she ought perhaps not to bear the costs.

(1) 11 Ves. 194. (2) 25 Gr. 407.

(3) 36 Can. S.C.R. 251.

1907

BLACK v. HIEBERT.

Idington J.

There has been and could be no appeal and I refer to these questions only to make clear that no costs of power of sale be now allowed.

The appeal should be dismissed with costs to be taxed to and payable to the respondent forthwith after taxation; and the judgment below varied to declare that such costs and all costs of the appellant herein or heretofore incurred, beyond the costs of an ordinary suit for redemption form no part of the costs of the mortgagee, or which the appellant is entitled to add to the sum due under the mortgage; that the sum due under the mortgage is only the sum of $180.00 and interest from the 22nd of December, 1904, together with such reasonable sum not to exceed the sum of $41.00 as may be due in respect of expenses of the loan, exclusive of the $7.00 for valuations included in the above fixed amount; that none of the costs of the proceedings under power of sale be allowed; and that the formal judgment of the court below be so varied as to give effect to these declarations and directions.

Appeal dismissed with costs.

Solicitor for the appellant: *J. R. Haney.*

Solicitors for the respondent: *Elliott & MacNeil.*

R. BALDOCCHI ON BEHALF OF HIMSELF AND OTHER CREDITORS OF D. SPADA (PLAINTIFF) ..... APPELLANT;

1907

*Mar. 20, 21.
*May 7.

AND

D. SPADA AND JOHN GARBORINO (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insolvency—Fraudulent preference—Security to creditor—Knowledge of insolvency—R.S.O. [1897] *c.* 147, *s.* 2, *ss.* 2 *and* 3.

G. had assisted S. with loans and also guaranteed his credit at the Dominion Bank to the extent of $3,000. His own cheque at the bank having been refused payment until the indebtedness of S. of $1,900 was settled the latter promised to arrange it within a month which he did by transferring to G. goods pledged to the Imperial Bank G. paying what was due to both banks. Shortly after S. sold out his stock in trade and absconded owing large sums to foreign creditors and being insolvent. On the trial of a creditor's action to set aside the transfer to G. as a fraudulent preference the manager of the Dominion Bank testified that G.'s cheque was not refused from any doubt of S.'s solvency but because he had heard that S. was dealing with another bank and he wished to close the account.

Held, Idington and Duff JJ. dissenting, that under the evidence produced G. had no reason to suppose, when the goods were transferred, that S. was insolvent and he had satisfied the onus placed upon him by the provincial statute of shewing that he had not intended to hinder, delay or defraud the creditors of S.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the defendants.

The material facts are set out in the above head

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

1907

BALDOCCHI v. SPADA.

note. The trial judge found that Spada was insolvent when he transferred the goods to Garborino but not to the knowledge of the latter and that the transaction was not a fraudulent preference under the Ontario Act relating to preferential assignments. The Court of Appeal affirmed his judgment Mr. Justice Meredith dissenting.

McKay and *Gideon Grant* for the appellants.

Tytler and *R. G. Smythe* for the respondents.

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

MACLENNAN J.—After a full consideration of the evidence and of the arguments which were addressed to us, I am of opinion that we ought not to disturb the finding of the learned judge at the trial, approved by the full bench of the Court of Appeal, one learned judge alone dissenting.

The case depends on whether or not the respondent Garborino, when he entered into the impeached transaction with Spada, knew or had reason to believe that Spada was insolvent or unable to pay his debts in full.

Spada was an Italian and had been in business in Toronto for a number of years, dealing in Italian goods. Garborino was also an Italian, and had been acquainted with Spada for a number of years, and in 1900 had lent him two sums of $500 each, and in 1901 $1,500, upon note, without security, and in 1902 had given the Dominion Bank a bond for $10,000 to secure an account which Spada had opened with that bank. That bond was replaced by one for $3,000 some time

1907

BALDOCCHI v. SPADA.

Maclennan J.

in 1904, and this bond and the loan of $2,500 upon note, continued until the time of the impeached transaction, in July, 1905. Spada's bank account was an active one from $3,000 to $5,000 per month, foreign drafts being presented, which were always paid.

Garborino also had an account in the Dominion Bank, but at a different branch, and having in the beginning of June, 1905, issued a cheque for $1,700 on his account, payment was refused, and upon inquiry he was informed that his cheque would not be honoured until Spada's account for which they held his guarantee was arranged. At that time Spada owed the bank $1,906.25 over and above a sum of $524.75 which was standing at his credit in a savings account in the same bank. He also had an account with the Imperial Bank, with a balance at his credit, the proceeds of a loan of $1,000 made to him upon a warehouse receipt for goods in the possession of a warehouseman named Carrie.

Up to this time, and until the refusal to pay his cheque, there was nothing to suggest to Garborino, or any one else apparently, any doubt of Spada's solvency. He was carrying on his business as usual, with a stock of goods in his store, as he had been doing for years. Nevertheless it was only natural that Garborino should desire to be relieved from the embarrassment occasioned by the refusal of his cheque. He saw Spada about it and the latter promised to arrange the matter in the course of a month. It is not said that Mr. Ross, the Dominion Bank agent, expressed to Garborino any doubt of Spada's perfect solvency, nor that he even entertained any such doubt. The explanation he gave in his evidence at the trial of his action in refusing Garborino's cheque was that

1907

BALDOCCHI v. SPADA.

Maclennan J.

he had heard or suspected that Spada was dealing with another bank, and so he wanted to have his account closed.

Nothing further occurred until the 10th of July, when Spada, as he had promised, proposed to arrange matters with Garborino and the bank by a transfer of the goods in the possession of the warehouseman Carrie to Garborino if the latter would pay the balance due to the bank, the goods to be taken as security for that payment and also for the $2,500 due to him upon his note.

This was agreed to, and they went together to the office of the warehouseman. On their way they went to the Imperial Bank and Spada there obtained a release of the warehouse receipt held by that bank by paying off the charge thereon, and taking it to the warehouseman, had the goods transferred into the name of Garborino, who gave him a cheque for $1,906.25 with which to pay the balance due to the Dominion Bank, and which was paid on the same or the following day.

It is this transaction, whereby Spada gave Garborino security for the sum of $2,500 which was due to him upon his note, and for the $1,906.25 paid to the bank, which is attacked as a fraudulent preference.

Now up to the conclusion of that transaction, so far as appears, there was no knowledge by any one, but Spada himself, of any debts owing by him other than those which the transaction settled. The Dominion Bank was paid, and Garborino was secured. The debtor had his stock of goods in his store, and had a balance of $422 at his credit in the Imperial Bank.

On the following day, however, the 11th of July, Spada sold out his stock and absconded, and then for

the first time it became known that he owed very large sums to persons with whom he dealt in Italy, and was insolvent.

The present action was brought by some of those creditors on behalf of themselves and others, and was brought within sixty days of the transaction impeached, by which under the provincial statute, the onus of proof was cast upon the defendant.

I think the defendant has satisfied the onus cast upon him by the statute, and that his mental condition admitted in his evidence is sufficiently explained by the refusal of his cheque by the bank.

I think the appeal should be dismissed.

IDINGTON J. (dissenting).—This is a creditor's action to recover goods preferentially assigned by an insolvent debtor to a creditor within sixty days before action and, thus, presumed, by virtue of R.S.O. (1897) ch. 147, sec. 2, sub-sections 2 and 3, to have been fraudulent and void as against creditors so suing.

The first question raised is whether or not respondent can, by merely swearing that he accepted the transfer only as security for payment of old debts and did not know of the insolvency or eve thereof, escape the operation of the Act.

His story is that the larger part of this debt was represented by an old promissory note of $2,500, on which interest had accrued and that the transfer was by way of *security* only for that and another debt.

The transfer is only evidenced by a misdated invoice of the goods made out by the debtor, in his shop, and in respondent's presence, charging him with the

1907

BALDOCCHI v. SPADA.

Idington J.

goods at fixed prices in detail as if representing an ordinary sale and that invoice is receipted with thanks.

He swears positively, however, that despite the form of the transaction and his acceptance of this receipted account, it was not a sale but only a security for these debts that was intended.

Courts have been known to hesitate to accept on such an issue the uncorroborated statement, as this is, by a party thereto, that a sale in written form was in fact only intended as security—indeed, it has frequently happened that such statements have been held not proven. This statement does not rest there. The sum named as total of the prices fixed for the goods would not cover the indebtedness sworn to and set forth in the pleadings. It would fall short about three hundred dollars.

Yet the respondent tells, under oath, not only that the transaction was in fact intended as a security, but that the $2,500 note which was designed by the transaction to be secured was on his *getting this receipted invoice given back to Spada and by him torn up.* All this stands uncorroborated by any one or, indeed, in any way. Who ever heard before this of a creditor giving up to be torn up the *very note for which he was getting security when the security, by his own evidence, would fall far short of covering the debt.*

He had no other security for these debts, if his story be true, There was no memorandum of a stated account. He does not pretend there was any, or any accounting and balance struck at this time. He had no voucher to substitute for what this $2,500 note stood for. True, he produces three withdrawal receipts on his savings-bank account some years before

that together amount to $2,500, but nothing appears, save his oath, that they had aught to do with this alleged promissory note—or to connect them with Spada.

He was an intelligent money-lender as well as shopkeeper.

We ask, with respect, what security can creditors have in a statutory presumption created for their protection, if tales so absurd are to be accepted by courts to rebut the presumption?

Sir William Scott said over a hundred years ago, in the case of *The "Odin"*(1).

> It is a wild conceit that any court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgment.

Of course, there are not many men so intelligent as the one here in question who would venture to swear to such absurdities.

Stress was laid by the learned trial judge and in the court below on the confidence the respondent had placed in his debtor as excusing him.

When we find this giving of security, sale of goods and sham invoice, all carried out between two old friends on the day, indeed at the very hour, and in the place the debtor is arranging for what is admitted to have been a wretched swindle, under the guise of sale of his entire stock, by this same debtor, whereby his other creditors are defrauded, and then the debtor absconds,—how can we be so cruel, so harsh, as disbelieve the man who was so trustful and confiding till the last, as the oath referred to shews?

The confidence began in lending money to, and giv-

(1) 1 C. Rob. 248 at p. 252.

1907

BALDOCCHI v. SPADA.

Idington J.

ing security for his friend and fellow countryman, to the Dominion Bank, which kept a cheque on both by insisting upon the respondent, the wealthier of the two, keeping $2,000 within the bank's reach, in their savings bank branch.

Four years after these loans began and two or three years after the suretyship, which was rather continuous and increasing, had began, the respondent attempted to withdraw $1,700 out of the bank but was refused and was told that the refusal was owing to Spada, the debtor, having overdrawn his account $2,400.

He went to see his solicitor. The solicitor went with him to the bank. The money remained there. The respondent borrowed elsewhere the $1,700 he had needed to complete a loan.

It is quite clear the respondent's money in the bank had become impounded to meet Spada's obligations and so remained.

Spada, when face to face with his banker and surety on this date, 7th or 8th of June, could do nothing. He did not pretend he could then do anything save promise, as he did, that in a month's time he was going to make everything all right.

The result on the mind of the respondent, he states thus:

> 253.—Q. You understood from that that he couldn't settle then; that he was hard up?
>
> A. I got kind of funny after him.
>
> 254.—Q. You got kind of afraid?
>
> A. Yes.

Respondent waited, perhaps nervously, the expiration of that month. Meantime, once or twice, when Spada, who had come to spend most of his time in

New York and Buffalo, was home, the respondent saw him and was again assured by Spada, "he would be all right."

Why, if he had confidence, did he require these re-assurances? Like a shrewd, sensible man, he accepted them, but felt as above quotation describes.

The very day, though a Sunday, the month had expired, we find him, I take the liberty of thinking, still "funny" and "afraid," looking up Spada, telling him "about this account." And he said: "Come in to-morrow and I will settle everything."

No explanation was given of how. But he went and saw him, Monday, 10th of July, and was told as follows:—

> Q. Then did you go to see him?
>
> A. Yes. I went down and saw him at his shop and he told me that, if I lent him about $1,900, he would give me enough of goods to settle everything he owed me; and I said, "all right." He said he would give them to me to be security. He said they were some goods he had down to the storage. I said—"all right, I would do that."

It was arranged, after some delays, that the warehouseman should give a receipt providing for delivery to respondent of all the goods now in question but seventy-five baskets of cheese expected in but not yet in the warehouse, and for those an order was given to respondent by Spada. Then, the same day, they went to the shop of Spada and the transaction took the form of the invoice I have referred to.

The goods were in bond. The duties were unpaid. The first delivery, ex-warehouse, to respondent was on 25th of July. The account for these duties is dated 13th July, charged Spada and so marked paid. Respondent paid them. What do these things mean? Are we to accept the giving up and tearing up of the

1907

BALDOCCHI v. SPADA.

Idington J.

note, if unpaid, and these duties unpaid, as only marks of confidence?

I cannot find a word of evidence to say how the customs dues were agreed to be paid. Nothing explains this custom house part of the dealing. Nothing in it renders the story of giving up and tearing up of the note more credible.

The next day, after exchanging receipted invoice and note as stated above, they went to the bank, and Spada paid $500 cash and respondent $1,906.25 out of money he had in the bank. Several minor errors are made by the learned trial judge in regard to the details of the transaction and customs duties which I pass by.

I, with every respect, venture to suggest that there is error of a radical kind in the learned trial judge's treating the advance out of the impounded money as a fresh loan to Spada and a badge of confidence on respondent's part. It seems to me this false assumption tainted the whole results.

The cheque or form does not alter the real essence of the dealing.

It was, as the banker swears, a substitution. Enforced loans of that kind are not of much value as a mark of confidence in the solvency of one's debtor and much less so when we find them preceded by a month's waiting to get from the debtor what was got here.

It was only after a month, I surmise, of feeling "funny" and "afraid" that the respondent felt constrained to accept such goods as he did not want and could not handle, and make the best of things. How changed from the course of four or five years of dealing without security. Why was there such a change?

This presents a record I regret to see stand to be

accepted as a test of how the presumption in question can henceforth be rebutted.

The following remarks, on pages 290, 291 of the judgment in the case of *The National Bank of Australasia* v. *Morris*(1), are in point.

> Their lordships conceive that if the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent, * * * . What have the defendants to set against this strong evidence that the insolvency of Braun was apparent to them? First; that Balfour states that he did not believe or suspect that Braun was insolvent. We need not inquire nicely whether Balfour used the term "insolvent," as is suggested by a subsequent passage in his evidence, in a sense compatible with Braun's inability to meet his engagements. It is sufficient that he knew the facts which ought to have shewn clearly enough that Braun could not do so.

The presumption adds force to them.

I think the appeal should be allowed with costs. I would modify somewhat the suggestion of Mr. Justice Meredith as to an allowance he suggests to the respondent, (but as the result is the appeal is to be dismissed, I need not say more), the learned judge who in the court below took substantially the same view as I do of the case.

DUFF J. concurred with His Lordship Mr. Justice Idington.

Appeal dismissed with costs.

Solicitors for the appellants: *Johnston, McKay, Dods & Grant.*

Solicitor for the respondents: *John Tytler.*

(1) (1892) A.C. 287.

1907

*April 4.
*May 7.

FREDERICK T. ANDREWS (DEFENDANT) ..... } APPELLANT;

AND

ANGELO CALORI (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Vendor and purchaser—Sale of land—Formation of contract—Conditions—Acceptance of title—New term—Statute of Frauds—Principal and agent—Secret commission—Avoidance of contract—Fraud—Specific performance.

While A was absent abroad, B assumed, without authority, to sell certain of his lands to C and received, from C, a deposit on account of the price. On receipt of a cablegram from B, notifying him of what had been done, but without disclosing the name of the proposed purchaser, A replied, by letter, stating that he was willing to sell at the price named, that he would not complete the deal until he returned home, that the sale would be subject to an existing lease of the premises and that he would not furnish evidence of title other than the deeds that were in his possession, and requesting B to communicate these terms to the proposed purchaser. On learning the conditions, C, in a letter by his solicitors, accepted the terms and offered to pay the balance of the price as soon as the title was evidenced to their satisfaction. In a suit for specific performance,

Held, that the correspondence which had taken place constituted a contract sufficient to satisfy the requirements of the Statute of Frauds, that the words "so soon as title is evidenced to our satisfaction," in the solicitors' letter accepting the conditions, did not import the proposal of a new term and that A was bound to specific performance.

Held, also, that an arrangement, unknown to A and made prior to the receipt of his letter, whereby B was to have a commission on the transaction from C, could not have the effect of avoiding the contract, as B was not, at that time, the agent of A for the sale of the property.

Judgment appealed from (12 B.C. Rep. 236) affirmed.

---

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

1907

ANDREWS v. CALORI.

APPEAL from the judgment of the Supreme Court of British Columbia(1) affirming the judgment of Morrison J., at the trial, which maintained the plaintiff's action for specific performance with costs.

The case is stated in the judgment of the court, by His Lordship Mr. Justice Maclennan, now reported.

Nesbitt K.C. and *G. H. Cowan K.C.* for the appellant. There was no concluded agreement with the plaintiff by the defendant or his agent, thereunto duly authorized, or any memorandum in writing sufficient to satisfy the requirements of the Statute of Frauds. *Hussey* v. *Horne-Payne*(2) *per* Cairns L.C., at page 849. The whole correspondence must be looked at; *North-West Transportation Co.* v. *McKenzie*(3). The letter stating his lowest price to be "thirteen thousand net" does not confer power upon the agent to enter into a contract for sale; *Hamer* v. *Sharp*(4) *per* Hall V.C., at page 55; *Ryan* v. *Sing*(5); *Wilde* v. *Watson*(6); *Wilkinson* v. *Stringer*(7) *per* Turner V.C. The unauthorized contract by a person assuming to act as an agent cannot be confirmed in part and repudiated in part, it must be confirmed as a whole; see remarks by Ellenborough L.J. in *Hovil* v. *Pack*(8), also *Cornwal* v. *Wilson*(9) *per* Hardwicke L.C.; and *Rader's Administrator* v. *Maddox* (10). The defendant was ignorant of the terms and of the parties to the contract. *Banque Jacques-Cartier* v. *Banque d'Epargne de la cité et du district de*

(1) 12 B.C. Rep. 236.
(2) 48 L.J. Ch. 846; 4 App. Cas. 311.
(3) 25 Can. S.C.R. 38.
(4) 44 L.J. Ch. 53.
(5) 7 O.R. 266.
(6) 1 L.R. Ir. 402.
(7) 16 Jur. 1033.
(8) 7 East 164.
(9) 1 Ves. Sr. 509.
(10) 150 U.S.R. 128.

1907

ANDREWS v. CALORI.

Montréal(1). The court will refuse a decree for specific performance where there is merely a treaty in view of a future contract; *Huddleston* v. *Briscoe*(2) at pages 591-2; *Stratford* v. *Bosworth*(3); *Harvey* v. *Facey*(4); and there was no unqualified acceptance, *Dyas* v. *Stafford*(5); *Holland* v. *Eyre*(6); *Honeyman* v. *Marryatt*(7); *Crossley* v. *Maycock*(8); *Culverwell* v. *Birney*(9); *McIntyre* v. *Hood*(10); *Winn* v. *Bull*(11); *Hudson* v. *Buck*(12).

There is no evidence to identify the proposed purchaser and the letter from the plaintiff's solicitors treated the matter as incomplete; parol evidence cannot avail, in such a case, to shew a completed contract; *Champion* v. *Plummer*(13) *per* Mansfield L.J. The alleged contract does not state who are the contracting parties. See also *Smith* v. *Surman*(14); *White* v. *Tomalin*(15); *McIntosh* v. *Moynihan*(16) *per* Burton J. at page 242. There could be no unqualified acceptance where the new term was proposed "subject to evidence of title being approved." *Hussey* v. *Horne-Payne*(17) *per* Jessel M.R. at page 752; *Queen's College* v. *Jayne*(18). Moreover this acceptance was written by the solicitors without authority from the purchaser; *Smith* v. *Webster*(19). Negotiations as to a completed contract were post-

(1) 13 App. Cas. 111.
(2) 11 Ves. 583.
(3) 2 Ves. & B. 341-5.
(4) (1893) A.C. 552.
(5) 9 L.R. Ir. 520.
(6) 2 Sim. & St. 194.
(7) 6 H.L. Cas. 112; 21 Beav. 14.
(8) L.R. 18 Eq. 180.
(9) 14 Ont. App. R. 266.
(10) 9 Can. S.C.R. 556.
(11) 7 Ch. D. 29.
(12) 7 Ch. D. 683.
(13) 8 R.R. 795; 1 Bos. & P. (N.R.) 252.
(14) 33 R.R. 259; 9 B. & C. 561.
(15) 19 O.R. 513.
(16) 18 Ont. App. R. 237.
(17) 8 Ch. D. 670; 47 L.J. Ch. 751.
(18) 10 Ont. L.R. 319.
(19) 3 Ch. D. 49.

poned until the defendant's return home, and the negotiations shew changed terms of payments and as to defendant being relieved from payment of rates for local improvements. *Bristol C. & S. Aërated Bread Co.* v. *Maggs*(1) *per* Kay J. at pages 624-5; *Jones* v. *Victoria Graving Dock Co.*(2) *per* Lush J. at page 223; *Jervis* v. *Berridge*(3) *per* Selborne L.C.; *Harris* v. *Robinson*(4); *Coventry* v. *McLean* (5); *Goring* v. *Nash*(6) *per* Hardwicke L.J. at page 188; *Powell* v. *Lloyd*(7).

There was still a dispute between the parties and too much uncertainty to justify a decree for specific performance; *Pearce* v. *Watts* (8); *Rummens* v. *Robins*(9); *Clowes* v. *Higginson*(10); *Griffin* v. *Coleman*(11).

The stipulation for a secret commission disentitles the plaintiff to the decree. *Panama, etc., Telegraph Co.* v. *India Rubber, Gutta Percha & Telegraph Works Co.*(12) *per* James L.J. at page 125; *Ex parte Bennett*(13) *per* Eldon L.C.; *McElroy* v. *Maxwell*(14); *Marsh* v. *Buchan*(15); *Powell & Thomas* v. *Jones & Co.*(16); *Andrews* v. *Ramsay & Co.*(17); *Kersteman* v. *King*(18).

The fact that a "net" fixed price was secured does not prevent the arrangement for a secret commission

(1) 44 Ch. D. 616.
(2) 46 L.J.Q.B. 219.
(3) 42 L.J. Ch. 518.
(4) 21 Can. S.C.R. 390.
(5) 22 O.R. 1.
(6) 3 Atk. 186.
(7) 31 R.R. 598; 2 Y. & J. 372.
(8) L.R. 20 Eq. 492.
(9) 3 DeG. J. & S. 88.
(10) 1 Ves. & B. 524.
(11) 28 L.T. 493.
(12) 10 Ch. App. 515; 45 L.J. Ch. 121.
(13) 10 Ves. 381.
(14) 101 Mo. 294.
(15) 46 N.J. Eq. 595.
(16) (1905) 1 K.B. 11.
(17) (1903) 2 K.B. 635.
(18) 15 C.L.J. 140.

1907

ANDREWS v. CALORI.

from operating as a fraud; *Fish* v. *Leser*(1); *Bartram & Sons* v. *Lloyd*(2); *Manitoba & North-West Land Corporation* v. *Davidson*(3). Plaintiff's course could only be justified by actual disclosure; *Grant* v. *Gold Exploration, etc., Syndicate*(4) *per* Collins L.J. at page 158; *Shipway* v. *Broadwood*(5).

Ewart K.C. and *Bird* for the respondent. The decision in *Hussey* v. *Horne-Payne*(6) is not in point. There the agreement was clearly conditional. That case was also disapproved in *Chippenfield* v. *Carter* (7) *per* Wright J. at page 488. See also *Hack* v. *London Provident Building Society*(8). Neither is it binding on this court in the construction of the documents now in question. *Grey* v. *Pearson*(9) at pages 106 and 108; *Rossiter* v. *Miller*(10) at page 1152.

As to the Statute of Frauds, a writing need not have as its object the attesting of an agreement. *In re Hoyle*(11) at pages 98, 99, 100. Nor need the agent's authority entitle him to sign a record of contract. It is sufficient if the agent had authority to sign a memorandum for any purpose. There is, in the cablegram and letter a description sufficiently identifying the purchaser who offered $13,000 net and paid $500 on account of purchase price. *Rossiter* v. *Miller*(10) *per* O'Hagan L.J. at page 1147, and Blackburn L.J. at

(1) 69 Ill. 394.
(2) 20 Times R.L. 281.
(3) 34 Can. S.C.R. 255.
(4) 69 L.J.Q.B. 150.
(5) (1899) 1 Q.B. 369; 68 L.J.Q.B. 360.
(6) 8 Ch. D. 670.
(7) 72 L.T. 487.
(8) 23 Ch. D. 103, at p. 111.
(9) 6 H.L. Cas. 61.
(10) 3 App. Cas. 1124.
(11) (1893) 1 Ch. 84.

page 1153. See also *Carr* v. *Lynch*(1) and *Ryan* v. *United States*(2).

As to the contention that the plaintiff's name does not appear in the contract; (1) in the receipt for the $500 the plaintiff's name does appear; (2) it also appears in the receipt given for title deeds, which carries the signature of the defendant himself.

Upon the questions of law involved the following cases are cited; *Newell* v. *Radford*(3); *Hood* v. *Lord Barrington*(4); *Sale* v. *Lambert*(5); *Commins* v. *Scott*(6); *Catling* v. *King*(7); *Sarl* v. *Bourdillon*(8); *Barkworth* v. *Young*(9); *Parton* v. *Crofts*(10).

Two papers may, by intrinsic evidence with the aid of parol evidence of surrounding circumstances, be connected to constitute a memorandum; *Ridgway* v. *Wharton*(11); Campbell on Sale(12); *Buxton* v. *Rust*(13); *Long* v. *Millar*(14); *Shardlow* v. *Cotterell* (15); *Cave* v. *Hastings*(16); *Craig* v. *Elliott*(17). The reference to production of a title satisfactory to the solicitors does not import the proposal of a new term. It is a mere matter of detail.

The rule is even more elastic where it is merely required to supplement an incomplete memorandum, signed by the party to be charged, with another also signed by him. It is sufficient here if they can with reasonable certainty be construed as relating to one

(1) (1900) 1 Ch. 613.
(2) 136 U.S. 68.
(3) L.R. 3 C.P. 52.
(4) L.R. 6 Eq. 218.
(5) L.R. 18 Eq. 1.
(6) L.R. 20 Eq. 11.
(7) 5 Ch. D. 660.
(8) 1 C.B. (N.S.) 188.
(9) 4 Drew 1.
(10) 16 C.B. (N.S.) 11.
(11) 6 H.L. Cas. 238.
(12) 2 ed. p. 309.
(13) L.R. 7 Ex. 1.
(14) 4 C.P.D. 450.
(15) 20 Ch. D. 90.
(16) 7 Q.B.D. 125.
(17) 15 L.R. Ir. 257.

1907

ANDREWS v. CALORI.

transaction. *Allen* v. *Bennett*(1); *Western* v. *Russell*(2); *Warner* v. *Willington*(3); *Baumann* v. *James*(4); *Studds* v. *Watson*(5); *Oliver* v. *Hunting* (6). It is sufficient if the name of the agent appears on the receipt for the deposit instead of that of the vendor. *Smith* v. *Brentnell*(7). The names of the parties need not all be in the same document. *Warner* v. *Willington*(3) at p. 533; *Buxton* v. *Rust*(8). The contract need not be in writing; only the evidence of the contract is required to be in writing. The documents may be written *alio intuito; Jones* v. *Victoria Graving Dock Co.*(9).

As to the arrangement for commission, there was nothing concealed in the action of the plaintiff; the defendant expressed no surprise at what he was told; he knew very well that he had himself provided for the payment to the agent; and he went on with the necessary preparations for closing the transaction after the plaintiff had told him of the payment to the agent. All cases *re* secret commission are dependent on fraud as an element of the defence. It must be proved. None here exists on the facts. Where concealment does not exist no secret about the commission can be pretended. *Cavendish-Bentinck* v. *Fenn* (10); *Corporation of Salford* v. *Lever*(11).

The following authorities are also referred to: *Panama, etc., Telegraph Co.* v. *India Rubber, etc., Co.*(12); *Ex parte Bennett*(13).

(1) 3 Taunt. 169.
(2) 3 Ves. & B. 187.
(3) 3 Drew 523.
(4) 3 Ch. App. 508.
(5) 28 Ch. D. 305.
(6) 44 Ch. D. 205.
(7) (1888) W.N. 69.
(8) L.R. 7 Ex. 1.
(9) 46 L.J.Q.B. 219.
(10) 12 App. Cas. 652.
(11) (1891) 1 Q.B. 168.
(12) 10 Ch. App. 515.
(13) 10 Vesey 381.

1907

ANDREWS v. CALORI.

Maclennan J.

The judgment of the court was delivered by

MACLENNAN J.—I am of opinion that this appeal fails. The action is by the respondent Calori against the appellant for the specific performance of an alleged contract of sale by the appellant to the respondent of a parcel of land in Vancouver.

The respondent succeeded at the trial and also in an appeal taken to the Supreme Court of British Columbia, Irving J. dissenting, and the present appeal is from the judgment of the Supreme Court.

The question in the case is whether there was any contract between the parties, and whether there was a sufficient memorandum thereof signed by the appellant to support the action.

The appellant was a business man resident at Vancouver, and owning property there, but when the material acts bearing upon the case occurred, was absent in England.

The respondent, Calori, was a hotel proprietor in Vancouver, and a firm of W. A. Clark & Co. were land agents, also in Vancouver.

On the sixth of January, 1905, Clark & Co. (whom I shall hereafter call Clark), without any authority from either Andrews or Calori, cabled Andrews inquiring lowest price for the lot in question, and received an answer on the 9th of January, "thirteen thousand net." He then went to Calori and proposed to him to buy at that price, but Calori refused, offering to give twelve thousand. Thereupon, Clark, on the same day, cabled to Andrews—"Best offer I can get $12,000 net to you; can I accept?"

To this Andrews made no reply, but between that date and the twenty-fifth of January, Clark managed

1907

ANDREWS v. CALORI.

to work Calori up to the $13,000 mark, and, on that day, Calori paid Clark $500 and obtained from him a receipt in the following terms:—

Maclennan J.

Received from A. Calori the sum of $500, five hundred dollars, deposit on lot 24, block 8, D., 196, on purchase price of $13,000 (net to F. T. Andrews), subject to confirmation of owner. Title being satisfactory.

That was a strange, bold thing to do, inasmuch as he had no authority of any kind whatever from Andrews to do anything of the kind. I think that Calori's evidence, as well as the form of the papers, shews that Clark had no authority from Calori either, and was not his agent.

Having given Calori that receipt, he cabled to Andrews the same day, as follows:—

Sold lot 24, block 8 196, thirteen thousand dollars net you deposit paid by client $500 confirm cable.

Up to this point, neither Calori nor Andrews had signed anything which could be called a contract, or a memorandum of a contract, nor had anything been signed by any agent on behalf of either of them. Clark had assumed to sign the receipt as if he had authority, but he had none.

Nevertheless, the effect of paying the $500, and taking the receipt which he had taken was a verbal offer by Calori to buy the land from Andrews for $13,000.

Andrews answered Clark's cable of the 25th of January, on the 27th, saying, "writing acceptance," and he followed that by a letter to Clark on the 2nd of February.

When writing this letter, Andrews knew that there was a certain person who was willing to buy, at $13,000, and also had actually paid a deposit of $500.

That person, however, had signed nothing, and even his name was not known to him. But his identity and name were not uncertain. Both were known to Clark.

The letter was as follows:—

February 2nd, 1905.

Messrs. Clark & VanHouten,
Vancouver, B.C.

Dear Sirs:—

I am in receipt of your cablegram dated January 26th, offering me $13,000 cash for my property on Hastings street, lately occupied by McKay as a hardware store. I answered your cable (writing acceptance), my reason for doing this was I wanted it understood distinctly that I could not complete the deal until I returned, which may not be until April. It would be impossible to close before as the title deeds belonging to the property were left in Toronto. I will accept the offer on the following terms, that is, the adjustments to be calculated to the first of April. After that time the purchaser can collect the rents. The premises are leased for a year from last fall.

Kindly make it known to the purchaser so that there will not be any misunderstanding, be sure and tell the purchaser that I cannot give him possession of the premises, he will simply have to accept the present tenant, of course, I accept the thirteen thousand net, cash offer with the understanding that I am not to be called upon to produce or procure any title papers other than those in my possession, no doubt you have explained all the details to your client.

I may state that the title to the Hastings street property was accepted by Davis, Marshall & MacNeill acting for Hull.

Kindly write and let me know if your client accepts these terms, as other parties have written and cabled me for price.

Your prompt attention will greatly oblige.

Yours truly,

F. T. ANDREWS.

Now this letter is a distinct offer to sell the land in question, on certain specified terms and conditions, for $13,000 net cash, to the person who had paid the deposit of $500. It was written to Clark with a request that it should be communicated to that person, and Clark is requested to inform him whether the terms are agreed to.

1907

ANDREWS v. CALORI.

Maclennan J.

The letter was received by Clark and communicated to Calori, who agreed to the altered terms, and immediately instructed his solicitors to communicate that to Clark, which they did by letter of 22nd February. Clark communicated this to Andrews by letter of the 23rd February, for the first time disclosing to Andrews the purchaser's name.

I think it is clear that, on receipt by Andrews of this letter of 23rd February, there arose a complete contract of sale and purchase between the parties, sufficient to satisfy the requirements of the Statute of Frauds, subject to a question arising upon certain words contained in the solicitors' letter of the 22nd of February.

That letter was as follows:—

> Find enclosed herewith copy of letter of F. T. Andrews to you in regard to the sale of his Hastings street property to Mr. Calori. We have retained the original letter pursuant to your kind permission and will thank you to confirm the terms suggested by Mr. Andrews to him by letter. It will be quite satisfactory to Mr. Calori to take the property over, subject to the tenancy, and so far as the question of title deeds is concerned, we accept unreservedly the stipulations made by Mr. Andrews. We are ready, at any minute, to pay this money over to Mr. Andrews as soon as proper title is evidenced to our satisfaction, and we shall be obliged if you will ask Mr. Andrews to have such title deeds as are in his possession forwarded here with a solicitor's abstract to enable us to examine into the title fully.

And it is urged that the words "so soon as proper title is evidenced to our satisfaction" are a new stipulation or condition of the contract proposed on behalf of the plaintiff, and which was never assented to by the defendant in writing.

I am unable to assent to this view of those words.

The two letters must be read together.

The defendant had stipulated that the sale should

not be completed until the first of April, after his return from England. His title deeds were in Toronto, and he is not to be called upon to produce any title papers other than those in his possession. He wants to have no trouble searching for or producing title papers not in his possession. That stipulation would clearly not oblige the purchaser to accept a bad or defective title, but, if accepted *simpliciter*, it might leave room for a contention that the purchaser had agreed to accept such title as might be shewn by the vendor's deeds and papers when produced, even if defective. To guard against any inference or contention of that kind the solicitors say, the money is ready, let Mr. Andrews send forward his deeds and the title papers in his possession. But, if these deeds and title papers do not disclose a good title, we must still be satisfied that it is good. I think the words which follow shew that is all that was meant. They ask for his deeds and a solicitor's abstract "to enable them to examine into the title fully."

The sense in which these words were used is also illustrated by the language used by the same solicitors in their letter to the defendant of the 31st January. Their words are:—

> If the title as disclosed is satisfactory, there will be no delay.

In the case of *Hussey* v. *Horne-Payne*(1), a similar question arose, the words used in that case being "subject to the title being approved by our solicitors." The Court of Appeal(1) held that these words were a new term. That was, however, dissented from in the House of Lords(1) Cairns L.C., at pp. 321-2, concur-

(1) 8 Ch. D. 670; 4 App. Cas. 311.

1907

ANDREWS v. CALORI.

Maclennan J.

red in by Lords Selborne and Gordon, and although the judgment was affirmed in other grounds, must be deemed to be overruled. *Hack* v. *London Provident Association*(1), in the Court of Appeal.

It was also contended that the parties did not regard the terms of the contract as completely settled by the letter of the 23rd of February, but entered upon a further discussion of terms.

I do not think that anything which is shewn to have occurred can be regarded as a waiver of the contract which had been deliberately made, or as having opened the negotiations *de novo*.

Some argument was also made upon the fact that Clark received a commission from Calori of $200 upon the transaction. If Clark had been the defendant's agent for sale, at that time, such a payment would have been a bribe and a fraud upon the defendant. 1 Dart on Vendors and Purchasers, page 214, and cases there cited. But Clark was not then the defendant's agent for sale, nor did he act for him at any time, until he was requested to communicate to the plaintiff his letter of the 2nd of February.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Cowan & Reid.*

Solicitors for the respondent: *Bird, Brydone-Jack & McCrossan.*

(1) 23 Ch. D. 112.

JAMES CONMEE (DEFENDANT).....APPELLANT; 1907

AND

*Mar. 21, 22.
*May 7.

THE SECURITIES HOLDING COMPANY AND A. E. AMES AND COMPANY (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Broker—Stock—Purchase on margin—Pledge of stock by broker—Possession for delivery to purchaser.

C. instructed A. & Co., brokers, to purchase for him on margin 300 shares of a certain stock, paying them $3,000, leaving a balance of $6,225 according to the market price at the time. A. & Co. instructed brokers in Philadelphia to purchase for them 600 shares of the stock, paying $9,000, nearly half the price, and pledged the whole 600 for the balance. The Philadelphia brokers pledged these shares with other securities to a bank as security for indebtedness and later drew on A. & Co. for the balance due thereon, attaching the scrip to the draft which was returned unpaid and 475 of the 600 shares were then sold and the remaining 125 returned to A. & Co. In an action by the latter to recover from C. the balance due on the advance to purchase the shares with interest and commission:

Held, reversing the judgment of the Court of Appeal (12 Ont. L.R. 435, affg. 10 Ont. L.R. 159), Fitzpatrick C.J. dissenting, that the brokers had no right to hypothecate the shares with others for a greater sum than was due from C. unless they had an agreement with the pledgee whereby they could be released on payment of said sum; that there never was a time when they could appropriate 300 of the shares pledged for delivery to C. on paying what the latter owed; and that, therefore, they were not entitled to recover.

The bought note of the transaction contained this memo: "When carrying stock for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us."

Held, per Davies and Idington JJ., that this did not justify the brokers in pledging the shares for a sum greater than that due from the customer.

---

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

1907

CONMEE v. SECURITIES HOLDING CO.

Per Duff J.—That the shares were purchased before this note was delivered, and it could not alter the character of the authority conferred on the brokers; and that no custom was proved which would modify the common law right and duties of the brokers and their customer in the transaction.

(Leave to appeal to Privy Council was refused.)

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment of a Divisional Court(2) in favour of the plaintiffs.

The material facts are stated in the above headnote and fully set out in the several opinions of the judges on this appeal.

C. Millar, for the appellant. The brokers did not execute the order to buy the stock. They cannot be allowed to substitute their personal liability for the security to which appellant is entitled. DosPassos on Stock Brokers(3); *Cox* v. *Sutherland*(4); *Mara* v. *Cox*(5); *Douglas* v. *Carpenter*(6) at page 333.

By placing appellant's order joined to orders from other customers with the brokers in Philadelphia no privity was created between the appellant and the sellers of the stock. *Robinson* v. *Mollett*(7); *Beckhuson & Gibbs* v. *Hamblet*(8).

From the time the stock was purchased it was always pledged by Ames & Co. for more than was due from appellant.

Tilley, for the respondent. Brokers are entitled to be indemnified against loss incurred in properly carry-

(1) 12 Ont. L.R. 435.
(2) 10 Ont. L.R. 159.
(3) 2 ed. p. 206.
(4) 24 Can. L.J. 55; Cout. Dig. 214.
(5) 6 O.R. 359.
(6) 17 App. Div. N.Y. 329.
(7) L.R. 7 H.L. 802.
(8) [1900] 2 Q.B. 18.

ing out the customer's orders. *Duncan* v. *Hill*(1); *Thacker* v. *Hardy*(2); *Forget* v. *Ostigny*(3). And such right is not lost by wrongful termination of the contract by the broker. It is only diminished in amount by the damage to the customer. Dos Passos on Stock Brokers, 2 ed., p. 230. *Minor* v. *Beveridge* (4); *Ames & Co.* v. *Sutherland*(5).

The customer is deemed to be aware of the usual course of dealing and to authorize the broker to act in accordance therewith. *Grissell* v. *Bristowe*(6).

The brokers were not obliged to hold for their customer the particular shares bought. The evidence shews that this is a custom binding on the principal. *Scott & Horton* v. *Godfrey*(7).

THE CHIEF JUSTICE.—As more fully explained by my brother Davies, the plaintiffs (A. E. Ames & Co.), now respondents, allege that on the 28th April, 1902, as stock brokers doing business in Toronto, they were instructed by the defendant, now appellant, to purchase for him in a way sanctioned by the rules and usages of the Stock Exchange, a certain number of shares of the common stock of the Lake Superior Company at the then current market price. Coincident with the giving of the order, a certain amount was paid on account of the price by the appellant, it being then understood and agreed that the money required to complete the purchase was to be provided by the respondents.

(1) L.R. 8 Ex. 242.
(2) 4 Q.B.D. 685.
(3) [1895] A.C. 318.
(4) 141 N.Y. 399.
(5) 9 Ont. L.R. 631; 11 Ont. L.R. 417; 37 Can. S.C.R. 694.
(6) L.R. 3 C.P. 112.
(7) [1901] 2 K.B. 726.

1907

CONMEE v. SECURITIES HOLDING CO.

The Chief Justice.

The two courts below find as facts that the stock was purchased and the mandate properly executed according to usage by the brokers and, on the evidence, as I read it, these findings are fully justified. I am of opinion that there is no error in the judgment appealed from. The brokers having fulfilled their duty according to the general known usages and customs of the Stock Exchange are entitled to recover their commission and the amount they expended necessarily and properly in the course and for the purpose of their employment. *Mollett* v. *Robinson*(1) at p. 94; *Scott & Horton* v. *Godfrey*(2) at p. 736; *Bentinck* v. *London Joint Stock Bank*(3) pp. 120-140-141; *Chase* v. *City of Boston*(4).

I would dismiss the appeal with costs.

DAVIES J.—I agree with the judgment of the appeal court that to a large extent the questions to be determined in this appeal depend upon the appreciation the court forms of the evidence. Substantially the question to be decided is whether or not the plaintiffs have shewn affirmatively that they bought the stock they were instructed to purchase by and for the appellant, and after such purchase held the same for him so that at all times they were ready and able to deliver the stock to the defendant (appellant) had he come to them to redeem it.

I agree with Anglin J., who delivered the dissenting opinion in the Divisional Court, substantially in his statements of the law governing transactions of this kind, and in his appreciation of the evidence, given by the partners of Ames & Co.

(1) L.R. 7 C.P. 84.
(2) (1901) 2 K.B. 726.
(3) (1893) 2 Ch. 120.
(4) 62 N.E. Rep. 1059.

The 300 shares of the stock of the Lake Superior Consolidated Company which appellant instructed his brokers, the respondent Ames & Co., to purchase for him and on which he advanced them the sum of $3,000 as a marginal payment, were purchased by Ames & Co. through their brokers Chandler & Co., Philadelphia, together with 300 other shares of the same stock for other customers by the same order and on the same day. On being advised by their brokers in Philadelphia of the purchase by them of the 600 shares, Ames & Co. remitted to Chandler & Co. $9,000 on the total purchase of the 600 shares leaving a debit balance against them with Chandler in respect of the purchase of $9,375 leaving the whole 600 shares in Chandler's possession as security for the balance. Chandler & Co. in turn, acting within their assumed rights, pledged all of the shares to a bank in Philadelphia as collateral security for monies due by them to the bank.

On 12th December, 1902, Chandler & Co. drew on Ames & Co. for the amount of the balance due to the former firm on the purchase of the 600 shares ($9,375) and interest, and annexed the scrip for the shares to the draft but the draft with scrip annexed was returned unpaid.

Four days afterwards, viz., 16th December, 1902, Chandler & Co. sold the shares except 125 which they returned to respondent, Ames & Co. on the 30th December, at which time the respondent's account with Chandler was ended and closed.

From the time of the purchase by Chandler of the 600 shares until their sale they were continuously pledged by Ames & Co. to Chandler for a greater sum than Conmee owed to Ames & Co. (compare Ames &

1907

CONMEE v. SECURITIES HOLDING CO.

Davies J.

Co.'s account with Conmee, Ex. 1, and their account with Chandler & Co., Ex. 21), with the possible exception of two days just before their sale by Chandler, and there was no evidence shewing the right of Ames & Co. on behalf of Conmee to redeem his 300 shares from the possession of Chandler & Co. or the persons with whom that firm had pledged the shares in Philadelphia on payment of the amount Conmee owed on them.

As a fact Ames & Co. never had the 600 shares purchased by Chandler & Co. in their possession or under their control; they dishonoured the draft drawn on them by Chandler & Co. for the balance of the purchase money of the 600 shares of which Conmee's 300 formed a part, and there was no satisfactory or precise evidence of the existence of a condition of things enabling Ames & Co. to obtain and deliver over to Conmee these 300 shares from Chandler & Co. or their pledgees at any time after their purchase and until their sale on payment or tender of the balance due by Conmee on them.

Mr. Tilley, respondent's counsel, frankly admitted on the argument that unless these 600 shares in Chandler & Co.'s hands or those of their pledgees were counted by Ames & Co. as available shares which they could deliver to any one of their customers for whom they had purchased and were carrying this particular class of Lake Superior common shares, on demand and payment by the purchaser of any balance due by him, he could not under the evidence contend that Ames & Co. had sufficient of these Consolidated Lake Superior common shares to meet possible demands which their customers might make upon them.

From the time of the purchase by Chandler & Co.

of the 600 shares the possession of which were admittedly necessary by Ames & Co. to enable them to discharge their obligations as brokers of their clients until their sale by Chandler & Co. after the dishonour of the draft on Ames & Co., the evidence shews that the shares were either held by Chandler & Co. for "purposes of hypothecation or for security of the debit balance owing by Ames & Co." and that only 125 shares were ever delivered by Chandler & Co. to Ames & Co., namely on December 30th after the sale of the other 475 shares.

Mr. Chandler of the firm of Chandler & Co., when examined, after stating how the shares were held by his firm as above, went on to say:

> The six hundred shares were either deposited in the course of the ordinary transaction of business as collateral security with lenders or carried by us.

He was unable to say which, but he added that

> when deposited by their firm for an advance it would be liable to the lender *for the firm's total indebtedness to the lender.*

Now it seems to me to have been incumbent on Ames & Co. under these circumstances in order to maintain this action and in the face of Mr. Tilley's admission as stated above, to have shewn their absolute right to obtain Conmee's 300 shares from Chandler & Co. or their pledgees at any time on payment of Conmee's balance to them on the purchase of the shares, and Chandler & Co.'s readiness to deliver them on payment of such purchase money.

I can find no satisfactory evidence on that point. The evidence of Mr. Fraser, one of the firm of Ames & Co., was simply in general terms

1907

CONMEE v. SECURITIES HOLDING CO.

Davies J.

We could always have delivered the stock on payment. We could always make delivery to him of it without buying it.

The next answer he makes throws a flood of light on what he meant by saying the firm could always make delivery of the stock. He is asked:—

While the 600 shares were with Chandler's did you have enough shares to answer the requirements of all your clients without that? A. Well, I don't know.

Now his counsel admits that he had not and on determining whether he could or could not deliver the shares to Conmee if demanded we are relegated to the facts in connection with the purchase and pledging by the Philadelphia brokers of the 600 shares, and the further fact that all the shares held by Ames & Co. were also pledged to cover their indebtedness.

My conclusion from these facts is not so much that there was a subsequent conversion of the stock purchased by Ames & Co. as that they never did legally purchase and *hold* for Conmee as they contracted to do and as in their statement of claim they stated they had done the 300 shares he had contracted with them to purchase and hold for him.

It was contended by Mr. Tilley that the bought note alleged to have been forwarded to Conmee at the time of the purchase of the shares by them had a memorandum on its margin as follows:—

When carrying stocks for clients we reserve the right of pledging the same in raising money upon them in any way convenient to us.

And that this memorandum authorized and justified the pledging of the stock by the brokers in the manner shewn in this case. Without expressing any opinion

whether or not this memorandum was brought to the notice of the defendant so as to form a condition of the contract entered into between him and Ames & Co., I am not prepared to say that its language authorized the pledging by the brokers of the stock for an amount beyond what the purchaser owed the brokers upon its purchase. In my opinion it does not. The language used should be confined to an authority to determine the "most convenient way" they should pledge the stock and not to authorize them to pledge it for amounts which the law prohibited. If brokers desire that the latter power should be given them they must use in their contract clear and unequivocal language on this point.

I take it there cannot be much difference of opinion as to the law regulating the broker's rights and liabilities towards his customer on the purchase of stock on margin.

The broker must at all times have on hand stock sufficient in quantity to deliver to his client upon the payment by the latter of the amount due by him upon the stock.

The purchaser does not rely upon nor does his right depend upon an engagement with the broker to procure and furnish the shares when required but upon the latter's duty and obligation to purchase and hold for the customer the number of shares ordered by the latter subject only to the payment of the purchase price or such part of it as may be unpaid.

While the broker may lawfully pledge the customer's securities for an amount not exceeding the indebtedness of the customer to him any disposition of the securities or mingling of them with other securities pledged which has the effect of depriving the cus-

1907

CONMEE v. SECURITIES HOLDING CO.

Davies J.

tomer of his right to their immediate possession upon payment or tender by him of his indebtedness to the broker will amount to a conversion.

If the broker for his own benefit or convenience chooses to mingle his customer's securities with those of other of his customers or his own and rehypothecates them for a greater amount than the customer's indebtedness to him not retaining in his possession a like amount of similar securities or not having a special agreement with the bank or person with whom he has hypothecated the customer's stock preserving the rights of his customer as they are above stated, he is guilty of conversion.

Clarkson v. *Snider*(1), and the authorities collected in DosPassos on Stock Brokers (2 ed.) pages 257 and 259, especially *Douglas* v. *Carpenter*(2).

In my opinion the appeal should be allowed with costs here and in the divisional and appeal courts, and judgment entered for the defendant upon the issue joined on the third statement of defence, with costs of that issue.

IDINGTON J. concurred with Davies J.

MACLENNAN J.—Appeal by defendant Conmee from a judgment against him at the trial for $4,217.62, affirmed by a divisional court, with a slight variation, Anglin J. dissenting, and afterwards affirmed by the court of appeal for Ontario.

Ames & Co. were a firm of stock brokers in Toronto, when the facts of the case occurred, and their co-plaintiffs, The Securities Holding Co. have, by assignment, succeeded to the rights and interests of Ames & Co.

(1) 10 O.R. 561. (2) 17 App. Div. N.Y. 329.

1907

CONMEE v. SECURITIES HOLDING CO.

Maclennan J.

The plaintiffs' case is that on the 27th of April, 1902, they were employed by the defendant, as brokers, for commission and reward, to purchase for him 300 shares of Lake Superior Consolidated Stock, of the par value of $100 per share, and to hold the same for him, upon a margin of ten per cent. of the par value, the marginal payment to be added to from time to time on demand, in case of a decline in the market value of the shares. They allege the contract to have been that the marginal payments were to be regarded as payments on account of the purchase money, the remainder of the purchase money being a loan by the brokers to their customer to be repaid on demand with interest, and secured by pledge of the shares, with right of sale on default of payment.

They allege a payment to them on the 27th of April, 1902, by the defendant of the sum of $3,000 on account of margin, and a purchase by them for him on the following day of 300 shares at $30½ per share, equal to $9,150; that a further payment of $1,800 on account of margin was made, but that the shares having afterwards steadily declined in the market, they made frequent demands upon the defendant for further margin, and the same not having been paid, they sold the shares on the 10th of July, 1903, at $2 13/16 per share, and they seek to recover $4,190.89 as a balance due to them from the defendant, for purchase money advanced on his behalf and interest thereon.

It appears to me that the all important question in the case is whether or not the plaintiffs have proved performance on their part of the alleged contract.

What they did, according to the evidence, after receiving the sum of $3,000 from the defendant for margin, was to employ a firm of Chandler & Co., brokers

1907

CONMEE v. SECURITIES HOLDING CO.

Maclennan J.

in Philadelphia, to purchase, not 300 shares but 600 shares of the stock, at $30½ per share, equal to $18,300, paying Chandler $9,000 on account of the price, and leaving a balance of $9,300 due to that firm, for which sum and interest the latter retained the whole 600 shares in pledge, as their security, continuously from the time of purchase until the following month of November, when the market value of the shares had fallen to $21 1/8 per share.

It is also in evidence that, there being the large sum of $9,300 due to Chandler & Co., that company pledged these shares, along with other shares, to their bankers for a very large sum. And there is no evidence of any stipulation by the plaintiffs with Chandler & Co., if that would make any difference, that the 300 shares alleged to have been bought for the defendant, could be redeemed by or on behalf of the defendant, either from Chandler & Co.'s bankers, or from Chandler & Co. themselves, on payment of the balance of purchase money owing by the defendant to the plaintiff, as upon a purchase of 300 shares only.

What the plaintiffs contracted to do was to buy 300 shares for the defendant, and to advance for him the price, over and above the sum of $3,000, and to hold the shares as security, ready to be delivered on payment of their advance, with interest and commission.

The defendant's right upon such a contract clearly was to require delivery of the shares upon payment of what he owed with interest and commission. He became a debtor to the plaintiffs for an ascertained sum, and upon payment of that sum was to be entitled to delivery of the shares. But the plaintiffs had in the very act of purchase encumbered the shares, not merely with the sum which would have been due to

them on a purchase of 300 shares, namely $6,300, but with a sum of $9,300.

That being so, I think it is clear the plaintiffs did not perform the contract on their part. They had not the 300 shares which they had agreed to buy, at any time ready to be delivered to the defendant on payment of the balance of the purchase money. There never was even a moment when he had a legal right to receive those shares on payment of what he owed. If the plaintiffs demanded them of Chandler & Co., they could not, as of right, have them without paying $9,300, instead of $6,300, which was all the defendant owed. Nor could either the plaintiffs or Chandler & Co. have them while they remained pledged to the bankers of the latter, without paying the bankers' whole claim.

It seems to me too plain to require authority to support the proposition, that while a broker, like any other mortgagee, may pledge his client's shares for an advance, he may not pledge them for more than is due to himself. He can have no right to expose his client's, or his debtor's property, to the contingencies or chances of his own solvency. Nor can it make any difference that he throws in what he deems sufficient countersecurity. It is clear, in my opinion, that if Chandler & Co. had bought 300 shares instead of 600, and if the plaintiffs treating them as bought for the defendant, had paid them the full price, the plaintiffs could not afterwards lawfully have pledged those shares, even with others, for a larger sum than was due to them by the defendant, without a distinct stipulation for redemption on payment of the latter sum. And if the broker could not do that after the purchase, no more could he do it the very moment and by the

1907

CONMEE v. SECURITIES HOLDING CO.

Maclennan J.

act of purchase. To do so after the purchase would be a wrong and a breach of trust of the plainest kind, and therefore to do so at the moment of purchase and as a part of the transaction must vitiate it as against the client and be a failure to perform his contract with him.

While this position seems to me to be very clear on principle neither is it without authority. See *Clarkson* v. *Snider*(1); *Douglas* v. *Carpenter*(2); *Taussig* v. *Hart*(3); DosPassos 257-9.

The case of *Scott & Horton* v. *Godfrey*(4), relied on by the learned chancellor at the trial, is quite different from the present. There the intention of the parties was that the broker should make a contract between his client and the sellers of the shares, and the action was by the latter against the client. It was as if Chandler & Co. were here suing Conmee. It is not suggested that there was any contract in the present case between Chandler & Co. and Conmee. The plaintiffs' case, as plainly stated in their statement of claim, is that they were to *purchase and hold* the shares for the defendant, and were to advance part of the purchase money. That case, moreover, was tried with a special jury who found the bargain to have been as contended for by the plaintiffs.

I am therefore of opinion that the purchase made by the plaintiffs through Chandler & Co. was not a performance of their contract with the defendant.

Nor is it attempted to be shown that the plaintiffs made any other purchase of shares for the defendant. That is the purchase, and the only purchase, on which

(1) 10 O.R. 561, 568.
(2) 17 App. Div. N.Y. 329.
(3) 58 N.Y. 425.
(4) [1901] 2 K.B. 726.

1907

CONMEE v. SECURITIES HOLDING CO.

Maclennan J.

their claim is rested, either in their statement of claim or in their evidence. If there was any other purchase, what was its date? Or at what price was it made? There is not even a suggestion of any other.

But then it is said that the plaintiffs always had shares on hand to answer the alleged purchase for the defendant. It may be conceded that if they had bought 300 shares through Chandler & Co., and if they were in Chandler & Co.'s hands subject to a sum not exceeding what Conmee owed, they could appropriate to Conmee any other equivalent number of shares in their possession, subject to the same debt. But if the purchase through Chandler & Co. was imperfect or defective, then they could not appropriate any other shares to the defendant, even if they had any number of them in their possession free and unpledged and unincumbered. Their contract with him was, as they themselves allege, to buy for him, and not to sell to him. They could not buy from themselves, and they do not pretend to have done so. *Robinson* v. *Mollett*(1).

The appeal should, therefore, in my opinion, be allowed, and the action should be dismissed with costs both here and below.

DUFF J.—The plaintiffs claim the balance of moneys paid by Ames & Co. in the purchase of 300 shares of consolidated Lake Superior common stock for the defendant as his brokers. The character of the employment of Ames & Co. in the course of which these moneys are alleged to have been paid is stated in the second paragraph of the statement of claim. I transcribe the paragraph in full:

(1) L.R. 7 H.L. 802 at pp. 815, 836, 838.

1907

CONMEE
v.
SECURITIES HOLDING CO.

Duff J.

On or about the 27th day of April, 1902, the defendant employed and instructed the plaintiffs, as stock brokers for commission or reward, to purchase and hold for him certain shares of stock (300 of Soo Common) as particularly set forth in the sixth paragraph of the Statement of Claim and requested the plaintiffs to advance to him part of the moneys necessary to enable him to become the purchaser of such shares.

The payment—in point of fact—of the moneys sued for, is not in dispute. The defendant resists the claim upon the grounds, first, that the mandate of Ames & Co. was to acquire for him as his broker 300 shares of the stock referred to and to hold them for him upon the terms that on payment of his indebtedness in respect of their advances he should be entitled to the delivery of the shares, and that this mandate has not been executed; secondly, that if such a purchase was made he is relieved from liability to indemnify Ames & Co. in respect of it by reason of their subsequent wrongful dealing with the subject matter of the purchase.

As I think the defendants ought to succeed on the first ground, I wish to be understood as expressing no opinion whatever upon any of the points involved in the second.

On the day on which Ames & Co. received the defendants' order, they instructed their Philadelphia agents, Chandler & Co. to buy 600 shares of the stock in question. These were bought at 30½ in three parcels (one of 400 and two of 100 each) and the certificates, having transfers executed in blank attached to them, were delivered on the following day. Of the purchase price of the whole 600 shares Chandler & Co. advanced for account of Ames & Co. $9,375.

These 600 shares passed to Chandler & Co. on account of Ames & Co., subject to a charge for the whole

sum advanced by Chandler & Co. They remained subject to that charge. There was no time when Ames & Co. were entitled in law to appropriate 300 of these shares to the defendant so that he could, on the payment of the amount which Ames & Co. had agreed to advance to him ($6,000.00 plus interest and commission) put forth his hand and take the appropriated shares as his own. I do not think, therefore, that speaking of any 300 of these 600 shares, it can, in accordance with the fact, be said that Ames & Co. had purchased them, and were holding them for the defendant, under the terms of their agency,—that the defendant should be entitled to the delivery of them at any time upon the payment of these sums.

I do not, of course, overlook Mr. Tilley's point, that Ames & Co., having other stock which they held for other customers free from any such burden, could at any time have met the defendant's demand. I think this point fails for the want of evidence to support it. Mr. Tilley relies on the evidence of Fraser; but that evidence in substance only amounts to this, that if the defendant had demanded his stock they could on payment of the balance of the purchase money have made delivery of it to him. I have no doubt that is so. I have no doubt, for instance, that, speaking after the event, Fraser could truly say that they could have got 300 shares from Chandler on the payment of the amount of Ames & Co.'s advances; but the statement really affords us no assistance whatever on the point at issue.

Nor, with respect, can I agree with the view taken by Mr. Justice Osler in the court below that the failure on the part of the defendant to set up a wrongful dealing with the stock by Ames & Co. helps the plaintiffs in

1907

CONMEE v. SECURITIES HOLDING CO.

Duff J.

considering the effect to be given to this evidence. It is not a question, in my view, whether Ames & Co. did something analogous to a conversion of the defendant's stock in procuring from Chandler & Co. an advance of a portion of the purchase money on the terms on which it was procured. The advance by Chandler & Co. and the purchase, must, I think, be treated as a single transaction; and the real question put in the form most favourable to Ames & Co. is: Had they as a result of the transaction in question 300 shares of the specified stock which on payment of the sums referred to they were legally entitled to appropriate and deliver to the defendant? To shew that they had was, I think, part of the respondents' case.

I have still to refer to Mr. Tilley's argument based upon the letter informing the defendant of the purchase dated 28th April, 1902, which is said to have been mailed to the defendant at Port Arthur. The letter contains a memorandum in the words:

> When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us.

It is argued that the defendant, having received this letter, by his silence acquiesced in Ames & Co.'s course of dealing. On the evidence I have no difficulty in concluding that the term expressed in the memorandum was not referred to in the conversation which occurred when the defendant gave his order; and it is not disputed that the purchase by Chandler & Co. was complete before the defendant received the letter, if he ever received it. Assuming that it came to his attention, it cannot, I think, with respect to transactions already past be held to alter the character of the authority conferred upon Ames & Co. as a result of what

happened at the time the order was given: *North-West Transportation Co.* v. *MacKenzie* (1).

To prevent misconception, I should add this. There is no sufficient evidence in this case, of any custom which would have the effect of modifying the reciprocal common law rights and duties of the defendant and Ames & Co. in respect of the matters I have dealt with. The case was argued by both counsel and I have dealt with it on that basis.

Appeal allowed with costs.

Solicitors for the appellant: *Millar, Ferguson & Hunter.*

Solicitors for the respondents: *Thomson, Tilley & Johnson.*

(1) 25 Can. S.C.R. 38.

1907

*April 4.
*May 7.

JAMES D. LAFFERTY.....APPELLANT;

AND

WILLIAM A. LINCOLN.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Constitutional law—British North America Act, 1867—*Provincial legislative jurisdiction—"Alberta Act,"* 4 & 5 *Edw. VII. c.* 3 (*D.*) —*Con. Ord. N.W.T.* (1898), *c.* 52—6 *Edw. VII. c.* 28 (*Alta.*)—*Medical profession—Practising without license—Criminal law—Practice—Special leave to appeal—R.S.C.* (1906), *c.* 139, *s.* 37 (*c*).

The "Medical Profession Act," 6 Edw. VII. ch. 28 (Alta.) is *intra vires* of the legislative jurisdiction of the Legislature of Alberta and a member of the College of Physicians and Surgeons of the North-West Territories may be validly convicted thereunder for the offence of practising medicine, surgery, etc., for gain and reward, in the Province of Alberta, without complying with its requirements as to registration and license, notwithstanding that the College of Physicians and Surgeons of the North-West Territories had not been previously dissolved and abolished by order of the Governor in Council, in conformity with the provisions of sec. 16(3) of "The Alberta Act."

Dobie v. *The Temporalities Board* (7 App. Cas. 136) distinguished.

APPEAL from the judgment of the Supreme Court of the North-West Territories, in banc, Harvey and Stuart JJ. dissenting, on a case stated, whereby the conviction of the respondent by the police magistrate of the City of Calgary, Alta., for an offence under the "Medical Profession Act," 6 Edw. VII. ch. 28, of the statutes of Alberta (1906), was quashed and the said

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

Act declared *ultra vires* of the Legislative Assembly of the Province of Alberta.

The case stated by the police magistrate for the opinion of the Supreme Court of the North-West Territories, was as follows:—

CASE STATED.

"This is a case stated for the opinion of this court pursuant to section 900 of the Criminal Code, 1892, and the amendments thereto, on the application in writing to me by said appellant (respondent in the Supreme Court of Canada).

"The appellant (Lincoln) was, on the 20th day of December, A.D. 1906, tried before me, Crispin E. Smith, police magistrate in and for the City of Calgary, in the Province of Alberta, upon an information laid before me by James D. Lafferty, the said respondent (now appellant), for that he, the said appellant, William A. Lincoln, on the thirteenth day of December, A.D. 1906, did in the City of Calgary, in the Province of Alberta, unlawfully practice medicine for gain, he the said Wiliam A. Lincoln not being then a registered person pursuant to "The Medical Profession Act," chapter 28 of the statutes of the Province of Alberta (1906), contrary to the provisions of said Act.

"Upon the hearing of said charge the following facts were established and proven before me.

"1. That on the third day of October, A.D. 1906, pursuant to and in accordance with the provisions of said "The Medical Profession Act," a council of the College of Physicians and Surgeons of the Province of Alberta referred to in said Act was duly elected

1907

LAFFERTY v. LINCOLN.

and on the 18th day of October, 1906, a registrar was duly appointed and a book on and since said date has been kept known as the "Alberta Medical Register," as provided by said Act.

"2. That the name of said William A. Lincoln was not entered and did not appear in the said "Alberta Medical Register," and that the said William A. Lincoln was an unregistered person within the meaning of said "The Medical Profession Act."

"3. That the said William A. Lincoln did on the said thirteenth day of December, 1906, practice medicine for gain in said City of Calgary.

"4. That the name of the said William A. Lincoln was on the 18th day of May, A.D. 1906, duly entered and thereafter remained in the book or register provided by "The Medical Profession Ordinance," chapter 53 of the Consolidated Ordinances of the Territories, 1898, and the amendments thereto.

"5. That there was at and prior to the date of said offence, and thereafter at the date of said information, a duly elected council of "The College of Physicians and Surgeons of the North-West Territories," and a duly appointed registrar, also the book or register, all as provided by said ordinance.

"6. That "The College of Physicians and Surgeons of the North-West Territories," the association incorporated by said ordinance had not been dissolved or abolished by any order of the governor in council.

"Upon the said facts proven before me on the 20th day of December, 1906, I did on said last mentioned date find the said William A. Lincoln guilty of the offence, in said information charged, and did thereupon convict him of said offence, and did order and adjudi-

cate him to pay forthwith the sum or penalty of one dollar and two dollars costs, subject to the opinion of said court.

"1. The appellant (Lincoln) submits that the said "The Medical Profession Act" of the Province of Alberta is *ultra vires* of the legislature of said province, and that the same is not and never has been in force in said province.

"2. That in any case sections 66 to 69 both inclusive of said Act, are *ultra vires* of said provincial legislature.

"3. That all persons registered under the provisions of the said "The Medical Profession Ordinance," including those so registered since the 9th day of May, 1906, are entitled to practice medicine for gain within said Province of Alberta without being registered under the provisions of the said "The Medical Profession Act."

"4. That for registration purposes said "Medical Profession Act" has no force or effect and does not in that respect come into operation until the said corporation, "The College of Physicians and Surgeons of the North-West Territories," has been abolished and dissolved by order of the Governor in Council.

"The questions submitted for the opinion of the court are:

"(*a*) Is the said "The Medical Profession Act," *intra vires* of the Legislature of the Province of Alberta?

"(*b*) Is the said Act in force since the 9th day of May, A.D. 1906?

"(*c*) Are sections 66 to 73 inclusive, *intra vires* of said legislature?

"(*d*) Are said sections in force in said province since May 9th, 1906?

1907

LAFFERTY v. LINCOLN.

(*e*) Do the provisions in said "Medical Profession Act," respecting registration come into force before the said corporation, "The College of Physicians and Surgeons of the North-West Territories," has been abolished and dissolved by order of the Governor in Council?

"(*f*) Are persons registered since May 9th, 1906, under the provisions of the said "The Medical Profession Ordinance," entitled to practice medicine for gain within the Province of Alberta without having been registered under the said "The Medical Profession Act" of said province?

"(*g*) Since the 9th day of May, 1906, and until dissolved and abolished by order of the Governor in Council, does the said association incorporated as "The College of Physicians and Surgeons of the North-West Territories," continue for any purpose or with any powers within the Province of Alberta other than to arrange for and effect the payment of its debts and liabilities and the division and disposition and transfer of its property?

"(*h*) Does registration since May 9th, 1906, in accordance with the provisions of "The Medical Profession Ordinance of the North-West Territories," entitle the persons so registered to all the rights and privileges provided by said ordinance?

"The said conviction is to be affirmed or quashed in accordance with the opinion of the court on said questions.

"Given under my hand this 20th day of December, A.D. 1906, at the City of Calgary, in said Province of Alberta.

"CRISPIN E. SMITH,
Police Magistrate."

Special leave for the appeal was granted, on motion by *Chrysler K.C.* (*Haydon,* contra), by the full court, under the provisions of the "Supreme Court Act," R.S.C. (1906), ch. 139, sec. 37(*c*), on the 19th of February, 1907.

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

Woods, Deputy Attorney-General of Alberta, and *Young* for the appellant.

J. A. Allen, for the respondent.

THE CHIEF JUSTICE.—The appeal is allowed with costs. I agree in the opinion of Mr. Justice Maclennan.

GIROUARD J.—I agree in the opinion of my brother Maclennan.

IDINGTON J.—This is an appeal from the judgment of the Supreme Court of the North-West Territories upon a case stated by the police magistrate of the City of Calgary arising out of the prosecution and conviction of the respondent under the provisions of the Medical Professions Act, ch. 28, of the statutes of Alberta.

The sole questions raised are whether or not the prohibition in the said statute against practising medicine without being registered in accordance with the terms of that statute, and the imposition of a penalty for breach of such prohibition are *intra vires* the powers of the Legislature of Alberta.

1907

LAFFERTY v. LINCOLN.

Idington J.

The Provinces of Alberta and Saskatchewan were carved out of the North-West Territories by Acts passed by the Dominion Parliament.

Prior to the passing of said Acts, the "Medical Professions Ordinance," ch. 52 of the Consolidated Ordinances of the North-West Territories, prohibited any one from practising medicine within the North-West Territories unless registered in accordance with the provisions of that Ordinance.

A prior Ordinance created a corporation known as the "College of Physicians and Surgeons of the North-West Territories," and this "Medical Professions Ordinance," ch. 52, I have referred to, continued the said corporation, and declared that all persons, registered members of such college under the provisions of the ordinance, should be a body corporate under the name of the "College of Physicians and Surgeons of the North-West Territories," and should have perpetual succession, etc., as therein provided.

To this college was confided the keeping of the register of medical practitioners, and many powers were given it in the way of examining candidates for admission, and admitting when passed to registration, and in other ways regulating the conduct of members of the medical profession.

When the provinces in question were being created it was found necessary to anticipate the dissolution of that corporation and similar corporations. Their existence as corporations would have continued as a matter of course. It seemed an obviously probable thing that a provincial body of the same character, and possibly endowed with the same powers, might in the course of time advantageously be created by each of the new legislatures for each province. It was

quite obvious also that, if that should take place, it was desirable the functions of the corporation, with territorial jurisdiction, so to speak, should cease. It no doubt was apprehended that in such event dissolution of the old territorial corporations could not be brought about by either province, and possibly could not be provided for by legislation of the Dominion Parliament. It seems likely that to provide for this difficulty was all that was within the intention of Parliament in enacting sub-sec. 3 I am about to refer to.

It certainly would fall within the usual powers given to provinces of the Dominion; to regulate the practice of medicine; to regulate the practice of law, or other like professions; to fix the standards of qualification entitling such persons to practice; to prohibit others respectively not so qualified from practising; and if need be, to carry into effect such powers, to create colleges or such other corporations as the Legislature might deem proper.

These ample powers were certainly given and exist under sub-sec. 1, sec. 16 of the Alberta Act, unless the contention set up by respondents and upheld by the Supreme Court of the North-West Territories be correct. That contention is this, that sub-sec. 3 of said Act restricts this power of sub-sec. 1. Sub-sec. 3 reads as follows:—

> 3. All societies or associations incorporated by or under the authority of the Legislature of the North-West Territories existing at the time of the coming into force of this Act which include within their objects the regulation of the practice of or the right to practice any profession or trade in the North-West Territories, such as the legal or the medical profession, dentistry, pharmaceutical chemistry and the like, shall continue, subject, however, to be dissolved and abolished by order of the Governor in Council and each of such societies shall have power to arrange for and effect the payment of

1907

LAFFERTY v. LINCOLN.

Idington J.

its debts and liabilities, and the division, disposition or transfer of its property.

It is to be noted that the corporation alone and what is enacted relative to its creation, continuation and dissolution is all this refers to. It does not refer to the numerous other legislative enactments found in chapter 52 above cited. It is urged that the words "shall continue" in this sub-section cannot be given effect to unless the powers given by the consolidated Ordinance, chapter 52, are to be held as continued in full force and effect at least until the Governor in Council shall have dissolved the corporation created as above and continued thereunder.

It seems to me that we must, in this as in many other cases, test this pretention by finding whether it lies or not within the general purview of the Alberta Act to reserve to this college, instead of the Legislature, this regulating power. Why should there be such an anomaly as withholding from these provinces the right to legislate upon such a wide field for legislative action as implied in this contention?

It does not appear that there existed any reason for the making of this distinction.

It certainly could not be contended that the Dominion Parliament had intended to reserve to itself, if it could, the right to alter the Medical Professions Act. Where is the legislative power supposed to rest if not in the newly created Legislature?

If it is replied that Parliament only intended the continuation as a temporary expedient, then what body would we expect to have power to determine the period of its existence?

The Governor in Council is given the power to dissolve the corporations in question, but the executive

is not given the power to amend the provision of the Act in any respect.

This sub-sec. 3, when we look at it in the light of these considerations, obviously was designed to provide for the dissolution of these corporations, and the transfer of their property to some similar body.

It describes the class and, of abundant caution, needlessly but I think harmlessly, uses the words "shall continue" from which so very much is sought to be drawn by way of implication.

It was urged by respondent's counsel we should not find by implication the power to legislate that is claimed to have been given the Legislature.

It is not by implication at all that the power is given the Legislature. Section 16, sub-sec. 1 gives it clearly and explicitly in the power to alter existing laws save those thereby excluded unless restricted by sub-sec. 3. And all that was urged against giving an interpretation that rests upon mere implication is applicable to the interpretation by respondent's counsel of this sub-sec. 3. Not a word or line of it expressly provides such a restriction as has been suggested.

It is mere implication that the alleged restriction rests upon.

It is implication too of a far fetched kind. There is not the slightest reason why the continuation for a temporary purpose, of a corporate existence, that is intended to subserve a public and not a private interest, should imply that the duties intrusted to it as such are to extend and continue beyond the necessities of such temporary purpose. And moreover less so when, as I conceive, the temporary purpose was simply to await the action of the newly created legislatures or legislature.

1907

LAFFERTY v. LINCOLN.

Idington J.

It was but a vessel to carry to some other place or sphere of action the seeds of a possibly regenerated activity that was designed and nothing more.

It had fulfilled its functions and was only to be prepared for death in a decent and respectable manner.

The appeal should be allowed with costs here and in the court below if insisted upon.

MACLENNAN J.—Appeal from the judgment of the Supreme Court of the North-West Territories, setting aside a conviction of the respondent for practising medicine for gain within the Province of Alberta, without registration under the Medical Profession Act of Alberta, ch. 28 of the statutes of 1906.

Before the Alberta Act, statute of Canada, 4 & 5 Edw. VII. (1905), ch. 3, establishing a new province out of what before was the North-West Territories, there existed a corporation called "The College of Physicians and Surgeons of the North-West Territories," the members of which, and those admitted from time to time by the council of the said corporation, had the exclusive right to practice medicine, surgery, etc., for gain and reward within the limits of the territories. That corporation was incorporated by the legislature of the territories, and had been in existence for many years. The ordinance made practice contrary to its provisions illegal and punishable by fine not exceeding $100.

On the 20th day of July, 1905, the "Alberta Act" (Canada) was passed and, by section 3, declared that the British North America Act, 1867, should apply to the new province in the same way and to the same extent as to the provinces theretofore comprised in

the Dominion, as if Alberta had been one of them, except so far as varied *"by this Act,"* and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more, and not the whole of the said provinces.

By section 16(1) provision is made for a continuance within the new province of all laws, orders and regulations in force at the passing of the Act, until repealed, abolished or altered by the proper authority, that is, either by Parliament or by the newly created legislature.

Sec. 16 (3) provides that all societies or associations incorporated by or under the authority of the Legislature of the North-West Territories existing at the time of the coming into force of this Act, which include within their objects the regulation of the practice of, or the right to practice any profession or trade in the North-West Territories, such as the legal or medical professions, dentistry, pharmaceutical chemistry and the like, shall continue, subject, however, to be dissolved and abolished by order of the Governor in Council, and each of such societies shall have power to arrange for and effect the payment of its debts and liabilities, and the division, disposition or transfer of its property.

The Alberta statute makes provision for the medical professions in the new province very similar to those of the "Territories Act," but confined to the province. It enacts and directs that all qualified members of the territories' college are qualified for membership in the new one, and that any who might be in arrears for annual fees would, on paying their fees to the old college, be qualified for membership in the new.

It provides for the admission and registration of persons who were not members of the old college, on compliance with certain rules and regulations, and

1907

LAFFERTY v. LINCOLN.

Maclennan J.

forbids practice for reward within Alberta without registration, under a penalty.

Section 16(3) is what is relied on to support the judgment. It is said that the Act expressly provides that the associations mentioned are *to continue,* and that the meaning of that must be that until the Governor in Council dissolves the old college, the Legislature can make no provision for medical education or practice within the province.

I cannot assent to that view. It was to continue until it was dissolved by the Governor in Council, which might be at any time. It was not continued for active operation, but only for winding up, paying its debts and liabilities, if any, and the division and disposition of its property.

It is obvious that, unless provision was made for something to take the place of such societies, a most inconvenient state of things would result whenever the Governor in Council exercised the power vested in him. The Governor in Council could make no such provision. It is not pretended that Parliament could do so, and unless the province could do so no other power could but the Imperial Parliament.

There is nothing in the Act limiting in any way the jurisdiction over property and civil rights in the province, and the incorporation of companies with provincial objects conferred by the 93rd section of the British North America Act, 1867.

The Act does not assume to amend or alter or deal in any way with the Territorial Act, or with the corporation thereby incorporated. It deals solely with individuals. It says, no person shall practice for reward within the province without certain prescribed qualifications, and if he do he shall be liable to a pen-

alty. The Act of Parliament says it shall continue, and so it does. As a corporation it has not been interfered with nor affected in the slightest degree.

Great reliance was placed in the court below on *Dobie* v. *The Temporalities Board*(1), but that was a very different case from the present. The "Temporalities Act" was one which had been passed by the Province of Canada and which after the British North America Act, 1867, could not have been validly enacted by either Ontario or Quebec. Parliament could have passed it, because it concerned persons and trusts and property in both provinces. And the Quebec Act assumed to amend it in express terms.

In the present case, however, the Act, which has been held invalid, does not interfere in the slightest degree with the "Territorial Act," or with the property or rights of the college incorporated thereby. It simply says no one shall practise medicine for reward in Alberta after the passing of this Act without a particular qualification.

I agree with the conclusion and reasons of Stuart J. in the court below, and am of opinion that the appeal should be allowed and the conviction confirmed.

DUFF J.—I concur for the reasons stated by His Lordship Mr. Justice Idington.

Appeal allowed with costs.

Solicitor for the appellant: *James Muir.*
Solicitor for the respondent: *J. A. Allan.*

(1) 7 App. Cas. 136

INDEX.

ACCOUNT—*Practice—Statute of Limitations—Agents or partners—Reference.*] By agreement between them the Hamilton Brass Mfg. Co. was appointed agent of the Barr Cash Co. for sale and lease of its carriers in Canada at a price named for manufacture; net profits to be equally divided and quarterly returns to be furnished, either party having liberty to annul the contract for non-fulfilment of conditions. The agreement was in force for three years when the Barr Co. sued for an account, alleging failure to make proper returns and payments. *Held,* reversing the judgment of the Court of Appeal, Girouard and Davies JJ. dissenting, that the accounts should be taken for the six years preceding the action only.—On a reference to the Master the taking of the accounts was brought down to a time at which defendants claimed that the contract was terminated by notice. The Court of Appeal ordered that they should be taken down to the date of the Master's report. —*Held,* that this was a matter of practice and procedure as to which the Supreme Court would not entertain an appeal. HAMILTON BRASS MANUFACTURING CO. *v.* BARR CASH AND PACKAGE CARRIER CO. **216**

2——*Breach of contract—Breach of trust —Assessment of damages—Sale of mining rights—Promotion of company—Failure to deliver securities—Principal and agent—Account—Evidence—Salvage —Indemnity for necessary expenses—Laches—Estoppel* **198**

See TRUSTS 1.

3——*Officer of the Crown—Forged cheques—Payment by bank—Representation by drawee—Implied guarantee—Estoppel —Acknowledgment of bank statements—Mistake* **258**

See BANKS AND BANKING 2.

4——*Placer mining—Disputed title—Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts — Sinister intention — Conversion — Blending materials—Assessment of damages—Mitigating circumstances—Compensation for necessary expenses—Estoppel—Standing-by—Acquiescence* . . **516**

See MINES AND MINERALS 2.

ACCRETION—*Construction of will — Usufruct—Substitution — Partition between institutes—Validating legislation —60 V. c. 95 (Q.)—Construct of statute —Restraint of alienation—Interest of substitutes—Devise of property held by institute under partition—Devolution of corpus of estate es nature—Res judicata—Arts.* 868, 948 *C.C.* **1**

See WILL 1.

ACTION—*Negligence—Navigation of inland waters — Collision — Government ships and vessels—"Public work"—The Exchequer Court Act," s.* 16—*Construction of statute—Right of action.*] His Majesty's steam-tug "Champlain," while navigating the River St. Lawrence, at some distance from a place where dredging was being carried on by the Government of Canada, and engaged in towing an empty mud-scow, owned by the Government, from the dumping ground back to the place where the dredging was being done, came in collision with the suppliant's steam barge, which was also navigating the river, and the barge sustained injuries. *Held,* affirming the judgment of the Exchequer Court of Canada, that there could be no recovery against the Crown for damages suffered in consequence of negligence of its officers or servants, as the injury had not been sustained on a public work within the meaning of the sixteenth section of the "Exchequer Court Act." *Chambers* v. *Whitehaven Harbour Commissioners* ([1899] 2 Q.B. 132); *Hall* v. *Snowden, Hubbard & Co.* ([1899] 2 Q.B. 136), *Lowth* v. *Ibbotson* ([1899] 1 Q.B. 1003),

ACTION—*Continued.*

Farnell v. *Bowman* (12 App. Cas. 643) and *The Attorney-General of the Straits Settlements* v. *Weymss* (13 App. Cas. 192), referred to. PAUL *v.* THE KING 126

2——*Trespass — Possession — Evidence —Expropriation—Railway.*] The casual use of land for pasturing cattle in common with other persons does not constitute evidence of possession sufficient to maintain an action for trespass. Judgment appealed from (1 East. L.R. 524) reversed. TEMISCOUATA RY. CO. *v.* CLAIR. 230

AND *see* APPEAL 4.

3——*Action for negligence—Practice—Assessment of damages—Funeral expenses.*] In an action by the father of a person whose death was occasioned by the negligence of the defendants, it was held that the plaintiff could not recover funeral and other expenses incurred, as damages in the action. TORONTO RY. CO. *v.* MULVANEY 327

AND *see* NEGLIGENCE 5.

4——*Breach of trust by Crown—Purchase of debentures out of Common School Fund—Knowledge of misappropriation of moneys—Payment of interest —Statutory prohibition—Evasion of statute—Estoppel against Crown—Adding parties—Practice* 62

See QUEBEC NORTH SHORE TURNPIKE ROAD TRUST.

5——*Breach of contract—Breach of trust—Assessment of damages—Sale of mining rights—Promotion of company—Failure to deliver securities—Principal and agent—Account—Evidence—Salvage —Indemnity for necessary expenses—Laches—Estoppel* 198

See TRUSTS 1.

6——*Negligence—Trespass—Horse racing—Intruder upon racetrack—Carelessness* 226

See NEGLIGENCE 4.

7——*Vacating judgment—Appeal—Jurisdiction—Matter in controversy—Tierce*

ACTION—*Continued.*

opposition—Arts. 1185, 1188, *C. P. Q.— R.S.C.* (1886) *c.* 135, s. 29. 236

See OPPOSITION.

8——*Crown—Banks and banking — Forged cheque—Payment — Representation by drawee—Implied guarantee— Estoppel — Asknowledgment of bank statements—Liability of indorsers— Mistake—Money had and received.* .258

See BANKS AND BANKING 2.

9——*Admiralty law—Foreign bottoms— Collision in foreign waters—Jurisdiction of Canadian courts* 303

See SHIPS AND SHIPPING 3.

10——*Public work — Contract—Change in plans and specifications—Waiver by order in council—Powers of executive— Construction of statute—Directory and imperative clauses—Words and phrases —"Stipulations"—Exchequer Court Act, s.* 33*—Extra works—Engineer's certificate—Instructions in writing—Schedule of prices—Compensation at increased rate—Damages—Right of action—Quantum meruit.* 501

See CONTRACT 5.

11—— *Subaqueous mining — Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice—Statement of claim—Cause of action* 542

See MINES AND MINERALS 3.

12——*Vendor and purchaser—Sale of land—Formation of contract—Conditions—Acceptance of title—New term— Statute of Frauds—Principal and agent —Secret commission—Avoidances of contract—Fraud—Specific performance.* 588

See CONTRACT 6.

ADMIRALTY LAW—*Shipping — Collision—Violation of rules not affecting accident—Steering wrong course.*] The Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the local judge unless the appellant can point out

ADMIRALTY LAW—*Continued.*

his mistake and shew conclusively that the judgment is entirely erroneous. *The Picton* (4 Can. S.C.R. 648) followed. —A steamer coming up Halifax harbour ran into a schooner striking her stern on the port side. No sound signals were given. The green light of the schooner was seen on the steamer's port bow and the latter starboarded her helm to pass astern and then ported. She then was so close that the engines were stopped but too late to prevent the collision. *Held,* that the steamer alone was to blame for the collision.—*Held,* also, that though under the rules the schooner should have kept her course and also was to blame for not having a proper lookout neither fault contributed to the collision. SS. "ARRANMORE" *v.* RUDOLPH. 176

2—— *Foreign bottoms — Collision in foreign waters—Jurisdiction of Canadian courts.*] A foreign vessel passing through waters dividing Canada from the United States under a treaty allowing free passage to ships of both nations is not, even when on the Canadian side, within Canadian control so as to be subject to arrest on a warrant from the Admiralty Court.—A warrant to arrest a foreign ship cannot be issued until she is within the jurisdiction of of the court.—*Quære.* Have the Canadian Courts of Admiralty the same jurisdiction as those in England to try an action *in rem* by one foreign ship against another for damages caused by a collision in foreign waters? Judgment of the Exchequer Court, Toronto Admiralty District (10 Ex. C.R. 1) reversed, Idington J. dissenting. THE SHIP "D. C. WHITNEY" *v.* ST. CLAIR NAVIGATION CO. 303

3——*Maritime law—Collision — Negligence—Tug and tow — Negligence of tow.*] A tug with the ship "Wandrian" in tow left a wharf at Parsboro', N.S., to proceed down the river and get to sea. The schooner "Helen M." was at anchor in the channel and the tug directed its course so as to pass her on the port side when another vessel was seen coming out from a slip on that side. The tug then, when near the "Helen M." changed her course, without giving any signal and tried to cross her bow to pass down on the starboard side and in doing so the "Wandrian" struck her, inflicting serious injury. In an action against the "Wandrian" by the owners of the "Helen M." the captain of the former insisted that the schooner was in the middle of the channel, which was about 400 feet wide, but the local judge found as a fact that she was on the eastern side. *Held,* affirming the judgment of the local judge (11 Ex. C.R. 1) that the navigation of the tug was faulty and shewed negligence, that if the "Helen M." was on the eastern side of the channel as found by the judge there was plenty of room to pass on her port side, and if, as contended, she was in the middle of the channel she could easily have been passed to starboard; and that the attempt to cross over and pass to starboard when she was so near the "Helen M." as to render a collision almost inevitable was negligence on the tug's part; and that the "Helen M." exercised proper vigilance and was not negligent in failing to slacken her anchor chain as the "Wandrian" was too close and had not signalled.—*Held,* also, that the tow was liable for such negligence in the navigation of the tug. THE "WANDRIAN" *v.* HATFIELD. 431

4——*Negligence—Navigation of inland waters—Collision — Government ships and vessels—"Public work"—The Exchequer Court Act, s.* 16*—Construction of statute—Right of action.* 126

See NEGLIGENCE 3.

AGENCY—*Account—Statute of Limitations—Agents or partners—Reference—Practice.* 216

See ACCOUNT 1.

AND *see* PRINCIPAL AND AGENT.

APPEAL— *Jurisdiction—Intervention — Matter in controversy—Judicial proceeding—R.S.C. c.* 135, *s.* 29*—Equal division of opinion—Dismissal without costs.*] An intervention filed under the provisions of the Code of Civil Procedure of the Province of Quebec is a "judicial proceeding" within the meaning of section 29 of the "Supreme and Exchequer Courts Act," and a final judgment thereon is appealable to the Supreme Court

APPEAL—*Continued.*

of Canada where the matter in controversy upon the intervention amounts to the sum or value of $2,000 without reference to the amount demanded by the action in which such intervention has been filed. *Walcott* v. *Robinson* (11 L.C. Jur. 303); *Miller* v. *Déchêne* (8 Q.L.R. 18); *Turcotte* v. *Dansereau* (26 Can. S.C.R. 578); and *King* v. *Dupuis* (28 Can. S.C.R. 388) followed. *The Atlantic and North-West Railway Co.* v. *Turcotte* (Q.R. 2 Q.B. 305); *Allan* v. *Pratt* (13 App. Cas. 780), and *Kinghorn* v. *Larue* (22 Can. S.C.R. 347) distinguished. Girouard J. dissented. On an equal division of opinion among the judges, who heard the case on the merits of the appeal, the appeal stood dismissed without costs. COTÉ *v.* THE JAMES RICHARDSON CO. 41

2——*Appeal — Jurisdiction — Discretion of Governor in Council—Stated case —Railway subsidies—Construction of statute—3 Edw. VII. c. 57—Conditions of contract—Estimating cost of constructing line of railway—Rolling stock and equipment.*] Where the jurisdiction of the Supreme Court of Canada to entertain an appeal was in doubt, but it was considered that the appeal should be dismissed on the merits, the court heard and decided the appeal accordingly. (Cf. *Bain* v. *Anderson & Co.* (28 Can. S.C.R. 481). CANADIAN PACIFIC RY. CO. *v.* THE KING; (RE PHEASANT HILLS BRANCH) 137

AND *see* RAILWAYS 2.

3——*Criminal law—Crown case reserved —Appeal—Extension of time for notice of appeal—"Criminal Code" s.* 1024—*Order after expiration of time for service of notice—Jurisdiction.*] The power given by section 1024 of the "Criminal Code" (R.S.C. (1906) c. 146) to a judge of the Supreme Court of Canada to extend the time for service on the Attorney-General of notice of an appeal in a reserved Crown case may be exercised after the expiration of the time limited by the Code for the service of such notice. *Banner* v. *Johnston* (L.R. 5 H.L. 157) and *Vaughan* v. *Richardson* (17 Can. S.C.R. 703) followed. GILBERT *v.* THE KING. 207

APPEAL—*Continued.*

4——*Order extending time—Jurisdiction —R.S.C. c.* 135, *s.* 42—*Practice.*] The court refused to entertain a motion to quash the appeal on the ground that it had not been taken within the sixty days limited by the statute and that an order by a judge of the court appealed from alter the expiration of that time was *ultra vires* and could not be permitted under section 42 of the "Supreme and Exchequer Courts Act," R.S.C. c. 135. TEMISCOUATA RY. CO. *v.* CLAIR. . .230

AND *see* TRESPASS 1.

5——*Vacating judgment — Jurisdiction —Matter in controversy—Tierce opposition—Arts.* 1185-1188 *C.P.Q.—R.S.C. c.* 135, *s.* 29.] A creditor of an insolvent with a claim for $600 filed a *tierce opposition* to vacate a judgment declaring the respondent to be the owner of the business of a restaurant and the liquor license accessory thereto, alleged to be worth over $5,000. The opposition was dismissed on the ground that, under the circumstances of the case, the company had no *locus standi* to contest the judgment. On motion to quash an appeal to the Supreme Court of Canada: *Held*, that as there was no pecuniary amount in controversy an appeal would not lie. *Coté* v. *The James Richardson Co.* (38 Can. S.C.R. 41) distinguished. CANADIAN BREWERIES CO. *v.* GARIÉPY. . .236

6——*Appeal—Action for declaration and injunction*—60 & 61 *V. c.* 34, *s.* 1(*d.*) *—Municipal corporation—Water rates— Discrimination.*] The Act 60 & 61 V. 34(D.) relating to appeals from the Court of Appeal for Ontario does not authorize an appeal in an action claiming only a declaration that a municipal by-law is illegal and an injunction to restrain its enforcement. A by-law providing for special water rate from certain industries does not bring in question "the taking of an annual or other rent, customary or other duty or fee" under s. 1 (*d.*) of the Act (R.S. 1906. c. 139, s. 48(*d*). CITY OF HAMILTON *v.* HAMILTON DISTILLERY CO; CITY OF HAMILTON *v.* HAMILTON BREWING ASSOCIATION. 239

AND *see* MUNICIPAL CORPORATION 2.

APPEAL—*Continued.*

7——*Practice—Crown case reserved—Reserved questions—Dissent from affirmance of conviction—Jurisdiction.*] Two questions were reserved by the trial judge for the opinion of the Court of Appeal but he refused to reserve a third question, as to the correctness of his charge on the ground that no objection to the charge had been taken at the trial. The Court of Appeal took all three questions into consideration and dismissed the appeal, there being no dissent from the affirmance of the conviction on the first and third questions, but one of the judges being of opinion that the appeal should be allowed and a new trial ordered upon the second question reserved. On an appeal to the Supreme Court of Canada, the majority of the court, being of opinion that the appeal should be dismissed, declined to express any opinion as to whether or not an appeal would lie upon questions as to which there had been no dissent in the court appealed from, but it was held *per* Girouard J.—That the Supreme Court of Canada was precluded from expressing an opinion on points of law as to which there had been no dissent in the court appealed from. *McIntosh* v. *The Queen* (23 Can. S.C.R. 180) followed. *Viau* v. *The Queen* (29 Can. S.C.R. 90). *The Union Colliery Company* v. *The Queen* (31 Can. S.C.R. 81) and *Rice* v. *The King* (32 Can. S. C.R. 480) referred to. GILBERT *v.* THE KING. **284**

AND *see* CRIMINAL LAW 2.

8——*Findings of fact—Practice.*] The judgment appealed from was reversed, on the ground of captation and undue influence, but the Supreme Court of Canada refused to interfere with the concurrent findings of both courts below against the contention as to the testator's unsoundness of mind. MAYRAND *v.* DUSSAULT **460**

AND *see* WILL 2.

9——*Amount in controversy—Creditor's action—Transfer of cheque—Preference.*] An action was brought by creditors, on behalf of themselves and all other creditors of an insolvent to set aside the transfer of a cheque for $1,172.27 made by the insolvent to S. & Son as being a preference and therefore void. At the trial the action was dismissed and this judgment was affirmed by the Divisional Court (12 Ont. L.R. 91) and by the Court of Appeal (13 Ont. L.R. 232). On appeal to the Supreme Court of Canada: *Held*, Girouard J. dissenting, that the only matter in controversy was the property in the sum represented by the cheque and such sum being more than $1,000 the appeal would lie. ROBINSON, LITTLE & CO. *v.* SCOTT & SON. **490**

10—— *Railway Act—Expropriation — Appeal from award—Choice of forum—Curia designata.*] By section 168 of 3 Edw. VII. c. 58 amending the Railway Act, 1903, (R.S.C. (1906) c. 37, s. 209) if an award by arbitrators on expropriation of land by a railway company exceeds $600 any dissatisfied party may appeal therefrom to a Superior Court which in Ontario means the High Court or the Court of Appeal ("Interpretation Act, R.S. [1906] c. 1, s. 34, s.-s. 26). *Held*, that if an appeal from an award is taken to the High Court there can be no further appeal to the Supreme Court of Canada which cannot even give special leave. JAMES BAY RY. CO. *v.* ARMSTRONG. **511**

11——*Criminal law—Stated case—Dissent in Court of Appeal—Practice—Special leave for appeal—R.S.C.* (1906) *c.* 139, *s.* 37(*c*).] In an appeal from the judgment of the Supreme Court of the North-West Territories, *in banc*, whereby the conviction of the respondent was quashed, two of the judges dissenting, special leave for the appeal was granted on motion before the full court, under the provisions of R.S.C. (1906) c. 139, s. 39(*c*) on the 19th of February, 1907. LAFFERTY *v.* LINCOLN. **620, 625**

AND *see* CONSTITUTIONAL LAW 1.

12——*Account—Statute of Limitations —Agents or partners — Reference — Practice* **216**

See ACCOUNT 1.

ARBITRATION AND AWARD—*Appeal —Railway Act—Expropriation —Appeal from award — Jurisdiction — Choice of forum—Curia designata* 511

See APPEAL 10.

ASSESSMENT AND TAXATION—*Municipal corporation — Exemption from taxes—Resolution of council—Discrimination—Establishment of industry*—36 *V. c.* 81, *s.* 1 (*N.B.*).] By s. 1 of 36 V. c. 81, the New Brunswick Legislature authorized the town council of Woodstock from time to time to "give encouragement to manufacturing enterprises within the said town by exempting the property thereof from taxation for a period of not more than ten years by a resolution declaring such exemption." In 1892 the council passed the following resolution: "That any company establishing a woollen mill in the Town of Woodstock be exempted from taxation for a period of ten years." *Held, per* Davies, Idington and Maclennan JJ. that this resolution provided for discrimination in favour of companies and against individuals who might establish a woollen mill or mills in the town and was therefore void. *City of Hamilton* v. *Hamilton Distillery Co.* (38 Can. S.C.R. 239) followed.—*Held, per* Davies J.—The resolution exempting any company and not any property of a company was too indefinite and uncertain to be the basis for a claim for exemption.—In 1893 a woollen mill was established in Woodstock by the Woodstock Woollen Mills Co., and operated for some years without taxation. In 1899 the mill was sold under execution and two months later the Carleton Woollen Co., (appellants) were incorporated and acquired the said mill from the purchaser at the sheriff's sale and have operated it since.—*Held*, that the appellants could not by so acquiring the mill which had been exempted be said to have "established a woollen mill" without shewing that when it was acquired it had ceased to exist as such which they had not done. Judgment appealed from (37 N.B. Rep. 545), affirming that of Barker J. at the hearing (3 N.B. Eq. 138) affirmed. CARLETON WOOLLEN CO. *v.* TOWN OF WOODSTOCK. . 411

2——*Appeal—Action for declaration and injunction*—60 *&* 61 *V. c.* 34, *s.* 1 (*D.*)

ASSESSMENT AND TAXATION—*Con.*

—Municipal corporation—Water rates—Discrimination 239

See MUNICIPAL CORPORATION 2.

ASSIGNMENT—*Banks and banking — Security for advances—Assignment of goods—Claim on proceeds of sale*—53 *V. c.* 31, *s.* 74(*D.*) 187

See BANKS AND BANKING 1.

2——*Insolvency —Fraudulent preference —Security to creditor—Knowledge of insolvency—R.S.O.* (1897) *c.* 147, *s.* 2, *ss.* 2 *and* 3 577

See INSOLVENCY.

AWARD—*Appeal—Railway Act—Expropriation—Appeal from award—Jurisdiction—Choice of forum—Curia designata.* 511

See APPEAL 10.

BANKRUPTCY.

See INSOLVENCY.

BANKS AND BANKING—*Security for advance—Assignment of goods—Claim on proceeds of sale*—53 *V. c.* 31, *s.* 74 (*D.*).] A bank to which goods have been transferred as security for advances under section 74 of the "Bank Act, 1890," can follow the proceeds of sale of said goods in the hands of a creditor of the assignor to whom the latter has paid them when the purchaser knew, or must be presumed to have known, that the same belonged to the bank. UNION BANK OF HALIFAX *v.* SPINNEY. 187

2—— *Crown—Banks and banking — Forged cheques—Payment — Representation by drawee—Implied guarantee — Estoppel — Acknowledgment of bank statements — Liability of indorsers — Mistake — Action—Money had and received.*] A clerk in a department of the Government of Canada whose duty was to examine and check its account with the Bank of Montreal, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the drawee to the several other

BANKS AND BANKING—*Con.*

banks, on presentation, and charged against the Receiver-General on the account of the department with the bank. None of the cheques were marked with the drawee's acceptance before payment, In the meantime, the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques and charged against the Receiver-General: *Held*, affirming the judgment appealed from (11 Ont. L.R. 595), that the bank was liable unless the Crown was estopped from setting up the forgery. *Per* Davies, Idington and Duff JJ., that estoppel could not be invoked against the Crown. *Per* Girouard and Maclennan JJ., that, apart from the question of the Crown being subject to estoppel, under the circumstances of this case a private person would not have been estopped had his name been forged as drawer of the cheques. *Per* Davies and Idington JJ.—The acknowledgment by the accountant of the department of the correctness of the statements furnished by the bank, being made under a mistake as to the facts, the accounts could be re-opened to have the mistake rectified.—The defendant bank made claims against the other banks, as third parties, as indorsers or as having received money paid by mistake, for the reimbursement of the several amounts so paid to them, respectively. On these third party issues, it was held *per* Girouard and Maclennan JJ.—The drawee, having paid the cheques on which the name of its customer was forged, could not recover the amounts thereof from holders in due course. *Price* v. *Neal* (4 Burr. 1355) followed. *Per* Davies and Idington JJ. —As the third party banks relied upon the representation that the cheques were genuine, which was to be implied from their payment on presentation, and subsequently paid out of the funds to their depositor or on his order, the drawee was estopped and could not recover the amounts so paid from them either as indorsers or as for money paid to them under mistake. In the result, the judgment appealed from (11 Ont. L.R. 595) was affirmed. BANK OF MONTREAL *v.* THE KING **258**

BETTING—*Criminal law — Disorderly house — Common betting house — Place for betting—Betting booth—Race-course of incorporated association—Crim. Code*, 1892, *ss.* 197, 204—*Crim. Code*, 1906, *ss.* 227, 235—*Construction of statute—Interpretation of terms* **382**

See CRIMINAL LAW 3.

BILLS AND NOTES—*Crown—Banks and banking — Forged cheques—Payment — Representation by drawee — Implied guarantee — Estoppel — Acknowledgment of bank statements—Liability of indorsers—Mistake—Action—Money had and received* **258**

See BANKS AND BANKING 2.

BOUNDARY — *Construction of deed — Description of land — License to cut timber — Ambiguitas latens—Evidence—Boundary of timber area* **75**

See DEED 1.

2——*Title to land — Plan of survey — Evidence—Onus of proof—Findings of jury—Error—New trial* **336**

See NEW TRIAL 2.

BROKER—*Stock — Purchase on margin —Pledge of stock by broker—Possession for delivery to purchaser.*] C. instructed A. & Co., brokers, to purchase for him on margin 300 shares of a certain stock, paying them $3,000, leaving a balance of $6,225 according to the market price at the time. A. & Co. instructed brokers in Philadelphia to purchase for them 600 shares of the stock, paying $9,000, nearly half the price, and pledged the whole 600 for the balance. The Philadelphia brokers pledged these shares with other securities to a bank as security for indebtedness and later drew on A. & Co. for the balance due thereon, attaching the scrip to the draft which was returned unpaid and 475 of the 600 shares were then sold and the remaining 125 returned to A. & Co. In an action by the latter to recover from C. the balance due on the advance to purchase the shares with interest and commission: *Held*, reversing the judgment of the Court of Appeal (12 Ont. L.R. 435. affirming 10 Ont. L.R. 159), Fitzpatrick C.J. dissenting, that the broker had no right to hypothecate the shares with others for a greater sum than

BROKER—*Continued.*

was due from C. unless they had an agreement with the pledgee whereby they could be released on payment of said sum; that there never was a time when they could appropriate 300 of the shares pledged for delivery to C. on paying what the latter owed; and that, therefore, they were not entitled to recover.—The bought note of the transaction contained this memo: "When carrying stock for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us." —*Held, per* Davies and Idington JJ., that this did not justify the brokers in pledging the shares for a sum greater than that due from the customer. *Per* Duff J.—That the shares were purchased before this note was delivered, and it could not alter the character of the authority conferred on the brokers; and that no custom was proved which would modify the common law right and duties of the brokers and their customer in the transaction. CONMEE *v.* SECURITIES HOLDING CO.....601

BUILDING LOAN — *Mortgage — Money advanced to construct buildings — Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagee's rights — Redemption — Costs.* 557

See MORTGAGE.

BY-LAW—*Municipal corporation—Water rates—Discrimination.*] A by-law providing for special water rate from certain industries does not bring in question "the taking of an annual or other rent, customary or other duty or fee" under s. 1(*d.*) of the Act (R.S. 1906, c. 139, s. 48(*d.*)).—By 24 V. c. 56, s. 3 (Can.) the city council of Hamilton was "empowered from time to time to establish by by-law a tariff of rents or rates for water supplied or ready to be supplied in the said city from the said water works." *Held,* affirming the judgment of the Court of Appeal (12 Ont. L.R. 75) which sustained the verdict at the trial (10 Ont. L.R. 280) that the rate for water supplied to any class of consumers must be an equal rate to all members of such class and a by-law providing for a rate on certain manufacturers higher than that to be paid by

BY-LAW—*Continued.*

others was illegal. *Attorney-General* v. *City of Toronto* (23 Can. S.C.R. 514) followed. CITY OF HAMILTON *v.* HAMILTON DISTILLERY CO.; CITY OF HAMILTON *v.* HAMILTON BREWING ASSOCIATION..239

AND *see* MUNICIPAL CORPORATION.

CANADA TEMPERANCE ACT—*Canada Temperance Act—Conviction—"Criminal case"—R.S.C. c. 135, s. 32—Habeas corpus — Penalty — "Not less than* $50"*— Conviction for* $200.] A commitment on conviction for an offence against Part II. of the "Canada Temperance Act" is a commitment in a criminal case under s. 32 of R.S.C. c. 135 (R.S. 1906, c. 139, s. 62) which gives a judge of the Supreme Court of Canada power to issue a writ of *habeas corpus.* By 4 Edw. VII. c. 41 (R.S. 1906, c. 152, s. 127) for a first offence against Part II. of the "Canada Temperance Act" a fine may be imposed of "not less than $50" and for a second offence of "not less than $100." *Held,* that for a first offence the justice cannot impose a fine of more than $50. Maclennan J. dissenting. On application to a judge for a writ of *habeas corpus* he may refer the same to the court which has jurisdiction to hear and dispose of it. Idington and Maclennan J. dissenting. IN RE RICHARD.....394

CANALS—*Navigation—Trent canal crossing—Swing bridge — Cost of construction — Maintenance—Order in council.*] The C.P. Ry. Co. applied for liberty to build a bridge over the Otanabee, a navigable river, undertaking to construct a draw in it should the Government deem it necessary. An order in council was passed providing that "the company * * * shall construct either a swing in the bridge now in question * * * the cost to be borne by themselves or else a new swing bridge over the contemplated canal (Trent Valley Canal) in which case the expense incurred over and above the cost of the swing itself and the necessary pivot pier therefor shall be borne by the Government." A new swing bridge was constructed over the canal by agreement with the company. *Held,* that the words "the cost of the swing itself and the necessary pier" included, under the circumstances and in the connection

CANALS—*Continued.*

in which they were used, the operation and maintenance also of the swing by the company. CANADIAN PACIFIC RY. CO. *v.* THE KING. 211

CAPTATION—*Revocation of will—Testamentary capacity — Findings of fact — Practice — Improper suggestion—Undue influence—Bounty taken by prompter—Fraudulent representations—Evidence — Onus of proof* 460

See WILL 2.

CASES — *Adams* v. *Alcroft* (37 N.B. Rep. 332) reversed. 365

See CONTRACT 3.

2——*Allan* v. *Pratt* (13 App. Cas. 780) distinguished. 41

See APPEAL 1.

3——*A. E. Ames & Co.* v. *Conmee* (12 Ont. L.R. 435) reversed. 601

See BROKER.

4——*Atlantic & North-West Ry. Co.* v. *Turcotte* (Q.R. 2 Q.B. 305) distinguished 41

See APPEAL 1.

5——*Attorney-General* v. *City of Toronto* (23 Can. S.C.R. 514) followed. 239

See MUNICIPAL CORPORATION 2.

6——*Attorney-General of the Straits Settlements* v. *Wemyss* (13 App. Cas. 192) referred to. 126

See NEGLIGENCE 3.

7——*Aveson* v. *Kinnaird* (6 East 188) followed. 284

See CRIMINAL LAW 2.

8——*Bain* v. *Anderson* (28 Can. S.C.R. 481) to be compared. 137

See APPEAL 2.

9——*Banner* v. *Johnston* (L.R. 5 H.L. 157) followed. 207

See CRIMINAL LAW 1.

10——*Bartlett* v. *Nova Scotia Steel Co.* (1 East L.R. 293) affirmed. 336

See NEW TRIAL 2.

CASES—*Continued.*

11——*Bush* v. *Trustees of the Town and Harbour of Whitehaven* (52 J.P. 392; 2 Hudson on Bldg. Contracts (2 ed.) 121) referred to 501

See CONTRACT 5.

12——*Calori* v. *Andrews* (12 B.C. Rep. 236) affirmed 588

See CONTRACT 6.

13——*Canadian Pacific Ry. Co.* v. *The King* (*Re Pheasant Hills Branch*) (10 Ex. C.R. 325) affirmed. 137

See RAILWAYS 2.

14——*Carleton Woollen Co.* v. *Town of Woodstock* (37 N.B. Rep. 545; 3 N.B. Eq. 138) affirmed. 411

See MUNICIPAL CORPORATION 3.

15——*Carrisbrooke Co.* v. *London & Provincial Marine & General Ins. Co.* ([1901] 2 K.B. 861) followed. 198

See TRUSTS 1.

16——*Chambers* v. *Whitehaven Harbour Commissioners* ([1899] 2 Q.B. 132) referred to. 126

See NEGLIGENCE 3.

17——*Clair* v. *Temiscouata Ry. Co.* (1 East L.R. 524) reversed. 230

See TRESPASS 1.

18——*Copeland-Chatterson Co.* v. *Paquette* (10 Ex. C.R. 410) affirmed. . . 451

See PATENT OF INVENTION 1.

19——*Coté* v. *The James Richardson Co.* (38 Can. S.C.R. 41) distinguished. . . 236

See APPEAL 5.

20——*Cumberland Ry. & Coal Co.* v. *Saint John Pilot Commissioners* (37 N. B. Rep. 406) affirmed. 169

See SHIPS AND SHIPPING 1.

21——*DeHertel* v. *Goddard* (66 L.J.P.C. 90) distinguished. 1

See WILL 1.

22——*Dobie* v. *The Temporalities Board* (7 App. Cas. 136) distinguished. 620

See CONSTITUTIONAL LAW 1.

CASES—*Continued.*

23——*Farnell* v. *Bowman* (12 App. Cas. 643) referred to....126
See NEGLIGENCE 3.

24——*Gloster* v. *Toronto Electric Light Co.* (12 Ont. L.R. 413) reversed....27
See NEGLIGENCE 1.

25——*Hall* v. *Snowden, Hubbard & Co.* ([1899] 2 Q.B. 136) referred to....126
See NEGLIGENCE 3.

26——*Hamilton, City of* v. *Hamilton Street Ry. Co.* (10 Ont. L.R. 575) affirmed....106
See TRAMWAYS 1.

27——*Hamilton Brewing Association* v. *City of Hamilton* (12 Ont. L.R. 75) affirmed....239
See MUNICIPAL CORPORATION 2.

28——*Hamilton Distillery Co.* v. *City of Hamilton* (10 Ont. L.R. 280; 12 Ont. L.R. 75) affirmed....239
See MUNICIPAL CORPORATION 2.

29——*Hatfeild* v. *The "Wandrian"* (11 Ex. C.R. 1) affirmed....431
See ADMIRALTY LAW 3.

30——*King* v. *Dupuis* (28 Can. S.C.R. 388) followed....41
See APPEAL 1.

31——*Kinghorn* v. *Larue* (22 Can. S.C. R. 347) distinguished....41
See APPEAL 1.

32——*King, The, et al.* v. *Bank of Montreal* (11 Ont. L.R. 595) affirmed....258
See BANKS AND BANKING 2.

33——*King, The* v. *Dodge* (10 Ex. C.R. 208) reversed....149
See EXPROPRIATION 1.

34——*Lowth* v. *Ibbotson* ([1899) 1 Q.B. 1003) referred to....126
See NEGLIGENCE 3.

35——*Michael* v. *Hart & Co.* ([1902] 1 K.B. 482) followed....198
See TRUSTS 1.

CASES—*Continued.*

36——*Miller* v. *Déchène* (8 Q.L.R. 18) followed....41
See APPEAL 1.

37——*Misener* v. *Wabash Railway Co.* (12 Ont. L.R. 71) affirmed....94
See NEGLIGENCE 2.

38——*Montreal St. Ry. Co.* v. *City of Montreal* ([1906] A.C. 100) followed.106
See TRAMWAYS 1.

39——*McIntosh* v. *The Queen* (23 Can. S.C.R. 180) followed....284
See CRIMINAL LAW 2.

40——*McLean* v. *The King* (10 Ex. C.R. 390) reversed....542
See DEMURRER.

41——*Naas* v. *Manning* (39 N.S. Rep. 133) affirmed....226
See NEGLIGENCE 4.

42——*Nant-Y-Glo and Blaina Ironworks Co.* v. *Grave* (12 Ch. D. 738) followed. 198
See TRUSTS 1.

43——*Nova Scotia Steel Co.* v. *Bartlett* (35 Can. S.C.R. 527) referred to....326
See NEW TRIAL 2.

44——*"Picton," The* (4 Can. S.C.R. 648) followed....176
See SHIPS AND SHIPPING 2.

45——*Pigott & Inglis* v. *The King* (10 Ex. C.R. 248) affirmed....501
See CONTRACT 5.

46——*Prévost* v. *Prévost* (Q.R. 14 K.B. 309) compare....1
See WILL 1.

47——*Prévost* v. *Prévost* (Q.R. 28 S.C. 257) reversed....1
See WILL 1.

48——*Price* v. *Neal* (4 Burr. 1355) followed....258
See BANKS AND BANKING 2.

CASES—*Continued.*

49——*Reg.* v. *Beddingfield* (14 Cox 341) followed. 284
See CRIMINAL LAW 2.

50——*Rex* v. *Foster* (6 C. & P. 325) followed. 284
See CRIMINAL LAW 2.

51——*Rex* v. *Saunders et al.* (12 Ont. L.R. 615) affirmed. 382
See CRIMINAL LAW 3.

52——*Rice* v. *The King* (32 Can. S.C.R. 480) referred to. 284
See CRIMINAL LAW 2.

53——*Robertson* v. *McGillivray* (13 Ont. L.R. 232). *Right to appeal affirmed.* 490
See APPEAL 9.

54——*St. Clair Navigation Co.* v. *The "D. C. Whitney"* (10 Ex. C.R. 1) reversed. 303
See SHIPS AND SHIPPING 3.

55——*Turcotte* v. *Dansereau* (26 Can. S.C.R. 578) followed. 41
See APPEAL 1.

56——*Union Colliery Co.* v. *The Queen* (31 Can. S.C.R. 81) referred to. 284
See CRIMINAL LAW 2.

57——*Vaughan* v. *Richardson* (17 Can. S.C.R. 703) followed. 207
See CRIMINAL LAW 1.

58——*Viau* v. *The Queen* (29 Can. S.C. R. 90) referred to. 284
See CRIMINAL LAW 2.

59——*Wallcott* v. *Robinson* (11 L.C. Jur. 303) followed. 41
See APPEAL 1.

CHEQUE—*Crown—Banks and banking—Forged cheques—Payment — Representation by drawee — Implied guarantee — Estoppel — Acknowledgment of bank statements—Liability of indorsers—Mistake—Action—Money had and received.* 258
See BANKS AND BANKING 2.

CIVIL CODE—*Art.* 868, *C.C.* (*Legacies—Accretion; Art.* 948, *C.C.* (*Substitution*). 1
See WILL 1.

2——*Arts.* 1018-1019 (*Interpretation of contracts*). 422
See CONTRACT 4.

CIVIL CODE OF PROCEDURE—*Arts.* 1185-1188 (*Tierce oppositions*). 236
See APPEAL 5.

COMMISSION—*Vendor and purchaser—Sale of land—Formation of contract—Conditions — Acceptance of title — New term—Statute of Frauds — Principal and agent — Secret commission — Avoidance of contract — Fraud — Specific performance*. 588
See CONTRACT 6.

COMMON SCHOOL FUND — *Crown — Breach of trust—Purchase of debentures out of Common School Fund—Knowledge of misrepresentation of moneys — Payment of interest—Statutory prohibition — Evasion of statute — Estoppel against Crown—Action—Adding parties —Practice*. 62
See QUEBEC NORTH SHORE TURNPIKE ROAD TRUST.

COMPANY LAW—*Breach of contract—Breach of trust—Assessment of damages —Sale of mining areas — Promotion of company—Failure to deliver securities—Principal and agent—Account—Evidence —Salvage—Indemnity for necessary expenses—Laches — Estoppel.*] The plaintiffs transferred certain mining areas to the defendant in order that they might be sold together with other areas to a company to be incorporated for the purpose of operating the consolidated mining properties, the defendants agreeing to give them a proportionate share of whatever bonds and certificates of stock he might receive for these consolidated properties upon the flotation of the scheme then being promoted by him and other associates. In order to hold some of the areas it became necessary to borrow money and the lender exacted a bonus in stock and bonds which the defendant gave him out of those he received for conveyance of the properties to the

COMPANY LAW—*Continued.*

company. After deducting a ratable contribution towards this bonus, the defendant delivered to the plaintiffs the remainder of their proportion of stock and bonds, but did not then inform them that such deductions had been made, and they, consequently, made no demand upon him for the balance of the shares and bonds until some time afterwards when they brought the action to recover the securities or their value. *Held*, affirming the judgment appealed from (1 East L.R. 54) that whether the defendant was to be regarded as a trustee or as the agent of the plaintiffs, he was not entitled, without their consent, to make the deductions, either by way of salvage or to idemnify himself for expenses necessarily incurred in the preservation of the properties; and that under the circumstances, their failure to demand delivery of the remainder of the securities before action did not deprive the plaintiffs of their right to recover. If the defendant is to be considered a trustee wrongfully withholding securities which he was bound to deliver, he is liable for damages calculated upon the assumption that they would have been disposed of at the best price obtainable. If, however, he is to be regarded as a contractor who has failed to deliver the securities according to the terms of his agreement, he is liable for damages based on the selling price of the securities at the time when his obligation to deliver them arose. *Nant-Y-Glo and Blaina Ironworks Co.* v. *Grave* (12 Ch. D. 738); *The Steamship Carrisbrooke Co.* v. *The London and Provincial Marine and General Ins. Co.* ((1901) 2 K.B. 861) and *Michael* v. *Hart & Co.* ((1902) 1 K.B. 482) followed. MCNEIL *v.* FULTZ.....**198**

COMPENSATION—*Expropriation of land — Payment — Market value — Potential value—Evidence*.....**149**

See EXPROPRIATION 1.

CONSTITUTIONAL LAW — *Constitutional law—British North America Act, 1867—Provincial legislative jurisdiction —Alberta Act, 4 & 5 Edw. VII, c. 3 (D.)— Con. Ord. N.W.T.* (1898) *c.* 52—*6 Edw. VII. c.* 28 (*Alta.*)—*Medical profession— Practising without license — Criminal law—Practice—Special leave to appeal— R.S.C.* (1906), *c.* 139, *s.* 37 (*c*).] The "Medical Profession Act," 6 Edw. VII. c. 28 (Alta.) is *intra vires* of the legislative jurisdiction of the Legislature of Alberta and a member of the College of Physicians and Surgeons of the North-West Territories may be validly convicted thereunder for the offence of practising medicine, surgery, etc., for gain and reward, in the Province of Alberta, without complying with its requirements as to registration and license, notwithstanding that the College of Physicians and Surgeons of the North-West Territories had not been previously dissolved and abolished by order of the Governor in Council, in conformity with the provisions of sec. 16 (3) of "The Alberta Act." *Dobie* v. *The Temporalities Board* (7 App. Cas. 136) distinguished. LAFFERTY *v.* LINCOLN.....**620**

2——*Appeal—Jurisdiction — Discretion of Governor in Council—Stated case— Railway subsidies — Construction of statute—3 Edw. VII. c. 57—Conditions of contract—Estimating cost of construction of line of railway—Rolling stock and equipment*.....**137**

See RAILWAYS 2.

CONTRACT—*Breach of contract—Breach of trust—Assessment of damages—Sale of mining areas—Promotion of company —Failure to deliver securities—Principal and agent — Account — Evidence — Salvage — Indemnity for necessary expenses—Laches—Estoppel.*] The plaintiffs transferred certain mining areas to the defendant in order that they might be sold together with other areas to a company to be incorporated for the purpose of operating the consolidated mining properties, the defendants agreeing to give them a proportionate share of whatever bonds and certificates of stock he might receive for these consolidated properties upon the flotation of the scheme then being promoted by him and other associates. In order to hold some of the areas it became necessary to borrow money and the lender exacted a bonus in stock and bonds which the defendant gave him out of those he received for conveyance of the properties to the company. After deducting a ratable contribution towards this bonus, the defendant delivered to the plaintiffs the remainder of their proportion of stock and

CONTRACT—*Continued.*

bonds, but did not then inform them that such deductions had been made, and they, consequently, made no demand upon him for the balance of the shares and bonds until some time afterwards when they brought the action to recover the securities or their value. *Held*, affirming the judgment appealed from, that whether the defendant was to be regarded as a trustee or as the agent of the plaintiffs, he was not entitled, without their consent, to make the deductions, either by way of salvage or to idemnify himself for expenses necessarily incurred in the preservation of the properties; and that, under the circumstances, their failure to demand delivery of the remainder of the securities before action did not deprive the plaintiffs of their right to recover. If the defendant is to be considered a trustee wrongfully withholding securities which he was bound to deliver, he is liable for damages calculated upon the assumption that they would have been disposed of at the best price obtainable. If, however, he is to be regarded as a contractor who has failed to deliver the securities according to the terms of his agreement, he is liable for damages based on the selling price of the securities at the time when his obligation to deliver them arose. *Nant-Y-Glo and Blaina Ironworks Co.* v. *Grave* (12 Ch. D. 738); *The Steamship Carrisbrooke Co.* v. *The London and Provincial Marine and General Ins. Co.* ((1901) 2 K.B. 861) and *Michael* v. *Hart & Co.* ((1902) 1 K.B. 482) followed. MCNEIL *v.* FULTZ. 198

2——*Account—Statute of Limitations—Agent or partners — Reference.*] By agreement between them the Hamilton Brass Mfg. Co. was appointed agent of the Barr Cash Co. for sale and lease of its carriers in Canada at a price named for manufacture; net profits to be equally divided and quarterly returns to be furnished, either party having liberty to annul the contract for non-fulfillment of conditions. The agreement was in force for three years when the Barr Cash Co. sued for an account, alleging failure to make proper returns and payments. *Held*, reversing the judgment of the Court of Appeal, Girouard and Davies JJ. dissenting, that the accounts should be taken for the six years preceding the action only. HAMILTON BRASS MANUFACTURING CO. *v.* BARR CASH AND PACKAGE CARRIER CO. 216

AND *see* PRACTICE AND PLEADING. 6.

3——*Contract of hiring—Manager or expert — Dismissal.*] The manager of a veneer company having heard of plaintiff as a man who could usefully be employed in the business wrote him a letter in which he stated that "what we want is a man who is a good veneer maker and who knows how to make all kinds of built up woods that are salable, such as panels * * * We want you to take full charge of the mill, that is, the manufacturing." In reply plaintiff said: "Would say I understand fully the making of the articles you speak of as well as numerous others with proper machines and proper men to run them." And in a subsequent letter he said: "I feel from all the experience I have had I have mastered the entire principle of it (the veneer business), knowing machines required for various work, what veneer has got to be when completed." Having been hired by the manager he was discharged six weeks later and brought an action for wrongful dismissal. *Held*, reversing the judgment of the Supreme Court of New Brunswick (37 N.B. Rep. 332) that he was not hired as a business manager but as an expert in the veneer business and as the evidence established that he was not competent he was properly discharged and could not recover. ALLCROFT *v.* ADAMS 365

4——*Vendor and vendee—Sale of securities — Interpretation of contract—Arts.* 1018, 1019. *C.C.—Railways—Debtor and creditor—Right of way claims—Legal expenses incurred in settlement.*] The plaintiffs sold the defendants stock and bonds of the P. & I. Ry. Co. with an agreement in writing which contained a clause stipulating as a condition that the vendees might declare the option of paying a further sum of $30,000. in addition to the price of sale, in consideration of which the vendors agreed to pay all the debts of the P. & I. Ry. Co. except certain specially mentioned claims, some of which were in respect of settlement for the right of way. The final clause of the agreement was as follows:—"After two

years from the date hereof the Montreal Street Railway Company will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years or required by the purchasers so to be, shall be paid over to the vendors at the end of the said period, it being understood that the purchasers will not stir up or suggest claims being made." The vendees exercised the option and paid the $30,000 to the vendors who reserved their right to any portion of the $5,000 to be contributed towards settlement of the right of way claims which might not be expended during the two years. An unsettled claim for right of way, in dispute at the time of the agreement, was subsequently settled by the vendors within the two years. The question arose as to whether or not this claim, then known to exist, and legal expenses connected therewith was a debt which the vendor were obliged to discharge in consideration of the extra $30,000 so paid to them, and whether or not the $5,000 was to be contributed only in respect of right of way claims arising after the date of the agreement. *Held*, affirming the judgment appealed from, that the agreement must be construed as being controlled by the provisions of the last clause thereof; that said last clause was not inconsistent with the previous clauses of the agreement and that the vendees were bound to contribute to the payment of such claims and legal expenses in respect of the right of way to the extent of the $5,000 mentioned in the last clause. MONTREAL STREET RY. CO. *v.* MONTREAL CONSTRUCTION CO.....422

5——*Public works — Contract — Change in plans and specifications—Waiver by order in council—Powers of executive—Construction of statute—Directory and imperative clauses—Words and phrases —"Stipulations"—Exchequer Court Act, s.* 33—*Extra works—Engineer's certificate—Instructions in writing—Schedule of prices — Compensation at increased rates — Damages — Right of action—Quantum meruit.*] The suppliants, appellants, were contractors with the Crown for the widening and deepening of a canal and, by their petition of right, contended that there were such changes from the plans and specifications and in the manner in which the works were obliged to be executed as made the provisions of their contract inapplicable and that they were, consequently, entitled to recover upon a *quantum meruit*. In order to afford relief, an order in council was passed waiving certain conditions, provisoes and stipulations contained in the contract. By the judgment appealed from, the judge of the Exchequer Court held (10 Ex. C.R. 248) that there had been no such changes as would entitle the contractors to recover on the *quantum meruit*, as in the case of *Bush* v. *The Trustees of the Town and Harbour of Whitehaven* (52 J.P. 392; 2 Hudson on Building Contracts (2 ed.) 121); that the words "shall decide in accordance with the stipulations in such contract" in the thirty-third section of "The Exchequer Court Act" might be treated as directory only and effect given to the waiver in respect to the absence of written directions or certificates by the engineer in regard to works done, but that the remaining clauses of the section were imperative and there could be no valid waiver whereby a larger sum than the amount stipulated in the contract could be recovered, *e.g.*, on prices for the classes of work, so as to give the contractors a legal claim for higher rates of compensation without a new agreement under proper authority and for good consideration. On appeal to the Supreme Court of Canada: *Held*, *per* Girouard, Davies and Maclennan JJ., that the decision of the judge of the Exchequer Court was correct. *Per* Idington and Duff JJ.—That the word "stipulations" in the first part of the section referred to, should be construed as having relation entirely to the second part of the section and as applying to the rates of compensation fixed by the contract; that, on either construction, the result would be the same in so far as the circumstances of the case were concerned; that it did not warrant an implication that the executive could without proper authority, exceed its powers in relation to a fully executed contract or confer the power

CONTRACT—*Continued.*

to dispense with the requirements of the statute, and that, consequently, there could not be a recovery upon *quantum meruit*. PIGOTT & INGLIS *v.* THE KING. 501

6——*Vendor and purchaser — Sale of land—Formation of contract—Conditions —Acceptance of title—New term—Statute of Frauds—Principal and agent—Secret commission — Avoidance of contract — Fraud — Specific performance.*] While A was absent abroad, B assumed, without authority, to sell certain of his lands to C and received, from C, a deposit on account of the price. On receipt of a cablegram from B, notifying him of what had been done, but without disclosing the name of the proposed purchaser, A replied, by letter, stating that he was willing to sell at the price named, that he would not complete the deal until he returned home, that the sale would be subject to an existing lease of the premises and that he would not furnish evidence of title other than the deeds that were in his possession, and requesting B to communicate these terms to the proposed purchaser. On learning the conditions, C, in a letter by his solicitors, accepted the terms and offered to pay the balance of the price as soon as the title was evidenced to their satisfaction. In a suit for specific performance: *Held*, that the correspondence which had taken place constituted a contract sufficient to satisfy the requirements of the Statute of Frauds, that the words, "so soon as title is evidenced to our satisfaction," in the solicitors' letter accepting the conditions did not import the proposal of a new term and that A was bound to specific performance.—*Held*, also, that an arrangement, unknown to A and made prior to the receipt of his letter, whereby B was to have a commission on the transaction from C, could not have the effect of avoiding the contract, as B was not, at that time, the agent of A for the sale of the property. Judgment appealed from (12 B.C. Rep. 236) affirmed. ANDREWS *v.* CALORI. 588

7——*Municipal corporation—Agreement with electric street railway company—Use of streets—Payment for privilege—Percentage of receipts — Traffic beyond city—Validity of agreement*.....106

See TRAMWAYS 1.

8——*Railway subsidies—Construction of statute—3 Edw. VII. c. 57—Conditions of contract — Estimating costs of constructing line of railway—Rolling stock and equipment*.....137

See RAILWAYS 2.

9——*Navigation—Trent canal crossing —Swing bridge—Cost of construction—Maintenance—Order in council*.....211

See RAILWAYS 3.

10——*Subaqueous mining—Crown grants —Dredging lease—Breach of contract—Subsequent issue of placer mining licenses — Damages — Pleading and practice — Statement of claim—Demurrer—Cause of action*.....542

See MINES AND MINERALS 3.

11——*Mortgage — Money advanced to construct buildings—Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagee's rights—Redemption—Costs*.....557

See MORTGAGE.

CONVERSION—*Title to land—Plan of survey—Evidence—Onus of proof—Findings of jury—Error—New trial*.....336

See NEW TRIAL 2.

2——*Placer mining — Disputed title—Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts—Sinister intention—Blending materials—Accounts—Assessment of damages—Mitigating circumstances—Compensation for necessary expenses—Estoppel—Standing-by—Acquiescence*.....516

See MINES AND MINERALS 2.

CONVICTION — *Canada Temperance Act —Conviction — "Criminal case"—R.S.C.* (1886) *c.* 135, *s.* 32—*Habeas corpus—Penalty—"Not less than $50"—Conviction for $200 — Imposition of fine for first offence—Powers of Supreme Court judge—Reference of application to full court*.....394

See CANADA TEMPERANCE ACT.

COSTS—*Practice — Revising minutes of judgment—Mistake—Costs of abandoned defences—Reference to trial judge.*] The plaintiffs' action was maintained with costs in the courts below, but on appeal it was dismissed with costs by the Supreme Court of Canada (37 Can. S.C.R. 456), no reference being made to certain costs incurred by the plaintiffs in respect of several defences which the defendant had abandoned in the trial court. On motion to vary the minutes, the matter was referred to the judge of the trial court to dispose of the question of the costs on the abandoned defences. RUTLEDGE *v.* UNITED STATES SAVINGS AND LOAN CO. **103**

2——*Mortgage—Money advanced to construct buildings—Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagor's rights—Redemption.*] A building and loan company advanced money to an illiterate woman for the purpose of aiding in the construction of a house to be erected upon lands mortgaged to it to secure the loan. The mortgage contained no provision for advances to contractors, etc., as the work progressed, beyond the following: "And it is hereby agreed between the parties hereto, that the mortgagees, their successors and assigns, may pay any taxes, rates, levies, assessments, charges, moneys for insurance, liens, costs of suit, or matters relating to liens or incumbrances on the said lands, and solicitors' charges in connection with this mortgage, and valuator's fees, together with all costs and charges which may be incurred by taking proceedings of any nature in case of default by the mortgagor, her heirs, executors, administrators or assigns, and shall be payable with interest, at the rate aforesaid, until paid and, in default, the power of sale hereby given shall be forthwith exercisable. And it is further agreed that monthly instalments in arrears shall bear interest at the rate aforesaid until paid." In a suit for redemption: *Held*, first, that the clause in the mortgage did not justify the mortgagees in making advances to contractors and persons supplying material, without the express order of the mortgagor. Secondly, that the mortgagees ought not to have recognized an order in favour of the contractor for the total amount of the loan when they knew that the contractor had

COSTS—*Continued.*

not completed his contract and was, therefore, not entitled to the money when the order contained no name of a witness, and shewed that the mortgagor was unable to sign her name. The payment having been made by the loan company to a lumber company supplying material to the contractors for the building, without the express authority of the mortgagor, and the lumber company having taken an assignment of the mortgage, and attempted to enforce it against the mortgagor the transaction was declared fraudulent as against the mortgagor, and the payment to the lumber company disallowed.—*Held*, also, that the only costs the assignees of the mortgage were entitled to add to the mortgage debt were the costs of an ordinary redemption suit consented to by a mortgagee. Judgment appealed from varied, and appeal dismissed with costs. BLACK *v.* HIEBERT.....**557**

3——*Appeal—Equal division of opinion—Dismissal without costs.*] Upon an equal division of opinion among the judges, the appeal stood dismissed without costs. COTE *v.* THE JAMES RICHARDSON CO. **41**

AND *see* APPEAL 1.

COURT — *Admiralty law — Foreign bottoms—Collision in foreign waters—Jurisdiction of Canadian courts*.....**303**

See SHIPS AND SHIPPING 3.

2——*Appeal—Railway Act—Expropriation—Appeal from award—Jurisdiction—Choice of forum—Curia designata.***511**

See APPEAL 10.

CRIMINAL LAW—*Crown case reserved—Appeal—Extension of time for notice of appeal — "Criminal Code" s.* 1024—*Order after expiration of time for service of notice — Jurisdiction.*] The power given by section 1024 of the "Criminal Code" (R.S.C. (1906) c. 146) to a judge of the Supreme Court of Canada to extend the time for service on the Attorney-General of notice of an appeal in a reserved Crown case may be exercised after the expiration of the time limited by the code for the service of such notice. *Banner* v. *Johnston* (L.R. 5 H.L. 157)

CRIMINAL LAW—*Continued.*

and *Vaughan* v. *Richardson* (17 Can. S. C.R. 703) followed. GILBERT *v.* THE KING. 207

2——*Practice—Crown case reserved — Reserved questions—Dissent from affirmance of conviction—Appeal—Jurisdiction —Criminal Code*, 1892, *ss.* 742, 743, 744, 750—*R.S.C.* (1906), *c.* 146, *ss.* 1013, 1015, 1016, 1024—*Admission of evidence—Res gestæ.*] Evidence of statements made by a person, since deceased, immediately after an assault upon him, under apprehension of further danger and requesting assistance and protection, is admissible as part of the *res gestæ*, even though the person accused of the offence was absent at the time when such statements were made. *Reg.* v. *Beddingfield* (14 Cox 341); *Rex* v. *Foster* (6 C. & P. 325) and *Aveson* v. *Kinnaird* (6 East 188) followed.—Statements not coincident, in point of time, with the occurrence of the assault, but uttered in the presence and hearing of the accused and under such circumstances that he might reasonably have been expected to make some explanatory reply to remarks in reference to them, are admissible as evidence.—On the trial of an indictment for murder the evidence was that the deceased had been killed by a gun-shot wound inflicted through the discharge of a gun in the hands of the accused and the defence was that the gun had been discharged accidentally. *Held*, that, in view of the character of the defence and the evidence in support of it, there could be no objection to a charge by the trial judge to the jury, that the offence could not be reduced by them from murder to manslaughter but that their verdict should be either for acquittal or one of guilty of murder.—Two questions were reserved by the trial judge for the opinion of the Court of Appeal but he refused to reserve a third question, as to the correctness of his charge on the ground that no objection to the charge had been taken at the trial. The Court of Appeal took all three questions into consideration and dismissed the appeal, there being no dissent from the affirmance of the conviction on the first and third questions, but one of the judges being of opinion that the appeal should be allowed and a new trial ordered upon the second question reserved. On an appeal to the Supreme Court of Canada, the majority of the court, being of opinion that the appeal should be dismissed, declined to express any opinion as to whether or not an appeal would lie upon questions as to which there had been no dissent in the court appealed from, but it was held, *per* Girouard J.—That the Supreme Court of Canada was precluded from expressing an opinion on points of law as to which there had been no dissent in the court appealed from. *McIntosh* v. *The Queen* (23 Can. S.C.R. 180) followed. *Viau* v. *The Queen* (29 Can. S.C.R. 90); *The Union Colliery Company* v. *The Queen* (31 Can. S.C.R. 81) and *Rice* v. *The King* (32 Can. S.C.R. 480) referred to. GILBERT *v.* THE KING. 284

3——*Disorderly house—Common betting house—Place for betting—Betting booth —Race-course of incorporated association —Crim. Code*, 1892, *ss.* 197, 204—*Crim. Code*, 1906, *ss.* 227, 235.] A perambulating booth used on the race-course of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto as defined in sec. 197 of the Criminal Code, 1892 (Crim. Code, 1906, s. 227). Sub-section 2 of s. 204 of the former Code (now s. 235) which exempts from the provisions of the main section (dealing with the recording or registering of bets, etc.), bets made on the race-course of an incorporated association does not apply to the offence of keeping a common betting-house. Girouard and Davies J. dissenting. Judgment of the Court of Appeal (12 Ont. L.R. 615) affirmed, Girouard and Davies JJ. dissenting. SAUNDERS *v.* THE KING. 382

4——*Stated case—Dissent in Court of Appeal—Practice—Special leave for appeal—R.S.C.* (1906) *c.* 139, *s.* 37(*c*).] In an appeal from the judgment of the Supreme Court of the North-West Territories, *in banc*, whereby the conviction of the respondent was quashed, two of the judges dissenting, special leave for the appeal was granted on motion before the full court, under the provisions of R.S.C. (1907) c. 139, s. 39(*c*) on the 19th of February, 1907. LAFFERTY v. LINCOLN. 620, 625

AND *see* CONSTITUTIONAL LAW 1.

CRIMINAL LAW—*Continued.*

5——*Canada Temperance Act—Conviction—"Criminal Case"—R.S.C.* (1886) *c.* 135, *s.* 32—*Habeas corpus—Penalty—"Not less than* $50"*—Conviction for* $200*—Imposition of fine for first offence—Powers of Supreme Court judge—Reference of application to full court*..394

See CANADA TEMPERANCE ACT.

CROWN—*Breach of trust—Purchase of debentures out of Common School Fund — Knowledge of misapplication of moneys—Payment of interest—Statutory prohibition—Evasion of statute—Estoppel against the Crown—Action—Adding parties—Practice.*] In an action by the Crown against the Quebec North Shore Turnpike Road Trustees to recover interest upon debentures purchased from them by the Government of the late Province of Canada (with trust funds held by them belonging to the Common School Fund), the defendants pleaded that the Crown was estopped from recovery inasmuch as, at the time of their purchase, the advisers of the Crown were aware that these debentures were being issued in breach of a trust and with the intention of misapplying the proceeds towards payment of interest upon other debentures due by them in violation of a statutory prohibition. *Held*, affirming the judgment appealed from (8 Ex. C.R. 390) that, as there was statutory authority for the issue of the debentures in question, knowledge of any such breach of trust or misapplication by the advisers of the Crown could not be set up as a defence to the action. QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES *v.* THE KING. 62

2—— *Banks and banking — Forged cheques—Payment — Representation by drawee—Implied guarantee—Estoppel—Acknowledgment of bank statements—Liability of indorsers—Mistake—Action—Money had and received.*] A clerk in a department of the Government of Canada, whose duty was to examine and check its amount with the Bank of Montreal, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the

CROWN—*Continued.*

drawee to the several other banks, on presentation, and charged against the Receiver-General on the account of the department with the bank. None of the cheques were marked with the drawee's acceptance before payment. In the meantime, the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques and charged against the Receiver-General: *Held*, affirming the judgment appealed from (11 Ont. L.R. 595) that the bank was liable unless the Crown was estopped from setting up the forgery. *Per* Davies, Idington and Duff JJ., that estoppel could not be invoked against the Crown. *Per* Girouard and Maclennan JJ., that, apart from the question of the Crown being subject to estoppel, under the circumstances of this case a private person would not have been estopped had his name been forged as drawer of the cheques. *Per* Davies and Idington JJ.—The acknowledgment by the accountant of the department of the correctness of the statements furnished by the bank, being made under a mistake as to the facts, the accounts could be re-opened to have the mistake rectified. BANK OF MONTREAL *v.* THE KING 258

AND *see* BANKS AND BANKING 2.

3——*Negligence—Navigation of inland waters — Collision — Government ships and vessels—"Public work"—The Exchequer Court Act, s.* 16*—Construction of statute—Right of action* 126

See NEGLIGENCE 3.

4——*Subaqueous mining—Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice—Statement of claim—Demurrer—Cause of action*.....542

See MINES AND MINERALS 3.

CROWN CASES RESERVED—*Criminal law—Practice — Reserved questions — Dissent from affirmance of conviction—Appeal — Jurisdiction — Criminal Code,*

CROWN CASES RESERVED—*Con.*

1892, *ss.* 742, 743, 744, 750—*R.S.C.* (1906) *c.* 146, *ss.* 1013, 1015, 1016, 1024—*Admission of evidence—Res gestæ*....**284**

See CRIMINAL LAW 2.

CROWN GRANT—*Subaqueous mining—Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice—Statement of claim—Demurrer—Cause of action.*] A statement of claim which alleges that the Crown, after granting a lease of areas for subaqueous mining and while that lease was in force, in derogation of the rights of the lessee to peaceable enjoyment thereof, interfered with the rights vested in him by transferring the leased area to placer miners who were put in possession of them by the Crown to his detriment, discloses a sufficient cause of action in support of a petition of right for the recovery of damages claimed in consequence of such subsequent grants. Judgment appealed from (10 Ex. C.R. 390) reversed, Davies and Idington JJ. dissenting.—Davies J. dissented on the ground that there was no sufficient allegation in the petition either of interference with the submerged beds or bars of the stream, which alone were included in the dredging lease, or of such active interference by the Crown as would justify an action. MCLEAN *v.* THE KING..**542**

DAMAGES— *Expropriation of land — Payment — Market value — Potential value.*] D. purchased at different times and in sixteen different parcels 623 acres of land, paying for the whole nearly $7,000, or about $11 per acre. The Crown on expropriating the land offered him $20 per acre, which he refused, claiming $22,000, which on a reference to ascertain the value was increased to $45,000. The referee allowed $38,000, which the Exchequer Court reduced to the sum first claimed. *Held,* reversing the judgment of the Exchequer Court (10 Ex. C.R. 208), Girouard J. dissenting, that there was no user of the land nor any special circumstances to make it worth more than the market value, which was established by the price for which it was sold shortly before expropriation.—D. claimed the larger price as potential value of the land for orchard

DAMAGES—*Continued.*

purposes to which he had intended to devote it.—*Held,* that as he had not proved the land to be fit for such purpose and the evidence tended to disprove it he could not receive compensation on that ground. DODGE *v.* THE KING. **149**

AND *see* EVIDENCE 2.

2——*Action for negligence—Practice—Assessment of damages—Funeral expenses.*] In an action by the father of a person whose death was occasioned by the negligence of the defendants, it was held that the plaintiff could not recover funeral and other expenses incurred, as damages in the action. TORONTO RY CO. *v.* MULVANEY. **327**

AND *see* NEGLIGENCE 5.

3——*Placer mining—Disputed title — Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts—Sinister intention—Conversion—Blending materials—Accounts—Assessment of damages — Mitigating circumstances — Compensation for necessary expenses—Estoppel — Standing-by — Acquiescense.*] After a favourable judgment by the Gold Commissioner in respect to the boundary between contiguous placer mining locations and while an appeal therefrom was pending, the defendants, with the knowledge of the plaintiffs, entered upon the location and removed a quantity of auriferous material from the disputed and undisputed portions thereof, intermixed the products without keeping any account of the quantities taken from these portions respectively and appropriated the gold recovered from the whole mass. In an action for damages, taken subsequently, the plaintiffs recovered for the total value of the gold estimated to have been taken from the disputed portion of the claim, without deduction of the necessary expenses of workings and winning the gold. *Held,* affirming the judgment appealed from, Davies J. dissenting, that a correct appreciation of the evidence disclosed a sinister intention on the part of the defendants, that they had deliberately blended the materials taken from both parts of the location, converted the whole mass to their own use and thereby destroyed the means of ascertaining the respective quantities so taken and the

DAMAGES—*Continued.*

proportionate expense of recovering the precious metal therefrom, and that, consequently, they were liable in damages for the total value of so much of the intermixed products as were not strictly proved to have come from the undisputed portion of the location. *Quœre.* Does the English rule governing the assessment of damages in respect of trespasses in coal mines supply a method of assessment applicable in its entirety to placer mining locations? LAMB *v.* KINCAID. 516

4——*Negligence—Navigation of inland waters — Collision — Government ships and vessels—"Public work"—The Exchequer Court Act, s.* 16—*Construction of statute—Right of action.* 126

See NEGLIGENCE 3.

5——*Breach of contract—Breach of trust—Assessment of damages—Sale of mining rights—Promotion of company—Failure to deliver securities—Principal and agent—Account—Evidence—Salvage — Indemnity for necessary expenses — Laches—Estoppel* 198

See TRUSTS 1.

6——*Negligence—Trespass — Horse racing—Intruder upon race track—Carelessness.* 226

See NEGLIGENCE 4.

7——*Public work—Contract—Change in plans and specifications—Waiver by order in council—Powers of executive—Construction of statute—Directory and imperative clauses—Words and phrases —"Stipulations"—Exchequer Court Act, s.* 33—*Extra works—Engineer's certificate—Instructions in writing—Schedule of prices—Compensation at increased rate—Damages—Right of action—Quantum meruit.* 501

See CONTRACT 5.

8——*Subaqueous mining—Crown grants —Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Pleading and practice—Statement of claim—Demurrer—Cause of action.* 542

See MINES AND MINERALS 3.

DEBENTURES— *Crown — Breach of trust—Purchase of debentures out of Common School Fund—Knowledge of misappropriation of moneys—Payment of interest—Statutory prohibition—Evasion of statute—Estoppel against Crown —Action—Adding parties—Practice.* .62

See QUEBEC NORTH SHORE TURNPIKE ROAD TRUST.

DEBTOR AND CREDITOR—*Banks and banking—Security for advance—Assignment of goods—Claim on proceeds of sale —53 V. c.* 31, *s.* 74(*D.*)] A bank to which goods have been transferred as security for advances under section 74 of the "Bank Act," 1890, can follow the proceeds of sale of said goods in the hands of a creditor of the assignor to whom the latter has paid them when the purchaser knew, or must be presumed to have known, that the same belonged to the bank. UNION BANK OF HALIFAX *v.* SPINNEY. 187

2——*Vendor and vendee—Sale of securities—Interpretation of contract—Arts.* 1018, 1019 *C.C.—Railways—Debtor and creditor—Right of way claims—Legal expenses incurred in settlement.*] The plaintiffs sold the defendants stock and bonds of the P. & I. Ry. Co. with an agreement in writing which contained a clause stipulating as a condition that the vendees might declare the option of paying a further sum of $30,000, in addition to the price of sale, in consideration of which the vendors agreed to pay all the debts of the P. & I. Ry. Co. except certain specially mentioned claims, some of which were in respect of settlement for the right of way. The final clause of the agreement was as follows: —"After two years from the date hereof the Montreal Street Railway Company will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years or required by the purchasers so to be, shall be paid over to the vendors at the end of the said period, it being understood that the purchasers will not stir up or suggest

DEBTOR AND CREDITOR—*Con.*

claims being made." The vendees exercised the option and paid the $30,000 to the vendors who reserved their right to any portion of the $5,000 to be contributed towards settlement of the right of way claims which might not be expended during the two years. An unsettled claim for right of way, in dispute at the time of the agreement, was, subsequently, settled by the vendors within the two years. The question arose as to whether or not this claim, then known to exist, and legal expenses connected therewith was a debt which the vendors were obliged to discharge in consideration of the extra $30,000 so paid to them, and whether or not the $5,000 was to be contributed only in respect of right of way claims arising after the date of the agreement. *Held*, affirming the judgment appealed from, that the agreement must be construed as being controlled by the provisions of the last clause thereof; that said last clause was not inconsistent with the previous clauses of the agreement and that the vendees were bound to contribute to the payment of such claims and legal expenses in respect of the right of way to the extent of the $5.000 mentioned in the last clause. MONTREAL STREET RY. CO. *v.* MONTREAL CONSTRUCTION CO. 422

3——*Insolvency—Fraudulent preference—Security to creditor—Knowledge of insolvency—R.S.O.* [1897] *c.* 147, *s.* 2, *ss.* 2 *and* 3.] G. had assisted S. with loans and also guaranteed his credit at the Dominion Bank to the extent of $3,000. His own cheque at the bank having been refused payment until the indebtedness of S. of $1,900 was settled the latter promised to arrange it within a month which he did by transferring to G. goods pledged to the Imperial Bank G. paying what was due to both banks. Shortly after S. sold out his stock in trade and absconded owing large sums to foreign creditors and being insolvent. On the trial of a creditor's action to set aside the transfer to G. as a fraudulent preference the manager of the Dominion Bank testified that G.'s cheque was not refused from any doubt of S.'s solvency but because he had heard that S. was dealing with another bank and he wished to close the account. *Held*, Idington and Duff JJ. dissenting, that under the evidence produced G. had no reason to suppose, when the goods were transferred, that S. was insolvent and he had satisfied the onus placed upon him by the provincial statute of shewing that he had not intended to hinder, delay or defraud the creditors of S. BALDOCCHI *v.* SPADA. 577

DEDICATION — *Negligence — Electric lighting—Wires on public highway—Proximity to bridge—Injury to child.* 27

See NEGLIGENCE 1.

DEED—*Construction of deed—Description of lands—License to cut timber—Ambiguitas latens — Evidence—Boundary.*] A license to cut timber on a lot of land described the portion affected as bounded on the south by a river. The river almost crossed the lot at a point near its northern boundary and, at another point, about nineteen arpents further south, it again crossed the lot, completely. In an action to eject the licensee from the portion of the lot between the first and second bends of the river and to recover damages: *Held*, that, under the circumstances, there was no ambiguity in the designation of the quantity of the land affected by the license and, in any event, the language of the instrument must be literally construed in favour of the grantee and the party bound thereby could not be permitted to shew a different intention by evidence of surrounding circumstances. MOREL *v.* LEFRANCOIS. 75

2——*Dominion mining regulations—Hydraulic mining—Place mining—Lease—Water-grant—Conditions of grant—User of flowing waters—Diversion of watercourse—Dams and flumes—Construction of deed—Riparian rights—Priority of right—Injunction.* 79

See MINES AND MINERALS 1.

3——*Mortage—Money advanced to construct buildings—Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagee's rights—Redemption—Costs.* 557

See MORTGAGE.

DELIVERY— *Broker — Stock — Purchase on margin—Pledge of stock by broker—Possession for delivery to purchaser* **601**

See BROKER.

DEMURRER — *Subaqueous mining — Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice—Statement of claim—Demurrer —Cause of action.*] A statement of claim which alleges that the Crown, after granting a lease of areas for subaqueous mining and while that lease was in force, in derogation of the rights of the lessee to peaceable enjoyment thereof, interfered with the rights vested in him by transferring the leased area to placer miners who were put in possession of them by the Crown to his detriment, discloses a sufficient cause of action in support of a petition of right for the recovery of damages claimed in consequence of such subsequent grants. Judgment appealed from (10 Ex. C.R. 390) reversed, Davies and Idington JJ. dissenting. Davies J. dissented on the ground that there was no sufficient allegation in the petition either of interference with the submerged beds or bars of the stream, which alone were included in the dredging lease, or of such active interference by the Crown as would justify an action. MCLEAN *v.* THE KING. **542**

DEVOLUTION—*Construction of will—Usufruct—Substitution — Partition between institutes—Validating legislation —60 V. c. 95 (Q.)—Construction of statute—Restraint of alienation—Interest of substitutes—Devise of property held by institute under partition—Devolution of corpus of estate es nature—Accretion—Res judicata—Arts.* 868, 948 *C.C.* **1**

See WILL 1.

DREDGING — *Subaqueous mining — Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice—Statement of claim—Cause of action* **542**

See MINES AND MINERALS 3.

DURESS—*Revocation of will—Testamentary capacity—Findings of fact—Practice—Improper suggestion — Undue influence—Captation—Bounty taken by promoter—Fraudulent representations—Evidence—Onus of proof.* **460**

See WILL 2.

EMINENT DOMAIN.

See EXPROPRIATION.

EMPLOYER AND EMPLOYEE — *Contract of hiring—Manager or expert—Dismissal.*] The manager of a veneer company having heard of plaintiff as a man who could usefully be employed in the business wrote him a letter in which he stated that "what we want is a man who is a good veneer maker and who knows how to make all kinds of built up woods that are salable, such as panels. * * * We want you to take full charge of the mill, that is, the manufacturing." In reply plaintiff said: "Would say I understand fully the making of the articles you speak of as well as numerous others with proper machines and proper men to run them." And in a subsequent letter he said: "I feel from all the experience I have had I have mastered the entire principle of it (the veneer business), knowing machines required for various work, what veneer has got to be when completed." Having been hired by the manager he was discharged six weeks later and brought an action for wrongful dismissal. *Held*, reversing the judgment of the Supreme Court of New Brunswick (37 N.B. Rep. 332) that he was not hired as a business manager but as an expert in the veneer business and as the evidence established that he was not competent he was properly discharged and could not recover. ALLCROFT *v.* ADAMS **365**

ELECTRICITY — *Negligence — Electric light company—Wires on public highway —Proximity to bridge—Injury to child —Dedication.*] Several years ago the owners of land in the Township of York built a bridge over a ravine for access to and from the City of Toronto and about 1894 the Toronto Electric Light Co. placed wires across the ravine about ten feet from the bridge. In 1904 the

ELECTRICITY—*Continued.*

bridge was reconstructed and made wider, being brought to within from 14 to 20 inches of the wires, which had become worn and ceased to be insulated. G., a boy under nine years of age, while playing on the bridge, put his arm through the railing and his hand touching the wire he was badly injured. *Held*, reversing the judgment of the Court of Appeal (12 Ont. L.R. 413), that the plans and deeds in evidence shewed a dedication as a public highway of the bridge and land on each side of it and such highway included the land over which the wires passed.—*Held*, also, that the wires in the condition in which they were at the time of the accident were dangerous to those using the highway and the company were liable for the injury to G. GLOSTER *v.* TORONTO ELECTRIC LIGHT CO. 27

ERROR.

See MISTAKE.

ESTOPPEL—*Crown—Breach of trust—Purchase of debentures out of Common School Fund—Knowledge of misapplication of moneys—Payment of interest—Statutory prohibition—Evasion of statute—Estoppel against the Crown—Action—Adding parties—Practice.*] In an action by the Crown against the Quebec North Shore Turnpike Road Trustees to recover interest upon debentures purchased from them by the Government of the late Province of Canada (with trust funds held by them belonging to the Common School Fund), the defendants pleaded that the Crown was estopped from recovery inasmuch as, at the time of their purchase, the advisers of the Crown were aware that these debentures were being issued in breach of a trust and with the intention of misapplying the proceeds towards payment of interest upon other debentures due by them in violation of a statutory prohibition. *Held*, affirming the judgment appealed from (8 Ex. C.R. 390) that, as there was statutory authority for the issue of the debentures in question, knowledge of any such breach of trust or misapplication by the advisers of the Crown could not be set up as a defence to the action. QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES *v.* THE KING. 62

ESTOPPEL—*Continued.*

2——*Crown — Banks and banking — Forged cheques — Payment — Representation by drawee—Implied guarantee —Estoppel — Acknowledgment of bank statements — Liability of indorsers — Mistake — Action—Money had and received.*] A clerk in a department of the Government of Canada, whose duty was to examine and check its account with the Bank of Montreal, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the drawee to the several other banks, on presentation, and charged against the Receiver-General on the account of the department with the bank. None of the cheques were marked with the drawee's acceptance before payment. In the meantime, the accountant of the department, being deceived by false returns of checking by the account by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques and charged against the Receiver-General: *Held*, affirming the judgment appealed from (11 Ont. L.R. 595) that the bank was liable unless the Crown was estopped from setting up the forgery. *Per* Davies, Idington and Duff JJ., that estoppel could not be invoked against the Crown. *Per* Girouard and Maclennan JJ., that, apart from the question of the Crown being subject to estoppel, under the circumstances of this case a private person would not have been estopped had his name been forged as drawer of the cheques. *Per* Davies and Idington JJ.—The acknowledgment by the accountant of the department of the correctness of the statements furnished by the bank, being made under a mistake as to the facts, the accounts could be re-opened to have the mistake rectified—The defendant bank made claims against the other banks, as third parties, as indorsers or as having received money paid by mistake, for the reimbursement of the several amounts so paid to them, respectively. On these third party issues, it was held, *per* Girouard and Maclennan JJ.—The drawee, having paid the cheques on which the name of its customer was forged, could not

ESTOPPEL—*Continued.*

recover the amounts thereof from holders in due course. *Price* v. *Neal* (4 Burr. 1355) followed. *Per* Davies and Idington JJ.—As the third party banks relied upon the representation that the cheques were genuine, which was to be implied from their payment on presentation, and subsequently paid out the funds to their depositor or on his order, the drawee was estopped and could not recover the amounts so paid from them either as indorsers or as for money paid to them under mistake. In the result, the judgment appealed from (11 Ont. L.R. 595) was affirmed. BANK OF MONTREAL *v.* THE KING. **258**

3——*Breach of contract — Breach of trust—Assessment of damages—Sale of mining rights—Promotion of company —Failure to deliver securities—Principal and agent—Account—Evidence—Salvage—Indemnity for necessary expenses —Laches—Estoppel.* **198**

See TRUSTS 1.

4——*Infringement of patent—Purchase of patented device.* **451**

See PATENT OF INVENTION 1.

5——*Placer mining—Disputed title— Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts —Sinister intention—Conversion—Blending materials—Accounts—Assessment of damages — Mitigating circumstances — Compensation for necessary expenses— Standing-by—Acquiescence.* **516**

See MINES AND MINERALS 2.

EVIDENCE—*Construction of deed — Description of lands—License to cut timber — Ambiguitas latens—Evidence — Boundary.*] A license to cut timber on a lot of land described the portion affected as bounded on the south by a river. The river almost crossed the lot at a point near its northern boundary and, at another point, about nineteen arpents further south, it again crossed the lot, completely. In an action to eject the licensee from the portion of the lot between the first and second bends of the river and to recover damages: *Held,* that, under the circumstances there was no ambiguity in the designation of the quantity of the land affected by the license and, in any event, the language of the instrument must be literally construed in favour of the grantee and the party bound thereby could not be permitted to shew a different intention by evidence of surrounding circumstances. MOREL *v.* LEFRANCOIS. **75**

2——*Practice—Examination of witnesses —Expert testimony—2 Edw. VII. c. 9, s. 1.*] By 2 Edw. VII. c. 9, s. 1, only five expert witnesses can be called by either side on the trial of a case without leave. *Quœre.* If more are so called without objection by the opposite party is the testimony of the extra witness valid? DODGE *v.* THE KING. **149**

AND *see* EXPROPRIATION 1.

3——*Admiralty law—Collision — Violation of rules not affecting accident— Steering wrong course.*] A steamer coming up Halifax harbour ran into a schooner striking her stern on the port side. No sound signals were given. The green light of the schooner was seen on the steamer's port bow and the latter starboarded her helm to pass astern and then ported. She then was so close that the engines were stopped but too late to prevent the collision. *Held,* that the steamer alone was to blame for the collision.—*Held,* also, that though under the rules the schooner should have kept her course and also was to blame for not having a proper lookout neither fault contributed to the collision. SS. "ARRANMORE" *v.* RUDOLPH. **176**

AND *see* SHIPS AND SHIPPING 2.

4——*Criminal law — Practice — Crown case reserved—Reserved questions—Dissent from affirmance of conviction—Appeal—Jurisdiction—Criminal Code,* 1892, *ss.* 742, 743, 744, 750—*R.S.C.* (1906), *c.* 146, *ss.* 1013, 1015, 1016, 1024—*Admission of evidence—Res gestæ.*] Evidence of statements made by a person, since deceased, immediately after an assault upon him under apprehension of further danger and requesting assistance and protection, is admissible as part of the *res gestæ,* even though the person accused of the offence was absent at the

EVIDENCE—*Continued.*

time when such statements were made. *Reg. v. Beddingfield* (14 Cox 341), *Rex* v. *Foster* (6 C. & P. 325) and *Aveson* v. *Kinnaird* (6 East. 188) followed.—Statements not coincident, in point of time, with the occurrence of the assault, but uttered in the presence and hearing of the accused and under such circumstances that he might reasonably have been expected to make some explanatory reply to remarks in reference to them, are admissible as evidence.—On the trial of an indictment for murder the evidence was that the deceased had been killed by a gun-shot wound inflicted through the discharge of a gun in the hands of the accused and the defence was that the gun had been discharged accidentally. *Held*, that, in view of the character of the defence and the evidence in support of it, there could be no objection to a charge by the trial judge to the jury that the offence could not be reduced by them from murder to manslaughter but that their verdict should be either for acquittal or one of guilty of murder. GILBERT *v.* THE KING. 284

AND *see* CRIMINAL LAW 2.

5——*Title to land—Plan of survey—Evidence—Onus of proof—Findings of jury—Error—New trial.*] Where it appeared that in directing the jury, at the trial, the judge attached undue importance to the effect of a plan of survey referred to in a junior grant as against a much older plan upon which the original grants of the lands in dispute depended and that the findings were not based upon evidence sufficient in law to shift the onus of proof from the plaintiff and were, likewise, insufficient for the taking of accounts in respect to trespass and conversion of minerals complained of: *Held*, affirming the order for a new trial made by the judgment appealed from (1 East. L.R. 293), that in the absence of evidence of error therein, the older grants and plan must govern the rights of the parties. BARTLETT *v.* NOVA SCOTIA STEEL CO. 336

6——*Revocation of will—Testamentary capacity—Findings of fact—Practice—Improper suggestion—Undue influence—Captation—Bounty taken by promoter—*

EVIDENCE—*Continued.*

Fraudulent representations—Evidence — Onus of proof.] While the testator was suffering from a wasting disease of which he died shortly afterwards, the defendant, his brother, took advantage of his weakness of mind and secretly obtained the execution of a will, in which he was made the principal beneficiary, by fraudulently suggesting and causing the testator to believe that his malady was caused and aggravated by the carelessness and want of skill of his wife in the preparation of his food. The testator and his wife had lived together in harmony for a number of years and, shortly after their marriage, had made wills by which each of them, respectively, had constituted the other universal residuary legatee and the testator's former will, so made, was revoked by the will propounded by the defendant. *Held*, that, as the promoter of the will, by which he took a bounty, had failed to discharge the onus of proof cast upon him to shew that the testator had acted freely and without undue influence in the revocation of the former will, the second will was invalid and should be set aside. MAYRAND *v.* DUSSAULT. . 460

AND *see* WILL 2.

7——*Jury trial—Judge's charge—Practical withdrawal of case—Evidence — New trial.* 165

See NEW TRIAL 1.

8——*Appeal—Order extending time — Jurisdiction—R.S.C.* (1886) *c.* 135, *s.* 42 *—Practice — Trespass — Possession — Evidence — Expropriation — Railways.* 230

See APPEAL 4.
" TRESPASS 1.

EXECUTIVE POWERS—*Appeal—Jurisdiction — Discretion of Governor in Council—Stated case—Railway subsidies —Construction of statute—3 Edw. VII. c.* 57*—Conditions of contract—Estimating cost of construction of line of railway—Rolling stock and equipment.* .137

See RAILWAYS 2.

EXPROPRIATION — *Expropriation of land—Payment — Market value —Potential value—Evidence.*] D. purchased

EXPROPRIATION—*Continued.*

at different times and in sixteen different parcels 623 acres of land, paying for the whole nearly $7,000, or about $11 per acre. The Crown on expropriating the land offered him $20 per acre, which he refused, claiming $22,000, which on a reference to ascertain the value was increased to $45,000. The referee allowed $38,000, which the Exchequer Court reduced to the sum first claimed. *Held*, reversing the judgment of the Exchequer Court (10 Ex. C.R. 208), Girouard J. dissenting, that there was no user of the land nor any special circumstances to make it worth more than the market value, which was established by the price for which it was sold shortly before expropriation.—D. claimed the larger price as potential value of the land for orchard purposes to which he had intended to devote it.—*Held*, that as he had not proved the land to be fit for such purpose and the evidence tended to disprove it he could not receive compensation on that ground. By 2 Edw. VII. c. 9, s. 1, only five expert witnesses can be called by either side on the trial of a case without leave. *Quære.* If more are so called without objection by the opposite party is the testimony of the extra witness valid? DODGE *v.* THE KING. 149

2——*Railway Act—Appeal from award—Choice of forum—Curia designata.*] By s. 168 of 3 Edw. VII. c. 58 amending the Railway Act, 1903, (R.S.C. (1906) c. 37, s. 209) if an award by arbitrators on expropriation of land by a railway company exceeds $600 any dissatisfied party may appeal therefrom to a Superior Court which in Ontario means the High Court or the Court of Appeal (Interpretation Act R.S. [1906] c. 1, s. 34, s.-s. 26). *Held*, that if an appeal from an award is taken to the High Court there can be no further appeal to the Supreme Court of Canada which cannot even give special leave. JAMES BAY RY. CO. *v.* ARMSTRONG. 511

3——*Appeal—Order extending time — Jurisdiction—R.S.C.* (1886) *c.* 135, *s.* 42—*Practice — Trespass — Possession—Evidence — Expropriation — Railways.* 230

See APPEAL 4.
" TRESPASS 1.

FINDINGS OF FACT—*Negligence—Railway crossing—Findings of jury—"Look and listen"* 94

See NEGLIGENCE 2.
AND *see* APPEAL; PRACTICE.

FORGERY—*Crown—Banks and banking—Forged cheque—Payment—Representation by drawee—Implied guarantee—Estoppel — Acknowledgment of bank statements — Liability of indorsers — Mistake—Action—Money had and received.* 258

See BANKS AND BANKING 2.

FRAUD—*Revocation of will—Testamentary capacity—Findings of fact—Practice—Improper suggestion—Undue influence—Captation—Bounty taken by promoter—Fraudulent representations—Evidence—Onus of proof.*] While the testator was suffering from a wasting disease of which he died shortly afterwards, the defendant, his brother, took advantage of his weakness of mind and secretly obtained the execution of a will, in which he was made the principal beneficiary, by fraudulently suggesting and causing the testator to believe that his malady was caused and aggravated by the carelessness and want of skill of his wife in the preparation of his food. The testator and his wife had lived together in harmony for a number of years and, shortly after their marriage, had made wills by which each of them, respectively, had constituted the other universal residuary legatee and the testator's former will, so made, was revoked by the will propounded by the defendant. *Held*, that, as the promoter of the will, by which he took a bounty, had failed to discharge the onus of proof cast upon him to shew that the testator had acted freely and without undue influence in the revocation of the former will, the second will was invalid and should be set aside. MAYRAND *v.* DUSSAULT. . 460

AND *See* WILL 2.

2——*Crown — Banks and banking — Forged cheque—Payment — Representation by drawee—Implied guarantee — Estoppel — Acknowledgment of bank statements—Liability of indorsers—Mistake—Action—Money had and received.* 258

See BANKS AND BANKING 2.

FRAUD—*Continued.*

3——*Placer mining—Disputed title — Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts — Sinister intention — Conversion — Blending materials — Accounts—Assessment of damages—Mitigating circumstances—Compensation for necessary expenses—Estoppel — Standing-by — Acquiescence.* 516

See MINES AND MINERALS 2.

4——*Mortgage—Money advanced to construct buildings—Lien for materials supplied — Payment to contractor — Transactions in fraud of mortgagee's rights—Redemption—Costs.* 557

See MORTGAGE.

5——*Vendor and purchaser—Sale of land—Formation of contract—Conditions —Acceptance of title—New term—Statute of Frauds—Principal and agent—Secret commission—Avoidance of contract—Specific performance.* 588

See CONTRACT 6.

FRAUDULENT PREFERENCES — *Insolvency — Security to creditor—Knowledge of insolvency — R.S.O.* [1897] *c.* 147, *s.* 2, *ss.* 2 *and* 3.] G. had assisted S. with loans and also guaranteed his credit at the Dominion Bank to the extent of $3,000. His own cheque at the bank having been refused payment until the indebtedness of S. of $1,900 was settled the latter promised to arrange it within a month which he did by transferring to G. goods pledged to the Imperial Bank G. paying what was due to both banks. Shortly after S. sold out his stock in trade and absconded owing large sums to foreign creditors and being insolvent. On the trial of a creditor's action to set aside the transfer to G. as a fraudulent preference the manager of the Dominion Bank testified that G.'s cheque was not refused from any doubt of S.'s solvency but because he had heard that S. was dealing with another bank and he wished to close the account. *Held,* Idington and Duff JJ. dissenting, that under the evidence produced G. had no reason to suppose, when the goods were transferred, that S. was insolvent and he had satisfied the onus placed upon him by

FRAUDULENT PREFERENCES—*Con.*

the provincial statute of shewing that he had not intended to hinder, delay or defraud the creditors of S. BALDOCCHI *v.* SPADA. 577

GAMBLING—*Criminal law—Disorderly house—Common betting house—Place for betting—Betting booth—Race-course of incorporated association — Crim. Code,* 1892, *ss.* 197, 204—*Crim. Code,* 1906, *ss.* 227, 235—*Construction of statute—Interpretation of terms.* 382

See CRIMINAL LAW 3.

GOVERNOR IN COUNCIL — *Appeal — Jurisdiction—Discretion of Governor in Council—Stated case—Railway subsidies —Construction of statute—3 Edw. VII. c.* 57—*Conditions of contract—Estimating costs of constructing line of railway —Rolling stock and equipment.* 137

See RAILWAYS 2.

2——*Public work—Contract—Change in plans and specifications—Waiver by order in council—Powers of executive—Construction of statute—Directory and imperative clauses—Words and phrases —"Stipulations"—Exchequer Court Act, s.* 33—*Extra works—Engineer's certificate—Instructions in writing—Schedule of prices—Compensation at increased rate—Damages—Right of action—Quantum meruit.* 501

See CONTRACT 5.

GUARANTEE— *Crown — Banks and banking—Forged cheques — Payment — Representation by drawee — Implied guarantee — Estoppel — Acknowledgment of bank statements—Liability of indorsers—Mistake—Action—Money had and received.* 258

See BANKS AND BANKING 2.

HABEAS CORPUS—*Canada Temperance Act — Conviction — "Criminal case"— R.S.C. c.* 135, *s.* 32—*Habeas corpus— Penalty—"Not less than* $50"—*Conviction for* $200.] A commitment on conviction for an offence against Part II. of the Canada Temperance Act is a commitment in a criminal case under s. 32 of R.S.C. c. 135 (R.S. 1906, c. 139, s. 62) which gives a judge of the Supreme Court of Canada power to issue

HABEAS CORPUS—*Continued.*

a writ of *habeas corpus*. On application to a judge for a writ of *habeas corpus* he may refer the same to the court which has jurisdiction to hear and dispose of it. Idington and Maclennan JJ. dissentin. IN RE RICHARD. 394

AND *see* CANADA TEMPERANCE ACT.

HIGHWAY—*Negligence—Electric lighting—Wires on public highway—Proximity to bridge—Injury to child—Dedication* 27

See NEGLIGENCE 1.

2——*Negligence — Railway crossing — Findings of jury—"Look and listen."* 94

See NEGLIGENCE 2.

3——*Municipal corporation—Agreement with electric street railway company—Use of streets—Payment for privilege—Percentage of receipts—Traffic beyond city—Validity of agreement.* 106

See TRAMWAYS 1.

HORSE RACES.

See RACE-COURSE.

HYDRAULIC MINING.

See MINES AND MINERALS 1.

HYPOTHECATION—*Broker — Stock — Purchase on margin—Pledge of stock by broker—Possession for delivery to purchaser.* 501

See BROKER.

INJUNCTION—*Dominion mining regulations—Hydraulic mining—Place mining —Lease—Water-grant — Conditions of grant—User of flowing waters—Diversion of watercourse—Dams and flumes —Construction of deed—Riparian rights —Priority of right.* 79

See MINES AND MINERALS 1.

2——*Appeal—Action for declaration and injunction—60 & 61 V. c. 34, s. 1(D.)— Municipal corporation—Water rates — Discrimination.* 239

See MUNICIPAL CORPORATION 2.

INSOLVENCY—*Fraudulent preference—Security to creditor—Knowledge of insolvency—R.S.O.* [1897] *c.* 147, *s.* 2, *ss.* 2 *and* 3.] G. had assisted S. with loans and also guaranteed his credit at the Dominion Bank to the extent of $3,000. His own cheque at the bank having been refused payment until the indebtedness of S. of $1,900 was settled the latter promised to arrange it within a month which he did by transferring to G. goods pledged to the Imperial Bank G. paying what was due to both banks. Shortly after S. sold out his stock in trade and absconded owing large sums to foreign creditors and being insolvent. On the trial of a creditor's action to set aside the transfer to G. as a fraudulent preference the manager of the Dominion Bank testified that G.'s cheque was not refused from any doubt of S.'s solvency but because he had heard that S. was dealing with another bank and he wished to close the account. *Held*, Idington and Duff JJ. dissenting, that under the evidence produced G. had no reason to suppose, when the goods were transferred, that S. was insolvent and he had satisfied the onus placed upon him by the provincial statute of shewing that he had not intended to hinder, delay or defraud the creditors of S. BALDOCCHI *v.* SPADA. 577

INTERPRETATION.

See STATUTE; WORDS AND PHRASES.

INTERVENTION— *Appeal — Jurisdiction — Intervention — Matter in controversy — Judicial proceeding—R.S.C. c.* 135, *s.* 29.] An intervention filed under the provisions of the Code of Civil Procedure of the Province of Quebec is a "judicial proceeding" within the meaning of section 29 of the Supreme and Exchequer Courts Act, and a final judgment thereon is appealable to the Supreme Court of Canada where the matter in controversy upon the intervention amounts to the sum or value of $2,000 without reference to the amount demanded by the action in which such intervention has been filed. *Walcott* v. *Robinson* (11 L.C. Jur. 303); *Miller* v. *Déchêne* (8 Q.L.R. 18); *Turcotte* v. *Dansereau* (26 Can. S.C.R. 578); and *King* v. *Dupuis* (28 Can. S.C.R. 388) followed.

INTERVENTION—*Continued.*

The Atlantic and North-West Railway Co. v. *Turcotte* (Q.R. 2 Q.B. 305); *Allan* v. *Pratt* (13 App. Cas. 780), and *Kinghorn* v. *Larue* (22 Can. S.C.R. 347) distinguished. Girouard J. dissented. COTÉ *v.* THE JAMES RICHARDSON CO. .41

JUDGE—*Charge to jury—Criminal law —Practice — Crown case reserved—Reserved questions—Dissent from affirmance of conviction—Appeal—Jurisdiction —Criminal Code*, 1892, *ss.* 742, 743, 744, 750—*R.S.C.* (1906) *c.* 146, *ss.* 1013, 1015, 1016, 1024—*Admission of evidence—Res gestæ*. 284

See CRIMINAL LAW 2.

2——*Title to land—Plan of survey—Evidence—Onus of proof—Findings of jury —Error—New trial* 336

See NEW TRIAL 2.

JUDGMENT—*Practice — Revising minutes of judgment—Mistake—Costs of abandoned defences—Reference to trial judge*. 103

See PRACTICE AND PLEADING 1.

2——*Vacating judgment—Appeal —Jurisdiction — Matter in controversy — Tierce opposition—Arts.* 1185-1188 *C.P. Q.—R.S.C.* (1886) *c.* 135, *s.* 29. 236

See OPPOSITION.

JURY—*Title to land—Plan of survey—Evidence—Onus of proof—Findings of jury—Error—New trial.*] Where it appeared that in directing the jury, at the trial, the judge attached undue importance to the effect of a plan of survey referred to in a junior grant as against a much older plan upon which the original grants of the lands in dispute depended and that the findings were not based upon evidence sufficient in law to shift the onus of proof from the plaintiff and were, likewise, insufficient for the taking of accounts in respect to trespass and conversion of minerals complained of: *Held*, affirming the order for a new trial made by the judgment appeal from (1 East. L.R. 293), that in the absence of evidence of error therein, the older grants and plan must govern the rights of the parties. BARTLETT *v.* NOVA SCOTIA STEEL CO. 336

JURY—*Continued.*

2—— *Negligence—Railway crossing — Findings of jury—"Look and listen."* 94

See NEGLIGENCE 2.

3——*Jury trial—Judge's charge—Practical withdrawal of case—Evidence — New trial*. 165

See NEW TRIAL 1.

4—— *Criminal law — Practice—Charge to jury — Crown case reserved — Reserved questions — Dissent from affirmance of conviction — Appeal — Jurisdiction — Criminal Code*, 1892, *ss.* 742, 743, 744, 750 — R. S. C. (1906) *c.* 146, *ss.* 1013, 1015, 1016, 1024 —*Admission of evidence—Res gestæ.* 284

See CRIMINAL LAW 2.

JURISDICTION — *Admiralty law — Foreign bottoms—Collision in foreign waters — Jurisdiction of Canadian courts.*] A foreign vessel passing through waters dividing Canada from the United States under a treaty allowing free passage to ships of both nations is not, even when on the Canadian side, within Canadian control so as to be subject to arrest on a warrant from the Admiralty Court.—A warrant to arrest a foreign ship cannot be issued until she is within the jurisdiction of the court. *Quære.* Have the Canadian Courts of Admiralty the same jurisdiction as those in England to try an action *in rem* by one foreign ship against another for damages caused by a collision in foreign waters? Judgment of the Exchequer Court, Toronto Admiralty District (10 Ex. C.R. 1) reversed, Idington J. dissenting. THE SHIP "D. C. WHITNEY" *v.* ST. CLAIR NAVIGATION CO. 303

2——*Constitutional law—British North America Act*, 1867—*Provincial legislative jurisdiction—"Alberta Act,"* 4 *&* 5 *Edw. VII. c.* 3 (*D.*)—*Con. Ord. N.W.T.* (1898) *c.* 52—6 *Edw. VII. c.* 28 (*Alta.*) —*Medical profession—Practising without license—Criminal law—Practice — Special leave to appeal—R.S.C.* (1906) *c.* 139, *s.* 37 (*c*). 620

See APPEAL 11.

" CONSTITUTIONAL LAW 1.

LACHES—*Breach of contract—Breach of trust—Assessment of damages—Sale of mining rights—Promotion of company—Failure to deliver securities—Principal and agent—Account—Evidence — Salvage—Indemnity for necessary expenses—Laches—Estoppel.* 198

See TRUSTS 1.

LEASE—*Dominion mining regulations—Hydraulic mining — Place mining — Water-grant — Conditions of grant — User of flowing waters—Diversion of watercourse—Dams and flumes — Construction of deed—Riparian rights — Priority of right—Injunction.* 79

See MINES AND MINERALS 3.

2——*Subaqueous mining—Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice—Statement of claim—Cause of action.* 542

See MINES AND MINERALS 1.

LEGACY.

See WILL.

LEGISLATION— *Constitutional law — British North America Act,* 1867—*Provincial legislative jurisdiction — Alberta Act,* 4 *&* 5 *Edw. VII. c.* 3 *(D.)—Con. Ord. N.W.T.* (1898) *c.* 52—6 *Edw. VII. c.* 28 *(Alta.)—Medical profession—Practising without license—Criminal law—Practice—Special leave to appeal—R.S.C.* (1906) *c.* 139, *s.* 37 *(c).* 620

See APPEAL 11.
" CONSTITUTIONAL LAW 1.

LIEN—*Mortgage—Money advanced to construct buildings—Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagee's rights—Redemption—Costs.* 557

See MORTGAGE.

LIMITATIONS OF ACTIONS.

See STATUTE OF LIMITATIONS.

LIQUOR LAWS — *Canada Temperance Act—Conviction—"Criminal case" —R. S.C.* (1886) *c.* 135, *s.* 32—*Habeas corpus*

LIQUOR LAWS—*Continued.*

—Penalty—"Not less than $50"*—Conviction for* $200*—Imposition of fine for first offence—Powers of Supreme Court judge—Reference of application to full court.* 394

See CANADA TEMPERANCE ACT.

LIS PENDENS—*Placer mining — Disputed title—Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts—Sinister intention — Conversion—Blending materials — Accounts—Assessment of damages — Mitigating circumstances—Compensation for necessary expenses—Estoppel—Standing-by—Acquiescence.* 516

See MINES AND MINERALS 2.

MARITIME LAW.

See ADMIRALTY LAW.
" SHIPS AND SHIPPING.

MARKSMAN— *Mortgage — Money advanced to construct buildings—Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagee's rights—Redemption—Costs.* 557

See MORTGAGE.

MEDICAL PROFESSION—*Constitutional law—British North America Act,* 1867—*Provincial legislative jurisdiction — Alberta Act,* 4 *&* 5 *Edw. VII. c.* 3 *(D.)—Con. Ord. N.W.T.* (1898) *c.* 52—6 *Edw. VII. c.* 28 *(Alta.)—Practising without license—Criminal law—Practice—Special leave to appeal—R.S.C.* (1906) *c.* 139, *s.* 37 *(c).* 620

See APPEAL 11.
" CONSTITUTIONAL LAW 1.

MINES AND MINERALS — *Dominion mining regulations—Hydraulic mining—Placer mining—Lease—Water-grant — Conditions of grant—User of flowing waters — Diversion of watercourse — Dams and flumes—Construction of deed—Riparian rights—Priority of right—Injunction.*] An hydraulic mining lease, granted in 1900, under the Dominion Mining Regulations, for a location extending along both banks of Hunker Creek, in the Yukon Territory, included a point at which, in 1904, the plaintiff acquired the right to divert a portion of

MINES AND MINERALS—*Con.*

the waters of the creek, subject to then existing rights, for working his placer mining claims adjacent thereto. *Held*, that, under a proper construction of the tenth clause of the hydraulic mining regulations, waters flowing through or past the location were subject to be dealt with under the regulations of August, 1898; that the hydraulic grant conferred no prior privileges or paramount riparian rights upon the lessee, and that the grant to the plaintiff was of a substantial user of the waters which was not subject to the common law rights of riparian owners and entitled him, by all reasonable means necessary for the purpose of working his placer claims, to divert the portion of the flowing waters so acquired by him without interference on the part of the lessee of the hydraulic privileges. KLONDYKE GOVERNMENT CONCESSION *v.* MCDONALD. 79

2——*Placer mining—Disputed title — Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts — Sinister intention — Conversion — Blending materials — Accounts — Assessment of damages — Mitigating circumstances — Compensation for necessary expenses—Estoppel—Standing-by—Acquiescence.*] After a favourable judgment by the Gold Commissioner in respect to the boundary between contiguous placer mining locations and while an appeal therefrom was pending, the defendants, with the knowledge of the plaintiffs, entered upon the location and removed a quantity of auriferous material from the disputed and undisputed portions thereof, intermixed the products without keeping any account of the quantities taken from these portions respectively and appropriated the gold recovered from the whole mass. In an action for damages, taken subsequently, the plaintiffs recovered for the total value of the gold estimated to have been taken from the disputed portion of the claim, without deduction of the necessary expenses of workings and winning the gold. *Held*, affirming the judgment appealed from, Davies J. dissenting, that a correct appreciation of the evidence disclosed a sinister intention on the part of the defendants, that they had deliverately blended the materials taken from both parts of the location, converted the whole mass to their own use and thereby destroyed the means of ascertaining the respective quantities so taken and the proportionate expense of recovering the precious metal therefrom, and that, consequently, they were liable in damages for the total value of so much of the intermixed products as were not strictly proved to have come from the undisputed portion of the location. *Quœre.* Does the English rule governing the assessment of damages in respect of trespasses in coal mines supply a method of assessment applicable in its entirety to placer mining locations? LAMB *v.* KINCAID. 516

3——*Subaqueous mining—Crown grants —Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice —Statement of claim—Demurrer—Cause of action.*] A statement of claim which alleges that the Crown, after granting a lease of areas for subaqueous mining and while that lease was in force, in derogation of the rights of the lessee to peaceable enjoyment thereof, interfered with the rights vested in him by transferring the leased area to placer miners who were put in possession of them by the Crown to his detriment, discloses a sufficient cause of action in support of a petition of right for the recovery of damages claimed in consequence of such subsequent grants. Judgment appealed from (10 Ex. C.R. 390) reversed, Davies and Idington JJ. dissenting. Davies J. dissented on the ground that there was no sufficient allegation in the petition either of interference with the submerged beds or bars of the stream, which alone were included in the dredging lease, or of such active interference by the Crown as would justify an action. MCLEAN *v.* THE KING. 542

4——*Title to land—Plan of survey—Evidence—Onus of proof—Findings of jury—Error—New trial.* 336

See NEW TRIAL 2.

MISTAKE—*Crown—Banks and banking —Forged cheques — Payment — Representation by drawee—Implied guarantee —Estoppel — Acknowledgment of bank*

MISTAKE—*Continued.*

statements—Liability of indorsers—Mistake—Action—Money had and received.] A clerk in a department of the Government of Canada, whose duty was to examine and check its account with the Bank of Montreal, forged departmental cheques and deposited them to his credit in other banks. The forgeries were not discovered until some months after these cheques had been paid by the drawee to the several other banks, on presentation, and charged against the Receiver-General on the account of the department with the bank. None of the cheques were marked with the drawee's acceptance before payment. In the meantime, the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques and charged against the Receiver-General: *Held*, affirming the judgment appealed from (11 Ont. L.R. 595) that the bank was liable unless the Crown was estopped from setting up the forgery. *Per* Davies, Idington and Duff JJ., that estoppel could not be invoked against the Crown. *Per* Girouard and Maclennan JJ., that, apart from the question of the Crown being subject to estoppel, under the circumstances of this case a private person would not have been estopped had his name been forged as drawer of the cheques.—*Held, per* Davies and Idington JJ.—The acknowledgment by the accountant of the department of the correctness of the statements furnished by the bank, being made under a mistake as to the facts, the account could be re-opened to have the mistake rectified—The defendant bank made claims against the other banks, as third parties, as indorsers or as having received money paid by mistake, for the reimbursement of the several amounts so paid to them, respectively. On these third party issues, it was held, *per* Girouard and Maclennan JJ.—The drawee, having paid the cheques on which the name of its customer was forged, could not recover the amounts thereof from holders in due course. *Price* v. *Neal* (4 Burr. 1355) followed. *Per* Davies and Idington JJ.—As the third party banks relied upon the representation that the cheques were genuine, which was to be implied from their payment on presentation, and subsequently paid out of the funds to their depositor or on his order, the drawee was estopped and could not recover the amounts so paid from them either as indorsers or as for money paid to them under mistake. In the result, the judgment appealed from (11 Ont. L.R. 595) was affirmed. BANK OF MONTREAL *v.* THE KING. **258**

MISTAKE—*Continued.*

2——*Practice — Revising minutes of judgment—Costs of abandoned defences —Reference to trial judge.* **103**

See PRACTICE AND PLEADING 1.

MISTRIAL—*Jury trial—Judge's charge —Practical withdrawal of case — Evidence—New trial.* **165**

See NEW TRIAL 1.

MORTGAGE—*Money advanced to construct buildings—Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagor's rights—Redemption—Costs.*] A building and loan company advanced money to an illiterate woman for the purpose of aiding in the construction of a house to be erected upon lands mortgaged to it to secure the loan. The mortgage contained no provision for advances to contractors, etc., as the work progressed, beyond the following: "And it is hereby agreed between the parties hereto, that the mortgagees, their successors and assigns, may pay any taxes, rates, levies, assessments, charges, moneys for insurance, liens, costs of suit, or matters relating to liens or incumbrances on the said lands, and solicitors' charges in connection with this mortgage, and valuator's fees, together with all costs and charges which may be incurred by taking proceedings of any nature in case of default by the mortgagor, her heirs, executors, administrators or assigns, and shall be payable with interest, at the rate aforesaid, until paid and, in default. the power of sale hereby given shall be forthwith exercisable. And it is further agreed that monthly instalments in arrear shall bear interest at the rate aforesaid until paid." In a suit for redemption: *Held*, first, that the clause

MORTGAGE—*Continued.*

in the mortgage did not justify the mortgagees in making advances to contractors and persons supplying material, without the express order of the mortgagor. Secondly, that the mortgagees ought not to have recognized an order in favour of the contractor for the total amount of the loan when they knew that the contractor had not completed his contract and was, therefore, not entitled to the money when the order contained no name of a witness, and shewed that the mortgagor was unable to sign her name.—The payment having been made by the loan company to a lumber company supplying material to the contractors for the building without the express authority of the mortgagor, and the lumber company having taken an assignment of the mortgage, and attempted to enforce it against the mortgagor the transaction was declared fraudulent as against the mortgagor, and the payment to the lumber company disallowed.—*Held,* also, that the only costs the assignees of the mortgage were entitled to add to the mortgage debt were the costs of an ordinary redemption suit consented to by a mortgagee. Judgment appealed from varied, and appeal dismissed with costs. BLACK *v.* HIEBERT. **557**

MUNICIPAL CORPORATION — *Agreement with Electric Street Ry. Co.—Use of streets—Payment for—Percentage of receipts—Traffic beyond city—Validity of agreement.*] By agreement between the City of Hamilton and the Hamilton Street Ry. Co. the latter was authorized to construct its railway on certain named streets and agreed to pay to the city, *inter alia,* certain percentages on their gross receipts. *Held,* following *Montreal Street Ry. Co.* v. *City of Montreal* ([1906] A.C. 100) that such payment applies in respect to all traffic in the city including that originating or terminating in the adjoining Township of Barton.—*Held,* also, that as when the railway was extended into Barton the company agreed with that township to carry passengers from there into the city at city rates, the percentage was payable on the whole of such traffic and not on the portion within the city only.—*Held,* further, that the power of the company to construct its railway was not derived wholly from its charter, but

MUNICIPAL CORPORATION—*Con.*

was subject to the permission of the city corporation; the city had, therefore, a right to stipulate for payment of such percentages and the agreement therefor was *intra vires.* The judgment of the Court of Appeal (10 Ont. L.R. 575), affirming that of Meredith J. at the trial (8 Ont. L.R. 455) was affirmed. HAMILTON ST. RY. CO. *v.* CITY OF HAMILTON. **106**

2——*Appeal — Action for declaration and injunction*—60 *&* 61 *V. c.* 34, *s.* 1 (*d.*)—*Municipal corporation — Water rates—Discrimination.*] The Act 60 & 61 Vict. 34 (D.) relating to appeals from the Court of Appeal for Ontario does not authorize an appeal in an action claiming only a declaration that a municipal by-law is illegal and an injunction to restrain its enforcement.—A by-law providing for special water rate from certain industries does not bring in question "the taking of an annual or other rent, customary or other duty or fee" under section 1 (*d.*) of the Act (R.S. 1906. c. 139, s. 48 (*d.*).—By 24 V. c. 56,, s. 3 (Can.) the City council of Hamilton was "empowered from time to time to establish by by-law a tariff of rents or rates for water supplied or ready to be supplied in the said city from the said water works." *Held,* affirming the judgment of the Court of Appeal (12 Ont. L.R. 75) which sustained the verdict at the trial (10 Ont. L.R. 280) that the rate for water supplied to any class of consumers must be an equal rate to all members of such class and a by-law providing for a rate on certain manufacturers higher than that to be paid by others was illegal. *Attorney-General* v. *City of Toronto* (23 Can. S.C.R. 514) followed. CITY OF HAMILTON *v.* HAMILTON DISTILLERY CO.; CITY OF HAMILTON *v.* HAMILTON BREWING ASSOCIATION. . **239**

3——*Exemption from taxes—Resolution of council—Discrimination — Establishment of industry*—36 *V. c.* 81, *s.* 1 (*N. B.*).] By s. 1 of 36 V. c. 81, the New Brunswick Legislature authorized the town council of Woodstock from time to time to "give encouragement to manufacturing enterprises within the said town by exempting the property thereof from taxation for a period of not more than ten years by a resolution declaring such

MUNICIPAL CORPORATION—*Con.*

exemption." In 1892 the council passed the following resolution: "That any company establishing a woollen mill in the Town of Woodstock be exempted from taxation for a period of ten years." *Held, per* Davies, Idington and Maclennan JJ. that this resolution provided for discrimination in favour of companies and against individuals who might establish a woollen mill or mills in the town and was therefore void. *City of Hamilton* v. *Hamilton Distillery Co.* (38 Can. S.C.R. 239) followed. *Held, per* Davies J.—The resolution exempting any company and not any property of a company was too indefinite and uncertain to be the basis for a claim for exemption.—In 1893 a woollen mill was established in Woodstock by the Woodstock Woollen Mills Co., and operated for some years without taxation. In 1899 the mill was sold under execution and two months later the Carleton Woollen Co., (appellants) were incorporated and acquired the said mill from the purchaser at the sheriff's sale and have operated it since.—*Held,* that the appellants could not by so acquiring the mill which had been exempted be said to have "established a woollen mill." without shewing that when it was acquired it had ceased to exist as such which they had not done. Judgment appealed from (37 N.B. Rep. 545) affirming that of Barker J. at the hearing (3 N.B. Eq. 138) affirmed. CARLETON WOOLLEN CO. *v.* TOWN OF WOODSTOCK 411

NAVIGATION— *Shipping—Collision — Violation of rules not affecting accident —Steering wrong course.*] The Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the local judge unless the appellant can point out his mistake and shew conclusively that the judgment is entirely erroneous. *The Picton* (4 Can. S.C.R. 648) followed. —A steamer coming up Halifax harbour ran into a schooner striking her stern on the port side. No sound signals were given. The green light of the schooner was seen on the steamer's port bow and the latter starboarded her helm to pass astern and then ported. She then was so close that the engines were stopped

NAVIGATION—*Continued.*

but too late to prevent the collision. *Held,* that the steamer alone was to blame for the collision.—*Held,* also, that though under the rules the schooner should have kept her course and also was to blame for not having a proper lookout neither fault contributed to the collision. SS. "ARRANMORE" *v.* RUDOLPH. 176

2——*Negligence — Navigation of inland waters — Collision — Government ships and vessels—"Public work"—The Exchequer Court Act, s.* 16*—Construction of statute—Right of action.* 126

See NEGLIGENCE 3.

3——*Pilotage—Port of St. John, N.B.— Ships propelled wholly or in part by steam — Coal barges towed — R.S.C.* (1886) *c.* 80, *ss.* 58, 59. 169

See SHIPS AND SHIPPING 1.

4——*Navigation—Trent canal crossing— Swing bridge—Cost of construction— Maintenance—Order in council.* . ..211

See RAILWAYS 3.

5——*Admiralty law—Foreign bottoms —Collision in foreign waters—Jurisdiction of Canadian courts.* 303

See SHIPS AND SHIPPING 3.

NEGLIGENCE— *Electric light company —Wires on public highway—Proximity to bridge—Injury to child—Dedication.*] Several years ago the owners of land in the Township of York built a bridge over a ravine for access to and from the City of Toronto and about 1894 the Toronto Electric Light Co. placed wires across the ravine about ten feet from the bridge. In 1904 the bridge was reconstructed and made wider, being brought to within from 14 to 20 inches of the wires, which had become worn and ceased to be insulated. G., a boy under nine years of age, while playing on the bridge, put his arm through the railing and his hand touching the wire he was badly injured. *Held,* reversing the judgment of the Court of Appeal (12 Ont. L.R. 413), that the plans and deeds in evidence shewed a dedication as a public highway of the bridge and land on each side of it and such highway included the

NEGLIGENCE—*Continued.*

land over which the wires passed.—*Held*, also, that the wires in the condition in which they were at the time of the accident were dangerous to those using the highway and the company were liable for the injury to G. GLOSTER *v.* TORONTO ELECTRIC LIGHT CO. 27

2——*Railway company — Findings of jury—"Look and listen."*] M. attempted to drive over a railway track which crossed the highway at an acute angle where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing when he could have seen an engine approaching which struck his team and he was killed. In an action by his widow and children the jury found that the statutory warnings had not been given and a verdict was given for the plaintiffs and affirmed by the Court of Appeal. *Held*, affirming the judgment of the Court of Appeal (12 Ont. L.R. 71). Fitzpatrick C.J. *hesitante*, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified. WABASH RAILROAD CO. *v.* MISENER. .94

3——*Navigation of inland waters—Collision — Government ships and vessels —"Public work"—The Exchequer Court Act, s.* 16*—Construction of statute — Right of action.*] His Majesty's steamtug "Champlain," while navigating the River St. Lawrence, at some distance from a place where dredging was being carried on by the Government of Canada, and engaged in towing an empty mud-scow, owned by the Government, from the dumping ground back to the place where the dredging was being done, came in collision with the suppliant's steam barge, which was also navigating the river, and the barge sustained injuries. *Held*, affirming the judgment of the Exchequer Court of Canada, that there could be no recovery against the Crown for damages suffered in consequence of negligence of its officers or servants, as the injury had not been sustained on a public work within the meaning of the sixteenth section of the "Exchequer Court Act." *Chambers* v. *Whitehaven Harbour Commissioners* ([1899] 2 Q.B. 132); *Hall* v. *Snowden*, *Hubbard & Co.* ([1899] 2 Q.B. 136), *Lowth* v. *Ibbotson* ([1899] 1 Q.B. 1003), *Farnell* v. *Bowman* (12 App. Cas. 643), and *The Attorney-General of the Straits Settlements* v. *Weymss* (13 App. Cas. 192), referred to. PAUL *v.* THE KING. 126

4——*Negligence—Trespass — Horse racing — Intruder upon race track—Carelessness.*] After the first heat of a trotting match in which N. had been a competitor he was seated in his sleigh and walking his horse upon his proper side of one of the tracks, laid out by the ploughing away of the snow on the ice of a public harbour, while waiting to be called for the next heat. M., who had not been a competitor in that race, came alone the same track, from an opposite direction to that in which N. was going, driving his vehicle at excessive speed and, in attempting to pass in a narrow space between the ridge formed by the snow and N.'s sleigh, collided with it, causing injuries to N. and damaging his sleigh and harness. *Held*, affirming the judgment appealed from (39 N.S. Rep. 133) that even if M. was lawfully upon the track in question he was responsible for damages as the accident was solely attributable to his improvident carelessness and want of judgment. MANNING *v.* NAAS. 226

5——*Street railway—Excessive speed—Gong not sounded—Contributory negligence—Damages.*] A passenger on a street car in Toronto going west alighted on the side farthest from the other track and passed in front of the car to cross to the opposite side of the street. The space between the two tracks was very narrow and seeing a car coming from the west as she was about to step on the track, she recoiled, and at the same time the car she had left started and she was crushed between the two, receiving injuries from which she died. In an action by her father and mother for damages the jury found that the company was negligent in running the east bound car at excessive speed and starting the west bound car and not sounding the gong in proper time. They found also that deceased was negligent, but that the company could, neverthe-

NEGLIGENCE—*Continued.*

less, have avoided the accident by the exercise of reasonable care. *Held*, that the case having been submitted to the jury with a charge not objected to by the defendants and the evidence justifying the findings the verdict for the plaintiffs should not be disturbed.—The plaintiffs should not have had the funeral and other expenses incurred by the father of deceased allowed as damages in the action. TORONTO RY. C. *v.* MULVANEY 327

6——*Maritime law—Collision—Tug and tow—Negligence of tow.*] A tug with the ship "Wandrian" in tow left a wharf at Parsboro', N.S., to proceed down the river and get to sea. The schooner "Helen M." was at anchor in the channel and the tug directed its course so as to pass her on the port side when another vessel was seen coming out from a slip on that side. The tug then, when near the "Helen M." changed her course, without giving any signal and tried to cross her bow to pass down on the starboard side and in doing so the "Wandrian" struck her, inflicting serious injury. In an action against the "Wandrian" by the owners of the "Helen M." the captain of the former insisted that the schooner was in the middle of the channel, which was about 400 feet wide, but the local judge found as a fact that she was on the eastern side. *Held*, affirming the judgment of the local judge (11 Ex. C.R. 1) that the navigation of the tug was faulty and shewed negligence; that if the "Helen M." was on the eastern side of the channel as found by the judge there was plenty of room to pass on her port side, and if, as contended, she was in the middle of the channel she could easily have been passed to starboard; that in attempting to cross over and pass to starboard when she was so near the "Helen M." as to render a collision almost inevitable was negligence on the the tug's part; and that the "Helen M." exercised proper viligance and was not negligent in failing to slacken her anchor chain as the "Wandrian" was too close and had not signalled.—*Held*, also, that the tow was liable for such negligence in the navigation of the tug. THE "WANDRIAN" *v.* HATFIELD. 431

NEW TRIAL— *Jury trial — Judge's charge—Practical withdrawal of case—Evidence—New trial.*] On trial of an action against a surety, the defence was that he had been discharged by the plaintiff's dealings with his principal. The trial judge directed the jury that the facts proved in no way operated to discharge him; and that while, if they could find any evidence to satisfy them that he was relieved from liability, they could find for defendant he knew of no such evidence and it was not to be found in the case. *Held*, that the disputed facts were practically withdrawn from the jury, and as there was evidence proper to be submitted and on which they might reasonably find for defendant there should be a new trial. WOOD *v.* ROCKWELL 165

2——*Title to land—Plan of survey—Evidence—Onus of proof—Findings of jury—Error—New trial.*] Where it appeared that in directing the jury, at the trial, the judge attached undue importance to the effect of a plan of survey referred to in a junior grant as against a much older plan upon which the original grants of the lands in dispute depended and that the findings were not based upon evidence sufficient in law to shift the onus of proof from the plaintiff and were, likewise, insufficient for the taking of accounts in respect to trespass and conversion of minerals complained of. *Held*, affirming the order for a new trial made by the judgment appealed from (1 East. L.R. 293), that in the absence of evidence of error therein, the older grants and plan must govern the rights of the parties. BARTLETT *v.* NOVA SCOTIA STEEL CO. 336

3——*Negligence—Street railway — Excessive speed—Gong not sounded — Contributory negligence — Damages.* . . .327

See NEGLIGENCE 5.

NOTICE—*Crown case reserved—Extension of time for notice of appeal—"Criminal Code" s.* 1024*—Order after expiration of time for service of notice—Jurisdiction.* 207

See APPEAL 3.

OBLIGATIONS.

See CONTRACT.

OPPOSITION—*Vacating judgment—Appeal — Jurisdiction — Matter in controversy—Tierce opposition—Arts.* 1185-1188 *C.P.Q.—R.S.C. c.* 135, *s.* 29.] A creditor of an insolvent with a claim for $600 filed a *tierce opposition* to vacate a judgment declaring the respondent to be the owner of the business of a restaurant and the liquor license accessory thereto, alleged to be worth over $5,000. The opposition was dismissed on the ground that, under the circumstances of the case, the company had no *locus standi* to contest the judgment. On motion to quash an appeal to the Supreme Court of Canada: *Held*, that as there was no pecuniary amount in controversy an appeal would not lie. *Coté* v. *The James Richardson Co.* (38 Can. S.C.R. 41) distinguished. CANADIAN BREWERIES CO. *v.* GARIÉPY. **236**

OWNERSHIP—*Construction of will — Usufruct — Substitution — Partition between institutes — Validating legislation—60 V. c. 95 (Q.)—Construct of statute—Restraint of alienation — Interest of substitutes—Devise of property held by institute under partition—Devolution of corpus of estate es nature—Accretion —Res judicata—Arts.* 868, 948 *C.C.*..**1**

See WILL 1.

PARTITION— *Construction of will — Usufruct — Substitution — Partition between institutes—Validating legislation—60 V. c. 95 (Q.) — Construction of statute—Restraint of alienation—Interest of substitutes—Devise of property held by institute under partition—Devolution of corpus of estate en nature—Accretion—Res judicata—Arts.* 868, 948 *C.C.*] The effect of the statute, 60 V. c. 95 (Que.), respecting the will of the late Amable Prévost, read in conjunction with the provisions of the will and codicils therein referred to, is to declare the deed of partition between the beneficiaries thereunder final and definitive and not merely provisional; the judgment of the Court of Queen's Bench, on the appeal side taken under that statute, has no other effect.—Neither the statute nor the judgment referred to sanctions the view that the said will and codicils constitute more than one substitution; there was but one substitution created thereunder in favour of all the joint legatees and consequently accretion takes place among them within the meaning of article 868 of the Civil Code, in the event of any legacy lapsing, under the terms of the will, upon the death of an institute without issue prior to the opening of the substitution. In such case, the share of the institute dying without issue devolves to the other joint legatees, as well in usufruct as in absolute ownership, and, consequently, none of the institutes or substitutes have the right of disposing of any portion of the testator's estate, by will or otherwise, prior to the date of the opening of the substitution. Judgment appealed from (Q. R. 28 S.C. 257) reversed. *DeHertel* v. *Goddard* (66 L.J.P.C. 90) distinguished. PRÉVOST *v.* LAMARCHE. **1**

2——*Construction of will—Usufruct — Substitution — Partition between institutes — Validating legislation—60 V. c. 95 (Q.)—Construction of statute — Restraint of alienation—Interest of substitutes—Devise of property held by substitute under partition—Devolution of corpus of estate es nature—Accretion—Res judicata—Arts.* 868, 948 *C.C.*....**1**

See WILL 1.

PARTNERSHIP—*Account — Statute of Limitations—Agents or partners — Reference — Practice.* **216**

See ACCOUNT 1.

PATENT OF INVENTION — *Infringement — Want of novelty — New and beneficial results—Subject matter of invention—Purchase of patented device—Estoppel.*] The plaintiffs were patentees of a device intended to cheapen and simplify former methods of keeping and rendering statements of accounts by merchants and others, as was claimed, by providing for making entries and invoices by one and the same act on manifolding sheets so folded as to occupy the entire platen of standard typewriters and, at the same time, without waste, to provide a binding margin for the leaf with the book-keeping entry to utilize it as a page in a permanently

PATENT OF INVENTION—*Con.*

bound book. The sheets manufactured and sold by the plaintiffs accomplished these ends through being folded so as to form two or three leaves as required; with two-leaf sheets the upper leaf forming an original or invoice and the lower leaf the duplicate and book-keeping entry; with three-leaf sheets, the third leaf serving either as a duplicate or to be used as an original duplicated on the reverse side of the centre leaf. In each case the leaves are connected together so as to form one integral sheet with vertical and transverse score lines enabling the invoices, etc., to be easily detached, leaving the permanently retained page and folded margin with perforations to fit binders. The specifications of the patented device succinctly described and illustrated various forms of folding the sheet to secure these advantages. An action for infringement by the defendants using, manufacturing and selling sheets similar to the above described device was dismissed in the Exchequer Court. On appeal to the Supreme Court of Canada: *Held*, affirming the judgment appealed from (10 Ex. C.R. 410) that there was neither subject matter nor novelty in the above device claimed as an invention and, consequently, that it was not patentable. COPELAND-CHATTERSON CO. *v.* PAQUETTE. **451**

2——*Account — Statute of Limitations —Agents or partners—Reference—Practice.* **216**

See ACCOUNT 1.

PAYMENT—*Mortgage—Money advanced to construct buildings—Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagor's rights—Redemption — Costs.*] A building and loan company advanced money to an illiterate woman for the purpose of aiding in the construction of a house to be erected upon lands mortgaged to it to secure the loan. The mortgage contained no provision for advances to contractors, etc., as the work progressed, beyond the following: "And it is hereby agreed between the parties hereto, that the mortgagees, their successors and assigns, may pay any taxes, rates, levies, assessments, charges, moneys for insurance, liens, costs of suit, or matters re-

PAYMENT—*Continued.*

lating to liens or incumbrances on the said lands, and solicitors' charges in connection with this mortgage, and valuator's fees, together with all costs and charges which may be incurred by taking proceedings of any nature in case of default by the mortgagor, her heirs, executors, administrators or assigns, and shall be payable with interest, at the rate aforesaid, until paid and, in default, the power of sale hereby given shall be forthwith exercisable. And it is further agreed that monthly instalments in arrear shall bear interest at the rate aforesaid until paid." In a suit for redemption: *Held*, first, that the clause in the mortgage did not justify the mortgagees in making advances to contractors and persons supplying material, without the express order of the mortgagor. Secondly, that the mortgagees ought not to have recognized an order in favour of the contractor for the total amount of the loan when they knew that the contractor had not complied his contract and was, therefore, not entitled to the money when the order contained no name of a witness, and shewed that the mortgagor was unable to sign her name.—The payment having been made by the loan company to a lumber company supplying material to the contractors for the building, without the express authority of the mortgagor, and the lumber company having taken an assignment of the mortgage, and attempted to enforce it against the mortgagor the transaction was declared fraudulent as against the mortgagor, and the payment to the lumber company disallowed.—*Held*, also, that the only costs the assignees of the mortgage were entitled to add to the mortgage debt were the costs of an ordinary redemption suit consented to by a mortgagee. Judgment appealed from varied, and appeal dismissed with costs. BLACK *v.* HIEBERT. **557**

PENALTY—*Canada Temperance Act — Conviction — "Criminal case"—R.S.C.* (1886) *c.* 135, *s.* 32—*Habeas corpus — Penalty — "Not less than $50"—Conviction for $200—Imposition of fine for first offence—Powers of Supreme Court judge —Reference of application to full court.* **394**

See CANADA TEMPERANCE ACT.

PETITION OF RIGHT.

See CONTRACT 5.
" DEMURRER.

"PHEASANT HILLS BRANCH" CAN. PAC. RY.—*Appeal — Jurisdiction — Discretion of Governor in Council — Stated case—Railway subsidies — Construction of statute—3 Edw. VII. c. 57—Conditions of contract—Estimating costs of constructing line of railway—Rolling stock and equipment.* **137**

See RAILWAYS 2.

PILOTAGE—*Compulsory pilotage—Port of St. John, N.B. — Ships propelled wholly or in part by steam—Coal barges towed—R.S.C. c. 80, ss. 58, 59.*] Coal barges towed by steamers or tugs between the ports of Parsboro', N.S. and St. John, N.B., are exempt from compulsory pilotage at the latter port, even though under favourable conditions they could be navigated as sailing ships. Judgment appealed from (37 N.B. Rep. 406), affirmed. SAINT JOHN PILOT COMMISSIONERS *v.* CUMBERLAND RY. AND COAL CO. **169**

PLANS—*Public highway—Dedication.* **27**

See NEGLIGENCE 1.

2——*Title to land—Plan of survey—Evidence—Onus of proof—Findings of jury—Error—New trial.* **336**

See NEW TRIAL 2.

PLANS AND SPECIFICATIONS—*Public work—Contract—Change in plans and specifications—Waiver by order in council—Powers of executive—Construction of statute—Directory and imperative clauses — Words and phrases—"Stipulations"—Exchequer Court Act, s. 33—Extra works—Engineer's certificate — Instructions in writing — Schedule of prices—Compensation at increased rate —Damages—Right of action—Quantum meruit.* **501**

See CONTRACT 5.

PLEADING.

See PRACTICE AND PLEADING.

PLEDGE— *Broker—Stock — Purchase on margin—Pledge of stock by broker—Possession for delivery to purchaser.*] C. instructed A. & Co., brokers, to purchase for him on margin 300 shares of a certain stock, paying them $3,000, leaving a balance of $6,225 according to the market price at the time. A. & Co. instructed brokers in Philadelphia to purchase for them 600 shares of the stock paying $9,000, nearly half the price, and pledged the whole 600 for the balance. The Philadelphia brokers pledged these shares with other securities to a bank as security for indebtedness and later drew on A. & Co. for the balance due thereon, attaching the scrip to the draft which was returned unpaid and 475 of the 600 shares were then sold and the remaining 125 returned to A. & Co. In an action by the latter to recover from C. the balance due on the advance to purchase the shares with interest and commission: *Held,* reversing the judgment of the Court of Appeal (12 Ont. L.R. 435, affirming 10 Ont. L.R. 159), Fitzpatrick C.J. dissenting, that the brokers had no right to hypothecate the shares with others for a greater sum than was due from C. unless they had an agreement with the pledgee whereby they could be released on payment of said sum; that there never was a time when they could appropriate 300 of the shares pledged for delivery to C. on paying what the latter owed; and that, therefore, they were not entitled to recover.—The bought note of the transaction contained this memo: "When carrying stock for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us." *Held, per* Davies, and Idington JJ that this did not justify the brokers in pledging the shares for a sum greater than that due from the customer. *Per* Duff J.—That the shares were purchased before this note was delivered, and it could not alter the character of the authority conferred on the brokers; and that no custom was proved which would modify the common law right and duties of the brokers and their customer in the transaction. CONMEE *v.* SECURITIES HOLDING CO. **601**

POSSESSION—*Trespass — Possession — Evidence — Expropriation — Railways.*] The casual use of land for pasturing cat-

POSSESSION—*Continued.*

tle in common with other persons does not constitute evidence of possession sufficient to maintain an action for trespass. Judgment appealed from (1 East. L.R. 524) reversed. TEMISCOUATA RY. CO. *v.* CLAIR. **230**

AND *see* APPEAL; BROKER.

PRACTICE AND PLEADING — *Revising minutes of judgment—Mistake—Costs of abandoned defences—Reference to trial judge.*] The plaintiffs' action was maintained with costs in the courts below, but on appeal, it was dismissed with costs by the Supreme Court of Canada (37 Can. S.C.R. 546), no reference being made to certain costs incurred by the plaintiffs in respect of several defences which the defendant had abandoned in the trial court. On motion to vary the minutes, the matter was referred to the judge of the trial court to dispose of the question of the costs on the abandoned defences. RUTLEDGE *v.* UNITED STATES SAVINGS AND LOAN CO. **103**

2——*Appeal—Jurisdiction—Discretion of Governor in Council—Stated case—Railway subsidies—Construction of statute—3 Edw. VII. c. 57—Conditions of contract—Estimating cost of constructing line of railway—Rolling stock and equipment.*] Where the jurisdiction of the Supreme Court of Canada to entertain an appeal was in doubt, but it was considered that the appeal should be dismissed on the merits, the court heard and decided the appeal accordingly. (Cf. *Bain* v. *Anderson & Co.* (28 Can. S.C.R 481). CANADIAN PACIFIC RY. CO. *v.* THE KING (RE PHEASANT HILLS BRANCH). **137**

See RAILWAYS 2.

3——*Jury trial—Judge's charge—Practical withdrawal of case — Evidence — New trial.*] On trial of an action against a surety, the defence was that he had been discharged by the plaintiff's dealings with his principal. The trial judge directed the jury that the facts proved in no way operated to discharge him; and that while, if they could find any evidence to satisfy them that he was relieved from liability they could find for defendant, he knew of no such evidence and if was not to be found in the case. *Held*, that the disputed facts were practically withdrawn from the jury, and as there was evidence proper to be submitted and on which they might reasonably find for defendant there should be a new trial. WOOD *v.* ROCKWELL. . **165**

4——*Shipping — Collision—Violation of rules not affecting accident — Steering wrong course.*] The Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the local judge unless the appellant can point out his mistake and shew conclusively that the judgment is entirely erroneous. *The Picton* (4 Can. S.C.R. 648) followed. SS. "ARRANMORE *v.* RUDOLPH. **176**

AND *see* SHIPS AND SHIPPING 2.

5——*Criminal law—Crown case reserved —Appeal—Extension of time for notice of appeal — "Criminal Code" s. 1024— Order after expiration of time for service of notice — Jurisdiction.*] The power given by section 1024 of the "Criminal Code" (R.S.C. (1906) ch. 146) to a judge of the Supreme Court of Canada to extend the time for service on the Attorney General of notice of an appeal in a reserved Crown case may be exercised after the expiration of the time limited by the code for the service of such notice. *Banner* v. *Johnston* (L.R. 5 H.L. 157) and *Vaughan* v. *Richardson* (17 Can. S.C.R. 703) followed. GILBERT *v.* THE KING. **207**

6——*Account—Statute of Limitations— Agents or partners—Reference.*] On a reference to the Master the taking of the accounts was brought down to a time at which defendants claimed that the contract was terminated by notice. The Court of Appeal ordered that they should be taken down to the date of the Master's report. *Held*, that this was a matter of practice and procedure as to which the Supreme Court would not entertain an appeal. HAMILTON BRASS MANUFACTURING CO. *v.* BARR CASH AND PACKAGE CARRIER CO. **216**

AND *see* ACCOUNT 1.

PRACTICE AND PLEADING—*Con.*

7——*Appeal — Order extending time— Jurisdiction—R.S.C.* (1886) *c.* 135, *s.* 42 *—Practice.*] The court refused to entertain a motion to quash the appeal on the ground that it had not been taken within the sixty days limited by the statute and that an order by a judge of the court appealed from after the expiration of that time was *ultra vires* and could not be permitted under section 42 of the "Supreme Court and Exchequer Courts Act," R.S.C. c. 135. TEMISCOUATA RY. CO. *v.* CLAIR.....230

AND *see* TRESPASS 1.

8——*Criminal law—Crown case reserved — Reserved questions — Dissent from affirmance of conviction—Appeal—Jurisdiction—Criminal Code,* 1892, *ss.* 742, 743, 744, 750—*R.S.C.* (1906), *c.* 146, *ss.* 1013, 1015, 1016, 1024.] On the trial of an indictment for murder the evidence was that the deceased had been killed by a gun-shot wound inflicted through the discharge of a gun in the hands of the accused and the defence was that the gun had been discharged accidentally. *Held,* that, in view of the character of the defence and the evidence in support of it, there could be no objection to a charge by the trial judge to the jury that the offence could not be reduced by them from murder to manslaughter but that their verdict should be either for acquittal or one of guilty of murder.—Two questions were reserved by the trial judge for the opinion of the Court of Appeal but he refused to reserve a third question, as to the correctness of his charge on the ground that no objection to the charge had been taken at the trial. The Court of Appeal took all three questions into consideration and dismissed the appeal, there being no dissent from the affirmance of the conviction on the first and third questions, but one of the judges being of opinion that the appeal should be allowed and a new trial ordered upon the second question reserved. On an appeal to the Supreme Court of Canada, the majority of the court, being of opinion that the appeal should be dismissed, declined to express any opinion as to whether or not an appeal would lie upon questions as to which there had been no dissent in the court appealed from, but

PRACTICE AND PLEADING—*Con.*

it was held, *per* Girouard J.—That the Supreme Court of Canada was precluded from expressing an opinion on points of law as to which there had been no dissent in the court appealed from. *McIntosh* v. *The Queen* (23 Can. S.C.R. 180) followed. *Viau* v. *The Queen* (29 Can. S.C.R. 90); *The Union Colliery Co.* v. *The Queen* (31 Can. S. C. R. 81) and *Rice* v. *The King* (32 Can. S.C. R. 480) referred to. GILBERT *v.* THE KING.....284

AND *see* CRIMINAL LAW 2.

9——*Habeas corpus — Application for writ—Reference to court.*] On application to a judge for a writ of habeas corpus he may refer the same to the court which has jurisdiction to hear and dispose of it. Idington and Maclennan JJ. dissenting. IN RE RICHARD.....394

AND *see* CANADA TEMPERANCE ACT.

10——*Appeal — Findings of fact.*] The judgment appealed from was reversed, on the ground of captation and undue influence, but the Supreme Court of Canada refused to interfere with the concurrent findings of both courts below against the contention as to the testator's unsoundness of mind. MAYRAND *v.* DUSSAULT.....460

AND *see* WILL 2.

11——*Appeal—Amount in controversy— Creditor's action—Transfer of cheque— Preference.*] An action was brought by creditors, on behalf of themselves and all other creditors, of an insolvent to set aside the transfer of a cheque for $1,172.27 made by the insolvent to S. & Sons as being a preference and therefore void. At the trial the action was dismissed and this judgment was affirmed by the Divisional Court (12 Ont. L.R. 91) and by the Court of Appeal (13 Ont. L.R. 232). On appeal to the Supreme Court of Canada: *Held,* Girouard J. dissenting, that the only matter in controversy was the property in the sum represented by the cheque and such sum being more than $1,000 the appeal would lie. ROBINSON, LITTLE & CO. *v.* SCOTT & SON.....490

PRACTICE AND PLEADING—*Con.*

12——*Subaqueous mining—Crown grants —Dredging lease—Breach of contract— Subsequent issue of placer mining licenses—Damages—Pleading and practice — Statement of claim—Demurrer— Cause of action.*] A statement of claim which alleges that the Crown, after granting a lease of areas for subaqueous mining and while that lease was in force, in derogation of the rights of the lessee to peaceable enjoyment thereof, interfered with the rights vested in him by transferring the leased area to placer miners who were put in possession of them by the Crown to his detriment, discloses a sufficient cause of action in support of a petition of right for the recovery of damages claimed in consequence of such subsequent grants. Judgment appealed from (10 Ex. C.R. 390) reversed, Davies and Idington JJ. dissenting. Davies J. dissented on the ground that there was no sufficient allegation in the petition either of interference with the submerged beds or bars of the stream, which alone were included in the dredging lease, or of such active interference by the Crown as would justify an action. MCLEAN *v.* THE KING...**542**

13——*Criminal law—Stated case—Dissent in court of appeal—Special leave for appeal—R.S.C.* (1906) *c.* 139, *s.* 37(*c*).] In an appeal from the judgment of the Supreme Court of North-West Territories, *in banc*, whereby the conviction of the respondent was quashed, two of the judges dissenting, special leave for the appeal was granted on motion before the full court, under the provisions of R.S.C. (1907) c. 139, s. 39(c) on the 19th of February, 1907. LAFFERTY *v.* LINCOLN. **620, 625**

AND *see* CONSTITUTIONAL LAW 1.

14——*Appeal—Equal division of opinion —Dismissal without costs.*] Upon an equal division of opinion among the judges, the appeal stood dismissed without costs. COTE *v.* THE JAMES RICHARDSON CO. **41**

AND *see* APPEAL 1.

15——*Crown — Breach of trust — Purchase of debentures out of Common School Fund — Knowledge of misappropriation of moneys—Payment of interest —Statutory prohibition — Evasion of statute—Estoppel against Crown—Action —Adding parties*.....**62**

See QUEBEC NORTH SHORE TURNPIKE ROAD TRUST.

16——*Expert testimony — Examination of witnesses—2 Edw. VII. c. 9, s. 1*..**149**

See EXPROPRIATION 1.

17——*Vacating judgment — Appeal — Jurisdiction — Matter in controversy — Tierce opposition—Arts.* 1185-1188 *C.P. Q.—R.S.C.* (1886) *c.* 135, *s.* 29.....**236**

See OPPOSITION.

18——*Crown — Banks and banking — Forged cheque — Payment — Representation by drawee — Implied guarantee — Estoppel — Acknowledgment of bank statements—Liability of indorsers—Mistake—Action—Money had and received.* **258**

See BANKS AND BANKING 2.

19——*Negligence — Street railway—Excessive speed—Gong not sounded—Contributory negligence—Damages*.....**327**

See NEGLIGENCE 5.

20——*Title to land—Plan of survey— Evidence — Onus of proof—Findings of jury—Error—New trial* **336**

See NEW TRIAL 2.

21——*Appeal—Railway Act—Expropriation—Appeal from award — Jurisdiction —Choice of forum—Curia designata*.**511**

See APPEAL 10.

PRESCRIPTION.

See STATUTE OF LIMITATIONS.

PRINCIPAL AND AGENT — *Breach of contract—Breach of trust—Assessment of damages—Sale of mining areas—Promotion of company—Failure to deliver securities—Account — Evidence—Salvage — Indemnity for necessary expenses — Laches—Estoppel.*] The plaintiffs transferred certain mining areas to the de-

PRINCIPAL AND AGENT—*Con.*

fendant in order that they might be sold together with other areas to a company to be incorporated for the purpose of operating the consolidated mining properties, the defendants agreeing to give them a proportionate share of whatever bonds and certificates of stock he might receive for these consolidated properties upon the flotation of the scheme then being promoted by him and other associates. In order to hold some of the areas it became necessary to borrow money and the lender exacted a bonus in stock and bonds which the defendant gave him out of those he received for conveyance of the properties to the company. After deducting a ratable contribution towards this bonus, the defendants delivered to the plaintiffs the remainder of their proportion of stock and bonds, but did not then inform them that such deductions had been made, and they, consequently, made no demand upon him for the balance of the shares and bonds until some time afterwards when they brought the action to recover the securities or their value. *Held*, affirming the judgment appealed from, that whether the defendant was to be regarded as a trustee or as the agent of the plaintiffs, he was not entitled, without their consent, to make the deductions, either by way of salvage or to idemnify himself for expenses necessarily incurred in the preservation of the properties; and that, under the circumstances, their failure to demand delivery of the remainder of the securities before action did not deprive the plaintiffs of their right to recover. If the defendant is to be considered a trustee wrongfully withholding securities which he was bound to deliver, he is liable for damages calculated upon the assumption that they would have been disposed of at the best price obtainable. If, however, he is to be regarded as a contractor who has failed to deliver the securities according to the terms of his agreement, he is liable for damages based on the selling price of the securities at the time when his obligation to deliver them arose. *Nant-Y-Glo and Blaina Ironworks Co.* v. *Grave* (12 Ch. D. 738); *The Steamship Carrisbrooke Co.* v. *The London and Provincial Marine and General Ins. Co.* ((1901) 2 K.B. 861) and *Michael* v. *Hart & Co.* ((1902) 1 K.B. 482) followed. MCNEIL *v.* FULTZ.....**198**

PRINCIPAL AND AGENT—*Con.*

2——*Vendor and purchaser — Sale of land — Formation of contract — Conditions—Acceptance of title—New term—Statute of Frauds—Secret commission—Avoidance of contract—Fraud—Specific performance.* **588**

See CONTRACT 6.

3——*Broker—Stock—Purchase on margin—Pledge of stock by broker—Possession for delivery to purchaser*.....**601**

See BROKER.

PRINCIPAL AND SURETY—*Jury trial—Judge's charge—Practical withdrawal of case—Evidence—New trial*.....**165**

See NEW TRIAL 1.

PUBLIC OFFICER—*Negligence—Navigation of inland waters—Collision—Government ships and vessels—"Public work"—The Exchequer Court Act, s.* 16—*Construction of statute—Right of action.*
.....**126**

See NEGLIGENCE 3.

2——*Subaqueous mining—Crown grants—Dredging lease—Breach of contract—Subsequent issue of placer mining licenses — Damages — Pleading and practice — Statement of claim—Demurrer—Cause of action*.....**542**

See MINES AND MINERALS 3.

"PUBLIC WORK"—*Negligence—Navigation of inland waters—Collision—Government ships and vessels — "Public work"—The Exchequer Court Act, s.* 16 *— Construction of statute — Right of action.*] His Majesty's steam-tug "Champlain," while navigating the River St. Lawrence, at some distance from a place where dredging was being carried on by the Government of Canada, and engaged in towing an empty mud-scow, owned by the Government, from the dumping ground back to the place where the dredging was being done, came in collision with the suppliant's steam barge, which was also navigating the river, and the barge sustained injuries. *Held*, affirming the judgment of the Exchequer Court of Canada, that there could be no recovery against the Crown for damages suffered in consequence of

"PUBLIC WORK"—*Continued.*

negligence of its officers or servants, as the injury had not been sustained on a public work within the meaning of the sixteenth section of the "Exchequer Court Act." *Chambers* v. *Whitehaven Harbour Commissioners* ([1899] 2 Q.B. 132); *Hall* v. *Snowden, Hubbard & Co.* ([1899] 2 Q.B. 136); *Lowth* v. *Ibbotson* ([1899] 1 Q.B. 1003), *Farnell* v. *Bowman* (12 App. Cas. 643) and *The Attorney-General of the Straits Settlements* v. *Weymss* (13 App. Cas. 192), referred to. PAUL *v.* THE KING.....**126**

2——*Contract — Change in plans and specifications—Waiver by order in council—Powers of executive—Construction of statute — Directory and imperative clauses—Words and phrases—"Stipulations"—Exchequer Court Act, s.* 33—*Extra works—Engineer's certificate—Instructions in writing—Schedule of prices — Compensation at increased rates — Damages — Right of action — Quantum meruit.*] The suppliants, appellants, were contractors with the Crown for the widening and deepening of a canal and, by their petition of right, contended that there were such changes from the plans and specifications and in the manner in which the works were obliged to be executed as made the provisions of their contract inapplicable and that they were, consequently, entitled to recover upon a *quantum meruit.* In order to afford relief, an order in council was passed waiving certain conditions, provisoes and stipulations contained in the contract. By the judgment appealed from, the judge of the Exchequer Court held (10 Ex. C.R. 248) that there had been no such changes as would entitle the contractors to recover on the *quantum meruit,* as in the case of *Bush* v. *The Trustees of the Town and Harbour of Whitehaven* (52 J.P. 392); 2 Hudson on Building Contracts (2 ed.) 121); and that the words "shall decide in accordance with the stipulations in such contract" in the thirty-third section of "The Exchequer Court Act" might be treated as directory only and effect given to the waiver in respect to the absence of written directions or certificates by the engineer in regard to works done, but that the remaining clauses of the section were imperative and there could be no

"PUBLIC WORK"—*Continued.*

valid waiver whereby a larger sum than the amount stipulated in the contract could be recovered, *e.g.,* on prices for the classes of work, so as to give the contractors a legal claim for higher rates of compensation without a new agreement under proper authority and for good consideration. On appeal to the Supreme Court of Canada: *Held, per* Girouard, Davies and Maclennan JJ., that the decision of the judge of the Exchequer Court was correct. *Per* Idington and Duff JJ.—That the word "stipulations" in the first part of the section referred to, should be construed as having relation entirely to the second part of the section and as applying to the rates of compensation fixed by the contract; that, on either construction, the result would be the same in so far as the circumstances of the case were concerned; that it did not warrant an implication that the executive could, without proper authority, exceed its powers in relation to a fully executed contract or confer the power to dispense with the requirements of the statute, and that, consequently, there could not be a recovery upon *quantum meruit.* PIGOTT & INGLES *v.* THE KING. **501**

3——*Expropriation of land—Payment—Market value — Potential value — Evidence.* **149**

See EXPROPRIATION 1.

4——*Navigation—Trent canal crossing—Swing bridge—Cost of construction — Maintenance—Order in council*.....**211**

See RAILWAYS 3.

QUANTUM MERUIT — *Public work — Contract—Change in plans and specifications — Waiver by order in council — Powers of executive — Construction of statute — Directory and imperative clauses—Words and phrases—"Stipulations"—Exchequer Court Act, s.* 33—*Extra works — Engineer's certificates—Instructions in writing — Schedule of prices—Compensation at increased rate —Damages—Right of action—Quantum meruit.* **501**

See CONTRACT 5.

QUEBEC NORTH SHORE TURNPIKE ROAD TRUST—*Crown—Breach of trust —Purchase of debentures out of Common School Fund—Knowledge of misapplication of moneys — Payment of interest — Statutory prohibition—Evasion of statute—Estoppel against the Crown — Action — Adding parties — Practice.*] In an action by the Crown against the Quebec North Shore Turnpike Road Trustees to recover interest upon debentures purchased from them by the Government of the late Province of Canada (with trust funds held by them belonging to the Common School Fund), the defendants pleaded that the Crown was estopped from recovery inasmuch as, at the time of their purchase, the advisers of the Crown were aware that these debentures were being issued in breach of a trust and with the intention of misapplying the proceeds towards payment of interest upon other debentures due by them in violation of a statutory prohibition. *Held*, affirming the judgment appealed from (8 Ex. C.R. 390) that, as there was statutory authority for the issue of the debentures in question, knowledge of any such breach of trust or misapplication by the advisers of the Crown could not be set up as a defence to the action. QUEBEC NORTH SHORE TURNPIKE ROAD TRUSTEES *v.* THE KING. **62**

RACE COURSE—*Negligence—Trespass—Horse racing—Intruder upon race track —Carelessness.*] After the first heat of a trotting match in which N. had been a competitor he was seated in his sleigh and walking his horse upon his proper side of one of the tracks, laid out by the ploughing away of the snow on the ice of a public harbour, while waiting to be called for the next heat. M., who had not been a competitor in that race, came along the same track, from an opposite direction to that in which N. was going, driving his vehicle at excessive speed and, in attempting to pass in a narrow space between the ridge formed by the snow and N.'s sleigh, collided with it, causing injuries to N. and damaging his sleigh and harness. *Held*, affirming the judgment appealed from (39 N.S. Rep. 133) that even if M. was lawfully upon the track in question he was responsible for damages as the accident was solely attributable to his improvident carelessness and want of judgment. MANNING *v.* NAAS. **226**

RACE COURSE—*Continued.*

2——*Criminal law—Disorderly house—Common betting house—Place for betting —Betting booth—Race-course of incorporated association—Crim. Code*, 1892, *ss.* 197, 204—*Crim. Code*, 1906, *ss.* 227, 235.] A perambulating booth used on the race-course of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto as defined in s. 197 of the Criminal Code, 1892 (Crim. Code, 1906, s. 227).—Subsection 2 of s. 204 of the former Code (now s. 235) which exempts from the provisions of the main section (dealing with the recording or registering of bets, etc.), bets made on the race-course of an incorporated association does not apply to the offence of keeping a common betting-house. Girouard and Davies JJ. dissenting. Judgment of the Court of Appeal (12 Ont. L.R. 615) affirmed, Girouard and Davies JJ. dissenting. SAUNDERS *v.* THE KING. **382**

RAILWAYS—*Negligence—Railway crossing — Findings of jury — "Look and listen."*] M. attempted to drive over a railway track which crossed the highway at an acute angle where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing when he could have seen an engine approaching which struck his team and he was killed. In an action by his widow and children the jury found that the statutory warnings had not been given and a verdict was given for the plaintiffs and affirmed by the Court of Appeal. *Held*, affirming the judgment of the Court of Appeal (12 Ont. L.R. 71), Fitzpatrick C.J. *hesitante*, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified. WABASH RAILWAY CO. *v.* MISENER. **94**

2——*Appeal — Jurisdiction—Discretion of Governor in Council—Stated case—Railway subsidies—Construction of statute—3 Edw. VII. c. 57—Conditions of*

RAILWAYS—*Continued.*

contract—Estimating cost of constructing line of railway—Rolling stock and equipment.] The provisions of the Act, 3 Edw. VII. c. 57, authorizing the granting of subsidies in aid of the construction of railways are not mandatory, but discretionary in so far as the grant of the subsidies by the Governor in Council is concerned.—On a proper construction of the said Act it does not appear to have been the intention of Parliament that the costs of rolling stock and equipment should be included in the cost of construction in estimating the amount of subsidy payable to the company in aid of the "Pheasant Hills Branch" of their railway under the provisions of that Act, notwithstanding that the said Act did not specially exclude the consideration of the cost of equipment in the making of such estimate as had been done in former subsidy Acts with similar objects, and that the Governor in Council imposed the duty of efficient maintenance and equipment of the branch as a condition of the grant of the subsidy. CANADIAN PACIFIC RY. CO. *v.* THE KING (RE PHEASANT HILLS BRANCH).....137

3——*Navigation—Trent canal crossings—Swing bridge—Cost of construction—Maintenance—Order in council.*] The C.P. Ry. Co. applied for liberty to build a bridge over the Otanabee, a navigable river, undertaking to construct a draw in it should the Government deem it necessary. An order in council was passed providing that "the company * * shall construct either a swing in the bridge now in question * * the cost to be borne by themselves or else a new swing bridge over the contemplated canal (Trent Valley Canal) in which case the expense incurred over and above the cost of the swing itself and the necessary pivot pier therefor shall be borne by the Government." A new swing bridge was constructed over the canal by agreement with the company. *Held*, that the words "the cost of the swing itself and the necessary pier" included, under the circumstances and in the connection in which they were used, the operation and maintenance also of the swing by the company. CANADIAN PACIFIC RY. CO. *v.* THE KING.....211

4——*Municipal corporation—Agreement with electric street railway company—Use of streets—Payment for privilege—Percentage of receipts—Traffic beyond city—Validity of agreement*.....106

See TRAMWAYS 1.

5——*Appeal—Order extending time—Jurisdiction—R.S.C.* (1886) *c.* 135, *s.* 42.—*Practice—Trespass—Possession—Evidence—Expropriation—Railways*. . ..230

See APPEAL 4.
" TRESPASS 1.

6——*Vendor and vendee—Sale of securities—Interpretation of contract—Arts.* 1018, 1019 *C.C.—Debtor and creditor—Right of way claims—Legal expenses incurred in settlement*.....422

See CONTRACT 4.

7——*Appeal—Railway Act—Expropriation—Appeal from award—Jurisdiction—Choice of forum—Curia designata*.511

See APPEAL 10.

RESERVED CASE.

See CRIMINAL LAW.

RES GESTAE—*Criminal law—Practice—Crown case reserved—Reserved questions—Dissent from affirmance of conviction—Appeal—Jurisdiction—Criminal Code*, 1892, *ss.* 742, 743, 744, 750—*R.S.C.* (1906) *c.* 146, *ss.* 1013, 1015, 1016, 1024—*Admission of evidence*.....284

See CRIMINAL LAW 2.

RES JUDICATA—*Construction of will—Usufruct—Substitution—Partition between institutes—Validating legislation—60 V. c.* 95 (*Q.*)—*Construction of statute—Restraint of alienation—Interest of substitutes—Devise of property held by substitute under partition—Devolution of corpus of estate es nature—Accretion—Arts.* 868, 948, *C.C.*1

See WILL 1.

RIPARIAN RIGHTS—*Dominion mining regulations—Hydraulic mining—Place mining—Lease—Water-grant—Conditions of grant—User of flowing waters—Diversion of watercourse—Dams and flumes—Construction of deed—Priority of right—Injunction*.....79

See MINES AND MINERALS 1.

RIVERS AND STREAMS — *Dominion mining regulations—Hydraulic mining—Placer mining — Lease — Water-grant—Conditions of grant — User of flowing waters—Diversion of watercourse—Dams and flumes — Construction of deed—Riparian rights—Priority of right—Injunction.*] An hydraulic mining lease, granted in 1900, under the Dominion Mining Regulations, for a location extending along both banks of Hunker Creek, in the Yukon Territory, included a point at which, in 1904, the plaintiff acquired the right to divert a portion of the waters of the creek, subject to then existing rights, for working his placer mining claims adjacent thereto. *Held,* that, under a proper construction of the tenth clause of the hydraulic mining regulations, waters flowing through or past the location were subject to be dealt with under the regulations of August, 1898; that the hydraulic grant conferred no prior privileges or paramount riparian rights upon the lessee; and that the grant to the plaintiff was of a substantial user of the waters which was not subject to the common law rights of riparian owners and entitled him, by all reasonable means necessary for the purpose of working his placer claims, to divert the portion of the flowing waters so acquired by him without interference on the part of the lessee of the hydraulic privileges. KLONDYKE GOVERNMENT CONCESSION *v.* MCDONALD.....79

2——*Navigation—Trent canal crossing—Swing-bridge — Cost of construction — Maintenance—Order in council*.....211

See RAILWAYS 3.

3——*Admiralty law—Foreign bottoms—Collision in foreign waters—Jurisdiction of Canadian courts*.....303

See SHIPS AND SHIPPING 3.

SALE—*Banks and banking—Security for advances — Assignment of goods—Claim on proceeds of sale—53 V. c. 31, s. 74(D.)*.....187

See BANKS AND BANKING 1.

2——*Vendor and vendee—Sale of securities — Interpretation of contract—Arts. 1018, 1019, C.C.—Railways—Debtor and creditor—Right of way claims—Legal expenses incurred in settlement*.....422

See CONTRACT 4.

3——*Sale of land — Vendor and purchaser—Formation of contract—Conditions—Acceptance of title—New term—Statute of Frauds—Principal and agent—Secret commission—Avoidance of contract—Fraud—Specific performance*..588

See CONTRACT 6.

SALVAGE—*Breach of contract—Breach of trust—Assessment of damages—Sale of mining rights — Promotion of company — Failure to deliver securities — Principal and agent—Account—Evidence—Salvage—Indemnity for necessary expenses—Laches—Estoppel*.....198

See TRUSTS 1.

SECURITY—*Banks and banking—Security for advances—Assignment of goods—Claims on proceeds of sale—53 V. c. 31, s. 74(D.)*.....187

See BANKS AND BANKING 1.

SHIPS AND SHIPPING—*Pilotage—Port of St. John, N.B.—Ships propelled wholly or in part by steam—Coal barges towed—R.S.C. c. 80, ss. 58, 59.*] Coal barges towed by steamers or tugs between the ports of Parsboro', N.S. and St. John, N.B., are exempt from compulsory pilotage at the latter port, even though under favourable conditions they could be navigated as sailing ships. Judgment appealed from (37 N.B. Rep. 406), affirmed. SAINT JOHN PILOT COMMISSIONERS *v.* CUMBERLAND RY. AND COAL CO. 169

2——*Collision—Violation of rules not affecting accident — Steering wrong course.*] The Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the local judge unless the appellant can point out his mistake and shew conclusively that the judgment is entirely erroneous. *The Picton* (4 Can. S.C.R. 648) followed.—A steamer coming up Halifax harbour ran into a schooner striking her stern on the port side. No sound signals were given. The green

SHIPS AND SHIPPING—*Con.*

light of the schooner was seen on the steamer's port bow and the latter starboarded her helm to pass astern and then ported. She then was so close that the engines were stopped but too late to prevent the collision. *Held*, that the steamer alone was to blame for the collision.—*Held*, also, that though under the rules the schooner should have kept her course and also was to blame for not having a proper lookout neither fault contributed to the collision. SS. "ARRANMORE" *v.* RUDOLPH 176

3——*Admiralty law—Foreign bottoms—Collision in foreign waters—Jurisdiction of Canadian courts.*] A foreign vessel passing through waters dividing Canada from the United States under a treaty allowing free passage to ships of both nations is not, even when on the Canadian side, within Canadian control so as to be subject to arrest on a warrant from the Admiralty Court.—A warrant to arrest a foreign ship cannot be issued until she is within the jurisdiction of the court.—*Quære.* Have the Canadian Courts of Admiralty the same jurisdiction as those in England to try an action *in rem* by one foreign ship against another for damages caused by a collision in foreign waters? Judgment of the Exchequer Court, Toronto Admiralty District (10 Ex. C.R. 1) reversed, Idington J. dissenting. THE SHIP "D. C. WHITNEY" *v.* ST. CLAIR NAVIGATION CO. 303

4——*Maritime law—Collision—Tug and tow—Negligence of tow.*] A tug with the ship "Wandrian" in tow left a wharf at Parsboro', N.S., to proceed down the river and get to sea. The schooner "Helen M." was at anchor in the channel and the tug directed its course so as to pass her on the port side when another vessel was seen coming out from a slip on that side. The tug then, when near the "Helen M." changed her course, without giving any signal and tried to cross her bow to pass down on the starboard side and in doing so the "Wandrian" struck her, inflicting serious injury. In an action against the "Wandrian" by the owners of the "Helen M." the captain of the former insisted that the schooner was in the middle of the

SHIPS AND SHIPPING—*Con.*

channel, which was about 400 feet wide, but the local judge found as a fact that she was on the eastern side. *Held*, affirming the judgment of the local judge (11 Ex. C.R. 1) that the navigation of the tug was faulty and shewed negligence; that if the "Helen M." was on the eastern side of the channel as found by the judge there was plenty of room to pass on her port side, and if, as contended, she was in the middle of the channel she could easily have been passed to starboard; and that in attempting to cross over and pass to starboard when she was so near the "Helen M." as to render a collision almost inevitable was negligence on the the tug's part; and that the "Helen M." exercised proper vigilance and was not negligent in failing to slacken her anchor chain as the "Wandrian" was too close and had not signalled.—*Held*, also, that the tow was liable for such negligence in the navigation of the tug. THE "WANDRIAN" *v.* HATFIELD. 431

5——*Negligence — Navigation of inland waters — Collision — Government ships and vessels — "Public work"—The Exchequer Court Act, s. 16—Construction of statute—Right of action* 126

See NEGLIGENCE 3.

SPECIFIC PERFORMANCE—*Vendor and purchaser—Sale of land—Formation of contract — Conditions — Acceptance of title—New term—Statute of Frauds—Principal and agent—Secret commission —Avoidance of contract—Fraud*. 588

See CONTRACT 6.

SPECIFICATIONS — *Public work—Contract—Change in plans and specifications —Waiver by order in council—Powers of executive — Construction of statute — Directory and imperative clauses — Words and phrases—"Stipulations" — Exchequer Court Act, s. 33 — Extra works — Engineer's certificate—Instructions in writing—Schedule of prices — Compensation at increased rate—Damages—Right of action—Quantum meruit.* 501

See CONTRACT 5.

STATUTE—*Construction of will—Usufruct—Substitution — Partition between institutes—Validating legislation* 60 *V. c.* 95 (*Q.*)—*Construction of statute—Restraint of alienation—Interest of substitutes — Devise of property held by institute under partition—Devolution of corpus of estate en nature—Accretion—Res judicata—Arts.* 868, 948 *C.C.*] The effect of the statute, 60 V. c. 95 (Que.), respecting the will of the late Amable Prevost, read in conjunction with the provisions of the will and codicils therein referred to, is to declare the deed of partition between the beneficiaries thereunder final and definitive and not merely provisional; the judgment of the Court of Queen's Bench, on the appeal side taken under that statute, has no other effect. Neither the statute nor the judgment referred to sanctions the view that the said will and codicils constitute more than one substitution; there was but one substitution created thereunder in favour of all the joint legatees and consequently accretion takes place among them within the meaning of article 868 of the Civil Code, in the event of any legacy lapsing, under the terms of the will, upon the death of an institute without issue prior to the opening of the substitution. In such case, the share of the institute dying without issue devolves to the other joint legatees, as well in usufruct as in absolute ownership, and, consequently, none of the institutes or substitutes have the right of disposing of any portion of the testator's estate, by will or otherwise, prior to the date of the opening of the substitution. Judgment appealed from (Q.R. 28 S.C. 257 reversed. *DeHetel* v. *Goddard* (66 L.J.P.C. 90) distinguished. PRÉVOST *v.* LAMARCHE.....1

2——*Construction of* 3 *Edw. VII. c.* 57 — *Railway subsidies — Conditions—Cost of construction—Method of estimating—Rolling stock and equipment.*] The provisions of the Act, 3 Edw. VII. c. 57, authorizing the granting of subsidies in aid of the construction of railways are not mandatory, but discretionary in so far as the grant of the subsidies by the Governor in Council is concerned.—On a proper construction of the said Act it does not appear to have been the intention of Parliament that the cost of rolling stock and equipment should be included in the cost of construction in

STATUTE—*Continued.*

estimating the amount of subsidy payable to the company in aid of the "Pheasant Hills Branch" of their railway under the provisions of that Act, notwithstanding that the said Act did not specially exclude the consideration of the cost of equipment in the making of such estimate as had been done in former subsidy Acts with similar objects, and that the Governor in Council imposed the duty of efficient maintenance and equipment of the branch as a condition of the grant of the subsidy. CANADIAN PACIFIC RY. CO. *v.* THE KING (RE PHEASANT HILLS BRANCH).....137

AND *see* APPEAL 2.

3——*Criminal law—Crown case reserved —Appeal—Extension of time for notice of appeal—"Criminal Code" s.* 1024—*Order after expiration of time for service of notice — Jurisdiction.*] The power given by section 1024 of the "Criminal Code" (R.S.C. (1906) c. 146) to a judge of the Supreme Court of Canada to extend the time for service on the Attorney General of notice of an appeal in a reserved Crown case may be exercised after the expiration of the time limited by the code for the service of such notice. *Banner* v. *Johnston* (L.R. 5 H.L. 157) and *Vaughan* v. *Richardson* (17 Can. S. C.R. 703) followed. GILBERT *v.* THE KING.....207

4——*Appeal — Order extending time — Jurisdiction—R.S.C. c.* 135, *s.* 42—*Practice.*] The court refused to entertain a motion to quash the appeal on the ground that it had not been taken within the sixty days limited by the statute and that an order by a judge of the court appealed from after the expiration of that time was *ultra vires* and could not be permitted under section 42 of the "Supreme and Exchequer Courts Acts," R.S.C. c. 135. TEMISCOUTA RY. CO. *v.* CLAIR.....230

AND *see* TRESPASS 1.

5——*Appeal—Action for declaration and injunction—*60 *& 61 V. c.* 34, *s.* 1 (*d.*)—*Municipal corporation — Water rates—Discrimination.*] The Act 60 & 61 V. 34 (D.) relating to appeals from the Court of Appeal for Ontario does not authorize an

STATUTE—*Continued.*

appeal in an action claiming only a declaration that a municipal by-law is illegal and an injunction to restrain its enforcement. CITY OF HAMILTON *v.* HAMILTON DISTILLERY CO.; CITY OF HAMILTON *v.* HAMILTON BREWING ASSOCIATION.....**239**

AND *see* MUNICIPAL CORPORATION 2.

6——*Criminal law—Disorderly house—Common betting house—Place for betting—Betting booth—Race-course of incorporated association—Crim. Code,* 1892, *ss.* 197, 204—*Crim. Code,* 1906, *ss.* 227, 235.] A perambulating booth used on the race-course of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto as defined in s. 197 of the Criminal Code, 1892 (Crim. Code, 1906, s. 227).—Subsection 2 of s. 204 of the former Code (now s. 235) which exempts from the provisions of the main section (dealing with the recording or registering of bets, etc.), bets made on the race-course of an incorporated association does not apply to the offence of keeping a common betting-house. Girouard and Davies JJ. dissenting. Judgment of the Court of Appeal (12 Ont. L.R. 615) affirmed, Girouard and Davies JJ. dissenting. SAUNDERS *v.* THE KING.....**382**

7——*Construction of statute—4 Edw. VII. c. 41—R.S.C.* (1906) *c.* 152, *s.* 127—*Conviction—Penalty.*] By 4 Edw. VII. c. 41 (R.S. 1906, c. 152, s. 127) for a first offence against Part II. of the "Canada Temperance Act" a fine may be imposed of "not less than $50" and for a second offence of "not less than $100." *Held,* that for a first offence the justice cannot impose a fine of more than $50. Maclennan J. dissenting. IN RE RICHARD. **394**

AND *see* CANADA TEMPERANCE ACT.

8——*Municipal corporation—Exemption from taxes—Resolution of council—Discrimination—Establishment of industry—Construction of* 36 *V. c.* 81, *s.* 1(*N.B.*)] By s. 1 of 36 V. c. 81, the New Brunswick Legislature authorized the town

STATUTE—*Continued.*

council of Woodstock from time to time to "give encouragement to manufacturing enterprises within the said town by exempting the property thereof from taxation for a period of not more than ten years by a resolution declaring such exemption." In 1892 the council passed the following resolution: "That any company establishing a woollen mill in the Town of Woodstock be exempted from taxation for a period of ten years." *Held, per* Davies, Idington and Maclennan JJ., that this resolution provided for discrimination in favour of companies and against individuals who might establish a woollen mill or mills in the town and was therefore void. *City of Hamilton* v. *Hamilton Distillery Co.* (38 Can. S.C.R. 239) followed.— *Held, per* Davies J.—The resolution exempting any company and not any property of a company was too indefinite and uncertain to be the basis for a claim for exemption.—In 1893 a woollen mill was established in Woodstock by the Woodstock Woollen Mills Co., and operated for some years without taxation. In 1899 the mill was sold under execution and two months later the Carleton Woollen Co. (appellants), were incorporated and acquired the said mill from the purchaser at the sheriff's sale and have operated it since.—*Held,* that the appellants could not by so acquiring the mill which had been exempted be said to have "established a woollen mill" without shewing that when it was acquired it had ceased to exist as such which they had not done. Judgment appealed from (37 N.B. Rep. 545) affirming that of Barker J. at the hearing (3 N.B. Eq. 138) affirmed. CARLETON WOOLLEN CO. *v.* TOWN OF WOODSTOCK **411**

9——*Appeal — Railway Act—Expropriation — Appeal from award — Choice of forum—Curia designata.*] By s. 168 of 3 Edw. VII. c. 58 amending the "Railway Act," 1903 (R.S.C. (1906) c. 37, s. 209) if an award by arbitrators on expropriation of land by a railway company exceeds $600 any dissatified party may appeal therefrom to a Superior Court which in Ontario means the High Court or the Court of Appeal (Interpretation Act R.S. [1906] c. 1, s. 34, s.-s. 26). *Held,* that if an appeal from an

STATUTE—*Continued.*

award is taken to the High Court there can be no further appeal to the Supreme Court of Canada which cannot even give special leave. JAMES BAY RY CO. *v.* ARMSTRONG. **511**

10——*Constitutional law—British North America Act*, 1867 — *Provincial legislative jurisdiction—Alberta Act*, 4 & 5 *Edw. VII. c.* 3 (*D.*)—*Con. Ord. N.W.T.* (1898), *c.* 52—6 *Edw. VII. c.* 28 (*Alta.*)—*Medical profession—Practising without license—Criminal law—Practice—Special leave to appeal—R.S.C.* (1906), *c.* 139, *s.* 37 (*c*).] The "Medical Profession Act," 6 Edw. VII. c. 28 (Alta.) is *intra vires* of the legislative jurisdiction of the Legislature of Alberta and a member of the College of Physicians and Surgeons of the North-West Territories may be validly convicted thereunder for the offence of practising medicine, surgery, etc., for gain and reward, in the Province of Alberta, without complying with its requirements as to registration and license, notwithstanding that the College of Physicians and Surgeons of the North-West Territories had not been previously dissolved and abolished by order of the Governor in Council, in conformity with the provisions of s. 16 (3) of "The Alberta Act." *Dobie* v. *The Temporalities Board* (7 App. Cas. 136) distinguished. LAFFERTY *v.* LINCOLN. **620**

11——*Crown — Breach of trust — Purchase of debentures out of Common School Fund—Knowledge of misappropriation of moneys—Payment of interest — Statutory prohibition — Evasion of statute — Estoppel against Crown — Action—Adding parties—Practice*. **62**

See QUEBEC NORTH SHORE TURNPIKE ROAD TRUST.

12——*Negligence—Navigation of inland waters—Collision—Government ships and vessels—"Public work"—The Exchequer Court Act, s.* 16—*Construction of statute —Right of action*. **126**

See NEGLIGENCE 3.

13——*Construction of* 2 *Edw. VII. c.* 9. *s.* 1—*Expropriation of land—Payment —Market value—Potential value—Evidence*. **149**

See EXPROPRIATION 1.

STATUTE—*Continued.*

14——*Pilotage—Port of St. John, N.B. —Ships propelled wholly or in part by steam — Coal barges towed — R.S.C.* (1886) *c.* 80, *ss.* 58, 59. . . . . **169**

See SHIPS AND SHIPPING 1.

15——*Public works—Contract—Changes in plans and specifications—Waiver by order in council—Powers of executive—Exchequer Court Act s.* 33—*Construction of statute — Directory and inoperative clauses—Words and phrases—"Stipulations"—Extra works—Engineer's certificate—Right of action*. **501**

See CONTRACT 5.

STATUTE OF FRAUDS — *Vendor and purchaser—Sale of land—Formation of contract — Conditions — Acceptance of title—New term—Statute of Frauds — Principal and agent—Secret commission — Avoidance of contract — Fraud — Specific performance.*] While A was absent abroad, B assumed, without authority, to sell certain of his lands to C and received, from C, a deposit on account of the price. On receipt of a cablegram from B, notifying him of what had been done, but without disclosing the name of the proposed purchaser, A replied, by letter, stating that he was willing to sell at the price named, that he would not complete the deal until he returned home, and the sale would be subject to an existing lease of the premises and that he would not furnish evidence of title other than the deeds that were in his possession, and requesting B to communicate these terms to the proposed purchaser. On learning the conditions, C, in a letter by his solicitors, accepted the terms and offered to pay the balance of the price as soon as the title was evidenced to their satisfaction. In a suit for specific performance: *Held*, that the correspondence which had taken place constituted a contract sufficient to satisfy the requirements of the Statute of Frauds, that the words "so soon as title is evidenced to our satisfaction," in the solicitors' letter accepting the conditions, did not import the proposal of a new term and that A was bound to specific performance.—*Held*, also, that the arrangement, unknown to A and made prior to the re-

STATUTE OF FRAUDS—*Con.*

ceipt of his letter, whereby B was to have a commission on the transaction from C, could not have the effect of avoiding the contract, as B was not, at that time, the agent of A for the sale of the property. Judgment appealed from (12 B.C. Rep. 236) affirmed. ANDREWS *v.* CALORI.....588

STATUTE OF LIMITATIONS—*Account — Statute of Limitations — Agents or partners—Reference.*] By agreement between them the Hamilton Brass Mfg. Co. was appointed agent of the Barr Cash Co. for sale and lease of its carriers in Canada at a price named for manufacture; net profits to be equally divided and quarterly returns to be furnished, either party having liberty to annul the contract for non-fulfilment of conditions. The agreement was in force for three years when the Barr Co. sued for an account alleging failure to make proper returns and payments. *Held*, reversing the judgment of the Court of Appeal, Girouard and Davies JJ. dissenting, that the accounts should be taken for the six years preceding the action only.—On a reference to the Master the taking of the accounts was brought down to a time at which defendants claimed that the contract was terminated by notice. The Court of Appeal ordered that they should be taken down to the date of the Master's report.—*Held*, that this was a matter of practice and procedure as to which the Supreme Court would not entertain an appeal. HAMILTON BRASS MANUFACTURING CO. *v.* BARR CASH AND PACKAGE CARRIER CO. 216

STATUTES—*British North America Act, 1867, (Imp.) (Provincial Legislative Jurisdiction)* 620
See CONSTITUTIONAL LAW 1.

2——*R.S.C.* (1886) *c.* 80, *ss.* 58, 59 (*Pilotage*) 169
See SHIPS AND SHIPPING 1.

3——*R.S.C.* (1886) *c.* 135, *s.* 29 (*Appeals to Supreme Court of Canada*) . .41
See APPEAL 1.

4——*R.S.C.* (1886) *c.* 135, *s.* 29 (*Supreme Court Act*) 236
See APPEAL 5.

STATUTES—*Continued.*

5——*R.S.C.* (1886) *c.* 135, *s.* 42 (*Supreme Court Act*) 394
See HABEAS CORPUS.

6——*R.S.C.* (1886) *c.* 135, *s.* 42 (*Supreme Court Act*) 230
See APPEAL 4.

7——*R.S.C.* (1906) *c.* 1, *s.* 34, *s.-s.* 26 (*Interpretation Act*) 511
See APPEAL 10.

8——*R.S.C.* (1906) *c.* 37, *s.* 209 (*Railways*) 511
See APPEAL 10.

9——*R.S.C.* (1906) *c.* 139, *s.* 37(*c.*) (*Appeals to Supreme Court of Canada*) 620
See APPEAL 11.

10——*R.S.C.* (1906) *c.* 139, *s.* 48(*d*) (*Appeals to Supreme Court of Canada*) 239
See APPEAL 6.

11——*R.S.C.* (1906) *c.* 139, *s.* 62 (*Supreme Court Act*) 394
See HABEAS CORPUS.

12——*R.S.C.* (1906) *c.* 146, *ss.* 227, 235 (*Criminal Code*) 382
See CRIMINAL LAW 3.

13——*R.S.C.* (1906) *c.* 146, *ss.* 1013, 1015, 1016, 1024 (*Criminal Code*) . .284
See CRIMINAL LAW 2.

14——*R.S.C.* (1906) *c.* 146, *s.* 1024 (*Criminal Code*) 207
See CRIMINAL LAW 1.

15——*R.S.C.* (1906) *c.* 152, *s.* 127 (*Canada Temperance Act*). 394
See CANADA TEMPERANCE ACT.

16——50 *&* 51 *V. c.* 16, *s.* 16(*D.*) (*Exchequer Court Act*) 127
See NEGLIGENCE 5.

17——50 *&* 51 *V. c.* 16, *c.* 33(*D.*) (*Contracts by the Crown*) 501
See CONTRACT 5.

STATUTES—*Continued.*

18——53 *V. c.* 31, *s.* 74(*D.*) (*Bank Act*) 187

See BANKS AND BANKING 1.

19——55 *& 56 V. c.* 29, *ss.* 197, 204(*D.*) (*Criminal Code,* 1892) 382

See CRIMINAL LAW 3.

20——55 *& 56 V. c.* 29, *ss.* 742, 743, 744, 750(*D.*) (*Criminal Code,* 1892)...284

See CRIMINAL LAW 2.

21——60 *& 61 V. c.* 34(*D.*) (*Appeals to Supreme Court of Canada from Ontario*) 239

See APPEAL 6.

22——2 *Edw. VII c.* 9, *s.* 1(*D.*) (*Expert Testimony*) 149

See EXPROPRIATION 1.

23——3 *Edw. VII. c.* 57(*D.*) (*Railway Subsidies*) 137

See RAILWAYS 2.

24——3 *Edw. VII. c.* 58, *s.* 168(*D.*) (*Amendment to Railway Act*).....511

See APPEAL 10.

25——4 *Edw. VII. c.* 41, *s.* 1(*D.*) (*Fines under Canada Temperance Act*) ...394

See CANADA TEMPERANCE ACT.

26——4 *& 5 Edw. VII. c.* 3(*D.*) (*Alberta Act*) 620

See CONSTITUTIONAL LAW 1.

27——*R.S.O.* (1897) *c.* 147, *s.* 2, *ss.* 2 *and* 3 (*Assignments by Insolvents*). 577

See INSOLVENCY.

28——60 *V. c.* 95(*Q.*) (*Prévost Estate*) 1

See WILL 1.

29——*Con. Ord. N.W.T.* (1898) *c.* 52 (*Medical profession*) 620

See CONSTITUTIONAL LAW 1.

STATUTES—*Continued.*

30——6 *Edw. VII. c.* 28 (*Alta.*) (*Medical profession*) 620

See CONSTITUTIONAL LAW 1.

STOCK—*Broker—Purchase on margin—Pledge of stock by broker—Possession for delivery to purchaser.* 601

See BROKER.

SUBSIDIES—*Aid to railway—Construction of statute—3 Edw. VII. c.* 57—*Mode of estimating cost of construction of line—Rolling stock and equipment.*137

See RAILWAYS 2.

SUBSTITUTION—*Construction of will—Usufruct—Substitution — Partition between institutes — Validating legislation —60 V. c.* 95(*Q.*)—*Construction of statute—Restraint of alienation—Interest of substitutes—Devise of property held by institute under partition—Devolution of corpus of estate en nature—Accretion —Res judicata—Arts.* 868, 948 *C.C.*] The effect of the statute, 60 V. c. 95 (Que.), respecting the will of the late Amable Prévost, read in conjunction with the provisions of the will and codicils therein referred to, is to declare the deed of partition between the beneficiaries thereunder final and definitive and not merely provisional; the judgment of the Court of Queen's Bench, on the appeal side taken under that statute, has no other effect. Neither the statute nor the judgment referred to sanctions the view that the said will and codicils constitute more than one substitution; there was but one substitution created thereunder in favour of all the joint legatees and consequently accretion takes place among them within the meaning of article 868 of the Civil Code, in the event of any legacy lapsing, under the terms of the will, upon the death of an institute without issue prior to the opening of the substitution. In such case, the share of the institute dying without issue devolves to the other point legatees, as well in usufruct as in absolute ownership, and, consequently, none of the institutes or substitutes have the right of disposing of any portion of the testator's estate,

SUBSTITUTION—*Continued.*

by will or otherwise, prior to the date of the opening of the substitution. Judgment appealed from (Q.R. 28 S.C. 257) reversed. *De Hertel* v. *Goddard* (66 L.J.P.C. 90) distinguished. PRÉVOST *v.* LAMARCHE. 1

SURVEY—*Title to land—Plan of survey — Evidence — Onus of proof—Findings of jury—Error—New trial.* . .336

See NEW TRIAL 2.

TERMS, INTERPRETATION OF.

See WORDS AND PHRASES.

TIMBER LICENSE — *Construction of deed—Description of land — License to cut timber—Ambiguitas latens — Evidence—Boundary of timber area.* 75

See DEED 1.

TITLE TO LAND—*Plan of survey—Evidence—Onus of proof—Findings of jury —Error—New trial.*] Where it appeared that in directing the jury, at the trial, the judge attached undue importance to the effect of a plan of survey referred to in a junior grant as against a much older plan upon which the original grants of the lands in dispute depended and that the findings were not based upon evidence sufficient in law to shift the onus of proof from the plaintiff and were, likewise, insufficient for the taking of accounts in respect to trespass and conversion of minerals complained of: *Held*, affirming the order for a new trial made by the judgment appealed from (1 East. L.R. 293), that in the absence of evidence of error therein, the older grants and plan must govern the rights of the parties. BARTLETT *v.* NOVA SCOTIA STEEL CO. 336

2——*Construction of will—Usufruct — Substitution — Partition between institutes — Validating legislation*—60 *V. c.* 95 (*Q.*)—*Construct of statute—Restraint of alienation—Interest of substitutes—Devise of property held by institute under partition—Devolution of corpus of estate es nature—Accretion—Res judicata—Arts.* 868, 948 *C.C.* 1

See WILL 1.

TITLE TO LAND—*Continued.*

3—— *Negligence — Electric lighting — Wires on public highway—Proximity to bridge—Injury to child—Dedication.* 27

See NEGLIGENCE 1.

4——*Construction of deed—Description of land—License to cut timber—Ambiguitas latens—Evidence — Boundary of timber area.* 75

See DEED 1.

5——*Dominion mining regulations — Hydraulic mining — Place mining — lease — Water-grant — Conditions of grant—User of flowing waters—Diversion of watercourse—Dams and flumes—Construction of deed—Riparian rights—Priority of right—Injunction.* 79

See MINES AND MINERALS 1.

6——*Placer mining—Disputed title — Trespass pending litigation—Colour of right—Invasion of claim—Adverse acts —Sinister intention—Conversion—Blending materials—Accounts—Assessment of damages — Mitigating circumstances — Compensation for necessary expenses—Estoppel — Standing-by — Acquiescence.* 516

See MINES AND MINERALS 2.

7——*Subaqueous mining—Crown grants —Dredging lease—Breach of contract—Subsequent issue of placer mining licenses—Damages—Pleading and practice —Statement of claim—Cause of action.* 542

See MINES AND MINERALS 3.

8—— *Vendor and purchaser—Sale of land—Formation of contract—Conditions —Acceptance of title—New term—Statute of Frauds—Principal and agent—Secret commission — Avoidance of contract—Fraud—Specific performance.* 588

See CONTRACT 6.

TRAMWAYS—*Municipal corporation—Agreement with Electric Street Ry. Co. —Use of streets—Payment for—Percentage of receipts—Traffic beyond city — Validity of agreement.*] By agreement between the City of Hamilton and the Hamilton Street Ry. Co. the latter was authorized to construct its railway on certain named streets and agreed to pay

TRAMWAYS—*Continued.*

to the city, *inter alia*, certain percentages on their gross receipts. *Held*, following *Montreal Street Ry. Co.* v. *City of Montreal* ([1906] A.C. 100) that such payment applies in respect to all traffic in the city including that originating or terminating in the adjoining Township of Barton.—*Held*, also, that as, when the railway was extended into Barton the company agreed with that township to carry passengers from there into the city at city rates, the percentage was payable on the whole of such traffic and not on the portion within the city only. *Held*, further, that the power of the company to construct its railway was not derived wholly from its charter, but was subject to the permission of the city corporation; the city had, therefore, a right to stipulate for payment of such percentages and the agreement therefor was *inter vires*. The judgment of the Court of Appeal (10 Ont. L.R. 575), affirming that of Meredith J. at the trial (8 Ont. L.R. 455) was affirmed. HAMILTON ST. RY. CO. *v.* CITY OF HAMILTON. **106**

2——*Negligence—Street railway — Excessive speed—Gong not sounded—Contributory negligence—Damages.*] A passenger on a street car in Toronto going west alighted on the side farthest from the other track and passed in front of the car to cross to the opposite side of the street. The space between the two tracks was very narrow and seeing a car coming from the west as she was about to step on the track, she recoiled, and at the same time the car she had left started and she was crushed between the two, receiving injuries from which she died. In an action by her father and mother for damages the jury found that the company was negligent in running the east bound car at excessive speed and starting the west bound car and not sounding the gong in proper time. They found also that deceased was negligent, but that the company could, nevertheless, have avoided the accident by the exercise of reasonable care. *Held*, that the case having been submitted to the jury with a charge not objected to by the defendants and the evidence justifying the findings the verdict for the plaintiffs should not be disturbed.—The plaintiffs should not have had the funeral

TRAMWAYS—*Continued.*

and other expenses incurred by the father of deceased allowed as damages in the action. TORONTO RY. CO. *v.* MULVANEY. **327**

TRENT VALLEY CANAL—*Navigation—Trent canal crossing—Swing bridge — Cost of construction—Maintenance—Order in council.* **211**

See RAILWAYS 3.

TRESPASS—*Possession — Evidence — Expropriation—Railway.*] The casual use of land for pasturing cattle in common with other persons does not constitute evidence of possession sufficient to maintain an action for trespass. Judgment appealed from (1 East. L.R. 524) reversed. TEMISCOUATA RY. CO. *v.* CLAIR. **230**

AND *see* APPEAL 4.

2——*Placer mining—Disputed title — Trespass pending litigation — Colour of right—Invasion of claim—Adverse acts —Sinister intention—Conversion—Blending materials — Accounts — Assessment of damages — Mitigating circumstances —Compensation for necessary expenses — Estoppel — Standing-by — Acquiescence.*] After a favourable judgment by the Gold Commissioner in respect to the boundary between contiguous placer mining locations and while an appeal therefrom was pending, the defendants, with the knowledge of the plaintiffs, entered upon the location and removed a quantity of auriferous material from the disputed and undisputed portions thereof, intermixed the products without keeping any account of the quantities taken from these portions respectively and appropriated the gold recovered from the whole mass. In an action for damages, taken subsequently, the plaintiffs recovered for the total value of the gold estimated to have been taken from the disputed portion of the claim, without deduction of the necessary expenses of workings and winning the gold. *Held*, affirming the judgment appealed from, Davies J. dissenting, that a correct appreciation of the evidence disclosed a sinister intention on the part of the defendants, that they had deliberately blended the materials taken from both parts of the loca-

TRESPASS—*Continued.*

tion, converted the whole mass to their own use and thereby destroyed the means of ascertaining the respective quantities so taken and the proportionate expense of recovering the precious metal therefrom, and that, consequently, they were liable in damages for the total value of so much of the intermixed products as were not strictly proved to have come from the undisputed portion of the location. *Quœre.* Does the English rule governing the assessment of damages in respect of trespasses in coal mines supply a method of assessment applicable in its entirety to placer mining locations? LAMB *v.* KINCAID. **516**

3——*Negligence — Horse racing — Intruder upon race track — Carelessness.* **226**

See NEGLIGENCE 4.

4——*Title to land—Plan of survey — Evidence — Onus of proof—Findings of jury—Error—New trial.* **336**

See NEW TRIAL 2.

TRIAL — *Criminal law — Practice — Charge to jury—Case reserved—Reserved questions—Dissent from affirmance of conviction—Appeal—Jurisdiction—Criminal Code,* 1892, *ss.* 742, 743, 744, 750—*R.S.C.* (1906) *c.* 146, *ss.* 1013, 1015, 1016, 1024—*Admission of evidence—Res gestæ.* **284**

See CRIMINAL LAW 2.

TRUSTS—*Breach of contract—Breach of trust—Assessment of damages—Sale of mining areas—Promotion of company—Failure to deliver securities—Principal and agent — Account — Evidence — Salvage — Indemnity for necessary expenses—Laches — Estoppel.*] The plaintiffs transferred certain mining areas to the defendant in order that they might be sold together with other areas to a company to be incorporated for the purpose of operating the consolidated mining properties, the defendants agreeing to give them a proportionate share of whatever bonds and certificates of stock he might receive for these consolidated properties upon the flotation of the scheme then being promoted by him and other associates. In order to hold some

TRUSTS—*Continued.*

of the areas it became necessary to borrow money and the lender exacted a bonus in stock and bonds which the defendant gave him out of those he received for conveyance of the properties to the company. After deducting a ratable contribution towards this bonus, the defendant delivered to the plaintiffs the remainder of their proportion of stock and bonds, but did not then inform them that such deductions had been made, and they, consequently, made no demand upon him for the balance of the shares and bonds until some time afterwards when they brought the action to recover the securities or their value. *Held,* affirming the judgment appealed from, that whether the defendant was to be regarded as a trustee or as the agent of the plaintiffs, he was not entitled, without their consent, to make the deductions, either by way of salvage or to indemnify himself for expenses necessarily incurred in the preservation of the properties; and that, under the circumstances, their failure to demand delivery of the remainder of the securities before action did not deprive the plaintiffs of their right to recover. If the defendant is to be considered a trustee wrongfully withholdings securities which he was bound to deliver, he is liable for damages calculated upon the assumption that they would have been disposed of at the best price obtainable. If, however, he is to be regarded as a contractor who has failed to deliver the securities according to the terms of his agreement, he is liable for damages based on the selling price of the securities at the time when his obligation to deliver them arose. *Nant-Y-Glo and Blaina Ironworks Co.* v. *Grave* (12 Ch. D. 738); *The Steamship Carrisbrooke Co.* v. *The London and Provincial Marine and General Ins. Co.* ((1901) 2 K.B. 861) and *Michael* v. *Hart & Co.* ((1902) 1 K.B. 482) followed. MCNEIL *v.* FULTZ . . **198**

2——*Crown — Breach of trust — Purchase of debentures out of Common School Fund—Knowledge of misappropriation of moneys—Payment of interest —Statutory prohibition—Evasion of statute—Estoppel against Crown—Action—Adding parties—Practice.* **62**

See QUEBEC NORTH SHORE TURNPIKE ROAD TRUST.

USE—*Dominion mining regulations — Hydraulic mining—Place mining—Lease —Water-grant—Conditions of grant — User of flowing waters—Diversion of watercourse—Dams and flumes — Construction of deed—Riparian rights — Priority of right—Injunction.* 79

See MINES AND MINERALS 1.

USUFRUCT—*Construction of will—Substitution—Partition between institutes—Validating legislation—60V. c. 95 (Q.)—Construction of statute — Restraint of alienation — Interest of substitutes — Devise of property held by institute under partition—Devolution of corpus of estate es nature—Accretion—Res judicata—Arts.* 868, 948 *C.C.* 1

See WILL 1.

VERDICT — *Negligence — Railway company — Findings of jury — "Look and listen."*] M. attempted to drive over a railway track which crossed the highway at an acute angle where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways but did not look again just before crossing when he could have seen an engine approaching which struck his team and he was killed. In an action by him widow and children the jury found that the statutory warnings had not been given and a verdict was given for the plaintiffs and affirmed by the Court of Appeal. *Held*, affirming the judgment of the Court of Appeal (12 Ont. L.R. 71), Fitzpatrick C.J. *hesitante*, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified. WABASH RAILROAD CO. *v.* MISENER. 94

2——*Negligence—Street railway—Excessive speed—Gong not sounded—Contributory negligence—Damages.* 327

See NEGLIGENCE 5.
AND *see* JURY.

VENDOR AND PURCHASER—*Sale of land—Formation of contract—Conditions —Acceptance of title—New term—Statute of Frauds—Principal and agent—Secret commission—Principal of contract —Fraud—Specific performance.*] While A was absent abroad, B assumed, without authority, to sell certain of his lands to C and received, from C, a deposit on account of the price. On receipt of a cablegram from B, notifying him of what had been done, but without disclosing the name of the proposed purchaser, A replied, by letter, stating that he was willing to sell at the price named, that he would not complete the deal until he returned home, that the sale would be subject to an existing lease of the premises and that he would not furnish evidence of title other than the deeds that were in his possession, and requesting B to communicate these terms to the proposed purchaser. On learning the conditions, C, in a letter by his solicitors, accepted the terms and offered to pay the balance of the price as soon as the title was evidenced to their satisfaction. In a suit for specific performance: *Held*, that the correspondence which had taken place constituted a contract sufficient to satisfy the requirements of the Statute of Frauds, that the words "so soon as title is evidenced to our satisfaction," in the solicitors' letter accepting the conditions, did not import the proposal of a new term and that A was bound to specific performance.—*Held*, also, that an arrangement, unknown to A and made prior to the receipt of his letter, whereby B was to have a commission on the transaction from C, could not have the effect of avoiding the contract, as B was not, at that time, the agent of A for the sale of the property. Judgment appealed from (12 B.C. Rep. 236) affirmed. ANDREWS V. CALORI. 588

VENDOR AND VENDEE—*Sale of securities—Interpretation of contract—Arts.* 1018, 1019 *C.C.* — *Railways — Debtor and creditor—Right of way claims — Legal expenses incurred in settlement.* 422

See CONTRACT 4.

WATERCOURSES.

See RIVERS AND STREAMS.

WATERWORKS—*Municipal corporation —Water rates—Discrimination.*] *Held*, affirming the judgment of the Court of Appeal (12 Ont. L.R. 75) which sus-

WATERWORKS—*Continued.*

tained the verdict at the trial (10 Ont. L.R. 280) that the rate for water supplied to any class of consumers must be an equal rate to all members of such class and a by-law providing for a rate on certain manufacturers higher than that to be paid by others was illegal. *Attorney-General* v. *City of Toronto* (23 Can. S.C.R. 514) followed. CITY OF HAMILTON *v.* HAMILTON DISTILLERY CO.; CITY OF HAMILTON *v.* HAMILTON BREWING ASSOCIATION. 239

AND *see* MUNICIPAL CORPORATION 2.

WILL—*Construction of will—Usufruct—Substitution — Partition between institutes—Validating legislation*—60 *V. c.* 95 (*Q.*)—*Construction of statute — Restraint of alienation—Interest of substitutes—Devise of property held by institute under partition—Devolution of corpus of estate en nature—Accretion—Res judicata—Arts.* 868, 948 *C.C.*] The effect of the statute, 60 V. c. 95 (Que.), respecting the will of the late Amable Prévost, read in conjunction with the provisions of the will and codicils therein referred to, is to declare the deed of partition between the beneficiaries thereunder final and definitive and not merely provisional; the judgment of the Court of Queen's Bench, on the appeal side taken under that statute, has no other effect. Neither the statute nor the judgment referred to sanctions the view that the said will and codicils constitute more than one substitution; there was but one substitution created thereunder in favour of all the joint legatees and consequently accretion takes place among them within the meaning of article 868 of the Civil Code, in the event of any legacy lapsing, under the terms of the will, upon the death of an institute without issue prior to the opening of the substitution. In such case, the share of the institute dying without issue devolves to the other joint legatees, as well in usufruct as in absolute ownership, and consequently, none of the institutes or substitutes have the right of disposing of any portion of the testator's estate, by will or otherwise, prior to the date of the opening of the substitution. Judgment appealed from (Q.R. 28 S.C. 257) reversed. *DeHertel* v. *Goddard* (66 L.J. P.C. 90) distinguished. PRÉVOST *v.* LAMARCHE. 1

WILL—*Continued.*

2——*Revocation of will—Testamentary capacity—Findings of fact—Practice — Improper suggestion — Undue influence —Captation—Bounty taken by promoter —Fraudulent representations—Evidence —Onus of proof.*] While the testator was suffering from a wasting disease of which he died shortly afterwards, the defendant, his brother, took advantage of his weakness of mind and secretly obtained the execution of a will, in which he was made the principal beneficiary, by fraudulently suggesting and causing the testator to believe that his malady was caused and aggravated by the carelessness and want of skill of his wife in the preparation of his food. The testator and his wife had lived together in harmony for a number of years and, shortly after their marriage, had made wills by which each of them, respectively, had constituted the other universal residuary legatee and the testator's former will, so made, was revoked by the will propounded by the defendant. *Held*, that, as the promoter of the will, by which he took a bounty, had failed to discharge the onus of proof cast upon him to shew that the testator had acted freely and without undue influence in the revocation of the former will, the second will was invalid and should be set aside. The judgment appealed from was reversed, on the ground of captation and undue influence, but the Supreme Court of Canada refused to interfere with the concurrent findings of both courts below against the contention as to the testator's unsoundness of mind. MAYRAND *v.* DUSSAULT. 460

WORDS AND PHRASES — *"Criminal case"* 394

See CANADA TEMPERANCE ACT.

2——*"Judicial proceeding"* 41

See APPEAL 1.

3——*"Look and listen"* 94

See NEGLIGENCE 2.

WORDS AND PHRASES—*Continued.*

4——*"Not less than* $50" 394

See CANADA TEMPERANCE ACT.

5——*"Office"* ' ' ' 382

See CRIMINAL LAW 3.

6——*"Place"* 382

See CRIMINAL LAW 3.

WORDS AND PHRASES—*Continued.*

7——*"Public work"* 123

See NEGLIGENCE 3.

8——*"Stipulations"* 501

See CONTRACT 5.