REPORTS

OF THE

SUPREME COURT

OF

CANADA

REPORTER

C. H. MASTERS, K.C.

CIVIL LAW REPORTER AND ASSISTANT REPORTER

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Charles Joseph Doherty K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Hugh Guthrie K.C.

MEMORANDA.

On the twenty-first day of October, 1918, the Right Honourable Sir Charles Fitzpatrick, Knight, one of His Majesty's most Honourable Privy Council, resigned the office of Chief Justice of Canada.

On the twenty-third day of October, 1918, the Honourable Sir Louis Henry Davies, Knight, one of the Puisne Judges of the Supreme Court of Canada, was appointed Chief Justice of Canada, in the room and stead of the Right Honourable Sir Charles Fitzpatrick, resigned.

On the twenty-fifth day of October, 1918, Pierre Basile Mignault, one of His Majesty's Counsel, learned in the law, was appointed a Puisne Judge of the Supreme Court of Canada, in the room and stead of the Honourable Sir Louis Henry Davies, appointed Chief Justice of Canada.

On the first day of January, 1919, the Honourable Sir Louis Henry Davies, Chief Justice of Canada, and the Honourable Lyman Poore Duff, one of the Puisne Judges of the Supreme Court of Canada, were appointed members of His Majesty's most Honourable Privy Council.

APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF VOL. 56 OF THE SUPREME COURT REPORTS.

Cameron v. *The Church of Christ, Scientist, and others* (57 Can. S.C.R. 298, 43 D.L.R. 668). Leave to appeal refused, Mar., 1919.

Hansen v. *Franz* (57 Can. S.C.R. 57, 41 D.L.R. 457). Leave to appeal refused, June, 1918.

Nelson v. *The Canadian Pacific Railway Co.* (55 Can. S.C.R. 626, 39 D.L.R. 760). Leave to appeal refused, Mar., 1919.

Schofield v. *The Emerson Brantingham Implement Company* (57 Can. S.C.R. 203, 43 D.L.R. 509). Leave to appeal granted, Mar., 1919.

Toronto General Trusts Corporation v. *The King* (56 Can. S.C.R. 26, 39 D.L.R. 380). Appeal dismissed 12th April, 1919.

A TABLE

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ADA M. RUSSELL (DEFENDANT).....APPELLANT;

AND

LEN RUSSELL (PLAINTIFF).....RESPONDENT.

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*May 16.
*June 10.

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

Statutory law—Married woman's caveat—Affidavit—"Married Woman's Home Protection Act," ch. 4, Alberta statutes 1915—"Alberta Land Titles Act," sec. 85.

Held, Davies and Brodeur JJ. dissenting, that a caveat filed by a married woman under the "Married Woman's Home Protection Act," ch. 4, Alberta statutes 1915, must be supported by an affidavit of *bona fides* as required by the provisions of sec. 85 of the "Land Titles Act."

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta reversing the judgment of Hyndman J. in chambers (1), in favour of the defendant.

The material facts of the case and the circumstances on which the issues depend will be found in the judgments now reported.

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

(1) 12 Alta. L.R. 111.

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v.
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The Chief Justice.

R. B. Bennett K.C. for the appellant.
J. D. Matheson for the respondent.

THE CHIEF JUSTICE:—Some time prior to the 12th August, 1916, the appellant commenced an action against her husband for alimony and on this date filed a caveat under the "Married Woman's Home Protection Act," c. 4, statutes of 1915, against his land.

The claim for alimony was refused by the trial judge on the ground that the appellant had sufficient means of her own. On the 27th day of April, 1917, the respondent executed a transfer of his land to one D. Gillen. The "Dower Act," c. 14 of the 1917 statutes, came into force on the 1st of May, 1917, and by that Act the "Married Woman's Home Protection Act" was repealed. On the 1st June, 1917, the respondent gave notice of motion for an order to remove the caveat and in October, 1917, judgment was rendered refusing the application.

The judge of first instance held that under the "Interpretation Act, "section 48, saving acts done and rights existing,

> the wife is entitled to maintain her caveat, notwithstanding the repealing statute, until the same is removed in the manner provided by the Act creating the right and in the "Land Titles Act."

The judge does not deal otherwise with the application to remove the caveat.

Four judges of the Appellate Division, without giving any reasons, reversed that judgment and ordered the caveat removed.

It was argued here that because Mr. Justice Walsh held in the alimony action that the wife was provided for to the extent that an award of alimony was unnecessary she was not entitled to her caveat.

The judgment of Mr. Justice Walsh is not in this

record and there is no evidence that the appellant has a private estate.

It is also urged that the caveat should be removed because it is not supported by affidavit as required by the provisions of section 85 of the "Land Titles Act," and in that contention I concur.

The "Married Woman's Home Protection Act" was passed subsequently to the "Land Titles Act," but section 8 of the former Act provides:

> This Act shall be read with and as part of the "Land Titles Act."

If the "Land Titles Act" is read with the provisions of the "Married Woman's Home Protection Act" inserted in the proper place, having regard to those provisions, we have a statute which enables any married woman to file with the registrar an instrument to be known as a married woman's caveat and which is described in all the sections dealing with the matter as a caveat and for which a special form is provided.

Then we have section 85 which reads as follows:—

> *Every caveat* filed with the registrar shall state the name and addition of the person by whom and on whose behalf the same is filed and *except in the case of a caveat filed by the registrar* as hereinafter provided shall be signed by the caveator, his attorney or agent, and shall state some address or place within the province at which notices and proceedings relating to such caveat or the subject matter thereof may be served and the nature of the interest claimed and the grounds upon which such claim is founded, and shall be supported by an affidavit that in the belief of the deponent the person by whom or on whose behalf the caveat is filed has a good valid claim in respect of the land, mortgage or encumbrance intended to be affected by the same, and that the caveat is not filed for the purpose of delaying or embarrassing the applicant, or owner, or any person claiming through him, which affidavit or affidavits may be in the form X in the schedule to this Act.

This section provides that all caveats with the single exception of a caveat filed by the registrar under section 100 must be supported by an affidavit as to good faith, etc.

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Independently of the very broad terms of section 85, there are very obvious reasons why such an affidavit should be required in the case of a caveat filed by a married woman.

It is quite conceivable that an unscrupulous adventuress alleging herself to be the wife of a homesteader or even a lawfully married woman moved by some unworthy motive should improperly and without justification seek to embarrass a man in dealing with his property. I can see no difficulty in framing an affidavit in accordance with the general provisions of form X to meet the requirements of section 85 with respect to the married woman's caveat.

I would dismiss the appeal with costs.

DAVIES J. (dissenting):—The single question to be determined on this appeal is whether a caveat filed and registered by the appellant, the wife of the respondent, against the sale of their homestead, was a valid caveat without the affidavit required for an ordinary caveat by the "Land Titles Act."

The trial judge held it was a good caveat. His judgment was reversed by the Appeal Court which ordered that the caveat should be removed from the register and vacated. No reasons were given for their judgment.

I am of the opinion that the appeal should be allowed and the judgment of the trial judge restored.

The reasons for the appeal court judgment must, of course, have been that as the "Land Titles Act" required all caveats to be supported by an affidavit of the caveator in the form given in the schedule to that Act, and as the "Married Woman's Home Protection Act," which was passed subsequently to the "Land Titles Act," provided that "it should be read with and form part of the 'Land Titles Act,'" it was not a valid

caveat unless supported by the affidavit. That affidavit required the caveator to swear amongst other things "that this caveat is not being fyled for the purpose of delaying or embarrassing any person interested in or proposing to deal therewith," that is in or with the lands to protect the estate or interest in which the caveator fyled his caveat.

The answer which seems to me to be a good one to this argument is the one advanced by Mr. Bennett at bar, viz., that the "Married Woman's Home Protection Act," which came into force 17th of April, 1915, was a special Act passed with a special purpose, viz., to protect a married woman thereafter from being deprived of all her interest in the homestead property which she in many cases did as much to make valuable as her husband did. The caveat required covered the homestead property only and did not affect other lands of the husband. A special form was set out in a schedule to the Act which was strictly followed in this case. It was called a married woman's caveat and had no form of affidavit attached to it nor did the Act itself in any way refer to or suggest that any affidavit was required.

There are many differences in the object and purpose of the ordinary caveats, and those of the married woman's caveat. The object of the former is to protect some right or interest of the caveator in certain lands and the caveator is properly obliged to swear that he does not fyle the caveat for the purpose of delaying or embarrassing any person interested in the land or proposing to deal therewith. The main object of the married woman's caveat was to protect her rights in the homestead and in order to do so to delay her husband so that he could not sell the homestead over her head and deprive her of her rights. That being her

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object and purpose, how could she conscientiously make affidavit that it was not? Reading the two Acts together, it does seem to me an unfair construction to put the married woman in such a position or dilemma that she must swear falsely or lose her rights in her homestead? A reasonable construction should be placed upon both of the statutes in question when read together so that effect may be given to the intention of the legislature.

Such construction is not consistent with requiring an affidavit to be made which could not have been intended to apply to the "Married Woman's Home Protection Act," because an honest, truthful woman could not swear that her caveat was not intended to hinder or delay her husband in dealing with the homestead by sale or otherwise. It was so intended. It was the manifest intention of the "Married Woman's Home Protection Act" to delay and embarrass the husband so that he should not convey away or mortgage the homestead and deprive her of her rights. To say you must either swear to that which is false or your caveat will be vacated is to put an unreasonable and improper construction upon the two Acts which are to be read together.

I am therefore of the opinion that in following strictly the form given in the "Married Woman's Home Protection Act" and in omitting the affidavit required in the cases of ordinary caveats by the "Land Titles Act," which she could not honestly or conscientiously take, the appellant was within her rights and her caveat was good.

I would allow the appeal and restore the judgment of the trial judge.

IDINGTON J.—The Alberta Legislature passed an Act called the "Married Woman's Home Protection Act" which by section one enacted as follows:—

Any married woman may cause to be filed on her behalf with the registrar an instrument to be known as a married woman's caveat in form WW in the schedule to this Act against the registration of any transfer, mortgage, encumbrance, lease or other instrument made by or on behalf of her husband affecting a homestead as defined in sec. 2 of this Act.

The last section of the Act reads as follows:—

This Act shall be read with and as part of the "Land Titles Act."

This seems clearly to have intended the Act to constitute part of the "Land Titles Act" just as much as if under a distinct caption it had been placed therein originally, otherwise there was no sense in such a provision.

The "Land Titles Act" by section 85 enacts as follows:—

Every caveat filed with the registrar shall state the name and addition of the person by whom or on whose behalf the same is filed and except in the case of a caveat filed by the registrar as hereinafter provided shall be signed by the caveator, his attorney or agent, and shall state some address or place within the province at which notices and proceedings relating to such caveat or the subject matter thereof may be served and the nature of the interest claimed and the grounds upon which such claim is founded, and shall be supported by an affidavit that in the belief of the deponent the person by whom or on whose behalf the caveat is filed has a good valid claim in respect of the land, mortgage or encumbrance intended to be affected by the same, and that the caveat is not filed for the purpose of delaying or embarrassing the applicant, or owner, or any person claiming through him, which affidavit or declaration may be in the form X in the schedule to this Act.

The form of affidavit by the second clause is as follows:—

I believe that I have (or the said caveator has) a good and valid claim upon the said land (mortgage or encumbrance), and I say that this caveat is not being filed for the purpose of delaying or embarrassing any person interested in or proposing to deal therewith.

Sworn before me, etc.

The "Land Titles Act," by section 100 thereof, specifically exempts certain caveators from making an affidavit, thereby emphasizing the necessity for an affidavit in all other cases where the Act provides for the use of a caveat.

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The appellant filed a document (in the form of the caveat which she was enabled to use *under the Act*), with the registrar, relative to certain lands of respondent her husband, without any affidavit or proof of who she was, or in any manner pretending to verify the facts as required by the above section 85 of the "Land Titles Act."

This was done pending an alimony suit which she had instituted against respondent and which ended in the learned trial judge finding she was so circumstanced as not to need any alimony.

Then respondent moved to set the registration aside. Mr. Justice Hyndman refused the application, on the ground that no affidavit was necessary. The Court of Appeal reversed that judgment and directed the removal of the caveat.

We have no notes of why the court so directed, but the counsel arguing here seem to admit it was because of non-compliance with the "Land Titles Act" in failing to file the affidavit I have referred to and that is the point most elaborately dealt with in respondent's factum.

I agree with that view and hence think the appeal should be dismissed with costs.

I see no difficulty in any honest married woman complying with the Act if in truth she needs to resort to that means for her protection.

If she does not then she is quite clearly not one of those the legislature desired to protect and hence should not attempt its use. I can conceive of no reason why she should if entitled to file the caveat refrain from making the affidavit. Moreover, I can conceive of many reasons why she should be required to make the affidavit, and cannot understand the argument addressed to us for distinguishing in that regard this

caveat from others when the Act has not made any exception in its favour and if so minded could so easily have applied the excepting part of the Act thereto.

To pretend that the legislature when enacting this statute and declaring it part of an Act which in most imperative terms required by said section 85 every caveat filed with the registrar saving the specified exception to have an affidavit of verification and negation of improper motive did not mean it to apply to a married woman's caveat seems like a mockery of the legislature so enacting.

The kind of argument that is presented for supporting the appeal I respectfully submit seems to be that which the rules in *Heydon's Case* (1) suggested it should be the office of the judges to repel, by requiring them to suppress the mischief and advance the remedy, and to

> suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*. (1)

It seems to me obvious that this class of caveat, such as enabled, more than any other needs the restraint of an affidavit such as the statute requires in all but the specifically excepted cases and hence it must have been intended that it should be made. The reason for making the claim, in short, the foundation for it, which the statute required set forth in any affidavit, is needed so that the court on whom the burden is cast may have had defined that which is to be tried.

I think the appeal should be dismissed with costs.

ANGLIN J.—Notwithstanding the able and forceful argument presented by Mr. Bennett on behalf of the appellant, further consideration of the "Married

(1) 3 Co. Rep. 7b.

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Woman's Home Protection Act" with the "Land Titles Act"—with and as part of which the former Act is by its 8th section required to be read—has convinced me that the legislature intended that the requirement of section 85 of the "Land Titles Act" as to an affidavit of *bona fides* should apply to a married woman's caveat.

No good reason has been advanced for depriving the owner of property upon which it is sought to register such a caveat of the protection against fraudulent and purely vexatious claims which an affidavit of *bona fides* by the caveator may afford. She should at least be required to pledge her oath that she is the wife of such owner and that the property was occupied by her as a homestead. These facts are implied in the first clause of paragraph 2 of the prescribed affidavit:—

> I believe that I have a good and valid claim upon the said land.

Nor does the further clause—

> that this caveat is not being filed for the purpose of delaying or embarrassing any person interested in or proposing to deal therewith,

i.e., with such land,—present the difficulty which at first blush seemed most serious. Embarrassment and delay to the owner and to any other person proposing to deal with the land are no doubt consequences likely to ensue as a result of the lodging of a married woman's caveat, just as they are likely to ensue as a result of the filing of any other caveat. But the primary "purpose" of the married woman must be the same as that of any other caveator—to protect the "good and valid claim" which she believes she has upon the land. To the existence of that purpose she may well be obliged to pledge her oath. I am satisfied that a judge required to construe an affidavit made in the prescribed form upon a charge of perjury should direct a jury, or himself, that the affiant could not be con-

victed unless it was established beyond reasonable doubt either that she did not honestly believe that the claim in respect of which she lodged her caveat was good and valid, or that her purpose in fyling it was not to protect such a claim but solely to delay or embarrass some person interested in or proposing to deal with the land. The requirement of an affidavit imposed by section 85 is, in my opinion, mandatory and not merely directory and a caveat lodged without such affidavit, although accepted by the registrar, is fatally defective. Solely upon this ground I would dismiss the appeal.

BRODEUR J. (dissenting):—We have to decide in this case if a woman who has executed a caveat under the "Married Woman's Home Protection Act" of Alberta is obliged to fyle the affidavit required by section 85 of the "Land Titles Act" of the same province.

There was also a question of jurisdiction which was raised before us as to the right of the Appellate Division of the Supreme Court of Alberta; but it was not strongly pressed. Besides, it appears that the appellant, who was respondent in the Appellate Division, had not thought fit when they were before that court to discuss that question of jurisdiction; and it seems to me now too late, when the parties are before this court, to say that the court below was without authority to deal with the case. The jurisdiction of the Appellate Division was then accepted by both parties and the appellant should not be permitted now to set it aside.

Coming to the question of registration of the *caveat*, it is advisable to state that the Torrens System established in Alberta by the "Land Titles Act" provided that a person claiming an interest under a will, a transfer or a mortgage in any land may fyle a

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caveat forbidding the registration of any instrument affecting that land, unless that instrument be subject to the claim of the caveator (section 84).

It was also provided that the caveator was bound to fyle an affidavit shewing, 1st, that he has a valid claim and, 2nd, that the caveat is not fyled for the purpose of delaying or embarrassing any person interested in the land in question.

In 1915 the Legislature of Alberta passed the "Married Woman's Home Protection Act" which gave to a married woman the right to fyle with the registrar a caveat forbidding the registration of any sale by her husband of her homestead.

That Act gave also the power to the husband to apply to a judge for the removal of that caveat; and section 8 provides that "This Act shall be read with and as part of the 'Land Titles Act.'"

The appellant, Mrs. Russell, fyled such a caveat under the "Married Woman's Home Protection Act" and the respondent, her husband, has applied to a judge for the removal of the caveat. His application was dismissed but in appeal he obtained judgment in his favour.

Mrs. Russell is now appealing from that judgment and contends that the Appellate Division has erroneously held that her caveat should be removed because she has not fyled the affidavit required by section 85 of the "Land Titles Act."

I am, with due deference, unable to agree with the view expressed by the Appellate Division. The "Married Woman's Protection Act" is an enactment which is to be considered by itself. It is true that it is to be read, as section 8 declares, with and as part of the "Land Titles Act;" but in all cases where the provisions of the "Land Titles Act" are inconsistent

with the "Married Woman's Home Protection Act," or where there is a formal provision in the latter Act, then the provisions of the "Married Woman's Home Protection Act", should prevail.

The instrument which the married woman is entitled to register should not be, if it had not been so determined by the Act, called a *caveat.* The ordinary *caveat* is a claim made by a person that he has some interest in certain lands; it is essentially of a temporary nature according to section 89 and is deemed to have lapsed after the expiration of sixty days, unless some proceedings have been instituted in the meantime.

The ordinary caveat also would not prevent the property encumbered to be sold; it could be sold subject to that incumbrance. The ordinary caveat also being based upon a statement of a person that he has a claim upon the property by way of an agreement of sale or mortgage, it is only reasonable that it should be accompanied by a sworn statement.

None of those requirements of the ordinary caveat present themselves in the right which the wife may exercise under the "Married Woman's Home Protection Act."

First, the statute declares that the wife may register an instrument which will be called a married woman's caveat. It is not then, as we see, the ordinary *caveat*; but it is a particular instrument which the law calls a *caveat.*

The law also declares (section 3) that "upon the receipt of such married woman's caveat the registrar shall take the same proceedings as in the case of the filing of any other caveat under this Act."

The law does not say that upon the receipt of that instrument and of an affidavit the registrar will do this and will do that; but it simply says that upon the

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receipt of the instrument in question the registrar will give notice. The law does not require there any affidavit and section 4 says that so long as such caveat remains in force the registrar shall not register any transfer or other document affecting the homestead in question.

That is very different from the ordinary *caveat*, which requires such affidavit. A sale could take place but subject to the right of the person claiming a right upon the property.

This right of the woman is not an uncertain right like the one of the person who would claim under an agreement of sale or a mortgage. It is an absolute right which is given to the woman and I could understand that, in such a case, an affidavit would not be required. The affidavit required by section 85 is for the object of swearing that the caveator has a good and valid claim. Here, in the case of the wife, it is not a claim that she asserts; it is her right which the legislature has granted. It seems to me that the affidavit is not required in the case of the married woman's caveat.

For these reasons, the appeal should be allowed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Lougheed, Bennett, McLaws & Company.*

Solicitor for the respondent: *J. D. Matheson.*

MALCOLM S. SCHELL AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

McCALLUM & VANNATTER (DEFENDANTS) ..... } RESPONDENTS.

1918
*May 22.
*June 10.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Contract—Construction—Guarantee—Bonâ fide Agreement.

By agreement between them McC. & V. engaged in the purchase, on behalf of S., of securities known as "Purchasers' Agreements." Land in Saskatoon having been sold for $12,000 of which $4,000 was paid in cash the vendor assigned to McC. & V. the agreement to purchase and the latter drew upon S. for the amount payable under their agreement. S. then wired to McC. & V. as follows:—

"Certificate of title value five thousand assessment four thous-
"and fifty Jones allowed penalty on taxes. No declarations from
"Love orJones as to moneys received or paid only one lot looks dear.
"Please explain and guarantee holding draft give men's standing
"we are afraid been away from home caused delay."

On the same day was wired the following reply:

"Value on title made low to reduce registration costs are getting
"declaration as to monies received from Love who is good man
"agreement good and guarantee it."

Held, Davies and Brodeur JJ. dissenting, that the last mentioned document was ambiguous and was shewn by the circumstances to have been intended as an assurance that the vendor was a man of good financial standing and the property in question good security for the money and the agreement and title passed thereby in proper legal form, but did not guarantee payment of the purchase money.

Per Davies and Brodeur JJ. dissenting:—The document is a guarantee of the agreement including the undertaking to pay if the main debtor makes default.

APPEAL from the judgment of the Supreme Court of Saskatchewan (1), reversing the judgment of Newlands J. at the trial and dismissing the plaintiff's action with costs.

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

(1) 10 Sask. L.R. 440; 38 D.L.R. 133.

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SCHELL v. MCCALLUM & VANNATTER.

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

Tilley K.C. for the appellants.
Chrysler K.C. for the respondents.

THE CHIEF JUSTICE.—The action is brought on an alleged guarantee by the respondents of the payment of the balance of the purchase price under an agreement for sale, the vendor's rights under which were acquired by the appellants.

The guarantee was contained in the telegram which reads:—

> Value or title made low to reduce registration costs are getting declaration as to moneys received from Love who is good man agreement good and guarantee "it."

There was a letter confirming this telegram but I do not know that it carries the matter much further even if it was admissible in evidence which it probably was not since it was not received until the appellants had completed the purchase of the agreement.

Some time prior to the transaction in question in this suit the appellant, in reference to similar ones had inquired of the respondents on what terms they would be prepared to guarantee the due completion of such agreements for sale. The respondents replied stating in a general and rather vague manner terms on which they would give a guarantee which apparently would have been for the payment of the balance of purchase money remaining due.

The matter went no further, but the trial judge interpreted the guarantee given by the respondents in this case by the light of this letter and held that the same meaning must be given to the guarantee in this case. I do not think there was any occasion for doing

so but rather the contrary since here the respondents made no stipulation for any commission or other remuneration for themselves for giving such a guarantee. Indeed the only consideration for their giving it which the appellants are able to suggest is "the appellant purchasing the said agreement for sale from Robert W. Love" and this seems entirely inadequate as a consideration for the respondents, who were merely agents, undertaking to guarantee the payment of the purchase money under the agreement.

I think the simple and natural construction of the guarantee is as stated in the judgment appealed from

that it did not guarantee payment of the agreement, but went no further than to guarantee that the agreement was a *bonâ fide* one, and that the property and the parties were good.

In their letter confirming the guarantee the respondents say

in talking the matter over we decided to guarantee it, which should be sufficient for your requirements.

It appears from the correspondence that the respondents were aware that the appellants were only speculating in the purchase of these agreements for sale with borrowed money and that they had the greatest difficulty in getting the banks to advance money for the purpose. I think it is therefore probable that when they said

this should be sufficient for your requirements

they had in view that the guarantee was to satisfy the bank lending the money of the *bona fides* of the agreement in which no doubt the respondents believed.

I would dismiss the appeal with costs.

DAVIES J. (dissenting).—I am of the opinion that the appeal in this case should be allowed with costs and the judgment of the trial judge restored. Mr. Justice

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Lamont, who dissented in the Appeal Court, was of the same opinion on the latter point.

The question at issue between the parties is whether the proper construction of the guarantee in question of an agreement for the sale of certain lands sold by the respondents to the plaintiffs, appellants, was a guarantee of the agreement including its payment or was limited to the agreement being a *bonâ fide* one only as to property and parties.

The respondents were real estate agents carrying on business in Saskatoon and the appellants were business men residing in Woodstock, Ont. Prior to May, 1913, the appellants had purchased from respondents a number of agreements for the sale of land and a proposition had apparently been made by the appellant plaintiffs to the defendant respondents respecting the guarantee of those agreements. On November 1st, 1912, Blow, one of the plaintiffs, wrote the following letter to defendants:—

Woodstock, Ont., Nov. 1, 1912.

McCallum & Vannatter,
Saskatoon, Sask.

Dear Sirs:—Your letter is received and glad to hear that everything is being put in proper shape and trust that everything will end well.

And now about further business. I think agreements ranging from one thousand to three, but smaller or a little larger would not make much difference if we could prove that they were gilt-edged. About what would it be worth to guarantee them as you propose? Now if three or four real good ones came to you and you could mail them to me in haste by registered letter I could do better by exhibiting them and attending to it and returning promptly to you if you thought wise.

I am,
Truly yours,
(Sgd.) J. W. BLOW.

P.S.—Please give me the nature and details of the guarantee you could give and oblige.

In reply the defendants wrote on the 7th November a letter in which are the following paragraphs:—

As before written to you, we will not submit anything to you that is not first class, but if you will just leave the matter in our hands, we

will secure agreements for you and put through the papers without any delay. As you know, when these people bring in an agreement to sell, they want the money right away, so we could handle them in this way having the papers put through the Land Titles Office without loss of time if we knew how you wished them made out.

As to this guarantee you mention would say that we consider it worth 5 per cent., and would give you any kind of a binding agreement of that nature that you could wish. We, of course, would expect that settled at the time and we would be fully responsible for all payments so that if the party on the agreement did not come through, we would have to come through ourselves.

On the 17th April, 1913, defendant wired plaintiffs offering them the agreement now in controversy and plaintiffs replied expressing their willingness to purchase. The papers were sent forward to them through the bank at Woodstock with a draft attached for the purchase price. After examination of the agreement and the other papers, the plaintiffs were not satisfied and wired defendants as follows:—

Woodstock, Ont., May 10, 1913.
McCallum & Vannatter,
Saskatoon, Sask.

Certificate of title value five thousand, assessment four thousand fifty Jones allowed penalty on taxes. No declarations from Love or Jones as to moneys received or paid only one lot looks dear. Please explain and guarantee holding draft, give men's standing, we are afraid being away from home caused delay.

21; o6k. SCHELL and BLOW.

To this telegram, plaintiffs replied:—

From Saskatoon, May 12, 1913.

To M. Schell and J. Blow,

Value on title made low to reduce registration costs, are getting declaration as to monies received from Love who is good man, agreement good and guarantee it.

McCALLUM & VANNATTER.

On the same day the defendants wrote plaintiffs a letter in which they explaimed that the certificate of title is

no guide to the real value of the property

and that

as to the assessment from what we can learn this is figured on a 40% basis for property of this description

adding:

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However in talking the matter over we decided to guarantee it which should be sufficient for your requirements. We know Mr. Love personally and know for a fact that he has considerable means and while we are not personally acquainted with Mr. Jones we are told he is good and will make payments promptly being a drug traveller.

On the 14th May, the plaintiffs wired defendants:—

Your telegram explaining reason low valuation on duplicate certificate and guaranteeing agreement as good came to hand on Monday afternoon and we paid draft yesterday.

Reading the correspondence and the telegram together, I cannot have any doubt that when the defendants telegraphed the plaintiffs saying, "agreement good and guarantee it" they meant what any ordinary businessman would mean that they guaranteed its payment. The letter sent by them the same day in which they say,

However in talking the matter over we decided to guarantee it which should be sufficient for your requirements

taken in conjunction with their previous letter of 7th November in which they explain what they mean by the guarantee mentioned in the plaintiff's letter they were answering was that

we would be fully responsible for all payments so that if the party on the agreement did not come through we would have to come through ourselves

place the question of the meaning of the guarantee and the intention of both parties as to what it covered beyond any doubt in my mind. Defendants say what they mean by guaranteeing agreement and I cannot agree with the limited and narrow construction which the Court of Appeal placed upon it that

it went no further than to guarantee that the agreement was a *bonâ fide* one and that the property and the parties were good.

Such a limited construction is right in the teeth of their letter and their telegram.

I would allow the appeal with costs.

IDINGTON J.—The appellants and respondents had for some months prior to the transaction now in question been negotiating with each other for the purchase by the appellants of securities known as "Purchasers' Agreements" for the purchase of lands and the covenant for the payment of the money.

The appellants resided in or about Woodstock, in Ontario, and the respondents in Saskatoon, Saskatchewan. Several transactions of that kind had taken place during these negotiations prior to the one in question, which was an agreement for the purchase of some land in Saskatoon alleged to have been purchased by one Jones from one Love, both of Saskatoon, for the price of $12,000 on which a sum of $4,000 on account of principal was supposed to have been paid. Love made an assignment of the agreement of purchase by an instrument dated 18th April, 1913, to the respondent Schell.

The respondent who procured this drew upon the appellants for the amount agreed upon as the price of said security, making their draft payable at Woodstock, Ontario, and accompanying the draft with the assignment and other documents relative thereto.

On the 12th May, 1913, by night lettergram, the appellants wired respondents as follows:—

> Certificate of title value five thousand assessment four thousand fifty Jones allowed penalty on taxes. No declarations from Love or Jones as to moneys received or paid only one lot looks dear. Please explain and guarantee holding draft give men's standing we are afraid been away from home caused delay.

The respondents on the same day wired reply as follows:—

> Value on title made low to reduce registration costs are getting declarations as to moneys received from Love who is good man agreement good and guarantee it.

Upon this instrument lastly mentioned the appel-

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lants brought an action which was instituted on the 18th September, 1916, claiming that respondents had guaranteed to them in writing the payment of the balance of the purchase price under the said agreement for sale. The learned trial judge maintained the claim, but the Court of Appeal for Saskatchewan reversed that judgment and dismissed the action. Hence this appeal which should be determined solely by the correct construction to be placed upon the said telegram.

I think the document is very ambiguous and capable of more than one meaning. Counsel for the appellants contends that it must mean a guarantee by the respondents of the payment by Jones of the amount of the balance of purchase money of the land or by Love, his vendor, who covenanted therefor. On the other hand, counsel for the respondents contended that it could have no such meaning or any meaning beyond being an assurance that Love was a good man and the agreement in proper form and possessing the validity such an agreement should have.

I confess that from the perusal of the judgments, and listening to the argument of counsel for the appellants, I had received the impression that an interpretation and construction midway between these extreme contentions was more consonant with reason and better fitted to express in truth what the parties had in view. According to that impression I should hold that it represented Love as a man of good financial standing, the property in question good security for the money and the agreement and title passed thereby in proper legal form. In that view, if Love could be shewn to have been at the time in question of such apparent good financial standing as would answer the description and the land of the value which the agreement represented and the title perfect, there could be no recovery; and

on the other hand, if it turned out that between the date of the telegram and the recovery on the action brought by appellants against Love and Jones financial disaster had overtaken one or both or the condition of the market value of the land in question had become such that the land had fallen far below the market value of that of previous years, these circumstances should not be taken into account in determining adversely to these respondents their liability. I am still inclined to think that is the correct view of the nature of the instrument sued upon and the liability thereunder.

Counsel for the appellants repudiated in argument any such construction as possible. Possibly the circumstances that had transpired were of such a nature as to indicate that an action seeking to enforce that view would be of little avail.

I cannot accept the interpretation and construction contended for by appellants that it was distinctly intended that the respondents should, on default of those liable under the agreement and the assignment thereof, become liable to pay the balance of the purchase price of the land named in the security. The instrument being of an ambiguous character I think that anything which had passed between the parties prior thereto, and leading up to it, as well as that concurrent therewith and the acts of the parties immediately after, may be looked at. Counsel for appellants relies in that connection upon a letter of the 7th November, 1912, from the respondents to Mr. Blow, one of the appellants, in which they further explain to him the nature of the business involved in the buying such like securities and used these words:—

> As to this guarantee you mention would say that we consider it worth 5% and would give you any kind of a binding agreement of that nature that you could wish. We, of course, would expect that settled at the time and would be fully responsible for all payments so that if

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the party on the agreement would not come through, we would have to come through ourselves.

These two sentences taken from the middle of a long letter are evidently an answer to a letter of Mr. Blow of the 1st November in which, amongst other things, he says, speaking of such like agreements:—

> About what would it be worth to guarantee them as you propose?

and then adds the following postscript:—

> Please give me the nature and details of the guarantee you could give and oblige.

I am very far from finding anything in that correspondence to support the appellants in their view of the transaction now in question. Indeed, I think that a letter written only five months before so expressly stipulating for 5% being paid at the time of the sale of such a security, as the price of the guarantee for its payment, excludes the possibility of the parties hereto having ever intended that such a guarantee was to be implied in the telegram in question.

There was no 5% paid or anything paid by way of securing an assurance of payment, and when reliance is placed upon a letter written on the same day as the telegram but not received until after the draft had been paid, I do not think it helps.

Stress is laid upon an expression in that letter that the respondents had decided to guarantee. I do not attach the importance to the expression in the letter that counsel seems to think was attached to it. In short, the circumstances to be gathered from the correspondence clearly shew that appellants' difficulty and hesitation in accepting the draft was what the night lettergram indicates. The difficulty seems to have been that the certificate of title valued the property at $5,000 and the assessment only $4,050 and that Jones the purchaser had allowed the imposition of the penalty for non-payment of taxes. Hence the suggestion of a

declaration from Love or Jones as to the moneys received or paid for what looked dear. These were the things that were to be explained and guaranteed against as well as an assurance relative to the man's standing, and pursuant thereto a declaration was got from Mr. Love verifying the price and terms of the cash payment according to the terms of purchase and also his own standing to the extent that he had not been sued for the money or it garnisheed.

It is to be observed that the parties had several transactions of a like kind between the date of the letter and the telegram in question, but in not a single instance was a 5% premium for guarantee resorted to.

I do not think under such circumstances that the construction contended for by appellants of the document sued upon can or should be maintained and I therefore think the appeal should be dismissed with costs.

ANGLIN J.—I concur in the dismissal of this appeal substantially for the reasons stated by Mr. Justice Idington.

BRODEUR J. (dissenting).—The appellants by their action claimed from the respondents the payment of a sum of money for which they say the respondents gave a guarantee, that sum of money being originally due by Love and Jones.

The respondents claim that they did not guarantee the payment of the obligation of Love and Jones but simply guaranteed that the agreement was *bonâ fide* and that Love and Jones were good.

The appellants succeeded before the trial judge; but the Supreme Court of Saskatchewan *en banc* by a majority dismissed their action and reversed the judgment of the trial judge.

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For some time, the appellants had some business dealings with the respondents and had been purchasing some agreements of sale through the respondents or from the respondents. They were purchasing the interest of the vendor in those agreements, taking assignments thereof.

In the month of April, 1913, the respondents offered for sale the agreement of Love and Jones for the sum of $7,300, and they sent a few days afterwards a draft for the purchase price as was the usual custom of dealing between the appellants and the respondents.

The appellants, after having inspected the document, were not satisfied, having found out that the certificate of title valued the property only at $5,000 and that the municipal assessment was only $4,050 and they asked whether they would guarantee.

The respondents answered stating that the value and title were made low in order to reduce the registration costs and they added, "Agreement good and guarantee it." They sent a confirming letter stating that having thought the matter over, they had decided to guarantee it.

I must state that in a previous correspondence exchanged between the parties, the respondents had been willing to guarantee the debts which they would sell to the appellants who were living in Ontario when those agreements of sale were made in the Province of Saskatchewan. They said, however, that a sum of 5% should be given to them for such a guarantee and they added:—

> We, of course, would expect that settled at the time and we would be fully responsible for all payments so that if the party on the agreement did not come through we would have to come through ourselves.

We see by that letter the nature of the guarantee which the respondents were willing to give concerning those agreements of sale.

But outside of that what is the nature of the contract of guarantee?

It is an undertaking to answer for another's liability and collateral thereto. It is a collateral undertaking to pay the debt of another in case he does not pay it. It is a provision to answer for the payment of some debt or the performance of some duty in the case of the failure of some person who in the first instance is liable for such payment or performance. Bouvier, "Law Dictionary," word *Guaranty*.

It is in the nature of that contract of guarantee that the primary debtor will perform his contract and the guarantor has to answer for the consequence of the primary debtor's default.

13 Halsbury, vbo. *Guarantee*, sec. 864. Anson on Contract, 10th ed., p. 73.

What was the obligation of Love and Jones in this case? It was to pay a certain sum of money when it would become due. There is no statement, no warranty in their contract that they were solvent at the time they made it or that the agreement was a *bonâ fide* document. Then, what obligation would a guarantor of their debt contract? It would be the obligation of payment when the debt would become due. As I have said, the contract of guarantee presupposes a primary debt and when a person becomes a guarantor he undertakes to carry out that obligation if the main debtor makes default.

The contract of guarantee made in this case would necessarily induce the appellants to accept the draft of the respondents because the latter were undertaking to pay the debt if Love and Jones would not pay it. If the respondents wanted to restrict the nature of their contract or wanted to give to the word *guarantee* another meaning than the one which is being naturally

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given, then it was their duty to specify in a clear manner that they were undertaking not to guarantee the obligation of the main debtor but the fact that the debtor was solvent and that the agreement was *bonâ fide*. As they have not done it, the word *guarantee* should be considered in its ordinary sense, which means that the respondents undertook to pay the debt of the principal debtor if the latter failed to do it.

I have come then to the conclusion that the appellants should succeed. The judgment *a quo* should be reversed with costs of this court and of the court below and the judgment of the trial judge restored.

Appeal dismissed with costs.

Solicitors for the appellants: *Carrothers & Williams.*
Solicitor for the respondents: *G. H. Yule.*

THE NATIONAL BENEFIT LIFE AND PROPERTY ASSURANCE COMPANY (DEFENDANT)..... APPELLANT;

AND

MAUD McCOY (PLAINTIFF).....RESPONDENT.

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*May 10, 13.
*June 10.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Insurance—Conditions—Subsequent insurance—Assent—Foreign Company—Liability for acts of its general agent.

One of the conditions indorsed on a policy of insurance was: "The company is not liable for loss * * * if any subsequent insurance is effected in any other company unless and until the company assents thereto."

Held, Anglin J. dissenting, that, when a foreign company, doing business in Canada, appoints a general agent for a province, the actions of the agent are binding upon the company, and in case of loss under the policy the appointment by the agent of an adjuster with authority to make a settlement with the insured, after he was aware of a subsequent insurance constitutes an assent on behalf of the company to such subsequent insurance.

Per Anglin J. dissenting:—Though the general agent of a foreign insurance company has authority, before loss, to assent to co-insurance, such assent given by him after loss would amount to a relinquishment of an unanswerable defence to the claim of the insured and is not within the apparent scope of the authority of an agent, however general it may be.

APPEAL from the decision of the Court of Appeal for British Columbia, which varied the judgment of Macdonald J. at the trial, and maintained the action of the plaintiff for $1,309.10 instead of $581.80.

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

W. L. Scott for the appellant.

A. E. Honeywell, for the respondent.

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

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THE CHIEF JUSTICE:—It is contended by the appellant that there is no question of waiver in this case; that any liability of the appellant could only arise from the creation of a new liability. I do not think that is so. A similar condition has been before the court in many cases but the exact wording of the condition varies considerably in different cases. In many of them the policy is conditioned to be absolutely void on subsequent insurance without notice. Such is not the case here where it is only provided that the company shall not be liable if any subsequent insurance is effected unless and until the company assent thereto. It is a good defence to an action on the contract so long as the company has not assented but the contract continues and if the company at any time assents the insured can recover under it.

In Kerr on Insurance it is correctly said that

> if after knowledge of any default for which it might terminate the contract, or if after all right to recover on the contract has to the knowledge of the insurer become barred by the very terms of the contract itself because of the failure of the insured to perform some condition precedent to his right of recovery, the insurer does any act or enters into any negotiations with the insured, which recognizes the continuing validity of its obligation, or treats it as still in force and effect, the default or forfeiture is waived.
>
> Forfeiture is not favoured either in law or equity, and the provision for it in a contract will be strictly construed, and courts will find a waiver of it upon slight evidence when the justice and equity of the claim is, under the contract, in favour of the insured.

There can be no doubt that if the company is responsible for the acts of its agents in this case these were abundantly sufficient to constitute a waiver of the forfeiture.

The fact that there was subsequent insurance came to the knowledge of the agents the day after the fire, that is, on the 2nd January, 1916. The matter was placed in the hands of the adjusters on behalf of the companies, proofs of loss were duly made and accepted;

many interviews and correspondence ensued, the matter being complicated by the fact that the city by-laws would not permit of the re-instatement of the premises. On the 31st March, 1916, the adjuster, who had been handling the case since the middle of February, when he was substituted for the first one appointed, wrote to the respondent offering a definite sum which he said:

I am authorized to offer you in full settlement of the claim.

The appellant is an English company. The head office is in England and its general agents in British Columbia are Messrs. Rutherford & Co.; Mr. Charles Rutherford was their attorney for British Columbia under the "Companies Act." The trial judge said:

I consider that where a foreign company is doing business in the province, that the actions of its general agents should be binding upon the company. It is essential to the proper carrying on of insurance business at a distant point from the head office that they should have such general authority, not only to effect insurance, but also to adjust and pay losses.

Mr. Justice Martin says that Mr. Rutherford must be deemed to be for the purposes of this case in the same position as the head office. I am not sure that it is necessary to go quite so far as this; but I certainly think there is much weight in the opinion and that we should consider the authority of agents in such a position to be as extensive as possible.

The knowledge of the company's agents was the knowledge of the company; not that it is necessary to invoke for this any technical rule of law; but, as I have said, the agents had knowledge of the subsequent insurance on the 2nd of January and, of course, the company could have been and presumably was informed of it months before it decided to repudiate liability. Yet, in the interval, so far as appears by this record, it not only gave no instructions to this

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effect to its agents but permitted them to go on taking action which could only be consistent with an intention to accept liability on the policy.

The fact that the company was carrying on business at such a distance from its head office that it might reasonably be expected to give to its agents here a large measure of authority to act on its behalf, coupled with the fact that there was ample time for all necessary correspondence with its agents must, I think, preclude the appellant from repudiating the acts of its agents by which accordingly I hold that they were bound.

It is satisfactory to be able to conclude that the appellant has effectually waived any forfeiture under the insurance contract. Were it not so, the insured would have been unfairly prejudiced by the appellants' course of action. As it is, the respondent has been forced, in order to obtain her rights, to bring this second action, which the company has endeavoured to defeat on doubtful technical grounds, though itself profiting by the subsequent insurance.

The appeal should be dismissed with costs. Judgment for $1,310 which is the amount of the loss incurred by the respondent.

DAVIES J.—This action is one brought on a policy of insurance taken out by the respondent in the appellant company against loss or damage by fire on the plaintiff's houses and buildings on a specified property in Vancouver, B.C., and any loss under the policy was made payable to Carrie M. Jamieson, the mortgagee thereof, as her interest might appear.

Subsequent insurance was placed by the respondent upon the premises in the North Empire Fire Insurance Company for the sum of $3,500 and knowledge of this latter insurance only came to the general

agent of the appellant for British Columbia on the morning after the fire which partially destroyed the insured premises.

The policy of insurance had the usual statutory conditions, namely

> The company is not liable for loss * * * if any subsequent insurance is effected in any other company unless and until the company assents thereto.

The appellant company was an English company with its head office in London, England.

Its general agents in and for British Columbia were Rutherford & Co. Policies in blank signed by the managing director and the fire and accident manager of the company in London were sent to their general agent with a provision that they were not valid until countersigned by their general agents in British Columbia.

It was agreed at the trial by both parties that the value of the building at the time of the fire was $3,750 and that the loss due to the fire was $1,600 and that the building by-law of Vancouver prohibited the reconstruction or repair of the building to a greater extent than 20% of the original value, with the result that the building could not be repaired.

Immediately after the fire adjustment of the loss was placed by both companies in the hands of one McKenzie; but subsequently the adjustment was taken from him and placed in the hands of one Shallcross, another adjuster, who took from respondent a "non-waiver" agreement providing that any action taken by the company appellant in investigating the cause of the fire or the amount of the loss and damage to the property should not waive or invalidate any of the conditions of the policy.

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The trial judge found that the company was protected by the non-waiver agreement while Shallcross was acting as adjuster and settling the amount of the loss.

It clearly appeared in evidence, however, that outside of his duties as adjuster he was authorized by the general agent, Rutherford, after the latter had full knowledge of the subsequent insurance, to settle with the respondent amicably if possible the amount which they should pay under the policy. After prolonged negotiations and with Rutherford's full knowledge and authority he offered respondent on behalf of both companies to pay her

> in full settlement of her claim the National Benefit's proportion of the sum of $1,500.

Apart from the amount payable the question therefore is reduced down to this, whether Rutherford, as general agent for this company in British Columbia, with power to issue, adjust and settle losses in that province on policies issued by him had also power to give the company's assent to the subsequent insurance effected by the respondent?

I have had the question of the extent of the powers of a general agent in Canada of a foreign company under consideration in several cases which have been before this court and have expressed myself as being of the opinion that such general agent must of necessity be held for certain purposes connected with the issuing of the policy, adjustment, proofs and settlement of loss and matters akin thereto to be *the company* itself.

I do not see how otherwise the business of the company could be carried on if the general agent could not give such an assent to subsequent insurance in another company as the condition in this case calls for. Such assent is not required by the condition to be in writing.

Cases calling for it must constantly arise. If they have necessarily to be referred to the head office in London for the formal assent of the company, then much valuable time would be lost. It is a question peculiarly for the general agent whose knowledge must govern in any such case to say whether assent should be given or not. As general agent he has policies placed in his hands already signed by the company's officers in London and good only when countersigned by him.

Absolute reliance is and must be placed on his judgment as to the taking of the risk insured. If further insurance in his own company was asked he would have authority to take it and either issue a new policy for the increased amount and cancel the old one or by memorandum on the one already issued increase the amount insured. Surely then a general agent entrusted with such unlimited powers may give the "assent" called for by the condition to a subsequent insurance in another company not required even to be in writing. Of course the company can limit his powers but there is nothing in this case to shew any such limitation was ever made. The inference I draw from the admitted powers he possesses as general agent is that they extend to and embrace the case of giving assent to subsequent insurance effected in any other company.

The condition in question in case of prior insurance requires that the company's assent to it must appear in the policy or be indorsed thereon.

That clearly contemplates to my mind that such indorsement might be made by the general agent when he issues the policy. It further requires that if written notice of an intention or desire to effect subsequent insurance is given and the company does not dissent in writing within two weeks after receiving such notice the company should be held not to have dissented.

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Surely the written notice so required may be given the general agent and if so and he does not dissent the company would be held not to have dissented. The two weeks time within which the company must dissent would not allow time for the company in London to be advised of the notice and to send their dissent in writing. It would seem to me that in all the cases dealt with in this condition the general agent must be held to stand for the company.

The mere appointment of an adjuster to adjust the loss under the policy might not be sufficient to indicate any assent to subsequent insurance but in this case the evidence shewed specific authority given to Shallcross, the adjuster, by Rutherford, the general agent, to pay plaintiff in full settlement of her claim the company's proportion of the sum of $1,500.

This specific authority was given after full knowledge of the subsequent insurance by the general agent and beyond doubt amounted to an assent to such insurance by the general agent if he had the power to give it.

I assume it will not be denied that the principal officers of the company at the head office conducting its affairs there would be held to have authority to waive the conditions invoked without having special authority from the directors and so I hold in like manner the general agent for the company residing and conducting its affairs in British Columbia had such authority.

The case of *Western Assurance Company* v. *Doull*(1), was strongly relied upon by Mr. Scott for the company as a binding authority in this case. It would appear to me from the facts as stated in the judgments of the

(1) 12 Can. S.C.R. 446.

court in that case that the agent there, Greer, was a local agent merely and not a general agent for the province. He is referred to by several of the judges in their judgments as a local agent and his powers were very limited. In that case the condition of the policy required that in cases of subsequent insurance notice in writing must at once be given to the company and such subsequent insurance indorsed upon the policy. No such written notice or indorsement was required in the present case but simply the "assent" of the company to the subsequent insurance. In the *Doull Case*(1), Mr. Justice Strong said, at p. 455, that:

> It does not appear very clearly whether he (the adjuster Corey) was instructed directly from the principal officer of the appellants or through Greer. The latter in his evidence said he "had a telegram from defendant company authorizing me to request Corey to adjust the loss and I requested him to do so." In cross-examination he says: "After a loss I notify the head office and I get *instructions from them what to do.*"

Manifestly, therefore, Greer's authority was a limited one and not a general one. He was simply authorized to investigate and adjust the loss. In the case now before us there is no suggestion that the general agent's authority was a limited one. On the contrary, he appeared to have all the powers necessary for the issue of policies and in case of loss, for its adjustment and settlement. In the *Doull Case*(1), the plaintiff relied alone upon the adjuster's action in adjusting the loss as amounting to a waiver by the company.

But in the present case the plaintiff relies not upon the mere adjustment of the loss but upon the special authority given to him by the general agent, Rutherford, to settle it if he could and the offer to pay her the company's proportion of the sum of $1,500.

Mr. Scott strenuously contended that under the condition where subsequent insurance was effected

(1) 12 Can. S.C.R. 453.

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without the company's approval its liability under the policy ceased and that no agent could create a new liability. But I do not think that is the proper construction of the condition. It says that the company shall not be liable if any subsequent insurance is effected *unless* the company assents. But if it does assent that assent makes the non-liability provision inapplicable. The liability is one depending on the "assent" and once that is given no question of any new liability arises.

I therefore would dismiss the appeal and as to the amount, while I confess I am not without doubt on this point, I will not dissent from the amount determined on by a majority of the Court of Appeal and of this court, viz., $1,300.

IDINGTON J.—The appellant is an English insurance company which carried on business in British Columbia and insured the respondent's property in Vancouver for the sum of $2,000 for one year from the 14th of April, 1915, subject to the stipulations and conditions indorsed on the policy. One of the said conditions so indorsed was as follows:

> The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is indorsed hereon, nor if any subsequent insurance is effected in any other company unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent insurance is effected.

The only question raised herein is whether under the said condition and the circumstances I am about to relate the appellant has been relieved from liability.

The respondent shortly after obtaining said policy of insurance assigned same to her mortgagee. A condition indorsed upon it provided that in the event of the

property being assigned without a written permission indorsed thereon

by an agent of the company duly authorized for such purpose

the policy should thereby become void.

The person to whom she applied in that event was the same agent who had signed the policy and issued it to her. He duly signed same without raising any question of his authority.

On the heading of the policy is printed in large type the name of the appellant and under same is printed in large type also the words "Head Office, London, England," and under those the words "Agency No. Vancouver, B.C."

And the policy at the foot thereof after the attesting clause has the following:

This policy shall not be valid until countersigned by the duly authorized agents of the company at Vancouver, B.C., and then besides being executed by the managing director and the fire and accident manager is countersigned by Rutherford & Company, general agents.

We are informed by the record that Chalmers Rutherford was in fact the general agent.

It may be necessary to observe all those details in considering the weight to be given the acts of this agent and of those authorized by him upon which respondent relies, and to which I am about to refer, because counsel for appellant contends no authority is shewn for such acts.

The respondent on the 19th July, 1915, obtained by virtue of the policy of insurance of that date, issued to her by the North Empire Fire Insurance Company at Vancouver further insurance for the sum of $3,500 for one year from said date.

That policy provided as follows:—"Further concurrent insurance permitted."

Unfortunately notice had not been given to the

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appellant of this insurance as required by the above quoted condition.

The dwelling house thus insured was partly destroyed by fire on the first of January, 1916.

The said general agent of the appellant says he learned of the last mentioned insurance the morning after the fire.

He, nevertheless, instead of repudiating on behalf of his company all liability to respondent by reason of her failure to give notice of the subsequent insurance, suggested and procured, through his chosen adjuster, proof to be made by her of the loss and when presented to him by the respondent accepted the said proof without objection. Indeed he had previously, unsolicited, as if no question of liability existed, appointed Mr. McKenzie to act as adjuster on behalf of appellant along with the adjuster for the other company.

He acted, doubtless, under the authority of the general agent in meeting respondent and making the many proposals he seems to have made to her for a settlement of her claim under the policy.

He never pretended to claim for a single instant that her rights had been lost by the failure to give notice of the subsequent insurance, but evidently assumed throughout that there was no doubt of her right to claim under the policy. The only question in dispute was the amount she might be entitled to under the very peculiar circumstances to which I will advert presently and certainly raising a question of much difficulty. These negotiations extended over six weeks and involved some fifteen to twenty meetings she swears. It was in the course of these negotiations that he told respondent she should have proof of loss made out and took her to a solicitor to have same pre-

pared when they were prepared accordingly pursuant to the suggestion of Mr. McKenzie who never made any objection in any way to her actual right to claim.

He offered her $1,150 to be expended by the company in repairs.

If all that done under the authority of the general agent does not constitute an assent to the subsequent insurance I am puzzled to know what would unless an express declaration in writing, which is not required by the terms of the condition now invoked. All that is required thereby is an assent to the subsequent policy which under the circumstances was a very fortunate thing for the appellant by reason of the other company becoming liable to bear a share of the loss which by reason of the amount of its contract constituted it the bearer of the larger part thereof.

These negotiations having failed the general agent says he appointed, in substitution for Mr. McKenzie, Mr. Shallcross who had been appointed as adjuster for the other company.

Rutherford, the general agent of the appellant, was examined for discovery herein on the 22nd Nov., 1916, and explains how and why that came about and relative to what was done thereunder as follows:—

Q.—And Mr. Wilson asked you to employ the same adjuster?

A.—Yes, if I recollect, it was placed first in the hands of Hector McKenzie, and then we took it out of his hands, the reason being our policy was a smaller policy, and where a company has a large interest to decide on a course of action, it is a matter of insurance courtesy to follow the company having the larger interest. It is not obligatory—it is a custom.

Q.—And the actual negotiations towards the adjustment were carried on by Shallcross as your adjuster?

A.—Yes.

Q. —You have authority, I suppose, to appoint, or employ an adjuster?

A.—Yes.

Q.—You do not know personally, I presume, the negotiations that were carried out by Shallcross?

A.—More or less acquainted with them.

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Q.—Did you keep in touch with him?

A.—Yes, more or less, but things like that are generally left in the hands of the adjuster, and we interfere as little as possible.

* * *

Q.—The proof of loss as handed to you apparently was made out to the Mutual Benefit instead of the National Benefit?

A.—Yes.

Q.—But you accepted it as a sufficient compliance with the policy?

A.—Yes.

Shallcross following a usual practice of his obtained a non-waiver agreement from the respondent which was signed also by him

on behalf of the above named companies.

That provides

that any action taken by said parties of the second part in investigating the cause of fire or investigating and ascertaining the amount of loss and damage to the property of the party of the first part caused by fire alleged to have occurred on January 1st, 1916, shall not waive or invalidate any of the conditions of the policies of the parties of the second part, held by the party of the first part, and shall not waive or invalidate any rights whatever of either of the parties to this agreement.

That ordinary form used by an adjuster may prevent any inference of waiver, if any further needed, relative to rights under the conditions in question, derivable from the actions taken so far as limited thereby, but does not extend to the fair inference from the act of the manager in making the appointment or to what I am about to refer to, as happening beyond the scope thereof, and of the investigating duties of an adjuster as such. But Mr. Shallcross by and with the authority of the appellant's general agent went far beyond that. He repeated the offer of doing work to the extent of $1,150 in repair of the buildings.

He wrote her on the 24th July, 1916, a letter pointing out that the premises were being neglected and damage therefrom had arisen which could not form a claim against the insurance companies and that loss

was being incurred by their exposure to the weather and that these further losses could not form a claim against the company, and notified her of the earnest effort made by the companies through him to agree as to total damages and that responsibility must rest with her for failure to meet such agreement that day. Not a word is said of any doubt as to the validity of her claims to damages for loss.

On the 16th March, 1916, he wrote her solicitor as follows:—

> Having failed to arrive at any reasonable settlement with your client as to her claim for loss under Policy No. 39483 in the National Benefit Company and Policy No. 400096 in the North Empire Company, I now on behalf of the two companies interested notify you that they will in accordance with the conditions of the policies proceed to repair the property damaged by fire and that the companies have for that purpose obtained the necessity permit from the Building Inspector of the City of Vancouver.

He went further and got a permit, from the proper city authority, to make the repairs to the amount to which the city by-laws limited repairs.

And here I may observe that the real difficulty in adjusting the loss was that the city by-laws had prohibited repairs beyond 20% of the loss, yet the insurance companies were bound to make good the loss thereby incurred by the proprietor as one of the results of the fire. It would seem that the companies did not take that view, and hence the resort to litigation which decided that point against them. It is not now contended that the view so taken by the courts is erroneous.

The appellant was quite willing to bear the loss on that basis contended for by it and then offered to carry out repairs to that extent of its liability.

On the 23rd March, 1916, the general manager wrote respondent's solicitor as follows:—

> I have to-day received proof of loss dated March 18th, made out

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to Mutual Benefit which I assume is intended for National Benefit and so understand the proof. I cannot accept the valuation or claim sworn to therein. I have requested Mr. P. G. Shallcross to deal with the case.

On the 24th March, 1916, Shallcross wrote the respondent as follows:—

Damage by fire January 1st, 1916, to house situate 639 Alexander Street.

Please note that under the condition of Policy No. 39483 the National Benefit Fire and Property Assurance Company may, should it appear that they are liable under such policy, notify the insured of their intention to repair within fifteen (15) days after the filing of proof of loss. I wish therefore to advise you that failing arriving at a reasonable settlement with you that the company will formally notify you of this intention to repair within the time allowed them for giving such notice.

And again on the 31st March, 1916, he wrote her as follows:—

Re House, 639 Alexander Street, damaged by fire January 1, 1916. Policy No. 39483 issued by the National Benefit Fire & Property Assurance Company for $2,000. Referring to my letter to you dated March 24th, 1916. Subject to the terms and conditions of the policy, including the application of insurance policy issued by the North Empire Fire Insurance Company, I am authorized to offer you in full settlement of the claim the National Benefit Company's proportion of the sum of fifteen hundred dollars ($1,500.00). Failing your immediate acceptance, then on behalf of the National Benefit Company, I give you notice of their intention to repair the above described house to the extent permitted by the by-laws and in accordance with the terms and conditions of the policy.

An action was brought by the respondent against the North Empire Life Insurance Company on its policy which was tried before Mr. Justice Murphy, who in May, 1916, decided in respondent's favour, assessed the damages at $3,750, less some salvage which he fixed at $150, and in light of the foregoing facts, and absence of any repudiation by appellant or pretension such as now set up, gave judgment for the proportionate amount of $3,600 for which that company would be liable after taking into account the concurrent insurance which is now in question. Such is the net

result of the policy of absolute silence on the part of the appellant under so many and divers circumstances requiring it or its officers to be honest and straightforward instead of lulling at every step respondent into feeling assured that whatever might come the condition now relied upon would not be invoked.

I am of opinion that its entire course of conduct including the appointment of Shallcross and his letters as well as what had preceded same as outlined above was evidence of that assent which is all that ever was necessary to put beyond peradventure any doubt as to its continued liability and that it is thereby estopped from denying such assent.

I am reminded by the very peculiar circumstances in question herein, and the unworthy attempt to escape from liability on such ground as set up, of the case of *Tattersall* v. *The People's Life Insurance Company*(1), which was tried before me in Toronto in 1904, wherein the company sued upon a life insurance policy for which the last premium had not been paid, but by the terms of which it might be paid within thirty days after the death. It was not paid within that time. The circumstances which led to this result are detailed in the report of the case.

The parties concerned in making inquiry in order to decide upon the payment of the premiums in default had perhaps no legal right to insist upon making a tender of payment.

The officers of the company who failed to make answer to such inquiries were perhaps as destitute of authority to answer as counsel would wish us to hold the general agent herein was for what he did and permitted and directed, yet the judgment directed at the trial, proceeding upon estoppel, was upheld in the

(1) 9 Ont. L.R. 611.

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Divisional Court as above cited; in the Court of Appeal for Ontario(1); and in this court(2).

I need not dwell upon the many peculiar facts in that case for they are fully reported in the first citation I have given, but I cannot help thinking that there was much more to be said for the company in that case than there exists on the facts in this case for appellant.

See also the cases of *Royal Guardians* v. *Clarke*(3); *The Canadian Railway Accident Ins. Co.* v. *Haines* (4); *Evangeline Fruit Co.* v. *Provincial Fire Ins. Co.* (5); *Mahomed* v. *Anchor Fire & Marine Ins. Co.* (6).

It is suggested that the condition herein having been broken the policy was at an end before the fire. The general manager of the company did not think so, for in his examination for discovery he was asked and answered as follows:—

> Q.—And the policy was in force on the 1st January 1916?
> A.—Yes.

There was an insuperable barrier to anything else being said, for by the terms of the assignment to the mortgagee assented to by the general manager of the appellant it was rendered impossible of invalidation as to the mortgagee by reason of any such condition and hence cannot be said to have become null as suggested.

And had the mortgagee sued upon it appellant could have had no effective answer. And I venture to think that had the appellant in such case under such circumstances as exist in question herein sought after all

(1) 11 Ont. L.R. 326.
(2) 37 Can. S.C.R. 690.
(3) 49 Can. S.C.R. 229; 17 D.L.R. 318.
(4) 44 Can. S.C.R. 386.
(5) 51 Can S.C.R. 474; 24 D.L.R. 577.
(6) 48 Can. S.C.R. 546; 15 D.L.R. 405.

that transpired up to and including the trial and judgment for only a proportionate part of the loss to pay the other part of such assessment and to be subrogated to the mortgagee and enforce the mortgage on its behalf as against the respondent it would have failed. That apportionment of damages was clearly induced by the conduct of the appellant leading all concerned to assume that appellant was making no other contention than in common with the concurrent insurers as to the extent of damages.

Again, whilst in one breath denying that the policy existed after default, in the next it is urged that all that is now relied upon by the respondent answering, by way of estoppel, or as I suggest evidence of assent, was done in relation to the mortgagee's rights. As there never was in all the dealings of the general manager or the adjuster or either of them the slightest attention paid to the mortgagee and indeed her existence or rights were ignored throughout, such a suggestion seems hardly worthy of consideration.

It is because of the misleading dealings with the respondent and her alone that the result was reached of only a proportionate part of the whole loss being allowed by the learned judge that they form an impassable barrier in the appellant's way if justice is to be done.

Again, it is said there is no evidence of authority in the general manager to do or authorise to be done these things which respondent relies upon.

The circumstances I have already adverted to as well as the presumption arising from his admitted position as the general agent of the appellant for British Columbia not only by virtue of the facts in evidence but also the requirements of the British Columbia statute put him in the same legal category

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as those whom this court has in several cases held agents entitled to bind their respective principals.

I may refer to the *Royal Guardians*, (1) *Evangeline Fruit Co.* (2), and the *Mahomed Cases* (3), above cited, and the general law of the subject as set forth in May on Insurance, paragraph 126; Bunyon on Fire Insurance, 233 *et seq.*; Cameron on Insurance, pages 231, 390, 412, and the several cases cited therein respectively. The case of *Mutchmor* v. *Waterloo Mutual Fire Insurance Co.*(4), in appeal contains a judgment by Mr. Justice Osler in which I agree. He expressly lays down therein that assent before or after the liability has accrued is sufficient. This is not the case of a condition where the policy is declared void. In such case, the consequences might be entirely different. See also the case of *Richard* v. *Springfield Fire and Marine Ins. Co.* (5). I think the problem of solving the authority of an agent is well put as follows:—

> The authority of an agent must be determined by the nature of his business, and is *primâ facie* co-extensive with its requirements (1 May on Insurance, 4th ed., sec. 126, p. 231).

I think the appeal should be dismissed with costs.

ANGLIN J. (dissenting):—I understand that on the question of the liability of the defendant company the other members of the court are in favour of upholding the judgment against it. I am, with respect, inclined to take the contrary view for the reasons assigned by Macdonald, C.J.A., and Galliher, J.A.

The existence of co-insurance unassented to when the loss occurred afforded the defendant company an absolute defence to the plaintiff's claim. It would

(1) 49 Can. S.C.R. 229; 17 D.L.R. 318.
(2) 51 Can. S.C.R. 474; 24 D.L.R. 577.
(3) 48 Can. S.C.R. 546; 15 D.L.R. 405.
(4) 4 Ont. L.R. 606.
(5) 108 Am. St. R. 359.

probably be necessary to the conduct of the business of a foreign insurance company like the defendant that it should have an agent in British Columbia empowered to assent to co-insurance before loss. Were such assent not readily given the assured might discontinue the policy, claim a refund of a proportion of his premium and insure with another company prepared to assent to co-insurance. The continuation of the risk, mutually advantageous, would afford sufficient consideration to warrant the giving of the assent. But after loss the position is entirely changed. An assent then given would amount to a relinquishment of an unanswerable defence to the claim of the insured and would be tantamount to an assumption of liability which would be purely gratuitous. In my opinion the giving of an assent entailing such consequences would not be within the apparent scope of the authority of any mere agent however general his representation of the company. Nothing short of an express provision conferring such authority could be relied upon to support it. The burden of proving its existence was upon the plaintiff. That burden she did not discharge. I do not find in the evidence enough to warrant a finding of acquiescence on the part of the company itself in what its agent had done.

In *Mutchmor* v. *Waterloo Ins. Co.*(1), relied on by the respondent, there was a finding, warranted by the evidence, that the company itself had express knowledge of the co-insurance when its general manager authorized steps similar to those authorized by the defendant company's agent in this case. *Western Assurance Co.* v. *Doull* (2), seems to me to be more closely in point. But I am apparently alone in holding these views and

(1) 4 Ont. L.R. 606.
(2) 12 Can. S.C.R. 446.

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therefore confine myself to the mere statement of them to which I conceive the appellant is entitled.

There remains for consideration the question of the amount which the plaintiff is entitled to recover. The company's liability rests upon the assumption of an assent binding upon it having been given to the co-insurance. Under the 9th statutory condition, indorsed upon the defendant's policy, when co-insurance has been assented to the company is liable only for "a ratable proportion of such loss or damage," *i.e.*, of the loss or damage insured against. That, according to the terms of the policy, is

> all direct loss or damage by fire, except as hereinafter provided.

Re-instatement of the plaintiff's premises in the condition in which they were before the fire admittedly could have been effected for $1,600. That was the amount of "the direct loss or damage by fire." Owing to a municipal by-law, however, re-instatement of the premises as they were before the fire was impossible. Re-building in conformity with the by-law would have cost $3,600. While that may be in one sense the plaintiff's "loss," it is a "loss" due to the fire plus the effect of a municipal by-law. The greater part of it is not "direct loss and damage occasioned by fire," and is loss against liability for which the defendant company expressly stipulated.

By the 18th statutory condition the defendant company instead of making payment under its policy was entitled to repair, rebuild or replace the property damaged or lost. It gave notice of its intention to do so. But the municipal by-law prevented re-instatement. A variation of this condition, properly held to be reasonable in itself and duly endorsed on the policy, provided that:—

If in consequence of any local or other laws, the company shall in any case be unable to repair or reinstate the property as it was it shall only be liable to pay such sum as would have sufficied to repair or reinstate the same.

The company, therefore, never became liable in respect of a rebuilding on a $3,600 basis. The effect of the variation was, in my opinion, notwithstanding the notice which had been given, clearly to limit liability to the $1,600 which it would have cost to effect reinstatement had the by-law not prevented it. The effect of reinstatement being rendered impossible by the by-law was to deprive the company of that alternative method of satisfying its liability. It remained liable under the policy itself to pay the amount of "the direct loss or damage by fire"—$1,600. I cannot perceive any good reason why it is not entitled to the benefit of the co-insurance condition in respect of that sum. There was concurrent insurance to this extent, but to this extent only.

My attention has been drawn to two Ontario decisions—*The Trustees of the First Unitarian Congregation of Toronto* v. *The Western Assurance Co.*(1), and *McCausland* v. *Quebec Fire Ins. Co.*(2), the latter based upon the former. I think the former is clearly distinguishable from that now before us. Both policies dealt with in that case covered the entire risk. The apportionment provided for by the condition there under consideration was to be made in the proportion which

the amount hereby assured shall bear to the whole amount assured *on the said property,*

i.e., in the opinion of the court, on any part of the property which the policy covered. In the case at bar the provision is for payment of a ratable proportion of the loss, *i.e.*, of the loss for which the defendant com-

(1) 26 U.C.Q.B. 175. (2) 25 O. R. 330.

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pany should be liable and for which there should be co-insurance assented to. The *McCausland Case*,(1) except on the question of costs, was the decision of the late Mr. Justice Rose alone. I am, with respect, unable to accept his view that the 9th statutory condition therein dealt with does not differ from the language upon which the decision in the *Unitarian Congregation Case*(2) was based. The condition under which the question of apportionment arises in the case at bar differs essentially in my opinion from those presented in either of the Ontario authorities to which reference has been made. I allude to them merely to indicate that they have not been overlooked.

It may have been—it probably was—unfortunate for the plaintiff, as the learned trial judge points out, that this action was not tried at the same time as the plaintiff's action against the other insurance company. The latter might, in that event, have been required to pay all of the $3,600 for which the present defendant should not be held liable. But for that this defendant is not responsible. It had no control over the other action. It took no part in the trial of it and I find nothing in the record to support the contention that by reason of what then took place it is estopped from claiming the full benefit of the 9th statutory condition. It was for the plaintiff, if she desired to do so, to have taken proper steps to secure the trial of both actions at the same time.

I agree with Mr. Justice McPhillips that the defendant, if liable at all, is entitled to have the plaintiff's recovery limited to its ratable proportion of the sum of $1,600, *i.e.*, $581.80, as found by the learned trial judge, whose judgment should therefore be restored.

(1) 25 Ont. Rep. 330. (2) 26 U.C.Q.B. 175.

BRODEUR J.—The most important question in this appeal is whether the subsequent insurance taken by the respondent is a bar to her claim. By the statutory conditions of the Province of British Columbia, it is provided that an insurance company is not liable for loss

if any subsequent insurance is effected in any other company, unless and until the company assents thereto.

It is claimed by the respondent that the company has given, through its attorney and representative in British Columbia, Mr. Rutherford, the necessary assent. The appellant company, which is a company having its head office in London, England, was bound, under the "Companies Act" of British Columbia, to appoint an agent or attorney in that province. We have not before us the deed appointing Mr. Rutherford; but in complying with the provincial statute a company is expected to give all the necessary powers to exercise their rights and obligations with regard to the business they intend to carry on in that province.

In this case, the appellant company or its agent became aware of the existence of a subsequent insurance only the day after the fire took place. However, the attorney, Rutherford, appointed adjusters with authority to settle the loss. Negotiations were carried on for several months without the company, at any time, denying liability or intimating to the respondent that the condition above quoted had put an end to its liability.

There was a clause in the policy that if in consequence of any local loss the company should, in any case, be unable to repair or reinstate the property as it was, then the company should only be liable to pay such sum as would have sufficed to repair it.

Under the provisions of that agreement, the com-

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pany, through its adjusters and agent, offered to rebuild.

It seems to me that all those circumstances shew that the company, through its attorney, elected to consider the policy in force and to be bound by it, though subsequent insurance had been taken.

It is suggested, however, that the negotiations were carried on by the agents because they had in mind the company's liability to the mortgagee, which, under the mortgage clause of the policy, would not be affected by the default of the mortgagor in giving to the appellant notice of the subsequent insurance.

If these negotiations had taken place with that end in view, it seems to me that a reference to that mortgage would have been made during those negotiations or they would have negotiated with the mortgagee. But all negotiations were carried on with the respondent; all offers were made to her and no reference has ever been made to the mortgagee.

It seems to me, in reading over the evidence, that the difference, during all those negotiations, was as to the amount which was to be paid for the loss. Respondent was claiming $6,000.00.

A reference was made to the case decided by this court of *Western Assurance Company* v. *Doull*(1). It is to be borne in mind that this case of Doull was a different one. In that case, it was provided that the assent had to be indorsed upon the policy. This was not required in the present case. Besides, when the insurance company in the *Doull Case*(1) gave instruction to its inspector to adjust the loss, it had no notice of the subsequent insurance.

I would rely on the case decided by the Court of Appeal of Ontario of *Mutchmor* v. *Waterloo Mutual*

(1) 12 Can. S.C.R. 446.

Fire Ins. Co.(1), where it was held that the assent to the subsequent insurance is sufficiently shewn by the insurance company joining in the adjustment of the loss.

The appellant company contended before this court that it should be condemned to pay only $581.80 and not $1,390.00 as decided by the Court of Appeal. The total loss suffered by the plaintiff was $3,600; and she was insured for $5,500, of which $2,000 was in the appellant company and $3,500 in the North Empire Company. If the two insurance companies had the same risk, the proportion could be determined without any difficulty. In such a case the appellant company would be liable for 20-55ths of the sum of $3,600 and the other company 35-55ths of the same sum. In other words, the appellant company would have to pay $1,309.10, and the North Empire $2,290, a total of $3,600.

But the appellant says: I was not liable for the total loss of $3,600. I had a protective clause in my policy which restricted my liability in this case only to $1,600. Then my ratable proportion of the loss should be 20-55ths of $1,600, viz., $581.80, and all the rest of the loss should be supported by the North Empire Company.

That was the amount granted by the trial judge, but the Court of Appeal decided, on the contrary, that the ratable proportion to be paid by the appellant should be 20-55ths of $3,600, viz., $1,309.10.

It seems to me that the proper method of ascertaining the relative amount payable by the companies when the risks are different is to add the amount of all policies together, without reference to the division of the risks and that each company is liable for its relative proportion to the whole amount insured.

(1) 4 Ont. L.R. 606.

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McCausland v. *Quebec Fire Ins. Co.*(1); *Trustees of the First Unitarian Congregation* v. *Western Assurance Co.*(2).

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Wilson & Whealler.*

Solicitor for the respondent: *T. E. Wilson.*

(1) 25 O.R. 330.

(2) 26 U.C.Q.B. 175.

P. C. HANSEN AND LILLIE M. HANSEN (DEFENDANTS) ..... } APPELLANTS;

AND

HENRY FRANZ (PLAINTIFF) ..... RESPONDENT.

1917
*Oct. 11.
1918
*Mar. 11.

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

Sale of land—Mistake as to area—Completion of purchase—Remedy of purchaser—Guarantee.

Where, through no fault of the vendor, the quantity of land sold proves to be much less than that mentioned in the deed, and there is no warranty as to quantity, the purchaser is without remedy.

The description of the land sold as "containing 271 acres" or "271 acres more or less" is not such a warranty. Idington J. *contra.*

The undertaking in an agreement for sale afterwards embodied in the deed that the vendor would give a warranty deed does not help the purchaser even under the system as to land titles in Alberta. Idington J. *contra.*

Judgment of the Appellate Division (36 D.L.R. 349) reversed, Idington and Duff JJ. dissenting.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta(1), reversing the judgment on the trial in favour of the defendants.

The question for decision on the appeal is stated in the above head-note.

A. S. Matheson for the appellants.
Chrysler K.C. for the respondent.

THE CHIEF JUSTICE:—The appellant by deed dated 27th February, 1909, agreed to convey to the respondent his farm described as follows:—

All that part of section three (3) Township eight (8) Range one (1) west of the fifth (5th) Principal Meridian, lying west of the river, said land containing two hundred and seventy-one (271) acres and being located in Alberta, Canada.

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

(1) 12 Alta. L.R. 406; 36 D.L.R. 349.

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This description is in accordance with that in the appellant's certificate of title from the South Alberta Land Registration District which adds, however,

> as shewn on a plan of survey of the said township signed at Ottawa, 24th August, 1898, by Edouard Deville, Surveyor-General of Dominion lands and of record in the Department of the Interior.

A transfer dated 15th Nov., 1910, as printed in the record, but which is undoubtedly an error for 1909, was made by the appellant to the respondent; and the latter has a certificate of title dated 1st December, 1909.

Through an error in the survey the property is described as containing 271 acres when as a fact it has been subsequently ascertained to contain only 164.80 acres. It is admitted that there was an innocent mistake common to both parties.

Except that the deficiency is so remarkably large there is nothing to distinguish this case from any other in which the contract calls for a larger area than the property actually contains.

Nothing is more clearly established in the practice of conveyancing, and it is so laid down in all the books, than the rule that after completion of the conveyance the purchaser who has had the opportunity of raising objection to any least deficiency in the quantity agreed to be conveyed has no further remedy. The so-called exceptions to the rule include a representation made at the sale collateral to the contract for sale and amounting to a warranty of the truth of the fact stated.

I can find in this case no evidence whatever either of an intention on the part of either party that there should be any warranty or that such was given. The testimony carries the matter no further than the written document which is the very ordinary statement of quantity in the property agreed to be sold and

which it is admitted the appellant had the best reason for believing was correct. If we were to hold that there was ground for decreeing compensation in this case, I do not know how it could be refused in any case at all, as the established rule would be reversed and the conveyance with payment of the purchase money would cease to be a final settlement of the sale.

I agree further with Mr. Justice Stuart that no such claim as that on which the judgment appealed from is based ought to have been admitted upon the pleadings which raise an entirely different one. Even if the respondent were entitled to any relief I do not think the judgment of the Appellate Division could stand. The agreement was for the sale of the farm at a named sum and this has been carried out. There can, I think, be no possible warrant for the court to substitute for the terms of the agreement a purchase price arrived at by a *pro ratâ* one on the acreage of the farm. This is no way to arrive at the damages sustained by the respondent.

The appeal should be allowed with costs.

DAVIES J.—I concur with my brother Anglin J. and I would allow this appeal with costs and restore the judgment of the trial judge.

IDINGTON J. (dissenting).—This appeal presents a case which is remarkable, not only by reason of its peculiar facts, but also by reason of the very peculiar state of our law relevant thereto, being such as it is. The facts are undisputed. The inferences therefrom may vary.

According to the law as presented by appellant we are asked to render a judgment which would produce not only a bare denial of justice but a shocking injustice. The judgment appealed from, no doubt, if

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left standing, would execute substantial justice between the parties.

The real question is whether or not the law is such as appellant contends.

The appellants and respondent in 1909 lived in the State of Washington. The respondent had a farm there which he valued at seven thousand dollars and the appellant, P. C. Hansen, agreed to buy at that price, pay three thousand five hundred dollars cash and transfer a piece of land in Alberta represented by him to contain two hundred and seventy-one acres. The cash part of the price was paid and then the appellants and the respondent executed an agreement, dated 27th February, 1909, made between the former as parties of the first part and the latter as party of the second part whereby it was witnessed:

> That the said party of the first part, in consideration of the covenants and agreements hereinafter made by the party of the second part, hereby covenants and agrees that he the said first party will deliver unto the second party hereto a warranty deed shewing a clear title to the following described property, to wit:
>
> All that part of section three (3) Township eight (8) Range one (1) west of the Fifth (5th) Principal Meridian, lying west of the river, said land containing two hundred and seventy-one (271) acres, and being located in Alberta, Canada.

The instrument then proceeded to bind the party of the second part that he would

> in consideration of the covenants of the said first party

deliver a warranty deed conveying to him the lands described free of encumbrance.

It is to be observed that there is nothing in this instrument relative to the cash part of the transaction or indeed in any way pretending to set forth the entire actual bargain between the parties. It relates only to part of that entire contract. It is not an ordinary contract of purchase and sale yet may fall within the rules of law applicable thereto.

The conveyance from respondent provided for by this instrument was duly given and his land resold by appellant. All that the appellant P. C. Hansen gave to respondent in way of assumed compliance with his covenant, above quoted, was by a transfer in the usual form under the "Alberta Land Titles Act," dated 15th November, 1909, in which the lands professed to be thereby transferred were described as follows:—

That portion of section three (3) in Township eight (8) Range one (1) west of the Fifth Meridian, which lies to the west of the Old Man River as shewn on a plan of survey of the said Township signed at Ottawa 24th August, 1898, by Edouard Deville, Surveyor-General of Dominion Lands, and of record in the Department of the Interior containing two hundred and seventy-one acres more or less.

Which is followed by a reservation as follows:—

Reserving unto His Majesty, His successors and assigns all gold and silver and unto the Calgary and Edmonton Land Company, Limited, their successors and assigns, all other minerals and the right to work the same.

It is to be again observed that this description bears a resemblance to yet is far from being identical with that in the covenant of 27th February, 1909, above quoted.

Can it be held in law to have been identical therewith? That is one of the questions to be considered herein.

This transfer professed on its face to have been made in consideration of $3,500 and the receipt thereof is therein acknowledged. There were no covenants expressed therein of any kind.

The "Land Titles Act" implies only one on the part of the vendor and that is one for further assurance of a very limited nature which does not touch what is involved herein.

The expression in the description used in the covenant of 27th February, 1909, was such as called for

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absolutely 271 acres, but is modified in the transfer to read 271 acres more or less.

Can the latter be said to be a fulfilment of the obligations in the former?

I pass the reservation of minerals, though a clear departure from the contract, because nothing is made of that herein, and confine my question to the rest of what appears.

That transfer was registered and a certificate of title issued, dated 1st December, 1909, constituting respondent the owner of an estate in fee simple in lands which are described substantially the same as in the transfer containing two hundred and seventy-one acres more or less.

It turned out upon investigation some months later that within that part of section three thus described there were only one hundred and sixty-four 8/10 acres instead of the promised two hundred and seventy-one acres.

The parties seem to have been friendly and it was for a long time assumed that their efforts at rectification made first by claims on the railway company which had sold the land to Hansen, and next upon the Dominion Government, made through first one parliamentary representative and then through another, his successor, might bring relief. All that ended nowhere; but it accounts for the loss of time which had elapsed before resorting to the court on the 1st November, 1912.

Had the litigious spirit been predominant and suit entered immediately upon discovery and before respondent's Washington farm had been resold by Hansen, I think there can be little doubt but that rescission might have been had of the entire contracts between the parties.

It seems to be admitted that is now impossible.

Hence authorities bearing upon that aspect of the case, of which a few are to be found, are almost useless for our present purpose. The latest application of the law relevant thereto, at least up to the stage when a conveyance has been accepted, appears in *Lee* v. *Rayson* (1).

And the large number of decisions in specific performance cases, which have been cited to us, shewing that compensation has been many times insisted upon by the courts, seem still more remote from the business in hand.

In any such case as presented herein there would have been clearly either a refusal of specific performance or it would have been only granted with compensation.

In his evidence P. C. Hansen was asked and answered as follows:—

Mr. McDonald: You do admit that you told him your land had 271 acres in it?

A. I think I told Henry there was 271 acres, at least I told him that is what the deed called for.

Mr. Matheson You thought at that time there were 271 acres? A. Yes, certainly, because I had the deed for it.

and from his examination for discovery there is the following evidence:—

13. Q. Did you ever mention to him the number of acres that were there? A. I told him that according to the deed it was 271 or 272 acres, I think. That is my recollection. Of course it was a long time ago.

14. Q. And at that time he had not had any opportunity of measuring the land or examining it? A. No.

15. Q. As a matter of fact how many acres are there in that piece? A. Well, that is pretty hard for me to say, you know, I never measured it. I bought the land and I got a title for it and of course I bought hundreds of acres of land and I have never measured a piece of land yet. I have always taken the title for it.

This has been relied upon, as evidencing a collateral warranty, enabling two of the learned judges in the Appellate Division to hold respondent entitled to

(1) [1917] 1 Ch. 613.

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relief, though recognizing the general rule that after a contract of sale and purchase has been executed by the delivery of the conveyance there can be no relief got by a purchaser, by reason of any failure on the part of the vendor to give thereby what he had bargained to give, unless there has been actual fraud on his part or some covenant in the deed of conveyance upon which he can sue.

Mr. Justice Beck agreed in the result but apparently on the ground that the general rule thus recognized was not, in the Alberta jurisdiction, where an agreement for the sale of land is not followed by a deed of grant, but by a transfer, which in his opinion is, in effect, only an order to the registrar to cancel the vendor's certificate of title, and to issue a new one in the purchaser's name leaving, in his opinion, in full force and effect all the covenants of the agreement for sale.

There certainly is much to be said for this view if, as I understand, the system introduced by the "Land Titles Act" into Alberta, that it forbids covenants in the instrument of transfer, and that in itself it is of no value until recognized, and given vitality by the registrar's certificate, which in truth is what passes the title; and also if we have regard to the origin and development of the rule in question.

But unfortunately the doctrine it represents has not been confined to transactions relative to the sale of some interests in land.

It is set forth by that very able judge, the late Lord Justice James, in the case of *Leggott* v. *Barrett*(1), at foot of page 30, as follows:—

> but I cannot help saying I think it is very important, according to my view of the law of contracts, both at common law and in equity, that

(1) 15 Ch. D. 306.

if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. * * * unless there be a suit for rescinding the deed on the ground of fraud, or for altering it on the ground of mistake.

This was said, not in a case relative to the sale of land, but where the only questions involved depended upon the terms of a dissolution of partnership, and how far the defendant was bound by the terms as expressed in the deed of dissolution, which had been preceded by an agreement in writing possibly capable of a wider import than in the said deed.

In the same case Lord Justice Brett, perhaps somewhat more concisely, said as follows:—

I entirely agree with my Lord that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed; and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document.

It might be argued that it was not necessary for the decision of that case to express any such opinions and hence these expressions should be held to be mere *obiter dicta*. Indeed, Brett L. J. distinctly says he could see no difference at all between the preliminary contract and the deed.

Be that as it may, the definition of the doctrine as expressed by James L.J. has received acceptance by others on the Bench, and writers of text books.

Why, as it is thus expressed, there should be found ground for relief in the case of mistake which, I take it,

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means mutual mistake, and then only limited to the case of a possible alteration of the deed, must puzzle any one but those conversant with the peculiarities which our judge-made law has so frequently developed.

And I may be permitted to remark that if we look for its parallel in the wider field of law applied to mercantile transactions we will not easily find its application to have been permitted there to frustrate the execution of justice.

We will find that the common sense of mankind engaged in these pursuits has so impressed the judicial mind therewith, that it has so developed the law, as generally to furnish implications that execute the purposes of the contracting parties and thereby escape the undesirable consequences of a rigid adherence to such a rule.

The rigid application of the doctrine has doubtless received a greater measure of success, if I might say so, in relation to contracts respecting land than in those relative to mercantile transactions. This has probably arisen because the former have been more generally conducted, than the latter, through skilled men ready to apply that due diligence, which courts are apt to insist upon, in the way of procuring safeguarding covenants following careful examination of what is being bought or sold.

But what measure of diligence should be required of men dealing in wild lands? Must they have a survey made?

I am almost tempted to ask if when and where the reason for the rule ceases should it not then also cease to operate?

Passing all these suggestions and coming to the question of the observation of the rule as stated above,

we find (in 1883) the case of *Palmer* v. *Johnson*(1), decided by A. L. Smith J. holding expressly that a purchaser, after conveyance and without any covenant therein upon which he could rely, might resort to a stipulation in the original contract providing for compensation in case of error, misstatement or omission being discovered in the particulars—otherwise meaning the terms of sale.

In this he professed to follow the law as laid down in *Bos* v. *Helsham*(2), and *In re Turner and Skelton*(3). He discarded the decision by V.-C. Malins, in the case of *Manson* v. *Thacker*(4), a short time previously and essentially of the same nature in its leading features. The reason assigned by him for so doing was that Malins V.-C. had rested his decision upon the grounds that the purchaser should by the exercise of due diligence have observed the misstatement before conveyance executed.

This decision of A. L. Smith J. was upheld in the Court of Appeal(5). Of that appellate court Brett M.R., whose opinion expressive of the rule of law applicable to the case of an executory contract followed by an executed contract and the resultant consequences thereof, has been quoted above, was the first to give his opinion in support of the decision by A. L. Smith J.

One might be tempted to suggest that the two opinions are irreconcilable; but Brett M.R., speaking doubtless of the argument which had pressed that view, says as follows:—

> Smith L.J. in his judgment, from which this appeal is brought, points out all that was there meant, "All that was there held was," he says, "that where the parties enter into a preliminary contract which is afterwards to be carried out by a deed to be executed, there the com-

(1) 12 Q.B.D. 32.
(2) L.R. 2 Ex. 72.
(3) 13 Ch.D. 130.
(4) 7 Ch.D. 620.
(5) 13 Q.B.D. 351.

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plete contract is to be found in the deed, and that the court has no right whatever to look at the preliminary contract," but *Bos* v. *Helsham*(1), had decided that this particular contract for compensation was one which was not to be carried out by the deed of conveyance, and therefore it did not come within the principle of the law and was not merged in the deed.

With great respect for the memories of these judges I doubt if the explanation is quite satisfactory. It certainly did not occur to the astute mind of Jessel M.R. in his more elaborate judgment in, *In re Turner and Skelton*(2), or to that of Malins V.-C. in *Manson* v. *Thacker*(3), where each had to grapple with the same doctrine though of course not with the identical expression of it.

Moreover, the opinion of James L.J. expressly covered the law of contracts both at common law and in equity. By the latter, as lucidly shewn in the case of *Holroyd* v. *Marshall*(4), at page 209, there is in a sense no need for a formal conveyance, as a valid contract for a present transfer passes at once the beneficial interest to the vendee.

The fair deduction from these cases is, I submit, a narrowing of the rule and limiting it to the mere effect of the conveyance of the legal estate which does not as a matter of course seem to have such elemental force in it as to extinguish anything in the contract of purchase but what is strictly limited to the passing of that common law legal estate.

And what of it when it fails to pass title to the substantial part of that which the parties believed they were contracting for? Does the doctrine only rest upon a mere play upon words, or was it developed from and does it rest upon the requirement of due diligence and subject to the limitations so implied.

(1) L.R. 2 Ex. 72.
(2) 13 Ch.D. 130.
(3) 7 Ch.D. 620.
(4) 10 H.L.Cas. 191.

However, if the distinction drawn by Brett M.R. be sound, then it is very helpful in maintaining the judgment appealed from by reason of its limiting the operation of the rule simply to what may be a mere fractional part of the contract, leaving all else intact and operative.

As already pointed out, not only was there the verbal assurance of there being in fact two hundred and seventy-one acres offered, which the appellant admits, but also there was an express contract under seal for a warranty deed of two hundred and seventy-one acres, which never has been given, indeed could not be effectively given in the Province of Alberta. The respondent, doubtless relying upon the assurance of appellant, P. C. Hansen, was induced to accept a certificate of title which professed to be for two hundred and seventy-one acres "more or less" but in fact falls one hundred and six acres short of the two hundred and seventy-one acres promised.

True there was not a specific agreement for compensation but there was a collateral agreement upon which, applying ordinary reason and common sense, the respondent was quite as much entitled to rely for his protection which would, upon being enforced, bring him the equivalent result in damages. And under the peculiar circumstances of the giving of the written contract, which did not profess to deal with the entire transaction between the parties, I think its nature and purport may well be looked to as shedding light upon the meaning and intention of the verbal assurance that there were two hundred and seventy-one acres to be given.

I observe the attempt faintly made by Hansen to fall back upon what the deed, as he alleges, had expressed. A comparison of the dates and other facts

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leaves, as highly probable, the inference that at the time he spoke of giving such assurance he had never seen what he calls the deed. If it was present at the bargaining I fail to see why the conveyancers drawing up the written covenant did not incorporate the language used therein. Not only did he fail to catch the expression "more or less" therein, but also the entire wording of the description varies so much from either that in the so-called deed from the railway company to Hansen or the certificate of the registrar, that I am driven to the conclusion that neither was at hand.

The transfer from the railway company to Hansen is dated 20th Feb., 1909; the affidavit of execution thereof is dated 22nd Feb., 1909; the affidavit of Kemmis as to value, doubtless for the registrar's use in fixing fees, is dated 26th Feb., 1909; and the certificate of the registrar is dated 1st day of March, 1909.

Having regard to the relative localities where these several acts where respectively done, and the dwelling place of the parties concerned herein, and place where the bargaining and execution of the covenant took place, it is extremely improbable that Hansen on the 27th February, or before, had had any opportunity of seeing, much less of speaking from, the deed as he suggests.

These facts and dates are important not only as a means of rendering more definite the terms of the verbal assurance he gave, but also as reflecting what purpose was intended in the giving of that assurance.

I have not the slightest doubt it was fully intended to persuade respondent to rely upon it, and that he did rely upon it and none the less so because it was followed or accompanied by a covenant emphatically consistent therewith.

Such being the facts, I am unable to distinguish

between the force and effect thereof and what was in the case of *De Lassalle* v. *Guildford*(1), given effect to, in the way of a warranty for good drainage given by an intended lessor to an intended lessee who was induced to take and took possession under a lease which had no covenant relative to drainage. That was an action for damages and so far as I can see could have been successfully answered if maintainable by just such arguments as appellants have presented here, relying upon the line of authority I have already dealt with.

Let us test the matter in another way, as exemplified in the case of *Piggott* v. *Stratton*(2), when the representation of a vendor that he was bound by some lease from others not to build so as to obstruct a sea-view of those choosing to build on land he was selling, was held enforceable by injunction, though the same argument doubtless was used as herein, and as is implied in the doctrine in question, that the vendee should have protected himself by a covenant in the deed but had not. How is that decision consistent with the doctrine? It is only possible to make it so by assuming that the law never intended to deprive purchasers of the plain rights which a solemn representation carries with it even when mistakenly made in good faith.

The converse of this case, as it were, where there was no evidence of representation to be relied upon and nothing enabling the plaintiff to claim the benefit of restrictive covenants, came up in the case of *Renals* v. *Cowlishaw*(3), when Hall V.-C. dismissed the action and was upheld in doing so by the Court of Appeal(4).

The principles involved in that case come to be dealt with in the case of *Spicer* v. *Martin*(5), where,

(1) [1901] 2 K.B. 215.
(2) 1 DeG. F. & J. 33.
(3) 9 Ch.D. 125.
(4) 11 Ch.D. 866.
(5) 14 App. Cas. 12.

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after conveyance, it was discovered that the purchaser might lose the benefits of restrictive covenants unless an injunction granted and it was granted accordingly and upheld on somewhat different grounds from mere misrepresentation.

The case of *Lagunas Nitrate Co.* v. *Lagunas Syndicate*(1), at pages 402, 403, 413-15, 417, 434 and 456, shews how a defendant was, long after conveyance, in absence of fraud, and where rescission had become impossible, granted damages plaintiff was entitled to, arising out of the condition of the property at the time of conveyance not having been such as plaintiffs were entitled to have it. Yet there was no covenant in the conveyance to rely upon. Again, the case of *Clarke* v. *Ramuz*(2), dependent upon the doctrine of equity, which I have already adverted to, of the vendee being the trustee of the purchaser from the time the contract of purchase had been formed, shews how, even after conveyance, the duty of such vendor to protect the property from deterioration has been enforced.

There had been in that case some earth in substantial quantities removed from the property after the making of the contract of sale, but before the conveyance, and the vendee was condemned to pay damages on discovery after the conveyance.

This case seems rather a decisive answer to the argument founded upon due diligence. Surely the vendee could have seen the earth in question had been taken without the knowledge of either vendee or vendor.

All these cases I refer to, not as strictly in point decisive of the question raised herein but of how much care is to be taken in applying some expressions of opinion of very able judges which, if given effect to

(1) [1899] 2 Ch. 392. (2) [1891] 2 Q.B. 456.

in the widest sense the language used might be capable of, would lead to doing an injustice which the courts have in these cases striven to avoid on one ground or another.

And the more I consider them the more I find it necessary to observe the terms of the covenant to give the respondent two hundred and seventy-one acres. It was not a mere symbol of numbers that appellant agreed to give but of so many acres of ground.

It must not be overlooked that men, when dealing in wild lands, think of the acreage thereof and not of the illusory description a surveyor's blundering work had put upon paper.

I am quite aware that, in *Doe d. Meyrick* v. *Meyrick*(1), and other cases, the rule has been laid down that, where in a deed there has been a general and specific description of the property, only that specifically described will pass. But I think we must ever observe, as was done in *Ringer* v. *Cann* (2) by Baron Parke and cited with approval by Wood V.-C. in *Jenner* v. *Jenner* (3), at page 366, the object of the parties.

And the fact should not be overlooked that what is thus attempted to be put off upon the confiding purchaser as worth three thousand five hundred dollars to secure which to respondent was the object of the parties here, had almost immediately before been bought for sixteen hundred and twenty-six dollars by the appellant P. C. Hansen.

This is not the case of only an immaterial or small fractional part of that bargained about being in question, but more nearly resembles that which was involved in the case of *Cole* v. *Pope*(4), where, without actual fraud as here, the price had been paid and a

(1) 2 Cr. & J. 223.
(2) 3 M. & W. 343.
(3) L.R. 1 Eq. 361.
(4) 29 Can. S.C.R. 291.

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conveyance got by a purchaser of what in truth as it turned out the vendor had no title to and the purchaser was held entitled to recover his purchase money.

The decision in the case of *Joliffe* v. *Baker*(1), so much relied upon, is, if we examine closely the facts, possibly reconcilable with justice and common sense.

The vendor in the opening letter of negotiations had stated in his description of the property, the quantity of land to be three acres, but the description in the contract of purchase, drawn up later and after the purchaser had come to inspect and presumably inspected the premises, alleged the property to "contain by estimation three acres or thereabouts." It turned out that there were only two acres, one rood and twelve perches. The price was £270. There were upon it a four-room cottage, a pig-sty, cow-pen, garden, and a capital meadow, which facts suggest that the shortage in mere acreage was probably in the eyes of the parties but a comparatively trifling part of the whole of that which was sold (although assessed at £50), and might well fall within the allowance therefor in the description.

There was nothing in that case upon which the plaintiff could by any possibility hang a claim of warranty beyond the not very uncommon one that the purchaser taking and paying for a thing which turns out to be a trifle less valuable than he had expected, and hence was driven to rely upon alleged fraud, which was quite untenable.

The court could not find anything in the conveyance upon which to found a warranty of quantity when that was expressly referred to as by estimation. I fail to see much resemblance between that case and this.

(1) 11 Q.B.D. 255, at p. 268.

In closing his long judgment Mr. Justice Williams refers to a number of cases of defect in the quantity including *Portman* v. *Mill*(1), and says he cannot extract a rule therefrom. Neither can I, yet I cannot escape feeling a suspicion derived from the tone of his closing remarks, that had he been confronted with such a case as the *Portman Case* (1) or that herein he might have found a remedy.

It is observable that it was only in the next year that A. L. Smith J. who had concurred in the result decided *Palmer* v. *Johnson* (2), cited above and I may add that the greater number of the other decisions I have referred to, and rely upon herein, were decided since the *Joliffe Case* (3) and shew clearly that there can be found a collateral warranty resting upon the representation made; and especially so, when as herein that is equally consistent therewith followed by a covenant not yet fulfilled, instead of being followed, as in the *Joliffe Case*(3), by an agreement which by its very terms so modified the representations as to render the representation worthless.

I need not enter upon the question of what a collateral warranty may or must consist of, for I agree, speaking generally, with what Mr. Justice Walsh has set forth in that regard, and the meaning thereof is illustrated by the cases I have cited.

Although holding with him that which he relies upon to be sufficient reason for dismissing the appeal, I am yet inclined to think that the covenant under seal was not extinguished by what transpired. The gist of the rule in question relative to an executory contract being extinguished by the executed contract, implies that it has been substantially executed and

(1) 2 Russ. 570. (2) 12 Q.B.D. 32.
(3) 11 Q.B.D. 255, at p. 268.

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thus has carried out the purpose and attained the object of the contracting parties.

Can it be said to have been executed in this case unless we assume that the respondent's assent to the transactions relied upon as its execution was induced by the representation?

I am disposed to attach more importance to the indirect effect, not limiting it to the words "Warranty deed" but the entire tenor of the written covenant, than Mr. Justice Walsh does, as shewing the purpose of the appellant in making the representation he did and of the respondent in accepting it.

Let us revert, in that connection, to a consideration of the doctrine of its extinction as respectively expressed by James and Brett LL.J. and some of the reasons for its existence.

Brett L.J. distinctly puts it upon the ground of the superior nature of the later writing substituting the oral agreement, or deed substituting the prior writing.

If that expresses its meaning we have before us in this case a covenant under seal which is followed by a transfer which is not under seal and a certificate o title which is neither under seal nor given any force or vitality by virtue of any seal.

The superior document, if common law notions relative to the value of a seal are to prevail, is that covenant, under seal, which has never been fulfilled if due effect is to be given to all the language used relevant to what was contracted for. And as the superior document has never been fulfilled may I suggest it has not been extinguished?

A reason for part of the operation of the rule laid down by those learned judges, which, however, is not given expression to by them, is that rule of law against the admission of oral evidence varying that which has

been written. The real reason, I submit, for the rule in question is, that, in such transactions as the sale of real estate, the parties are presumed to have used due diligence and care and to have expressed in the later and final writing, what they mutually had agreed upon and hence it cannot be varied by oral evidence.

As governing what in the vast majority of cases happens in England or Ontario, the rule is a wise one and not lightly to be set aside, but as Mr. Justice Beck has suggested is it under the circumstances in which parties find themselves in those jurisdictions in which the Torrens system of passing titles prevails, likely to be as useful or workable as elsewhere?

And when we find in the reports of the courts of our western provinces the number of cases we do, where its observance may be suspected of having produced injustice, it becomes our duty not too hastily to extend its operation but to scrutinize closely the facts in each case and see if in truth they permit the operation of the rule.

We have seen how by later development that which may be held to be a collateral part of the purchase contract is not supposed to be extinguished by only that relevant to the passing of the legal estate.

Does not all that bring us back to the original question of whether or not any such passing of title can be said to have taken place in pursuance of a covenant under seal, to convey by a method clearly impossible as contracted for, two hundred and seventy-one acres of land when that which has been given neither in fact nor in form executes the purpose of the covenant?

I doubt it so much that I cannot see my way to allow an appeal by a judgment that would rest upon an affirmative answer to the query I put.

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As already stated I hold the representation made, coupled with the covenant as illuminating the meaning and purpose thereof, such a warranty as relied upon below.

I have examined all the authorities cited and many more to ascertain whether or not it really is law as suggested that a man can misrepresent and mislead no matter how innocent of fraud, and profit thereby at the expense of another who has had no fair opportunity to test the truth of the representation.

I submit there is no justification for imputing to the law such inevitable and unjust results as herein claimed for expressions, in terms too wide, of a doctrine that is supposed to be so well known and daily relied upon as that in question.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—I think the appeal should be dismissed with costs.

ANGLIN J.—I am with respect of the opinion that this appeal should be allowed and the judgment of the learned trial judge restored.

The plaintiff (respondent) very properly concedes that, owing to his delay in instituting this action, the absence of fraud and the impossibility of a *restitutio in integrum* he is not entitled to the equitable remedy of rescission. His alternative claim to recover damages he rests on (*a*) a warranty as to the quantity of land which he asserts is implied in the agreement for sale by the words in the description of the land to be transferred, "containing two hundred and seventy-one acres," which follow its designation (in itself definite, unequivocal and complete) as that part of a defined section lying west of the river; and (*b*) an alleged

collateral warranty consisting in a verbal representation that the parcel in fact contained 271 acres.

There can be no question as to the identity of the parcel with which the parties were dealing. The plaintiff got the land for which he bargained. Both he and the defendant were quite innocently mistaken as to the acreage, which was only 164.80 instead of 271. There is, therefore, neither a suggestion nor ground for a suggestion of fraud. The preliminary contract contains no provision for compensation for any deficiency in the quantity or quality of the estate. It may also be worth noting that before he took his transfer the plaintiff had learned that there was a very considerable deficiency in the quantity of the land, although he ascertained its precise extent only afterwards.

In the transfer itself and in the certificate of title obtained by the plaintiff words of designation, the equivalent of those used in the preliminary agreement, are followed by the words,

containing two hundred and seventy-one acres more or less.

The words, "more or less," cannot cover a deficiency of 106.20 acres in a parcel supposed to contain 271 acres. *Portman* v. *Mill*(1). I do not, therefore, see any material difference between the description in the transfer and certificate and that in the preliminary agreement. Moreover, since the transfer was made in the form prescribed and customary in the Province of Alberta, it must be taken to be the form of conveyance for which the parties to the agreement intended to stipulate. I am, therefore, with respect, unable to assent to the view, which I understand Mr. Justice Beck to express, that the doctrine of merger of the preliminary agreement in the conveyance is inapplicable to such a transfer.

(1) 2 Russ. 570.

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I agree with Mr. Justice Walsh that (at all events in the absence of evidence as to the meaning according to the law of the State of Washington of the term "warranty deed" used in the agreement) the provision for such a deed cannot be taken to import a stipulation that the transfer to be given under the "Alberta Land Titles Act" should contain a warranty of the quantity of the land. If that should be its meaning a serious obstacle to reliance being placed upon such a stipulation would probably be presented by the acceptance, especially with knowledge of a deficiency, of a transfer without any such warranty.

But whether the transfer itself or the preliminary agreement is looked to, I am of the opinion that the words "containing two hundred and seventy-one acres" or "containing two hundred and seventy-one acres more or less" are merely a part of the description, probably to be regarded as *falsa demonstratio* (see cases collected in 10 Hals., p. 407, n. (*g*)), and not importing a covenant or warranty as to quantity which could found a demand either for compensation or for damages after the completion of the contract. *Penrose* v. *Knight*(1); *Follis* v. *Porter*(2); *Clayton* v. *Leech*(3); Dart on Vendors and Purchasers (1905 ed.), p. 812; Williams on Vendors & Purchasers (1911 ed.), pp. 6, 10, 11. In an action to enforce the contract while still executory a court of equity might of course entertain a claim for compensation as incidental to its jurisdiction to grant specific performance. The right to that relief would not rest upon breach of any warranty implied in a statement of quantity in the description but would be based upon the equitable doctrine of mistake. After completion, however, unless

(1) Cass. Dig. (2 ed.) 776. (2) 11 Gr. 442.
(3) 41 Ch.D. 103.

a case can be made for rescission (*Debenham* v. *Sawbridge*(1)), the only remedy is by an action at law for damages. Neither innocent mistake nor innocent misrepresentation will support such an action. It must either be in tort for deceit or upon contract for breach of warranty. *Jolliffe* v. *Baker*(2), at pages 267-9. Moral fraud, the essential of deceit, is entirely absent. The transfer does not contain any contract of warranty. Lord Moulton, in *Heilbut* v. *Buckleton*(3), at page 47, states the nature of such a contract and indicates the difficulty of establishing it when not expressed. There is no covenant in the transfer which gives a remedy. As Mr. Justice Stuart has said, we have been referred to no case where it has been decided that in a conveyance a statement of the number of acres contained in the parcel following the description of it amounts to a warranty. That appears to have been rather assumed in *Jolliffe* v. *Baker* (2), (in other aspects a strong authority for the defendant) in the latter part of the judgment of Watkins Williams J. (pp. 273-4). But that learned judge held that the terms of the description, regarded as a warranty, were literally true and that there had been no breach. That case is clearly not authority for the proposition that a mere statement of quantity in a description of land imports a warranty.

The claim based upon an alleged verbal warranty is in a position even more unsatisfactory. The only representation as to quantity of which there is any evidence amounted, in my opinion, to nothing more than a statement by the defendant that his own deed called for 271 acres—as in fact it did. Whether

(1) [1901] 2 Ch. 98, at p. 109. (2) 11 Q.B.D. 255.
(3) [1913] A.C. 30.

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a vendor's representation on a sale imports a warranty is always a question of intention. The existence of that intention must be established. It is a matter of fact to be determined upon "the totality of the evidence." *Heilbut* v. *Buckleton*(1). I am unable to discover in the record any evidence which would justify a finding that the defendant intended to make, or that the plaintiff understood him to make, a contract of warranty. On the contrary, the reference by the defendant, when speaking to the plaintiff of the quantity of land, to the description in his deed would to me rather seem to exclude the idea that any such undertaking was contemplated. Moreover, I doubt whether the statement of claim can be regarded as alleging a collateral warranty. If not, it would be unsafe for an appellate court to base a judgment on the existence of an intention which was not put in issue, which the defendant had not a fair opportunity of meeting, and upon which we are deprived of the advantage of a finding by the trial judge.

Appeal allowed with costs.

Solicitors for the appellants: *MacLeod & Matheson.*
Solicitors for the respondent: *Jones, Percod & Hayden.*

(1) [1913] A.C. 30, at pages 43, 50.

MICHEL BRUNET.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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*May 31.
*June 25.

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

Criminal Law—Abortion—Defence of innocent conduct—Evidence of previous offences — Rebuttal — Statutory law—Jurisdiction—"Absence." Articles 1014, 1017, 1019 Cr. C.—Art. 3262 (a) R.S.Q.

Under article 3262 (*a*) R.S.Q., the police magistrate who presided at the trial was empowered to hold the Court of Sessions of the Peace only "in case of the absence or inability to act of" the regular Judge of the Sessions of the Peace.

Held, that "absence" means absence from the bench or, at most, absence from the court-room in which the trial takes place when it begins.

When a person, accused of having unlawfully used means to procure a miscarriage, puts forward a defence of innocent and lawful purpose, the evidence of other women that he has previously practised abortion on them by a similar method is admissible in rebuttal.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Court of Sessions of the Peace, at Quebec.

The accused, appellant, was found guilty of abortion by the trial judge, but he prayed for a case to be reserved for the Court of King's Bench.

The questions submitted in the reserved case stated by the trial judge are as follows:—

1. That the trial and conviction are null, because the judge who tried the case had power to act only in the absence or incapacity of the Judge of Sessions, whereas the latter was, in fact, neither absent nor incapacitated.

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

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2. That the trial judge erred in admitting evidence of other criminal acts of the appellant.

3. That, in any event, there was error in admitting such evidence of other criminal acts in rebuttal.

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

Ferdinand Roy K.C., *Alleyn Taschereau K.C.* and *Paul Drouin* for the appellant.

Arthur Lachance K.C. and *Arthur Fitzpatrick* for the respondent.

DAVIES J.—I concur in the reasons for judgment stated by my brother Anglin and would dismiss this appeal.

IDINGTON J.—The appellant was convicted of abortion on his trial had therefor, pursuant to his election for a trial without a jury, and on the 15th May, 1917, sentenced to a term in the penitentiary.

The learned trial judge on motion of counsel for appellant decided same day or next to reserve questions of law for the Court of Appeal.

Of these we are appealed to in regard to the following:—

"A." Cette cour devait-elle admettre les témoignages de Laetitia Clouthier et de Bernadette Clouthier pour établir que l'accusé a déjà commis le crime dont on l'accuse?

"B." En supposant cette preuve légale, pouvait-elle être permise pendant l'enquête de la Couronne "in rebuttal?"

I have as result of reference to numerous decisions on which I rely specially upon *Rex* v. *Bond* (1), and *Rex* v. *Crippen* (2), come to the conclusion that the answers of the majority of the Court of Appeal to these questions are unquestionably right.

(1) [1906] 2 K.B. 389. (2) 27 Times L.R. 69.

In the former case the law applicable to such a case, and the limitations thereof, is so fully and ably dealt with that I need not repeat what therein is applicable. Whether such proof should in all cases be tendered in support of the case for the prosecution or only be given by way of rebuttal must depend upon the particular circumstances of each case.

If for example the appellant had refrained from tendering his own evidence, and relied upon others to establish an alibi, such evidence in rebuttal could not have been properly received merely in way of rebuttal.

But by his going into the witness box, to prove his innocence and try to shew a case wherein accident or mistake was all that was or could be involved, he raised a question which had to be met and could be effectually so by proving his previous criminal acts which could not rest upon mere mistake or accident.

One of these took place in 1914 and the other a year or two earlier—quite enough to illuminate the whole story.

As to the collateral effects on the minds of those having to pass upon such a case, that is something counsel defending an accused have to reckon with, and be prepared for if rendering same necessary by pursuing a hazardous course.

Often they have to take chances and do the best they can; but all that furnishes no reason for rejecting evidence when clearly admissible either in opening or in rebuttal according to the circumstances of each case.

And one guiding rule in regard thereto should ever be section 1019 of the Criminal Code which reads as follows:—

1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal,

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some substantial wrong or miscarriage was thereby occasioned on the trial; provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed a new trial shall be granted. (55-56 Vict., ch. 29, sec. 746.)

I think this curative section applicable here.

The appellant, after obtaining the foregoing reservation for the Court of Appeal on the 27th of August, 1917, nearly three months and a half later, bethought himself of something else and that was to question the jurisdiction of the court that tried and convicted him.

He applied to the judge who had tried him, and, I incline to think, had with his granting his former reservation become (under the peculiar conditional jurisdiction he had for acting) *functus officio*, unless in response to the possible requirements and directions of the Court of Appeal, he had to submit questions relative to his jurisdiction.

He graciously acceded, though I most respectfully submit he might have been well advised under all the circumstances and the material submitted to him, to have refused to state any further question, unless and until the Court of Appeal under its power in section 1015 of the Criminal Code so directed.

The result would probably have been from what now appears that on this branch of the case there could have been no further appeal herein.

When or how otherwise can the convicted be limited in regard to his appellant rights?

Suppose he had a dozen objections to make and chose to submit one at a time only and revert to the trial judge when that decided to state the next, and try the experiment with each, as it is agreed there is no time limit, could he go on through his list thus?

Out of respect to the Court of Appeal I will assume in this case that they have in substance acted under sec. 1015 and of the questions thus secondarily presented there would remain the third as follows:—

3. Aviez-vous juridiction pour instruire et présider le procès expéditif de l'accusé dans les circonstances ci-dessus exposées et ce procès n'est-il pas nul pour avoir été instruit devant un juge qui n'avait pas juridiction?

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It was suggested by Mr. Fitzpatrick in argument that as the trial must be presumed to have begun with the election of the accused and his pleading to the charge and fixing a date for the continuance of it the learned trial judge whose jurisdiction is attacked and his jurisdiction that far being maintained unanimously we could not entertain this part of the appeal.

I agree there would be much force in the argument, especially when we bear in mind the possibility of an accused so acting being led by the appearance of things to assume that it was the judge who interrogated him as to his wish that would be his judge, but I fear the decision of this court in *Giroux* v. *The King* (1), puts an end to the import formerly attached to that test of arraignment and pleading and fixing a date for trial.

It seems the remaining question must therefore be answered.

I admit the possible serious consequences of such a view for unless the fact that a judge once seized of the conduct of a case is to be allowed to continue it even if his senior, whose absence is the basis of his jurisdiction, should return there may be confusion arise some day.

It is not this case that embarrasses me, but what may flow from our recognition of a dissent that only cuts a proceeding in two.

I agree with the view taken by the majority in the Court of Appeal that the learned senior judge's actual absence from the trial is enough to rest the jurisdiction of his substitute upon.

This statute enabling that to be done is not like some others which expressly or impliedly intended

(1) 56 Can. S.C.R. 63; 39 D.L.R 190.

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absence to mean an absence beyond the place of residence or jurisdiction. Upon that many decisions rest.

I may also observe that the inability of the senior judge to undertake the duty is an alternative ground for naming a substitute.

The statement of Judge Langelier that for personal reasons he did not wish to sit ought to be presumed as meaning for good reasons which in law were a valid excuse and would in the alternative suffice, although not expressed on the record.

As at present advised I should so presume, if I thought the statement in the record could be displaced by any such proof as offered.

I do not however think the record can be so displaced for our purpose by such alleged proof.

I therefore think the learned trial judge must be held to have had jurisdiction and therefore the appeal be dismissed with costs.

ANGLIN J.—Convicted by the Court of Sessions of the Peace of having unlawfully used means to procure a miscarriage upon one Alice Vachon in July, 1916, and thereupon sentenced to imprisonment for a term of five years, the appellant applied for and obtained the reservation of several questions of law under section 1014 of the Criminal Code. The questions so reserved were determined adversely to him by the Court of King's Bench—unanimously, with the exception of three, in respect of which Mr. Justice Lavergne dissented. The defendant now appeals to this court. I find his three grounds of appeal succinctly stated in the judgment of Mr. Justice Cross in these terms:—

(1) That the trial and conviction are null, because the judge who tried the case had power to act only in the absence or incapacity of the Judge of Sessions, whereas the latter was, in fact, neither absent nor incapacitated.

(2) That the learned trial judge erred in admitting evidence of other criminal acts of the appellant.

(3) That, in any event, there was error in admitting such evidence of other criminal acts in rebuttal.

(1) The appellant urges that it appears by an affidavit intituled and filed in the Court of Sessions of the Peace, apparently made gratuitously by one Chouinard, the clerk of the court, that, although there are formal entries in the record of the trial that Judge Choquette presided in the absence of Judge Langelier, made by the direction of the former, the latter was in fact in his chambers in the court house at the time of the commencement of the trial. Affidavits filed on behalf of the Crown in the Court of King's Bench not only do not contradict the fact so deposed to, but rather support the inference that it is true. In stating the reserved case Judge Choquette has informed the court that although Judge Langelier had certainly been absent from the city of Quebec when the preliminary inquiry was held, neither he nor Judge Langelier can state whether the latter was or was not in his chambers, as alleged in the affidavits, when the trial of the accused began. He adds:—

L'eut-il été, vu sa déclaration qu'il ne pouvait siéger, j'avais d'apres ma commission juridiction pour entendre la cause.

The reserved case contains no further statement as to the presence or absence of Judge Langelier.

I am unable to accede to the contention of counsel for the Crown that the admitted absence of Judge Langelier at the time of the preliminary investigation would give Judge Choquette jurisdiction to sit upon the trial of the defendant. His trial was a new proceeding which began only after arraignment and plea at a later date then fixed for the hearing. *Giroux* v. *The King* (1); *Re Walsh* (2), at p. 17. The absence of Judge Langelier having been recorded as the ground

(1) 56 Can. S.C.R. 63; 39 D.L.R. 190.

(2) 23 Can. Crim. Cas. 7; 16 D.L.R. 500.

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upon which Judge Choquette acted in his stead, the right of the Crown to invoke Judge Langelier's inability to act, if that be the import of Judge Choquette's reference to "*sa déclaration qu'il ne pouvait siéger,*" would seem at least questionable. I think the case must be dealt with on the footing that Judge Choquette's jurisdiction was dependent upon the "absence" of Judge Langelier.

Counsel for the Crown maintained that entries in the trial book conclusively established his absence and strenuously resisted their being controverted upon extraneous evidence. I question whether upon a proceeding such as this—a recourse afforded by the statute for the very purpose of determining whether the trial is open to exception upon any substantial ground that can properly be stated as a question of law—the verity of a statement in the record in regard to a mixed matter of law and fact essential to his jurisdiction made by or under the direction of a judge of a court of inferior jurisdiction, although it be a court of record, should be conclusively presumed (*Mayor of London* v. *Cox* (1); *Falkingham* v. *Victorian Railways Commissioner* (2), at pages 463-4).

But we are dealing with a stated case (sub.-sec. 6 of sec. 1014) and, except as provided for by sub.-sec. 2 of sec. 1017 and subject to the power conferred by subsec. 3 of the same section, I incline strongly to the view that in disposing of the questions reserved the appellate court is confined to the facts set forth in the stated case. Unless the affidavit of Chouinard, intituled and filed in the Court of Sessions should be taken to be part of the stated case, it does not disclose the presence of Judge Langelier in the court house or even in the city of Quebec at the time when the defendant's trial began.

(1) L.R. 2 H.L. 239, at p. 262. (2) [1900] A.C. 452.

In the view I take, however, it is unnecessary to determine these points.

For the purpose of disposing of the question now under consideration I shall assume (without so deciding) that it has been established by material proper for our consideration that Judge Langelier, though not present in court, was in fact in his chambers at the court house when the trial began. The defendant and his counsel appear not to have been aware of that fact, however, until after the trial had concluded and may therefore be excused for not having taken exception before or during it to the jurisdiction of the presiding judge.

Acting under Art. 3262(*a*) of the R.S.Q. (enacted by 5 Geo. V., ch. 52, sec. 3) Judge Choquette was empowered to hold the Court of Sessions of the Peace only

in case of the absence or inability to act of one or more of the (Judges of the Court of Sessions of the Peace).

By the Order-in-Council by which he was appointed and in his commission the judge whom he is to replace is designated as

the Judge of the Court of Sessions of the Peace whose residence is established in the City of Quebec.

This was Judge Langelier.

The expression "absence or inability to act" should of course be given a construction at once reasonable and in harmony with the purpose of the statute. "Inability to act" may or may not involve "absence." It is usually accompanied by physical absence; and absence may be due to physical inability to be present. But, as used in the statute, "absence" clearly means something different from "inability to act." It connotes physical non-presence from whatever cause. The question is non-presence in what place or within what area? We are not concerned with the cause of absence.

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It must be presumed to be for some good and sufficient reason (*Engeman* v. *The State* (1)), and not to be due solely to a mere arbitrary refusal to act, since such dereliction of duty (*Klaise* v. *The State* (2)) will not be assumed. For an instance of a statute authorising a deputy magistrate to sit upon the mere request of the magistrate appointed to hold the court see R.S.O. 1914, ch. 88, sec. 10.

It cannot have been the intention of the legislature that the jurisdiction of the replacing judge and the validity of any trial had before him should be open to question merely because it can be shewn that when it began the Judge of the Court of Sessions of the Peace was elsewhere in the city of Quebec or even in the court house itself. Many grave inconveniences and uncertainties in the administration of justice would result from such a construction of the statute. It would impose upon the replacing judge the obligation of instituting a judicial inquiry as to the whereabouts of the Judge of the Court of Sessions of the Peace before the commencement of every trial.

"Absence," as used in this statute, must, I think, be taken to mean absence from the bench, or, at the utmost, absence from the court-room in which the trial takes place. That is a fact of which the replacing judge can be personally cognisant when the trial is beginning. Beyond that his actual knowledge ordinarily cannot extend. Reason and authority would seem to concur in indicating this to be the proper construction of what must be conceded to be an ambiguous term (*Watkins* v. *Mooney* (3), at pages 652-4)

seldom used without explanatory words.

Phillips v. *Phillips* (4), at p. 172. Thus it may

(1) 54 N.J. Law 247, at p. 251.
(2) 27 Wis. 462.
(3) 114 Ky. 646.
(4) 1 P. & D. 169.

necessarily import prior presence. *Buchanan* v. *Rucker* (1), at p. 194; or it may mean merely

not being in a particular place at the time referred to,

without importing prior presence. *Ashbury* v. *Ellis* (2), at p. 345. It may imply constructive as well as actual absence. *In re Brown* (3), at p. 385. In its technical meaning and standing alone it signifies "want of appearance." *Phillips* v. *Phillips* (4). *In common usage (it) simply means a state*

of being away from or at a distance from, not in company with.

Paine v. *Drew* (5), at p. 317; and *the words of a statute are to be taken in their ordinary familiar signification and import.* Potter's Dwarris on Statutes, p. 193.

The reference in the order-in-council and commission to the "residence in the city of Quebec" of Judge Langelier are invoked by the appellant in support of his contention that "absence" here means absence from that city. But these words are not in the statute, and it is the statute that prescribes the conditions of the jurisdiction which it confers. The language of the commission and order-in-council cannot aid in its construction.

In *Bingham* v. *Cabbot* (6), the Supreme Court of the United States was called upon to determine the meaning of the word "absent" in a statute affecting the constitution of Federal Circuit Courts. By sec. 4 of ch. 20 of the statute of the 1st session of the First Congress the Federal Circuit Courts were constituted each to consist of two Justices of the Supreme Court of the United States and the District Judge. Sec. 1 of ch. 22 of the statute of the 2nd session of the Second Congress enacted that the attendance of only one of

(1) 9 East 192.
(2) [1893] A.C. 339.
(3) 80 Cal. 381.
(4) 1 P. & D. 169.
(5) 44 N.H. 306.
(6) 3 Dal. 19.

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the Justices of the Supreme Court should be sufficient and that

when only one Judge of the Supreme Court shall attend any Circuit Court and the District Judge shall be absent * * * such Circuit Court may consist of the said Judge of the Supreme Court alone.

It appeared that the District Judge was present on the Bench but a memorandum in the margin of the record stated that he "did not sit in the cause." The court said, at p. 36:—

We are perfectly clear in the opinion that, although the District Judge was on the Bench, yet, if he did not sit in the cause, he was absent in contemplation of law.

In *Engeman* v. *The State* (1), a similar question arose under a New Jersey statute of 1888 enabling the Chief Justice, or any associate Justice of the Supreme Court of the State

in case of absence, sickness or other inability, or vacancy in the office of the law or president judge of any county in this State to sit or perform the duties of his office.

Van Syckle J., delivering the judgment of the court, said, at p. 251:—

It is not necessary that the Supreme Court Justice, before he may proceed with the business in these courts shall institute a judicial inquiry to ascertain why the law judge is not in attendance. "Absence" in this Act means non-presence in the courts; when the law judge is temporarily away he must be presumed to be away by reason of some inability to attend and he is absent in the statutory sense.

In *Byrne* v. *Arnold* (2), the Supreme Court of New Brunswick passed upon the construction of the 105th section of the Canada Temperance Act, providing that

if (a) prosecution is brought before two * * * justices no other justice shall sit or take part therein unless by reason of their absence or the absence of one of them, etc.

The court was of the opinion that if the justices before whom the prosecution was begun were lawfully subpœnaed as witness, they would, although physically present in the court-room, be "absent" in contempla-

(1) 54 N.J. Law 247. (2) 24 N.B. Rep. 161.

tion of the statute so that two other justices might lawfully carry on the proceeding. Allen C.J., with whom Weldon and Fraser JJ. concurred, said at 164:

I think the word "absence" in this section does not necessarily mean actual absence from the place or room where the trial is held; but would apply to a case where the justices had, for some cause, become incapable of sitting and taking part in the proceedings. If such was the case I think they would be absent within the meaning of the Act, though not absent in fact.

Palmer J. adds at 167:

When the Canada Temperance Act enacts that when a justice is absent another can act, it does not mean that such justice is not in any particular house or place but simply that he is not taking part in the hearing of the case, *i.e.*, does not form a member of the court * * * If this construction of the Act is not correct it would be in the power of a defendant to defeat any trial, and a construction that would lead to such a result, I do not think is even reasonable.

In *Ex parte Cormier* (1), the Supreme Court of New Brunswick, again called upon to construe a statute empowering another magistrate to act in the absence of the police magistrate, held that

The absence intended is * * * not actual absence from the jurisdiction or even from the place of trial, but it includes inability to attend to the business of the court such as was proved in this case.

The attendance of the police magistrate had been required before another tribunal apparently sitting in the same building at the time of the trial.

Of course the history of the legislation or the context of the statute may indicate an intention that the word "absence" should receive a stricter construction. *Opie* v. *Clancy* (2), at pages 46-7. Compare *Manners* v. *Ripsam* (3) with *Lucas* v. *Ensign* (4), at p. 144.

While I think that the mention of inability to act of the Judge of Sessions as a distinct ground upon which the replacing judge may sit in his stead makes it clear that "absence" in the statute means actual absence

(1) 17 Can. Cr. Cas. 179.
(2) 27 R.I. 42.
(3) 61 N.J. Law 207, at p. 208.
(4) 4 N.Y. Leg. Obs. 142.

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and not merely constructive absence such as was held is sufficient in *Bingham* v. *Cabbot* (1), and *Byrne* v. *Arnold* (2), I am of the opinion that the "absence" of Judge Langelier is sufficiently established by the admitted fact that when the trial of the appellant began he was neither on the Bench nor in the court-room where such trial was held. His subsequent presence would be immaterial. *Reg.* v. *Perkin* (3); *Ex parte Cormier* (4).

(2) The evidence in chief on behalf of the Crown furnished cogent proof of a miscarriage having followed the use by the defendant upon the person of Alice Vachon of instruments adapted to procure it. That it was so caused was an inference clearly open. The defendant's criminal intent was also *primâ facie* established since every man is presumed to intend the natural and probable consequences of his acts. Giving evidence on his own behalf the accused admitted having used instruments as deposed to by the chief witness for the Crown (a matter theretofore in issue on his plea of not guilty), but he denied his intent to procure a miscarriage, averring that miscarriage had in fact already begun before his intervention and that his purpose was merely to obviate septic poisoning. The defence of innocent intent was thus set up. To rebut this defence —to aid the court in determining the true intent of the accused, thus made the vital issue—the Crown maintains that evidence of the use by him of similar instruments in two other cases for the purpose of procuring miscarriage was admissible.

The objections taken by the defence to the admissibility of this evidence are that it is irrelevant to the issue, that it is unfair to the accused as tending to prove

(1) 3 Dal. 19.
(2) 24 N.B. Rep. 161.
(3) 7 Q.B. 165.
(4) 17 Can. Cr. Cas., 179.

the commission by him of other crimes and that he is a person of bad character, and that it contradicts him on a collateral issue.

Answers of the accused upon purely collateral matters are no doubt conclusive. But matter that is relevant is not purely collateral. Moreover, that the evidence in question had the effect of contradicting him on such a matter would not be a good reason for excluding it if otherwise admissible.

It no doubt tended to impeach the defendant's character. But that again does not form a ground for its exclusion if admissible for other purposes. *Rex* v. *Kurasch* (1), cited by Mr. Roy himself, makes this very clear. See too *Rex* v. *Thompson* (2).

The other objections are more serious and, in view of the decision of the Ontario Court of Appeal in *Rex* v. *Pollard* (3), call for careful consideration. Counsel for the Crown maintains that the evidence in question is relevant and admissible because in itself it tends to make it more probable that the intent of the accused in using instruments on Alice Vachon was criminal and not innocent and also because it established two of a number of cases in which, according to the evidence of Alice Vachon, the accused had stated to her that he had administered like treatment under similar circumstances, and is corroborative of her testimony. The passage in Alice Vachon's evidence is as follows:—

Q.—Est-ce que le médecin a essayé de vous rassurer? R.—Oui monsieur.

Q.—Qu'est-ce qu'il vous a dit? R.—Il m'a dit qu'il en traitait d'autres pour la même chose que moi et qu'il y en avait què ça prenait du temps, plus de temps que moi.

Q.—Vous en a-t-il nommé des cas? R.—Il m'a pas nommé des cas. Il m'a pas nommé les noms, mais qu'il y en avait une à Québec ici qui restait chez eux à elle et puis qu'elle était malade la même chose que moi, mais qu'elle était pas découragée.

(1) 25 Cox C.C. 55. (2) [1917] 2 K.B. 630, at p. 632.
(3) 19 Ont. L.R. 96.

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Q.—Vous a-t-il parlé de d'autres aussi, mademoiselle? R.—Oui, il m'a dit qu'il y en avait deux ou trois qu'il soignait comme ça.

This testimony counsel for the Crown maintains affords some evidence that procuring abortion was systematic with the accused.

In *Pollard's Case* (1), basing its decision on *Rex* v. *Bond* (2), the Ontario Court of Appeal held that testimony similar to that given in the case at bar by Bernadette Cleremont née Cloutier and Laetitia Cloutier had been improperly admitted in the absence of other evidence of a system of the existence of which a single prior criminal act of the same kind would not afford any proof.

In *Makin* v. *Attorney-General for New South Wales* (3), at p. 65, Lord Herschell formulated the rule in these terms, which have been accepted as authoritative in all subsequent cases:—

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand. the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or *to rebut a defence which would otherwise be open to the accused.*

This language is expressly approved of by the House of Lords in *Rex* v. *Ball* (4). In *Rex* v. *Wyatt* (5), Lord Alverstone, after citing it, quoted from the judgment of Lord Russell of Killowen C.J. in *Reg.* v. *Rhodes* (6), at p. 81, the following passage:—

> It seems to me quite clear that if the transactions with Elston and Chambers had taken place before that with Bays at a period not too remote, the evidence of Elston and Chambers would have been admissible against the prisoner.

(1) 19 Ont. L.R. 96.
(2) [1906] 2 K.B. 389.
(3) [1894] A.C. 57.
(4) [1911] A.C. 47.
(5) [1904] 1 K.B. 188.
(6) [1899] 1 Q.B. 77.

The transactions with them were similar to that charged in the indictment. At p. 193 Lord Alverstone concludes:—

> The evidence objected to was clearly admissible as tending to establish a systematic course of conduct on the part of the accused and as negativing any accident or mistake or the existence of any reasonable or honest motive.

"These last words," says Jelf J., in *Rex* v. *Bond* (1), at p. 412, "are equivalent to and confirm Lord Herschell's expression

> to rebut a defence which would be otherwise open to the accused.

As Darling J. points out in the same case, at p. 409, Lord Herschell did not mean

> that such evidence might be called to rebut any defence possibly open but of an intention to rely on which there was no probability whatever. Here, however, the evidence was called to overthrow a defence already set up and admitted to be the defendant's answer to the charge.

In the latest reported case that I have found, *Rex* v. *Thompson* (2), Lord Reading C.J. said, at p. 632:—

> There is no doubt as to the principles of law applicable to this case; they are well settled and in recent years have been frequently discussed and approved, and notably by the Judicial Committee of the Privy Council, in *Makin* v. *Attorney-General for New South Wales* (3), and by the House of Lords in *R.* v. *Ball* (4). The general rule is *that the evidence tendered must be relevant to the charge* for which the accused is being tried. If the evidence merely proves, or tends to prove, that the accused is of such evil character or disposition that he is likely to have committed the offence charged against him, it is irrelevant and is inadmissible. If *it tends to prove that the accused committed the crime charged against him it is relevant and admissible*, notwithstanding that incidentally it may also prove, or tend to prove, that the accused is a person of criminal or immoral character or disposition. *Reg.* v. *Ollis* (*per* Channell J.) (5); *Perkins* v. *Jeffery* (6). The difficulty lies in the application of this general rule to particular cases.

This judgment was affirmed in the House of Lords, 13 Crim. App. R. 61(7).

(1) [1906] 2 K.B. 389.
(2) [1917] 2 K.B. 630.
(3) [1894] A.C. 57.
(4) [1911] A.C. 47.
(5) [1900] 2 K.B. 758, at pages 781, 782.
(6) [1915] 2 K.B. 702, at page 707.
(7) [1918] A.C. 221.

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In *Rex* v. *Boyle and Merchant* (1), at p. 347, the same learned Chief Justice, discussing the admissibility against a defendant charged with demanding money with menaces of evidence of other recent transactions similar in all respects to that charged, said

> We think that the ground upon which such evidence is admissible is that it is relevant to the question *of the real intent of the accused in doing the acts*. Its object is to negative such a defence as mistake or accident *or absence of criminal intent* and to prove the guilty mind which is the necessary ingredient of the offence charged. * * * In the recent case of *Mason* v. *Rex*(2), this court followed the decision in *Reg.* v. *Rhodes*(3), and came to the conclusion that the evidence of similar transactions subsequent to the charge was admissible *in order to rebut the defence set up.*

Avory J., quoting the foregoing language with approval in delivering the judgment of the Court of Criminal Appeal in *Perkins* v. *Jeffrey* (4), at p. 708, preceded it with this statement:—

> But it is, we think, open to doubt whether evidence is admissible to prove a "system or course of conduct" unless it is relevant to negative accident or mistake *or to prove a particular intention.*

In *Rex.* v. *Shellaker*(5), on a prosecution for unlawfully and carnally knowing a girl under 16, evidence of previous acts and conduct of the accused tending to shew that he had previously had connection with the girl was held admissible, as Isaacs C.J. said, citing *Reg.* v. *Ollis* (6), for the purpose of shewing intent. See too *Rex* v. *Smith*, (7); *Reg.* v. *Francis* (8); Archbold's Criminal Pleading Evidence and Practice, 25th ed. (1918), 345 *et seq.* Roscoe's Criminal Evidence, 12th ed., p. 80.

In *Rex* v. *Fisher* (9), Channell J., speaking for the Court of Criminal Appeal, said at p. 152:—

(1) [1914] 3 K.B. 339.
(2) 10 Cr. App. Rep. 169.
(3) [1899] 1 Q.B. 77.
(4) [1915] 2 K.B. 702.
(5) [1914] 1 K.B. 414.
(6) [1900] 2 K.B. 758.
(7) 84 L.J. K.B. 2153.
(8) 30 L.T. 503.
(9) [1910] 1 K.B. 149.

The principle is clear, however, and if the principle is attended to I think it will usually be found that the difficulty of applying it to a particular case will disappear. The principle is that the prosecution are not allowed to prove that the prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he committed the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that, it proves that the prisoner has committed another offence.

And at p. 153:

If all the cases had been frauds of a similar character shewing a systematic course of swindling by the same method, then the evidence would have been admissible.

The passage first quoted from the *Fisher Case* (1) is approved in *Rex* v. *Rodley* (2), at p. 472. In *Rex* v. *Ball* (3), a case of incest, the House of Lords upheld the admission of evidence of previous incestuous relations between the defendants to establish, as Lord Loreburn C. says, at p. 71, that

the proper inference from their occupying the same bedroom and the same bed was an inference of guilt or—which is the same thing, in another way—that the defence of innocent being together as brother and sister ought to fail.

This, says Avory J. in *Rex* v. *Rodley* (2), at p. 473,

comes within the rule previously indicated that (such) evidence is admissible to rebut a defence really in issue.

In *Reg.* v. *Ollis*(4), the defendant was charged with obtaining money on three worthless cheques. To prove guilty knowledge the prosecutor on a former charge against the accused (of which he had been acquitted), based on a like use of a single worthless cheque, was called and gave evidence that he had been induced to give the accused his cheque by a false representation that another cheque taken in exchange was

(1) [1910] 1 K.B. 149.
(2) [1913] 3 K.B. 468.
(3) [1911] A.C. 47.
(4) [1900] 2 K.B. 758.

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good. A strong court held the evidence admissible, Lord Russell of Killowen C.J. saying, at p. 76:—

> It is impossible to say that all these facts were not relevant *as shewing an intention to defraud.* The fact of the dishonour of the first cheque might, and perhaps ought to, have been capable of explanation, but it is impossible to say that it was not relevant.

Channell J., at p. 782, gives a very apt illustration of the principle as applied to a case of passing counterfeit coin.

In part the syllabus in *The People* v. *Hodge* (1), reads as follows:—

> Where defendant on trial for manslaughter in procuring an abortion, admitted the abortion, but claimed that he believed that the operation was necessary, and that he performed it without criminal intent, evidence that he had performed a similar operation on another woman for the purpose of producing an abortion was admissible on the issue of intent.
>
> See too *The People* v. *Seaman* (2), at p. 357 *et seq.*

I do not cite *Reg.* v. *Dale* (3), referred to by Mr. Justice Cross, because, although very much in point, and an opinion of Charles J., whom Lord Alverstone in *Rex* v. *Thomson* (4), at p. 22, speaks of as "a great authority," it has been adversely commented upon by that learned Chief Justice at p. 396 and by Lawrence J., at p. 424, in *Rex* v. *Bond* (5), the case which probably calls for the most careful consideration.

That case involved a charge similar to that now before us. The accused had admitted to Crown witnesses that he had used instruments on the complainant but "suggested" that it was for a lawful purpose and with no criminal intent.

That was substantially his defence. The evidence of one Taylor, that he had performed a like operation upon her to procure a miscarriage, was admitted to shew criminal intent. She added, however, that the

(1) 141 Mich. 312.
(2) 107 Mich. 348.
(3) 16 Cox C.C. 703.
(4) [1912] 3 K.B. 19.
(5) [1906] 2 K.B. 389, at p. 398

accused had told her "he had put dozens of girls right." The judgments are very carefully and, if I may be permitted to say so, as was usual with that learned judge, very accurately analysed by Osler J.A. in *Rex* v. *Pollard* (1), with the probable exception of that of A. T. Lawrence J. As Mr. Justice Osler says, at p. 99:—

> The point (in *Pollard's Case*(1)) was not actually decided in the recent case of *The King* v *Bond*(2), but it would seem from the opinions of the majority of the judges who took part in the decision that the evidence was not in the circumstances admissible. * * * In the case before us the evidence of system which carried the day against the accused in *The King* v. *Bond* (*supra*), or anything approaching it, which would let in proof of a single prior criminal act as part of a system is wanting; and therefore, in my opinion, the conviction of the prisoners cannot stand (p. 102).

The evidence of system referred to was the statement of the prisoner in the *Bond Case*(2) made to the Crown witness Taylor that, "he had put dozens of girls right." *Pollard's Case*(1), therefore, is authority for the admissibility on the issue of intent of proof of a single prior criminal act of like nature provided some proof is first given of a system of which it may form part.

Of the seven judges who heard the appeal in the *Bond Case*(2), two, Alverstone C.J. and Ridley J., thought the evidence of the prior act inadmissible apparently because the defence was not accident or mistake and the evidence of system was in their opinion insufficient.

Jelf J. and Darling J. thought the evidence admissible without reference to the statement of the accused as to his treatment of dozens of other girls, and that the fact that it was a single instance affected only its weight and not its admissibility. The reasoning of Darling J., at pp. 409-10, is very cogent. He concludes:—

> Taylor's evidence went to prove that, contrary to the defendant's allegation in defence as to his being engaged in doing a lawful act, he

(1) 19 Ont. L.R. 96. (2) [1906] 2 K.B. 389, at p. 398.

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was doing a thing which, in his view, was apt to procure abortion, and that because it was so he had already done it with that unlawful avowed knowledge and purpose. This evidence, therefore, tends to prove that the defendant had, in repeating his former conduct, an intention different from that alleged by him in his defence, so it is not foreign to the point of it nor less relevant because it goes to prove the charge in the indictment.

Jelf J., at p. 413, says:—

> Upon the question whether there was or was not a design on the prisoner's part to procure the miscarriage of Ethel Jones evidence that on another occasion he had done the same thing with similar instruments under similar circumstances with that design upon another girl seems to me to have a definite bearing. The fact that only one other case was brought forward and that case nine months old, goes in my mind, only to the weight, and not to the admissibility of the evidence The subject of inquiry is the state of mind of the prisoner when he used the instruments upon Ethel Jones and the improbability that on one occasion under precisely similar circumstances he should have the design to procure a miscarriage, and on the other occasion should have another and an innocent object would tend to shew (and that is all that is necessary) that he had the bad design in regard to Ethel Jones. Of course, if instances are multiplied, the weight of the evidence is greatly increased, and if a system is shewn it may be irresistible. But to my mind it is quite unnecessary to shew a system which is only a question of degree.

Kennedy J., if there had not been anything more, would have excluded the evidence of a single prior act done nine months before as affording no just ground of an inference of guilty intent in the case on trial. Citing *Reg.* v. *Cooper* (1), at pp. 549-50, however, he thought the statement made by the prisoner to the witness Taylor could not be excluded and amounted to proof of a course of conduct sufficient to render proof of the prior operation admissible as evidence of an act that formed part of such course of conduct and warranting an inference of a systematic pursuit of the same criminal object. A single instance of a former similar offence is in his opinion relevant without proof of system only to rebut a defence of accident or mistake.

I confess my inability to understand how evidence

(1) 3 Cox C.C. 547.

of a single prior similar act can be relevant to an issue of design versus accident or mistake, if it be wholly irrelevant to an issue of criminal versus innocent intent.

A. T. Lawrence J., as I read his judgment, distinctly held evidence of the former offence admissible as relevant on the issue of intent. He says, at p. 420:—

> The relevance depends upon the issues actually in contest; whenever it is in issue whether the prisoner, though he did the act alleged, did it without any intention, *i.e.*, accidentally, or without any criminal intention, *i.e.*, innocently, such evidence may be given.
>
> * * * * * * * * *
>
> If the act charged is manifestly an intentional act, but the defence is that it was honestly or properly done, such evidence is admissible to rebut this defence by shewing knowledge of some fact essential to guilty knowledge or by shewing that in other cases similar acts have been committed by the prisoner by the like means under the like circumstances. The number of cases and the peculiarity of the circumstances tend to shew the improbability of the innocent intention (p. 421).
>
> The mind of the prisoner can only be revealed by his words or by his acts. It is in many cases impossible to form a sound conclusion upon the state of his mind at a given moment, unless his words and acts under similar circumstances are subjected to investigation. It is for this reason that I think the words of Lord Herschell—"to rebut a defence which would otherwise be open to the accused"—are an essential part of the proposition of law. This idea is also expressed by Lord Alverstone C.J. in *Rex* v. *Wyatt* (1), when he says that such evidence is admissible as negativing any accident or mistake or the existence of any reasonable or honest motive.
>
> Any statement of the law which omits this latter part of the proposition would seriously cramp the administration of justice and cannot be supported upon principle.
>
> * * * * * * * * *
>
> In all cases in order to make evidence of this class admissible there must be some connection between the facts of the crime charged in the indictment and the facts proved in evidence. In proximity of time, in method, or in circumstances there must be a nexus between the two sets of facts otherwise no inference can be safely deduced therefrom (p. 424).

The learned judge concluded:—

> It is impossible without reversing a long series of cases to say that the evidence of Taylor was not admissible. It shewed that the illness of the prosecutrix was the result of design, and not of accident; it shewed that the prisoner's scheme or system when the indulgence of

(1) [1904] 1 K.B. 188 at p. 193.

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his passions had got girls into trouble was to use these instruments upon them to relieve himself from the burden of paternity; *it tended to rebut the defence he set up of an innocent operation, and to negative any reasonable or honest motive for its performance.*

It seems to me with respect, to be reasonably clear that Mr. Justice Lawrence agreed with Darling and Jelf JJ. rather than with Kennedy and Bray JJ., as Mr. Justice Osler appears to have thought.

No doubt, however, as put by Osler J.A., it was

the evidence of system which carried the day against the accused in *The King* v. *Bond*(1).

It led Kennedy and Bray JJ. to hold the evidence in question admissible thus supporting the conclusion of Darling, Jelf, and Lawrence JJ. in favour of dismissing the appeal. While the *Bond Case* (1), therefore, certainly cannot be cited as an authoritative decision for the admission of evidence of the commission by the accused of another similar offence, if unaccompanied by some other similar evidence of system, to prove criminal intent where that is in issue, or to rebut a defence of innocent or lawful purpose, the reasoning of Darling, Jelf, and Lawrence JJ. seems to me unanswerable. With Jelf J. I am of the opinion that whatever objection there may be to evidence of a single other similar offence goes to its weight only and not to its admissibility. It

tends to rebut the defence (of innocent purpose) which would be otherwise open to the accused

(*Makin* v. *Attorney-General for New South Wales*(2))—

to rebut the defence set up,

(*Mason* v. *Rex*(3))—

to rebut a defence really in issue,

(*Rex* v. *Rodley*(4))—

(1) [1906] 2 K.B. 389.
(2) [1894] A.C 57.
(3) 10 Cr. App. R. 169.
(4) [1913] 3 K.B. 468.

to overthrow a defence already set up and admitted to be the defendant's answer to the charge

Rex v. *Bond*(1), *per* Darling J.—

Its object is to negative the defence of absence of criminal intent (*Rex* v. *Boyle and Merchant* (2)), to establish that the defence of innocent conduct should fail (*Rex* v. *Ball* (3)), to prove a particular intention (*Perkins* v. *Jeffrey*(4)). With Lord Russell C.J. I find it impossible to say that such evidence is not relevant (*Reg.* v. *Ollis*(5)), inasmuch as it tends to make more probable the criminal intent regarding which, in view of the defence set up, it was essential that the Crown should not leave room for reasonable doubt. How far it does so is a question of degree which affects its weight not its admissibility; see the speech of Lord Atkinson in *Rex* v. *Thompson* (6), at p. 72.

But while I think the evidence of the Cleremont and Cloutier women was admissible without and apart from any evidence of system, we have in the passage quoted from the testimony of Alice Vachon, an admission by the accused of his practice or system of procuring abortions quite as clear and strong as was that deposed to by the witness Taylor in the *Bond Case*(1) and deemed sufficient by Kennedy and Bray JJ. to render admissible evidence of another like offence committed by the accused. The evidence here is of two like offences in the commission of which the method pursued was so similar to that adopted in the accused's treatment of Alice Vachon that the necessary nexus is clear notwithstanding that they took place, one, two years, and the other, four or five years before.

The admissibility of the evidence could probably be

(1) [1906] 2 K.B. 389.
(2) [1914] 3 K.B. 339.
(3) [1911] A.C. 47.
(4) [1915] 2 K.B. 702.
(5) [1900] 2 K.B. 758.
(6) 13 Cr. App. R. 61; [1918] A.C. 221, 229, 231.

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upheld also on the ground that it is corroborative of the testimony of Alice Vachon that the accused had told of having treated other girls in the same manner. *Rex* v. *Chitson* (1).

The weight of the testimony was, of course, for the consideration of the trial judge in this case, as it would have been for that of a jury had the trial been by jury. I entertain no doubt whatever that the evidence objected to was admissible.

Nor have I any doubt that the evidence was properly received in rebuttal. It was offered to meet the defence of innocent purpose put forward by the accused. While such a defence was always open, there was no probability of its being set up until the prisoner gave his testimony. It was then actually in issue. *Rex* v. *Bond* (2), at pp. 409, 420. The evidence was offered to rebut the respondent's denial of criminal intent and, according to the view stated in a very recent criminal case, could not properly have been admitted for that purpose until that defence was definitely put forward. Avory J. in delivering the judgment of the Court of Criminal Appeal in *Perkins* v. *Jeffery* (3), said, at p. 708:

> Having regard to what was said in the House of Lords in the case of *Rex* v. *Christie* (4), as to the practice in a criminal case of guarding against the accused being prejudiced by evidence which though admissible would probably have a prejudicial influence on the minds of the jury out of proportion of its true evidential value, we think that such evidence as to other occasions should not be admitted unless and until the defence of accident or mistake, or *absence of intention* to insult, is definitely put forward.

But as Osler J.A. said in *Rex* v. *Pollard* (5), at p. 103, in answer to the contention of the appellants that the evidence objected to, if admissible, should have formed part of the Crown's case in the first instance and that it was erroneous to admit it in reply:—

(1) [1909] 2 K.B. 945.
(2) [1906] 2 K.B. 389.
(3) [1915] 2 K.B. 702.
(4) [1914] A.C. 545.
(5) 19 Ont. L.R. 96.

In my view, however, the point is of no importance. If admissible at all, the evidence might, by leave of and in the discretion of the trial judge, be given at either stage of the case for the purpose of disproving honesty of motive, if that were the defence relied upon, or of rebutting a defence of accident or mistake, or to contradict the defendant on a point material to the charge, as in *The King* v. *Higgins* (1).

In *Rex* v. *Crippen* (2), the Court of Criminal Appeal held that:

Where evidence which is relevant to the issue is tendered by the prosecution to rebut the case set up by the defence it is for the judge at the trial to determine in his discretion whether such evidence should be allowed to be given or not. Even if the judge exercised his discretion in a way different from that in which the Court of Criminal Appeal would have exercised it, that affords no ground for quashing the conviction of the prisoner. If, however, it is shewn in any case that the prosecution has done something unfair which has resulted in injustice to the prisoner the Court of Appeal may interfere.

Here the learned judge when admitting the testimony of Cleremont and Clouthier definitely informed the defendant that he would have the fullest opportunity of meeting it by calling any further evidence he might wish in sur-rebuttal and offered him an adjournment for that purpose; and the defendant actually gave evidence in contradiction of that given by those witnesses.

Not only was the evidence in my opinion properly admitted but every care was taken that the accused should suffer no possible injustice by its reception in rebuttal.

The appeal fails and should be dismissed.

BRODEUR J.—I am of opinion that this appeal should be dismissed with costs. The reasons for judgment of Mr. Justice Anglin and of Mr. Justice Lemieux having been communicated to me, I concur in those reasons.

LEMIEUX C.J. (*ad hoc*).—On the 15th May, 1917, Brunet, a physician, was convicted, before Judge

(1) 7 Can. Cr. Cas. 68. (2) 27 Times L.R. 69.

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Choquette, at Quebec, of practising abortion on the person of one Alice Vachon, and sentenced for such crime to five years in the penitentiary (303 Crim. Code).

Before passing sentence, the judge at Brunet's request reserved for the decision of the Court of King's Bench, the two following questions:—

1. Whether the presiding judge had jurisdiction to hear and determine the case;
2. Whether certain evidence adduced in rebuttal by the Crown was legal or not.

Appellant Brunet has contended, as well before the Court of King's Bench as before the present court, that Judge Choquette had no jurisdiction to hear and determine the case and that the evidence in reply put in by the Crown was illegal and prejudicial to the accused inasmuch as the trial judge had relied on such evidence to convict the appellant.

First Question.

Validity of the evidence in rebuttal or in reply adduced by the Crown.

As stated in the record of the reserved case, it was proved by the prosecution that the accused had, on the 13th, 14th, 15th and 16th days of July, 1916, used certain surgical instruments on the person of one Alice Vachon, an unmarried female, who was pregnant at the time, for the purpose of procuring her miscarriage.

The Crown, in making its proof in chief, adduced the evidence of the girl upon whom the illegal operation had been performed as well as medical evidence of the symptoms of Alice Vachon and of the mutilated condition of the fœtus and then rested its case.

Brunet, the accused, thought proper to be examined in his own behalf and stated, as a witness, that the instruments used by him on the person of Alice Vachon

were so used for a lawful purpose and without any criminal intent.

In order to repel such criminal intent which the girl's evidence would fasten on him, the following question is put to Brunet by his attorney:—

Q.—At all the visits which Alice Vachon made to you, she has sworn that you had worked in her body with certain instruments to bring about abortion, at almost every one of her visits, except in the afternoon; I ask you, is that true or not?

A.—I did not use instruments to bring about abortion, but I used instruments to produce disinfection.

In cross-examination, he was asked by the Crown if it was not true that, in 1914, he had procured the miscarriage of two females living on Bridge St., Quebec city.

Following are the questions asked him in that connection as well as his answers thereto:—

Q.—Now, did you not either procure the abortion of two young girls residing on Bridge St. in the fall of 1914? Question objected to. Question allowed. A.—It was not done, that is sure.

Q.—I put you the question whether, in the fall of 1914, you did not procure the abortion particularly of a girl residing on Bridge St.? Question objected to. Objection reserved. A.—I do not recollect that.

Q.—Will you swear that that did not happen? A.—I would have to see the person to be able to tell.

Q.—You cannot remember? A.—Why no; in 1914, I do not remember.

The Crown, in reply or in rebuttal, heard, as witnesses, two women, Laetitia Cloutier and Bernadette Clouthier, who testified that the appellant had procured the miscarriage of each of them, some few years before, by methods which resembled those described by Alice Vachon as having been applied to her.

Brunet, heard as a witness in his own behalf, expressly admits having used instruments on the person of Alice Vachon; he denies however that it was with the criminal intent of procuring abortion, but states, on the contrary, that it was for disinfection purposes.

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Brunet's assertion was obviously intended to exculpate himself and to repel or disprove all evidence tending to shew that he had employed such instruments for abortive purposes.

Under such circumstances, was the Crown entitled to contradict Brunet, to rebut his affirmation and to examine, in reply, witnesses to shew that Brunet, with a criminal intent, that of causing abortion, had performed, on those very witnesses, similar practices, using instruments like those used in the case of Alice Vachon?

In this matter of evidence in reply, the rule adopted by all the English authors is that such evidence must not be confirmatory. Evidence in reply must, as a general rule, be strictly confined to rebutting the defendant's case and must not merely confirm that of the plaintiff or prosecutor.

Brunet's contention, as embodied in his testimony, that he had used certain instruments on the person of Alice Vachon not with a view to determining abortion but in order to produce disinfection, purported on his behalf the allegation of a certain fact intended to establish his good faith and dismiss any criminal intent.

Such his claim amounted to a special plea based on a special fact which the Crown, in the examination in chief, could not anticipate. That theory of the disinfection constituted a new fact which the Crown had the right to disprove or rebut by evidence in reply of other facts excluding good faith, that is to say, of similar practices previously performed by the accused, on other persons, for a like criminal purpose.

Such evidence was not confirmatory of the prosecutor's case, but was evidence the nature and intent of which was to rebut the defendant's case and pretensions.

Jurisprudence or at least a list of judgments are to the effect that the evidence to prove in reply or in re-

buttal against the accused similar acts committed by him on other occasions is legal, when the defence of absence of intent to commit a crime is definitely put forward. It has been decided that such evidence was admissible upon three grounds: to establish design, to rebut the defence of accident, mistake or lack of criminal intent, and as shewing a systematic course of conduct.

As said in *Perkins* v. *Jeffery* (1):

> There is an essential difference between evidence tending to shew generally that the accused had a fraudulent or dishonest mind, * * and evidence tending to shew that he had a fraudulent or dishonest mind in the particular transaction, the subject matter of the charge, then being investigated.

In the most recent criminal law treatise entitled Outlines of Criminal Law, published by Kenny, Professor of the Laws of England, 8th ed., p. 354, we find the following doctrine expounded:—

> Nor is there, even in English law, any intrinsic objection to giving evidence of the prisoner having committed other crimes, if there be any special circumstance in the case to render those crimes legally relevant.
> * * * * * * * * *
> Whilst the fact of a prisoner having committed other similar offences is not relevant to the question whether he committed the *actus reus* of which he is accused now, yet, so soon as this *actus reus* has been fully established, evidence of those previous offences may well be relevant to the question of his state of mind in committing this act (*his mens rea*) if the defendant do actually raise that question (*Rex* v. *Rodley*) (2). Such evidence was originally admitted only in exceptional offences where a denial of *mens rea* was peculiarly easy, like embezzlement or false pretences. But now the admissibility is recognised as a general rule in no way limited to peculiar classes of crime.

And the author quotes a number of cases where decisions were rendered supporting that principle.

On that ground, we find: that the evidence in reply adduced by the Crown through the two girls Leatitia and Bernadette Clouthier was legal inasmuch as such evidence was not confirmatory of the prosecution's case, but was meant to disprove or deny the assertion

(1) [1915] 2 K.B. 702 at p. 708. (2) 9 Cr. App. R. 69 at p. 75.

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made under oath by Brunet, of a new fact intended to establish his good faith; that such evidence was further legal inasmuch as it exposed or purported to expose Brunet's perverse or criminal mind in his practices or in his use of instruments on the person of the Vachon girl, to procure her abortion, by reason of the fact that, for a like criminal purpose, he had previously performed in a similar way on the Clouthier girls.

Second Question.

Had Magistrate Choquette proper jurisdiction to hear and determine the case?

Magistrate Choquette, who tried and convicted Brunet, is a Judge of the Sessions of the Peace, but his jurisdiction as such is subject to a particular condition, that is to say, he may sit only in the case of absence or inability to act of Judge Langelier, who is the regular Judge of the Sessions of the Peace, in and for the District of Quebec.

Brunet's contention is that Magistrate Choquette has heard and determined the information with which he was charged without due power or jurisdiction so to do, owing to the fact that, at the time of the trial, Judge Langelier was not absent, but that, on the contrary, he was then present in his chambers, at the court house, Quebec city, and furthermore that the condition to which Magistrate Choquette's jurisdiction is subject, *i.e.*, the absence of Judge Langelier, does not appear in the record.

All the proceedings had in the Brunet case before Magistrate Choquette bear, as a head-line, the statement that Magistrate Choquette is sitting in the absence and owing to the absence of Judge Langelier.

Such declaration in the record is supposed to be true or implies a presumption *pro tantum* of truth, to wit: that Judge Langelier was juridically absent for

reasons deemed valid which it is not our province to question or appreciate. Such presumption *pro tantum* could of course be nullified and superseded by a stronger presumption or by legal evidence, offered in the usual way of legal debate, in support of a plea declining the jurisdiction of the court.

No such declinatory plea was ever urged in this matter.

We read, in Broom's Legal Maxims, p. 722, that

> where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rule is *omnia præsumuntur rite et solleniter esse acta donec probetur in contrarium*, everything is presumed to be rightly and duly performed until the contrary is shewn. The following may be mentioned as general presumptions of law illustrating this maxim—that a man, in fact acting in a public capacity, was properly appointed and is duly authorised so to act; that the records of a court of justice have been correctly made, according to the rule, *res judicata pro veritate accipitur*; that judges and jurors do nothing causelessly and maliciously; that the decisions of a court of competent jurisdiction are well founded, and their judgments regular, etc.

The statute, when referring to the *absence* of Judge Langelier, making conditional upon such absence the jurisdiction with which Magistrate Choquette is vested, uses a word which must be construed in a broad and liberal acceptation. The word "absent" does not mean "physically away from the district or the court house." The juridical construction of that word "absence" rather implies non-presence of the judge on the bench or in the court-room. The reasons for the judge's absence from the hench or the court-room may be numerous and may consist in relationship to either of the parties in the case, in having expressed his opinion on the matter at issue, in his feeling temporarily indisposed and in so many other reasons *ejusdem generis* as may induce the judge to abstain from attendance on the bench or in the court-room.

It is Judge Langelier himself who, in such instances,

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appreciates the validity of the reasons of his absence. He is not bound nor called upon to make a statement in writing as to his absence and his reasons therefor or to fyle same in the record, in order to vest Magistrate Choquette with the necessary jurisdiction.

Such absence was sufficiently established by the statement heading the proceedings in the case: "present, Hon. Judge Choquette, in the absence of Judge Langelier."

The following decision seems to conform to the spirit of the statutory enactment under discussion as well as to common sense: "Absent" as used in Acts, 1888, p. 64, authorising the Chief Justice to hold court in the absence of a law judge means non-presence in the courts. When the law judge is temporarily away, he must be presumed to be away by reason of some inability to attend, and he is absent in the statutory sense. *The State* v. *Engeman* (1), from Words and Phrases Judicially Defined, vol. 1, p. 35.

At the time when the reserved case was argued before the Court of King's Bench, the Crown fyled a sworn declaration wherein Judge Langelier stated that it was to his knowledge and with his consent that Magistrate Choquette had tried the Brunet case.

Such statement, supposing it were valid or necessary, would go to shew that Judge Langelier had agreed that the case be heard by Magistrate Choquette, because, obviously, for one reason or another deemed legitimate, he himself did not want to act. The above declaration would also preclude any supposition that Magistrate Choquette might have interfered in the case or arrogated to himself powers and jurisdiction with which he was not legally vested.

(1) 23 Atl. Rep. 676; 54 N.J. Law 247.

In this affair, after Brunet had been sentenced, there took place certain formalities which, unless sternly discountenanced and reproved by our courts of justice, might lead to serious mishaps of a nature to interfere with the administration of justice in criminal matters.

Two months after the sentence, a clerk in the office of the Court of Sessions of the Peace gave his affidavit wherein he stated that Judge Langelier was present in court while Brunet was being tried. That clerk had no authority to make such declaration which had and could have no legal weight or value whatever. It could not avail as against the oft-repeated statement contained in the record that Magistrate Choquette had acted in the absence of Judge Langelier.

Other affidavits were also produced either to deny or corroborate the entry made in the record anent the absence of Judge Langelier. Such affidavits were not and could not be of any consequence in the decision of the reserved case. If really Magistrate Choquette had no jurisdiction, if he usurped the functions which he then exercised, there was but one way, during the trial, to dispute his jurisdiction and that was by special plea or exception. And if such want of jurisdiction only came to appellant's knowledge after his conviction, he could yet complain by urging the usual grounds, which he utterly failed to do.

We consequently find that Magistrate Choquette had due jurisdiction to hear and determine the case.

I am for dismissing the appeal.

Appeal dismissed.

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*June 25.

RICHARD ROBERT SHORTEN.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Criminal law—Indecent assault—Evidence—Complaint elicited by questions—Admissibility—Corroboration—Criminal Code, s. 1003.

The appellant was indicted for an indecent assault on a girl of seven years of age. At the trial evidence was admitted of the answers given by the girl to questions put by her mother immediately on her return home after the assault, the mother promising not to spank her if she told the whole truth.

Held, that the evidence was properly admitted as corroborating the credibility of the girl (who told what had happened without being sworn), as required by section 1003 of the Criminal Code.

Held, also, that the mother's promise not to punish the child did not make what she said her "assisted story."

APPEAL from the judgment of the Supreme Court of Saskatchewan, rendered on a case reserved for the opinion of the court by the trial judge.

The appellant was charged with carnally knowing Olive King, a girl of seven years of age. The evidence shewed that he met her and another girl of five years of age on the street and brought them into an empty house where the offence is alleged to have taken place. Both little girls made statements in court but did not give evidence under oath.

The mother of the girl gave evidence as to the answers given by her daughter when she was asked to explain the reasons of her prolonged absence; and the mother admitted having promised not to spank her if she would tell the whole truth.

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

The questions for decision were whether the evidence of the girl was "corroborated by some material evidence in support thereof implicating the accused," as required by section 1003 of the Criminal Code, and whether the statements made by her to her mother were "spontaneous."

C. J. Bethune for the appellant cited *The King* v. *McGivney*(1).

Harold Fisher for the respondent referred to *Rex* v. *Gray* (2); *The King* v. *Daun* (3); *Rex* v. *Scheller* (4); and *The King* v. *Burr*(5).

THE CHIEF JUSTICE:—I am of opinion that the statement of the child made to her mother immediately on her return home after the assault was properly admitted. It is true that the mother, irritated and alarmed at the prolonged absence of her daughter, was obliged to persuade her to explain the reason of that absence; but nothing that was said can be construed as questions of an inducing or intimidating character. The child understood that she was expected to explain the cause of her absence and nothing more.

There is also corroboration in other particulars, as pointed out by my brother Idington, and I have no doubt of the sufficiency of the proof of identification.

DAVIES J.:—The only doubt I entertained in this case of the admission in evidence of the young girl Olive King's statement to her mother as to what the prisoner had said and done to her arose, not from the fact that some natural and reasonable questions were put to the child by her mother which elicited the

(1) 22 Can. Cr. Cas. 222; 15 D.L.R. 550.
(2) 68 J.P. 327.
(3) 11 Can. Cr. Cas. 244.
(4) 23 Can. Cr. Cas. 1; 16 D.L.R. 462.
(5) 12 Can. Cr. Cas. 103.

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statement in question, but the fact that before making it the mother had promised not to spank her if she told the whole truth. I rather doubted whether this promise was not an inducement to make the statement, depriving it of being spontaneous.

After reading the evidence of the mother and the two late decisions of the Criminal Court of Appeal, *Rex* v. *Osborne*(1), and *Rex* v. *Norcott*(2), I am satisfied the evidence was under all the circumstances properly received. I am also satisfied that there was sufficient corroboration of the evidence of the child Olive King to convict the appellant.

The appeal should be dismissed.

IDINGTON J.:—As the majority of the Court of Appeal upheld the conviction, the only question within our jurisdiction and therefore which we can consider is what the learned dissentient judge may have expressed as his ground of dissent.

That if I understand him aright was that there was no evidence of corroboration which, I take it, means of the story of the little girl who says she was assaulted, including, of course, the identification of the appellant as the party implicated.

I think there was sufficient evidence, apart from that of the other little girl, of corroboration to satisfy the statute.

It consists of many little circumstances which I think it needless to dwell upon.

The identification of the appellant is the weakest part of the case and yet so ample that it could not have been properly withdrawn from a jury had there been one in the case.

I think as part thereof that the mother's entire story was properly admitted and considered.

(1) [1905] 1 K.B. 551. (2) 86 L.J. K.B. 78.

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Idington J.

I cannot agree with some of the expressions of the learned judge who gave the judgment of the court in the case of *Rex* v. *Dunning*(1). The question of the weight to be given the evidence of those whom the law in a variety of cases requires to be corroborated varies so much that I should hesitate to attempt to define the limits thereof or what question may be put by a mother to her child. The case of *Rex* v. *Osborne*(2), illustrates the problem of admissibility but only governs so far as that case decided. Each case stands on its own bottom.

Judges must as well as Crown officers ever be on the alert in cases of this kind to see that there is no ground for suspecting the good faith of mothers or others in putting forward the charge. The possibility of inciting the child or other persons to make such a charge as herein must ever be jealously guarded against.

Once assured of that good faith I should be sorry to test the admissibility of the evidence by any requirements upon the expressions a mother may have used in order to elicit the truth.

Of course the possibility of the child being innocently as it were misled into an assent to the mother's suggestive questions must be guarded against.

That again may come back to the question of weight to be given the evidence rather than its admissibility.

I do not think such cases as this must necessarily be governed for example by the rule against accepting admissions of a prisoner when induced by some one in authority.

The appellant's identification as the man seen with the children seems complete and is corroboration which cannot be rejected.

(1) 14 Can. Cr. Cas. 461. (2) [1905] 1 K.B. 551

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I should have preferred to have had related so far as admissible facts and circumstances the facts which led the police officer to arrest the accused.

The same line of thought which guided him if founded on circumstantial evidence might have aided the court in coming to the right conclusion as to the implicating of the accused.

It may, as experience teaches me, have been mere instinct, as it were, that guided the police officer or that he was told to get the man seen with the girls on the occasion in question.

In either such case his evidence could not furnish further facts.

I think the appeal should be dismissed.

ANGLIN J.:—I think there was evidence in corroboration of the evidence given by the child. Two witnesses identified the accused as a man who had been seen with the child not very long before the offence was committed. (*Rex* v. *Murray*(1)). He had no business whatever to be with her. When confronted with the child, he said:

"You never saw me before—you don't know me."

This conduct aids in his identification.

The evidence of the child's statement to her mother was, in my opinion, admissible. It was made shortly after the occurrence. It was "spontaneous" in the sense indicated by Lord Reading C.J. in *Rex* v. *Norcott*(2). Nothing more than mild persuasion led to its being made; there is nothing to indicate that it was "put into her mouth by some one else" or was not "her own unvarnished and unassisted story." The evidence was not inadmissible by reason of the fact that "questions were put to the girl to get her to tell

(1) 9 Cr. App. R. 248. (2) 86 L.J. K.B. 78.

her own story." Nor does the fact that "the circumstances indicate that but for the questioning there would probably have been no voluntary complaint" justify the exclusion of the evidence as was suggested in *Rex* v. *Osborne*(1).

I would dismiss the appeal.

BRODEUR J.:—I concur with my brother Anglin.

Appeal dismissed.

(1) 74 L.J. K.B 311, at p 315

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*June 6.
*June 25.

GRAND TRUNK PACIFIC COAST STEAMSHIP COMPANY (DEFENDANT) ..... APPELLANT;

AND

VICTORIA - VANCOUVER STEVEDORING COMPANY (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Indemnity clause—Master and servant—Negligence.

In an agreement under which the respondent contracted to supply the requisite longshore labour in connection with the ships of the appellant, who was to supply all necessary gear, an indemnity clause provided: "That the Steamship Company shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement." The appellant having failed to supply some wheelbarrows required for unloading coal, the respondent gave instructions to one Scott to get them at their own warehouse. Scott, having met with an accident in doing so, recovered damages from respondent, who then took action against appellant for indemnification under the above clause.

Held, that Scott, at the time he was injured, was performing labour embraced in the agreement.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), maintaining, upon an equal division of the court, the judgment of Murphy J. at the trial(2), by which the plaintiff's action was maintained with costs.

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

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

(1) 38 D.L.R. 468; [1918] 1 W.W.R. 196. (2) [1917] 1 W.W.R. 791.

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GRAND TRUNK PACIFIC COAST STEAMSHIP CO. v. VICTORIA-VANCOUVER STEVEDORING CO.

The Chief Justice.

Geo. F. Henderson, K.C. for the appellant.

Wallace Nesbitt K.C. and *C. C. Robinson* for the respondent.

THE CHIEF JUSTICE.—The case really depends upon the interpretation of clause 5 of the agreement between the parties which reads:—

5. That the S.S. Co. shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement.

It has been held and I think rightly that an employee of the respondents was injured while performing labour embraced in the agreement. If the workman's employment compels him to be at a particular place when the accident happens, the accident must be taken to arise out of the employment, although it is not being contributed to in any way by the nature of the employment. It is not, I think, disputed that the accident was due to the respondents' negligence.

The trial judge held that clause 5 above quoted was intended and the language used was sufficiently wide to cover the respondents' own negligence.

In the appeal court, where there was an equal division of opinion, Chief Justice Macdonald thought that the contract should be construed only to relieve the respondent of the burden of making compensation to employees under the "Workmen's Compensation Act," which compensation is payable irrespective of the employee's negligence. He relied in support of this view on the case of *Price & Co.* v. *Union Lighterage Co.*(1), but with all respect I think he has failed to appreciate the principle on which that decision is based. Mr. Justice Walton, the trial judge whose judgment was approved by the Court of Appeal, says:—

(1) (1904) 1 K B. 412

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The Chief Justice.

There is a well-established rule of construction applicable to the present case. The law of England, unlike in this respect the law of the U.S. of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants; but, if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms.

And this is no arbitrary distinction of the case of carriers but depends on the fact that a carrier is liable not only for the due conveyance of goods as he is of passengers but is also liable as an insurer of the goods. It is fallacious to say that the greater liability of carriers than of other classes of contractors is "merely a question of degree." Under his contract the carrier has a duty of conveyance for the neglect of which he is liable, but as an insurer he is liable irrespective of any negligence on his part and this is a liability of a different kind. The rule of construction established in the case of the contracts of carriers is that the exemption clause refers to conveyance in contra-distinction to insurance—that it limits the liability not the duty.

But in truth these cases have nothing to do with the present one, for in all contracts, even including those of carriers, it is a question of what was the intention of the parties. Now, I think nothing can be clearer than the intention of the parties to express in clause 5 of the agreement under consideration that the respondents should be relieved of all liability, however occurring, to any of their employees. Mr. Justice McPhillips says that to construe the provision in accordance with the submission of the appellant would be to render it wholly illusory; it certainly would restrict its operation within very narrow bounds, for it cannot consistently be held to apply even to all cases under the "Workmen's Compensation Act," since damages may of course be recovered under this Act where the employer has been guilty of negligence as well as when he has not.

The wording of this clause of the contract is as wide as possible and there is no reason for attributing to the parties any intention of restricting its natural meaning. I do not think, therefore, the rule of construction adopted for a totally different class of contracts and for reasons which have no application here can be invoked to restrict such natural meaning.

In my opinion the appeal should be dismissed with costs.

IDINGTON J.—The appellant having contracted with respondent for services to be performed by its men, amongst other things, agreed as follows:—

> That the Steamship Company shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement.

The appellant having failed in its supply of what it had contracted for, one of the men was sent to get it from the respondent's warehouse. He met with an accident in doing so for which he had recourse against the respondent and rightfully recovered damages. The appellant claims this liability for a personal injury did not fall within the meaning of what the contracting parties had in contemplation in the clause I have quoted.

I cannot so fritter away the very obvious purpose of such a contract of indemnity. It does not appear to me that the appellant can be heard to say that its own default in making the service more onerous than it might have turned out can thus escape responsibility.

The very obvious purpose of such a contract as in question was to free the respondent from that incidental loss that every employer of labour may incur, and in all probability must incur, by reason of negligence,

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from time to time in the course of executing what he has undertaken.

The cases relied upon do not seem to me to touch the question.

If the accident had arisen from something wilful on the part of respondent then one could hardly say that it had fallen within the scope of what in reason was within the contemplation of those making such a contract.

Nor can I see how the contract, under which the parties had been operating beyond the period originally named can be said, as argued for appellant, to have terminated when they by mutual consent, to be implied from their conduct, had extended its operation. All the terms of any such like time contracts are in law, when so extended, presumed, so far as applicable, to govern those so acting thereunder.

I suspect if the appellant had been sued for an increased rate of wages it would have been able to see the point and understand the law in the sense I refer to.

The appeal should be dismissed with costs.

ANGLIN J.—It is common ground that one Scott, an employee of the plaintiffs, recovered judgment against them in respect of a personal injury sustained on the 31st of July, 1915, which was caused by negligence imputable to them either at common law or under the "Employers' Liability Act." Rightly or wrongly the defendants have admitted that the finding of such liability is binding upon them. The plaintiffs, on the other hand, do not suggest that their liability to Scott could have been based on anything other than fault or negligence.

The chief defences to their claim to indemnity made in this action are that Scott at the time he was

injured was not "performing labour embraced in (the) agreement" for stevedoring made between the plaintiffs and the defendants, and that injuries ascribable to the plaintiffs' negligence are not within the provisions for their indemnification, which reads as follows:—

> That the Steamship Company shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement.

It was also alleged that the stevedoring agreement had been terminated before Scott was injured.

It recites that

> The Stevedoring Company is desirous of undertaking the stevedoring business of the Steamship Company at Vancouver, B.C., and Victoria, B.C., and the Steamship Company is willing to accord this privilege upon terms and conditions and at prices hereinbefore set forth,

and it provides that it shall

> remain in force for a period of one year from the date hereof (20th Nov., 1911) and if not then terminated, to remain in force thereafter until either party should give three months' notice in writing terminating the same.

Primâ facie this agreement would continue in force unless some step were taken to bring it to an end at the close of the first year. Action by one of the parties was required to terminate it on the 20th Nov., 1912. No evidence of any such action or of any subsequent notice to bring it to an end on the expiry of three months was given. The burden of proving termination was, in my opinion, on the party alleging it. The agreement must therefore be deemed to have been in force when Scott was injured.

For the reasons assigned by the learned trial judge I am also satisfied that the work Scott was engaged on when injured was "labour embraced in (the) agreement." He was carrying out a lawful direction to bring from their place of housing or storage some

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wheelbarrows belonging to the plaintiffs which were required for unloading coal—part of the stevedoring work undertaken by the plaintiffs. The arrangement that the defendants were to supply all necessary gear did not necessarily make it part of their obligation to bring such gear to the ship's side. They appear to have arranged to "borrow" these wheelbarrows from the plaintiffs. Obtaining them from the place where they were ordinarily kept in order to use them in unloading would seem to have been part of the stevedoring work for which the defendants undertook to supply labour and therefore to have been "labour embraced in (the) agreement."

Unless the plaintiffs were "undertakers" within the meaning of that term as defined by section 2 of the "Workmen's Compensation Act," R.S.B.C., 1911, ch. 244, they would not be liable under that Act for personal injuries sustained by their employees. Section 4 restricts its application to employment by "undertakers" as defined in the Act.

> "Undertaker" (as defined) in the case of a railway means the railway company; in the case of a factory, quarry, laundry, smelter or workhouse, means the occupier or operator thereof, in the case of a mine, means the owner thereof; and in the case of an engineering work or other work specified within this Act means the person undertaking the construction, alteration, repair or demolition.

I agree with Mr. Nesbitt's contention that a person or company engaged in the work of stevedoring is not an undertaker within this definition.

Apart from that established by the "Workmen's Compensation Act" in cases that fall within it, I know of no foundation for liability of an employer to his employee for personal injuries sustained by the latter in the course of his employment except fault or negligence imputable to the employer either under the common law or the "Employers' Liability Act." Under

these circumstances, since it was against liability of the plaintiffs to their employees for personal injuries that the defendants engaged to indemnify them, I think such liability arising from negligence must not only have been within the contemplation of the parties but must have been the very thing in respect of which they were contracting. The case of the *City of Toronto* v. *Lambert*(1), relied upon by counsel for the appellants, is clearly distinguishable on this ground. Had this view of the matter presented itself to the learned Chief Justice of the Court of Appeal of British Columbia I incline to think he would have reached the same conclusion. His citation of *McCawley* v. *Furness Ry. Co.*(2), appears to warrant this inference.

I express no opinion on the question whether injuries caused by negligence of, or ascribable to, the Stevedoring Company would or would not have been within the purview of the term "any and all liability for personal injury," were it not reasonably certain that such liability must have been, and that liability apart from and without negligence or fault cannot have been, within the contemplation of the parties to the agreement under consideration

The appeal fails and should be dismissed with costs.

BRODEUR J.—The liability of the appellant depends upon the construction of an agreement between the parties by which the appellant company undertook to hold the respondent company

> entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced in this agreement.

In my opinion, there is no doubt that the man Scott was injured when he was doing some stevedoring

(1) 54 Can. S.C.R. 200; 33 D.L.R. 476. (2) L.R. 8 Q.B. 57.

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work contemplated by the contract. Wheelbarrows were required for the unloading of the ship and when he was bringing them he had an accident for which he sued and obtained judgment against his employer, the respondent company. The latter now seeks to be indemnified by the appellant under the above clause of the contract.

It is common ground that the accident was due to the stevedoring company's negligence. Nobody would suggest, however, that the negligence was wilful. But it is one of those accidents inherent to the carrying out of work of that kind. The indemnity clause is a very wide one. It is not restricted to liability arising out of the "Workmen's Compensation Act" or "Employers' Liability Act"; but it is general "from any and all liability for personal injury."

One of the greatest risks the contractor for labour must incur is his liability for damages for personal injury to his workmen. The number of persons employed and the lack of care on the part of some of those employees render the undertaking a risky one.

In this case we have besides a provision in the contract that all the gear and apparatus for performing the work should be supplied by the Steamship Company.

The defective appliances are to a very large extent the cause of those accidents to workmen. It was only natural for the parties to agree that all those accidents, whether they were caused by the ordinary neglect of the steamship company or of the stevedoring company, should be provided for. It is not giving then to the contract too wide an interpretation to declare that the liability of the appellant company covers a case similar to the one we have before us.

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Cassels, J. ad hoc.

The judgment that has declared the appellant company liable should be confirmed with costs.

CASSELS J. *ad hoc.*—I am of the opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Tupper & Bull.*
Solicitors for the respondent: *Davis & Co.*

1918
*May 21, 22.
*June 25.

JAMES ANDERSON AND THORNE EDDY (PLAINTIFFS)..... } APPELLANTS;

AND

THE CANADIAN NORTHERN RAILWAY COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Railways—Animals at large—Wilful act of owner—Absence of cattle-guards—"Railway Act" R.S.C., 1906, c. 37, s. 294, as amended by 9 & 10 Ed. VII., c. 50, s. 8.

Section 294 of the "Railway Act" means that if animals are allowed by their owner to be at large within one-half mile of the intersection of the railway and a highway at rail level, the owner takes the risk upon himself of any damage caused to or by them upon the intersection; but if such damage is caused to the animals not upon the intersection but upon the railway property beyond it, the company would be liable unless it established that the animals "got at large through the negligence or wilful act or omission of the owner or his agent."

Per Davies and Anglin JJ.—Section 294 is *intra vires* of the Parliament of Canada and is not in conflict with provincial legislation which permitted animals to be at large unless restricted by municipal regulations.

Section 294 is a code by itself and is not altered by section 254 which requires railway companies to maintain cattle-guards.

Per Idington and Brodeur JJ.—Sub-section 5 of section 294 is limited in its operation to the requirements of sub-section 1 imposing on the owner of animals the duty of providing some competent person to be in charge.

APPEAL from the judgment of the Supreme Court of Saskatchewan *en banc*(1), affirming the judgment of

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

(1) 10 Sask. L.R. 325, 35 D.L.R. 473.

Elwood J. at the trial(1), which dismissed the plaintiffs' action for damages for horses killed on the railway tracks of the defendant company.

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

Chrysler K.C. for appellant.
Tilley K.C. for respondent.

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

DAVIES J.—This is an appeal from the unanimous judgment of the Supreme Court of Saskatchewan *en banc* confirming the judgment of the trial judge dismissing plaintiff's action.

The action was brought to recover damages for the loss or injury caused to the plaintiff's herd of ponies which were killed upon the railway track either at the intersection of the railway and the highway at level or upon the track somewhat beyond that intersection.

The right of the plaintiff to recover depends in my judgment upon the construction given to section 294 of the "Railway Act" of Canada as amended in 1910.

A suggestion was made that the section was *ultra vires* of the Parliament of Canada and was in conflict with provincial legislation which permitted animals to go at large unless restricted by municipal regulations. I cannot for a moment entertain the suggestion of the section being *ultra vires* nor do I think that it is necessarily in conflict with the provincial legislation. It simply means that if animals

(1) 33 D.L.R. 418.

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ANDERSON AND EDDY v. CANADIAN NORTHERN RWAY. CO.

Davies J.

are allowed by their owner to be at large within one-half a mile of the intersection of the railway and a highway at level the owner takes the risk upon himself of any damages which may be caused to or by them upon the intersection, and if such damages are caused to the animals not upon the intersection but upon the railway property beyond it the company would be liable for them unless it established that the animals

got at large through the negligence or wilful act or omission of the owner or his agent, etc.

In the case before us I am strongly inclined to think the evidence shewed the animals to have been killed at the intersection of the railway and the highway. If so, the animals being at large contrary to the provisions of the section, the plaintiff by the express words of the sub-section 3 was deprived of any right of action for their loss.

If, on the contrary, the animals were killed not at the intersection but on the railway track beyond it, then the plaintiffs would have a right of action under the 4th sub-section for damages caused by their loss unless the company proved that they were "at large" by "the negligence or wi ful act or omission" of the owner.

That this was proved is beyond doubt. The plaintiffs admitted that they allowed the ponies to be at large on a section adjoining that through which the railway track ran and that they must have wandered or strayed away till they had got upon the highway and then on to the intersection of the railway. The trial judge found these facts on satisfactory evidence to have been proved. In my judgment the animals were beyond doubt at large by the plaintiffs' "wilful act." It was not "negligence" on the plaintiffs' part which allowed the animals to get "at large" but the inten-

tional, deliberate act of the plaintiffs who allowed them to go at large. That was the plaintiffs' "wilful act" which when proved by the company deprived them under sub-section 4 of a right to recover damages for the loss of the animals. The result therefore in my opinion is that, if the animals being at large within half a mile of the railway and the highway crossing at level wandered or strayed on to the railway track and were killed on the intersection, the plaintiffs were deprived by sub-section 3 of their right of action and if killed beyond the intersection on the railway track were also deprived of their right of action by sub-section 4 for their loss, once it was established that the animals were at large by their "wilful act."

It was contended that as the cattle-guards had not been maintained at the intersection as required by section 254 the company was liable whether the animals were killed on the intersection or not and whether they were at large by the plaintiffs' wilful act or not. But I think clearly this is not so. Section 294 is in my opinion a code in itself, with respect to the rights and obligations of the Railway Company and of the owners of animals killed upon the company's track whether at the intersection of the railway and the highway level, or on other railway property beyond it. Section 254 is of general application but it cannot control or alter the operation of section 294 which deals with the particular case now before us and defines with particularity and care the respective obligations and rights of the company and the owners of animals at large in the neighbourhood of level crossings of railways and highways.

IDINGTON J.—The decision of this appeal ought to turn upon the effect to be given to section 294, sub-

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Idington J.

section 5. The whole section reads, as amended by 9 & 10 Ed. VII., c. 50, sec. 8, as follows:—

294. No horses, sheep, swine or other cattle shall be permitted to be at large upon any highway, within half a mile of the intersection of such highway with any railway at rail level, unless they are in charge of some competent person or persons, to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

2. All horses, sheep, swine or other cattle found at large contrary to the provisions of this section may, by any person who finds them at large, be impounded in the pound nearest to the place where they are so found, and the poundkeeper with whom the same are impounded shall detain them in like manner, and subject to like regulations as to the care and disposal thereof, as in the case of cattle impounded for trespass on private property.

3. If the horses, sheep, swine or other cattle of any person, which are at large contrary to the provisions of this section, are killed or injured by any train, at such point of intersection, he shall not have any right of action against any company in respect of the same being so killed or injured.

4. When any horses, sheep, swine or other cattle at large, whether upon the highway or not, get upon the property of the company, and by reason thereof damage is caused to or by such animal, the party suffering such damage shall, except in the cases otherwise provided for by the next following section, be entitled to recover the amount of such damage against the company in any action in any court of competent jurisdiction, unless the company establishes that such animal got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent; Provided, however, that nothing herein shall be taken or construed as relieving any person from the penalties imposed by section 407 of this Act. (9 & 10 Ed. VII., c. 50, s. 8).

5. The fact that any such animal was not in charge of some competent person or persons shall not, if the animal was killed or injured upon the property of the company, and not at the point of intersection with the highway, deprive the owner of his right to recover.

The owner is given by section 4 a right of action unless the company prove that the animal got at large through negligence or wilful act or omission of the owner or his agent.

Does sub-section 5 dispense with this right of the company when its default causes the accident?

Or is it only limited in its operation to the requirements of sub-section 1, imposing the duty of providing some competent person to be in charge?

The common sense of sub-section 5 in depriving the company of a defence when animals not killed on the highway but on the railway track by reason of the company's default in not observing the law suggests it ought to have been made to apply to all such cases.

I incline, however, to think Parliament has failed to so express itself and that the latter or second class is only what is covered and not the former.

That would not prevent the operation of the exception in sub-section 4 in favour of the company.

The case of *Canadian Pacific Railway Co.* v. *Eggleston* (1), wherein it was decided that the owner of a band of horses, though in a sense in charge, which in 1902 strayed upon an unfenced railway track had no remedy for their slaughter by the defendant's train, I imagine led to this attempt to bring the law in harmony with due regard by railway companies for the rights of others.

I regret that the effort at amendment seems to have partially miscarried.

I cannot say the court below is wrong in the holding that an owner leaving his horses at large on an unfenced section of land falls within same.

I agree the legislation of the local legislature cannot invade the express declaration of parliament in a railway Act such as that in question.

The appeal should be dismissed with costs.

ANGLIN J.—I agree with Mr. Justice Davies.

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

Appeal dismissed with costs.

Solicitors for the appellants: *Seaborn, Taylor, Pope & Quirk.*

Solicitors for the respondent: *Fish & Ferguson.*

(1) 36 Can S.C.R. 641.

1918
*June 10.
*June 25.

CANADA & GULF TERMINAL RAILWAY COMPANY..... } APPELLANT;

AND

CHARLES J. FLEET

AND

HIS MAJESTY THE KING..... } RESPONDENTS.

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

Appeal—Jurisdiction—"Matter in controversy"—"Court"—"Public Utilities Commission," R.S.Q., 1909, arts. 718 & seq.—"Supreme Court Act," R.S.C., 1906, c. 139, ss. 36, 37(a).

An appeal lies to the Supreme Court of Canada under section 37 of the "Supreme Court Act" from the judgment of the Court of King's Bench in the Province of Quebec in an appeal from a ruling of the Quebec Public Utilities Commission which had affirmed its own jurisdiction to accord running rights to the Intercolonial Railway over the Canada & Gulf Terminal Railway (Fitzpatrick C.J. and Idington J. dissenting).

Per Fitzpatrick C.J. and Idington J. (dissenting).

The Public Utilities Commission, constituted by R.S.Q. 1909, art. 718, is not a "court" in the sense of that word in the "Supreme Court Act."

APPEAL from a decision of the Court of King's Bench, appeal side, Province of Quebec, maintaining the jurisdiction of the Public Utilities Commission in this case.

The Public Utilities Commission granted a petition of C. J. Fleet and ordered the appellant to permit the Intercolonial Railway to run its engines and cars over the railway line of the appellant.

The appellant made an application for the cancellation of this order on the ground that the Commission had no jurisdiction in the case but the application was refused. On appeal to the Court of King's

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

Bench the jurisdiction of the Public Utilities Commission was affirmed.

The appellant then appealed to the Supreme Court of Canada and applied to the registrar to affirm the jurisdiction of the court and to have the security approved, which application was granted for the following reasons.

THE REGISTRAR.—This is an application to affirm the jurisdiction of the court coupled with a motion to allow a bond offered as security for the appeal. Mr. Walker appears for the motion, Mr. Darveau appears for the King. No exception is taken to the nature of the security offered if the court has jurisdiction.

The facts appear to be as follows:—

R.S.Q., art. 718, establishes the Quebec Public Utilities Commission and art. 742, as amended by 1 Geo. V., ch. 14, sec. 4, provides that the Commission should have general supervision over all public utilities subject to the legislative authority of the province, and may make such orders regarding equipment, appliances, safety devices, extension of works or systems of reporting and other matters as are necessary for the safety or convenience of the public or for the purpose of carrying out any contract, charter, or franchise involved in the use of public property or rights.

C. J. Fleet, Esq., K.C., residing in Montreal, on the 11th June, 1917, presented a petition to the Commission asking that an order should be made requiring the Canada & Gulf Terminal Railway Company to permit the Intercolonial Railway to run a train over the line of the former company from Mont Joly Junction to Little Metis; and thereupon the Commission made an *ex parte interim* order granting the petition and

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The Registrar.

ordered the Canada & Gulf Terminal Railway Company to permit the Intercolonial Railway to run its engines and cars over the railway line of the Canada & Gulf Terminal from Mont Joly Junction to Little Metis. It also provided that the Intercolonial should furnish the necessary motive power and the crew for operating its trains and directed the Canada & Gulf Terminal and Intercolonial Railways to appear before it on the 26th June, 1917, for the purpose of determining the compensation to be paid by the latter company to the former. Both companies appeared before the Commission and the Canada & Gulf Terminal Company confined its objection to the question of jurisdiction of the Commission and asked for the cancellation of this order on the ground that the Intercolonial Railway was not subject to the jurisdiction of the Commission, and because the Commission had no power to accord running rights to one railway company over another. This objection was overruled on the 10th July following.

Art. 763 gives an appeal to the Court of King's Bench (appeal side) from any final decision of the Commission upon any question as to its jurisdiction or upon any question of law, but such an appeal can be taken only by permission of a judge of the said court given upon a petition presented to him within 15 days from the rendering of the decision.

The appeal was apparently regularly taken to the Court of King's Bench, which pronounced judgment on the 3rd April, 1918, affirming the jurisdiction of the court below (two judges, Carroll and Pelletier JJ. dissenting). The present application is based on the right of appeal conferred by sec. 37, s.s. *a*, of the "Supreme Court Act," which provides as follows:—

37. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of

final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a superior court, in the following cases;

(*a*) In the Province of Quebec if the matter in controversy involves the question of or relates to any fee of office, duty rent, revenue, sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound; or amounts to or exceeds the sum or value of two thousand dollars;

The applicants contend, first, that the matter involved exceeds the sum or value of $2,000 and in any event his case falls within the words "matter in controversy involves the question of or relates to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound."

With respect to the amount involved, an affidavit is filed by the vice-president of the applicant company in which he says that the amount involved exceeds the sum of $2,000, while the traffic manager of the Canadian Government Railways files an affidavit in which he says that the compensation which should be allowed to the applicant for the use of the railway for the season of 1917 should be materially under $2,000. The only other evidence bearing on the amount involved is the petition of Fleet presented to the Commission, in which it is said that the Intercolonial Railway had offered $2,000 for the running rights during the year and that the applicant company had demanded $5,000. The Commission never determined the compensation owing to the objection taken to its jurisdiction. If I had to determine the application solely on the question of the amount involved for the privilege of using the applicant's railway, I should have little hesitation in holding that it must exceed $2,000 as the order which has been made is not limited to one year. I am, however, of the

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opinion that there is jurisdiction because titles to lands or tenements, annual rents and other matters or things where rights in future might be bound are involved. This provision of section 37 is substantially the same as section 46 (*b*) which has been the subject of consideration by the court in a number of cases. The right conferred upon the Intercolonial to use the roadbed and rails of the applicant company is quite as much an interest in lands under this section as are the servitudes which have been declared to confer jurisdiction in the cases of *Macdonald* v. *Ferdais*(1), and the other cases to be found collected in Cameron's Supreme Court Practice, at pp. 225-228.

I am therefore of the opinion that the court has jurisdiction and grant the motion. Costs in the cause.

(Sgd.) E. R. CAMERON.

The respondent then made a motion, by way of appeal to the Supreme Court, to reverse the decision of the registrar.

C. V. Darveau K.C. for the motion.
H. N. Chauvin K.C. contra.

THE CHIEF JUSTICE (dissenting)—In my opinion this appeal should be allowed. The case does not come within sec. 36 of the "Supreme Court Act" and I cannot quite understand how section 37 can be applied. The Public Utilities Commission is not a court (*vide* section. 740 R.S.Q.) and the statute which creates the Commission provides for an appeal to the Court of King's Bench subject to limitations which shew that it was the intention of the legislature to limit appeals to certain specified questions and to the Court of

(1) 22 Can. S.C.R. 260.

King's Bench in an advisory rather than a judicial capacity (*vide* sections 763 *et seq.* of the R.S.Q.). Moreover, in the present instance the Commission exercised the jurisdiction formerly vested in the Railway Committee of the Provincial Executive Council.

The appeal should be allowed.

DAVIES J.—I am to dismiss the appeal from the registrar with costs and to affirm our jurisdiction to hear this appeal.

IDINGTON J. (dissenting)—The constitution of a Public Utilities Commission in Quebec does not create a court in the sense of that word in the "Supreme Court Act" and hence there does not seem to be any place in that Act for appeals from the Court of King's Bench (appeal side) rendering a judgment pursuant to the provisions of art. 763 of the revised statutes of Quebec. It is manifest that such a proceeding as in question herein did not originate in any superior court and hence the jurisdiction given by section 36 of the "Supreme Court Act" cannot be invoked to support an appeal here.

No more can section 37 of same Act which in the first part thereof giving jurisdiction in cases originating in other courts reads as follows:—

> Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a superior court, in the following cases:

It is to be observed that this section relates only to judicial proceedings which the exercise of power given the Utilities Commission is not. The nature of the powers given are purely administrative and not judicial.

The power conferred upon the King's Bench to

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Idington J.

determine whether or not the Commission has acted within its jurisdiction, and according to law is of course a judicial jurisdiction, but that did not originate in any other court as contemplated by the section I have just quoted.

The proposed appeal should be quashed with costs of the motion.

ANGLIN J.—Although at first of the opinion that the appeal from the registrar's order affirming jurisdiction should succeed, further consideration has led me to the contrary conclusion. Admittedly not within section 36 of the "Supreme Court Act" because the proceeding did not originate in a superior court, the appellant maintains that this appeal is within our jurisdiction under section 37 (*a*) on the grounds: (*a*) that the matter in controversy involves a question of or relating to title to lands or tenements and (*b*) amounts to or exceeds the sum or value of $2,000.

As the registrar points out, it has been established by affidavit that the value of the running rights granted by the order of the Public Utilities Commission exceeds $2,000. Their annual value is said to be over $1,000 and the order is for an indefinite term. While the matter in controversy on the proposed appeal is merely the jurisdiction of the Public Utilities Commission to make the order which it did, the matter in controversy in the proceeding is the running rights; and it has been determined in a number of cases that the words "the matter in controversy" in section 37 (*a*) mean not the matter in controversy on the appeal but the matter in controversy in the proceeding. While I cannot think that it was ever intended that an appeal should lie from these provincial boards to this court, section 37 (*a*) in terms covers this case.

I would dismiss the appeal with costs.

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CANADA & GULF TERMINAL RWAY. CO. v. FLEET AND THE KING.

Brodeur J.

BRODEUR J.—Il s'agit d'un appel, de la part de l'intimé, d'une décision du Régistraire de cette cour qui a déclaré que nous avions juridiction pour entendre la présente cause.

La compagnie appelante est une compagnie de chemin de fer incorporée par la Législature de la province de Québec. Sa ligne se raccorde à Mont Joli avec le chemin de fer Intercolonial. Une demande a été faite devant la Commission des Services d'Utilité publique de Québec sous l'autorité des dispositions des articles 740 et suivants des statuts refondus de la province de Québec pour que la compagnie appelante soit tenue de donner un droit de passage sur sa voie à certains trains de l'Intercolonial. La compagnie appelante s'est objectée à cette demande en alléguant que la Commission des Services d'Utilité publique n'avait pas le pouvoir et la juridiction nécessaire pour accorder cette demande.

La Commission a le 10 juillet 1917 maintenu la demande. Suivant les dispositions de l'article 763 des Statuts refondus de la province de Québec, un appel a été institué devant la Cour du Banc du Roi par la compagnie appelante de cette décision de la Commission des Service d'Ulilité publique. Le jugement de la Commission a été confirmé et la Compagnie Canada & Gulf Terminal institue le présent appel.

Par l'article 36 de l'acte de la Cour Suprême, il est déclaré qu'il y a appel à cette cour de tout jugement final de la plus haute cour de dernier ressort établie dans toute province du Canada, que cette cour soit une cour d'appel ou une cour de première instance, dans le cas où la cour de première instance est une cour supérieure.

Par la section 37 de l'acte de la Cour Suprême, il est déclaré cependant qu'il peut y avoir appel de tout

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jugement définitif de la Cour du Banc du Roi de Québec même quand la poursuite n'a pas pris naissance devant une cour supérieure, si l'affaire en litige

a trait au titre à des biens-fonds, à des rentes annuelles et à d'autres affaires où choses ou peuvent se rencontrer des droits futurs; ou bien si le montant de l'affaire atteint ou dépasse la somme ou la valeur de deux mille dollars.

Cette cour a été appelée à plusieurs reprises à interpréter une disposition semblable qui se trouve à la section 46 de l'acte de la Cour Suprême et il a été déclaré que les poursuites concernant les droits de passage affectaient le titre d'une propriété et, par conséquent, pouvaient donner lieu à un appel devant cette cour.

Voir *Macdonald* v. *Ferdais*(1), et les autres causes qui sont mentionnées dans Cameron's Supreme Court Practice, pp. 225 et 228.

Mais on dit: La Cour d'Appel, en vertu de l'acte, ne peut intervenir dans les causes qui ont originé devant la Commission des Services d'Utilité publique que dans les questions de droit ou de juridiction; et alors la matière qui est en litige devant nous n'est pas la question du droit de passage que l'on demande sur la propriété de l'appelante, mais simplement la question de savoir si la Commission des Services d'Utilité publique a jurisdiction ou non.

Je crois qu'en adoptant ce point de vue-là on arriverait à des conséquences assez étranges. Les montants en litige qui sont généralement demandés par la poursuite entrainent presque toujours la décision de questions de droit et faudrait-il dire alors que nons n'avons pas juridiction parce que le fonds du litige repose sur une question de droit seulement? Evidemment non. Il faut aller aux sources; il faut examiner la nature de la demande faite devant les

(1) 22 Can. S.C.R. 260.

tribunaux inférieurs; et si cette demande a pour objet une somme d'argent excédant $2,000 ou un droit de servitude et si cette demande ne peut être accordée que dans le cas où la cour superieure aurait juridiction il n'en reste pas moins vrai que la matière en litige sera de savoir si telle somme est due ou si telle servitude doit être accordée ou refusée.

Le jugement que nous aurons à rendre dans cette cause-ci est, suivant les dispositions de l'article 51 de l'acte de la Cour Suprême, celui qui aurait dû être prononcé par la Commission des Services d'Utilité Publique, c'est-à-dire refuser ou accorder la demande qui lui a été faite pour un droit de passage sur la propriété de la compagnie appelante.

J'en suis donc venu à la conclusion que nous avons juridiction pour entendre cet appel et que le jugement rendue par le régistraire doit être confirmé avec dépens.

Motion dismissed with costs.

1918
*July 18.
*July 19.

IN RE GEORGE EDWIN GRAY.

REFERRED BY MR. JUSTICE ANGLIN IN CHAMBERS.

Constitutional law — Parliament — Delegation of powers — Order-in-council — "War Measures Act, 1914" — "Military Service Act, 1917."

The Parliament of Canada can validly delegate but cannot abandon its legislative powers.

Section 6 of the "War Measures Act, 1914," provides that: "The Governor-in-Council shall have power to do and authorize such acts and things and to make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, deem necessary or advisable for the security, defence, peace, order and welfare of Canada." By a joint resolution of the Senate and House of Commons of Canada, passed on April 19th, 1918, it was resolved: "That in the opinion of this House it is expedient that regulations respecting Military Service shall be made and enacted by the Governor-in-Council in manner and form and in the words and figures following that is to say," reciting the terms of an order-in-council passed on the following day which made regulations providing, *inter alia*, for additions to the men included in classes 1 and 2 as liable for service under the "Military Service Act, 1917," that the Governor-in-Council might direct orders to issue to men in any class under the Act to report for duty and any exemption granted to any man should cease at noon of the day on which he was so ordered to report and no claim for exemption should be entertained thereafter; and that all men in class 1 should report for duty as required by proclamation under the Act or be liable to the penalties specified for failure to do so.

Held, Idington and Brodeur JJ dissenting, that this order-in-council was *intra vires*.

The said section of the "War Measures Act" proceeded to declare that "for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor-in-Council shall extend to all matters coming within the classes of subject hereinafter enumerated, that is to say—(a) censorship and the control and suppression of publications &c., and went on to specify other matters also more or less remote from the prosecution of the war.

Held, that the *ejusdem generis* rule is not applicable because of this enumeration of matters which could be dealt with by the Governor-in-Council.

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

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RE GEORGE EDWIN GRAY.

MOTION before Mr. Justice Anglin in Chambers for the issue of a writ of *habeas corpus ad subjiciendum* referred by him to the full court.

The following was the resolution passed by the two Houses of Parliament.

RESOLUTION.

Passed by the Senate and the House of Commons of Canada, April 19, 1918:—

That in the opinion of this House, it is expedient that regulations respecting Military Service shall be made and enacted by the Governor-in-Council in manner and form and in the words and figures following, that is to say:—

P. C. 919.

At the Government House at Ottawa.

Present:

His Excellency the Governor-General-in-Council.

Whereas there is an immediate and urgent need of reinforcements for the Canadian Expeditionary Force and the necessity for these reinforcements admits of no delay;

And Whereas it is deemed essential that notwithstanding exemptions heretofore granted a substantial number of men should be withdrawn forthwith from the civil life for the purpose of serving in a military capacity;

And Whereas having regard to the number of men immediately required and to the urgency of the demand, time does not permit of examination by exemption tribunals of the value in civil life, or the position, of the individuals called up for duty;

Therefore His Excellency the Governor-General-in-Council, on the recommendation of the Right Honourable the Prime Minister, and in virtue of the powers conferred on the Governor-in-Council by the "War Measures Act, 1914," and otherwise, is pleased to make the following regulations which shall come into force as soon as approved by resolution of both Houses of Parliament, and the same are hereby made and enacted accordingly:—

Regulations.

1. In these regulations,—
   (*a*) "Minister" shall mean the Minister of Militia and Defence.
   (*b*) "Act" shall mean the "Military Service Act, 1917."
2. Class 1 under the Act shall, in addition to the men included therein as in the said Act mentioned, include all men who,—
   (*a*) Are British subjects; and
   (*b*) Are not within the classes of persons described in the exceptions mentioned in the schedule to the Act; and
   (*c*) Have attained the age of 19 years; but were born on or since 13th October, 1897; and

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RE GEORGE EDWIN GRAY.

(*d*) Are unmarried or widowers without children; and
(*e*) Are resident in Canada.

3. Class 2 under the "Military Service Act, 1917," shall, in addition to the men included therein as in the said Act mentioned, include all men who,—
   (*a*) Are British subjects; and
   (*b*) Are not within the classes of persons described in the exceptions mentioned in the schedule to the said Act; and
   (*c*) Have attained the age of 19 years; but were born on or since 13th October, 1897; and
   (*d*) Are married or widowers with children; and
   (*e*) Are resident in Canada.
4. The words "In any theatre of actual war" in the fifth exception in the schedule to the Act shall not include the high seas or Great Britain or Ireland and the said exception shall be interpreted accordingly.
5. The Governor-in-Council may direct orders to report for duty to issue to men in any class under the Act of any named age or ages or who were born in named years or any named year or part of a year and any exemption theretofore granted to any man of any such named age or year of birth shall cease from and after noon of the day upon which he is ordered so to report and no claim for exemption by or in respect of any man shall be entertained or considered after the issue to him of such order, provided, however, that the Minister may grant leave of absence without pay to any man by reason of the death, disablement or service of other members of the same family while on active service in any theatre of actual war.
6. The age stated in any claim for exemption made by or on behalf of any man or in any other document signed by the man shall be conclusive evidence as against him of his age and year of birth.
7. The Minister may, from time to time, direct that no orders to report for duty be issued to men who have been examined by military medical boards and placed in such medical categories as are specified in such direction.
8. All men included in Class 1 by virtue of the provisions of these regulations shall report to the Registrar or Deputy Registrar under the Act as required by Proclamations; they shall be subject to military law as in such Proclamation set out and shall, in the event of their failing to report, be liable to the penalties specified in the Act and the regulations thereunder.
9. (*a*) Any man now unmarried, who at any time hereafter attains the age of 19 years and is then a British subject resident in Canada and not within one of the exceptions in the schedule to the Act, shall; and
   (*b*) Any man who, having attained the age of 19 years, being then a British subject resident as aforesaid and not within one of the exceptions in the schedule to the Act, becomes a widower without children, shall, if the class within which he then falls has been called out on active service:

Forthwith become subject to military law and shall within ten days thereafter report to the Registrar or Deputy Registrar under the province or the part of a province in which he resides. He shall be placed on active service as provided by the Act, by the regulations thereunder or by these regulations, and shall, until so placed on active service, be deemed to be on leave of absence without pay.

10. Where under or pursuant to any treaty or convention with any foreign Government or any country provision is now or hereafter be made that the subjects of such Government or the citizens of such country resident in Canada may be made liable by law to military service, such subjects or citizens of such Government or country may be called out by Proclamation and shall report, be liable to military law and be placed on active service as may be specified in said Proclamation or in the Act or the regulations thereunder.

The said order-in-council was passed on April 20th, 1918, and under the said regulations the applicant Gray, who had been granted exemption from service, was ordered to report for duty and refusing to do so was arrested by the military authorities. He then applied to Mr. Justice Anglin to be discharged on *habeas corpus*.

Chrysler K.C. for the applicant. The applicant asks for the issue of a writ of *habeas corpus* to discharge him from the custody of the military authorities who hold him for refusing to obey an order to put on uniform and enter into military service. This action was taken under the order-in-council of April 20th, 1918, which directed that all men in Class 1 (of which the applicant was one), could be directed to report for duty and that all exemptions granted to such men should cease.

Brodeur J.—Is this a criminal matter under section 62 of the Supreme Court Act?

Chrysler K.C.:—It is my Lord. By section 74 of the "Military Service Act" (R.S.C. [1906] ch. 41) the "Imperial Army Act" is made part of the statute law of Canada and under it Gray could be sentenced to imprisonment.

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The real question is as to the scope and effect of the order-in-council of April 20th, 1918. Can a resolution of the two Houses of Parliament confer the powers contended for on the Governor-in-Council? We submit it cannot and that what this order-in-council purports to do can be done only under the authority of an Act of Parliament. See *Rex* v. *Halliday* (1); *Sprigg* v. *Sigcan* (2); *Cox* v. *Hates*(3).

Geoffrion K.C. follows for on the same side. The specific enumeration of matters with which the Governor-in-Council can deal shews that only orders-in-council can pass in respect to matters *ejusdem generis* as those enumerated.

The power to make rules and regulations cannot be extended to the power to legislate.

The "British North America Act, 1867," does not authorize Parliament to amend the constitution and gives it no authority, express or implied, to delegate its powers.

C. C. Robinson was also present on behalf of the applicant.

Bennett K.C. was heard to point out the distinction between this case and that of *Re Lewis*(4) in the Court of Appeal for Alberta which held the order-in-council *ultra vires*. He cited the case of *Clowes* v. *Edmonton School District* (5).

Newcombe K.C. contra. Parliament is empowered to make laws for the peace, order and good government of Canada ("British North America Act, 1867," section 91) and must be granted the widest discretion for attaining that object. *Riel* v. *The Queen* (6), *per* Lord

(1) [1916] 1 K.B. 738; [1917] A.C. 260.
(2) [1897] A.C. 238.
(3) 15 App. Cas. 506.
(4) 13 Alta. L.R. 423; 41 D.L.R. 1.
(5) 9 Alta. L.R. 106; 25 D.L.R. 449.
(6) 10 App. Cas. 675.

Halsbury, at pages 678-9. *Smiles* v. *Belford* (1), discussed in Lefroy on Legislative Power, page 214. Parliament in its sphere has powers as extensive as those of the Imperial Parliament. "Orders" and "Regulations" are merely the terms used to designate the mode of exercising the powers conferred on the Governor-in-Council.

The question of delegation has been settled by the House of Lords in *Rex* v. *Halliday* (2). Formerly all the outlying portions of the Empire were governed by order-in-council; see *Taylor* v. *The Attorney-General* (3); and some of them are still so governed. It cannot be said that there is any change in the constitution by this mode of proceeding.

Tilley, K.C., on same side.

THE CHIEF JUSTICE.—I have no doubt respecting the right of this court to entertain the present application for a writ of *habeas corpus*. Indeed, in any case of an application for this writ which, as is said in Maitland's Constitutional History of England,

is unquestionably the first security of civil liberty,

this court, the court of last resort in the country, would not willingly admit any doubt of its authority to grant to any of his Majesty's subjects the protection which the writ affords.

The facts out of which these proceedings arise are fully set out by Mr. Justice Anglin in the reasons for judgment which he has delivered. In these I concur. But, in view of the importance of the question involved, I desire to add a few words of my own to emphasize my view of the points raised.

(1) 23 Gr. 590; 1 Ont. App. R. 436. (2) [1917] A.C. 260.
(3) 23 Com. L.R. 457.

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The sole question for determination is whether there was authority for the order-in-council of the 20th of April, 1918, cancelling the petitioner's exemption from military service, granted under the provision of the Act respecting military service, passed in the year 1917.

Parliament, after the declaration of war, passed the "War Measures Act, 1914," to confer upon the Governor-in-council certain powers. Section 6 of the Act provides that:—

> The Governor-in-council shall have power to do and authorize such acts and things, *and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or* advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor-in-council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say: (a) censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communications; (b) arrest, detention, exclusion and deportation; (c) control of the harbours, ports and territorial waters of Canada and the movements of vessels; (d) transportation by land, air, or water, and the control of the transport of persons and things; (e) trading, exportation, importation, production and manufacture; (f) appropriation, control, forfeiture and disposition of property and of the use thereof.
>
> 2. *All orders and regulations made under this section shall have the force of law and shall be enforced in such manner and by such courts, officers and authorities as the Governor-in-council may prescribe,* and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation.

The practice of authorizing administrative bodies to make regulations to carry out the object of an Act, instead of setting out all the details in the Act itself, is well known and its legality is unquestioned. But it is said that the power to make such regulations could not constitutionally be granted to such an extent as to

enable the express provisions of a statute to be amended or repealed; that under the constitution parliament alone is to make laws, the Governor-in-council to execute them, and the court to interpret them; that it follows that no one of these fundamental branches of government can constitutionally either delegate or accept the functions of any other branch.

In view of *Rex* v. *Halliday*(1), I do not think this broad proposition can be maintained. Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the executive government. Such powers must necessarily be subject to determination at any time by Parliament, and needless to say the acts of the executive, under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.

It is true that Lord Dunedin, in the case referred to, said:

> The British constitution has entrusted to the two Houses of Parliament, subject to the assent of the King, an absolute power untrammelled by any written instrument, obedience to which may be compelled by some judicial body.

That, undoubtedly, is not the case in this country, which has its constitution founded in the Imperial statute, the "British North America Act, 1867." I cannot, however, find anything in that Constitutional Act which, so far as material to the question now under consideration, would impose any limitation on the authority of the Parliament of Canada o which the Imperial Parliament is not subject.

The language of section 6 is admittedly broad enough to cover power to make regulations for the raising of military forces. That power is directly covered by the words

> security, defence, peace, order and welfare.

(1) [1917] A.C. 260.

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As Lord Halsbury said in *Reil* v. *Reg.*(1):

> These words are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to.

But it is said that the enumeration of several matters in section 6 of the "War Measures Act" limits the effect of the general power conferred. The answer to this objection, as urged by Mr. Newcombe, would appear to be 1st, that the statute itself expressly provides otherwise; and 2nd, that the reason for introducing specifications was that those specified subjects were more or less remote from those which were connected with the war, and it was therefore thought expedient to declare explicitly that the legislative power of the government could go even thus far. The decisions of the Judicial Committee of the Privy Council, under section 91 of the "British North America Act," upon similar language exclude such limited interpretation. (See Lefroy, p. 119.)

It was also urged, at the argument, that the powers conferred by section 6 were not intended to authorize the Governor-in-council to legislate inconsistently with any existing statute, and particularly not so as to take away a right (the right of exemption) acquired under a statute. Here, again, Mr. Newcombe's answer appears to be conclusive. There is no difference between statute law and common law, and consequently if effect is given to that point the government would be denied any power to amend the law as a war measure, no matter how urgent or necessary that might be for public safety. Such an interpretation seems absurd and impossible. It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains

(1) 10 App. Cas. 675.

unlimited powers. Parliament expressly enacted that, when need arises, the executive may for the common defence make such orders and regulations as they may deem necessary or advisable for the security, peace, order and welfare of Canada. The enlightened men who framed that section, and the members of parliament who adopted it, were providing for a very great emergency, and they must be understood to have employed words in their natural sense, and to have intended what they have said. There is no doubt, in my opinion, that the regulation in question was passed to provide for the security and welfare of Canada and it is therefore *intra vires* of the statute under which it purports to be made.

Now, I want to add a few observations. In August, 1914, the Empire was at war. *De jure* and *de facto* Canada and all the British dependencies were at war. There can be no doubt as to the individual liability at that time of all the male population of Canada between the ages of 18 and 60 for military service. It is so expressly declared by section 10 of the "Militia Act," ch. 41, R.S.C. 1906. By section 25 of the same Act, the Governor-in-council is authorized to make regulations for the enrolment of persons liable for military service. That Act is merely a re-enactment with amendments of the "Militia Act" passed in 1868, immediately after Confederation—31 Vict. ch. 40. Section 69 of the "Militia Act" authorizes the Governor-in-council to place the militia on active service anywhere in Canada, and also beyond Canada, for the defence thereof. Of course, it is unnecessary to add that so long as Canada remains a part of the British Empire, the defence thereof may depend, as suggested by Sir Louis Davies, in the course of the argument, on the success of the military and naval operations carried on far beyond its borders.

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The main departure from the provisions of the "Militia Act" which the "Military Service Act, 1917," was intended to introduce, is to be found in the recital in the latter Act that

> by reason of the large number of men who have already left agricultural and industrial pursuits in Canada to join such Expeditionary Force as volunteers, and of the necessity of sustaining under such conditions the productivity of the Dominion, it is expedient to secure the men still required, not by ballot as provided in the "Militia Act," but by selective draft.

When, in April of this year, the government came to the conclusion that it was necessary to cancel the exemptions granted under the "Military Service Act" of 1917, the effect of the order-in-council was really nothing but a return to the status under the "Militia Act" in force since Confederation, by which all are liable for service with the variations in the order of their calling out introduced by the Act of 1917.

There are obvious objections of a political character to the practice of executive legislation in this country because of local conditions. But these objections should have been urged when the regulations were submitted to parliament for its approval, or better still when the "War Measures Act" was being discussed. Parliament was the delegating authority, and it was for that body to put any limitations on the power conferred upon the executive. I am not aware that the authority to pass these regulations was questioned by a vote in either house. Our legislators were no doubt impressed in the hour of peril with the conviction that the safety of the country is the supreme law against which no other law can prevail. It is our clear duty to give effect to their patriotic intention.

SIR LOUIS DAVIES:—I concur with Mr. Justice Anglin.

IDINGTON J. (dissenting)— The question raised herein is of a somewhat remarkable character.

In a brief session of the Dominion Parliament held in August, 1914, as a result of the declaration of war between the British Empire and Germany the "War Measures Act, 1914," was duly passed and assented to on the 22nd of said month of August.

Section 6, subsection 1, is as follows:—

6. The Governor-in-council shall have power to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor-in-council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

(a) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;

(b) Arrest, detention, exclusion and deportation;

(c) Control of harbours, ports and territorial waters of Canada and the movements of vessels;

(d) Transportation, by land, air or water and the control of the transport of persons and things;

(e) Trading, exportation, importation, production and manufacture;

(f) Appropriation, control, forfeiture and disposition of property and of the use thereof.

Besides the sub-section 1 just quoted there was a sub-section 2 which declared that all orders and regulations made under the said section should have the force of law, enforceable in such manner and by such courts, officers and authorities as the Governor-in-council might prescribe, and provided for variations and revocations by any subsequent order or regulation and then proceeded:

But if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

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The "Militia Act" by its many provisions gave a much wider scope for the operations of a government to be carried on by orders-in-council than the above quotation from the said section 6 of the "War Measures Act" indicates.

Moreover, there were in the latter Act itself three other sections which gave unusual powers to the government each of which obviously furnished scope for the possible and indeed probable exercise of some such power as conferred by section 6 thereof.

All these and possibly cognate subjects by way of irrelevant details would give ample scope for the operation of the powers conferred by said section 6 beyond those somewhat crudely indicated in its s.s. (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) in subsection 1 thereof.

And I have not a shadow of doubt that its widest conceivable operation within the minds of the legislators concerned was confined to subserving the purposes I have suggested. And I agree with such conception.

If any doubt could have existed relative to the scope of power conferred thereby it must have been regarding some minor details.

For the law relevant to government by order-in-council so far as directly connected with the war stood so till the session of 1917 when the "Military Service Act" was enacted in consequence of it being discovered that the "Militia Act" as it then stood providing for drafting men by ballot might operate to the detriment of agricultural and industrial pursuits, and hence it was necessary to reconcile the imperative demands for more men with a system of conscription that might not press unduly upon the productive capacities of the Dominion.

Hence that Act was passed after reciting many reasons therefor of which the last was as follows:—

And whereas by reason of the large number of men who have already left agricultural and industrial pursuits in Canada to join such Expeditionary Force as volunteers, and of the necessity of sustaining under such conditions the productivity of the Dominion, it is expedient to secure the men still required, not by ballot as provided in the "Militia Act," but by selective draft.

That Act was as clearly intended to be an absolute and paramount code for carrying out its provisions in the way therein indicated and provided as anything which can be described or defined in the English language.

Local Tribunals, Appeal Tribunals, and a Central Appeal Judge were provided thereby and powers were again conferred upon the Governor-in-council to make regulations to secure the full effective and expeditious operation and enforcement of the Act.

The applicant Gray is a young farmer, unmarried, and a homesteader on land in Nipissing whereon he had done such settlement duties that he has some thirty-six acres in crop and no one to help him, and upon an appeal founded upon that situation, under the said Act, the Local Tribunal did not allow his claim for exemption, but upon an appeal taken to the Appeal Tribunal his claim was allowed, and at this moment he thereby stands exempt under said "Military Service Act."

An appeal was taken by the military authorities to the Central Appeal Judge.

Pending that appeal, he has been, without his case having been disposed of by due process of law, seized and tried as an offender against neither the "Militia Act," the "Military Service Act," nor any other statute of his country unless he falls within an order-in-council dated 20th April last and alleged to have been passed by virtue of the said section 6 of the "War Measures Act, 1914," which it is strongly argued before us overrides all the enactments in and regulations

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made under the "Military Service Act" to which I have adverted.

Reliance for such contention so far as I can understand the argument, is based solely upon the powers conferred by section 6 of the "War Measures Act" of 1917,

> to make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada

coupled with the following subsection (5) of section 13 of the "Military Service Act, 1917":—

> Nothing in this Act contained shall be held to limit or affect the punishment provided by any other Act or law for the offence of assisting the enemy nor the powers of the Governor-in-council under the "War Measures Act, 1914."

The fact that the order-in-council now in question was supported by a resolution of the two Houses of Parliament was very properly discarded by counsel for the Crown as failing to give any statutory efficacy thereto.

The bald proposition put forward in argument that notwithstanding the elaborate provisions of the "Military Service Act" evidently designed as a paramount code to govern the mode of selecting draftees under its provisions in substitution for the "Militia Act" and all therein contained was liable to be repealed or nullified by an order in council, I cannot accept.

Nor can I as a matter of law subscribe to any such doctrine as contained in the startling propositions put forward that it was quite competent for the Governor-in-council to have proceeded under the "War Measures Act" of 1914 not only independently of but to repeal and render inoperative all the provisions of the "Military Service Act" of 1917, and to substitute therefor what the Governor-in-council might "deem necessary or advisable" including therein the levy of such taxes as

needed to meet such exigencies; and in short to govern the country according to such conceptions save and except the possibility of parliament being convened once a year and invited to act and seeing fit to revoke such orders.

Indeed, I venture to think that such conceptions of law as within the realm of legislation assigned by the "British North America Act" to the Dominion have no existence.

As I understand the situation with which we in Canada are confronted by this war, there is no activity which the mental and physical energies of every member of the entire population come to mature years is capable of but should be made so far as possbile subservient to the success of our endeavours.

The several measures required to produce such results must be enacted by the Parliament of Canada in a due and lawful method according to our constitution and its entire powers thereunder cannot be by a single stroke of the pen surrendered or transferred to anybody.

The delegation of legislation in way of regulations may be very well resorted to in such a way as to be clearly understood as such, but a wholesale surrender of the will of the people to any autocratic power is exactly what we are fighting against.

Not only as a matter of constitutional law, sanctified by all past history of our ancestors, and prevalent in the legislative enactments of he Mother Country, but as a matter of expediency I venture to submit such view should be our guide.

The "Military Service Act, 1917," and section 6 of the "War Measures Act" are quite consistent if properly interpreted and construed as intended by parliament but are quite incompatible according to the

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argument presented and the last legislative expression of parliament from such point of view must govern else there is an end to parliamentary sanction.

Test the matter of the question raised by supposing for a moment the quite conceivable case of a change of government having taken place after the "Military Service Act" had been passed, and the new government had desired to repeal it but possibly found the Senate bar the way, would the new men have dared to repeal it by an order-in-council under the "War Measures Act" of 1914? And suppose, further, they tried to do so and asked us by a reference for a judgment maintaining such an order-in-council what could we have said? I should in such a case answer just as I do now that the "War Measures Act" could not be so stretched nor our constitution stand such a strain as repeal of a single line of the "Military Service Act" by any such methods.

I think the application should be granted.

DUFF J.—The Governor-in-council shall have power

> to do and authorize such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

These words constitute the first branch of the first subsection of section 6.

The words (I put aside for the moment any suggestion of qualifying context or substantive modifying enactment) are comprehensive enough to confer authority, for the duration of the war, to "make orders and regulations" concerning any subject falling within the legislative jurisdiction of parliament—subject only to the condition that the Governor-in-

council shall deem such "orders and regulations" to be

by reason of the existence of real or apprehended war, etc., advisable.

"Order" is a proper term for describing an act of the Governor-in-council by which he exercises a law-making power, whether the power exist as part of the prerogative or devolve upon him by statute. (See 21 & 22 Vict., ch. 99, s. 2; Ruperts Land O. in C., 4 R.S.C. 57; B. C. O. in C., 4 R.S.C. 77 and 78; P.E.I. O. in C., 4 R.S.C. 87 and 88.)

"Regulation" when used in such a collocation as found in the sentence excerpted above is broad enough to extend to any rule in relation to a particular subject matter laid down in exercise of such authority; and past all possible doubt is sufficient to embrace provisions of the kind ordained by the order-in-council of 20th April.

In *Rex* v. *Halliday*(1), it was held by the House of Lords that under a general power to

issue regulations for securing the public safety and defence of the realm

a "regulation" could validly be "issued" authorizing the detention of persons without trial and without charge. The judgments of the Law Lords in *Rex* v. *Halliday*(1), afford a conclusive refutation of the contention that a general authority to make "orders and regulations" for securing the public defence and safety and for like purposes is, as regards existing law resting on statute, limited to the functions of supplementing some legislative enactment or carrying it into effect and is not adequate for the purpose of supersession.

The authority conferred by the words quoted is a law-making authority, that is to say an authority

(1) [1917] A.C. 260.

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(within the scope and subject to the conditions prescribed) to supersede the existing law whether resting on statute or otherwise; and since the enactment is always speaking, "Interpretation Act," section 9, it is an authority to do so from time to time. It follows that unless the language of the first branch of section 6 is affected by a qualifying context or by subsequent statutory modification the order-in-council of the 20th April (the subject matter of which in the above expressed view is indisputably within the scope of the "War Measures Act") is authorized by it.

There is no qualifying context. There is in the second branch of the section an enumeration (an enumeration let it be said rather of groups of subjects which it appears to have been thought might possibly be regarded as "marginal instances" as to which there might conceivably arise some controversy whether or not they fell within the first branch of the section) of particular subjects and a declaration that the powers thereby given to the Governor-in-council extended to these subjects, so enumerated; but there is also a declaration that this enumeration shall not have the effect of limiting the "generality" of the language of the first branch of the section—the language quoted above. Thus the context, instead of qualifying the preceding language (the language quoted), emphasizes the comprehensive character of it and pointedly suggests the intention that the words are to be comprehensively interpreted and applied.

It is here convenient to note the argument so strongly pressed—the argument of *reductio ad absurdum* —that under this construction of section 6 the Governor-in-council acquired authority to repeal the "Militia Act" and pass by order-in-council provisions identical with the provisions of the "Military Service Act,"

1917. This, it is said, parliament could not conceivably have intended in August, 1914. The answer can be expressed in a sentence.

It is the function of a court of law to give effect to the enactments of the legislature according to the force of the language which the legislature has finally chosen for the purpose of expressing its intention. Speculation as to what may have been passing in the minds of the members of the legislature is out of place, for the simple reason that it is only the corporate intention so expressed with which the court is concerned. Besides that road—the road of speculation—leads into a labyrinth where there is no guide.

Ambiguous expressions may be interpreted in light of the general object of the enactment when that is known with certainty, and of the circumstances in which the enactment was passed, but subject to this the words of the statute must be construed in their natural sense.

It ought not, moreover, to be forgotten in passing upon this argument for a narrow construction, that this Act of Parliament supervened upon a decision which was the most significant, indeed the most revolutionary decision in the history of the country, namely —that an Expeditionary Force of Canadian soldiers should take part in the war with Germany as actual combatants on the Continent of Europe; a decision which would entail, as everybody recognized, measures of great magnitude; requiring as a condition of swift and effective action, that extraordinary powers be possessed by the executive.

It is convenient also at this point to note the objection raised by Mr. Geoffrion, that accepting this construction of section 6 of the "War Measures Act" that enactment must be held to be *ultra vires* of the Dominion Parliament.

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It is a very extravagant description of this enactment to say that it professes (on any construction of it) to delegate to the Governor-in-council the whole legislative authority of parliament. The authority devolving upon the Governor-in-council is, as already observed, strictly conditioned in two respects: First —It is exercisable during war only. Secondly—The measures passed under it must be such as the Governor-in-council deems advisable by reason of war.

There is no attempt to substitute the executive for parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law. Maitland's Constitutional History, pp. 1, 15 *et seq.*

Our own Canadian constitutional history affords a striking instance of the "delegation" so called of legislative authority with which the devolution effected by the "War Measures Act" may usefully be contrasted. The North West Territories were, for many years, governed by a council exercising powers of legislation almost equal in extent to those enjoyed by the provinces.

The statute by which this was authorized, by which the machinery of responsible government, and what

in substance was parliamentary government, was set up and maintained in that part of Canadian territory, was passed by the Parliament of Canada; and it was never doubted that this legislation was valid and effectual for these purposes under the authority conferred upon parliament by the Imperial Act of 1871

to make provision for the administration, peace, order and good government in any territory not for the time being included in any province.

That, of course, involved a degree of devolution far beyond anything attempted by the "War Measures Act." In the former case, while the legal authority remained unimpaired in parliament to legislate regarding the subjects over which jurisdiction had been granted, it was not intended that it should continue to be, and in fact it never was, exercised in the ordinary course; and the powers were conferred upon an elected body over which parliament was not intended to have, and never attempted to exercise, any sort of direct control. It was in a word strictly a grant (within limits) of local self government. In the case of the "War Measures Act" there was not only no abandonment of legal authority, but no indication of any intention to abandon control and no actual abandonment of control in fact, and the council on whom was to rest the responsibility for exercising the powers given was the Ministry responsible directly to Parliament and dependent upon the will of Parliament for the continuance of its official existence.

The point of constitutional incapacity seems indeed to be singularly destitute of substance.

The applicant does not point to any subsequent Act of Parliament by which the enactments of section 6 of the "War Measures Act" (in so far as they are now relevant) have been modified. A powerful argument might have been founded on the provisions of the

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"Military Service Act" of 1917, had it not been for sec. 13, sub-sec. 5 of that Act, by which it is provided that

> nothing in this Act contained shall be held to limit or affect * * * the powers of the Governor-in-council under the "War Measures Act" of 1914.

Here Parliament appears to have anticipated and nullified in advance the contention now put forward that the provisions of the "Military Service Act" are exclusive as regards the subjects with which they deal and that the powers given by the "War Measures Act" in relation to these subjects were revoked in 1917.

The force of sub-section 5 as touching any controversy at present material, is not affected by anything to be found in sub-section 4. The last mentioned sub-section deals with a particular subject matter only, the extent, namely, of the reinforcements to be provided under the "Military Service Act." These, it is enacted by sub-section 4, shall not exceed one hundred thousand men

> unless further authorized by parliament.

Assuming (without expressing any opinion upon the point) as Mr. Geoffrion contends, that the meaning of this sub-section is that the reinforcements to be provided under the Act shall not exceed the prescribed number in the absence of authority given by a new Act of Parliament; in other words, that as regards that particular subject matter the "Military Service Act" is not to be amended except by a new Act of Parliament to be passed for the purpose; assuming this, the provision is certainly an arresting one. It at once suggests that Parliament must have assumed the existence of some instrumentality for amending the Act it was passing other than a new Act of Parliament,

this instrumentality being, of course, the authority created by the "War Measures Act."

Sub-section 4 thus adds, if possible, to the force of the 5th sub-section, indicating as it does a conscious and deliberate acceptance by Parliament at the time (in 1917) of the view now put forward by the Crown concerning the scope of the powers granted by the "War Measures Act."

This brief sketch is perhaps more than is strictly necessary to dispose of all the argument seriously advanced in support of the application.

ANGLIN J.—The applicant moved before me in chambers for a writ of *Habeas Corpus ad subjiciendum* under section 62 of the "Supreme Court Act." He is in military custody awaiting sentence of a court martial for disobedience as a soldier to lawful orders of a superior officer. Such disobedience is declared to be an offence punishable by imprisonment for any term up to life by the "Army Act" (44 & 45 Vict., Imp., ch. 58, sec. 9; Manual of Military Law, 1914, pp. 370, 387) made part of the law of Canada by the "Militia Act," R.S.C., ch. 41, sec. 62 and 74, and the "Military Service Act, 1917," ch. 19, sec. 13. The "commitment" of the applicant is therefore "in a criminal case" under an Act of Parliament of Canada and is within section 62 of the "Supreme Court Act."

Before me in chambers and on the argument of yesterday before the full court, counsel for the applicant based their client's claim for discharge from military custody solely on the ground that he had been granted exemption under the "Military Service Act, 1917," and that two orders-in-council of the 20th April, 1918 (Nos. 919 and 962) purporting to cancel or set aside exemptions so granted to men of Class A between the ages of 20 and 23 (which apply to him) are invalid.

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Counsel representing the Attorney-General frankly conceded that, if these impugned orders-in-council cannot be upheld, the applicant is entitled to his discharge. The issue is therefore clean cut and, while the circumstances of the two cases differ somewhat in points not material, is precisely that recently passed upon by the Supreme Court of Alberta in the case of Norman Earl Lewis. That court (Chief Justice Harvey dissenting) held the two orders-in-council to be *ultra vires*. As many thousands of young men throughout Canada, most of them already drafted and a considerable number of them already overseas or *en route* to Europe, are affected, the importance of the matter involved is obvious. It has occasioned much public excitement and unrest, and numerous applications for writs of *habeas corpus* are already pending in provincial courts. Under these circumstances it was obviously of great moment in the public interest that the question of the validity of these orders-in-council should be authoritatively determined by this court. I therefore readily acceded to the suggestion of Mr. Newcombe, in which Mr. Chrysler concurred, that I should follow the course taken by Mr. Justice Duff and approved of by the majority of this court in *Re Richard*(1), and subsequently sanctioned by Rule 72 of our Rules of Court, and, instead of myself dealing with the motion, should refer it to the court.

The doubt which exists as to the appealability of the order for discharge made by the Alberta court in the *Lewis Case*(2), the unavoidable delay that the taking of such an appeal (which solicitors for the respondent could scarcely be expected to expedite) might involve, the probability that if I should make a like order in the

(1) 38 Can. S.C.R. 394. (2) 13 Alta. L.R. 423; 41 D.L.R. 1.

present case it would not be subject to appeal (sub-sec. 2 of sec. 62 gives a right of appeal to the court if the judge refuses the writ or remands the prisoner) and the fact that it could not be expected that a decision of a single judge of this court would be accepted as binding in the provincial courts seemed to me most cogent reasons for taking the course suggested, in view of Mr. Newcombe's assurance that it had been already arranged with the Chief Justice and the Acting Registrar that, should the reference be directed, a special session of the court to hear the motion would be called for an early date so that the applicant would not suffer the prejudice of any undue delay.

Although some questions as to the case being within the section 62 of the "Supreme Court Act" and as to the right of the full court to deal with it were raised by two of my learned brothers during the course of the argument, for the reasons already stated I entertain no doubt upon either point.

Against the validity of the orders-in-council it is urged (a) that Parliament cannot delegate its major legislative functions to any other body; (b) that it has not delegated to the Governor-in-council the right to legislate at all so as to repeal, alter or derogate from any statutory provision enacted by it; (c) that if such power has been conferred it can validly be exercised only when parliament is not in session.

(a) The decision of the Judicial Committee in *Powell* v. *Apollo Candle Co.*(1), cited by Harvey C.J. in the *Lewis Case*(2), puts beyond doubt the sovereign character of colonial legislatures within the ambit of the legislative jurisdiction committed to them and the constitutionality of limited delegations of their legislative powers. Such delegations have been so frequent

(1) 10 App. Cas. 282. (2) 13 Alta. L.R. 423; 41 D.L.R. 1.

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that it is almost a matter of surprise that their legality should now be considered open to question. A very common instance (sometimes regarded as conditional legislation) is the provision that a statute shall come into effect, if at all, in whole or in part on a day or days to be named by proclamation to be issued pursuant to an order-in-council. Here the limitation upon the extent of the powers delegated is found in the words of section 6 of the "War Measures Act" of 1914

> as he may by reason of the existence of real, or apprehended war, invasion or insurrection, deem necessary or advisable.

Their duration is expressly limited by section 3. A further limitation as to sanctions is imposed by section 11. As was said in the *Apollo Case*(1), at p. 291,

> the legislature has not parted with its perfect control over the Governor and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him.

In *Bank of Toronto* v. *Lambe*(1), at p. 588, their Lordships of the Judicial Committee said

> The Federal Act exhausts the whole range of legislative power.

A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction certainly as wide as that of which it has been said by incontrovertible authority that it is

> as plenary and as ample * * * as the Imperial Parliament in the plenitude of its powers possessed and could bestow.

Hodge v. *the Queen*(2);

> as large and of the same nature as those of the Imperial Parliament itself.

The Queen v. *Barah*(3). I am of the opinion that it

(1) 12 App. Cas. 575. (2) 9 App. Cas. 117, 132.
(3) 3 App. Cas. 889, 904.

was within the legislative authority of the Parliament of Canada to delegate to the Governor-in-council the power to enact the impugned orders-in-council. To hold otherwise would be very materially to restrict the legislative powers of Parliament.

(b) I am quite unable to appreciate the force of the argument based on the *ejusdem generis* rule. In opening, Mr. Chrysler rather disavowed invoking it. Mr. Geoffrion, however, appealed to it and in his brief reply Mr. Chrysler appeared to insist upon its application. If this rule of construction would otherwise have governed, its application to section 6 of the "War Measures Act" of 1914 is clearly excluded by the words which precede the enumeration of the specified subjects, namely

> for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared, etc.

The same language is found in section 91 of the "B.N.A. Act" and I have never heard it suggested that the residuary powers of Parliament under the general terms of that section

> to make laws for the peace, order and good government of Canada

are restricted to matters and things *ejusdem generis* with the subjects enumerated in its succeeding clauses, or, as Mr. Chrysler put his argument on this branch in opening, that the specified subjects should be regarded as illustrative of the classes of matters to which the application of the preceding general terms should be confined. Rather, I think, as put by Mr. Newcombe and Mr. Tilley, the specification should be deemed to be of cases in which there might be such doubt as to whether they fell within the ambit of the general terms—wide as they are,—that *ex abundanti cautelâ* it was safer to mention them specifically. Mr. Justice Beck in the *Lewis Case*(1) appears to have

(1) 13 Alta. L.R. 423; 41 D.L.R. 1.

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appreciated that this was the purpose of the words "for greater certainty, etc," yet by some mental process that I am unable to follow, after saying:

> The enumeration of the particular subjects of jurisdiction is obviously made in order to remove doubts which might possibly arise as to whether or not the particularized subjects would fall within the general statement of the subjects of jurisdiction,

he proceeds to add that

> Such an enumeration of particular subjects * * * must necessarily be taken as interpretative and illustrative of the general words, which must consequently be interpreted as intended to comprise only such subjects, in addition to those particularly specified, as fall within a generic class of which the specified instances are illustrative and definitive of the general characteristics of the class,

and he makes a strict application of the *ejusdem generis* rule, thereby excluding the making of orders for the enlistment of certain men exempt under the "Military Service Act, 1917," as to which, whatever else may be said of them, there cannot be a shadow of doubt that they were made

> by reason of the existence of real * * * war,

and because

> deemed necessary or advisable for the security, defence and welfare of Canada.

The very purpose of inserting the words

> for greater certainty, but not so as to restrict the generality of the foregoing terms

would appear to have been to insure the exclusion of the rule of construction under consideration.

The terms of section 6, the generality of which is not restricted, are

> to do and authorize such acts and things and to make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

More comprehensive language it would be difficult to find. The corresponding terms of the "B.N.A. Act," section 91, are

to make laws for the peace, order and good government of Canada in relation, etc.

"Welfare" is substituted for "good government" and "security, defence" are added in section 6 of the "War Measures Act." In some constitutional Acts, for instance the "New South Wales Constitution Act," we find the word "welfare" used with "good government" as a substitute for the word order. To introduce such a limitation as that suggested by Mr. Justice Beck and approved of by some of his colleagues would therefore appear to me to be to fly in the teeth of the very words of the Act of Parliament itself.

Parliament by express recital in the "Military Service Act, 1917," declares that the Canadian Expeditionary Force is engaged in active service

for the defence and security of Canada,

and that it is necessary to provide reinforcements to maintain and support it. The position taken by counsel for the Attorney-General, that the orders-in-council fall within the very terms of section 6 of the "War Measures Act," as orders made for the security and defence of Canada, therefore has statutory sanction.

Nor does the use of the term "orders and regulations" present any serious difficulty. No doubt "regulations" is a term usually employed to describe provisions of an ancillary or subordinate nature which the executive, or a Minister, or some subordinate body is empowered to make to facilitate the carrying out of a statute. But, coupled with the word "orders," (which, as used here, seems to me clearly to mean orders-in-council) and employed to connote provisions to be made

for the security, defence, peace, order and welfare of Canada,

it has necessarily and obviously a more comprehensive

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signification. It was used no doubt because the Governor-in-council usually acts by making orders or regulations. "Ordinances" might have been a more apt expression; but the context leaves no room for doubt that it was intended to confer the power to pass legislative enactments such as should be deemed necessary or advisable by reason of

real or apprehended war, invasion or insurrection,

which is declared by a definitive clause of the "Militia Act" to establish an "emergency."

No doubt the amendment of a statute or the taking away of privileges enjoyed or acquired under the authority of a statute by order-in-council is an extreme exercise of the power of the Governor-in-council to make orders and regulations of a legislative character; but the very statute, the operation of which is affected by the orders now in question, contains a provision, not found we are told in the original draft and apparently inserted for the purpose of expressing the acquiescence of Parliament in such a use being made of the power which it had conferred on the Governor-in-council by the "War Measures Act." By sub-sec. 5 of sec. 13 of the "Military Service Act" it is provided that

nothing in this Act contained shall be held to limit or affect * * * the powers of the Governor-in-council under the "War Measures Act" of 1914.

The very presence of this sub-section in the "Military Service Act, 1917," imports that under the power conferred on the Governor-in-council by the "War Measures Act," orders and regulations might be made with the validity of which, but for it, some provisions of the "Military Service Act" might be deemed to interfere. It carries confirmation of the view that the scope of the powers conferred by the "War Measures Act" was wide enough to embrace matters dealt with by the

"Military Service Act" and it puts beyond question, in my opinion, the purpose of Parliament to enable the Governor-in-council, in cases of emergency, as defined, to exercise the powers granted by section 6 of the "War Measures Act" even to the extent of modifying or repealing, at least in part, the "Military Service Act" itself. The immediate juxtaposition of sub-sec. 4 to sub-sec. 5 of sec. 13, as was pointed out by Mr. Newcombe, serves to emphasize the significance of the latter and to make it certain that its purview and operation did not escape the notice of Parliament.

The provision of sub-sec. 2 of sec. 6 of the "War Measures Act" was also relied upon as affording an indication that Parliament did not mean to confer upon the Governor-in-council power to repeal statutes in whole or in part. Sub-section 2 is probably only declaratory of what would have been the law applicable had it not been so expressed. Parliament, however, thought it necessary to express such powers in regard to its control over its own statutes. (Sections 18 to 19 of the "Interpretation Act," R.S.C., ch. 1.) I fail to find in the presence of this clause anything warranting a court in cutting down such clear and unambiguous language as is found in the first paragraph of section 6 of the "War Measures Act."

Again, it is contended that should section 6 of the "War Measures Act" be construed as urged by counsel for the Crown, the powers conferred by it are so wide that they involve serious danger to our Parliamentary institutions. With such a matter of policy we are not concerned. The exercise of legislative functions such as those here in question by the Governor-in-council rather than by Parliament is no doubt something to be avoided as far as possible. But we are living in extra-

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ordinary times which necessitate the taking of extraordinary measures. At all events all we, as a court of justice, are concerned with is to satisfy ourselves what powers Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them. Upon both these points, after giving to them such consideration as has been possible, I entertain no doubt, and, but for the respect which is due to the contrary opinion held by the majority of the learned judges of the Supreme Court of Alberta, I should add that there is, in my opinion, no room for doubt.

It has also been urged that such wide powers are open to abuse. This argument has often been presented and as often rejected by the courts as affording no sufficient reason for holding that powers, however wide, if conferred in language admitting of no doubt as to the purpose and intent of the legislature, should be restricted. In this connection reference may be made with advantage to the observations of their Lordships in delivering the judgment of the House of Lords in *The King* v. *Halliday*(1). As Lord Dunedin there said:

> The danger of abuse is theoretically present; practically, as things exist, it is, in my opinion, absent.

As Lord Atkinson observed:

> However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the executive. What is contended is that the executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact.

(c) It may be open to doubt whether Parliament had in mind when enacting the "War Measures Act" that legislative enactments such as those now under

(1) [1917] A.C. 260.

consideration should be passed by the Governor-in-council acting under it while Parliament itself should be actually in session. We can only determine the intention of Parliament, however, by the language in which it has been expressed. The terms of section 6 of the "War Measures Act" are certainly wide enough to cover orders-in-council made while Parliament is in session as well as when it stands prorogued. The fact that in the present case a resolution was adopted by both Houses of Parliament approving of the orders-in-council, while it does not add anything to their legal force as enactments, makes it abundantly clear that no attempt was made in this instance to take advantage of the powers conferred by section 6 of the "War Measures Act" to pass legislation without the concurrence and approval of parliament.

For the foregoing reasons I am of the opinion that the motion for *habeas corpus* must be refused. But, having regard to the fact that this has been made a test case and to its criminal character, there should, in my opinion, be no order as to costs.

BRODEUR J.—I concur in the opinion of Mr. Justice Idington.

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*June 5, 6.
*Oct. 8.

DAME O. PRATTE AND VIR (PLAINTIFFS) ..... } APPELLANTS;

AND

NARCISSE VOISARD (DEFENDANT) .. RESPONDENT.

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

Evidence—Forgery—Comparison of handwriting—Experts.

Per Fitzpatrick C.J. and Anglin and Brodeur JJ.—Under the law governing proof in the Province of Quebec, the testimony of experts in handwriting by comparison is admissible.

Per Brodeur J.—Evidence by experts cannot be set aside in a court of appeal, when it has been admitted without objection at the trial. *Schwersenski* v. *Vineberg* (19 Can. S.C.R. 243) followed.

Judgment of the Court of King's Bench, appeal side, reversed, Davies J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, Drouin J., District of Three Rivers, which maintained the plaintiffs' action with costs.

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

Alex. Taschereau K.C. and *Fabre Surveyer K.C.* for the appellants.

Belcourt K.C. and *St. Laurent K.C.* for the respondent.

THE CHIEF JUSTICE.—This is an action to set aside a will as fraudulent.

The testator, Edouard Voisard, was a farmer and a bachelor. He died on the 11th September, 1915, at the age of 76, shortly after meeting with a serious accident. He left an estate valued at about $40,000.

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

At the time of his death, he had, living with him, his nephew, Narcisse Voisard, and two old women named Louise and Olivine Lescadre. These women, who were sisters, had kept house for him, and his father before him, for many years.

In answer to the inquiries of the relatives who attended the funeral, Louise Lescadre said that she knew of no will made by the deceased. But four days later she produced a holograph will dated 15th August, 1915, which she said she had found under the mattress of the deceased's bed. This will, which was proved on the 29th September, 1915, is the one now sought to be set aside.

At the trial documents admittedly in the handwriting of the testator and of Louise Lescadre respectively were put in for the purpose of comparison. Mr. Justice Drouin, by whom the case was tried, observes that the writings of the testator shew him to have been a man of education, capable of expressing himself correctly, whilst in the will we find:—

une ignare manière de dire, une orthographe pleine d'incorrections et une écriture bien inférieure à la sienne.

And, comparing the writing of Louise Lescadre with that of the will, he says:—

La similitude est tellement frappante et probante qu'elle saute aux yeux des moins experts;

and further:—

la physionomie générale de l'écriture est aussi parfaitement la même que différente de celle des écrits prouvés avoir été faits par Edouard Voisard.

The learned judge also says that as a witness Louise Lescadre shewed herself unworthy of credit, and he concludes that the will in its entirety was composed and written by her.

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The Court of King's Bench reversed the judgment, Cross and Carroll JJ. dissenting.

Mr. Justice Pelletier, who delivered the judgment of the majority of the court, admits, as every one necessarily must, that at first sight a comparison of the handwritings is most convincing in favour of the appellant's theory. But, he says:—

> Si le procédé de la comparaison des écritures n'est pas infaillible, y a-t-il au dossier, dans l'ensemble, la preuve suffisante pour maintenir l'action.

It must, indeed, be admitted that proof by comparison of handwriting is not infallible. But, where it is so certain, as the trial judge has found, it must have great weight. For, in many cases, what other evidence of forgery could be made? Evidence in support of or against it can, however, of course, be offered.

Counsel for the respondent strenuously argued that "under the law governing proof in the Province of Quebec, the testimony of experts in handwriting by comparison is not recognised or admitted." And in support of this general proposition, reference was made to *Paige* v. *Ponton* (1); *Deschénes* v. *Langlois* (2); *Banque Nationale* v. *Tremblay* (3). The same objection must exist to all opinion evidence, whether it be medical testimony or that of a chemist, engineer or other scientist, and the disastrous results that would necessarily follow from the adoption of such a principle must be obvious to all who are concerned with the administration of justice. This objection, cannot, in my opinion, be maintained in view of the provisions of articles 1204, 1205 and 1224 of the Civil Code. The language of article 1205 seems wide enough to include evidence of handwriting experts. True, it is merely

(1) 26 L.C.Jur. 155. (2) Q.R. 15 K.B. 388.
(3) Q.R. 46 S.C. 304.

opinion evidence, but if given by honest and competent persons, it must be of assistance to the court. And, in a case of this sort, it is difficult to see how the alleged forgery could be exposed except by experts and competent opinion evidence. The rule contended for by the respondent would, I repeat, frequently be a serious obstacle in the administration of justice, and, as was recently said:—

it would, if adopted, create unlimited opportunities for designing persons to forge the name of deceased persons to important documents and then swear it through.

If the cases relied upon at the argument are carefully examined, it will be seen that they afford no support for the respondent's somewhat startling proposition. The judges who sat in these cases merely say that the evidence of an expert will be given weight according to the reasons given in support of it. In *Paige* v. *Ponton* (1), Sanborn J. says, at p. 158:—

There is, undoubtedly, great uncertainty in the proof of writing whether by general knowledge of handwriting or by experts; but, it is difficult to see why proof from comparison is less objectionable in principle than proof from having acquired a knowledge of a person's writing, by forming a standard in the mind from having frequently seen the person write.

This is not very illuminating. Then the learned judge concludes by saying:—

I find nothing in the expression of opinion by judges who have dissented from the rule of the old law indicating that a writing could be solely proved by comparison of a disputed writing with a genuine by experts. It has been urged merely that it might supplement weak proof of the writing by strictly legitimate means; I do not think that alone it is plenary.

The headnote of that case is:—

The signature to writing which is forged cannot be proved solely by comparison of the disputed signature with other signatures which are admitted or proved to be genuine,

and in *Deschénes* v. *Langlois*, (2) Bossé J. said (p. 390):—

(1) 26 L.C.Jur. 155.

(2) Q.R. 15 K.B. 388.

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Les raisons que les hommes de l'art donnent pour soutenir leurs opinions peuvent être d'un grand secours et aider puissamment l'avocat comme le juge à remplir son ministère; mais, il ne faudrait pas aller au-delà et adopter une théorie scientifique contrairement aux règles ordinaires de la raison.

I am of the opinion that the learned trial judge was guided by this principle in the appreciation of the evidence in this case.

It is quite true that expert evidence under modern practice is rapidly becoming of little value for any judicial purpose, because even men of the highest character and integrity are apt to be prejudiced in favour of the party by whom they are employed, and that the better procedure is that prescribed by the ordinance of 1667 and still followed in France. The court should, whenever necessary, appoint upon application of either party or of its own motion disinterested experts, to be procured and paid in such a way as to secure their freedom from bias as in the case provided for in articles 392 *et seq.* of the Code of Civil Procedure. But those articles do not apply to a case like this; no such application was made, and here the evidence was taken without objection. I would add that the difference between the admittedly genuine signature of the deceased and the signature to the will is so obvious that any one at all familiar with handwriting could readily discover it, and we can make the comparison for ourselves.

The handwriting of the will, the language in which the testator's intentions are expressed, together with the suspicious circumstances connected with the production of the will by Louise Lescadre, lead me to the same conclusion as Mr. Justice Drouin. And, as he had the inestimable advantage of hearing and seeing the witnesses, I have no hesitation in saying that we are practically bound to accept his finding.

There seem to be two main reasons for the judgment now under appeal. First, the improbability of dishonesty in this old servant of the deceased; and second, the comparative smallness of the benefit which she takes under the will.

As to the first, it must be noted that it was not a question in any event of dishonesty towards her late master personally, whose wishes she might indeed have thought she was furthering if she did write the will. Towards his relatives other than his nephew and legatee, Narcisse Voisard, it is certain that she entertained no friendly feelings.

As regards the second reason, it must have been obvious to Louise Lescadre that to have appropriated the whole or great part of the property would have afforded grounds of suspicion against the will. The testator had years before brought his nephew, the respondent, from California to live with him, and the respondent was still residing with and helping him to work his farm at the time of his death. It may be well supposed that in view of their long service, the testator would have desired to make some provision for Louise Lescadre and her sister after his own death; but there was certainly no reason why he should do more than make a reasonable provision, such indeed it might well be as is made by the will. It would have been highly improbable that he would have left to them the bulk of his estate to the exclusion of his nephew and other relatives, with all of whom he appears to have been on good if not intimate terms.

I think, moreover, one requires to consider the point of view of such a person as Louise Lescadre, placed in the position in which she was. Obviously the case would be entirely different from that of the common criminal and professional forger. She would never

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have thought of or desired fortune. She is one of those of whom it is said: "Their wants but few, their wishes all confined." Would she not have been most likely to put into the will what she had hoped her master would have done himself? She and her sister had lived thirty years in the house, and would wish to remain there with the succeeding member of the family to the end of their lives. She already had a little money of her own, and with the legacy of $1,200 probably she would have all she required. In giving the property to the member of the family best entitled to it, and in making such provision for herself and her sister as she doubtless considered herself entitled to, she might not unlikely persuade herself that she was merely giving effect to the testator's intentions. This, I think, is the most probable explanation of her action.

Judge Pelletier states that he has given the case much time and attention, as is indeed apparent from the elaborate judgment in which he has set forth the reasons for the conclusion at which he has arrived. Certainly I have not come to an opposite conclusion without devoting to the matter most careful consideration, realising as I do its importance, not merely on account of the value of the property at stake, but because of the serious reflections on the respondent which my judgment necessarily involves.

I would allow the appeal.

DAVIES J. (dissenting)—The question to be determined in this appeal is the validity or otherwise of the holographic will of the late Edouard Voisard, a farmer residing in the Province of Quebec, dated the 3rd day of August, 1915. The will was duly probated on the 29th September, 1915; and these facts which are important for our decision with regard to the deceased,

namely, his relations towards Louise Lescadre, the alleged forger, his fortune, his relatives and his condition of life, etc., stated herein, are either admitted or not denied. His death took place on the 11th September, 1915. At the time of his death Voisard was 76 years old and a bachelor. Some short time before he had been gored by his bull, which, it is alleged, had seriously injured him and had probably hastened his death. He had been all his lifetime a farmer and lived on and cultivated the land devised in the will in question here. Louise Lescadre and Olivine Lescadre had been in his service and that of his father before him, one for thirty years and the other for forty years, receiving no salary beyond board, lodging and clothing. Narcisse Voisard, the respondent, universal legatee under the will in question, was testator's favourite nephew and had been brought back from California by the testator some six or seven years prior to his death to live with him and to look after the cultivation of the land, with the understanding that he was to be the testator's universal legatee. The testator had no relatives other than Narcisse Voisard except a number of nephews and nieces, all of whom lived in the United States or other distant places and with whom the testator had little or no communication and in whom he took little or no interest. The trial judge declared that the will in question was false in its entirety and consequently null; but on appeal to the Court of King's Bench this judgment was reversed and the action dismissed with costs.

At the conclusion of the argument before us, I confess I entertained grave doubts. That the testator made a will and made it upon blue paper just as that now produced before us as his genuine will, I have no

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doubt whatever. The evidence of Pageau and François Beland satisfies me upon that point.

The former states that he went to testator's house some time before his death, in the evening, about eight o'clock, and found him at his table writing; and asking him what he was writing was told he was making his will.

The other witness, Beland, speaks of a conversation he had with the deceased on the 11th of August, which would be six days after the date of the will produced and three weeks before the testator's death, in which the deceased Voisard told him that he had made a will and shewed the witness a blue sheet of paper which he said contained his will. Upon being shewn the will in dispute he said that the paper which Voisard shewed him was a paper similar in colour to that on which the will now before us was written.

Then again there is the evidence that some time before his death he went to his notary and asked him whether he could make or write his will himself and was told he could.

The fact that he was carrying about his will with him in his pocket supports the contention that he did not put it with his other papers in his box, presumably because he did not want others to read it or know its contents, and for the same reason that in his last sickness he placed it under one of the mattresses of his bed, where he knew it would be found and where Louise Lescadre, the alleged forger, says she found it when making up his bed after the death or funeral.

These facts, coupled with the admission on all sides that in the circumstances under which the deceased lived, he possessed of a fortune of about $40,000, his will was not an unreasonable or unnatural one in any respect, assist partly in convincing me that the docu-

ment produced as his will and found, as she says, by Louise Lescadre under the mattress after the funeral is the genuine will of the testator and not a forged document, as contended. The majority of the Court of King's Bench, consisting of the Chief Justice and of Lavergne and Pelletier JJ. have so found; and in my present state of mind I do not feel justified in finding Louise Lescadre guilty of the crimes of forgery, perjury and destroying a genuine will.

The only benefit she takes under the will is the sum of $1,200; and it was not contended that that sum was excessive, or more than she reasonably might have expected him to leave her for the care she had taken of him in his lifetime and of his father before him. The only possible motive which counsel could suggest for the forgery charged was this bequest of $1,200 to Louise Lescadre, the alleged forger. In view of the value of testator's estate and of the services she had rendered him for a period of over thirty years, this legacy cannot be held to be unreasonable. It is, on the contrary, such a legacy as an honourable man possessing the estate he had at his death would, under the circumstances, make.

I admit there are some strong arguments in favour of reaching the conclusion that the will was a forgery. The trial judge so found and Cross and Carroll JJ. dissented from the judgment of the majority of the Court of King's Bench and agreed with the conclusions of the trial judge.

I was strongly impressed during the argument with the contention that the signature of the witness to the will produced was the geniune signature of Louise Lescadre and her statement that it was not and that her signature had been written there by the deceased, who told her that he was making his will and that he

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would put her name as a witness, was untrue. The photograph of the will, which the appellant produced, rather confirmed that contention; but an examinatio n of the will itself convinces me that the photograph copy was greatly misleading and shewed a different colour in the ink used in the witness' name and that used in the deceased's own name, which difference was not apparent at all in the will itself, and was greatly calculated to mislead and did for a time mislead me.

The two expert witnesses called by the appellant gave what seemed to me plausible reasons for their conclusion that the signature to the will in dispute was not the same as the genuine signature produced on the documents produced in the evidence. I confess that at one time I shared their opinion; but it must be remembered that such expert evidence as was given at the trial was not evidence which, as a rule, should have very great weight attached to it and none at all if at variance with controlling facts proved. The admissibility of this evidence was challenged by Mr. Belcourt; but I do not consider it necessary to give any opinion on his objection and treat the evidence as properly admitted. It must be remembered, however, in weighing the opinions of these experts and the reasons for them, that Voisard, who at the time of the making of the disputed will was about 76 years of age, had a few weeks before been gored by his bull and had suffered in consequence somewhat in health. It was not unfairly urged that this would account for some slight want of firmness in the writing of the signature to the disputed will. The signatures to the genuine documents appear certainly more firm and in the formation of a few of the letters a difference appears between the genuine signatures and the disputed one; but making every proper allowance for these slight differences,

after examining for myself the several admitted genuine signatures most carefully and comparing them with the disputed signature to the will, I find myself unable to conclude that this signature to the disputed will is not a genuine one.

Weighing all the evidence most carefully, I am not satisfied that the findings of fact of the appeal court are wrong and am glad to find myself able to dismiss the appeal, and so amongst other things preserve to Narcisse Voisard, the absolutely innocent universal legatee, the just fruits of the property devised to him.

IDINGTON J.—This appeal should be allowed with costs throughout and the judgment of the learned trial judge restored.

I agree with the reasons he assigned therefor as well as in the main with those respectively assigned by the learned judges dissenting in the court of appeal. What seems to me above all else should be held as an insuperable barrier in the respondent's way of maintaining the judgment in appeal is her repeated denials of the existence of such a will when interrogated on the subject of the existence of any will after the death of the alleged testator when the circumstances confronting her constituted an imperative demand to assert the truth. If what she now says was the truth she could have no just reason for withholding it from somebody. She is not, like some persons who may accidentally have found a testator's will in a most unexpected place and thus discovered it for the first time.

She professes to have seen it written and signed and to have known all about it.

The learned trial judge was not impressed with her veracity at the trial. He had, in seeing her and hearing her story in the witness-box, an advantage over any

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appellate court and his judgment should not, I most respectfully submit, have been disturbed to give effect to such a marvellous and I submit an incredible tale.

ANGLIN J.—After full consideration of all the evidence and the most critical examination of the handwriting of the alleged will and the most careful comparison of it with the many admittedly genuine samples of the writing of the deceased in the record of which I am capable, I am very clearly of the opinion that the alleged will propounded is not in the handwriting of the late Edouard Voisard. The question is purely one of fact. To detail the grounds on which my conclusion rests would serve no good purpose.

I may add, however, that I entertain no doubt as to the admissibility of the evidence of the witnesses called as experts in handwriting challenged by Mr. Belcourt.

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

BRODEUR J.—Nous avons à décider dans cette cause si le testament d'Edouard Voisard est vrai ou faux. Afin de déterminer ce point, il est bon de rappeler la situation des parties et les circonstances dans lesquelles ce testament aurait été fait.

Edouard Voisard, le testateur, était un riche cultivateur de la paroisse de la Rivière du Loup. Il était très âgé, ayant atteint près de quatre-vingts ans. Vivaient avec lui depuis au-delà de trente ans deux ménagères, deux sœurs du nom de Lescadre. L'une appelée Louise avait été institutrice et avait par conséquent une certaine éducation. Elles étaient toutes les deux considérées comme membres de la famille, vu qu'elles ne recevaient aucun salaire.

Edouard Voisard avait des neveux et des nièces; il ne paraît pas avoir de sœurs ni de frères vivants. Ces neveux et ces nièces étaienl assez indifférents à son endroit. Par contre, il y avait un neveu du nom de Narcisse Voisard, le défendeur dans la présente cause, qu'il paraissait affectionner puisqu'il l'a fait reveuir de Californie pour rester avec lui et exploiter ses fermes. Narcisse Voisard est un homme assez âgé, dépassant la soixantaine, et paraît être un homme extrêmement paisible et jouissant d'un excellent caractère. La réputation de Narcisse Voisard et des ménagères était excellente à tous égards.

Dans le cours de l'été de 1915 Edouard Voisard eut un accident qui l'a empêché de travailler pendant quelque temps. Cependant il continuait de sortir et de vaquer à ses affaires. Mais après quelques heures seulement de maladie grave il mourait le 11 septembre 1915.

Les neveux et les nièces viennent à ses funérailles et le jour même ils envoient l'un d'eux pour demander s'il y avait un testament. Il me paraît évident que Narcisse Voisard ne savait pas qu'il y eût un testament, car on le voit lui-même aller s'enquérir chez le notaire pour savoir si son oncle avait écrit ses dernières volontés.

D'un autre côté, Louise Lescadre, l'une des ménagères, savait qu'il y avait un testament; cependant quand le représentant de la famille est allé lui demander s'il y en avait elle aurait répondu, d'après son témoignage, qu'il n'y avait pas de testament en sa faveur, à elle.

Elle a été un peu vexée de voir que ces neveux et ces nièces, qui n'avaient jamais pris intérêt à leur oncle, qui ne le visitaient qu'à de rares intervalles, s'empressent en foule quelques jours après pour s'emparer des

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documents, pièces, etc., qui se trouvaient dans la maison; et elle explique que c'est cette conduite de leur part qui l'a incitée à ne pas leur dire de suite toute la verité. A tout événement, elle prétend que le samedi suivant les funérailles d'Edouard Voisard elle a trouvé le testament produit en cette cause sous la paillasse du lit de la chambre du défunt.

Par ce testament, Edouard Voisard léguait ses biens à son neveu Narcisse Voisard et il donnait en même temps une somme de douze cents piastres ($1,200) à Louise Lescadre et exprimait le désir de la voir toujours rester avec son neveu. Il chargeait en même temps son neveu de donner une bonne pension à l'autre ménagère, Olivine, tant qu'elle vivrait, il faisait en outre un legs de deux cents piastres ($200) à une nièce, Emma Lambert, donnait une maison à Edouardina Voisard, une autre nièce, et déclarait en outre dans le testament qu'il devait une somme à Louise Lescadre qui était marquée dans son livre.

Les dispositions de ce testament sont extrêmement raisonnables et extrêmement justes. Il n'est pas étonnant que le testateur ait institué légataire universel de ses biens ce neveu qu'il affectionnait d'une manière tonte particulière et qu'il avait fait venir des Etats-Unis six ou sept ans auparavant pour vivre avec lui. Il n'est pas étonnant non plus qu'il ait donné quelque-chose, et cependant c'est bien peu de chose, à ses vieilles ménagères, qui avaient passé toute leur vie avec lui et qui l'avaient non-seulement servi lui-même, mais même son père. Il n'est pas étonnant, non plus, qu'il n'ait pas pourvu particulièrement à ses nombreux neveux et nièces, étant donné le fait que ces derniers avaient paru être assez indifférents à son sort.

En même temps, il faut dire aussi que la preuve me paraît bien certaine qu'il y a eu un testament de fait.

Dans le mois d'août 1915, c'est-à-dire à l'époque où ce testament a été écrit, un de ses grands amis, un voisin, étant allé le voir un soir, le trouva à écrire quelque chose. Sa ménagère, Louise Lescadre, était alors à côté de lui et Edouard Voisard de déclarer qu'il était à faire son testament. Cette preuve me paraît irréfutable et a été donnée par une personne dont la respectabilité et l'honorabilité ne font pas de doute.

Mais il y a plus. Vers le même temps, Voisard va au village, chez une connaissance, et cette dernière de lui dire en badinant qu'elle espérait qu'il ne l'oublierait pas sur son testament: et alors l'autre aurait dit: "Mon testament est fait"; et il aurait sorti de sa poche un papier bleuâtre en lui disant: "Le voici." La couleur de ce papier correspond absolument à celle du papier sur lequel le testament en question est écrit. Il a dit la même chose aussi à Arthur Lacerte.

Il n'y a donc pas de doute, suivant moi, qu'il y a eu un testament de fait. Maintenant, est-ce celui que nous avons devant nous?

Plusieurs témoins ont été entendus dans cette cause: et quelques-uns, qui connaissaient bien la signature d'Edouard Voisard, disent que ce testament n'a pas été signé par lui.

En même temps, le demandeur a produit au dossier une lettre de Louise Lescadre et une lettre écrite par Edouard Voisard. Plusieurs reçus qui avaient été donnés par Edouard Voisard ont été produits également. Mais les documents les plus importants pour établir la comparaison des écritures sont certainement la lettre de Louise Lescadre et celle d'Edouard Voisard.

La prétention des demandeurs appelants, c'est que le testament est écrit entièrement de la main de Louise Lescadre; et je suis porté à croire, après avoir examiné

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avec soin ces pièces et avoir lu la preuve avec une attention toute particulière, que leur prétention est bien fondée.

Sur le testament le nom de Louise Lescadre apparaît comme témoin. Elle a prétendu que ce n'était pas sa signature cependant, mais que le testateur, Edouard Voisard, en finissant d'écrire son testament lui aurait demandé si elle avait objection à être témoin du testament et il aurait simplement mis son nom.

Pour moi, il n'y a pas de doute que la signature qu'il y a sur le testament et la signature qu'il y a sur la lettre de Louise Lescadre sont de la même personne. Par conséquent, ayant admis qu'elle avait signé cette lettre en question, elle n'aurait pas dit la vérité quand elle a dit que ce n'était pas sa signature qui apparaissait sur le testament.

Pourquoi avoir caché à Narcisse Voisard lui-même l'existence de ce testament? Elle admet que le testament a été écrit en sa présence environ un mois avant la mort d'Edouard Voisard. Il est des plus surprenant qu'elle n'ait pas dit à Narcisse Voisard, avec qui elle paraissait être en bonnes relations, qu'il y avait un testament qui avait été fait. Les héritiers la questionnent. Il est vrai qu'elle a pu être vexée de la manière dont ils se sont adressés à elle; mais enfin il n'y avait pas de mal pour elle de dire qu'il avait fait un testament et qu'elle en avait eu connaissance.

Le juge qui a présidé au procès, qui a vu les témoins, notamment Louise Lescadre, dans la boîte, déclare formellement dans son jugement qu'elle a eu devant la cour une attitude qui dénotait un indéniable manque de sincérité. Alors en présence d'une déclaration aussi formelle du juge, il me semble qu'il est bien difficile d'accepter le témoignage de cette personne, d'autant plus que si l'on compare le testament avec une lettre

écrite par Edouard Voisard on voit de suite qu'il y une différence considérable dans l'écriture et que le testament ne paraît pas avoir été écrit par celui qui a écrit la lettre signée "Edouard Voisard;" et il est incontestable que cette lettre a bien été écrite et signée par lui.

La demande a produit des experts en écriture pour exprimer leur opinion sur ces documents. Aucune objection n'a été faite à cette preuve. Au contraire, je retrouve dans le dossier, à certains endroits, que les avocats de la défense se sont objectés à ce que certains témoins expriment une opinion sur les écritures parce qu'ils n'avaient pas d'abord déclaré s'ils étaient ou non des experts en écriture. Le témoignage de ces experts, Cartier et Bellinge, a été admis sans aucune objection de la part de la défense. Maintenant devant cette cour on prétend que ces témoignages-là devraient être rejetés parce que notre code de procédure civile n'autorise pas l'admissibilité de telle preuve.

L'ordonnance de 1667 avait une disposition formelle pour l'audition des experts en écriture. Cette disposition de l'ordonnance ne paraît pas avoir été suivie avant le code de procédure civile.

M. Belcourt prétend que le seul moyen de vérifier les écritures est suivant les dispositions de l'article 392 du code de procédure civile.

Par les dispositions de cet article le juge, s'il le trouve nécessaire, peut nommer des experts pour l'éclairer sur certains points de la cause. Il n'y a pas de doute que dans le cas actuel le juge aurait eu parfaitement le droit de nommer des experts en écriture. Mais était-il obligé de le faire? Et la preuve d'experts qui a été admise sans objection doit-elle être rejetée?

Il a été décidé par cette cour dans une cause de

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Schwersenski v. *Vineberg* (1), que dans le cas où une preuve a été admise pour contredire un écrit, sans objection, cette preuve ne peut pas être mise de côté subséquemment par les tribunaux d'appel.

Je suis d'opinion, suivant la jurisprudence énoncée dans la cause que je viens de mentionner, que dans le cas actuel si le défendeur voulait empêcher cette preuve il aurait dû s'y objecter formellement. Il ne l'a pas fait et je ne vois pas de raison pourquoi nous pourrions maintenant la mettre de côté.

Comme je le disais tout à l'heure, je suis convaincu qu'il y a eu un testament de fait. Maintenant qu'est-il devenu? Je ne le sais pas. A-t-il été détruit par Louise Lescadre et s'en est-elle servi pour écrire celui qui est maintenant devant nous? Je l'ignore également. Mais, à tout événement, je suis convaincu que celui que nous avons devant nous n'a pas été écrit par Voisard.

Sur le tout, j'en suis donc venu à la conclusion que le testament qui a été produit en cette cause n'a pas été écrit ni signé par Edouard Voisard et par conséquent l'action des demandeurs doit être maintenue. Leur appel devant cette cour doit donc être maintenu avec dépens de cette cour et de la cour d'appel et le jugement de la cour supérieure rétabli.

Appeal allowed with costs.

Solicitors for the appellant: *Tessier, Lacoursière & Fortier.*

Solicitors for the respondent: *Bureau & Bigué.*

(1) 19 Can. S.C.R. 243.

CHARLES J. SCHOFIELD (PLAINTIFF) ..... APPELLANT;

AND

THE EMERSON BRANTINGHAM IMPLEMENT COMPANY (DEFENDANT) ..... RESPONDENT.

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*May 16, 17.
*Oct. 8.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Sale—Principal and agent—Written contract—Modification by written consent of principal—Representations by agent.

The appellant ordered from the respondent "one of your Big Four 30 h.-p. Gas Traction Engines." The agreement provided that the order was "made upon the express condition that" it "contains all the terms and conditions of the sale * * *" and "cannot in any manner be changed, altered or modified without the written consent of the officers" of the company respondent. After one of of respondent's agents had concluded a trial of the engine, appellant was not satisfied with its performance; but the agent represented to him that "the engine would get better with wear and that if it was not right, the company would make it right." Thereupon appellant paid $600 in cash, gave notes for the balance of the purchase price and signed a satisfaction paper certifying that the engine had been "properly put in order."

Held that, upon the evidence, the engine supplied was not the engine ordered, as it could not develop its rated horse-power.

Per Idington and Anglin JJ.—According to the system adopted by the company respondent, such assurances by its agent were authorised notwithstanding the terms of the contract and were apparently confirmed by respondent which, without any demur, protest or reservation of rights, sent its employees to make extensive repairs to the engine.

Per Davies J. dissenting.—In the face of the express stipulations of the written contract, the respondent's agent had no power, by his representations to the appellant, to bind the respondent and alter the contract.

Judgment of the Supreme Court of Saskatchewan, 38 D.L.R. 528; [1918] 1 W W.R. 306, reversed, Davies J. dissenting.

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

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SCHOFIELD v. EMERSON BRANTINGHAM IMPLEMENT CO.

APPEAL from a decision of the Supreme Court of Saskatchewan *en banc* (1) reversing the judgment on the trial in favour of the plaintiff.

The material facts are stated in the above headnote.

C. E. Gregory K.C. for the appellant.

Geo. F. Henderson K.C. and *Fleming* for the respondent.

THE CHIEF JUSTICE.—The appellant's order to the respondents was for

one of your Big Four 30 h.-p. Gas Traction Engines.

The jury found that the engine was not capable of developing its rated horse-power; that the appellant made known to the respondents the particular purpose for which he required the engine so as to shew them that he was relying on their skill and ability to furnish him with an engine suitable for his purpose; that the engine was not reasonably fit for that purpose, being defective by reason of its lack of horse-power. There was evidence on which the jury could make these findings.

I do not myself understand how it can be maintained that the appellant was not ordering a 30 h.-p. engine. Mr. Justice Elwood thinks that if the order was not for "a" 30 h.-p. engine but for "your" 30 h.-p. engine, the latter did not need to be a 30 h.-p. engine; in fact that the respondents 30 h.-p. engines were not necessarily of 30 h.-p. This seems to me rather a strained meaning to put on so slight a difference of language and to be one that would not readily occur to ordinary persons dealing with the respondents.

Reading the order with the findings of the jury, I

(1) 38 D.L.R. 528; [1918] 1 W.W.R. 306.

come to the conclusion that the respondents did not deliver such an engine as was called for by the order.

This really disposes of the case, for it eliminates the difficulties presented by the conditions of the contract which were what troubled the learned judge who rendered the judgment appealed from. Mr. Justice Elwood, after pointing out that it was only after receiving certain assurances and representations from the respondents' agent that the appellant consented to sign exhibits 1 and 2 and to pay $600 and sign the notes, says:—

> Those representations were untrue. I am therefore of opinion that the appellant's acceptance is not binding upon him and it did not constitute him a purchaser of the engine.

Having found, however, that the engine was the one ordered, the learned Judge thinks that the agent had no authority to change the contract, as he would be doing, by making the representations he did because clause 8 of the contract provides that the order

> contains all the terms and conditions of the sale and purchase of said engine and cannot, in any manner, be changed, altered or modified without the written consent of the officers of the said company.

The judge points out that under the authority of *Wallis Son & Wells* v. *Pratt & Haynes*(1), and many other authorities, the appellant would have been entitled to recover damages if what the respondents had delivered had been something different from what was ordered.

I am entirely in agreement with the learned judge except that, as above stated, I am of opinion that the engine delivered was not such as was called for by the order.

It is a consequence of these differing premises that it follows that the conditions of sale have no application.

(1) [1911] A.C. 394.

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Davies J.

I would allow the appeal and restore the judgment at the trial.

DAVIES J. (dissenting)—In this case I have the misfortune to differ from my colleagues, being of the opinion that the appeal should be dismissed and the judgment of the appeal court confirmed.

I was satisfied at the conclusion of the argument that the whole case turned upon the question whether Winterhalt, the expert who was sent by the company to give the machine purchased by Schofield, the plaintiff, the actual trial provided for by the written contract of sale, had any authority to make a new contract, as it is alleged he did, or to in any way alter the original written one signed and made between the company and the plaintiff.

A full study of that contract has satisfied me that he had no such power and that the statements he made to the plaintiff, and on which the latter says he relied, could in no wise alter or change that written contract. The contract, in fact, expressly provides for just such a case as the one before us of a subordinate officer or agent of the company altering or attempting to alter, in any way, the contract of sale made by the company.

Clause 8 states that the order and agreement

> contains all the terms and conditions of the sale and purchase of the said engine, fixtures and equipment, and cannot, in any manner, be changed, altered or modified without the written consent of the officers of the company.

It is not contended that any such consent was obtained to the alleged changes made in the contract by Winterhalt, the expert sent to give the engine and machine the trial provided for by the contract, and I am unable to find how these representations can constitute a new contract or in any way bind the company.

After Winterhalt had given the engine the trial which was accepted by all parties as the equivalent of the three days' trial stipulated for in the contract, the plaintiff signed the satisfaction paper certifying that the company's expert had

> properly put in order, adjusted and started my model Big Four "30" Gas Traction Engine so that everything works satisfactorily to me.

He also paid the agent $600 and signed the notes for the balance of the purchase money, and relying as he said upon Winterhalt's statements, did not return the machine to the company within the time stipulated in the contract if it was found at the trial of the machine not to develop the horse-power or to do the work it was guaranteed to do.

At the time these documents were signed the evidence of the plaintiff was to the effect that the engine was not working properly in that it apparently did not develop sufficient horse-power to do the work it was supposed to do.

Plaintiff, with full knowledge of these facts, signed the satisfaction certificate and the notes and paid the cash, $600, to Winterhalt, and when asked at the trial why he did so said:

> From the guarantee he told me that the company would stand behind the engine and make it right if it was not right, and that it would develop more power with use. "Oh, yes," he said, "it would develop more power with use, after it got smoothed up."

It seems to me, therefore, that his whole case rests upon these statements and promises of Winterhalt.

If, in the face of the express stipulations of the written contract, it could be successfully contended that Winterhalt had such power to bind the company and alter the contract made by them the plaintiff would have gone a long way to establish his case.

If he had no such power, and it seems to me clearly

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Idington J.

and beyond reasonable doubt that he had not, then plaintiff must fail.

I am specially impressed with the reasons for judgment given by Mr. Justice Newlands with which I concur and would dismiss this appeal with costs.

IDINGTON J.—It seems to me that this case presents a system of doing business which has been devised to deprive respondent's customers of all rights save such as it may graciously recognise.

It has framed an order for intending purchasers of any of its 30 horse-power engines to sign as the first step in purchasing.

The order is for a shipment of such engine to a point named for the purpose of trying it there for three days. Then an agent of the respondent is to meet there the intending purchaser and demonstrate on land selected by him the efficiency of the engine.

The experienced agent who fails to demonstrate the cardinal facts of the whole transaction

(*a*) that the engine will develop its rated horse-power at the draw-bar (*b*) that the engine, if rated at 30 or more horse-power will furnish ample and steady power to drive any 36-inch cylinder threshing machine, complete with self-feeder, weigher and blower,

from any cause whatsoever, must be possessed of such adroitness as to ingratiate himself with the customer and persuade him that such demonstrations have taken place and that he is satisfied and has no longer any excuse for delaying the handing over of the cash and notes stipulated for.

If he happen to have some doubts, the agent may represent to him

that the engine would bet getter with wear and that if it was not right the company would make it right,

and thereby get, as the agent in question herein, by such representations got, $600 in cash and promissory

notes to the amount of $3,150, and take his departure carrying with him also a certificate got by the same means.

The only thing then supposed to be left in the contract to which the purchaser can look is the following:

Sixth.—It is mutually agreed that said engine, fixtures and equipment are purchased upon the following warranty only, viz.:

(*a*) Should any parts (except electrical parts) prove defective within one year from the date of purchase of said engine on account of inferior material or workmanship, and such parts be returned to the Big Four Tractor Works, Winnipeg, Manitoba, transportation prepaid thereon, and be found by the company to be defective on account of inferior material or workmanship, said company will furnish new parts in lieu of some defective parts on board cars at Big Four Tractor Works, Winnipeg, Manitoba.

(*b*) Should any of the hardened cut steel bevel gears on said engine break or wear out within five years from the date of the purchase of said engine, said company, after satisfactory proof upon demand therefor, will replace them by delivering such parts on board cars at Big Four Tractor Works, Winnipeg, Manitoba.

(*c*) Should the engine frame break or wear out within five years from the date of said purchase, said company will, after satisfactory proof, upon demand therefor, replace said engine frame by delivering the same on board cars at Big Four Tractor Works, Winnipeg, Manitoba.

It is to be observed that none of these provisions cover any possible defect, involving the discovery of any original defect after settlement procured by the blandishment of the agent bringing it about.

In such event the respondent falls back upon the provisions of the eighth clause which is as follows:—

It is further agreed that this order and agreement is given and accepted and the sale and purchase of said engine, fixtures and equipment are made upon the express condition that this order and agreement contains all the terms and conditions of the sale and purchase of said engines, fixtures and equipment and cannot, in any manner, be changed, altered or modified without the written consent of the officers of the said company, and that the sending of any person by the company to repair or operate said engine or the remaining of the person sent to start said engine, after the expiration of said three days' trial, shall in no manner waive, modify or annul any of the terms or conditions hereof. The company shall not be responsible for any delay in shipping

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said engine caused by accidents, strikes or other unavoidable circumstances, and that this order and agreement is not to be binding upon the company until approved by the said company by a duly authorised representative thereof signing the same.

And when, as will presently appear, some engine may have failed to fulfil the expectations of the respondent, and the acceptance thereof induced by the assurances of the demonstrating agent is relied upon in an action as herein occurred, the respondent by virtue of said clause whenever it suits its purpose repudiates all liability and claims such agent had no authority to give such assurances.

It, therefore, becomes important in this case to know if such a claim of want of authority is in fact true.

We have the evidence of one Cole, examined under a commission on behalf of respondent, which seems entirely to destroy this pretension.

He tells of nineteen years' experience and that he had been in the employment of respondent since 1912, which antedates the representation relied upon by appellant as given by Winterhalt, another agent engaged by respondent.

He further speaks as follows:—

Q.—State, Mr. Cole, your connection with the defendant company and your duties as such. A.—I have to deliver new—I deliver new outfits, go out and deliver and demonstrate them, and, well we are what are commonly called troubleshooters or experts. If a man has any trouble with his engine we are supposed to go and adjust it, repair them, etc.

Q.—Your time, then, is largely taken up in first demonstrating new engines and then going around and clearing up troubles that inexperienced operators may have with the engines? A.—Yes, sir.

Q.—In doing so do you ever find that the trouble is caused from the engine itself, or is it always, in your opinion, with the inexperienced operators? A.—It is not always with the inexperienced operators. You know, building the number of engines we do, one will occasionally get by the shop.

Q.—And that is the reason why they hire somebody to repair such

engines so they will operate? A.—Yes, sir. But I should judge that three-quarters of the trouble is from inexperienced operators.

* * * * * *

Q.—Mr. Cole, you were asked the question if you didn't state to the plaintiff after you had finished your repairs on his engine that if he got into any more trouble the company would take care of him, I wish you would state what authority you had, and what authority you had at that time from the company, in the nature of your employment, to make representations to people as to what the company would do for them, if you had any authority? A.—Well, it is customary when a man goes out, if the purchaser has had trouble, and he goes out and he is a little sore, to tell them that the company will take care of them, because they always do, as in this case they sent Hill back. I was working on another job and they sent Hill.

Q.—I understand. If a man sends in a complaint, the company sends a man to take care of the trouble? A.—Yes, sir.

Q.—It is the custom of the company to keep all their engines in working order? A.—Yes, sir.

* * * * * *

Q.—In fact, you have got no authority from the company to tell a man that they will take care of him? A.—Yes, we have that authority, to assure a man that he will be taken care of.

Q.—You know that that is the custom of the company to take care of them? A.—Yes, sir.

Q.—And you just assumed that they would do so in this instance? A.—Yes, sir.

Q.—And you were correct, so far as you know, in assuming that? A.—Yes, sir.

The latter part of this examination was in re-examination and evidently intended to evoke a reply denying authority.

It requires considerable assurance to stoutly contend in face of this evidence that there was no authority from the respondent to Winterhalt, (who was engaged in exactly the same capacity as Cole had occupied for years), when he gave the assurances which induced the acceptance of the engine in question, after only a two days' instead of three days' trial, and the giving by appellant of the cash and notes in question herein. But there is further evidence in the case from which it would be the fair inference that such assurances were fully authorised, notwithstanding the terms written in the contract, for all the appellant had to do when the

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engine in question broke down a few days after the settlement with Winterhalt, and he had gone was to notify the local selling agents of the fact and as, of course, the head office at Winnipeg was informed and, without any demur on its part, sent this Mr. Cole to the appellant's place to see and remedy what was wrong, and he did so accordingly and sent a report to the head office of his having done so to appellant's satisfaction. And, again, something much more serious went wrong and the like course was pursued with the like results which cost hundreds of dollars. Yet there was not the slightest effort at repudiation or appearance of the respondent resting upon the contractual provisions now relied upon. Can there be a doubt that these ready responses were pursuant to the assurances given by Winterhalt, and later by Cole himself repeated, I think, and in part fulfilment thereof? What had to be rectified did not fall within the terms I have quoted above from the contract.

Or is the form of contract supposed to prohibit not only agents from making some unwarranted contract, but also preclude the possibility of any later contractual relations between the parties thereto, unless reduced to writing?

If the latter alternative is relied upon it fails, for the two-fold reason that it is beyond the range of the meaning that ordinarily would be attached to the language used, and in the next place that the system adopted holds out to the public those experts as possessing the power of giving such assurances.

Another suggestion occurs to me, that it might be held fraudulent to devise such a trap for capturing the unwary.

As fraud has been rejected by the jury in the sense

in which it was submitted I need not follow the suggestion.

Its rejection, however, renders it all the more incumbent upon respondent to observe in an honourable manner the obligations resting upon one so holding out its agent to the public, and I do not think a contract made some months before, does preclude respondent from later on adopting another system than that contemplated thereby, or the other party from reaping the benefit and relying upon it.

The respondent, after observing the assurances given by responding to the calls I have already referred to, on a third occasion refused to do so, when it became imperatively necessary to stand behind its written and verbal contracts, and its engine in question when that collapsed as it were a short time later.

The appellant, having failed to get any proper result, consulted solicitors who, as such, wrote respondent and pointed out to it the history of failures, and a second time, on the 10th June, 1913, pointing out that fact and the failure of the last attempt of respondent's experts to make the engine serviceable and that it had never given satisfaction and had proven so unsatisfactory that they must demand its replacement by an engine properly fitted for the purpose.

In this they intimated that if not notified what was to be done their client would draw the engine to Webb and leave it there.

Respondent replied from Winnipeg on the 24th June asking them to furnish proof that they were the duly authorised attorneys to act for Mr. Schofield. Until then they would not go into the matter in detail.

Appellant wired confirmation of their authority and and got in reply letter of 30th June written in an abusive and insolent tone, and threatening suit when his first

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note fell due. No answer was made to the suggestion of drawing the engine to Webb to leave it there as would be in accord with what the written agreement provided for.

The evidence of Mr. Harriston, an expert, who seems to have been well qualified for his task, and who is admitted on argument before us to have discovered what was wrong with the engine in the condition in which Mr. Cole had left it tells how he proceeded. It would seem, from Mr. Harriston's inspection, that he took the engine apart and found that a piston in use in one of the cylinders which Mr. Cole, on behalf of respondent, had substituted for the first one was far too tight to work at all usefully and that twenty-five per cent. of the supposed 30 horse-power was thereby to be deducted from what was intended.

Needless for me to go into further detail. It is only necessary to do so thus far to shew exactly the nature of the legal problems that have arisen as the result of the circuitous scheme of business which puts forward for use a rigorous form of contract designed on the one hand, if possible, on occasion to shelter the respondent from all risk of liability or responsibility for anything but the demonstration of the specified horse-power as above quoted, and on the other hand, securing approbation by instructing its agents to give the assurances of its standing behind the engine and maintaining its efficiency to do the work expected of it yet abandon customer, agent, and all else if too troublesome.

Can such a scheme become successful in law with such findings of fact as the answers of the jury to the qustions submitted to them furnish? And specially when read in light of the evidence I have referred to and quoted in part? I cannot think so.

The questions submitted to the jury and their answers are as follows:—

Q.—Did the defendant's agent, Luce, represent to the plaintiff (*a*) that this engine in question was a simple engine that any one could run after three days' experience? A.—Yes. (*b*) That it would draw eight breaking ploughs on the plaintiff's land? A.—Yes.

Q.—If so, were either of these representations false, and if so, which? A.—Yes (*a*).

Q.—If false, did Luce know they were false? Or were they made recklessly, careless whether they were true or not? A.—No.

Q.—Was the plaintiff induced to enter into the contract by either of these representations? A.—Yes.

Q.—Did the plaintiff accept the machine? A.—Yes.

Q.—Was the engine capable of developing its rated horse-power? (*a*) As delivered? A.—No. (*b*) After Cole repaired it. A.—No.

Q.—Did Winterhalt represent to the plaintiff that the engine would get better with wear and that if it was not right the company would make it right? A.—Yes.

Q.—If so, were said representations or either of them made fraudulently? A.—No.

Q.—Were the moneys paid and notes given as a result of these representations or were they given because the plaintiff was then satisfied with the engine with the exception that it did not pull as well on kerosene as gasoline? A.—Because of representations made.

Q.—Did the plaintiff make known to the defendants the particular purpose for which he required the engine so as to shew that he was relying on their skill and ability to furnish him with an engine suitable for his purpose? A.—Yes.

Q.—Was the engine reasonably fit for that purpose? (*a*) as delivered? A.—No. (*b*) after being repaired by Cole? A.—No.

Q.—If not, wherein was it defective? A.—Lack of horse-power.

Q.—If the engine was not reasonably fit for the purposes for which it was purchased, what damage did the plaintiff suffer thereby? A.—Recovery of notes as they stand.

Q.—Was the engine retained by the plaintiff as the engine delivered under the contract? A.—Yes, kept by reason of the representations made.

It seems to me that despite all the attempts by the written contract to deprive appellant of any remedy, that the assurances of the agent were duly authorised, and were so acted upon, after getting the fruits thereof, by the respondent, in its subsequent dealings with the appellant in relation thereto, as to estop it from setting up the prior contract or anything restricting the appel-

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lant from asserting his right to rely upon said assurances.

It is not the mere collecting agent or expert demonstrator's authority which, doubtless, was what was had in view in making the provisions against agents variations now relied upon, that has to be passed upon, but the power of the head office in Canada to contract, save in writing, that is in question.

I have no doubt as a result of a perusal of the evidence bearing thereon that it had ample power and was held out to the public as having ample power to do such acts as to rescind the written contract now relied upon, to accept at any time a return of the engine, the property in which had never passed out of respondent, and in short to do anything it pleased relative thereto without a single piece of writing being used.

Assuming that the head office in and for Canada had such power to deal with the matter, there can be no doubt of the result; for it first directed its minor agents to give such assurances, acted upon them, led appellant to believe they were valid, and by virtue thereof presumed to make over, as it were, a good part of the engine which had been destroyed by the instructions of the respondent's agent having been followed.

In short the destruction of the machine resulted directly from the appellant's reliance upon the assurances given and his being induced thereby to trust respondent in its pretended and ineffective attempts at their fulfilment, without using adequate care and skill therein. Had he been bound and told to rely upon the letter of the writing, that destruction probably would have been averted by his calling in an expert such as Mr. Harrison when he would in all probability have got a more thorough examination of it, discovered the difficulty and had it rectified instead of

having the engine so destroyed, as the result of trusting to the good faith of respondent.

Corporations, as well as men, may so act that their conduct will contractually bind them in the ordinary course of business. The respondent's conduct has been such as to be a ratification of what it knew had been contracted for even if the agent had no prior authority.

In any event the written contract has never been observed by it in demonstrating, as its terms require, the existence of 30 horse-power when that was to have been done. And that stands good yet unless displaced by a settlement improperly obtained if one can give heed to such contention as set up. And the more especially is that the case where respondent is estopped for the reasons I have set forth in trying to take advantage of part of its contract, excluding all else.

In either of these views I take I need not dwell upon the questions which otherwise might arise under the "Sale of Goods Act," or under the law apart therefrom, if different.

I see no difficulty such as the learned trial judge found in giving relief in way of rescission of the contract and directing the return of the notes and money if that is a more appropriate remedy than what he applied.

The facts are stated, and the law that suits them will maintain the action and the alternative prayer for relief, other than damages, if found appropriate, will be open to the court.

I would, therefore, allow the appeal with costs of the appellate court and here and direct judgment accordingly in such form as desired.

ANGLIN J.—The plaintiff sues for the return of cash and notes given by him as the purchase price of a traction engine from the defendant company—neces-

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sarily, I take it, on the basis of rescission of the contract of sale—and, in the alternative, for damages for breach of warranty as to the capacity and fitness of the engine. The defendant counterclaims for judgment on the notes.

The trial judge held the plaintiff not entitled to rescission, but, while he gave the defendant judgment on its counterclaim, presumably on the footing that the plaintiff should be held to have accepted the engine and was not entitled to rescission which, indeed, the learned judge says was not claimed, on the jury's findings he held the plaintiff entitled to damages in an amount equal to that represented by the notes and directed a set-off, presumably, though he does not so put it, as Mr. Justice Newlands says,

> on the implied warranty of fitness.

On appeal the judgment for damages was reversed by the Supreme Court *en banc* which held, as I understand the opinions delivered by Elwood and Newlands JJ., that, although the plaintiff's giving of the cash and notes, after what was held to have been accepted by him as the three days' demonstration trial provided for by the contract, did not amount to a binding acceptance of the engine because induced (as found by the jury upon sufficient evidence) by a misrepresentation and an unfulfilled assurance of the agent who obtained them, his acceptance of the engine and its fulfilment of the requirements of the contract as to capacity were established as against him by his failure to return it under a provision of the contract making his retention of it for more than two days after the completion of the demonstration test

> proof conclusive that said engine and equipment fulfilled the *warranty* in every respect and shall constitute an acceptance and purchase, etc.

On the ground that the contract in express terms precluded any implied warranty of fitness under the Saskatchewan "Sales of Goods Act" (R.S. 1909, c. 147 s. 16), and contained no express collateral warranty thereof, the court further held that an action would not lie for breach of warranty.

Recovery on the ground of deceit, if otherwise open, was precluded by the jury's findings negativing fraud. Although this relief was not demanded in the statement of claim it would seem to have been treated as open to the plaintiff in the Appellate Division, had a case been made for it.

There is nothing to indicate anything in the nature of mistake or surprise on the part of the plaintiff in making the contract for the purchase of a "30 h.-p." tractor engine from the defendant, or fraud or overreaching inducing his execution of it. It was, therefore, when executed, clearly binding upon him according to its terms.

The jury, having found upon more than a mere scintilla of evidence that the engine delivered by the defendants was not capable of developing 30 h.-p., and the Appellate Court having accepted that finding, the case must be disposed of on the assumption that it is correct. I am, with respect, unable to assent to the view expressed by the learned judges of the Appellate Division that it was nevertheless the engine ordered. Not only was "30 h.-p." part of the description of the engine sold, but the contract expressly provided that the purchaser should not be bound to accept the engine unless after three days' trial in field work it should be demonstrated that it would develop 30 h.-p. at the draw-bar. Unless that condition of the sale was fulfilled the purchaser was entitled to reject the engine.

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Under such a contract I am unable to understand how it can be said that

> the h.-p. the engine would develop was quite immaterial, so long as it was one of the defendants' "engines" known as "their Big Four 30 h.-p. Gas Tractor Engines."

With respect it seems to me that undue weight has been given to the word "your" and the vital words of the description, "30 h.-p.," emphasised by the express stipulation making it a condition of the sale that the engine should answer to them, have been denied the importance which the contracting parties so clearly attached to them. In my opinion the engine delivered was not that contracted for and on that ground alone the plaintiff would be entitled to succeed unless the peculiar provision of the contract, which made his retention of it for more than two days after the demonstration test "proof conclusive" that it answered the description and "an acceptance and purchase of it," or undue delay in repudiating after he became or should have been aware that it did not fulfil the condition of sale as to horse-power, and that the company could not, or would not, make it do so, had terminated his right of rejection.

When the defendants' agent, Winterhalt, concluded what appears to have been accepted as a three days' trial of the engine under the contract, according to the weight of the evidence the plaintiff was not satisfied with its performance. This is implied in the jury's answer to the 9th question. Winterhalt, however, represented that the engine would get better with wear and assured the plaintiff that if it was not right the company would make it right. The jury has found that this representation and this assurance induced the plaintiff to settle for the purchase price, although not satisfied with the demonstration of the engine's capac-

ity, by paying the $600 in cash and giving notes for the balance of $3,150. The jury did not explicitly find that the representation was untrue and that the assurance had not been fulfilled, but both these facts are implied in their answers and are proper conclusions from the evidence.

I agree with Elwood J. that, although the jury negatived fraud on the part of Winterhalt, having regard to the relations between the plaintiff and the defendant company the latter cannot take advantage of a settlement so procured without implementing its agent's assurance. But I cannot understand why the plaintiff's retention of the engine, beyond the two days after the completion of the demonstration test, and until he finally rejected it, undoubtedly induced by the same representation and assurance, should bind him and constitute an acceptance of it if the giving of the $600 and the notes did not. In my opinion both are on the same footing.

The defendants invoke a provision of the contract to negative Winterhalt's authority as an agent to make any representation or give any assurance which would involve a departure from its express terms. Apart from the statement of their own agent, Cole, that it was customary for the company's agents and that they were authorised to give assurances to purchasers that the company would look after the engine and make it run satisfactorily, we have the indisputable facts that, when notified by the plaintiff that the engine had broken down, the company, without any demur, protest or reservation of rights sent its employees, Cole and Hill, on two distinct occasions to make extensive repairs and replacements of parts. It acted as it might have been expected that it would act in recognition of the obligation which Winterhalt's assurance would en-

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tail and the plaintiff may well have understood in attempted fulfilment of it, although it is, of course, quite possible that in doing so the company did not intend thereby to admit any liability to the plaintiff or to take a position in any wise inconsistent with its right to recover from him the purchase price of the engine. What occurred, however, prevents his retention and user of the engine being invoked as evidence of acceptance. On the whole I think it is the safer conclusion on this branch of the case that there never was a binding acceptance of the engine by the plaintiff, that he was entitled to reject it and that he sufficiently manifested his election to do so.

Moreover, although the contract treats the development of 30 h.-p. as a condition of the sale, it also speaks of this term as a warranty in clause 5, whereby retention of the engine for more than two days after the demonstration test is made

> proof conclusive that said engine and equipment fulfilled the *warranty* in every respect.

The only term of the contract which could be regarded as "the warranty" referred to is the stipulation.

> (*a*) that the engine will develop its rated horse-power at the draw bar. (*b*) That the engine, if rated at 30 or more horse-power will furnish ample and steady power to drive any 36-inch cylinder threshing machine, complete with self-feeder, weigher and blower.

The company, having in its own contract treated this term as a warranty as well as a condition, cannot complain if it be so dealt with now. As a warranty it was not fulfilled and the plaintiff would be entitled to the full measure of damages which its breach entailed. The judgment of the learned trial judge might be supported on this ground also.

I find it unnecessary to consider a question much argued, viz., whether the terms of the contract exclude

an implied warranty of fitness under the "Sales of Goods Act" arising from the fact found by the jury that the

plaintiff made known to the defendants the particular purpose for which he required the engine so as to shew that he was relying on their skill and ability to furnish him with an engine suitable for this purpose.

For these reasons, though not without some hesitation due to the acknowledgments of satisfaction signed by the plaintiff and his stupid plasticity, I concur in the allowance of this appeal.

BRODEUR J.—This is a case concerning the sale of a gasoline tractor engine for the sum of $3,750. The action was instituted by the purchaser for the reimbursement of the money which he had paid on account and for the recovery of some notes which he had given, claiming that the machinery in question was not suitable for the purpose for which it was purchased and had not the horse-power called for.

The order for the machinery was in writing and was addressed to the respondent company, asking for "one of your Big Four 30 h.-p. Gas Tractor Engines." Much reliance is being put on the words "one of your Big 4 Engines" by the respondent company and by the judges of the Supreme Court *en banc*. They do not seem to attach much importance to the words "thirty horse-power."

It seems to me, however, with due deference, as if the horse-power of the machine was of the greatest importance. This respondent company is manufacturing engines of different classes and different strength, and when they undertake to sell one of their engines which they call "thirty horse-power," they are bound, as a condition of their contract, to deliver an engine capable of developing that quantity of horse-

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power. The word "your" in the description of the machinery does not alter that condition.

The company has sent on several occasions their experts or agents to try the machine and to develop that quantity of horse-power. They have never been able to reach the strength they had contracted for. However, after the trial had been made by one of their experts, it was found that the machine was not absolutely suitable; but it was represented to the purchaser that by and by the situation would improve and the machinery would develop the necessary power.

The purchaser, then, on the strength of those representations, agreed to give his note and to pay a certain sum of money. A few days after, during the same week, it was found that the machinery would not work.

New experts were sent by the company, but with no practical result. At last, the respondent had to give up the use of the machine, and is now suing for the recovery of his notes and of the money which he had paid.

The findings of the jury were all in favour of the appellant, and, in fact, the only ground that is relied upon by the company is that by a provision of the contract the company was not responsible for any representation which could be made by their agents.

I fully realise that on some occasions those provisions may be essential in order to prevent fraud; but in this case no such suggestion appears from the evidence and from the action of the appellant. On the contrary, he seems to have taken almost in every instance the word of the company or its representative. He seems to have acted with the most honest intent and it is a pity to see that the company is now trying to take advantage of a provision in its contract which

should have been in only to meet some other cases or circumstances.

The company knew the purpose for which Schofield required the engine and he has certainly relied on their skill and ability to furnish him with an engine suitable for that purpose. The engine not having developed the quantity of horse-power for which it was sold, the respondent company has certainly not fulfilled its contract.

It is true that there was a settlement made but that settlement was obtained by continuous representations that the machine would develop the horse-power they contracted for. This engine, it was claimed, would get better with wear, etc. As a question of fact, the company sent after that settlement some experts to try and make it right. They have never succeeded, and it seems to me that the machine, having never been fit for the purpose for which it was purchased, and the settlement having been obtained under certain representations which proved absolutely incorrect, the respondent cannot avail itself of that settlement and the plaintiff should succeed.

The appeal should be allowed with costs of this court and of the court below.

Appeal allowed with costs.

Solicitors for the appellant: *Seaborn, Taylor, Pope & Quirk.*

Solicitors for the respondent: *Mackenzie, Brown, Thom, McMorran, MacDonald, Bastedo & Jackson.*

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*Oct. 21.

GRACE S. GEALL AND GEORGE W. ADAMS (PLAINTIFFS)..... } APPELLANTS;

AND

THE DOMINION CREOSOTING COMPANY AND THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY (DEFENDANTS).. } RESPONDENTS.

JOSEPH A. SALTER (PLAINTIFF).... APPELLANT;

AND

THE DOMINION CREOSOTING COMPANY AND THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY (DEFENDANTS). } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Procedure—Stay of Proceedings—Filing of bonds—Recovery upon them—Anterior execution against judgment debtors.

Pursuant to the terms of an order for a stay of proceedings under the judgments of the Supreme Court, the respondents filed bonds, whose condition was that the obligation should be void if special leave to appeal to the Privy Council should not be granted and the respondents should pay such damages and costs as has been awarded. The appellants made application for delivery out of the bonds, alleging and establishing by affidavits that leave to appeal had been refused and that the debt and costs were unpaid.

Held, that it was not incumbent upon the appellants to shew that they had exhausted their remedies against the respondents by execution before taking any step towards recovery upon the bonds.

MOTION before a Judge in Chambers for delivery out of bonds, to put the same in suit, securing payment of the debt and costs as awarded by the judgments of the Supreme Court, these bonds having been filed as a term of obtaining a stay of proceedings to permit of applica-

*PRESENT:—Anglin J. in Chambers.

tions for special leave to appeal being made to the Judicial Committee of the Privy Council.

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

Harold Fisher for the motion.
Alex. Hill contra.

ANGLIN J.—As a term of obtaining a stay of proceedings under the judgments of this court in these cases to permit of applications for special leave to appeal being made to the Judicial Committee the defendants filed bonds securing payment of the debts and costs.

The condition of each of the bonds so filed is that if special leave to appeal should not be granted and the defendants should pay such damages and costs as had been awarded the obligation should be void, otherwise it should remain in full force and effect.

The plaintiffs now apply on notice for delivery out of these bonds to put the same in suit. They allege and establish by affidavits that special leave to appeal to the Privy Council has been applied for and refused and that the debts and costs acknowledged by the bonds to have been awarded to the plaintiffs remain unpaid. In opposing the application counsel for the defendants contends that it is incumbent upon the applicants to shew that they have exhausted their remedies against the defendants by execution before taking any step towards recovery upon the bonds. With that contention I am unable to agree. The condition upon which the obligation under the bonds was to be avoided has not been fulfilled. The default necessary to establish the liability of the surety, according to its terms, has been proved, subject, of course, to any other defences that may be open.

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Daniels Chan. Practice, 6 ed., p. 1931, 8 ed., p. 1624 and note (*t*). To require the judgment creditors to issue executions and obtain returns of *nulla bona* as a condition of permitting them to put the bonds in suit might involve the incurring of needless expense and entail prejudicial delay. Any possible interest of the surety can be fully protected by the exercise of the discretion of the court which may try any actions upon the bonds over the costs thereof. The motion should be granted and the costs of it, so far as I have power so to direct, should be costs in the actions which it is proposed to bring.

Motion granted.

WILLIAMS MACHINERY COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

JOHN GRAHAM (DEFENDANT) .....RESPONDENT.

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*Oct. 8, 9.
*Oct. 21.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Insolvency—Claim as ordinary creditor—Right to revalue—Security—"Creditors' Trust Deeds Act," R.S.B.C. 1911, c. 13, s. 31.

The appellant, a creditor of C., claimed to hold securities on insurance moneys due under a verbal agreement for insurance, covering the whole of C.'s works, made two days previous to their destruction by fire, after which C. assigned to the respondent. The insurance companies refused payment, and litigation followed at the instance of the respondent on behalf of the creditors generally. The appellant, being called upon to value its securities, proved its claim in the hands of the respondent as an ordinary creditor, without mentioning its pretended preference under the insurance policies. Later on, the creditors succeeded in their action against the insurance companies, and the insurance money was paid to the respondent as assignee. Then the appellant claimed part of that money as a secured creditor.

Held, Duff J. dissenting, that the appellant could claim only as an ordinary creditor.

Judgment of the Court of Appeal, (39 D.L.R. 140; [1918] 1 W.W.R. 161,) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Murphy J. at the trial (2), by which the plaintiff's action was dismissed.

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

Mason and *Carter* for the appellant.
Griffin for the respondent.

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

(1) 39 D.L.R. 140; [1918] 1 W.W.R. 161. (2) [1917] 1 W.W.R. 803.

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The Chief Justice.

THE CHIEF JUSTICE.—The facts of this case are not doubtful or indeed disputed. They are sufficiently set out in the judgment of the courts below and only a brief statement of them is called for here.

When the Westminister Woodworking Company assigned to the respondent for the benefit of its creditors, of whom the appellant company were one, this last-named company held certain securities for its claim, the largest in amount arising out of a claim to certain insurance moneys under an agreement for insurance for a much larger amount, covering the whole of the Westminister Woodworking Company's works, made two days previous to the fire which destroyed that company's mill, but for which no policies had been issued or receipts given. The insurance companies refused payment and it was exceedingly doubtful if anything could be recovered under the agreement until as the result of legal proceedings they were held bound by it.

The appellant, called upon by the respondent to value its securities, after some hesitation put in a valuation of the securities it held other than its claim under the insurance in litigation of which it made no mention and proved for the balance of its claim as a creditor.

When the insurance moneys had been recovered, the appellant asserted its original right in these as a secured creditor and its claim to be at liberty to do this was repudiated by the respondent on behalf of the other creditors.

The action is for a declaration that the respondent holds the sum of $9,000 part of the insurance moneys collected as trustee for the appellant.

Whether the appellant considered that the claim against the insurance company was so doubtful as to be negligible or was desirous of holding off until it was seen how the lawsuit would turn out is perhaps im-

material. The position it eventually attempted to take was that it had reserved the right to take after the event whichever course had been shewn to be for its advantage, either to abandon its security and assert its claim in full or to stand upon its security and prove for the balance of the claim reduced by the amount received in respect of the security. This I do not think it could do. The proof put in must, I think, be considered, under the circumstances, as having been a valuation of all the security claimed to be held. There can, of course, be no question of valuation now when the security has been realised.

The result of the appellant's contention would manifestly be unfair to the other creditors. The appellant would have had the suit fought at their expense though itself the party chiefly interested, besides having the advantage if it had failed of having its claim rank in full with those of the other creditors.

That the appellant was badly advised by its solicitor as suggested in its factum can be no ground for holding that it is not bound by its acts.

The case is concisely, but I think sufficiently, dealt with in the reasons of Chief Justice Macdonald for the judgment appealed from, and I do not think it necessary to add anything further to these with which I agree.

The appeal should be dismissed with costs.

DAVIES J.—I concur with the reasons for judgment of Chief Justice Macdonald in the court appealed from and am of the opinion that either upon the ground of estoppel or of abandonment of its claim the plaintiff is not entitled to the preferential claim it seeks to have affirmed in its action.

The appeal should be dismissed with costs.

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IDINGTON J.—The appellant's factum says that:—

> This action was brought for a declaration that the plaintiff was entitled to the sum of $9,000 insurance received by the defendant from certain insurance companies and that the defendant holds the same as trustee for the plaintiff, and for an order directing payment of said amount to the plaintiff.

This is possibly in accord with the writ issued by appellant which claimed $9,000 out of moneys received by respondent from four companies named. But the statement of claim, departing therefrom, claims in respect of insurance contracts with five companies named.

Whichever way it is put, the prayer in the statement of claim is for a declaration that defendant (now respondent) holds as trustee for plaintiff (now appellant) $9,000 and an order for its repayment to the plaintiff, or alternatively that plaintiff is entitled to the sum of $9,000 out of the proceeds of the said insurance policies, which must mean out of the five policies.

There is a further prayer for costs but no other specific alternative or, as usually happens, in way of a prayer for such further or other relief as the plaintiff might be found entitled to.

I do not think the appellant at the trial made out by the evidence adduced any such claim as set forth, or, on such basis, right to relief as prayed for.

The claim as made is of a very ordinary character if the facts had supported it.

It is that of the ordinary mortgagee with a covenant assuring him that the mortgaged property will be insured for his benefit. He sometimes gets an assignment of the policy thus promised, and at other times gets a policy containing a clause reading

> loss, if any, payable to him as his interest may appear.

The appellant and the insolvent company or the latter's founder began a course of dealing on that basis which, if adhered to, would have produced a very simple set of facts to deal with.

Their dealings, however, so grew in complications arising from the later form of insurance policy adopted and the conflicting interests of others entitled to claim under the several policies issued, and relied upon, that I am strongly inclined to think the legal situation of the several parties under the policies so issued was entirely different from what they imagined and present in the statement of claim.

The companies concerned had agreed on a basis of indemnity which distributed the total amount of any given policy over a number of different subject matters, which would result in the application or appropriation of the proceeds in the event of a loss in a manner entirely different from that originally agreed on, or that presented by appellant in its statement of claim.

The claim so made was attacked in the court below and here by respondent on the ground of illegality, as infringing the provisions of the Imperial "Gambling Act" re-enacted in British Columbia.

That ground is fairly arguable, but upon what I conceive to be the true construction of the policies (which is that the terms used do not extend the insurances in favour of appellant to buildings) is not, in my opinion, tenable.

The claim, however, as made by appellant and founded upon an entirely different construction, is untenable. And whilst it had a tenable claim such as I conceive existed at one time, it failed by its statement of claim to put forward that and cannot do so now without amendment of its pleadings, which is not asked for and in any event at this stage should not

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be granted, under the peculiar circumstances of its devious course of conduct which has, beyond doubt, induced the respondent and those he represents to change his and their position.

The actual situation in law, of the appellant, on the true construction of the policies confining its rights to such claims according to its interests (which I take to mean insurable interests) as might appear would upon the application of the relevant facts reduce same to a mere fraction of what is now claimed.

That claim, perhaps legal at one time, is not now put forward and by its conduct the appellant is debarred from now setting it up. Quite true the counsel for appellant, at an early stage of the argument, in answer to my suggestions that the claim might be a fractional part, was good enough to say his client would accept that rather than nothing. An examination since, of the pleadings, leads me to the conclusion which I have already expressed.

I am not to be taken as holding that an insurance upon property of a debtor in which a creditor has no interest may not, pursuant to an agreement therefor, be assigned as a security by the debtor to his creditor and the fruits thereof claimed by such assignee in event of loss. I merely hold that the ordinary phrase:—

"Loss, if any, is payable to the party named as his interest may appear,"

does not extend his rights to cover more than his insurable interest unless and until something more express is made to appear, as the intention of the parties.

In the case of *McPhillips* v. *London Mutual Fire Ins. Co.* (1), relied upon by appellant, the late Mr. Justice Burton, whose opinion is entitled to great re-

(1) 23 Ont. App. R. 524.

spect, evidently held the same view, for he says, after quoting the phrase in question:

> This, though an appointment in favour of the mortgagee, was manifestly confined to his interest in the mortgaged premises.

When the judgment for recovery therein was given for something more in respect of chattels, it was expressly rested upon a later assignment by the assured to the creditor. If that had been made, and in question herein, another case than pleaded would exist. Or if any verbal agreement existed to produce such an assignment the pleading falls far short of expressing any such case; as do also the particulars delivered to make the pleading clear.

The case of *Castellain* v. *Preston* (1), though not expressly in point, furnishes an exposition of the relevant principles of law well worth bearing in mind, that an insurance contract is one of indemnity only, and surely *primâ facie* is confined solely to property the assured had claimed to be interested in. There are many American authorities cited in May on Insurance, 4th ed., sections 347 and following, to end of chap. 22, giving illustrations of almost every shade of opinion as to the relative right of mortgagor and mortgagee, and what falls within the usual phrase,

"Loss, if any, payable to one named as his interest may appear."

I suspect all these considerations were present to the mind of the solicitor for the appellant when he framed the last proof of its claim on the basis of discarding such a security as practically worthless.

The first proof of claim made by the appellant, immediately after the assignment to respondent, set forth its total claim of indebtedness, and said:

(1) 11 Q.B.D. 380.

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That the said A.R. Williams Machinery Company of Vancouver, Limited, hold lien security for the said indebtedness.

It was only lien security that was thought of and it might be fairly inferred insurance thereof but not of something else.

The appellant's course of business had been, in making sales, to take receipts shewing that the property in the thing agreed to be sold did not pass to the intended vendee. And then it was agreed to insure such personal properties for the benefit of the appellant.

The schedule system was never intended to give any substantially different right but was supposed no doubt to be so proportionately adjusted as likely to work out approximately the same result.

I do not think, in fact, that it did so work out. But certainly it never occurred to any one concerned to imagine that the insurance on the buildings which might, in event of loss, be satisfied by reinstatement, was to go to pay off the appellant or such like parties concerned in personal or chattel property only.

When the parties concerned were confronted with the actual situation of the results of a fire, it turned out that application had been made two days before the fire for a total insurance, in a new set of companies, of $40,000—an insurance of $5,000 beyond that theretofore existent and to be taken up or placed as old policies expired.

This was only an oral arrangement with insurance agents and its validity, or at all events enforceability, is of a dubious nature.

None of the companies concerned seemed inclined to respond to such a claim, and appellant failed to take any steps to enforce its alleged individual rights against any of such companies, though well aware of all the

facts known to respondent. I was surprised to hear it suggested in argument that appellant could not sue and was entirely at the mercy of respondent in that regard. The common law right of action, no doubt, rested with the insolvent company and was passed on by virtue of the effect of sec. 2 of the "Creditors' Trust Deeds Act" to the respondent, who, in the view contended for by the appellant, became a mere trustee for it of the entire insurance of the $6,000 placed with and accepted by the Stuyvesant Company.

The clear right of the appellant under such circumstances, if any foundation for its contention, was, in the first place, exactly what the assignee of any chose in action had long been in the enjoyment of, namely, to bring an action in the name of the assignor thereof upon duly indemnifying him against costs or what practically amounted to the same thing, any form of suit which local procedure sanctions to enforce its alleged equitable right; and in the next place, under sec. 53 of the "Creditors' Trust Deeds Act," to obtain an order from the judge entitling it to bring the action and receive the benefit thereof solely for itself.

The appellant, very prudently having regard to the untenable nature of its right to extend its claim into the region of illegality, if anything worth while is to be made of its claims, did none of these things, but being represented by its manager, as one of the inspectors of the estate, took an active part in promoting actions by the assignee for the joint benefit of all creditors against some of the insurance companies alleged to be liable on the oral agreement for insurance and formulating a scheme for the financing of such litigation.

This latter necessity was met by an assessment made upon the creditors; first of one per cent. of their

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respective claims, and again of another, and a third call till $750 had been collected.

The appellant first contributed $90 to this fund and, after the learned trial judge had decided in respondent's favour in the suit against the Stuyvesant Company, which case was tried as a test one, another $90 to fight the appeal in which the respondent was successful.

Then appellant turned around and put forward the claim now presented that it was entitled to the whole $6,000 so secured as its own and to $3,000 beyond out of later recoveries.

Meantime, some months after the action was brought and months before it was tried, the assignee, apparently advised to make clear and undoubted the actual position of the appellant, called upon it to value, in accordance with the "Creditors' Trust Deeds Act," any securities it had and, in accordance with such request, it filed an amended claim whereby its secretary, on its behalf, conversant with the foregoing history of the litigation then pending and advised by counsel, well aware of all the facts then obtainable, after setting forth as previously its claim, declared as follows:—

> 3. That the said The A. R. Williams Machinery Company of Vancouver, Limited, holds security for the said indebtedness in the form of lien notes covering machinery and an insurance policy with Ceperley, Rounsefell & Company covering portion of insurance on the machinery, which security we value as $3,700.

This was done, not hastily or in error, but on the advice of a solicitor since deceased, who, no doubt, appreciated not only the difficulties of supporting any litigation in maintenance of the assignee's claim, but also the difficulties which I have already referred to, of appellant, in any aspect of the matter involved, getting more than a fractional part of its entire claim.

The difference between what it might get standing alone, or jointly with other creditors of which its claim above represented, roughly speaking, would be a fourth part, was such that it could not be worth while raising any question about, and, alone, unaided running risk of litigation.

The statute under which such proof was made, provided, by sec. 31, sub-sec. (*a*) as follows:—

> Every creditor in his proof of claim *shall state* whether he holds any security for his claim, *or any part thereof*, and if such security is on the estate of the assignor or on the estate of a third party for whom such assignor is only secondarily liable, *he shall put a specified value thereon*; and the assignee, under *the authority of the creditors*, may either consent to the rights of the creditor to rank for the claim after deducting such valuation, or *he may require from the creditor* an assignment of the security at the specific *value to be paid* together with interest thereon at the legal rate from the date of filing the claim until payment out of the estate as soon as the assignee has realised such security, and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor *shall be the amount* for which *he shall rank and vote in respect of the estate.* Before assigning such security such creditor shall be entitled to receive security from such assignee for the value of such security so to be assigned. *In case of any dispute a Judge of the Supreme or County Court may settle the same on a summary application.*

It was thus obligatory by the statute, as well as otherwise, upon the appellant to be honest in presenting its claim, and to name any security from which it hoped to reap anything exclusively for itself, such as now claimed, and to value it. The respondent assignee was advised by the creditors to accept and act upon this declaration and surrender the securities claimed, and did so, on faith thereof.

With that obligation by statute and all other moral obligations resting upon it requiring the observance of fidelity in dealing with its co-adventurers who had embarked with it in promoting risky litigation for their common advantage, it saw fit, after the victory sought was won, to turn round and claim as its own one-half of the entire sum recovered. This was a violation of

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the contract clearly inferable from the expressions and conduct of the parties. It was an improper attempt to evade or to abuse the provisions of the statute. Its conduct had estopped it from so claiming.

We are called upon to give effect to such a claim deliberately abandoned, if faith was to be put in its statutory declaration. It had clearly elected to take its chances in common with all its fellow-creditors, instead of bearing alone the burden of asserting in litigation a claim for which I can find no support in law, and if possible still less in equity, to the rules of which it pretends to appeal as against the respondent, claimed by it to have been throughout its trustee.

I should be very sorry, indeed, if I had found our law such an impotent instrument for the administration of justice as to compel us to assent thereto.

I think the appeal should be dismissed with costs.

DUFF J. (dissenting)—I am of the opinion that this appeal should be allowed.

ANGLIN J.—Whether what the appellants did should be held to amount to an abandonment of their claim upon the insurance in question as security for the indebtedness to them of the Westminister Woodworking Company Limited, in liquidation, or merely to be conduct raising an estoppel *in pais* against their asserting a prior right to an integral part of such insurance as against the other creditors of the Woodworking Company and its assignee, for the reasons stated by the learned Chief Justice of the Court of Appeal, I am of the opinion that, having regard to all that has taken place, it would certainly be inequitable to permit such a right to be now insisted upon.

BRODEUR J.—The question in this case is whether the appellant company, having failed to claim a security

and to value it under the provisions of sec. 31 of the "Creditors' Trust Deeds Act" of British Columbia, is considered as having abandoned it or is estopped from exercising any right in connection with that security.

The appellant company had sold some machinery to the Westminister Woodworking Company, and it had been agreed between them that out of their total insurance on their mill and machinery the latter company would undertake to see that their liability to the Williams Company would be protected, and the policies provided that fire losses would be payable to the Williams Company as its interest may appear.

Several of those insurance policies terminated on the 13th of February, 1914, and an insurance agent verbally agreed in the name of different companies which he represented to insure the plant and the machinery of the Woodworking Company for the amount asked for. There was no written receipt given.

Before any policies were issued a fire occurred and the mill and contents were destroyed.

That accident put the Woodworking Company in financial difficulties and they were forced to assign for creditors under the "Creditors' Trust Deeds Act" of the province to respondent, John Graham.

It was decided by the creditors to claim the payment of the insurance, and the creditors were called upon to fyle their claims.

On the 16th of March, 1914, the appellant filed with the respondent a sworn declaration stating that a sum of $13,267 was due them and claimed security by lien. Later on the assignee asked the appellant to give particulars of their securities and the value they placed on them. That letter of the assignee was referred to their solicitors, who discussed the question with

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the solicitor of the estate and he evidently came to the conclusion that the appellant company would be in a better position to rank as an ordinary creditor than to claim any preference under the verbal insurance policies which were under litigation.

They could have valued their securities but then would have lost a part of their claim if later on the litigation with the insurance company would prove to be unsuccessful.

They could also abandon their securities and prove their total claim as an unsecured creditor.

They adopted the latter course.

Later on, however, the creditors succeeded in their action against the insurance companies and the insurance money was paid to the assignee. Now the Williams Company wants to claim part of that money as a secured creditor.

I agree with the trial judge and the Court of Appeal that the appellants can claim only as ordinary creditors. They were, under the provisions of the Act, bound to prove their claims and to state if they had some securities and value them, or they could abandon their securities. They thought, when the matter was under litigation and their alleged securities were very uncertain, that their interests would be better served by abandoning their privileged claims on that insurance money. They have deliberately elected not to claim as privileged creditors and they have abandoned their rights in that respect.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Russell, Hancox, Wismer & Anderson.*

Solicitors for the respondent: *Martin Griffin & Co.*

MUTUAL LIFE ASSURANCE COMPANY OF CANADA (DEFENDANT). } APPELLANT;

AND

CLARA ROSELLA DOUGLAS (PLAINTIFF) . . . . . } RESPONDENT.

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*May 15.
*Oct. 8.

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

Mortgage—Foreclosure—Extinguishment of debt—Collateral securities—"Land Titles Act," 1906, c. 24, s. 62 (a).

A final order for foreclosure and its registration, in proceedings taken under section 62 (*a*) of the "Land Titles Act" of Alberta, do not extinguish the mortgage debt so as to estop the mortgagee from proceeding on the mortgagor's covenant to pay or realising on any collateral securities he may have.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Simmons J. at the trial (2), by which the plaintiff's action was dismissed.

This is an action brought by the respondent as beneficiary under a life insurance policy assuring the life of her husband in the sum of $5,000. One of the conditions contained in the policy was:

Before payment of this policy as a claim, any loan or other indebtedness thereon, to the company by the assured, or by the beneficiary, and the balance of the year's premium, if any, will be deducted from the amount payable.

The respondent mortgaged to the appellant lots of land to secure an advance to her of $12,500, and she and the assured assigned the policy to the appellant as collateral security for the payment of the mortgage

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

(1) 13 Alta. L.R. 18; 39 D.L.R. 601. (2) 38 D.L.R 459.

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moneys. The mortgage having become in arrear, the appellant commenced foreclosure proceedings pursuant to the provisions of section 62*a* of the "Land Titles Act;" and after an abortive sale, a final order for foreclosure was made. The assured died a month after, and the appellant applied the net amount of the policy against the respondent's indebtedness. The respondent claimed that by reason of the final order of foreclosure, the mortgage debt became extinguished.

A. H. Clarke K.C. and *M. McLeod* for the appellant.
R. B. Bennett K.C. for the respondent.

THE CHIEF JUSTICE.—Speaking generally, I see very little practical difference at the present time between the mortgage of the English law and the hypothec of the civil law; both are *jura in re aliena*, and the terms in which certain sections of the Alberta Act are couched suggest an intention on the part of its framers to adopt, in part at least, the principles of the civil law of hypothecs. Both the mortgage and the hypothec are rights *in rem* conferred by a debtor upon a creditor as a security for a right *in personam*. The mortgage debtor transfers the title to the *res* to his creditor, retaining usually the possession and a right of redemption. The hypothecary debtor retains the title and possession, but gives a right *in rem*. The mortgagee may by foreclosure bar the mortgagor's right of redemption and thus secure a title absolute to the *res*. The hypothecary creditor has the right on default to bring the land to sale by the sheriff, and the proceeds are applied to the discharge of encumbrances according to their priority; and the personal obligation is discharged only in so far as the amount realised out of those proceeds is sufficient to satisfy the hypothecary claim. It is now generally recognised under the

English system, although old forms are still used, that the real owner of the land is the mortgagor; and the mortgage is a mere security for the debt or obligation. In courts of law the mortgage is recognised as conveying an estate, while equity merely creates a lien, and the "Judicature Act" provides that where there is any conflict between the rules of equity and the rules of common law, the rules of equity shall prevail.

In Chancery foreclosure was adopted as a proceeding by which the mortgagor's right of redemption of the premises was barred.

Unless there is something very clear in the Alberta "Land Act," I should hesitate to say that, notwithstanding all the safeguards with which the rights of the mortgagor are surrounded, the mortgagee is to be treated as a usurer and to be deprived of his right to recover *in personam* on the covenant, merely because he exercises his right to foreclose the mortgagor's right of redemption. I cannot see why, if the mortgage is a mere security for the debt, the right *in personam* should not continue to exist after the debtor, by foreclosure proceedings, has lost his right of redemption for ever.

Assuming that the title to the land under the Alberta Act remains in the mortgagor, and the forms used would seem, as I have already said, to convey the impression that the intention of the framers of the Act was to adopt that principle of the civil law, while using the old terms of the English law, and that the foreclosure order does not vest the land in the mortgagee, but that the title passes under the statutory provision as in the civil law under the sheriff's title—and the vesting order coupled with it—*non constat* that the personal obligation to pay has been satisfied.

The two things are distinct and separate, and in the

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absence of express language in the statute I decline to accept the suggestion that, if the lender of the money endeavours to realise on his security, he is assumed to have released the debtor from his obligation to pay under the covenant. It may be that the foreclosure order is granted under the Act for the purpose of realising the debt; but the fact is that the principal obligation to pay the debt is not satisfied even if the security is realised upon, unless the amount realised is sufficient to liquidate the obligation.

There is no evidence here of any intention, on the part of the mortgagee, to take the property in satisfaction of his debt.

It would seem to me, and I speak with great deference, that on the true construction of the Act the parties remain, as Mr. Justice Idington says, as they were under the old system. The mortgagee is entitled to sue on his covenant though, if he does, the mortgagor, on payment of the debt, in entitled to redeem his property; and the mortgagee must be in a position therefore to restore the property. Sections 62 and 63 (*a*) seem to provide for a twofold remedy, and for the postponement of the remedy upon the covenant until the foreclosure proceedings are exhausted.

I have read the case in the Supreme Court of Australia of *Fink* v. *Robertson* (1), with great care, and with respect must say that the dissenting judgment of Mr. Justice Higgins, to the effect that foreclosure under the Australian Act does not involve the release of the debt, and that the right to recover under the personal covenant still continues to exist, has led me to the conclusion that, applying the same principles to the Alberta Act, this appeal must be allowed.

(1) 4 Comw. L.R. 864.

DAVIES J.—In this appeal from the judgment of the Appellate Division of the Supreme Court of Alberta, to which I have given much consideration, I concur with the reasons stated by my brother Anglin in allowing the appeal and restoring the judgment of the trial judge.

I would simply add that if the legislature intended to make such a radical change in the relations and obligations of the mortgagor and mortgagee towards each other as held by the Appellate Division, namely, that the obtaining of a final order for foreclosure and its registration *ipso facto* extinguished the debt due to the mortgagor and estopped him from proceeding on the mortgagee's covenant to pay or from realising on any collateral securities he may have taken to secure payment of his debt they would have said so clearly and distinctly.

Under the law of England such a foreclosure on a common law mortgage admittedly did not extinguish the debt or prejudice the right of the mortgagee to recover on his collateral securities. Of course, the mortgagee could not after foreclosure claim to hold the land and at the same time sue on a covenant for the debt or recover it under his collateral securities. He could not have both land and the money secured upon it. If he chose to foreclose and then sell the land or part of it, he would be taken to have elected to take the land for his debt.

But in a case such as the present, where the mortgagee, though he has foreclosed, stands ready to reopen the foreclosure and able on being paid his debt to restore the land to the mortgagor, it does seem to me the inference drawn by the court below that under the "Land Titles Act" the foreclosure operated to ex-

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tinguish the debt and so deprive the mortgagee of his other remedies was a forced and improper one.

If that inference was the proper one and established as the law, investors would be very shy of loaning their money on mortgage security. At any rate, it is not an inference which I would draw from the Act under consideration; and if the legislature intended such a result they would have used language expressive of their intention.

The foreclosure order, when registered, bars, it is true, all further right of redemption on the part of the mortgagor; but so did the order for foreclosure under the old common law mortgage. But why should it be inferred under the statutory mortgage that such a foreclosure also extinguishes the unpaid debt secured and destroys all right in the mortgagee to realise on his collaterals under circumstances such as those under consideration where the mortgagee avows itself ready to open the foreclosure, receive payment of its debt and restore the land to the mortgagor?

I am not able to draw such an inference.

IDINGTON J.—The appellant, by its policy of insurance dated the 4th January, 1911, insured the life of D. F. Douglas in the sum of $5,000 subject to conditions printed or written on the succeeding pages thereof, which were made part of the contract.

Amongst other alternatives of payment so undertaken was one to pay the said sum on his death to the respondent, who was his wife, if she survived him.

Amongst the conditions so printed were the following:—

Before payment of this policy as a claim, any loan or other indebtedness thereon to the company, by the assured or by the beneficiary, and the balance of the year's premium (if any), will be deducted from the amount payable. No action or proceedings against the company shall

be brought or taken upon this policy unless commenced within one year from the date at which the policy becomes a claim, and in any such action or proceedings the policy shall in all respects be construed according to the laws of the Province of Ontario.

On the 10th January, 1911, she, in consideration of $12,500 lent by appellant to her, gave it a mortgage on land in Calgary and therein covenanted to pay said sum with interest at seven per cent. per annum, and further covenanted to pay all the premiums upon the policy aforesaid during its currency, and that upon default of payment of any of said premiums, the company might pay the same and add the amount thereof to the principal money thereby received, and such payments should bear interest at seven per cent. per annum, and for the better securing the payment thereof she mortgaged her estate and interest in said land to said company.

The husband joined in said mortgage, as a covenantor with the company that she would pay the mortgage money and interest and said premiums, and abide by and perform all the covenants, provisoes and conditions in the said mortgage.

The mortgage was registered on the 12th of January, 1911, in the land registration district at Calgary.

They both, on the 10th January, 1911, assigned the insurance policy and all benefits thereunder to the said company and thereby it was declared that the assignment was made as a collateral security for the repayment of the said $12,500 and interest and for any further advances.

They never paid anything either on account of principal or interest or premiums save the cash premium.

The appellant, on the 26th August, 1915, took proceedings under section 62 (*a*) of the "Land Titles Act" of Alberta for sale of said lands and, failing that, fore-

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closure, which proceedings terminated by a final order of foreclosure on the 20th November, 1916, made by the deputy registrar which, in the operative part, reads as follows:—

> It is ordered that the mortgagor and all persons claiming through or under him subsequently to said mortgage do stand absolutely debarred and foreclosed of and from all rights to redeem the mortgaged premises mentioned in the application herein.

And then follows a description of the land.

The usual affidavit, required by the Act to procure registration of the appellant as owner, was made, and the usual form of certificate issued that the appellant was then the owner of said lands

> subject to the encumbrances, liens and interests notified by memorandum underwritten or indorsed hereon, or which may hereafter be made in the register.

There does not appear to be any reference therein to any encumbrances; much less note of the mortgage in question.

I may remark in passing that the argument founded upon the assumption that vendors or transferors under the Act were by virtue thereof bound to pay prior encumbrances and hence a mortgagee getting a final order of foreclosure must be presumed to have assumed the burden of his own mortgage so foreclosed does not seem to get much support from this certificate.

The respondent's husband died on the 1st February, 1917. On the 2nd of April, 1917, the appellant applied the net amount of $4,460.53, which, if nothing else had to be considered, would have been the amount payable by virtue of the policy upon the mortgage debt, claiming the right to do so by virtue of the assignment of the policy.

The respondent, on the 9th May, 1917, began this action to recover the amount accrued due under said policy and claimed to be entitled to recover same.

Notwithstanding the assignment thereof, to the appellant, the declaration of the respondent proceeds as if no such assignment had ever existed, and in truth, without saying anything as to it, impliedly assumes, as if in fact duly established, the rather startling propositions of law that a final order of foreclosure and the mere registration thereof and issue of a certificate thereof obliterates all prior legal relations and obligations and the rights springing therefrom, as if they had never existed, so far as anything relative to the conduct and acts of the mortgagor and possible rights in favour of the mortgagee springing therefrom; but preserving sacredly everything possibly springing from the acts of any one else which might, by any possibility, enure to the benefit of the mortgagor. Nay more, it presumes all such latter rights to have been duly transferred, *ipso facto*, as it were, to the mortgagor without any formal conveyance of any kind such as would formerly have been required in law to enable the mortgagor to assert his right thereto in any legal proceedings.

The possible rights, duties and obligations of trustees or sureties and others which might, in manifold ways needless to dwell upon, have arisen meanwhile from some of the many complications of such inter-relations as our modern commercial activities often produce, are presumably swept away for the benefit of the defaulting mortgagor by what may have been a mere thoughtless act on the part of the mortgagee so long as he has not been involved in fraud in procuring such registration.

Accident or mistake cannot be rectified, for in effect the court, by its ruling, has said the result (unless possibly tainted with fraud involving him who has become such registered owner) obliterates all else standing—for the protection of no matter whom or

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what—in the way of the defaulter whose name has been deleted from the record, and the mortgagee's name substituted therefor.

Such would seem to be some few of the results of upholding the judgment appealed from and the mode of thought directly or impliedly approved as that to be used in the interpretation and construction of an act designed to improve and simplify the mode of dealing with and determining the rights and obligations of men in what is part of the daily intercourse of some one or more of them.

Another very obvious result of the maintenance thereof would be the impossibility of opening a foreclosure to relieve from oppression, free men from injustice, and rectify that which, in such like cases, has often been found to be the result of some trivial accidental oversight on the part of someone.

Let us test the validity of such reasoning as would lead to such results by adverting to the relevant law which governed the rights and obligations of mortgagor and mortgagee up to, and at the time when, the statute now relied upon for the production of such results was enacted, and see if that law has been repealed thereby, or in the least invaded.

I need not dwell upon the introduction of the English law into the North-West Territories.

I am spared that trouble by the reiteration of so much thereof as we are concerned with herein, by the re-enactment, so late as 1907, of the sections 10 and 11 of the "Supreme Court Act," statutes of Alberta, 1907, ch. 3, reading as follows:—

10. For the purpose of removing doubts and ambiguity but not so as to restrict the generality of the next preceding section, it is declared and enacted that the court shall have the like jurisdiction and powers as by the laws of England were, on the 15th July in the year one thousand eight hundred and seventy, possessed and exercised by the Court of

Chancery in England in respect of the matters hereinafter enumerated or referred to, that is to say:

* * * * * *

(*b*) In all matters relating to trusts, executors and administrators, co-partnerships and accounts, mortgages and awards, or to infants, idiots or lunatics and their estates;

* * * * * *

(*i*) The administration of justice in all cases where there exists no adequate remedy at law.

11. The rules of decision in the said matters in the last preceding section mentioned shall, except where otherwise provided, be the same as governed the Court of Chancery in England in like cases on the 15th July, one thousand eight hundred and seventy.

If there can be said to have been finally settled anything in regard to the jurisdiction and power of the Court of Chancery in England at the date named it was the power of reopening a foreclosure and further imposing upon him who had foreclosed and sought to enforce thereafter his common law right which was otherwise undoubted such terms of procedure as would have the effect of doing justice between those concerned.

It was settled that he, seeking to impose his common law right of suing upon a covenant for the debt, must be ready to reopen the foreclosure and ready to restore that property which had become his as absolutely as the English language could express it and further that if he had sold and conveyed away the property he had so acquired he should be restrained from proceeding to enforce that common law right whether by suing upon the covenant or in way of asserting a proprietory right over any property he had held by way of collateral security to his mortgage.

The long line of cases, from the times of Lord Hardwicke down to the year 1870, need not be dwelt upon. However unsatisfactorily some of the earlier cases may have been dealt with, or reported, the case of *Lockhart* v. *Hardy* (1), decided, in 1846, by an able judge, well

(1) 9 Beav. 349.

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conversant with equity jurisprudence, in a considered judgment, expresses the law as it existed and maintains what I have just stated.

Merely to shew that such law continued as late as July, 1870, I may refer to the case of *Kinnaird* v. *Trollope* (1), wherein at p. 642 Mr. Justice Stirling reaffirms the law so laid down, citing also *Palmer* v. *Hendrie* (2), decided by Sir John Romilly in 1860, and presenting another aspect of the application of the principles involved and adopted. That was when the mortgagee and the mortgagor had united in disposing of the estate.

Such being the undoubted state of the law which the Supreme Court of Alberta was in 1907 required to observe, how can we find any substantive amendment altering the rights of the parties in that regard or a repeal thereof in the language of section 62 (*a*) of the "Land Titles Act" of Alberta?

It is certainly not so expressed therein. Nor does such result seem to have been in the faintest degree part of the purpose of the enactment. It seems to me clear that the sole purposes of the enactment were to simplify and thus improve the procedure in simple cases of foreclosure and cheapen the law, and as sub-section 15 seems to indicate, to safeguard the interest of mortgagors by requiring an attempt at sale before issuing an order of foreclosure.

The net result is stated in sub-section 16 as follows:

> Every order of foreclosure under the hand of the registrar when entered in the register shall have the effect of vesting in the mortgagee or encumbrancee the land mentioned in such order free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under him subsequently to the mortgage or encumbrance; and such mortgagee or encumbrancee shall, upon such entry being made, be deemed a transferee of

(1) 39 Ch. D. 636. (2) 27 Beav. 349; 28 Beav. 341.

the land and become the owner thereof and be entitled to receive a certificate of title for the same.

There is nothing in the legal result which I can see differentiating the result of a foreclosure under and by means of section 62 (*a*) from that by way of section 62 which stands effective—same test must apply to foreclosure in either case.

What is there in this language but an expression of just such results as flowed from a foreclosure in all past history in the obtaining of same in the Court of Chancery?

The effect of that always had been to vest the mortgaged estate or interest in the land if not already vested in the mortgagee as in some such cases it might not have been.

It was not always the effect, of a mortgage which came to be foreclosed, to have conveyed an estate in the land though frequently it so happened to be the case.

A mortgage that fell short of doing so might, if the necessities of the case so demanded, or if the parties so desired have been created by them in some one of many ways, and even I suspect in the terms of the "Land Titles Act," if such a method chosen, and if for the purpose of the enforcement thereof by way of foreclosure it fell within the necessities of the execution of justice between the parties to make a vesting order part of the foreclosure, I imagine the Court of Chancery would have been equal to the emergency a good many years before July, 1870.

But, after all, by the "Land Titles Act" it is not absolute ownership of the estate but only that subject to prior encumbrances and claims created by the mortgagor or his predecessors that is in truth vested;

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cleared, however, of all subsequent encumbrances or conveyances by or through the mortgagor.

Then there is given as to that so vested nothing more than has been stated by so eminent an authority as Lord Selborne in the case of *Pough* v. *Heath* (1), as follows:—

> This being the position of the title, as long as the mortgage is redeemable, the effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to the land, for the first time, in a person who previously was a mere encumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released. "A foreclosure" (said Lord Hardwicke) "is considered as a new purchase of the land." "The mortgage being foreclosed" (said Sir William Grant) "the estate becomes absolutely his." "By the order made in the foreclosure suit" (said Sir Lancelot Shadwell) "he became the absolute owner." *Casborne* v. *Scarfe* (2); *Silberschildt* v. *Schiott* (3); *Le Gros* v. *Cockerell* (4). The title obtained by such "new purchase" did not, before the "Wills Act" of 1838, pass by general words in a will, duly attested to pass real estate, made before the foreclosure and not afterwards republished; it did pass, if such will were republished after foreclosure, or if a new will in like general terms were then made.
>
> It follows from this state of the law, that when the owner of land under an ordinary decree of foreclosure absolute takes proceedings to recover possession of that land, he seeks possession of that which, by a title newly accrued, has for the first time become his own property; and that it can make no difference whether the title which he previously had as a mere incumbrancer was, or was not, protected by a legal estate. The possession which he now claims, and the right by virtue of which he seeks to recover it, are substantially different from the possession which he might before have claimed, and from the right by virtue of which he might have claimed it. "There can be no two things" (said Lord Manners in *Blake* v. *Foster*) (5), "more distinct or opposite than possession as mortgagee and possession as owner of the estate; nor can anything be more hazardous or inconvenient than the possession of a mortgagee, the manner in which he is called to account is most rigorous and severe. One consequence of the decision, that a mortgagee who obtains a foreclosure absolute is not safe against the Statute of Limitations under circumstances like those of the present case, would be to make it necessary for him (under such circumstances) to take possession while still mortgagee, or, it if were resisted, to bring ejectment for that

(1) 6 Q.B.D. 345, at pages 360 *et seq.*
(2) 1 Atk. 603.
(3) 3 V. & B. 45.
(4) 5 Sim. 384 at p. 389.
(5) 2 Ball & B. 402 at p. 403.

purpose, on pain of forfeiting his title and of becoming liable, if a trustee (as the present plaintiffs are), for a loss by breach of trust of the whole value of the estate.

These are expressions by masters of the law and of the English language as to the effect of a final order of foreclosure.

I do not think the Alberta legislature can have meant more in their language which I have just quoted.

To suggest that the court cannot interfere with the registrar seems, I respectfully submit, like playing upon words. All the court does is to operate upon the parties who must obey or be enjoined by the Supreme Court to do that which that statute above quoted enabled to be done.

No case I have seen goes so far as to carry such power as the Court of Chancery had into operation by vesting or divesting any estate. I am not assuming, however, that the court in a proper case is powerless to deal with the register. I am merely dealing with the only argument on this head that the respondent presents as derivable from the nature of the order and the language of the Act relative thereto. The necessities of this case do not involve more than a recognition of the power in the court to enjoin him seeking to assert a right to desist therefrom unless and until he retransfers, or is ready to do so, all that he got by his foreclosure.

There is another argument presented in which the doctrine of merger is made to do duty.

There is nothing in the common law doctrine of merger relative to the meeting of greater and lesser estates in the same person, or other common law mergers which can be found here to apply and support the argument; or that the contract of the parties, as a whole, merged in the order for foreclosure. Nor can

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I see how the doctrine of merger as founded upon intention of the parties can be made to operate, unless we discard all judicial opinion and assume that those who developed the law we are asked to apply to determine what is in question between the parties herein were too stupid to have seen the point till the present day.

The law invoked by appellant herein has been often applied under circumstances which, far more forcibly than anything in this simple case suggests, presented the probability of an intention to abide by the foreclosure and abandon all other rights, yet such was not the conclusion drawn by the many eminent judges who have had to solve the problem, and all the while the doctrines of merger were recognised as in force where properly applicable. I prefer abiding by the law they made. Because the machinery by which the law may have been administered has been changed that furnishes no reason for changing or presuming to change the substantial and well-known principles of the law; especially so when we find it emphasised by such recent enactment as I have quoted from the "Supreme Court Act", of Alberta, 1907, in section 11, where the duty to observe it is enjoined "except where otherwise provided" and no such otherwise provision is or can be referred to bearing upon the duty so prescribed for us to follow.

The case of *Fink* v. *Robertson* (1), relied upon below, does not bind us, and is not of any value save for the reasoning it may furnish. Having read it, I may say respectfully that I prefer the reasoning of Mr. Justice Higgins, the dissenting judge, to that of the Chief Justice.

(1) 4 Comw. L.R. 864.

But there are many other considerations than those presented therein which enter into what binds us here, which may not have existed in Australia and bound that court; many others such as the legislation which assigns and defines the jurisdiction of the courts there should have to be entered into or brought forward to enable us to intelligently deal with the conclusion therein before we could make the decision applicable to the law governing the Alberta courts and us herein. The absence of many statutes, even of that country, from our reach, render it an impossibility to accept it as our guide unless we go it blind. I prefer trying to see where I am going. Hence I shall not labour with that decision. I cannot deprive appellant of its clear right unless upon an express legislative declaration of the law. And if I had to draw an inference of the intention I should want something much more clear and explicit than exists herein pointing the way to go.

Above all, in attributing to any one an election I cannot try to impose upon those concerned in any such relation the absolute renunciation of the law and language relative to what a foreclosure means in the minds of those accustomed thereto unless they have given them clear and explicit legislative declarations as a guide. Speculative inferences of what might be done under a new system are no ground for attributing to others the implication of an election or the duty to make it. The inference of fact I should draw is that nobody concerned on behalf of appellant ever paid the slightest attention to those remains of a wreckage. If they did they probably concluded the policy was worthless and would never be maintained.

I incline to infer it was only part of the one scheme the parties had in question, namely, the loan and its security.

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Nothing was ever paid nor was, I suspect, likely to be paid, but the first cash premium.

The unexpected death of Mr. Douglas, after the foreclosure, suggested to someone the possibilities of that confusion of thought which sometimes succeeds, though in justice presenting no merits, for not only had the claim been assigned to appellant and was as much out of the respondent's power as if she had assigned it to someone else, but also by a condition written in the policy itself it had been made subject to any debt due appellant.

I fail to see how she can recover unless and until she has redeemed her promise in that assignment and that suggests to me that the law of Ontario which was to have been, by the policy, the limit of the right to recover might well have been held as determining that right.

Nothing was made of that and I do not rely upon it for any purpose but to illustrate how many things remain untouched but yet might fall within the range of a judgment maintaining that appealed from.

The adoption by the framers of the "Land Titles Act" of a principle or form of mortgage drawn from the civil law yet grafting thereon rights defined by language using terms of foreclosure, etc., found in our equity jurisprudence, unknown to the development of that law elsewhere, suggests curious reflections and considerations; especially when reminded of how much of that jurisprudence has been drawn from the civil law.

I can conceive of a case where the beneficiary had gone on paying premiums for years after the foreclosure and then entirely different considerations would arise and possibly in law an entirely different result might be reached.

The appeal should be allowed with costs here and in the appellate court below, and the judgment of the trial judge be restored and, if desired, notwithstanding her renunciation of such right, provision be made for her redeeming within the usual time, after taking an account of what is the right sum due, the said lands upon the footing of the said insurance money being deducted from the sum found due on the mortgage.

ANGLIN J.—The plaintiff sues to recover the proceeds of an insurance policy on the life of her deceased husband held by the defendant company as collateral security to a mortgage made by him to secure a loan from the company. This mortgage, given under the Alberta "Land Titles Act," was foreclosed by an order of the registrar made under sub-section 16 of section 62 (*a*) of that statute. The company still holds the land foreclosed. It applied the proceeds of the policy on its mortgage debt, offering to allow the plaintiff, as her deceased husband's representative, to redeem on payment of the balance of its claim. The plaintiff, however, insists that the effect of the foreclosure under sub-section 16 of section 62 (*a*) was to release or extinguish the mortgage debt and to discharge all securities held as collateral therefor, because the mortgagee thereby became vested with an irredeemable title to the land and the courts, thereafter, could not compel it to open the foreclosure as a condition of attempting to realise the mortgage debt. This is the issue presented by the defendant's appeal from the judgment of the Appellate Division of the Supreme Court of Alberta, which, reversing the trial judge (Simmons J.), upheld the plaintiff's contention (1).

For the reasons stated by Mr. Justice Higgins in his

(1) 13 Alta. L.R. 18; 38 D.L.R. 459.

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dissenting judgment in *Fink* v. *Robertson* (1), I incline to think I should have been of the opinion that, as the Alberta "Land Titles Act" stood after the introduction of section 62 (*a*) in 1915 (ch. 3, sec. 2), an order of foreclosure made by the registrar under that section had no effect upon the mortgagors' covenant for payment and the mortgagee's rights in respect thereof other than or different from that which a final order of foreclosure granted by the court under section 62 would have had. The operation and the consequences of an absolute order of foreclosure obtained under the ordinary jurisdiction of a court of equity—those of an order made under section 62 must be the same—as well as its history are stated in the *Fink Case* (1). See, too. *Campbell* v. *Holyland* (2); *Platt* v. *Ashbridge* (3); *Trinity College* v. *Hill* (4).

As pointed out by Mr. Justice Higgins in dealing with section 130 of the Victoria "Transfer of Land Act," 1890, which corresponds with sub-section 16 of section 62 (*a*) of the Alberta "Land Titles Act," the term "foreclosure" used in each is a technical term, descriptive of a well-established equitable remedy to which well-known rights and incidents are attached. It may be somewhat inappropriate in a system under which a mortgage is merely a security and transfers no estate to the mortgagee. But there is nothing to warrant the assumption that the legislature meant that the "foreclosure" order which it empowered the registrar of titles to grant should have an effect upon the relations between the mortgagor and the mortgagee and their respective rights in regard to the mortgage debt and the securities held for it, including the foreclosed property, greater than and essentially

(1) 4 Comw. L.R. 864 at p. 884.
(2) 7 Ch. D. 166 at p. 171.
(3) 12 Gr. 105, 106.
(4) 10 Ont. App.R. 99 at pages 109-110.

different from that which courts of equity had for many years given to their foreclosure decrees. That its operation was intended to be similar is further indicated, if indeed not conclusively established, by the fact that the language in which its effect upon the title to the land and the mortgagor's interest therein is stated in the statute, viz., that the land shall be vested in the mortgagee or encumbrancee

free from all right and equity redemption on the part of the owner, mortgagor or encumbrancer, or any person claiming, through or under him, subsequently to the mortgagee or incumbrancee

is, as Higgins J. points out at p. 885, substantially that of the foreclosure orders absolute issued by courts of equity (Seton on Decrees, 3rd ed., p. 1393). The provision for the vesting of the land and declaring that the mortgagee or incumbrancee obtaining the order shall be deemed a transferee and become the owner thereof were necessary, as that learned judge says, because a mortgage under the Act does not operate as a transfer but only as a security and is analogous to the direction inserted in an equity decree for the foreclosure of an equitable mortgage—that the mortgagor shall execute a conveyance of the land.

I do not find in the provisions that a mortgagee foreclosing under sub-section 16 is to be deemed a transferee of the land and that a transferee of land subject to a mortgage or encumbrance impliedly covenants to indemnify the transferor against the same (section 52) anything to warrant the conclusion sought to be drawn from them—that it was intended that an order of foreclosure under section 62 (*a*) (16) should have the effect of releasing or extinguishing the mortgagor's covenant. In the first place the mortgagee does not become a transferee from the mortgagor—the mortgagor is not his transferor. There is no

instrument transferring land subject to a mortgage or encumbrance,

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and it is only in such an instrument that section 52 imports the covenant of indemnity by the transferee. The land is vested in the mortgagee free from the mortgage or encumbrance. Section 52, in my opinion, has no application to the statutory transfer effected by a foreclosure order made under sub-section 16.

I should require much more explicit language than anything found elsewhere in the Alberta "Land Titles Act" to justify the inference that "foreclosure" under section 62 (*a*) (16) was meant to be something so essentially different from any other foreclosure that it has the effect of extinguishing the mortgage debt, thus releasing all collateral securities, rendering it impossible for the mortgagee to proceed on his covenant and depriving the court of jurisdiction, however exceptional the circumstances (short of fraud), upon proper terms to relieve the mortgagor from the loss of his property.

Reference may also be made to *The Premier Permanent Land & Investment Association, Ex parte Lyall* (1), and *Noble* v. *Campbell* (2).

Orser v. *Colonial Investment and Loan Co.* (3); *Bernard* v. *Faulkner* (4); and *Richards* v. *Thomson* (5), cited in argument do not really help much in the determination of the case at bar. As far as they go they assist the appellant. All three, however, were cases of proceedings for foreclosure taken in court. In the first the order of foreclosure itself contained a judgment for personal payment making it impossible to maintain successfully that the personal liability of

(1) 25 Vict. L.R. 77.
(2) 18 W.L.R. 591.
(3) 37 D.L.R. 47; [1917] 3 W.W.R. 513.
(4) 18 D.L.R. 174; 7 W.W.R. 162.
(5) 18 W.L.R. 179.

the mortgagor was extinguished. In the second the court, on an application heard *ex parte*, allowed a reservation of the mortgagor's personal liability to be expressed in its foreclosure order. In the third the mortgagee had transferred the land to a *bonâ fide* purchaser for value and thereafter neither he nor the mortgagor could have had any right in equity to have the foreclosure opened.

Nor do the decisions in *Williams* v. *Box* (1), and *Smith* v. *National Trust Co.* (2), materially aid either party. The former rests on an amendment to section 126 of the Manitoba "Real Property Act" held to have restored to the court (if it was ever taken away) the jurisdiction over mortgages which it had before the "Real Property Act" was passed. A somewhat similar provision in section 10 of the Alberta "Supreme Court Act" of 1907, ch. 3, long antedates section 62 (*a*) of the Alberta "Land Titles Act," whereas the amendment to section 126 of the Manitoba "Real Property Act" was passed subsequently to the enactment of sub-sections 113 and 114 of that statute under which the foreclosure in *Williams* v. *Box* (1) was had. It must always be remembered, however, that a certificate of title is, under section 44 of the Alberta Act, as under section 71 of the Manitoba statute, conclusive evidence at law and in equity only "so long as it remains in force." Mr. Justice Idington emphasises the fact in *Williams* v. *Box*, (1) at p. 12.

All that was decided in *Smith* v. *National Trust Co.* (2) was that in a mortgage of property under the Manitoba "Real Property Act" (R.S.M. 1907, ch. 148), an express power of sale, at all events if it do not explicitly otherwise provide, must be exercised under and in accordance with the requirements of the sections

(1) 44 Can. S.C.R. 1. (2) 45 Can. S.C.R. 618; 1 D.L.R. 698.

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of that Act governing the exercise of the statutory power of sale which it confers. (Sub-sections 109 *et seq.*) While Mr. Justice Duff, who wrote the majority judgment, says of the mortgagee, at p. 641, that

his rights and powers must rest directly upon the provisions of the statute itself,

he significantly adds:

This view, of course, does not involve the consequence that the mortgagee's rights are those only which the statute expressly gives him. It is obvious that many things are left to implication; and where, in any particular case, it appears that the rules governing reciprocal rights of the mortgagor and mortgagee under the mortgage contract in relation to the mortgaged property are left to implication then it is a question to be determined upon an examination of the statute as a whole how far the rights of the parties are to be governed by the rules of law which, apart from the statute, are applicable as between mortgagor and mortgagee.

My learned brother had already said:—

There is much in the Act to indicate an intention on the part of its authors that, under the statutory mortgage, the powers and rights of the mortgagee should, in substance, be economically equivalent to those possessed by a mortgagee under a common law mortgage—

an observation which applies with equal force to the Land Titles Act of Alberta.

But whatever might have been the effect of section 62 (*a*) as originally enacted, the adoption of the proviso to section 62 contained in section 4 of the "Statute Law Amendment Act" of 1916, ch. 3, in my opinion, leaves no room for doubt as to its proper construction. That proviso reads:—

Provided, however, that where proceedings in respect of any mortgage or incumbrance have already been, or hereafter shall have been, commenced under the provisions of the next following section, no proceedings under this section for the enforcement of the covenant for payment shall be commenced, or if commenced, shall be continued until the remedies provided by the next following section are exhausted.

Where proceedings have been begun under section 62 (*a*) this proviso expressly stays all curial proceedings to enforce payment until nothing more can be done under that section, *i.e.*, until an order for foreclosure under

sub-section 16 has been made and registered and a certificate of title issued to the mortgagee. Only then are the remedies provided by section 62 (*a*) "exhausted." It would be difficult to conceive of a more distinct legislative recognition of the fact that the taking of any or all the remedies under section 62 (*a*) does not release the mortgage debt or extinguish the right of the mortgagee to proceed to enforce payment on his mortgagor's covenant. In the enactment that if the mortgagee has begun proceedings under section 62 (*a*) he cannot proceed upon his mortgagor's covenant until he has obtained the order of foreclosure—the ultimate remedy for which sub-section 16 of that section provides—the implication that he may then do so is irresistible.

A somewhat similar provision for the case of foreclosure proceedings in court under section 62 was made at the same time by clause (*b*) of section 4 of the Act of 1916, ch. 3. In connection with this latter provision it may be observed in passing that where foreclosure has been obtained it may be a little difficult to determine

the amount of the judgment or mortgage debt remaining unsatisfied.

But with that difficulty we are not now concerned.

I am for the foregoing reasons, with respect, of the opinion that the judgment of the learned trial judge was right and should be restored. The appellant should have its costs in this court and in the Appellate Division.

BRODEUR J.—I concur in the result.

Appeal allowed with costs.

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

Solicitors for the respondent: *Jones, Pescod & Hayden.*

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*May 29, 30, 31.
*June 4.
*Oct. 8.

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

AND

MAUD McDONALD (PLAINTIFF).... RESPONDENT.

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

Negligence—Joint and several responsibility—Cause of accident—Acts of two parties—Art. 1106 C.C.

There may be joint and several responsibility of two different parties for the consequences of an accident caused by independent acts of negligence committed by both at the same time and contributing directly to that accident.

Jeannotte v. *Couillard* (Q.R. 3 Q.B. 461), distinguished.

APPEAL from a decision of the Superior Court of the Province of Quebec (1), sitting in review at Montreal, affirming the judgment of Guerin J. (1), with a jury and condemning the defendants jointly and severally to pay $6,000 and costs.

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

Lafleur K.C. and *A. E. Beckett K.C.* for the appellant, The Grand Trunk Railway Company of Canada.

Atwater K.C. and *A. St. Pierre* for the appellant, The City of Montreal.

Ernest Pélissier K.C. and *Thomas Walsh K.C.* for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Court of Review, Montreal, which

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

(1) Q.R. 53 S.C. 460; 40. D.L.R. 749.

confirmed a judgment of the Superior Court in an action of damages for negligence. The issues of fact were tried by a jury. From the facts proved, the inference of negligence was drawn by the jury with the concurrence of the trial judge and, on appeal, the verdict was confirmed.

The respondents, plaintiffs below, are the mother and daughter of one Scarff, in his lifetime an employee of the railway company, who was killed in the course of that employment.

Three questions are raised on this appeal: (1) From the facts proved might negligence be legitimately inferred by the jury against both defendants? (2) Was the deceased's death caused by his own fault? (3) Are both appellants, as joint authors of the wrong, jointly and severally liable for the whole damage, or, in other words, are both appellants jointly and severally liable for the consequences of an accident caused by independent acts of negligence committed by the servants of both on the same occasion, or in connection with the same occurrence, and contributing directly to that accident?

In my opinion, the first and third questions should be answered in the affirmative.

To dispose of the third question, which is purely one of law, I adopt the opinion expressed by a learned writer in the "Revue Trimestrielle de Droit Civil," 4 (1905), p. 341, who puts the question and answer in these words:—

Quand y a-t-il solidarité entre les auteurs d'un délit civil?

La Cour de Cassation, dans son arrêt du 3 juin 1902 (Pand. fr. 1905, 1. 104) s'est-elle écartée de sa jurisprudence antérieure quant aux conditions nécessaires pour que la solidarité soit prononcée entre les auteurs d'un quasi-délit? Il ne suffit pas, disait-elle, il y a peu d'années (Cass. civ. 13 juin, 1895, D. 96, 1. 31), pour que la solidarité soit prononcée en matière de responsabilité provenant d'un quasi-délit, que la faute declarée soit commune à un certain nombre de défendeurs;

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il faut de plus qu'il soit constaté que cette faute est dans de telles conditions d'indivisibilité que toute répartition est impossible entre ceux qui l'ont commisè. (V. de même Cass. 12 Féve. 1899, D. 79, 1. 281).

Or dans l'arrêt de 1902, la Chambre civile, après avoir constaté que ce dommage est implicable à la faute commune de plusieurs, ajoute "que cette faute a concouru à produire l'entier dommage subi par la partie lésée, que dès lors la condamnation a pu être mise solidairement à leur charge." Il ne nous semble pas que cette diversité d'expression cache une idée différente; car si on a pu causer l'entier dommage, la faute a été indivisible.

The jury having found on sufficient evidence that the accident resulted from the common negligence of the employees of the city and the railway, they are both in law jointly and severally liable for the damage—1106 C.C. *Vide Piper* v. *Winnifrith* (1).

Dealing now with the first question, I am satisfied that from the facts proved, and I have read the evidence with great care, the jury might legitimately draw the inference of negligence against both defendants.

The circumstances of the accident are not very fully given by the witnesses. Although referred to, no plan of the locality was filed at the trial, probably for the reason given by Mr. Lafleur at the argument here. The place was so well known to the jurors that each of them was presumed to have a photograph of it in his mind. The deceased, who was the chief actor, was not present to speak for his wife and children, and the jury was obliged to rely for the details of the occurrence almost exclusively on the version of those to whose fault the accident was attributed; interested as they were to exculpate themselves and their employers. All of which tends to give additional weight to the verdict.

The accident occurred at the intersection of the railway, at rail level, by the street formerly known as Ste. Elizabeth, now De Courcelles street, a very busy

(1) 34 Times L.R. 108.

thoroughfare in the city of Montreal. When the crossing was made originally (1900) the city assumed the obligation to put up gates and keep a watchman constantly in attendance. By reason of the increased traffic, in 1911, the Railway Board ordered the city to put up modern gates. The railway had the right of way, and the municipality assumed the obligation to protect the traffic using the crossing.

At the time of the occurrence a number of empty passenger cars were being moved from the railway station to a place immediately beyond and westward of the DeCourcelles street crossing. The train consisting of 14 empty cars was moving reversely, the engine pushing the cars. Brunet, the company's foreman, was in charge, and it was his duty to direct the whole operation, having special regard to the protection of the public using the street crossing. To do this effectively, Brunet required to be in touch with the engine driver who controlled the motive power, and Scarff, who was at the end of the train as it approached the crossing. There was a curve in the line which made it necessary for Brunet to place himself in the middle of the train so as to be in communication with both ends. It was obviously necessary for him, before giving instructions to the engine driver, to know the conditions at the crossing.

Scarff's duties are thus defined in the company's plea:

> The said late Charles J. Scarff, under special instruction from his foreman, was sent to the said DeCourcelles street crossing for the sole purpose of safeguarding public traffic over said crossing during the shunting operations upon which the crew in charge of said train was engaged at the time.

The traffic at DeCourcelles street crossing was controlled by the city, under the order of the Railway Board, by gates which were opened only when the man

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in charge, Racicot, saw that there was no train in the vicinity. His instructions were verbal and, when examined as a witness, he says:—

On m'a dit que j'aurais à "watcher" les trains et fermer les barrières.

He had no time table or other means of knowing when the trains reached the crossing; he was dependent on his own judgment as to his action with respect to the gates.

In answer to a question from the bench, Mr. Lafleur admitted that the shunting operations continued until the cars were stowed away, *i.e.*, had reached their destination west of DeCourcelles street.

The jury found that the accident was attributable to two distinct acts, both of which contributed directly to the death of Scarff. In the course of the shunting operations, it was necessary to pick up a car which was on a track alongside the main line on which the train was being moved from the station, and for that purpose the whole train was backed up till within 40 or 50 feet of the crossing and there brought to a standstill. The train was then broken in two, *i.e.*, a certain number of the cars nearest the engine were detached and run on to the siding to pick up the car that was there, and all were then moved back to the main track where the other cars had been left. When all the cars were coupled, on a signal from the foreman Brunet, the train in the process of shunting was moved towards the crossing, and Brunet then left his post on the outside and stood on the steps of one of the cars, where he was no longer in touch with the engine driver or Scarff, as found by the jury. In the meantime, Racicot, seeing the cars nearest the crossing stopped, assumed that he might safely open the gate, which he did, thus permitting a large number of people to get on the track.

Seeing the imminent danger in which these people were placed, as the train was approaching the crossing running reversely, and unable to signal the engineer through Brunet, who had left his post, Scarff rushed forward to reach the signal cock so as to notify the engine driver of the danger, and in the attempt lost his life. It is said that he was negligent in what he did. Scarff may have assumed very heavy risks and even acted imprudently, but it must be borne in mind that he was dealing with a state of things due to the defendants' negligence. And, having read the evidence, I am satisfied that the finding of the jury, that in the circumstances he was free from fault, is fully justified. In a most trying emergency, he did his best (Laurent 20, p. 520, No. 489), and the jury evidently did not believe Menard's story about the removal of the signal whistle. So that, on the whole, I am fully satisfied that the finding of the jury to the effect that the accident was attributable exclusively to the acts of both Brunet and Racicot is borne out by the evidence.

Some questions were raised as to prescription and insufficiency of the notice. The acts of the employees of both the city and the company contributed to the death of Scarff, and the notice to the city was sufficient. The action was taken *en temps utile* against the company, and that was sufficient to interrupt prescription against the city (Laurent, vol. 17, Nos. 304 & 294; articles 1106 & 2231 C.C.).

On the whole, this appeal should be dismissed with costs.

DAVIES J.—I concur in dismissing these appeals; but I do so with much doubt: which, however, has not ripened into a conviction that the judgment

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appealed from was erroneous. My duty, as I conceive it, therefore, is to dismiss the appeal.

IDINGTON J.—I am of opinion that the evidence herein was such that the learned trial judge was right in submitting it to the jury and that their findings of fact bind us to apply such relevant law thereto as may be applicable.

In all its essential features I agree with the lucid statement of the case as presented by the judgment of Mr. Justice Lane on behalf of the Court of Review in support of the judgment appealed from.

I need not repeat, however, but may add what the argument here has suggested.

A perusal of the entire evidence in the case, except part of Menard's, which calls for little attention, convinces me clearly of one thing. It is that the stories of Racicot and of Benoit are in absolute conflict, in regard to the essential facts which furnish a crucial test of the weight to be given Racicot's version relative to his opening and shutting the gates.

He tells of a rush as it were of 5 or 6 vehicles from each side, when he opened the gates and that they all disappeared before the accident in question except a waggon loaded with brick which had not quite reached but was approaching the track on which the accident took place.

That story of their complete disappearance as the result of successful crossing by so many vehicles at one opening of the gates, before Benoit had been able during same opening to travel the short space he did to get where he saw deceased gesticulating in despair, is quite untrue if Benoit's story is even only approximately correct.

I can see no reason for disbelieving a word Benoit has said.

He was not a stranger to the crossing nor an idler, but knew well he had at such an hour to be prompt in entering when the gate, for the raising of which he had waited and watched, should permit him doing so.

The suggestion of the appellants' counsel in answer to my questions for explanation of this feature of the case that Benoit had wasted time watching some leak in an auto does not seem warranted by anything in the evidence. If counsel at the trial had imagined that Benoit had loitered behind others, pushing onward, he certainly should, and doubtless would, have pressed him on the point in a way that is not apparent.

Again Benoit swears to a delivery waggon approaching as he did and thus unintentionally demonstrates that Racicot's story is incorrect.

But more marvellous than all is that neither the man who had the load of brick is forthcoming as a witness, nor a single other one of the ten to a dozen like witnesses seemingly available to corroborate Racicot by shewing that they had crossed as he says.

The accident was far too important for either appellant interested in demonstrating that it had discharged its duty to the public to say nothing of what is involved in this action, to accept such a remarkable conflict of evidence as not requiring further inquiry and production of the testimony if Racicot's story is true.

There was a coroner's inquest at which both these witnesses testified.

The jury herein evidently disbelieved Racicot and accepted Benoit's story.

There are a number of minor things in Racicot's story which I need not dwell upon but which doubtlessly helped the jury to reach the conclusion they did.

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I must not, however, pass thus what he tells of the number of times that these gates would be opened in the course of a day.

Perhaps four or five hundred times a day was his reply when questioned there anent, adding he had never counted.

There were three men, as I understand him, each taking his turn on such duty in the course of the 24 hours.

No doubt the jury knew without being told that of the needed raising and lowering of gates thus spoken of by far the greater part would fall within a comparatively few hours. A man loaded with such a task at the noon hour with three gates to keep an eye upon and the possibilities of sixteen tracks to be watched without the aid of any system but his own eyes can hardly be charged with wilful false swearing if he happen to get confused and shrinking from blame for the life of another persuades himself that there was only one raising and lowering of the gates in question within a given time which he had no accurate means of measuring.

I think the jury was quite right in accepting Benoit's story in preference to that given by a single witness under such circumstances, and especially so when the latter's story was left uncorroborated and could have been corroborated, if true, and a proper effort made to procure testimony from such a stream of travel as indicated.

This is not the defence of a poor helpless creature for whom a semblance of excuse might be found, but of a city armed with the necessary equipment for tracing and bringing forward these missing witnesses.

Evidently Racicot confuses the occasions of his opening and shutting of gates and forgets the one testified

to by Benoit and which is the one we have to deal with.

The case rests upon inferences to be drawn by the jury from established facts, and I cannot say that any single one of their findings must be held such as twelve or nine out of twelve reasonable men could not properly arrive at on the evidence presented.

The findings of fact are quite sufficient in law to maintain the judgment appealed from.

The city appellant claims that it has no responsibility for the failure to protect the public using the crossing and tries to get some support for such contention in the wording of the order made by the Board of Railway Commissioners. That order is not the sole basis of its responsibility and indeed has very little to do with it.

The agreement entered into between the two appellants must be looked at, as well as the order of the Board and back of both the law upon which they were founded.

That agreement was entered into on the 8th November, 1900. It sets forth that the crossing of the railway company's yards by an extension of Ste. Elizabeth street is to be permitted by the railway company, that the city will place crossing gates and watchmen to operate said gates, at its own expense, and then by clause 3 agrees as follows:—

> The said corporation further agree to hold the said company free and harmless from any expense in connection with such temporary arrangement and protect them from all claims, costs, proceedings and expense for accidents occurring during its continuance.

The law upon which this rested is the "Railway Act" of 1888, as amended and interpreted and construed by the judgments in several cases. This court, in *The City of Toronto* v. *The Grand Trunk Railway*

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Company (1), held that a municipality in which a highway crossed a railway was a person interested within the meaning of sections 187 and 188 of said Act, and that the Railway Committee of the Privy Council had jurisdiction to make the order it had made, and which was there in question imposing the obligation upon the municipality to bear a share of the expenses of guarding and protecting the crossings such as there in question.

Leave to appeal to the Judicial Committee of the Privy Council was refused.

The story of the struggle between railway companies and municipalities, up to that time, relative to the possible responsibility of the municipality appears in the several cases cited in the report of the argument in said case.

The powers formally exercised by the Committee of the Privy Council in this regard became by the legislation creating the Board of Railway Commissioners vested in that Board. And the effect thereof was exemplified by an appeal to this court in the case of *Ottawa Electric Railway Company* v. *The City of Ottawa and the Canada Atlantic Railway Company* (2) to test the power of the Board in that regard. The power was maintained by the judgment of this court.

That establishes the principle of law upon which, by anticipation of its affirmation as it were, no doubt the parties concerned as appellants here had acted in entering into the agreement I have referred to and in which they, by a clause thereof, shew that the expedient of gates and watchmen was only temporary, for they evidently, as the agreement shews, expected a bridge over the railway as a substitute therefor to be constructed at their joint expense some day.

(1) 37 Can, S.C.R. 232.

(2) 37 Can. S.C.R. 354.

The city appellant is clearly liable by virtue of its agreement to indemnify the railway company.

The later order of the Board was, no doubt, made by reason of some one complaining of the inefficient protection given up to that time but it does not affect this case one way or another any more than if the order had been to paint the gates red or white.

But for the supervision of that Board, experience teaches that neither of such like parties will always maintain in a high state of efficiency such like expedients for accommodating and protecting the travelling public.

The city sets up that this action was barred as to it by the special Statute of Limitations in its charter. I do not think so. I hold they were jointly liable to respondent.

The appeal does not raise any question for us to decide as between them who ultimately may have to bear the burden of their neglect.

Whatever might have been said at one time as to the right of a railway company to shift its own legitimate burden on to municipalities, there is none of that here in question. The creation of the crossing in question and its operation was a joint enterprise no matter how they divided the necessary labour attendant thereon and the results following therefrom and incidental thereto must be borne jointly, even though in part there is involved the duty by the company towards its servants, in that as well as in other respects. Each contributed more than its due share to the result that is before us. As between them and others the obligation was jointly within the meaning of the code.

The appeal should be dismissed with costs.

ANGLIN J.—For the reasons stated by my Lord the Chief Justice and my brother Brodeur, I agree in their

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opinion that if both the defendants were responsible for the death of the plaintiff's husband, their liability is joint and several. It follows that the plea of prescription made by the city of Montreal fails.

We should also decline to disturb the ruling of the learned trial judge that the plaintiff's failure to give notice of her claim to the city corporation within 30 days after her husband was killed was excused by her ignorance of the fact that the city controlled the gates at the DeCourcelles street crossing. She believed, not unreasonably, that they were operated by the Grand Trunk Railway Company.

While I might have taken another view as to the proper conclusion to be drawn from the evidence if dealing with it as a trial judge, I agree with Mr. Justice Lane, who delivered the judgment of the Court of Review, that the jury may not improperly have preferred to rely upon Benoit's evidence rather than on that of Racicot, and may not unreasonably have drawn the inference that the latter had carelessly opened the crossing gates after the Grand Trunk train had started to move towards the crossing. This inference would negative any neglect of duty on the part of the deceased Scarff in giving the signal on which that train moved, which, of course, should not be presumed.

I have not been convinced that the jury was not warranted in holding that Scarff's attempt to stop the train by opening the angle-cock under the foremost car coming towards him—which undoubtedly cost him his life—did not amount to fault or contributory negligence. Unless he was responsible for the air whistle not being in place and available for use, he was not to blame for the existence of a situation which left him no other means of attempting to save the lives put in jeopardy by Racicot's negligent opening of the gates. In an

emergency, he imperilled his life in an effort to save others, praiseworthy not merely because of its heroism, but also because it evidenced zeal in the discharge of duty and in safeguarding the interests of his employers. An act done upon such an impulse, although under other circumstances inexcusably rash, may well be held not to have been a fault.

The jury evidently did not believe Menard, the chief witness whose testimony would establish that Scarff was himself responsible for the air whistle not having been in its place, and it is impossible to say that in doing so they were clearly influenced by any improper motive or were manifestly wrong. Yet I cannot help thinking that, even rejecting this testimony, had the jury found that Scarff had failed to place or to keep the air whistle where it should have been and could have been used by him without danger, such an inference from the proven facts would have been warranted and could not have been disturbed. Indeed, I am not entirely satisfied that it is not the most reasonable inference from the rest of the evidence, omitting entirely that given by Menard. But the jury has found otherwise and I am not prepared to say that their finding is so clearly against all the evidence that it should be set aside.

Upon the argument I also entertained grave doubt whether the action of Brunet in entering the train where he was unable to see Scarff after transmitting his signal to start, instead of remaining on the platform about 10 feet from the side of the train, where he could have seen Scarff in order to take any further signals that the latter might find it necessary to give, imputed by the jury as a fault attributable to the railway company, should properly be so regarded. I understand, however, that a majority of my learned brothers are

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of the opinion that it should. Although further consideration of the evidence has not dispelled my doubt, since it has not ripened into a clear conviction of error on the part of the Court of Review as well as the jury, it does not justify a dissent.

BRODEUR J.—Il s'agit d'un accident de chemin de fer où le mari de la demanderesse intimée a perdu la vie. La compagnie du Grand Tronc possède dans les limites de la ville de St. Henri une cour spacieuse où les trains à passagers, après leur course ordinaire, sont lavés et nettoyés. Cette cour est traversée à niveau par la rue DeCourcelles sur une longueur d'environ 300 pieds. Comme il y a beaucoup de trafic à cet endroit et vu le grand nombre de trains qui sont constamment en mouvement, la Commission des Chemins de fer a décidé en 1911 que des barrières modernes seraient installées et qu'elles seraient maintenues, entretenues et opérées par la Cité de Montréal jusqu'à ce que la Compagnie du Grand Tronc eût élevé sa voie.

Le jour de l'accident, le 21 août 1915, un train composé de quatorze chars était poussé dans cette cour par une locomotive. Le char qui se trouvait à l'avant était un char à bagages. Trois personnes, outre l'ingénieur et le chauffeur, étaient en charge de ce train: savoir, Brunet, le contremaitre; Scarff la victime; et un nommé Marcotte.

Arrivé près de la rue DeCourcelles, sur la voie No. 4, le train fut arrêté pour que la locomotive pût aller chercher un char qui se trouvait sur une voie voisine. Scarff reçut instructions de son contremaître Brunet, de se mettre à la traverse de la rue DeCourcelles pour voir à ce qu'il n'y eût aucun accident pendant qu'on procèderait à former le train et pour donner les signaux

nécessaires quand la rue serait libre. A cette fin, Scarff se tenait sur le trottoir à côté du char à bagages; et quand le train a été reformé, il a donné un signal à Brunet que le train pouvait partir et traverser la rue et, à son tour, l'ingénieur sur le signal de Brunet mit le train en mouvement.

Dès l'instant que le train partit, Scarff a dû s'apercevoir qu'il y avait danger pour certaines voitures ou piétons qui traversaient sur la rue et alors il a dû donner le signal d'arrêter; mais Brunet qui, dans l'intervalle, était monté sur le char, vers le milieu du train, n'a pas vu ce signal; et alors Scarff, dans un moment de dévouement qui est tout à sa gloire, s'est lancé à l'arrière du train pour l'arrêter au moyen du robinet d'angle.

C'était une démarche extrêmement dangereuse que celle qu'il faisait là; mais il a cru, je suppose, devoir y recourir dans l'espoir qu'il pourrait sauver la vie de ceux qui allait être frappés sur la rue et comptant probablement aussi sur sa propre agilité; mais malheureusement il a été entraîné en dessous du char et fut écrasé.

L'action était dirigée originairement contre la compagnie du Grand Tronc; mais au cours du procès on a découvert que la barrière qui se trouvait à cette rue était sous la garde d'un employé de la cité de Montréal; et alors, plus d'un an après l'accident, la cité de Montréal fut poursuivie et mise en cause pour être tenue conjointement et solidairement responsable avec la compagnie du Grand Tronc de cet accident.

La compagnie du Grand Tronc et la cité de Montréal ont plaidé que l'accident n'était pas dû à leur faute mais à la faute de la victime elle-même. La cité de Montréal a, en outre, plaidé prescription d'un an, invoquant les dispositions de l'article 2262 C.C.

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La procès a eu lieu devant un jury qui a trouvé coupable de négligence la cité de Montréal ainsi que la compagnie du Grand Tronc. Ils ont exonéré de tout blâme Scarff. La compagnie du Grand Tronc a été trouvée coupable parce que le contremaître n'était pas en position de pouvoir recevoir le signal qui lui avait été donné d'arrêter le train et la cité de Montréal a été trouvée en faute d'avoir par l'entremise de son employé levé les barrières lorsque le train était en mouvement.

Ce verdict a été unanimement confirmé par la Cour de Revision.

La question qui se présente est de savoir s'il y avait une preuve suffisante pour pouvoir justifier ce verdict. Les appelants prétendent qu'aucune preuve de négligence de leur part n'a été faite. La preuve est très longue et volumineuse et démontre le soin qu'on a eu de mettre devant le jury tous les faits qui pouvaient affecter la responsabilité des appelantes.

La faute trouvée contre la compagnie du Grand Tronc m'a paru d'abord, je l'admets, peu fondée et la preuve ne me paraissait pas la justifier. Mais après avoir lu et relu avec beaucoup d'attention cette preuve, je vois que, de fait, le jury pouvait avoir raison de condamner la compagnie.

La compagnie a essayé d'amener un certain témoin pour établir que Scarff était en faute, vu qu'il avait à sa disposition un sifflet à air qui aurait pu lui permettre d'arrêter le train et qu'il avait laissé ce sifflet sur le trottoir.

Nous n'avons pas eu occasion de voir ce témoin; mais, si j'en juge par les réponses qu'il a données, il n'est pas étonnant que le jury ne l'ait pas cru; et la Cour de Revision en est venu à la même conclusion.

Il me semble que le contremaître Brunet (et c'est la

conclusion à laquelle le jury paraît en être arrivé) aurait dû voir à rester dans une position de manière à recevoir tout signal qui pourrait lui être donné par Scarff. Scarff était bien resté sur le trottoir, à côté du train; pourquoi ne serait-il pas lui-même resté là? Ce train pouvait être suivi au pas d'un homme, vu qu'il n'y avait que quelques pieds pour atteindre sa destination; et alors Brunet me paraît avoir été coupable de négligence en montant sur le train et en perdant de vue Scarff qui avait été envoyé pour donner les signaux nécessaires.

Il est vrai que Scarff avait donné le signal du départ; mais vu la largeur considérable de la cour il pouvait arriver à tout instant qu'un signal d'arrêt eût pu être donné par Scarff; et alors Brunet aurait dû rester dans une position de manière à recevoir ces signaux. Malheureusement il ne l'a pas fait; et lorsque le danger est devenu très imminent, Scarff a été obligé, vu que ses signaux ne pouvaient pas être reçus, d'aller se mettre à l'avant du train pour essayer de l'arrêter autrement et éviter les accidents mortels qui allaient inévitablement se produire. Brunet, qui était monté sur un char vers le milieu du train, a vu tout à coup les signaux de détresse de la part d'un homme qui était sur la rue et il a alors fait arrêter le train; mais malheureusement il était trop tard; ce pauvre Scarff était écrasé.

Quant à la cité de Montréal, le jury a trouvé que Racicot, qui était en charge des barrières, a dû les lever après le départ du train. Il jure le contraire; mais il est contredit sous ce rapport par les circonstances qui ont été prouvées dans la cause. Je crois donc que le jury était justifiable de ne pas accepter sa version.

Je trouve donc que le verdict du jury tant contre la cité de Montréal que contre la compagnie du Grand

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Tronc est bien fondé et qu'il n'y a pas lieu de le mettre de côté.

Reste la question de prescription soulevée par la cité de Montréal. La question est de savoir s'il y a eu solidarité entre la compagnie du Grand Tronc et la cité de Montréal et s'il y a eu interruption de prescription par l'action prise contre la compagnie du Grand Tronc avant que la prescription fût acquise.

Les actions se prescrivent par un an pour injures corporelles, dit l'article 2262 C.C. Dans le cas actuel, il y avait eu interruption de prescription en tant que la compagnie du Grand Tronc est concernée parce qu'une action avait été prise contre elle avant l'expiration de l'année qui avait suivi l'accident (Art. 2224 C.C.). L'article 2231 C.C. nous dit que

> tout acte qui interrompt la prescription contre l'un des débiteurs solidaires l'interrompt contre tous.

Or, l'article 1106 C.C. déclare que l'obligation résultant d'un délit ou quasi-délit commis par deux personnes ou plus est solidaire.

La cité de Montréal nous dit qu'il n'y a pas de solidarité dans le cas actuel parce que le délit dont elle a été trouvée coupable par le jury n'est pas le même que celui qui est imputé à la compagnie du Grand Tronc. Il y aurait eu, suivant elle, deux délits; et, en conséquence, la solidarité ne devait pas exister; et elle cite à ce sujet la cause de *Jeannotte* v. *Couillard* (1), où il a été jugé ce qui suit:

> Although under article 1106 C.C. there may be solidarity in the responsibility established under article 1053 C.C., yet such solidarity only exists from the same act and not from an independent act on the part of each defendant.

Dans cette cause de *Jeannotte* v. *Couillard* (1), il s'agissait d'une poursuite contre un médecin et un

(1) Q.R. 3 Q.B. 461.

pharmacien; le premier pour avoir fait une erreur en écrivant une prescription pour un malade et le second pour ne pas avoir rempli la prescription telle qu'on l'avait écrite. Les deux fautes reprochées au pharmacien et au médecin étaient bien distinctes. Il est vrai qu'elles ont concouru toutes deux à la mort de la personne qui a pris ces remèdes; mais la Cour Supérieure et la Cour d'Appel n'ont pas jugé à propos de prononcer la solidarité.

Les faits sont différents dans la présente cause. D'abord, les délits se sont produits en même temps. En principe général, les co-auteurs d'un délit ou quasi-délit sont solidairement responsables du dommage causé à la victime de ce délit; et quand on se propose de régler l'étendue de la responsabilité des co-auteurs d'un délit, on doit considérer uniquement l'influence que les fautes des divers agents ont pu avoir sur ce quasi-délit; si elle est appréciable, chacun est astreint à la réparation du préjudice dans la proportion où il y a coopéré; et si elle ne l'est pas, on est autorisé à considérer chaque faute comme ayant engendré le dommage tout entier et par suite, sans se préoccuper de l'égalité ou de l'inégalité des imprudences ou négligences commises de part et d'autre, on inflige aux divers co-auteurs une condamnation totale.

Cette question s'est soulevée en France, et je trouve une décision de la Cour de Cassation rapportée dans Dalloz, 1894-1-561, où il a été décidé que la réparation d'un fait dommageable, imputable à deux ou plusieurs personnes, doit être ordonnée pour le tout contre chacune au profit de la partie lésée, lorsqu'il y a entre chaque faute et la totalité du dommage une relation directe et nécessaire. Il y aurait donc, suivant cette décision, solidarité même dans le cas où chaque co-auteur se serait rendu coupable de néligence par un fait distinct.

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GRAND TRUNK RWAY. CO. OF CANADA AND CITY OF MONTREAL v. MCDONALD.

Brodeur J.

La Cour de Cassation dans une cause rapportée dans Sirey, 1827-1-236, a décidé aussi qu'il y avait lieu de condamner solidairement à la réparation du dommage causé à un propriétaire voisin divers propriétaires d'établissements industriels, sans qu'il fût possible de déterminer la part pour laquelle chaque établissement y avait contribué. Larombière, commentant ce jugement dit:—

> Mais, par la manière indivisible dont le dommage s'était effectué et par le résultat d'une faute particulière et commune, le fait de chacun des fabricants étant réputé le fait de chacun, la réparation était due par tous et par chacun; en un mot, la solidarité résultait de la nature et de la force des choses.

La solidarité résulte de l'impossibilité de séparer, dans l'imputabilité d'un fait uni, des actions qui y ont simultanément concouru et qui y sont rattachées par des liens de cause à effet.

Je citerai aussi sur ce point Aubry & Rau, 4ème édition, vol. 4, p. 23.

A la lumière de ces décisions et de ces jugements, j'en suis arrivé à la conclusion que la Cité de Montréal et la compagnie du Grand Tronc se sont rendues coupables d'une faute qui a amené l'accident dont Scarff a été la victime et qu'il y a en conséquence solidarité. L'interruption de la prescription contre la compagnie du Grand Tronc a donc également interrompu la prescription contre la cité de Montréal.

Pour ces raisons, l'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant, The Grand Trunk Railway Company of Canada: *A. E. Beckett.*

Solicitors for the appellant, The City of Montreal: *Laurendeau, Archambault, Damphousse, Jarry, Butler & St. Pierre.*

Solicitors for the respondent: *Walsh & Walsh.*

THE TOWN OF COBOURG..... (DEFENDANT)..... } APPELLANT;

1918
*June 14.
*Oct. 8.

AND

THE CYCLONE WOVEN WIRE FENCE COMPANY (PLAINTIFFS) } RESPONDENTS.

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

Lease—Option to purchase—Conditional payment of rent—Relinquishment of option.

The Town of Cobourg by an agreement giving a wire company an option for five years to purchase land leased the premises to the company for that period at an annual rental payable at its expiration if the purchase was not completed or, *pro rata*, at any earlier period at which the option was relinquished, such rent to be paid prior to removal from the premises of the company's plant and machinery. At the end of three and one-half years the company sold some of its machinery and was negotiating with a junk dealer for sale of the rest when the town distrained for rent claimed as due under the agreement, and the contents of the company's factory were seized and sold. In an action claiming damages for illegal distress

Held, that as the option to purchase had not been relinquished no rent was due and the distress was illegal.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial by which the action was dismissed.

The facts are sufficiently stated in the above headnote.

F. M. Field K.C. for the appellant.
Loftus for the respondent.

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

IDINGTON J.—The appellant as a municipal corporation entered into an agreement with respondent

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

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Idington J.

giving it an option for a term of five years to purchase certain property and meantime to lease the property.

The questions raised herein must be determined by the construction to be placed upon two clauses of said agreement which are as follows:—

> The corporation offers to sell to the company the building and lands surrounding the same heretofore used as the Model School on the north side of University avenue in the Town of Cobourg comprising two acres of land be the same more or less for three thousand five hundred dollars at any time within five years from the day of the date hereof on the company tendering to the Mayor of the corporation within said period of five years a deed for execution by the corporation in accordance with the "Short Form of Conveyances Act:"
>
> And the corporation offers to lease to the company the said premises until the completion of the sale thereof to the company according to the terms of the offer hereinabove set forth at an annual rental of two hundred dollars, to be paid by the company to the corporation at the expiration of the said period of five years, in the event of the company not completing the purchase within the said period, and at the same rate for any less period than five years, in the event of the company relinquishing this option prior to the withdrawal from the said premises of the plant and machinery of the company.

The respondent entered into possession of said premises and after holding same for three years and a half and about a year and a half before the expiration of said five years, without making any election or expressly declaring its intention to relinquish the option of purchase given by the agreement, its goods were distrained by the appellant for an alleged claim of $700 for rent under the said second clause.

The respondent, six months later, brought this action, alleging the seizure was illegal and claiming damages therefor.

Appellant attempted to justify its seizure by evidence of the removal by respondent of a great part of its machinery and stock in trade thereby tending to demonstrate that it had relinquished its option and hence become liable to pay rent for the time it had been in possession.

I cannot see how the option to purchase can, under any fair or reasonable construction of the instrument, be determined in any such way. It was quite competent for the respondent to have removed every bit of its machinery and other personal property and awaited till the last day of the term of five years and then to pay the price named and the rental specified and take a conveyance.

Suppose there had been a rapid rise in value of real estate, and this property had become worth double by the end of the term what it was at the making of the agreement, could the option be held to have been relinquished by reason of any such evidence as adduced herein?

There was not a line in the agreement stipulating for occupation of the premises, much less imposing as a term thereof that it should bring goods and machinery to be used by it therein.

The only provisions made binding respondent in relation to the property were to keep it in repair, not to assign without leave, to insure and to pay school taxes on an assessment of $3,500.

It is not what conceivably may have been the understanding between the parties but what the writing expresses that we have to do with herein.

If appellant made an improvident agreement we cannot help it. If there was, outside of that, material for another case it should have been fought out otherwise than by distress.

I should not, even if I could get over the impassable barrier I have suggested arising from the construction of the instrument contemplating a five years' option to purchase, be able, as a matter of course, to put the construction on the leasing clause standing alone that appellant contends for. There is no time named for

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Idington J.

the payment of rent except at the expiration of the said period of five years. The matter is left so indefinite in that regard that I doubt if any well-founded right to distrain could be held to have arisen at an earlier date than the end of the five year term. I need not, however, decide that in my view of the plain, obvious meaning of the instrument otherwise.

The real issue in law had, I fear, got beclouded by reason of giving heed to collateral issues and considerations that never could have, in themselves, laid a foundation for the right to distrain, otherwise I imagine this litigation would have terminated long ago.

The appeal should be dismissed with costs.

ANGLIN J.—After hearing an able and exhaustive argument of this appeal, I am, with deference, utterly at a loss to appreciate the considerations which led the Appellate Division to regard this case as a fit subject for special leave to appeal. The unanimous judgment of that court (the personnel being somewhat different), reversing that of Britton J., who had dismissed the action, held that the defendant had made an illegal distress, awarded the plaintiff $23.50 actual, and $5 nominal, damages, declared certain of the distrained goods which the defendant had "bought in," at the bailiff's sale, at prices aggregating $905.35, to be still the property of the plaintiff, and gave it the costs of the action and appeal on the Supreme Court scale.

The defendant now concedes that its purchases at the sale held under its own distress warrant would have been indefensible had the distress itself been unimpeachable. The matter in controversy on this appeal, therefore, apart from costs, is confined to a judgment for $28.50 and the sole question to be determined is

whether there was or was not any rent due from the plaintiff to the defendant.

The plaintiff was lessee of premises owned by the defendant, a municipal corporation, with an option to purchase the same at any time within five years for $3,500. The rental ($200 a year) was payable on the expiry of the five years should the plaintiff not complete the purchase within that period and at the same rate for any less period should the plaintiff relinquish its option to purchase, payment in that event to be made

prior to the withdrawal from the said premises of the plant and machinery of the company.

The circumstances in evidence, in my opinion, fully sustain these findings of the learned trial judge:

The plaintiff company went into possession pursuant to the agreement but the business carried on was of small character and as if there were not very much in it in Cobourg.

Prior to the 22nd of June, the plaintiff set about removing what was in the building, and on the 22nd of June the defendant issued a landlord's warrant to distrain the chattels under a claim for rent to the amount of $700. The bailiff seized and sold part of the chattels so seized and bought in the residue.

I find that the company did form the intention of not purchasing the property and that it intended to remove the goods and chattels from the premises without paying any rent.

The defendant had reasonable ground for believing that the company did not intend to purchase the property or pay rent and upon that belief directed the seizure to be made.

It is true, as alleged by the defendant, that the plaintiff had to a great extent discontinued their business at Cobourg, The plaintiff company had been disposing of such of their manufactured goods as they had on hand, and had been stripping the premises of machinery and had been negotiating with a junk dealer for about a month prior to the 22nd of June, 1916, for the sale to him of such of the stock, machinery and plant as was left for $800.00 and at the very time of the seizure were concluding a sale thereof to the junk dealer for $625,00 with a view to abandonment of the property.

All that the defendant did was in good faith, and in the honest belief that the plaintiff company intended to resort to whatever might be necessary to avoid paying rent.

But does all this warrant the conclusion that the

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Anglin J.

plaintiff had, at or prior to the 22nd of June—the date of the distress—*relinquished its option* to purchase? That it had determined not to take advantage of it seems abundantly clear.

The defendant's Mayor wrote to the plaintiff on the 15th of June inquiring whether it intended to vacate the premises and, if so, what were its intentions regarding the option? The plaintiff's manager replied on the 20th June explaining that it was removing and disposing of surplus machinery, intending to apply the proceeds on a bank overdraft:

> This will enable the company in all probability to meet the difficulties caused by the war. I will be glad to keep you informed as to the progress the company is making at any time you request.

However evasive or disingenuous this reply, it is not susceptible of being construed as a relinquishment of the option, which was certainly still in force on the 15th June as the Mayor's letter shews. There was no further communication between the parties prior to the distress.

Under the agreement, during the currency of the five years' period only actual relinquishment of the option to purchase would make the *pro ratâ* rent for the elapsed portion of that period due and payable. An intention to relinquish, however definite and clearly established, would not suffice. Had a tender by the plaintiff on the 22nd of June of a conveyance of the property for execution accompanied by $3,500 been refused, the defendant, in my opinion, would have had no defence to an action for specific performance. With Mr. Justice Lennox, who delivered the judgment of the Appellate Division,

> I am of the opinion that there is no evidence whatever to shew a relinquishment, in fact, but, on the contrary, the letter from the Mayor to an officer of the plaintiff company of the 15th June, shews quite

clearly that upon the 15th June, at all events, there was no relinquishment, and there certainly is nothing to suggest that the parties came together in any way or did anything that would constitute a relinquishment of the option after that date. It is not necessary to determine *a priori* what documents or circumstances would be necessary to constitute a relinquishment as a matter of law of the right of the company to exercise the option within the five-year period limited by the agreement. It is sufficient to say that no fact or circumstance has been shewn which could be called a relinquishment or from which a relinquishment could be properly inferred.

The appeal fails and must be dismissed with costs.

BRODEUR J.—The object of the contract which we have to construe in this case was to assist the respondent company which intended to start an industrial establishment in the Town of Cobourg. It was represented to the civic authorities that a certain number of men would be employed and that the town then would profit in the establishment of that new industry.

With that end in view the Town of Cobourg agreed to give a lease of a building which they had at a rent of $200 per year and with the right of option on the part of the company to purchase the property within five years. No rent would be paid, however, during those five years, unless the company relinquished its option to purchase. The machinery and plant, however, of the company could not be removed prior to the rent being paid. That agreement was made on the 11th November, 1912, and the option then would have to be exercised on or before the 11th November, 1917.

The business of the company, however, was not prosperous. At the beginning they employed a certain number of men, but there was a decrease in number from time to time until, about the beginning of the year 1916, the number was reduced to one. The company failed to make a return of its affairs as required by the provisions of the provincial statute during the

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Brodeur J.

years 1914-1915 and 1916. No price lists were issued after the year 1913. In 1915 it gave to the bank a chattel mortgage covering all operating machinery on the premises. It is in evidence that only 1,110 lbs. of fence wire were brought during the year 1916. Then, in the months of April, May and June, they started to ship machinery and they negotiated with a junk dealer for sale of the balance of the machinery.

It is in evidence also that the total cost of power supplied from the 13th January, 1913, to the 26th of June, 1916, was $29.96.

The company was evidently not in a position to continue the business, and it was found by the trial judge that it had formed the intention of not purchasing the property, and it intended to remove the goods and chattels from the premises without paying any rent.

The trial judge found also that

> the defendants had reasonable ground for believing that the company did not intend to purchase the property or pay rent and upon that belief directed the seizure to be made.

The Appellate Division reluctantly reversed his decision.

Everything pointed to the fact that the company was in a hopeless condition and could not purchase the property. But can the company be held as having relinquished its option to purchase? I am sorry to have to come to the conclusion that the evidence does not disclose such relinquishment. It is more than possible that the company would not be in such a financial condition that it could exercise its option; but, then, we cannot say that some rent was due when the writ for distress was issued.

The Town of Cobourg seems, however, to have acted all through in a straightforward way and I could not see the same line of conduct followed by the respondent company.

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Falconbridge J.

I have come to the conclusion that the appeal should be dismissed with costs.

FALCONBRIDGE J.—I agree with the judgment of Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitor for the appellant: *Frank M. Field.*
Solicitor for the respondents: *John T. Loftus.*

1918
*June 18.
*Oct. 8.

MARY CAMERON.....APPELLANT;

AND

THE CHURCH OF CHRIST, SCIENTIST, AND OTHERS.....} RESPONDENTS.

IN RE ESTATE OF MARY HELEN ORR

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

Will—Charitable purposes—Devise of residue—Estate to be "used for God only."

The will of a Christian Scientist left the whole estate of the testatrix to trustees and contained several bequests for purposes connected with Christian Science doctrine and practice. One of such bequests was "fifty thousand will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near and universal for all who will receive. These institutions may take the place of what at present are called Hospitals, Poor Houses, Gaols and Penitentiaries or any place that is maintained for the uplifting of humanity."

Held, reversing the judgment of the Appellate Division (40 Ont. L.R. 567), Idington J *dubitante*, that the terms of this bequest are so vague and impracticable, and the objects to be benefited and the time for the benefit to accrue so uncertain that no reasonable or intelligible construction can be given to it and this sum of $50,000 must fall into the residue of the estate.

The will contained no formal disposition of the residue of the estate, but the final bequest ended with the sentence, "the whole of my estate must be used for God only."

Held, also, reversing the judgment appealed against, that even if the testatrix intended this expression to be a disposal of the residue the words are too broad, indefinite and controversial to be capable of being carried out and there is an intestacy as to said residue.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment of Sutherland J. in favour of the appellant.

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

(1) 40 Ont. L.R. 567 *sub nom. In re Orr*.

The proceedings in this case were commenced by originating notice of motion on behalf of the respondents, executors of the will of Mary Helen Orr, for the opinion and direction of the court on certain questions respecting the construction of said will and administration of the estate. The will was in the following terms:

This is the last Will and Testament of me, Miss Mary H. Orr, presently residing at Bobcaygeon, Victoria County, Ontario, I hereby revoking all former Wills at any time made by me, and being desirous of settling my affairs in the event of my decease and having full confidence in the persons after-named as Trustees and Executors, do hereby give, grant, assign, dispose, convey and make over to, and in favour of Mr. George Silas Haddock, 9 Crawford St., Roxbury, Christian Science Practitioner, Mr. Alfred Farlow, 609 Berkley Building, Boston, Mass., Christian Science Practitioner, Mr. William C. Moore, Bobcaygeon, Ontario, Manufacturer, and the survivor of them, as Trustees and in trust for the purposes aftermentioned the whole estate and effects, heritable and movable, real and personal, presently belonging to me and that shall belong to me at the time of my decease, together with the whole Writs and Vouchers thereof; and I nominate and appoint the said Mr. George Silas Haddock, Mr. Alfred Farlow, Mr. William C Moore and the survivor of them as they may appoint to be my sole Executors and Trustees of this my Will, but declaring that these Presents are granted in trust always for the purpose aftermentioned, viz.: (First) I direct my Executors and Trustees to first pay my just debts, personal and testamentary expenses.

(Second) I give, devise and bequeath unto:—The Mother Church, Boston, ten thousand dollars to be used in spreading the truth. Ten thousand dollars towards encouraging those building C. S. Churches to be distributed in smaller or larger sums as may be wise, from $100 to $300 to each Church. Ten thousand to be placed to the interest of Bobcaygeon to be used only for such purposes as will elevate the community spiritually. Ten thousand for the benefit of those who are endeavoring to uplift the needy in Chicago such as Miss Jane Addams, United Charities and whatever may seem to require assistance. Five thousand to be used for any necessary or uplifting purpose among Father's Kin. Five thousand to be used for any necessary or uplifting purpose among Mother's Kin. Fifty thousand will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the Light that is so real, near and universal for all who will receive. These institutions may take the place of what at present are called Hospitals, Poor Houses, Gaols and Penitentiaries or any place that is maintained for the uplifting of humanity. Ten thousand as a fund to be used in lending to deserving people, men or women, to buy small homes or farms. This money can be lent at 6 per cent. or

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whatever is lawful on good security. The profits accruing can be utilized as said before in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked through the Revelation as given in Science and Health with Key to the Scriptures by Mary Baker Eddy. The whole of my estate must be used for God only.

And I reserve my life-rent, and full power to alter, innovate or revoke these presents in whole or in part. And I dispense with the delivery hereof. And I consent to registration hereof for preservation.

The appellant is the next of kin of the testatrix. The respondents are the Church of Christ, Scientist, the executors of the will and the Attorney-General of Ontario.

At the original hearing on the motion Mr. Justice Sutherland held that the two last bequests were void and that no disposition had been made of the residue of the estate. The Appellate Division affirmed his judgment as to the last bequest of $10,000, but reversed it as to the preceding one of $50,000, and held that the words

all my estate must be used for God only

constituted a valid devise of the residue. The next of kin appealed to the Supreme Court of Canada.

McLaughlin K.C. and *Stinson* for the appellant. The devise of $50,000 cannot be construed as being for a "charitable purpose" as that expression is defined in the cases. See *Morice* v. *Bishop of Durham* (1); *Kendall* v. *Granger* (2); *Dunne* v. *Byrne* (3).

The words

the whole of my estate must be used for God only

were not meant to be operative nor intended to be a bequest. If they were they cannot be held to be a devise of the residue. *Powerscourt* v. *Powerscourt* (4); *Hunter* v. *Attorney-General* (5).

(1) 10 Ves. 521.
(2) 5 Beav. 300.
(3) [1912] A.C. 407.
(4) 1 Molloy 616.
(5) [1899] A.C. 309.

Hellmuth K.C. for the respondents, The Church of Christ and the executors. As to the residue the testator intended that the whole estate should be used for religious purposes and the words used constitute a valid devise. See *In re White* (1); *In re Pardoe* (2), at p. 192.

As to the bequest of $50,000 see *Townsend* v. *Carus* (3); *Houston* v. *Burns* (4).

THE CHIEF JUSTICE.—The late Mary Helen Orr, who was possessed of large means, left a will, a printed form filled in in writing, of which the individual respondents are the executors. They found it necessary to apply to the court for an opinion as to the meaning and validity of the provisions of the will and certainly there was necessity for so doing.

The will is as following:—

This is the last Will and Testament of me, Miss Mary H. Orr, presently residing at Bobcaygeon, Victoria County, Ontario, I hereby revoking all former Wills at any time made by me, and being desirous of settling my affairs in the event of my decease and having full confidence in the persons after-named as Trustees and Executors, do hereby give, grant, assign, dispose, convey and make over to, and in favour of Mr. George Silas Haddock, 9 Crawford St., Roxbury, Christian Science Practitioner, Mr. Alfred Farlow, 609 Berkley Building, Boston, Mass. Christian Science Practitioner, Mr. William C. Moore, Bobcaygeon, Ontario, Manufacturer, and the survivor of them, as Trustees and in trust for the purposes aftermentioned the whole estate and effects, heritable and movable, real and personal, presently belonging to me and that shall belong to me at the time of my decease, together with the whole Writs and Vouchers thereof, and I nominate and appoint the said Mr. George Silas Haddock, Mr. Alfred Farlow, Mr. William C. Moore and the survivor of them as they may appoint to be my sole Executors and Trustees of this my Will, but declaring that these Presents are granted in trust always for the purpose aftermentioned, viz.:

(First) I direct my Executors and Trustees to first pay my just debts, personal and testamentary expenses.

(Second) I give, devise and bequeath unto:—The Mother Church, Boston, ten thousand dollars to be used in spreading the truth. Ten

(1) [1893] 2 Ch. 41.
(2) [1906] 2 Ch. 184.
(3) 3 Hare 257.
(4) [1918] A.C. 337.

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The Chief Justice.

thousand dollars towards encouraging those building C.S. Churches to be distributed in smaller or larger sums as may be wise, from $100 to $300 to each Church. Ten thousand to be placed to the interest of Bobcaygeon to be used only for such purposes as will elevate the community spiritually. Ten thousand for the benefit of those who are endeavoring to uplift the needy in Chicago such as Miss Jane Addams, United Charities and whatever may seem to require assistance. Five thousand to be used for any necessary or uplifting purpose among Father's Kin. Five thousand to be used for any necessary or uplifting purpose among Mother's Kin. Fifty thousand will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to show that God's people are willing to help others to see the Light that is so real, near and universal for all who will receive. These institutions may take the place of what at present are called Hospitals, Poor Houses, Gaols and Penitentiaries or any place that is maintained for the uplifting of humanity. Ten thousand as a fund to be used in lending to deserving people, men or women, to buy small homes or farms. This money can be lent at 6 per cent. or whatever is lawful on good security. The profits accruing can be utilised as said before in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked through the Revelation as given in Science and Health with Key to the Scriptures by Mary Baker Eddy. The whole of my estate must be used for God only.

And I reserve my life-rent, and full power to alter, innovate or revoke these presents in whole or in part. And I dispense with the delivery hereof. And I consent to registration hereof for preservation.

In witness whereof I have subscribed these presents written (in so far as not printed) by myself at Bobcaygeon this twenty-ninth day of August, nineteen hundred and twelve.

Mary Helen Orr.

Signed, published and declared by the above named testatrix as and for her last Will and Testament in the presence of us both present at the same time, who at her request and in her presence have hereunto subscribed our names as witnesses.

(Witnesses)

Name, "Mrs. Georgenna McKay," (C.S. Practitioner),
Address, 2 College St., Toronto.

Name, "Louise Lewis," Chiropodist,
Address, No. 2 College Street.

The present appeal is confined to the disposition by the judgment *a quo* of the $50,000 for supplying institutions described in vague and general terms and the decision that the concluding sentence in the paragraph containing the bequests made,

the whole of my estate must be used for God only,

is a good and charitable bequest of the residue of the estate.

As to the specific bequest of $50,000 the trial judge found that

> the language in which the legacy is couched is so vague, visionary, chimerical and impracticable, and the objects intended to be benefitted, and the time when the benefit is to accrue, are so uncertain, that no reasonable or intelligible construction or effect can be given to the clause and the legacy must therefore be held to be void.

The Court of Appeal, varying the judgment, declared that

> the words contained in the will constitute a good and valid charitable bequest and that the intention of the will is that the sum of $50,000 shall be devoted by the executors to the dissemination and teaching of the principles and purposes of the Church of Christ, Scientist, commonly known as Christian Science.

I should have thought it impossible to say that by providing for the establishment of a fund towards helping to supply institutions for the uplifting of humanity the testarix intended that the capital sum should be devoted by her executors to the dissemination and teaching of the principles and purposes of the Church of Christ, Scientist, commonly known as Christian Science. I should have thought this impossible even if the will had not in the first two bequests made provision for this same purpose of dissemination and teaching of Christian Science.

The Chief Justice of Ontario, in his judgment, referring to this bequest, says:—

> The intention in favour of charity is for the reasons I shall mention when I come to deal with the 9th gift (the residue) found in the provisions that the whole of the estate of the testatrix "must be used for God only," aided to some extent perhaps by the other provisions of the Will.

Later on, however, when he comes to deal with the residue, he says:—

> It may be suggested that all that the testatrix meant by the provision in question was that the preceding bequests should be "used for

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God only," but that view cannot, I think, be supported. The words, "the whole of my estate" are inconsistent with it as is also the fact that the testatrix had already carefully directed the purposes to which the money she had bequeathed should be applied, and it is highly improbable that having done that she would have thought of restricting the use to which these benefactions should be put by the much looser expression that they "must be used for God only."

I think his latter view is the correct one and that the will itself, in which the purposes of the specific bequests are set out, contradicts any suggestion that they are to be governed by the words,

> The whole of my estate must be used for God only.

The key-note of the purpose of the bequests is, I should say, the uplifting of humanity. We find the word itself used not only in the bequest under consideration, but in three others, and the bequest for loans may be said to be a fifth bequest given for this purpose out of the eight bequests. On the other hand, the $10,000 for Bobcaygeon is expressly restricted

> to be used only for such purposes as will elevate the community spiritually.

The uplifting of humanity is a benevolent but not a charitable purpose; *James* v. *Allen* (1).

It is suggested that

> this gift may be supported as a charitable bequest coming under the 4th head mentioned in section 2 (s.) of the "Mortmain and Charitable Uses Act" (R.S.O. 1914, c. 103,

the opinion being expressed that the courts of Ontario are warranted in looking to it as the courts in England look to the Statute of Elizabeth for the purpose of determining what in law is a charitable gift in the case of personalty.

The law relating to charitable bequests in this province is not the English law, though no doubt like most of our law derived from English law. This law

(1) 3 Mer. 17.

having existed in the province from the beginning I do not think so great a change could be effected by the jurisprudence of the courts. It would require legislation and there is nothing in the "Mortmain and Charitable Uses Act" even to suggest that by this Act, dealing solely with land, there was any intention of indirectly altering the established law relating to charitable bequests.

I am of opinion that there is no ground for the interpretation which the Appellate Division has put upon this bequest and I think that the trust is so vague and uncertain that the trial judge was right in declaring that the bequest was void and falls into the residue.

Coming to the question of the disposal of the residue, I can find no ground for holding that the words,

> The whole of my estate must be used for God only,

constitute a charitable bequest disposing of the whole residue of the estate.

I do not think the words constitute a bequest at all. They occur at the end of the specific bequests in the space left for these in the printed form, and may perhaps be merely a statement of what the testatrix considers is the effect of the bequests. There seems to be some reason for supposing that she thought she had disposed of the whole of her property by the specific bequests and I think a very natural meaning to put upon the expression in the position in which we find it, is that she intended it as an apology or explanation of her leaving no individual or strictly private bequests. I cannot believe that in making use of these words she had the least idea of giving any property.

Chief Justice Meredith says that he has numbered the bequests for convenience of reference, but he has given an unfair gloss to the words in the last sentence

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by putting this in a separate paragraph and numbering and speaking of it as gift number 9. There is nothing to justify this. In the will it follows straight on after the disposition made by the specific bequests. But even if the words be held to pass the residue the question still remains whether it is a valid bequest.

I suppose it may be said that every use of property is, or at any rate ought to be, for God. In the case of *In re Darling* (1), Mr. Justice Stirling did indeed hold that a gift by will

> to the poor and the service of God

was a good charitable gift thinking that

> when the service of God is spoken of as it is in this will no one so construing the expression would hesitate to say that service in a religious sense was intended.

The learned judge was careful to restrict his construction to the service of God *spoken of as it was in the will before him*, and in this he adopted the same reserve as many other learned judges in similar cases. Each case must be considered upon it own special circumstances, and here the words are of the widest.

In *Dunne* v. *Byrne* (2), it was held that a residuary bequest

> to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge conducive to the good of religion in this diocese

is not a good charitable bequest and is void. It seems clear that a use of property that is conducive to the good of religion must be said to be used for God, and the present case would seem to fall clearly within this decision.

Again, whilst in *In re White* (3), it was held that in accordance with the authorities a bequest for religious

(1) [1896] 1 Ch. 50 (2) [1912] A.C. 407.
(3) [1893] 2 Ch. 41.

purposes must be considered as a good charitable gift, the cases all treat these purposes as necessarily of a public nature as was shewn by the Vice-Chancellor Wickens in *Cocks* v. *Manners* (1); there may well be religious purposes which are not of such a nature and consequently not charitable. No one could deny that a use of property for private devotion or edification was a use for God, and the words in this will must, therefore, be wider than any in which they have been held to make a good charitable gift. The language of the bequest is open to such latitude of construction as to raise no trust which a court of equity could carry into execution: *Baker* v. *Sutton* (2).

Perhaps, moreover, it may be said that Christian Science is rather a theory of all things in Heaven and earth evolved by the foundress of the Scientist Church, than a religion as commonly understood. The testatrix conceivably did not intend her property to be devoted to religious purposes according to the commonly accepted meaning of these words.

There is, I think, a difference between the present and the *Darling Case*(3) and the other similar cases which have been referred to. In all of these there was no doubt about the meaning of the testator in speaking of "God" or

My Lord and Master and I trust Redeemer,

or in similar expressions. In the appellant's factum it is said that the testatrix was pantheistic in her religious views. I am far from accepting that statement as correct, but on the other hand I am not prepared to agree with the Chief Justice of Ontario. He sets out the religious tenets of Christian Science as found in

(1) L.R. 12 Eq. 574. (2) 1 Keen 224.
(3) [1896] 1 Ch. 50.

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their authoritative manuals and adds the brief comment that

> there is nothing in all this which conflicts with the beliefs of the most orthodox Christian.

In this, I think, he goes further than the facts warrant.

If the testatrix did not accept the Christian religion, which is assumed in all the cases to which reference has been made, I do not know how the court is to say what were her intentions, or that the bequest was for religious purposes as ordinarily understood, still less how it is to formulate a trust for giving them effect *cy près*.

For these reasons I am of opinion that the bequest of $50,000 is void and the money falls into the residue of the estate; and that the residuary estate is not disposed of by the will but passes to the next of kin of the testatrix. The judgment of the Appellate Division should be varied accordingly.

Costs of all parties should come out of the estate.

IDINGTON J.—A number of questions were submitted to the Supreme Court of Ontario for advice and direction of that court respecting the construction of the last will and testament of Mary Helen Orr, a Christian Scientist, and respecting the administration of her estate.

All but three of these have been so disposed of that they need not concern us now save for purposes relative to these three.

If the judgment of the Appellate Division is right, in regard to the last of these, we need not trouble ourselves with any other.

The will written by the testatrix using, it is said, a printed form, begins by giving to three persons named as trustees and executors

in trust for the purposes after mentioned, the whole estate and effects heritable and movable, real and personal, presently belonging to me and that shall belong to me at the time of my decease,

and repeating the purport of this, proceeds in effect as follows:—

First, a direction to pay debts and testamentary expenses.

Secondly,

I give, devise and bequeath unto,

and then follows under that heading a continuous, consecutive stream, as it were, of giving of eight legacies, of which the last is thus expressed:

Ten thousand as a fund to be used in lending to deserving people, men or women, to buy small homes or farms. This money can be lent at 6 per cent. or whatever is lawful on good security. The profits accruing can be utilized as said before in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked through the revelation as given in Science and Health with Key to the Scriptures by Mary Baker Eddy. The whole of my estate must be used for God only.

The last sentence,

The whole of my estate must be used for God only,

forms part of the continuous text and to all appearance is a part of the definition of purpose attendant on this last gift.

But for the holding of the court below that this must be taken as a residuary bequest, I should have said that it was nothing more than a pious ejaculation, or possible admonition relative to the spirit in which "the profits accruing" referred to in the next preceding sentence were to be utilised.

And if I felt clear that it must be read as an intentional disposition of the residue of her estate, I should read it as clearly intending that the said preceding sentence, dealing with part of the residue falling into the hands of the trust, and in no other way disposed of, was comprised within its scope, and both sentences be

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read together in order to grasp the meaning of the testatrix.

The residuary bequest would then read:—

> The profits accruing can be utilized as said before in such work as is helpful to men and women who are willing to know and experience the truth as revealed in the Bible and which has been unlocked through the revelation as given in Science and Health with Key to the Scriptures by Mary Baker Eddy. The whole of my estate must be used for God only.

I submit that such a construction as may be given these two sentences read together, as they were written, much more truly represents the thought that was in the mind of the testatrix, than does the result embodied in paragraphs 8 and 9 of the formal judgment appealed from, which is intended to be worked out within the lines of the Ontario "Mortmain and Charitable Uses Act," as construed by the Master at Lindsay subject to the corrective power of the court.

The said paragraph 8 of the said judgment declares the words I have quoted (omitting the last sentence) do not constitute a valid bequest, and that despite one of the obvious purposes of the trust to produce an income designed to promote religion as the testatrix understood it.

The mode of investment of the fund is only a small part of the trust, and could not help many people, but the fund would produce or was intended to produce, six hundred dollars a year to promote in the way expressed the religion the testatrix held dear.

Not only have we thus, by reason of its immediate context, an expression which sheds light on the meaning of the testatrix's words

> the whole of my estate must be used for God only,

but also by the whole preceding bequests in the will.

It is not the residue, but the whole of her estate which is to

> be used for God only.

Some of these bequests have no very obvious relation to any such restricted charitable uses, as the court below has confined, by its direction, the application of the residue.

I most respectfully submit that the judgment in so wresting the sentence from its context and giving it such interpretation, and directing such an administration of the residue of the estate, is in effect making a will for the testatrix and giving effect to something she failed to express.

I agree with Mr. Justice Sutherland that there was no residuary bequest.

Indeed the originating notice of motion does not seem to have been launched with the conception that there was any actual residuary bequest, and merely wanted to know what was to be done with property given in trust yet no definite trust expressed relative thereto.

I also agree that if the words referred to are to be treated as independent of their immediate context and read only in connection with the words at the beginning of the will expressing an intention to create a trust, they are far too indefinite to be given any effect to.

The learned Chief Justice seems to rely upon *In re Darling* (1), the judgment of a single judge, and *Powerscourt* v. *Powerscourt* (2), which finds approval from the same learned judge, but seems to have been followed no place else, and I submit has in effect been overruled by the Privy Council in the case of *Dunne* v. *Byrne* (3), where the expression used and in question was much more definite than anything in either of said cases, yet in law held inoperative. Moreover, the court, deciding the *Powerscourt Case* (2), did not think it needed to form a scheme for execution of the trust.

(1) [1896] 1 Ch. 50. (2) 1 Molloy 616.
(3) [1912] A.C. 407.

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Indeed, in regard to any one of these three cases, I should have supposed there was much more to be said in favour of upholding the bequest than can be said in this case if regard is to be had at all to the mind and circumstances of the testatrix and her expressed views as interpreting her meaning.

The most recent case, of which the report has only come to hand since the judgment below was delivered, is that of *Houston* v. *Burns* (1), in which interpretation is given the expression

public, benevolent or charitable purposes

and holding such expression cannot be maintained as establishing a definite trust.

If the testatrix had been asked to define her meaning of the words now in question I have not the slightest doubt she would have given a like definition. Her whole trend of thought, as exemplified in the language of her will, convinces me such was what she thought and meant to be a giving

for the use of God.

It is her understanding and intention we must have regard to in the first place, as the courts did that passed upon the wills respectively in question in the *Darling Case* (2), and *Powerscourt Case* (3), and even there in light of the judgments in the *Houston Case* (1), just cited, clearly holding public and benevolent purposes mean nothing in such a connection.

It has been repeatedly held by the highest authority that the mere expression of any trust as for public or benevolent or philanthropic purposes, unless expressly defined by indicating some specific object within the meaning of such words, cannot create a trust which the law will recognise. Yet in many of these cases so

(1) [1918] A.C. 337. (2) [1896] 1 Ch. 50.
(3) 1 Molloy 616.

deciding the subject-matter and the object might have fallen within the scope of the words "use of God" had the court felt such a wide range of purpose as within the law enabling courts to maintain such a trust.

If, I submit most respectfully, the court deciding the *Houston Case* (1), I refer to, or *Blair* v. *Duncan* (2), had been as astute to find a charitable purpose as the court below, they could, and no doubt would have discarded all but the word "charitable" and given effect to the trust.

My only difficulties in this appeal have been, and are, the questions: First, as to the $50,000 which is to be

> held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the Light that is so real, near and universal for all who will receive. These institutions may take the place of what are at present called Hospitals, Poor Houses, Gaols and Penitentiaries or any place that is maintained for the uplifting of humanity,

and next, as to that raised by what I first set forth and quoted above, and is dealt with by paragraph 8 of the formal judgment.

As to the former, with some very grave doubts, I would let it stand as adjudged, but in doing so I cannot see why the equally obvious intention of the other should not be allowed to stand. I imagine it has not been so treated because of a misconception of the whole clause, in assuming that lending money to worthy people was the purpose thereof instead of that being an incident in the mode of carrying out a main purpose which I have already explained, or something like it.

I would therefore amend, in order to be consistent, the said eighth paragraph of the judgment, and declare the bequest valid and the profits from such investments to be devoted to the like purposes as defined in paragraph seven of said judgment.

(1) [1918] A.C. 337 (2) [1902] A.C. 37.

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Since writing the immediately foregoing hesitating expression of opinion, I learn that the majority of the court have come to the conclusion that both these bequests are invalid, and I agree, content with my expressions of doubt.

In my opinion, the appeal should be allowed; the so-called residuary clause declared invalid, and the formal judgment be rectified in paragraphs 7 and 8 accordingly.

ANGLIN J.—After such careful consideration as I have been able to give to the judgments of the learned judges of the Appellate Division, and to the factums and oral arguments of counsel, I am, with respect, of the opinion that upon the two questions involved in this appeal the judgment of the learned judge of first instance was right and should be restored.

Assuming that the clause,

The whole of my estate must be used for God only,

should be treated as a residuary bequest—which, I think, open to the gravest doubt—I cannot regard the phrase

for God only

as equivalent to

for the service of God—

words which have been held to import

service in a religious sense—service similar to such service as is referred to when * * * service in the church is spoken of.

In re Darling (1). The use of money "for God only" may include many things not religious or charitable within the sense in which English law restricts "charitable bequests"—just as a bequest of money to be used and expended as the donee may judge conducive to the

(1) [1896] 1 Ch. 50, 52.

good of religion within a defined area, may include purposes not strictly religious and therefore not necessarily charitable in the eyes of the law. *Dunne* v. *Byrne* (1). Moreover, the testatrix has by her specific gifts—at least two of which have been held not valid as charitable bequests—in my opinion, clearly indicated that, as used by her, the words

to be used for God only

(which she has made applicable in explicit terms to every bequest in her will) were not intended to restrict the use of her money to purely religious purposes or even to purposes charitable in the eyes of the law. I am therefore unable to regard the clause under consideration as a valid residuary charitable bequest.

Nor in the view which I take of their true import do the words,

to be used for God only,

aid the respondents in the consideration of the $50,000 legacy, the other subject of appeal. Some of the purposes indicated by the testatrix as objects of her bounty in that bequest are clearly not "charitable" in the legal sense; others may or may not be so. Moreover, I have utterly failed in my endeavour to find an intelligible meaning in the words,

such institutions as may in the future be demonstrated to shew that God's people are willing to help others to see the Light that is so real, near and universal for all who will receive.

I agree with Sutherland J. when he says of this bequest:

After repeated perusal and consideration of this clause of the will I have come to the conclusion that the language in which the legacy is couched is so vague, visionary, chimerical and impracticable and the objects intended to be benefitted and the time when the benefit is to accrue, are so uncertain that no reasonable or intelligible construction or effect can be given to the clause and the legacy must therefore be held to be void.

(1) [1912] A.C. 407.

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Anglin J.

I, of course, confine myself to the questions raised on the appeal, and to the grounds necessary for the disposition of them. I desire to guard, however, against being understood as holding that the impugned bequests may not be assailed on grounds broader and more far-reaching.

I would allow the appeal and would restore the judgment of the learned judge of first instance to the extent sought by the appellant. Having regard to all the circumstances, costs of all parties should be paid out of the estate.

BRODEUR J.—The first question submitted to this court is whether the $50,000 bequest is a charitable one. The court of first instance decided that it was not a charitable bequest. The Appellate Division came to a different conclusion.

The will appointed trustees and provided for certain specific bequests, and the testatrix said that

> $50,000 will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the Light that is so real, near and universal for all who will receive. These institutions may take the place of what are at present called Hospitals, Poor Houses, Gaols and Penitentiaries or any place that is maintained for the uplifting of humanity.

Miss Orr, the testatrix, was a Christian Scientist; and it is contended that the bequest was for religious purposes. She had, however, made legacies to her Mother Church and to encourage the construction of Christain Science churches; but the language of the bequest of $50,000 would be open to such latitude of construction, is so vague, and so indefinite, and I would add with Mr. Justice Sutherland,

> so visionary, chimerical and impracticable

as to raise no trust which a court of justice could carry into execution. (*Baker* v. *Sutton* (1)).

The Privy Council, in 1912, decided in the case of *Dunne* v. *Byrne* (2), that a residuary bequest to be used and expended by a trustee, a Roman Catholic Archbishop, in the way most conducive to the good of religion in his diocese, is not a good charitable bequest and is void.

I would rely also on the decision of the Privy Council in *Attorney-General of New Zealand* v. *Brown* (3).

The other question raised in this appeal is with regard to the residue of the estate.

The testatrix, after having mentioned specific bequests, adds:

The whole of my estate must be used for God only.

It was decided in first instance by Mr. Justice Sutherland that such an expression is too broad, indefinite and controversial to be capable of being carried out and that there is no residuary clause in the will. The Appellate Division came to the conclusion that such a clause constituted a good and valid charitable bequest and covered the residue of the estate.

I am unable to agree with the opinion of the Appellate Division. Those words:

the whole of my estate must be used for God only,

do not constitute a good residuary bequest. They should be considered as an advice to all those who receive any portion of her estate to spend their share in such a manner that will be agreeable to God.

It may be that the testatrix had a general charitable intention but she has not expressed it in words; and

(1) 1 Keen 224.
(2) [1912] A.C. 407.
(3) [1917] A.C. 393.

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the court cannot give effect to an unexpressed intention. *Hunter* v. *Attorney-General* (1).

The appeal should be allowed and the judgment of Mr. Justice Sutherland restored, the costs of all parties in this court and in the courts below to be paid out of the residuary estate of the deceased.

CASSELS J.—The appeal in this case is limited in this court to two points.

The appeal is from the decision of the Appellate Division of the Supreme Court of Ontario in respect to their finding as to the proper construction to be placed upon the clauses in the will of the late Helen Orr.

These clauses are numbered in the very able reasons of the Chief Justice of Ontario seven and nine. There is no numbering in the will, but it is convenient to adopt the method followed by the learned Chief Justice.

The clauses of the will in question read as follows:—

7. Fifty thousand will be held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the Light that is so real, near and universal for all who will receive. These institutions may take the place of what at present are called Hospitals, Poor Houses, Gaols and Penitentiaries or any place that is maintained for the uplifting of humanity.

9. The whole of my estate must be used for God only.

After the best consideration I can give to the case and with great respect for the opinion arrived at by the learned judges of the Appellate Division, I cannot bring my mind to the conclusions arrived at by them.

I think the learned trial judge arrived at the proper conclusion. Some propositions laid down in the various reasons are beyond doubt correct. If possible,

(1) [1899] A.C. 309.

a construction which should avoid an intestacy should be given to the will.

On the other hand, if such a construction be given to the will as would permit the executors and trustees to give the trust funds to purposes other than charitable bequests as to which the *cy près* doctrine should be invoked, then the bequests are void for uncertainty. *Houston* v. *Burns* (1); *Blair* v. *Duncan* (2); *Hunter* v. *Attorney-General*, (3), at page 314.

Consider the bequest referred to in provision 7. It cannot be contended that "gaols and penitentiaries" are in any sense charities of such a character, so that the *cy près* doctrine could be invoked to save the bequest. It is difficult to place any meaning on this seventh bequest (so numbered). It is too uncertain to be given effect to. If not void for uncertainty the trustees might devote the $50,000 for Godly purposes other than charitable purposes.

Then as to clause nine as numbered:—

The whole of my estate must be used for God only.

If the testatrix intended by this bequest to include all the previous legacies as well as the residue of the estate then the court must add to her will the words

for Godly purposes,

which might harmonise with the previous bequests.

If, on the other hand, this bequest merely applies to the residue of the estate undisposed of, I fail to see how the court can interpolate into the will the words,

for the service of God only.

The cases cited by the learned Chief Justice where the words used are for the service of God to my mind are not applicable.

(1) [1918] A.C. 407.
(2) [1902] A.C. 37.
(3) [1899] A.C. 309.

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Cassels J.

In the case of *Dunne* v. *Byrne* (1), decided by the Privy Council it was held

> that a residuary bequest to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge conducive to the good of religion in this diocese

is not a good charitable bequest and is void.

In delivering the judgment of the Board, Lord Macnaghten, at page 411, uses the following language:

> In the present case their Lordships think that they are not bound to treat the expression used by the testator as identical with the expression "for religious purposes," and therefore, not without reluctance, they are compelled to concur in the conclusion at which the High Court arrived.

To my mind there is great similarity between this case last referred to, *Dunne* v. *Byrne* (1), and the present case. I think the appeal should be allowed and the court should declare the bequests seven and nine void for uncertainty and that there was an intestacy as to the $50,000 and as to the residue.

As to costs: This case is a peculiar one. Having regard to the rule laid down by the House of Lords and the Privy Council, there being a considerable divergence of judicial opinion, and the litigation having been occasioned by the unfortunate wording of the will of the testatrix, the costs of all parties to this appeal as between solicitor and client should be paid out of the residuary estate.

Appeal allowed.

Solicitors for the appellant: *McLaughlin, Fulton, Stinson & Anderson.*

Solicitors for the respondent, The Church of Christ: *Hellmuth, Cattanach & Meredith.*

Solicitors for the respondents, executors: *Stewart & Scott.*

(1) [1912] A.C. 407.

BLANCHE GERTRUDE BRODIE AND ANOTHER..... APPELLANTS;

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*June 19, 20.
*Oct. 8.

AND

JOHN D. CHIPMAN AND OTHERS.... RESPONDENTS.

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

Will—Codicil—Revocation of bequest—Life insurance.

The will of S. provided that his life insurance should be paid as directed in the respective policies and of the rest of his estate one-half should be paid to his wife and the other to trustees who were to pay the revenue therefrom to his wife during her life, and on her death to divide it equally among his four children. His son having died he added a codicil setting out his insurance policies and providing that "one-quarter of these policies go direct to my wife, but all my other property now goes, with my last son dead, to my three daughters under the terms of my said last will."

Held, reversing the judgment of the Appellate Division (41 Ont. L.R. 281), Anglin and Cassels JJ. dissenting, that the codicil revoked the bequest to testator's wife of half the residue of his estate.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment on an originating summons in favour of the female appellant.

The facts are sufficiently set out in the above headnote.

McLaughlin K.C. and *Stinson* for the appellant cited *In re Whiting*(2); *Hearle* v. *Hicks* (3); *Hunter* v. *Attorney-General* (4).

Hellmuth K.C. and *Neil Sinclair* for the respondents referred to *Follett* v. *Pettman* (5); *In re Smith* (6).

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

(1) 41 Ont. L.R. 281 *sub nom.* *In re Spink.*
(2) [1913] 2 Ch. 1.
(3) 1 Cl. & F. 20.
(4) [1899] A.C. 309.
(5) 23 Ch. D. 337.
(6) 15 D.L.R. 44; 5 Ont. W.N. 501.

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THE CHIEF JUSTICE.—The case, I think, comes before the court with insufficient information to enable it to be satisfactorily dealt with. By his will the testator recited:—

> I have certain life insurance upon my life, some payable to my estate, some payable to my wife, some payable to my wife and children, and it is my wish, purpose and desire that the conditions of payment in all policies of insurance be carried out and that my wife and children and estate may receive and benefit in the proportions and manner as set forth in all and each of said policies.

With the exception of a specific bequest to his wife of his household goods and effects the testator bequeathed to trustees upon the trusts mentioned all of his property which, of course, would include insurance moneys coming to his estate.

The codicil to the will provided:

> And further I say, and irrevocably will and determine that my wife E. F. Spink, shall have one-quarter or one-fourth of my life insurance. I intend it to cover my policies in the Standard Life, now over $8,000, I think No. 80076 W. and United Workmen, I think certificate No. 3491, and I think Provident Saving Life No. 177,764, and Independent Order of Foresters, Certificate No. I think Nos. 31236 and 242662.

Although much argument has been made upon the amounts of the insurance moneys as they would go under the provisions of the will or codicil, there is no information concerning them in the record beyond a statement by certain of the parties that under the will the widow would receive of the life insurance about $9,000, and under the codicil about $4,000 or $5,000 less. This statement, of course, depends upon what is the understanding of the parties as to the effect of the will and codicil, an understanding that is possibly, if not probably, erroneous.

Not only have we no information concerning the policies and the amounts which, under their terms, would go to the widow and children and the estate of the testator respectively, but we do not know whether

in the codicil the testator, in the insurance of which he makes mention, was dealing only with those belonging to his estate, or whether he was assuming to dispose of the whole of the insurance on his life.

Chief Justice Meredith has accepted the parties' figures and ignored any difficulties to which they give rise, though his remarks that the insurance money amounted to about $20,000, that the half share of the widow under the will would have amounted to $9,000, and her quarter share under the codicil to about $4,000, seem to involve calculations difficult to reconcile with the immutable laws of arithmetic.

I do not, however, think it is necessary to refer the matter back on account of this imperfect evidence, because, in my opinion, the judgment appealed from cannot in any event be maintained.

The important words of the codicil which are in question read:—

> One-quarter of these policies go direct to my wife but all my other property now goes with my last son dead, to my three daughters under the terms of my said last will.

I suppose it must be admitted that, taken by themselves alone, the meaning of these words does not admit of much doubt. Omitting the words

> under the terms of my said last will,

it does not admit of any doubt.

The testator drew both will and codicil himself, and the latter document when he was *in extremis*. May he not well have supposed that some of the terms of the will would still be applicable to his bequest, the equal division between the children; the taking by survivorship; grandchildren inheriting their parents' share, etc.? Is not this more likely than supposing that he had forgotten that by his will he had left his children

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nothing but a reversionary interest in one-half share of his residuary estate.?

In the reasons for judgment appealed from it is said:—

> These considerations (of intention) are no doubt relevant only if the meaning of the provision of the codicil which is in question is doubtful, for if, on the true construction of it, there is a clear gift of the whole of the residue to the three daughters they are irrelevant and the codicil must be given effect to according to its terms.

The first ground on which the decision is put is the rule of law that an erroneous recital by a testator in a codicil that he has by his will given a legacy to A. B. when he has not done so, creates no legacy at all. This, of course, admits of no doubt but does not seem to be in point here. It has application in such cases as *Mackenzie* v. *Bradbury* (1), quoted by Meredith C.J.O., where the codicil erroneously stated:—

> Whereas, by my will, I have bequeathed to Francis, the son of my husband's niece, the sum of £1,000, now I hereby declare that the said legacy shall not be payable until, etc.,

and the claim of Francis to be entitled by implication to a legacy of £1,000 was held to be unfounded. Such a case as this has no bearing on the present unless we assume that the testator was not, by his codicil, making a bequest but merely a purposeless and erroneous recital of so important a matter as the disposition made by his will of the whole of his property.

The second ground put forward is that, as held by the House of Lords in *Hearle* v. *Hicks* (2), where there is a clear and manifest intention to devise it is incumbent on a party alleging a revocation by a codicil to prove that the intention to revoke was equally clear and manifest. To enable this rule to have any application it is necessary to assume the point in dispute,

(1) 35 Beav. 617.

(2) 1 Cl. & F. 20.

namely, that the codicil gave no bequest to the daughters, for obviously there must be a necessary revocation of a devise made by a will if the same property is left by the codicil to a different devisee. The argument, therefore, seems to amount to this that there was no bequest by the codicil because there was no revocation of the will and there was no revocation because there was no bequest by the codicil. This does not prove the proposition.

In the absence of any ambiguity the court cannot consider what may have been the intentions of the testator, but if it were possible in the present case to inquire into these, I do not think the probabilities would be such as the Chief Justice of Ontario suggests. The main ground on which he rests his views is that the testator must have intended in his codicil to have preserved to his widow the same proportion of his estate as he had left her in his will. Why should he wish to do so? I can imagine no reason, but, on the contrary, think the presumption, so far as there is any, should be the other way. The ordinary man, I apprehend, desires to leave his widow a suitable income proportionable to his means for the rest of her life, or until her remarriage, a dower in fact, following the provision made for her by the common law. If he should have an estate of $50,000 he might leave his widow one-half or $25,000, but if subsequently to the making of his will he became possessed of $500,000, it is most unlikely that he would wish to leave her half of this. He might increase her legacy to $50,000, or one-tenth of his estate, but the rest he would leave to his married children.

What are the facts assumed in this case, for as I have said, we do not know with certainty what they really are?. The estate, excluding life insurance, was

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sworn at $26,500, but this included the moiety of the son's insurance which, as appears from the affidavit of the latter's executor, was upwards of $11,000. Consequently the estate, excluding insurance, of which the testator was disposing at the date of his will, was not much over $20,000. Of this he left half, or $10,000, to his widow, and the other half, subject to a life interest to her, to his children. Adopting the figures of the executor, the respondent, J. R. Brodie, the widow would have taken $9,000 of the insurance money, a total of $19,000. Now the son died, and his mother took one moiety of his insurance money, and by the codicil in question, the other moiety, $11,000 and upwards; then the testator, again according to the figures of the executor, reduced her share of his insurance moneys from $9,000 to $5,000, and gave all the residue to his children, leaving her with $16,000 actual cash, instead of an uncertain $19,000, for he could not have known what the share which she would get under the will would amount to, and the life interest in half the residue. This, of course, was a reduction in the benefits given to the widow, but not an extravagant one, especially in view of the fact that the testator did undoubtedly intend to make some reduction of them.

We cannot speculate as to the motives of the testator. It is suggested in the appellants' factum that

> the son, unmarried, being dead and all the daughters being married, the necessity of the widow looking after and caring for the unmarried son had also ended.

It may be so, we cannot go into the family circumstances. It is said in the affidavit of the respondent, Ruby J. Middleton, that

> to the last there never was any change whatever in the tender relations and most affectionate regard which existed between my father and my mother.

It would indeed be unfortunate if the courts undertook to vary testamentary dispositions on such considerations. Where, owing to family circumstances, a testator finds it desirable to alter the previous appropriation of his property he would often have the best of reasons for not wishing to make public the cause of his doing so. The present case itself affords an illustration and I give it only as such. The testator may have had reason to foresee that, as in fact has happened, his widow would leave all her property to two of her daughters, disinheriting the third, contrary to his own wish. Yet how impossible it would have been for him to set down in his codicil the reason for revoking the bequest to his widow and making a different provision for her by the codicil.

In my own view a natural interpretation would be that in making his will the testator knew that his wife would employ her property largely for the benefit of his only son, but the death of the latter entirely changed the condition of affairs. The codicil was undoubtedly made owing to this occurrence; it was then only necessary to make a suitable provision for his widow, which was done, and the testator said

but all my other property now goes with my last son dead to my three daughters.

If, as I should think, these were his wishes, the terms used seem natural and apt enough to carry them into effect.

It is, I suppose, possible that the construction contended for by the appellants would involve the revocation of the specific bequest to the widow of the household goods and effects, and this can hardly have been the intention of the testator. Even if it were so, this would only be an unfortunate accident due to his want of skill or incapacity at the time, and cannot affect the

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construction of the provision in the codicil. In my opinion, however, it is not necessary to attribute any such effect to the provision. The testator is dealing only with his residuary estate, money and valuables, all of his property other than goods and chattels which form the subject of the specific bequest to the widow. Except in so far as the appropriation of his residuary estate is concerned, the will is in all other respects expressly confirmed.

The case is unlike that of *In re Smith*, in the Ontario courts (1), affirmed by the Privy Council (2), to which reference is made by Meredith C.J.O. That case was so wholly special and the decision so entirely dependent on the particular circumstances and the terms of the testamentary documents in question that it is of no general value as an authority, which doubtless is the reason that it was not reported in the law reports.

If I am correct in the views above set forth it will be seen that the testator secured to his widow his household goods and effects and a sum of $16,000 cash. It, moreover, appears from the will that she already had some property of her own. This seems to have been a very reasonable provision for the testator to make for his widow, a woman of advanced age with no one dependent upon her, considering the amount of his estate and that his three children were all married and they and his grandchildren and their needs were the objects, as they naturally would be, of his careful consideration for their welfare.

For these reasons I am of opinion that the appeal should be allowed and the judgment on the trial restored with the variation that the declaration should only be as to the residue of the property of the deceas-

(1) 15 D.L.R. 44. (2) 19 D.L.R. 192.

ed after giving effect to the specific bequests contained in both the will and codicil.

It is a proper case in which the costs of all parties should be paid out of the residuary estate.

IDINGTON J.—The testator, by his last will, made on the 23rd December, 1913, after some specific dispositions, referred to his life insurance as consisting of some payable to his estate, some payable to his wife, some payable to his wife and children, and declared it to be his wish that the conditions of payments in all policies of insurance on his life should be carried out.

Then he directed the residue of his estate, real and personal, to be divided into two equal parts of which one was given the wife absolutely and the other to his executors and executrix upon trusts which he declared at some length.

The income of the trust was to be paid the wife during her life and at her death the principal to be divided equally between his son and three daughters.

He provided for the children of his son and each of his daughters taking the parent's share in case of death and even anticipated the possibility of grandchildren's rights in case of any of his children dying leaving such.

He further provided against loans to wife or child being enforced as he declared them cancelled.

The son died suddenly under painful circumstances within a week after the testator had made his will.

The son left life insurance amounting to $11,000, which came by his will in equal shares to the testator and his wife.

The only other apparent alteration in the circumstances of the testator created by the death of the son

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arose from the fact that the son had been named an executor of the will.

The testator, on the 3rd February, 1914, made a codicil to his will, by which it is made clear to my mind that for some reason or other he had conceived another plan or scheme for the disposition of the greater part of his estate.

The death of his last son evidently was to him a disturbing factor of more far-reaching consequences than involved in the possible need, suggested by acquisitions derived from the son's bequests of his life insurance, for a slight readjustment of amounts he, as testator, had bequeathed. That could easily have been provided for by a few words clearly expressing such purpose, instead of the complex plan the codicil presents, which suggests much that is entirely overlooked in the elaborate computation in the judgment of the learned Chief Justice of Ontario, the correctness of which was challenged in argument.

Did the father not feel that, with the last son gone, there was some reason to fear the happening of that which has in fact taken place, by the mother preferring two out of three daughters?

Had he been possessed of unbounded confidence that an equal distribution would ultimately prevail, there would certainly have been little use in his making a codicil.

This codicil was made when the testator was very ill and suffering much on his death-bed, and he died ten days later.

Inasmuch as we do not know more than is presented, which does not even tell us all that was involved in the original distribution of insurance, I lay no great stress upon the facts just referred to but merely allude thereto by way of pointing out that the results of the

construction put upon said codicil by Mr. Justice Masten, as contrasted with what the wife might have got had there been no change in circumstances, may have been, as I respectfully submit, pressed too far by the judgment appealed from. It may be that the statements in affidavits filed as to what the wife would have got under the distribution which each of the policies of insurance provided, furnishes a possible key to the whole; but it by no means is necessarily to be implied that it accurately does so, or can disclose all relative to the original schemes of distribution in said several policies of insurance, which we should know if the train of thought, adopted by the use of such a key, is to be accepted as a leading factor in reaching our decision.

The codicil deals with the subject matter of the insurance in an entirely different manner from that adopted in the will by giving only one-fourth of the insurance on the testator's life to the wife.

That entire insurance money amounted to $20,000 and he gave the wife all that might have come to her or him under the son's will.

Then, after specifying the life insurance on his own life, he proceeds first by repeating that bequest, and comprehensively as follows:—

> One-quarter of these policies go direct to my wife but all my other property now goes with my last son dead to my three daughters under the terms of my said last will.

The neat point to be determined in this case is the effect of this single sentence.

I think we must have regard to the law requiring the express language used to be given its plain ordinary meaning, and if possible give effect to every word of it.

Then there is a principle deducible from numerous

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cases of which *Hearle* v. *Hicks* (1), is one usually relied on, which requires the language of a codicil to be clear and manifest before it can be maintained in revocation of a clear and manifest devise or bequest in a will.

That principle was involved in the case of *In re Stoodley* (2), and presumably was what induced Mr. Justice Eve to place the construction he did on the will in question therein. The report does not make clear exactly what he relied upon, but the course of argument and reasoning in the judgments in appeal suggest strongly such was the case.

Upon appeal therefrom the Court of Appeal reversed his construction and rested the judgment doing so upon the case of *Earl of Hardwicke* v. *Douglas* (3).

That involved in each of those two cases, as in that at bar, what had been given by a residuary bequest in each of the respective wills.

The language used in each codicil in question in the cases cited was, as the conflicting opinions shew, capable of more than one construction, but I venture to think is neither more comprehensive, forcible and expressive of the real intention of the testator, having regard to the circumstances surrounding each of the respective testators, than that I have just quoted from the codicil now before us.

I therefore conclude, so far as concerns the residuary bequest to the wife, that it was, in my opinion, partially revoked by this codicil, but the will in all other respects stands unrevoked save as to the insurance money of which there is no question.

I observe such a difference between the expressions of the strong, clear-headed man, writing his will, and the same man writing his codicil, under most painful

(1) 1 Cl. & F. 20. (2) [1916] 1 Ch. 242.
(3) 7 Cl. & F. 795.

circumstances, that I cannot help feeling how he would in health and strength have put the possibility of this lawsuit beyond peradventure.

Yet I cannot doubt his intention was that, seeing his last son dead and his wife provided for, as far as she was concerned, there was no contingency to be anticipated but what affection would meet, and that the daughters, so far as he was concerned, should be treated equally.

Such would be my reading of this will and codicil apart from authority save the doubt that must ever exist of whether or not he did not suppose that he was giving his wife the income of the entire residue for life.

The expression,

> to my three daughters under the terms of my said last will,

indicates such a restricted intention. Any way one may try there is a difficulty just there, but clearly the predominant purpose was an equal distribution amongst and between his three daughters.

Out of respect to the court below I have fully considered all the cases cited, but am of the opinion that the three cases I have cited above contain the whole relevant law which should govern us.

The appeal should, I think, therefore, be allowed, and the judgment below be modified accordingly, and that the costs of all parties should be paid out of the estate.

ANGLIN J. (dissenting)—Mr. McLaughlin's very able argument on behalf of the appellants failed to convince me that the judgment appealed from is erroneous. On the contrary, I think it correct and feel that I cannot usefully add anything to the reasons stated by the learned Chief Justice of Ontario in support of it.

I would dismiss the appeal with costs.

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BRODEUR J.—The question we have to decide in this case is whether by his codicil of the 3rd February, 1914, John Lawrence Spink has revoked the bequest given to his wife by which she was to have one-half of his property.

By his will made on the 23rd December, 1913, Mr. Spink devised all his real and personal property into two equal shares and gave one share absolutely to his wife and the other was to be divided among his three daughters and his son, and he declared that his wife and children should receive the amounts set forth in each of his insurance policies.

The evidence shews that $9,000 of that insurance money would have gone to his wife, and $11,000 to his children, the testator having his life insured for $20,000.

A few days after his will was made, his only son died and left an estate of $11,000, half of it going to his father and half to his mother.

The testator himself became seriously ill and on the 3rd February, 1914, he made a codicil, and he died a few days later, on the 13th February, 1914. The reason for making the codicil is stated by the testator himself to be owing to the fact of the death of his son. In that codicil he provided that the insurance money, instead of being divided as it was stated on the policies, would go one-fourth to the mother, and three-fourths to the three surviving children, his three daughters. He gave also by the codicil the amount of money which he had received from his son to his wife, and he added that everything that might have come to him or to her under the will of his son would belong to his wife. After having described the policies of insurance and included their numbers, he said:—

One-quarter of these policies go direct to my wife *but all my other property* now goes with my last son dead, to my three daughters under the terms of my said last will.

It is contended by the appellant that the provisions of that codicil revoke the bequest which the testator had made by his will of one-half of his estate to his wife.

On the other hand, it is claimed that this provision of the will has not been disturbed by the codicil.

Mr. Justice Masten decided that the contention of the appellant should be sustained, and he even declared that the life estate which had been given to the wife by the will had been revoked.

I must say here that the appellants do not insist upon the construction of the will as to the life estate.

The Appellate Division decided in favour of the respondents that the bequest of the half of the estate was not disturbed by the codicil.

It is strongly claimed on the part of the respondents that the sole reason for which this codicil was made was to dispose of the share of the son.

If the words:

all my other property

were ambiguous, the construction put by the respondents on the codicil might perhaps be sustained in view of the relations existing between Mr. Spink and his wife. But those words seem to me so clear that I think we should construe them in their ordinary meaning.

According to my opinion, then, he has disposed of all his other property in favour of his three children. As to the income during the life-time of the wife, I consider that, contrary to the view expressed by Mr. Justice Masten, this was one of the terms under which the bequest to his children was given, namely, that the life estate would remain in his wife and as he has

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said in his codicil that all his other property would go to his daughters under the terms of the will, I consider that the residuary was disposed of on the condition that the life estate would remain in the wife.

For these reasons, the judgment *a quo* should be reversed and the appeal should be maintained with costs to be paid out of the estate and the trial judgment should be restored with the modification that the wife was entitled, during her life-time, to the income of the property of the husband.

CASSELS J. (dissenting)—After a careful consideration of the able argument of Mr. McLaughlin, and the authorities cited by him, I have arrived at the conclusion that the judgment pronounced by the Appellate Division is correct and should not be disturbed.

The Chief Justice of Ontario has fully discussed the questions argued. I agree with his reasons and conclusions.

It would be merely repetition to again discuss the facts.

The appeal should be dismissed, and I think the appellants should pay the costs of the appeal.

The costs of the other proceedings have been allowed out of the residuary estate, but I think the appellants took a further appeal to the Supreme Court at the risk of costs.

Appeal allowed.

Solicitors for the appellants: *McLaughlin, Johnston, Moorhead & Macaulay.*

Solicitors for the respondents: *Watson, Smoke, Smith & Sinclair.*

HARRY PULOS (PLAINTIFF) .....APPELLANT;

AND

GEORGE N. LAZANIS AND DENIS LAZANIS (DEFENDANTS).....
AND
MARY KLADIS (INTERVENING PARTY) } RESPONDENTS.

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*Oct. 21.
*Nov. 18.

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

Appeal—Jurisdiction—Intervention—Judicial proceeding—Matter in controversy—"Supreme Court Act," section 46.

An intervention is a "judicial" proceeding within the meaning of section 46 of the "Supreme Court Act."

The matter in controversy, which will determine the jurisdiction of the Supreme Court of Canada, is the amount in issue upon the intervention and not the one originally claimed on the main action. *King* v. *Dupuis*, (23 Can. S.C.R. 388,) and *Côté* v. *Richardson Co.*, (38 Can. S.C.R. 41,) followed.

MOTION to quash for want of jurisdiction an appeal from the judgment of the Court of King's Bench, appeal side, (1) reversing the judgment of the Superior Court, District of Montreal, and maintaining the respondents' intervention.

The grounds urged on the motion are fully stated in the judgment now reported.

Belcourt K.C. for the motion.
Thomas Walsh K.C. and *Clark contra.*

The judgment of the court was delivered by

BRODEUR J.—This is a motion to quash for want of jurisdiction.

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

(1) 24 R.L.N.S. 482.

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PULOS v. LAZANIS AND KLADIS.

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An action had been instituted several years ago by the appellant Pulos, against the defendants Lazanis, for a sum of $1,807.56. Judgment was rendered in 1912 for that sum with interest.

In 1916, a writ of *saisie-arrêt* after judgment was issued in the ordinary way to recover money in the hands of the firm of Sperdakos & Lerikos. The *tiers-saisis* declared in substance that the defendant, Denis Lazanis, was a member of their firm and that they owed him money.

The wife of Denis Lazanis then fyled an intervention and claimed that it be declared that the defendant Lazanis, her husband, had no share in the partnership of Sperdakos & Lerikos, but that she herself be declared the sole proprietor of one-third share in that partnership.

That intervention was contested by the plaintiff, Pulos. The Superior Court dismissed the intervention but that judgment was reversed on appeal.

Then the real controversy on that intervention was whether their share in the firm belonged to the defendant or to his wife.

The respondent contends that the jurisdiction of this court should be determined by the amount originally claimed on the main action, and relies on *Champoux* v. *Lapierre*(1); *Kinghorn* v. *Larue*(2); and *Gendron* v. *McDougall* (3).

On the other hand, the appellant claims that the value of the share in dispute should determine our jurisdiction.

It is now the well-settled jurisprudence of this court that an intervention is a "judicial" proceeding within the meaning of section 46 of the "Supreme

(1) Coutlee's Digest 56. (2) 22 Can. S.C.R. 347.
(3) Cameron Sup. C. Practice 253.

Court Act;" and where the appeal depends upon the amount in controversy there is an appeal to this court if the amount in controversy upon the intervention amounts to the value of $2,000. *King* v. *Dupuis* (1); *Côté* v. *Richardson Co.* (2).

The intervening party, the respondent, stands in the same position as a plaintiff, and her proceeding is to all intents and purposes an action in revendication of her rights in the partnership.

The amount of money she claims to have put in the partnership is $2,000. In the Court of Appeal, the so much regretted late Chief Justice (Sir Horace Archambeault) stated in his reasons of judgment that her partners offered her husband $5,500 for her share and that the husband asked for $7,000. The affidavits fyled proved beyond doubt that the value of that share exceeds $2,000.

In those circumstances, we have jurisdiction and this motion to quash should be dismissed with costs.

Motion dismissed with costs.

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(1) 28 Can. S.C.R. 388.

(2) 38 Can. S.C.R. 41.

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*Oct. 8.
*Oct. 9.

"L'AUTORITE," LIMITEE (DEFENDANT) ..... APPELLANT;

AND

J. S. IBBOTSON AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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

Appeal—Jurisdiction—Joinder of several actions—Separate condemnations—"Supreme Court Act," s. 40—Articles 68 and 69 C.P.Q.

The respondents, eleven in number, alleging injury by the same libel, claimed from the appellant damages to the extent of $22,000, but asked separate condemnation of $2,000 in favor of each of them. The judgment of the trial court was affirmed by the Superior Court sitting in review.

Held that the appellant was in the same position as if eleven separate actions had been taken and as each would have been for a sum less than $5,000, no appeal lay to the Supreme Court of Canada.

MOTION to quash for want of jurisdiction an appeal from the judgment of the Superior Court of the Province of Quebec, sitting in review at Montreal, affirming the judgment of the Superior Court, District of Montreal and maintaining the plaintiffs' action.

The facts on which the matters in issue depend are sufficiently stated in the above head-note and in the judgments now reported.

Alphonse Decary K.C. for the motion.
Percy C. Ryan K.C. contra.

The judgment of the majority of the court was pronounced by

DUFF J.—The appeal is from the Court of Review, and consequently the question of jurisdiction is

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

governed by section 40 of "the Supreme Court Act," together with articles 68 and 69 of the Code of Civil Procedure.

Now, the action was an action brought by eleven persons who allege themselves to be injured by one and the same libel published by the newspaper "L'Autorité." It is quite obvious that this action must be treated as a joinder of several causes of action vested in the persons who were plaintiffs. Up to a certain point it is true that the facts constituting the cause of action of each of them are identical. There is, for example, the same publication, but beyond that it is impossible to say that the facts are identical. The facts relating, for example, to the extent of the temporal damages suffered by each of the plaintiffs and consequently the amount of damages recoverable by each of them, may be, and it is said, are different. In addition to that it is alleged and not disputed that separate independent and entirely different defences were set up as regards the different plaintiffs.

The action must, therefore, be considered as a joinder of several actions and when we come to apply section 40 the question must be with regard to any one of these plaintiffs, whether or not the amount in dispute as determined by the amount claimed, brings the case within article 68 of the Code of Civil Procedure—in other words, whether or not the amount is over $5,000. The amount claimed in each of the cases is $2,000. It follows that the appeal should be quashed.

BRODEUR J.—Il s'agit d'une question de juridiction. Les intimés, qui sont au nombre de onze, ont poursuivi en dommages l'appelante pour une somme de $22,000; et, par leur déclaration, ils ont demandé à ce qu'elle soit condamnée à payer $2,000 *à chacun d'eux.*

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"L'AUTORITE," LIMITEE v. IBBOTSON.

Brodeur J.

Le jugement a été en faveur des demandeurs intimés et il a été confirmé par la Cour de Revision. La défenderesse appelante porte cette cause maintenant devant nous.

Avons-nous juridiction? Cette action qui, pour chaque demandeur, représente une somme de moins de $5,000, quoique la totalité de la somme demandée excède ce montant, peut-elle faire l'objet d'un appel devant cette Cour?

Cette question n'est pas nouvelle et a fait le sujet de plusieurs décisions. La dernière par ordre de date est celle de *Glen Falls Insurance Company* v. *Adams* (1). Dans cette cause, qui venait d'Ontario, jugement avait été rendu contre chacun des défendeurs pour un montant moindre de $1,000, montant pour lequel nous avons juridiction dans les causes de cette province, quoique le montant total de la condamnation excédât cette somme. La Cour a décidé que les défendeurs étaient dans la même position que si des actions distinctes avaient été prises contre eux; et comme chacun d'eux était condamné à payer une somme insuffisante pour nous donner juridiction, l'appel devrait être refusé. La même décision, je crois, doit être rendue dans le cas où il s'agit de poursuites prises par plusieurs personnes qui demandent une somme particulière pour chacun d'eux.

Il peut y avoir du doute de savoir si, par une seule et même action, plusieurs personnes peuvent poursuivre et réclamer des dommages qui pour chacun d'eux peuvent être plus ou moins élevés. *Bénard* v. *Bourdon* (2), *Lawford* v. *Robertson*(3). Journal du Palais, 3ème édition, vol. 7, p. 128. Mais si les rapports qui

(1) 54 Can. S.C.R. 88. (2) 13 L.C. Jur. 233; 15 L.C. Jur. 60.
(3) 16 L.C. Jur. 173, at p. 178.

se trouvent entre plusieurs réclamations sont tels qu'elles demandent à être décidées par un seul et même jugement, les tribunaux, dans leur appréciation des circonstances diverses qui peuvent contribuer à établir la connexité et pour éviter des frais, peuvent décider que ces diverses réclamations peuvent être jugées par le même juge.

Sirey, 1817-1-315; Merlin, Répertoire, vo. Connexité; Favard, par. 2, Nos. 9 & 10; *Barrette* v. *St. Barthélémi* (1).

A fortiori si les créanciers se réunissent ensemble pour instituer une seule et même action et si le défendeur ne s'en plaint pas par exception préliminaire (art. 177 C.P.Q.), alors les conclusions, quoique différentes pour chacun des demandeurs, feront l'objet d'un seul et même procès. Dans le cas où l'un des demandeurs viendrait à succomber et que le montant qu'il aurait réclamé pour lui serait insuffisant pour lui permettre de venir devant cette cour, il ne pourrait interjeter appel ici. Il en serait de même pour le défendeur; son droit d'appel sera déterminé par le montant que chaque demandeur aura exigé de lui.

Le montant réclamé par chacun des demandeurs était dans le cas actuel moindre de $5,000, vu qu'il s'agit d'un jugement de la Cour Supérieure confirmé par la Cour de Revision (arts. 68 & 69 du Code de Procédure Civile, art. 40 Acte de la Cour Suprême); il en résulte que nous n'avons pas juridiction. La motion pour casser l'appel doit être accordée avec dépens.

Motion granted with costs.

(1) Q.R. 2 K.B. 585.

1918
*Oct. 23.
*Nov. 18.

HART-PARR COMPANY (PLAINTIFF)..APPELLANT;

AND

A. E. WELLS (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN.

Sale—Sale of goods—Farm machinery—Warranty—Notice of defects.

The provisions of a warranty clause requiring notice to be given to the vendor of an engine in case of defect in "workmanship or material" do not apply to a warranty that the engine would develop a stipulated horse-power, but only to a warranty that the engine was well made and of good material

Judgment of the Court of Appeal of Saskatchewan (11 Sask. L.R. 132; 40 D.L.R. 169), affirmed.

APPEAL from a decision of the Court of Appeal of Saskatchewan (1), affirming the judgment of Haultain C.J. at the trial in favour of the defendant.

This is an action for the purchase price of an engine sold by the plaintiff to the defendant under an agreement in writing. Under the heading of "warranty," the plaintiff warranted

the said tractor to be well made of good material and if properly operated will develop its rated brake horse-power.

It was also provided that

the purchaser shall not be entitled to rely upon any breach of above warranty, unless notice of the defect complained of, whether such defect be in workmanship or material, containing a description of the same and setting out the time at which the same was discovered is given to the vendor * * *

The plaintiff claimed the balance of the purchase price of the engine and the defendant fyled a counterclaim. The trial judge gave judgment for the plaintiff on its claim and judgment for the defendant for the

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

(1) 11 Sask. L.R. 132; 40 D.L.R.169; [1918] 2 W.W.R. 239.

amount equivalent to the purchase price for breach of warranty.

Bastedo for the appellant.
Gregory K.C. for the respondent.

THE CHIEF JUSTICE.—This action was one brought by plaintiff to recover the balance of the purchase price of an engine sold by it to defendant under an agreement in writing made between the parties in April, 1913.

Chief Justice Haultain, who tried the case, held, I think, properly, that the defence of misrepresentation had not been proved, but he also found that the engine

> was sent to the defendant in a very bad shape

and that

> the evidence that it practically never did satisfactorily work was overwhelming.

He also held that the plaintiff company had waived the conditions in the clauses of the contract requiring notices to be sent to the company with respect to the engine in case it was found defective and did not comply with the warranty given. He found as a result that the evidence as a whole

> established the fact that the engine did not comply with the warranty and failed to do work to any reasonable amount,

and awarded defendant as damages an amount equal to the price agreed to be paid for it and a return to defendant of the $500 paid by him on account of the purchase money.

An appeal to the Appeal Court of Saskatchewan was dismissed. Mr. Justice Newlands held that defendant was entitled to recover damages on his counterclaim by virtue of the breach of the warranty that the engine would develop its rated brake horse-power and that the clause in the contract that the purchaser should

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not be entitled to rely on any breach of the above warranty unless certain notices were given applied only to the warranty that the engine was well made and of good material and not to the warranty that it would develop a stipulated horse-power. Mr. Justice Lamont agreed with Chief Justice Haultain that the plaintiff company had in the letter of defendant of 9th August received and answered by it got the necessary notices called for by the contract and had failed to remedy the defect. In the result the judgment of Chief Justice Haultain was confirmed.

With regard to the questions raised by counsel for the plaintiff company that the pleadings did not warrant the judgment appealed from, I am of the opinion that the controversy between the parties alike as to the right of the plaintiff to recover for the price of the engine and the right of the defendant to damages for non-compliance with the warranty as to the development of its rated horse-power was fully thrashed out at the trial between the parties and that under these circumstances any necessary amendments to these pleadings can and should be made even now.

As to the meaning of the warranty clause requiring certain notices to be given the company in case of defects in

workmanship or material containing a description of the same,

I agree with Mr. Justice Newlands that the provisions in clause 9 of the contract prohibiting the purchaser from relying upon any breach of warranty therein given unless these notices were given does not apply to the warranty that the engine would develop certain horse-power but only to the warranty that the engine was well made and of good material.

The nature and particulars required to be given in these notices convince me that they do not cover the

case of any engine failing to develop the warranted horse-power from some cause not known to the purchaser and which he was unable to specify.

The construction that if defects of material or workmanship were complained of, notices should be given as the contract required or the defendant precluded from afterwards setting up breach of warranty may be held to be not unreasonable. These defects were capable of being known and the vendors informed of them so that they might have the opportunity of remedying them; not so if there were no apparent defects in workmanship or material, but nevertheless the engine failed to develop the rated horse-power contracted for. To construe the contract as applying to such a case would be unjust and unreasonable.

Having reached these conclusions on the construction of the notice clauses of the warranty in question and on the findings of fact of the trial judge of the failure of the engine to develop its rated horse-power, I am of the opinion that the appeal should be dismissed with costs and that in this court we should not interfere with the amount of damages awarded by the trial judge and confirmed by the Court of Appeal.

IDINGTON J.—It may be possible in law to so frame a contract that the vendor may be enabled thereby to acquire the right to use the courts to get all he desires from the vendee and retain same yet give him nothing, and at the same time so bind him that he cannot complain aloud or attempt to secure that he bargained for unless and, so far only, as graciously permitted by the vendor; and also forever debar his vendee from acquiring by mutual contract between them any relief or right thereto.

It would be well in such attempts for the vendor

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to steadfastly ignore any and all importunities of the deluded vendee, looking for rectification of the wrong done him, lest by listening thereto a new contract based on conduct may be inferred by some court applied to for the purpose of enforcing the original contract.

At all events the vendor framing (as appellant did that in question), such a contract of sale designed to accomplish such a comprehensive purpose, should make its meaning so clear and its purpose so beyond doubt and dispute, that the vendee can have no rights thereunder and that he alone is under any obligation arising therefrom.

The contract in question herein falls far short of accomplishing such purpose. Indeed, having given its ambiguous nature much consideration, I am of the opinion that Mr. Justice Newlands' construction thereof is correct. Though the failure of the machine to develop its rated horse-power does fall within the covenant and is thereby expressly provided for, yet a breach of that part does not seem to fit into and fall within the verbal subsidiary provisions which are relied upon by appellant to nullify its operation and should, if read as applicable to such a breach as failure to develop rated brake horse-power, render it an absurdity, unless and until demonstrated that the failure is in fact attributable to defect of material or workmanship. That has not been done. I agree that want of a specific rate of horse-power may exist with first-class material and workmanship. It may have been so designed.

The alternative view of the learned Chief Justice who tried the case, that the appellant waived these provisions, is also, I think, tenable, though to my mind more difficult.

The finding he makes of the overwhelming character

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of the evidence relative to the worthlessness of the machine seems well founded.

The argument of appellant's counsel that a test of the actual horse-power it was capable of developing, could only be determined by a scientific test, might have been well taken if only a narrow margin of the measure of power had been in question. No such doubtful question can exist on the evidence, and such machines are only of value to a farmer if, by use thereof, he can economise in way of horse or man power he has to employ in ploughing or other operations on the farm.

When representations as to its capacity fall so far short of realising the reasonable expectations of such a purchaser as this one seems to have done, there is not much need for further test.

The representations made in the first attempted contract beyond doubt operated as intended on the mind of the respondent as an inducement to purchase the machine in question and he was entitled to rely thereupon, though not in the sense of misrepresentation presented to the mind of the learned trial judge.

Much was said in the argument by the counsel for appellant as to the pleadings and the effect thereof, which might have been effective if it had not chosen to fight the case out on the lines on which it was fought and decided.

This is one of the many cases in which we should regard what the parties in fact have tried out regardless of the form of pleading.

It becomes too late after such a trial, and appeal therefrom, to fall back here upon the form of pleading.

The appeal should be dismissed with costs.

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

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Anglin J.

ANGLIN J.—The material facts of this case sufficiently appear in the judgments of the learned Appellate Judges (1). The evidence, in my opinion, abundantly warranted the conclusion of the learned Chief Justice who tried the action that the tractor delivered to the defendant did not fulfil the warranty in the contract of sale, that it

will develop its rated (60) brake horse-power.

I agree with Mr. Justice Newlands that the provision for notice in clause 9 does not apply to this warranty but is confined to

defects in workmanship and material.

It is, in my opinion, likewise the proper construction of clause 11 to restrict its application to "defects" within clause 9.

It may be that the plaintiff was rightly held not entitled to rescission because of his user of the engine with knowledge of its incapability to develop the rated horse-power. But I find nothing which debars him either on the ground of estoppel or on that of abandonment from setting up the breach of warranty relied upon as the basis of a claim for damages.

As to the alleged insufficiency of the pleadings, so much relied upon by counsel for the appellant, I agree with the view expressed by Mr. Justice Lamont, to which I would merely add that evidence on the issue of breach of warranty was fully gone into at the trial and the observations of the Chief Justice and of counsel during the course of it make it clear that it was well understood that this issue was one with which the court intended to deal. There was no surprise of which the appellant can complain. While it would probably have been better had the pleadings been

(1) 11 Sask L.R. 132; 40 D.L.R. 169; [1918] 2 W.W.R. 239.

formally amended at the trial, any amendment necessary to make them fit the issues actually tried and disposed of may be made even now. "Supreme Court Act," section 54.

Having found upon evidence warranting that conclusion, that the engine was

useless to the defendant

by reason of its failure to fulfil the warranty as to horse-power, the Chief Justice was justified in assessing the damages for breach of that warranty at the price agreed to be paid. With that assessment, affirmed by the provincial Appellate Court, we should not interfere.

BRODEUR J.—The appellant contends that no issue has been raised as to breach of warranty and that the damages awarded by the trial judge to the respondent as a result of that breach could not be granted.

The allegations in the defence and counterclaim are sufficient to support a claim for damages for breach of warranty. This is a question of practice and procedure on which the courts below have passed judgment, and that decision should not be interfered with by this court, whatever the view which we might have taken, had we had to deal originally with it on the merits. I am of opinion that the judgment below is well founded. The facts of this case and the provisions of the contract are much less favourable than those in issue in the case decided this term of *Schofield* v. *Emerson Co.* (1).

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Mackenzie, Thom, McMorran, Bastedo & Jackson.*

Solicitors for the respondent: *Seaborn, Pope & Gregory.*

(1) 57 Can. S.C.R. 203, 43 D.L.R. 509.

1918
*May 27.
*Oct. 8.

THE ROYAL TRUST COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

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

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

Expropriation—Irregularities prior to notice—Acquiescence—Actual value—Servitude—62 Vict. c. 58, s. 418.

Held, per Davies, Anglin and Brodeur JJ.—In proceedings to expropriate lands, taken under the provisions of the charter of the City of Montreal, the expropriated party, by appointing his commissioners and prosecuting his claim before the Board, estops himself after the award is made, from attacking it on the grounds of alleged irregularities anterior to the notice of expropriation.

Per Fitzpatrick C.J. and Anglin J.—The commissioners, in fixing the owner's compensation, are not entitled to make any deduction from the actual value of the expropriated land, in respect of the burden imposed upon it by the confirmation or homologation of a plan.

Per Davies and Brodeur JJ.—The commissioners, in finding the actual value of land which, when expropriated, will become a public street, are bound to take into consideration the facts of the homologation and confirmation of the lines of that street.

Judgment of the Court of King's Bench, appeal side (Q.R. 26 K.B. 557), affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment of the Superior Court, District of Montreal, by which the plaintiff's action was maintained.

The action was taken to set aside and have declared illegal and null proceedings which had been taken by the City of Montreal by way of expropriation for opening or extending Sherbrooke street in the east end of

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

(1) Q.R. 26 K.B. 557.

the city and also to set aside the award of the arbitrators in so far as it affected certain lots of land required for the opening of that street and owned by the appellant in trust for the estate of one Charles Sheppard.

Lafleur K.C. and *A. Chase-Casgrain K.C.* for the appellant.

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

THE CHIEF JUSTICE.—The substantial question in this appeal is what were the rights of the appellant in the land expropriated and for which it had a claim to be indemnified.

The lots in question were within the homologated street lines shewn on a plan prepared by the city and confirmed by the court in 1887 as being included in land required for an extension of Sherbrooke street.

The proprietor of land expropriated is entitled to be compensated by payment of the value of the land taken and section 421 of the city charter provides, *inter alia:*—

> Indemnity, in case of expropriation, shall include the *actual value* of the immovable, part of immovable or servitude expropriated and the damages resulting from the expropriation; but, when fixing the indemnity to be paid, the commissioners may take into consideration the increased value of the immovables from which is to be detached the portion to be expropriated and offset the same by the inconvenience, loss or damages resulting from the expropriation.

Section 418, however, provides:—

> 418. The city shall not be liable for any indemnity or damages claimed with respect to any building constructed, or improvements, leases or contracts made by any person whatever, upon any land or property, after the confirmation of any plan or map, or of any modification or alteration of, or addition thereto.

The question is what is the effect of section 418? Mr. Justice Cross, in his reasons for the judgment appealed from, says:—

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The respondent (now appellant) is in error in its pretension that it should have been awarded what would have been the real value of the land in question if it had been marketable land. It is said for the respondent (appellant) that the city is not to be permitted to depreciate land by putting it on a plan and then take the land at the depreciated value made so by its own act. To that it can be said that the city plan is given certain effect by statute. That effect causes depreciation but it is the law.

I must dissent altogether from this interpretation of section 418.

It is a well-recognised canon of construction not to interpret an Act of the legislature in such a way as to take away property without compensation unless such intention is clearly expressed or is to be inferred by plain implication.

In the recent case in the English Court of Appeal of the *Cannon Brewery Company* v. *The Central Control Board* (*Liquor Traffic*) reported in the Times of the 17th of May 1918, the Master of the Rolls in his judgment said:

> No intention could be attributed to Parliament of taking away from individuals their property without paying them for it unless such intention was expressed in clear and unequivocal language.

See *Gibb* v. *The King* also (1)

Now I can see nothing in section 418 to warrant the view that it is intended to have the effect of a partial and indeed almost total confiscation of the property of an owner of land. The intention of the legislature, I think, was this: Where a city improvement is proposed, the carrying out of which may necessarily take some time, parties whose land will need to be expropriated for the purpose are not to be allowed to aggravate the indemnity which they will be entitled to claim by carrying out improvements in the interval.

This does not seem to me to involve any intention on the part of the legislature to deprive the landowner

(1) [1918] A.C. 915, 42 D.L.R. 336; 52 Can. S.C.R. 402, 27 D.L.R. 262.

of the full value of his land which he is entitled to be paid.

The power given to the city is a very exceptional one and one that, no doubt, may easily lead to considerable hardship. Under it, the city can, owing to want of security, practically prevent a landowner making any use of his property for an indefinite time without being under any obligation to take the land at all or to pay any damages occasioned. That is sufficiently unfavourable to the landowner without an unnecessary finding in the statute of an intention to allow the owner even eventually nothing but the value of what would be scarcely more than a bare legal title, of which, indeed, the respondent's expert witness, Beausoleil, says:—

la valeur n'est que nominale et ne dépasse pas $1, pour tout le terrain.

The second clause in the third paragraph of section 421, that, namely, providing for an offset in consideration of increased value of the immovables from which is to be detached the portion to be expropriated is not, I think, effective here because at the date of the expropriation the appellant had no other lands than those expropriated. It had already disposed of its other immovables which benefited by the increased value. If it had sold them subsequently to the expropriation the increase in their value would have had to be set against the compensation for the land expropriated. At the time of the sale, however, the extension of Sherbrooke street had not been made and might never have been made. No doubt there was a probability that it would be made and the purchasers were willing to accept the possibility, still I do not see how this can affect the legal rights as between the appellant and the respondent.

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I think that from the record two facts are established: (1) that the value of land in the locality was more than that allowed in the award; and (2) that the majority of the commissioners took into consideration the homologated plan as depreciating the value of the land expropriated.

These are substantially the findings of Mr. Justice Cross, who says:—

> It can be said that the proof establishes that the real value of marketable land in the locality was 60c. per foot. The award is only 25c. per foot. That great disparity is suggestive of the view that the majority of the commissioners subjected themselves to some error not merely of estimate of value but to some error in principle.

And again he says:—

> The fact is that the majority of the commissioners did take into consideration the effect of the homologated plan and they would have been wrong if they had not done so.

It would be difficult to say how the commissioners arrived at their award. They seem to have been agreed at first in saying that they took into account the servitude of the road although later inclining to the contrary opinion. The principles on which they should have proceeded as above indicated are, however, so simple that I think it is clear they were not guided by these. No adequate explanation is forthcoming of the difference between the allowance for these and other lands taken; whilst one of the majority of the commissioners says that if he had taken the servitude into account he would have allowed only 15c. instead of 25c. per foot. A difference of only 10c. between the full value of lands and their value burdened with a servitude which, as the respondent's witnesses say, renders them absolutely valueless is inexplicable.

I do not wish to be understood as expressing now any opinion upon the amount of the compensation which the appellant is entitled to recover. The amount

awarded may for reasons which I have not considered work out as a fair and proper compensation, but if so it has worked out right rather by chance and the appellant is entitled to have a more satisfactory consideration and regular determination of its claim.

The appeal should, therefore, in my opinion, be allowed and the matter referred back to the commissioners to establish the actual value of the land expropriated the amount of which is to be awarded as indemnity to the appellant, but in view of the finding below and out of respect for the opinion of the majority here I do not enter a formal dissent.

DAVIES J.—This is an appeal from the judgment of the Court of King's Bench, Province of Quebec, reversing a judgment of the Superior Court judge which declared certain expropriation proceedings in connection with the plaintiff's property and the award of the majority of the commissioners to be null and void.

The Court of King's Bench reversed that decision and dismissed the plaintiff's action and against this judgment the present appeal was taken.

I agree fully with the Court of King's Bench that the alleged illegalities in the antecedent proceedings of the city and the commissioners cannot be invoked in this case on the grounds stated in the court below. The conduct and action of the present appellants in appointing their commissioners and prosecuting their claim before the Board effectually estopped them after the award was made from attacking it on the ground of these alleged irregularities, anterior to the notice of expropriation.

The statute makes the award of the commissioners, in such cases as the present, final and without appeal. In order to give grounds for attacking it, either highly

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improper conduct on the commissioners' part, or fraud, or the proceeding by the commissioners in making the award upon an improper principle, must be clearly shewn.

The latter was the ground relied upon in this case.

The Court of King's Bench held that the award attacked should not be interfered with and I think they were right in their conclusions.

The owner of land expropriated is undoubtedly entitled to be paid its actual value at the time of its expropriation; but it is the actual value of the land to him subject to any statutory charges upon it, and not the value to the person, corporation or company taking it that is to be awarded.

The City of Montreal had, in the year 1887, laid down on a plan the lines of a proposed extension of Sherbrooke street, one of the principal streets of Montreal, which extension ran through the property in question, and had the plan confirmed by a judge of the Superior Court.

The law provided that after the homologation of these lines by the confirmation of the plan of the same, the city was freed from liability or damages

> with respect to any building constructed or improvement, leases or contracts made by any person whatever upon any land or property after the confirmation.

An amendment, 7 Ed. VII. ch. 63, sec. 30, speaks of portions of vacant lots between homologated lines as being reserved for "public or municipal purposes."

In 1908 the Sheppard estate, of which the plaintiff is trustee, made a plan of subdivision of its land in the locality of the locus in question and made its plan to conform to the city plan so far as concerns the site of Sherbrooke street. Afterwards, in 1912, lots on the north-east side were sold to Larivière and Messier by

the now appellant and these lots are described in the deed as being bounded by Sherbrooke street.

When the commissioners made their award, upon what principle should they have proceeded? Clearly, in my opinion, they should have awarded the actual value of the land to its owner and in finding that actual value they were bound to take into consideration the fact of the proposed extension of Sherbrooke street and the homologation, and confirmation of the lines of that street through the plaintiff's lands as shewn on the plan of the same. In my judgment, the plaintiff had not a marketable title at the time of the expropriation. Such title as he had was one subject to the effect of the proposed extension of Sherbrooke street and the confirmation of the plans thereof, in other words, subject to a statutory charge. The commissioners were obliged, in my judgment, to consider this in making their award. This statutory charge or "reservation for municipal purposes," or servitude, or whatever name you choose to give it was something which affected the value of the land and diminished its marketable value. It is true it may have raised, probably greatly raised, when adopted by the Sheppard estate in making their plan of the land in 1908, the value of the lands fronting on that proposed street, but with that we have nothing to do. The owners of these adjoining lands, in this instance the plaintiff itself, got the benefit of that increase and no one complains or has a right to complain of that. But when they sold these adjoining lands at 60c. a foot, and then claimed to have allowed them the same price for the lands of the proposed street, the opening of which gave them the increased price they got for the adjoining lands, and contend that this was the principle on which the arbitrators should have acted they are going too far and advancing as a

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principle something I cannot for a moment accept. They claim properly all the increased price caused by the opening of the street to the adjoining lands and then contended that this increased price was that which should have guided the arbitrators in fixing the compensation for the street itself. As Mr. Justice Cross says:—

> It is simply resorting to the too common project of land speculators to get paid twice for the same thing.

Their title to the lands within the street boundaries was subject to the statutory charge or reservation I have referred to. It was not a marketable title such as that to the lands fronting on the street. It had to be valued as it stood at the time of the expropriation subject to the charge and if that had been done by the arbitrators, I would have held it was rightly done. Mr. Justice Cross holds that the majority of the commissioners did take into consideration the effect of the homologated plan, the Sheppard estate sudivision plan and the description of the Larivière and Messier lots as bounded on the street, which consideration would, of course, tend to decrease the actual value of the street land.

If they did, from my point of view they were right, and there is no ground for the contention that they acted upon a wrong principle.

If they did not, they omitted doing what they should have done in that respect; but the appellants have no ground of complaint on that score, as the omission would be in their favour.

I am unable to find that the arbitrators acted upon any wrong principle, and I would, therefore, agreeing, as I do, with the reasons for his judgment given by Mr. Justice Cross and with the conclusions of the Court of King's Bench, dismiss the appeal with costs.

IDINGTON J.—I think this appeal should be dismissed with costs.

ANGLIN J.—I agree with the learned judges of the Court of King's Bench that the award of the expropriation commissioners cannot be successfully attacked upon the grounds of alleged irregularities in the antecedent proceedings preferred by the appellants. Whether the provisions of the charter of the City of Montreal (62 V., ch. 58, and amendments) required or justified the commissioners in fixing the amount of compensation for the land expropriated to make a deduction from its actual value on account of rights or easements in favour of the municipality and the public to which it was subjected by the confirmation, in 1887, of a plan for the extension of Sherbrooke street, and whether they have in fact made such a deduction are, in my opinion, the only debatable questions. Both of them—the one a question of law, the other of fact—require careful consideration.

The principle of natural law which underlies Art. 407 of the Civil Code:—

> No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid,

is likewise the foundation of the well-established rule of statutory construction thus stated by Farwell J. in *Earl of Lonsdale* v. *Lowther* (1):—

> It is a sound rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it: see *per* Lord Esher in *Attorney-General* v. *Horner* (2).

The city charter declares that streets and highways indicated and projected upon a plan or map duly confirmed by the Superior Court shall be deemed to be

(1) [1900] 2 Ch. 687, at p. 696. (2) 14 Q.B.D. 245, 257.

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highways (section 411). Although the city is not bound to carry into effect any projected street opening, widening, or extension so confirmed (section 417), the owner is disentitled to indemnity, should the city subsequently expropriate the land, for any buildings or improvements constructed or made upon it subsequently to such confirmation (section 418). "Nor," says section 417:—

> shall the city hereafter be liable for any indemnity or damages whatever by reason merely of the confirmation of such plan or any alteration or modification thereof or addition thereto.

The only offset to the very serious interference with and deprivation of his rights thus authorised is that the property owner has by recent legislation (section 419 (*a*), enacted by 7 Ed. VII., ch. 63, sec. 30) been relieved from liability for taxes, but only if the expropriated land be vacant, and that he may make such use of his land as is practicable without building upon or otherwise improving it except at the risk of losing his expenditure and subject to the rights of the public in it as a highway. It is obvious that so burdened the interest of the owner in the land would be of little, if any, value and that if his indemnity on its ultimate exporpriation should be confined to the value of an interest so depreciated he will, in effect, have been deprived of his property without compensation. That such a result was intended by the legislature is most improbable.

The interval between the homologation of a plan shewing a projected highway or highway extension, and the expropriation of the land required for it, may be prolonged for many years. During that period the owner undoubtedly must submit to the hardship of the burden placed upon him by the statute as the result of confirmation of the plan without compensation

because the legislature has expressly negatived his right to

> any indemnity or damages whatever by reason *merely* (*simplement*) of the confirmation of the plan.

But the opening, widening or extension of a street cannot be actually made without expropriation under the provisions of the charter (section 419), and when that takes place the case is no longer one *merely* (*simplement*) of confirmation of a plan. The land itself must then be acquired and the statute says that the owner's indemnity

> shall include the *actual value* (la valeur réelle) of the immovable, part of immovable or servitude expropriated and the damages resulting from the expropriation (s. 421).

Applying to the two provisions which I have quoted from sections 417 and 421 the rule of interpretation above indicated and harmonizing their construction as far as their language permits with art. 407 of the Civil Code, I think section 417 should be read as suspending the right of the owner to compensation for the loss, temporary or permanent, of the rights of which he is deprived on confirmation of the plan. The loss may be temporary only, because the city is not bound to proceed with the projected opening, etc.; it may, by altering or modifying the homologated plan with the sanction of the court (section 415), abandon the project without incurring liability for indemnity (section 417). The loss may be permanent if the city proceeds with the project, necessitating the expropriation of the land. Thereupon, as already stated, the case ceases to be *merely* one of confirmation of the plan of a projected improvement and the owner becomes entitled to indemnity not by reason of such confirmation, but because his land is taken from him and the statute says that his indemnity shall include its actual value. The sus-

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pension under section 417 is then terminated. That confirmation of the plan should produce only a suspension of the owner's claim for indemnity in the event of ultimate expropriation seems very clearly to be the purpose of the word "merely" (simplement) in section 417, and—I say it with all becoming respect—I cannot but believe that the significance of this word has escaped the attention of those who have taken the contrary view.

I am, therefore, of the opinion that the commissioners in fixing the owner's compensation were not entitled to make any deduction from the actual value of the land taken in respect of the burden imposed upon it by the confirmation of the plan in 1887—that it was the actual value of the land for which they were to award compensation and not merely the value of the owner's interest therein subject to the rights of the municipality and the public acquired under the homologation.

Neither can I subscribe to the contention that by selling adjacent lands as fronting on Sherbrooke street, then a projected highway, and under the statute to "be deemed to be a public highway," the owner necessarily subjected the part of his property afterwards expropriated for that street to a servitude in favour of the purchasers and their assigns in respect of which the commissioners were required or entitled to make a deduction from its actual value in ascertaining the amount of the indemnity payable to the owner on expropriation.

Did the commissioners in fact make any such deduction? Mr. Justice Cross says:—

> The fact is that the majority of the commissioners did take into consideration the effect of the "homologated" plan, the making of the Sheppard estate subdivision plan and the description of the Larivière

and Messier lots as being bounded by Sherbrooke street; and they would have been wrong if they had not done so.

He reaches this conclusion apparently because of what he regards as the otherwise unexplained and inexplicable disparity between the 25c. a square foot allowed to the appellants as compensation and the 60c. a square foot which he says the proof establishes was the real value of marketable land in the locality.

On the other hand, the late Chief Justice of the Court of King's Bench (Sir Horace Archambeault) and Mr. Justice Carroll accepted the testimony given by each of the three commissioners who constituted the majority of the board that they had made no deduction on account of what they term "the servitude" (1). Recorder Geoffrion, Chairman of the Board, deposed that in taking this course the majority of the commissioners acted on the opinion of a judge of the Superior Court obtained and communicated to them by him; and the two other commissioners confirmed this statement. Mr. Justice Trenholme, the remaining member of the court, delivered no written opinion, but the formal judgment would seem to indicate that on this point he agreed with the learned Chief Justice and Mr. Justice Carroll rather than with Mr. Justice Cross. It is erroneously stated in the official report that Mr. Justice Pelletier sat as a member of the court.

After careful consideration of the entire record, notwithstanding some discrepancies, and the obviously fidgetty scrupulosity of Recorder Geoffrion, I have not found sufficient reason for disbelieving the commissioners' testimony or doubting its accuracy, corroborated as it is by that of Mr. Senecal, the secretary of the board. Still less am I prepared to hold

(1) Q.R. 26 K.B. 557 at pp. 565, 568.

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that upon this question of fact the Court of King's Bench clearly erred in its appreciation of the evidence. The mere disparity referred to by Mr. Justice Cross does not warrant such a conclusion. Moreover, I am not satisfied that the actual value of lands in the locality,

> excluding any advantage due to the carrying out of the scheme for which the property (was) compulsorily acquired, (*Fraser* v. *Fraserville*) (1),

was 60c. a square foot. Mr. Findlay valued the land in question at 40c. a square foot free from all servitudes and 20c. subject to the servitudes discussed, and there is no evidence how much less than the figures put upon it by the several expert witnesses it would be worth if the extension of Sherbrooke street were merely a possibility and not a realized possibility. *Cedars Rapids Manufacturing Co.* v. *Lacoste* (1). So far as appears none of the witnesses who deposed to values ranging from 40c. to 75c. a square foot were examined on this footing. One of them, Mr. Beausoleil, said that, subject to the "servitude," he would value the whole lot at $1. Moreover, other properties in the locality, some of them not shewn to have been so wholly different from that of the appellants as to preclude comparison, were valued by the commissioners at the same figure, 25c. a square foot, and there are the circumstances that the property in question had been the location of a city dump, was very low, and was comparatively close to abattoirs, which the commissioners regarded as having a tendency to depreciate its value.

There is no appeal from an award such as this. The statute expressly excludes it (section 429)—(4

(1) [1917] A.C. 187 at p. 194; 34 D.L.R. 211.

(2) [1914] A.C. 569; 16 D.L.R. 168.

Ed. VII., ch. 49, section 18). Without entertaining an appeal an award may not be set aside solely because the court is of opinion that it is too high or too low—even very considerably so—unless the disparity be so great that it is clear that the award must have been fraudulently made or that the arbitrators must have been influenced by improper or illegal considerations. The Court of King's Bench has held that neither of these grounds of invalidity has been established, and the clear case necessary to justify a reversal of its judgment, in my opinion, has not been made out.

I would merely add that if I thought it necessary to pass in detail upon the considerations that should affect the commissioners in arriving at the amount of the indemnity to which an expropriated owner is entitled under section 421 of the Montreal city charter, I am not at all certain that where, at the time of the homologation of the plan shewing the projected improvement, he owns adjacent lands, from which the expropriated property is thereby detached, and parts with those lands in the interval before expropriation, he should not, for the purposes of the off-set of increased value of such adjacent lands provided for by that section, be in the same position as if he still held them. Why should the amount which the city has to pay for the expropriated land be increased because the owner has parted with his adjacent property since the homologation of the plan of the projected work? It would seem to be contrary to the purpose of the statute providing for homologation and its consequences with the apparent object of preventing changes in the condition of the property affected which would increase the burden of the expropriating municipality that it should. But on this aspect of the case it is not necessary now to express a definite opinion.

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Solely on the ground that the evidence does not clearly establish that the award of 25c. a square foot was such a gross undervaluation of the appellants' property as would warrant a finding that the commissioners in making it must have been influenced by improper considerations, and *a fortiori*, that it has not been so plainly demonstrated that the Court of King's Bench erred in reaching that conclusion that a reversal of its judgment would be justified (*Demers* v. *Montreal Steam Laundry Co.* (1), I would dismiss this appeal.

BRODEUR J.—La principale question qui se présente dans cette cause est de savoir si les commissaires en expropriation en fixant le montant de l'indemnité se sont basés sur un principe erroné.

La propriété expropriée faisait partie autrefois d'un lot vacant; et en 1887 la cité de Montréal en vertu de sa charte a décidé de prolonger la rue Sherbrooke à travers ce lot. Elle a indiqué cette prolongation sur la plan officiel et l'a fait confirmer par la Cour Supérieure. Par ces procédures la rue projetée est devenue voie publique (art. 411 de la charte).

Une autre disposition de la charte déclare cependant que la cité n'est pas tenue, à raison de la confirmation du plan, d'ouvrir la rue; et elle n'est pas tenue non plus de payer une indemnité ou des dommages-intérêts à raison de la confirmation de ce plan (art. 417).

Cette disposition est certainement contraire aux principes ordinaires du droit. En effet, le Code Civil, art. 407, déclare que nul ne peut être contraint de céder sa propriété qu'en étant payé au préalable d'une juste indemnité. Or, voici un propriétaire dans la cité de Montréal qui voit tracer une rue sur son terrain. Il ne pourra plus le vendre sans dénoncer l'alignement

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

dont il est frappé (*Ménard* v. *Rambeau* (1); Sirey 1871-1-48). Il ne pourra pas, non plus, exiger d'indemnité ou des dommages-intérêts pour les bâtiments qu'il y construira.

La cité cependant ne pourra pas exiger de taxe pour le terrain couvert par cette ligne homologuée (art. 419*a* de la charte). Le propriétaire, du moment qu'une ligne est tracée comme cela, demeure bien le propriétaire du terrain qui sert d'assiette de la rue; mais il ne peut plus y faire de construction, à moins de s'exposer à les enlever sans compensation quand l'indemnité sera fixée pour le terrain lui-même. Son droit de propriété se trouve donc gravement restreint; et, de plus, ce terrain devient une voie publique, ainsi que le déclare l'article 411 de la charte.

Il est bien vrai que ce propriétaire a la perspective de voir une rue traverser sa propriété; et alors, à raison de cela, les lots que bordent la rue projetée augmentent en valeur et l'indemnisent. C'est probablement cette plus-value qui a induit la législature à adopter cette législation apparemment contraire au principe qui veut qu'il n'y ait pas d'expropriation sans indemnité.

Mais, d'un autre côté, si la cité jugeait à propos de ne pas donner suite à son projet d'ouvrir une rue à l'endroit en question, cela pourrait créer de graves injustices. Mais c'est là une question pour le législateur et non pour les tribunaux.

Dans le cas actuel, la rue fut tracée sur le plan en 1887, comme je l'ai dit plus haut; et ce n'est qu'en 1913 que la cité a décidé d'acquérir la rue et de faire fixer l'indemnité qui devait être payée au propriétaire.

Les commissaires en expropriation ont procédé à entendre les parties et leurs témoins et la majorité a

(1) 20 R.L. 448.

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décidé d'accorder 25 cents du pied au propriétaire. Ce dernier n'est pas satisfait de cette décision et demande qu'elle soit annulée et mise de côté.

La principale question soulevée est de savoir si les commissaires devaient accorder pour cette rue la même valeur que pour les lots riverains. Il est en preuve que ces lots riverains se vendaient environ 60 cents du pied. Alors l'appellante prétend qu'elle devrait avoir pour la rue le même prix.

Il est incontestable que du moment qu'une ligne est tracée à travers un lot vacant pour une rue que le droit du propriétaire est nécessairement restreint. Une servitude de droit de passage y est créée, puisque par l'article 411 de la charte la rue tracée sur le plan devient une voie publique. Il demeure bien le propriétaire du fonds. Mais son droit n'est pas absolu, comme il l'était. Alors, que nous considérions cette charge comme une servitude ou comme une restriction du droit de propriété, il n'en reste pas moins que ce terrain n'avait pas, lorsque les commissaires ont déterminé l'indemnité, la même valeur que les terrains riverains sur lesquels il n'existe aucune telle charge. Les commissaires étaient donc tenus, suivant moi, de prendre en considération cette charge et ce droit de passage.

Il y a un certain doute dans la preuve de savoir s'ils l'ont prise en considération ou non. Cependant, si nous prenons le montant qui a été accordé à l'indemnitaire, 25 cents du pied, et la valeur, qui paraît admise, des terrains riverains, 60 cents du pied, il me paraît évident qu'ils ont dû prendre en considération, comme c'était leur devoir, l'existence de cette servitude.

Je concours, par conséquent, dans l'opinion exprimée à ce sujet par le juge Cross. Car si j'étais certain qu'ils n'auraient pas tenu compte de cette

servitude, je serais alors d'opinion que la sentence arbitrale devrait être nulle, et que la cause devrait êteé renvoyée devant les arbitres pour qu'on y procède de nouveau. Mais alors ces nouvelles procédures seraient probablement au détriment de l'appelante, vu que la sentence arbitrale accorderait peut-être une somme moindre que celle qui a été donnée.

L'appelante prétend, en outre, que la sentence arbitrale devrait être mise de côté parce que certaines procédures initiales ne sont pas tout à fait régulières. Elle allègue, par exemple, que le rapport préalable qui devait être fait par le contrôleur avant que le conseil municipal décide de procéder à faire fixer l'indemnité n'était pas régulier et que la résolution du conseil lui-même n'a pas été adoptée par la majorité des membres du conseil, tel que voulu par la loi.

Il me semble que cette prétendue informalité aurait due être soulevée *ab initio*. D'ailleurs, il est à présumer que l'appelante avait tout intérêt à ce que l'indemnité soit fixée; car elle avait sur les bras un terrain qui ne lui rapportait rien et, par conséquent, elle devait être anxieuse que la compensation en fut déterminée le plus tôt possible. Il est trop tard pour elle, maintenant que la sentence arbitrale est rendue, de se plaindre de procédures auxquelles elle a acquiescé en procédant elle-même et en acceptant leur juridiction.

Si la résolution du conseil était illégale, rien ne lui était plus facile alors que de prendre les procédures nécessaires pour la faire mettre de côté. Mais non: je suis convaincu que l'appelante devait voir avec satisfaction que la cité, après plusieurs années d'attente, allait la payer pour son terrain; et il est trop tard aujourd'hui pour se plaindre de cela.

Pour ces raisons, l'appel doit être renvoyé avec

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dépens et le dispositif du jugement de la cour d'appel doit êteé confirmé.

Appeal dismissed with costs.

Solicitors for the appellant: *Casgrain, Mitchell, McDougall & Creelman.*

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

HELEN FRANCIS (PLAINTIFF).....APPELLANT;

AND

NORMAN M. ALLAN AND NORMAN M. ALLAN AND C. A. SMITH, EXECUTORS OF THE LAST WILL OF HENRY W. ALLAN (DEFENDANTS)..... RESPONDENTS.

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*June 10, 11.
*Oct. 15.

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

Contract—Agreement for maintenance—Consideration—Abandoning project—Forbearance.

F. to support herself and her mother proposed taking lodgers but was induced to abandon the project by her uncle who agreed to pay her $200 a year while he lived and secure her that income by his will. The annuity was paid, in cash and promissory notes, for four years when the uncle gave F. a note for $1,000, payable five years after date with interest and asked her to consider it "for the present" a settlement of all claims. F. was with her uncle in his last illness when he told her that he had left her $2,000 by his will, but a few days before his death he revoked a will containing a bequest to her and made another in which she was not mentioned. Shortly after his death A., who inherited all his estate, was informed by F. of her claim and the promises, verbal and written, on which it was based and some months later he wrote offering to pay her $3,000 as a settlement in full. F. accepted the offer but it was afterwards repudiated by A.

Held, Anglin J. dissenting, that F's forbearance to press her claim against the estate was a good consideration for the agreement by A. to pay her $3,000.

Held, per Davies and Brodeur JJ. and Falconbridge C.J., Idington J. expressing no opinion and Anglin J. *contra,* that the relinquishment by F. of the project of taking lodgers was a valid consideration for the agreement by her uncle to provide her with a life annuity and she was entitled to recover from his estate the $2,000 promised by her uncle to be given her in his will and the amount due on his notes which she held.

Judgment of the Appellate Division (43 Ont. L.R. 479) reversed.

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

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

The action was brought against the respondent, Norman M. Allan, personally to recover the sum of $3,000 which he had agreed to pay appellant in settlement of a claim made against the estate of Henry W. Allan, and also against the executors of that estate for the amount of said claim. The questions raised for adjudication are stated in the above head-note.

Lamport for the appellant.
R. S. Robertson for the respondents.

DAVIES J.—I am of the opinion that this appeal should be allowed and the judgment of the trial judge restored as to the amount adjudged by him as due the plaintiff, but that it should be entered against the defendants, Allan and Smith, as executors of the last will and testament of the late Henry W. Allan and not as against Norman M. Allan in his personal capacity only.

In one respect I differ from the trial judge, who held that the original understanding or agreement between the plaintiff, appellant, and the late Henry W. Allan, her uncle, that if she would abandon her project or intention of making a living for herself and her mother by opening and keeping a boarding-house, he would allow her a certain sum of money for her own and her mother's support

fell far short of amounting to an agreement legally enforceable by plaintiff.

The plaintiff's mother was a sister of the late Henry W. Allan, and in my judgment his arrangement with his sister's daughter, the plaintiff, that if she would abandon her boarding-house project and devote herself

(1) 43 Ont. L.R. 479.

to looking after and keeping her mother he would provide for her as long as she lived and would pay her $50 every four months during her and his lifetime, and would make provision out of his estate to produce the same income during her lifetime, was an agreement enforceable in law.

My brother Idington does not make any specific finding upon this point. In all other respects than these I have mentioned I concur in the reasons he has stated for allowing the appeal.

The judgment of the court will be, therefore, to allow the appeal; to restore the judgment in amount of the trial judge and to award it as against the defendants as executors and not as against Allan personally.

IDINGTON J.—Once more there is raised herein the oft mooted question of what may be interpreted such a forbearance on the part of one claiming it to have been given and duly accepted as a consideration for a contract, such as to satisfy the peculiar requirement of our English law.

The learned trial judge held that the appellant had adduced sufficient evidence from which it might fairly be inferred that she had agreed to forbear and that her cousin, the respondent Norman M. Allan, after long and serious consideration of the facts which she had submitted to him in response to his request therefor, had decided to accede to her demands, in part, and promised her accordingly that he or the representative of the ample estate he enjoys as recipient of the testator's bounty, should and would pay three thousand dollars to cover all her claims.

The Court of Appeal for Ontario held the learned trial judge had erred and reversed his judgment.

In doing so it laid stress upon the moderate and

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conciliatory language used by appellant in presenting her claims and pressing them upon the attention of respondent Norman M. Allan, and her equally inoffensive use of the word "allow" in accepting his solemn undertaking to pay what she now claims herein as of right.

It is not necessary in order to establish that one presenting a possibly legal claim, and who actually believed in ultimate success in a court of law as possible, should assert it in offensive language, or even expressly intimate that unless acceded to an action at law would be taken. Nor for the purpose of making the forbearance from such a mode of asserting a claim a valuable consideration, is it absolutely necessary to have everything believed by either party actually expressed in words.

It is, I admit, the plain obvious inference which he, resisting and then yielding, may have drawn from the presentation to him in regard to any honest, or probably honest, belief on the part of him pressing his right of claim thereto, which may become a cause of litigation, and the likelihood of such party being driven to try conclusions at law, that may constitute a perfectly good and valuable consideration for his so yielding and a basis for such obligation, as he, drawing such inference, may have entered into.

Long ago, in the common law courts, there prevailed an impression that unless proceedings had been taken there could *not* be said to have been a compromise in that forbearance which constitutes the valuable consideration.

Therefore in *Cook* v. *Wright* (1), this view seems to have been put an end to by the court holding that the mere threat of legal proceedings, though in law and in

(1) 1 B. & S. 559.

fact there was no valid claim, was sufficient and therefore a promissory note given as result held good.

Indeed it is hard to conceive how any one could have supposed in that case that there was any claim in law, yet the recognition of it and the lapse of time secured thereby to the party who was liable in law, and that to the possible detriment of the party accepting the note, it was held that it must be taken there was valuable consideration.

That case was followed by the case of *Callisher* v. *Bischoffsheim* (1), decided upon the pleadings when Cockburn C.J. made some remarks as did also his colleague Blackburn J. which would go far to support the appellant herein.

These utterances, of Cockburn C.J. especially, were criticised in the later case of *Ex parte Banner* (2), by Brett L.J., who seems to doubt the authority of that *Callisher Case* (1).

That in turn evoked, in the case of *Miles* v. *New Zealand Alford Estate Co.* (3), the opinions of the members of a strong appellate court in approval of what had been said and was so criticized.

It is quite evident that the vews expressed thus, strongly approved of the views expressed in the *Callisher Case* (1).

And of these views one was the expression of Blackburn J.

> that the real consideration depends upon the reality of the claim made and the bona fides of the compromise

which he quoted from his own judgment on behalf of the court in *Cook* v. *Wright* (4).

It is only as giving something shewing the growth of the law as it were, that the *Miles Case* (3) is of any

(1) L.R. 5 Q. B. 449.
(2 17 Ch. D. 480.
(3) 32 Ch. D. 266.
(4) 1 B. & S. 559.

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value herein, for the decision turns upon the finding by a majority that there had not in fact been a compromise though Bowen L.J. dissented.

This opinion contains the following passage worth quoting for its definition of the requirements of the law:—

> It seems to me that if an intending litigant *bonâ fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think, therefore, that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession.

Now let us see what the appellant claimed from respondent, Norman M. Allan.

The testator was her uncle, a brother of her mother, and had been very kind to both.

He went so far as to dissuade the appellant from taking boarders or roomers and to avert it promised them what was equivalent to an annuity for life which he varied later. He, however, on 1st October, 1912, after continuing the payments, so varied, for some four years, made a promissory note for $1,000 payable to appellant five years after date, with interest at six per cent. to be paid half-yearly on the 1st of April and 1st October, which he enclosed in a letter to her.

In that letter he explained that his state of health was such that he could not stand additional worry, complained of his sons being a burden instead of assistance and then proceeded as follows:—

> I am writing you in this way in order that you may see that I am compelled to make some temporary settlement at least that will help to relieve my mind of the claims that I feel from past promises you have on me.

I am sending you a note for $1,000 upon which I will pay you the interest at six per cent, half yearly for five years. I will pay you the interest on the notes you have and this for the present you will kindly regard as a settlement of all claims.

Now Helen, if things brighten up, I will do the best I can. In the meantime this note for $1,000 outright is absolutely good and as I do not intend to risk what I have it is just as safe as any security you could have and in the event of your death this $1,000 you can do what you like with. Should I die before the note is due, I will instruct my executors to pay in one year from the date of my death.

It is to be observed that he had made a will just four months previously in which he had bequeathed to her $1,500.

That will stood good and unrevoked till six days before his death, which took place in a hospital at Gravenhurst on the 10th of March, 1913, and no mention was made of the appellant in said will, though in most of its features the bequests are chiefly to the same parties as in the earlier will.

Having regard to the expression in the quotation I make from the letter enclosing the note that it was "for the present," this omission is very singular.

The appellant saw him and waited on him at the hospital, next day after this last will was made.

She swears her uncle told her, after his voluntarily going over the subject of what notes he had given her, that he had made a new will and had left her in that $2,000 and that she would have altogether something over $3,000 from him.

She describes him as a man of unimpeachable character whose word was always as good as his bond, and consequently she felt much surprised when she learned, after his death, that she was not even named in the will which seems to have been drawn in a hurried sort of emergency at the request of a doctor in charge of deceased, made to another patient, a barrister by profession, in the same hospital after 10 o'clock at night.

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The barrister in question was a stranger to the testator and when so called asked if the matter could not stand until morning, but was told not. The will, as finally drawn, was executed between two and three o'clock next morning.

Some mistake, or mistakes, in first draft resulted in its being rewritten.

The friends had been phoned to, and as a result of the call appellant hastened to the dying man's aid. She found him apparently able to talk but so weak that he failed to sign cheques, which she had written out for him at his request to pay some accounts he mentioned.

All this led to a correspondence with the respondent, Norman M. Allan, which is in the case and constitutes all there is to inform us of the claims made, the nature thereof, and the resultant undertaking to pay appellant three thousand dollars, and her acceptance thereof with thanks. It is to be observed that this was not done in a hurry, but after months of due consideration of a long statement by appellant of what claims she had, based on correspondence she had had with deceased, of which full extracts were enclosed and her statement of what he had told her, relative to the bequest of $2,000 in his will, that he wrote the letter from Glasgow on the 24th November, 1913, in which he says he had read over very carefully her

letters and copies of extracts from father's letters

and intimates his father had given him when at home to understand that he intended to give about $1,500 in all and yet he can very easily conceive that he probably increased this in his mind before his death, and he ends that part of the letter by saying

> Therefore you can take it as settled and I undertake that you shall receive $3,000 inclusive of the promissory notes he gave you.

I should attach much more importance to the words "settled" and "undertake," and hold them as much more significant of what was present to the mind of respondent in writing thus than it is possible to find in her expression "allow."

It is not, however, on such like criticism and analysis of the language used that I should care to rely, but upon the broad features of the case as presented.

Did the case which her brief laid before him present to his mind the possibility of litigation ensuing unless he made some settlement; and hence was it to avert such result, no matter how confident he might be of winning out, that he signed the undertaking? If so, then he is bound. And can there be a doubt that he was solely moved by such considerations.?

To assume in face of such a retraction of such promise, fourteen months later, that he had been only moved by moral considerations, seems to me quite absurd.

The possessor of such an ample estate, so easily acquired making such a retraction, and inflicting thereby such a blow of disappointment upon his cousin, who had doubtless for fourteen long months assumed that all her troubles had been so happily ended, was not the man to be moved by any moral or sentimental notions.

I, therefore, have no doubt as to his attitude of mind as having relation only to, and being governed solely by, the possibilities of litigation ensuing unless he settled.

If proof were needed of this the fact that the $1,000 note his father gave and coupled its giving with an assurance that his executors would be instructed to pay it within one year after his death, yet remains unpaid, supplies ample proof.

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The fact that this assurance, forgotten in the making of the will, was brought to the respondent's mind is clear from his own letter, yet he has not been moved to regard that engagement of his father.

And the omission of all reference thereto in the will doubtless furnished another disturbing proof to him that such a will might not be quite unimpeachable under the distressing circumstances in which it was made.

Convinced as I am by these considerations that respondent was moved solely by one purpose, and that to avert litigation, I ask myself whether he who knew appellant intimately and acted solely on the chances of her entering upon litigation, if he refused to yield, was not more likely to be right in his judgment in that regard than any judge can be when depending only on the written record and rejecting all inferences to be drawn therefrom or other palpable facts.

I have no difficulty in concluding that appellant had present to her mind her own belief in the law being likely to furnish a remedy for what she evidently thought had been a grave mistake in the framing of the will.

The question of whether or not in fact she could have succeeded is immaterial for our present purpose. But after the lapse of two years her difficulties would be much greater and hence his boldness and courage correspondingly enhanced.

Any one of long experience at the bar knows well that cases much more hopeless of success than what she presents, as her basis of possible action in regard to this will and the state of mind of the testator, are often tried.

Again, the fact that proposed litigation was in fact not mentioned in the correspondence goes for little if

we accept the fact that it discloses no intention to bring this action, yet we have it.

The following cases where expected forbearance was the only consideration, and yet not a word of threat or otherwise used relative to proposed litigation, unless a solicitor's conducting the business in one instance or other people's litigation be so taken, are instructive in this connection.

See *Alliance Bank* v. *Broom* (1); *Wilby* v. *Elgee* (2); *Ockford* v. *Barelli* (3); *Oldershaw* v. *King* (4); *Attwood* v. (5); *Lucy's Case* (6).

For these and other considerations presented in the judgment of the learned trial judge I conclude he was right and this appeal should be allowed with costs and his judgment restored.

ANGLIN J. (dissenting)—I would dismiss this appeal for the reasons given by the learned Chief Justice of Ontario.

To whatever sympathy the plaintiff may be entitled and whatever should be thought, if regarded from an ethical point of view, of the conduct of the defendant, Norman M. Allan, in repudiating his promise to her, I cannot find that that promise had either been made or accepted as the compromise of a claim preferred by her as enforceable at law. On the contrary, the sole consideration for it was of a moral character—Norman Allan's belief that his father may have entertained intentions in favour of the plaintiff unfortunately for her not expressed in a form legally binding. There is nothing to shew that either the plaintiff or Norman Allan ever thought that she had, or could have, a legal claim against the late H. W. Allan's estate.

(1) 2 Dr. & S. 289.
(2) L.R. 10 C.P. 497.
(3) 20 W.R. 116.
(4) 5 W.R. 753.
(5) 1 Russ. 353
(6) 4 De G.M. & G. 356

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I agree with the learned trial judge and the Appellate Division that, apart from Norman Allan's promise, the plaintiff had no enforceable claim against his father's estate.

BRODEUR J.—Mr. Henry W. Allan was a man of means, having left an estate of nearly $100,000. He had a sister, Mrs. Francis, who was not in very comfortable circumstances and as she was rather advanced in years she was looked after by her daughter, Miss Helen Francis, the appellant in this case. Mr. Allan was very kind to them and contributed with some other relations to their support.

At one time, however, Mrs. and Miss Francis contemplated keeping roomers and so informed Mr. H. W. Allan, since, on the 7th January, 1909, he wrote to his niece, the appellant, that his sister, Mrs. Francis, had worked hard enough all her life without taking lodgers and he was sure satisfactory arrangements would be made for the mother and the daughter. He entered into an arrangement with the appellant whereby he promised to provide a sum of $200 a year during her lifetime and to make provision out of his estate to produce the same income.

The relations of those three persons were of the best, and it is no wonder that Mr. Allan, who was occupying a high social standing and had been in public life, would have prevented his sister from taking roomers and would have provided for her and her daughter. He had no daughters himself and was not having, perhaps, from his sons all the consolations which his old age might expect. When he died he would have been alone if the appellant, his niece, had not been at his bedside; his son, the respondent, had left the country and was in Scotland.

The payments agreed upon were duly made from 1909 to 1912, when Mr. H. W. Allan became rather short of funds and gave two notes of $100 and $50 respectively in payment payable at two years from date but with interest. In May, 1912, he made a will with a legacy of $1,500 to the appellant.

In October of the same year, he gave the appellant another note of $1,000 payable in five years also with interest to be paid half yearly.

A few days before his death he said to his niece that he had left her $2,000 in his will and that sum, with the notes, would give her a little more than $3,000, and she would then get about the same income as he had been providing for her mother and herself during the last four years.

When he was very ill and on the point of death, Mr. Allan made another will and no mention is made therein of his niece, the appellant. He was then so weak that the doctor, who requested Mr. Bruce to draft the will, said it had to be made right away during that night for fear the testator could not see the next day.

After his arrival in Canada the respondent, Norman Allan, who was one of the executors, wrote to his cousin, the appellant, that he understood she had a claim against his father in notes and otherwise, and asked for information.

She then told him of the notes she had and the declaration he made to her as to the contents of his will, and she gave him extracts of the letters of Mr. H. W. Allan stating the circumstances under which his obligation had been contracted and the consideration for which he had undertaken to provide for her.

The respondent, after several months, answered that in those circumstances he was willing, though no

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provision was made for her in the will, to pay her $3,000 in satisfaction of her claim. But in January, 1915, he repudiated his obligation and the present action is to recover that amount of $3,000. He says in his plea that there was no consideration for the agreements alleged in the statement of claim, neither on his part nor on the part of his father.

The action was maintained against him personally by the trial judge on the ground that the obligation of the respondent was based on a compromise for a settlement of plaintiff's claims. That judgment was reversed in appeal, but judgment was given against the estate for the two notes then due and for interest.

I am of opinion that the trial judgment should be restored. There is no doubt that the appellant had valid claims for the notes which she had in her hands, namely, $1,150, since the respondents accept the judgment which condemned them to pay the note due and the interest on the other. As to the legacy of $2,000 she had every reason to believe that she had a legitimate claim.

There might be a question, besides, whether the will made in March, 1913, was valid or not. It is rather extraordinary that, willing as he was to provide for a permanent income to his niece of about $200 per year, the testator should have said to the solicitor who prepared the will and who was an absolute stranger to him, and who did not know anything about his affairs, that he had already provided for her by way of notes, when the notes she had would give her only about $60 a year. His mind then was not clear enough to make a valid will, or he was confused as to the amount of his obligation resulting from those notes.

It is no wonder that the son, being appraised of all those circumstances, would be willing to make a settle-

ment and to agree to pay the total sum of $3,000, which was a little less than the amount which was supposed to be in the will and the amount of the notes.

A compromise of a disputed claim which is honestly made constitutes valuable consideration, even if the claim ultimately turns out to be unfounded. Halsbury, vol. 7, p. 387.

The appellant had an undisputed claim for a part of the sum which the respondent undertook to pay and she was in perfect good faith when she was claiming an additional sum of $2,000 under the will; and the facts as then disclosed and known might perhaps have created some difficulty as to the validity of the will. It is no wonder that the respondent, as a son respectful of the wishes of his father, would, in such a case, have agreed to compromise and settle for $3,000; and, as the compromise was made with the evident consent of the two executors, the estate should be held liable.

The judgment *a quo* should be reversed with costs of this court and of the court below and judgment should be rendered against the estate for the sum of $3,000 with costs of this court and of the courts below.

FALCONBRIDGE C.J.—I concur in the opinion of Mr. Justice Davies.

Appeal allowed with costs.

Solicitors for the appellant: *Lamport, Ferguson & McCallum.*

Solicitors for the respondents: *Fasken, Robertson, Chadwick & Sedgewick.*

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*June 11.
*Oct. 15.

IN THE MATTER OF THE PORT ARTHUR WAGON COMPANY.

SMYTH'S CASE.

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

"Winding-Up Act"—Company in liquidation—Contributory—Subscription for shares—Reduced capital—Power of attorney—Prospectus.

S. signed an application for shares in a company to be formed under the name of The Port Arthur Mfg. Co., with a capital of one million dollars. The company was incorporated with the name of Port Arthur Wagon Co., the capital being $750,000. S. was allotted his shares, elected a director and executed a power of attorney giving authority to sign his name to the prospectus of the company, which, on the hearing, he swore he had done on being told that paid-up shares had been transferred to him for services rendered. The company having been placed in liquidation, S. was settled on the list of contributories for the price of the shares subscribed for, but the order placing him on said list was set aside by a judge, confirmed by the Appellate Division.

Held, Anglin J. dissenting, that S. was properly placed on the list; that his conduct evinced an intention to become a shareholder, and that the reduction in the capital stock and the change in the name of the company did not warrant a rescission of his contract.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming, by an equal division of opinion, the judgment of Mr. Justice Britton, who had ordered the name of Smyth to be struck off the list of contributories of the Port Arthur Wagon Co., where it had been placed by order of the Master-in-Ordinary.

The material facts are stated in the above headnote.

Bain K.C. and *M. L. Gordon* for the appellant.
Strachan Johnston for the respondent.

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

DAVIES J.—There has been much conflict of judicial opinion upon this application to settle the name of W. R. Smyth upon the list of contributories of the insolvent company being wound up.

The Master-in-Ordinary settled his name on the list of contributories.

On appeal to a justice of the High Court, Britton J. allowed the appeal and struck off Smyth's name.

On further appeal to the Appellate Division the judgment of Mr. Justice Britton was affirmed on an equal division of the learned judges of that court, whereupon the present appeal to this court was taken.

I have given the facts of the case much consideration and have reached the conclusion that the appeal should be allowed with costs throughout and the judgment of the Master-in-Ordinary restored for the reasons stated by him, and those stated by Chief Justice Meredith and Riddell J. in the Second Appellate Division.

I think the power of attorney executed by Smyth to the Port Arthur Wagon Company, Limited, to sign the prospectus of that company, dated the 23rd September, 1910, and which was duly filed with the Provincial Secretary together with the prospectus, as required by the provincial law, signed by Smyth and the other directors, conclusive as against Smyth, and that his attempted explanation as to why he signed was unsatisfactory.

I cannot think it reasonable or possible that after such a solemn and deliberate act, he can now be heard to say that he never was a shareholder or a director in the company.

Whatever might be said as to other branches of the case, this fact of the signing of the power of attorney to put his name as a shareholder and director to such

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an important official document as the prospectus of the company, intended to be and which was duly filed as by law required with the Provincial Secretary, is conclusive to my mind.

IDINGTON J.—The numerous excuses given by, or on behalf of, respondent for relieving him from the position that the report of the learned Master-in-Ordinary had placed him in as a contributory, have been so well met and disposed of by the Master-in-Ordinary and the learned Chief Justice of the Common Pleas (with each of whom in all essential parts of their respective reasons for judgment I agree) that it seems needless for me to reiterate same here.

I also agree with the greater part of the reasons assigned by Mr. Justice Riddell, but cannot feel so charitably disposed as he seems, and hence inclined to accept at its face value, as he does, the respondent's story of how and why he felt qualified to act in discharge of a most grave and serious part of a director's duties when only qualified to do so by reason of something that did not take place for four months after his joining in such discharge of a director's duty.

I am afraid respondent has deceived himself. An argument is made that the appellant did not call the other alleged actor in such a comedy to contradict him.

One of those had, as shewn by the quotation Mr. Justice Rose gives, to all intents and purposes already sworn to what was quite inconsistent with the story in the sense in which it is now put forward.

The marvel is that the other, if present in court as alleged, was not called to corroborate respondent if he could be got to do so.

It is not necessary to assume that respondent manufactured the whole story. Having regard to his failure

to respond to the demands made upon him for payment of calls made, upon the stock allotted to him, it was quite natural he should, when asked to act as director, make some such remark as he swears to, and equally well might Lindsay, hearing it, recall the fact that he was to give him some stock got for nothing and make the response alleged.

That any one concerned in such idle talk could have taken it seriously as the basis for qualifying a director to act, and yet the implementing of such a basis be delayed for four months, I cannot accept.

Much less can I understand why he should, for the many months thereafter, continue to submit, as previously, without response, to be dunned so persistently, if in fact he intended to repudiate acceptance of the allotment. That was a time for him to speak or forever afterwards be silent.

The case, as I view it, is that of a man who, having agreed to take stock, might have withdrawn from the consequences of that act at least up to the time when interpreted by those concerned as a proposal still on foot and valid, and when they assented thereto, by the allotment they duly made, and by his election as director, and possibly including the time of his failure to repudiate either, but when all that is followed by an act as a director which involved possible serious consequences to himself and others, he was thereby inviting to join him and rely upon his representations, he should not be permitted, years afterwards, successfully to say that what he did rested, *not* upon the written record, but upon, and only attributable to, some idle persiflage.

It is idle to dwell upon the frame of the contract as it originally stood as being only between him and Cameron. Neither that sort of document, nor even articles of association, can be said to be in themselves,

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when standing alone, a contract with the company which is created later.

When the company has come into existence the subscription may be given vitality, or possibly be nullified by those becoming empowered under its charter to act in relation thereto.

The conduct of the parties concerned must ever remain as the true test of what measure of responsibility there may attach to any one claimed to have become legally liable to be placed on the list of contributories.

Indeed, as said long ago by Lord St. Leonards, in the case of *Spackman* v. *Evans* (1), at page 208:—

> A man may become a contributory to a company by his acts. although he has not made himself legally a member of it.

I think possibly *Leeke's Case* (2), of all the many cases I have looked at, bears the most instructive resemblance, in its leading features, to this, in the way of supporting the line of thought I have adverted to.

The contributory there in question had never signed any application for shares, but had taken some little part in the initiatory steps towards the creation of the new company in which he was allotted shares, and his acceptance of the office of director, though evidenced only by a simple act of very minor importance, was held sufficient to bind him also in way of an acceptance of what had been allotted.

And curiously enough, in that case, there was also a discarded side-light story, as to the possibility of the shares having been paid up.

The case of *Robert* v. *Montreal Trust* (3), decided what some of us thought of men who subscribe and pay no heed to the consequences of their acts.

(1) L.R. 3 H.L. 171. (2) 6 Ch. App. 469.
(3) 56 Can. S.C.R. 342.

I do not feel called upon to express any opinion upon the validity or invalidity of the liquidator's transaction with Wiley. The proper time to have raised any contention, if ever founded, as to the status of the liquidator, was before or immediately after these proceedings had begun.

I think this appeal should be allowed with costs throughout and the report of the learned Master-in-Ordinary be restored and confirmed.

ANGLIN J.—The question raised on this appeal is the liability of the respondent to be placed on the list of contributories of the Port Arthur Wagon Company, which is being wound up, in respect of 50 shares of preferred stock. The Master held the respondent liable. On appeal a judge of the High Court Division reversed this holding and removed his name from the list of contributories. This judgment was affirmed by an equally divided court of the Appellate Division.

The liquidator asserts the liability of the respondent on two grounds: (a) a subscription by him for the 50 shares duly accepted by allotment; (b) conduct estopping him from denying that he is the holder of these 50 shares.

(a) Mr. Justice Britton, Mr. Justice Riddell, Mr. Justice Lennox and Mr. Justice Rose all agree that there was no subscription by the respondent for the shares allotted to him. The document relied on as a subscription is an agreement made in September, 1909, with Mr. (now Sir) Donald C. Cameron and other prospective subscribers, to take 50 shares in a projected company—

> the Port Arthur Manufacturing Company * * * with a capital of $1,000,000, divided into 10,000 shares of $100 each.

The subscribers covenanted and agreed with each other to become incorporated. No other subscriptions

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to this agreement were obtained. It was not proceeded with. Another company, the Port Arthur Wagon Company, was incorporated in January, 1910, with a capital of $750,000. The respondent had nothing whatever to do with this incorporation. Long before it took place—indeed, very shortly after he had signed the September agreement—he learned that a representation made to him by the promoter, Lindsay, when his signature was obtained, that the Town of Port Arthur had passed a by-law giving a cash bonus of $100,000 to the projected company, was untrue and he at once notified Lindsay, who had secured his subscription, that he withdrew it on account of the misrepresentation and Lindsay acquiesced in his doing so. There was nobody else whom he could notify at that time. Lindsay had also told him that he had practically all the $1,000,000 capital subscribed, which was likewise an untrue statement.

The company incorporated decided to issue part of its stock as preference shares, and it is for 50 of these preferred shares that it is sought to hold the respondent as a contributory. As Mr. Justice Riddell says:—

> In my view it cannot be successfully contended that a subscriber for shares in a proposed company with $1,000,000 can be compelled to take shares in a company with only $750,000, nor can a subscriber for shares be compelled to take "preferred shares"—and unless his conduct subsequent to the allotment bound him the respondent must be cleared of liability.

(b) The estoppel which is invoked against the respondent is rested on two grounds: (1) his neglect to answer numerous letters notifying him of the allotment of shares to him, demanding payment of calls, advising of meetings, etc. (2) The execution of a power of attorney authorising the appending of his name as a director to a prospectus of the company now in liquidation.

(1) If the respondent had ever subscribed for the shares which it is sought to fasten upon him, a great deal might be made of his failure to answer letters of the company's secretary addressed to him, or to take other steps to repudiate liability. But I know of no ground on which a person who has never subscribed can be made liable in respect of shares, which a company has purported to allot to him, merely by inaction —by refusing or neglecting to reply to letters notifying him of calls, etc., or failing to take steps to have his name removed from the books of the company as a shareholder. No authority for such a proposition was cited and I venture to think none can be found.

(2) The matter of the power of attorney is not so easily disposed of. If the only shares in respect of which the respondent could have qualified as a director had been the 50 shares here in question, his signature to the power of attorney and action upon it which ensued might be taken to estop him from denying his liability as a contributory. But he makes this explanation about the signing of the power of attorney: He had been elected a director of the company without his knowledge or assent. The company's secretary had written him stating that the company was obliged to issue a prospectus and that it was necessary that all the directors should sign it and assent to retain office. In answer to this letter he went to Mr. Lindsay's office and tells this story of what happened there.

Q.—Then do you recollect sending this power of attorney? A.—I do.

Q.—Was that signed in Mr. Lindsay's presence? A.—Yes.

Q.—Tell His Honour what took place then? A.—Mr. Lindsay—Mr. Fox, I believe the gentleman who was here had written me regarding calling at his office that he wanted to see me particularly, and I think I wrote him to say that I would be in the city some day and would perhaps call on him. I don't remember exactly the circumstances, what I said in the letter. However, I called at the office. Mr. Lindsay and Mr. Fox were both there, and I told Mr. Lindsay there, and Mr.

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Fox as well, that I couldn't sign no prospectus, that I had no stock, had subscribed for no stock in this company; didn't understand why they should ask me to sign any prospectus. The reasons they gave me for asking me to sign a prospectus were that they had put my name in as a director—which was absolutely without my authority—that they put my name as a director for this company, and they were stuck regarding the prospectus because my name had been put in as a director, and asked me if I would sign this power of attorney, and I said, "No, I will not sign it because I am not a shareholder." Then Mr. Lindsay said: "You are a shareholder of the company because I have given you some of my stock" for services that I had done for him in connection with introducing Mr. Price and Mr. Clair to Mr. Lindsay some time the previous winter, and he said that he placed to my credit, in my name, a certain number of shares fully paid up. I says: "Under those circumstances I will sign the prospectus on the condition—taking your word for it—that you have placed to my name 25 shares of stock in the company that you are asking me to sign the prospectus for."

Q.—Did you ever attend a directors' meeting, Mr. Smyth? A.—Never.

Q.—Some time later you got a certificate shewing that you were the holder of 25 shares of stock? A.—I did.

Q.—Do you know who sent that? A.—Mr. Lindsay sent me that. Certificate marked exhibit No. 12.

Q.—Did you see this prospectus that was signed Mr. Smyth. A.—No

Neither Mr. Lindsay nor Mr. Fox was called to contradict this story, although both were in court and heard it sworn to by Mr. Smyth. Mr. Fox gave other evidence in rebuttal. The stock certificate produced corroborated Mr. Smyth's statement as to the 25 shares given him by Lindsay. He was not discredited as a witness by the Master who heard his evidence. His statement is accepted by Riddell J. as well as by Britton, Lennox and Rose JJ. There is nothing to shew that he did anything whatever in respect of the 50 shares. His signature to the power of attorney, and the use of his name as a director, which he permitted, is fully explained by his understanding that he was the holder of the 25 shares given him by Lindsay. The fact that the certificate issued to him for 25 shares bears a date subsequent to that of the prospectus has no special significance. He acted on

the assumption that Lindsay had transferred, or would transfer, the shares to him. Smyth did no act which he thought, or which anybody else who knew of the arrangement in regard to the 25 shares could reasonably think, was based upon his being also the holder of 50 shares of preferred stock. There was, therefore, as Mr. Justice Rose points out, nothing done by the respondent which amounted to a representation that he was the holder of 50 shares of the stock of the Port Arthur Wagon Company—nothing which he knew, or should have known, was calculated to create that impression. The foundation for an estoppel is, therefore, lacking.

Morrisburg and Ottawa Electric Railway Co. v. *O'Connor* (1), cited by Mr. Justice Riddell, was not, as is that at bar, a case of no subscription by the allottee—it was a case of a voidable subscription not repudiated with reasonable promptitude, in that respect not unlike a a case recently dealt with in this court; *Robert* v. *Montreal Trust Co.* (2).

For these reasons and those stated by Mr. Justice Rose, I would dismiss this appeal.

BRODEUR J.—We are called upon to decide whether the respondent, W. R. Smyth, should be placed on the list of contributories of the appellant company in liquidation.

There is a great divergence of opinion in the court below as to the liability of the respondent. The Master-in-Ordinary, who heard the evidence and whose findings are, therefore, entitled to a great deal of weight, and two judges of the Appellate Division have

(1) 34 Ont. L.R. 161; 23 D.L.R. 748.

(2) 56 Can. S.C.R. 342; 41 D.L.R. 173.

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declared that he was liable, while the other three judges who dealt with the case stated that he was not.

The defence of Smyth was that he never subscribed nor applied for shares in the appellant company, and that any subscription which might have been obtained from him was obtained by fraud or misrepresentation. But the latter ground seems to have been abandoned, since there is no mention of it in his notice of appeal from the report of the Master-in-Ordinary.

Some other objections have been raised before this court and the Appellate Division, viz., the one concerning the validity of the sale of the assets to Wiley, but as the facts on which these grounds might be based have not been fully inquired into, it would be rather dangerous to pronounce upon them. I prefer to confine myself to the pleadings and to the facts which have been tried.

On the 24th September, 1909, Sir Douglas Cameron and the respondent Smyth signed the following document:—

> We, the undersigned, do hereby severally covenant and agree each with the other to become incorporated as a company under the provisions of the first part of the "Companies Act" under the name of The Port Arthur Manufacturing Company, Limited, or such other name as the Secretary of State may give to the company, with a capital of one million dollars, divided into ten thousand shares of one hundred dollars each.
>
> And we do hereby severally, and not one for the other, subscribe for and agree to take the respective amounts of the capital stock of the said company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such company to the said amounts.
>
> In witness whereof we have signed.
>
> D. C. Cameron (s) 1 Sept. 24th, Toronto, Winnipeg, Man.
> W. J. Lindsay as Vice-President.
> W. R. Smyth (s) 50 Sept. 24th, Rydal Bank, W. J. Lindsay.

As far as the signature of Smyth was concerned, it was obtained on the solicitations of a company promoter by the name of W. J. Lindsay, whose name

appears on the above document as having witnessed the signatures of the subscribers.

In the month of November, 1909, at the request of Lindsay an application was made to the Secretary of of State by the firm of solicitors Starr, Spence & Cameron, and two of their students, for the incorporation of the company under the name of Port Arthur Wagon Company. The application stated that the amount of capital stock of the company would be $750,000. The application was granted and letters patent were issued on the 11th January, 1910.

The organization of the company was then proceeded with and a by-law was passed declaring that 3,000 shares of the capital stock of the company be issued as preferential shares of $100 each with cumulative dividend of 7% and priority over all the other shares of the capital stock of the company.

On the 22nd March, 1910, at a meeting of the directors of the company, the allotment of preferred shares was made to different persons, namely, to Sir Douglas Cameron for one share and to W. R. Smyth for 50 shares, and Smyth was elected as one of the directors. A notice of allotment was given to the respondent. He was at the same time also informed of his election as director and was given notice of different meetings of directors which were called later on; but he does not seem to have ever attended any of these meetings.

He was called upon also several times to pay calls upon his stock.

At first he did not answer, but on the 19th October, 1911, he wrote stating:—

It is impossible for me to accept your draft for reasons which I have several times explained to the company at their office, while I was in Toronto. I also explained my position to the Honourable Mr. Cameron of your city, who was then, I believe, president.

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SMYTH'S CASE.

Brodeur J.

As to what those reasons were, the evidence is rather conflicting. The secretary of the company said that Smyth had never repudiated his subscription, and he added that Sir Douglas Cameron had reported at a meeting that he had met Smyth and that he was unable to take up drafts on account of losses he had got in a fire. On the other hand, Smyth states in his evidence that he told to his co-shareholders that his subscription had been obtained by fraud and misrepresentation and that he should not be considered as a shareholder.

On the 29th August, 1910, he, however, as a director, gave to the secretary of the company a power of attorney to sign the prospectus of the company.

Now he says that when he was asked by Lindsay and the secretary of the company to give that power of attorney, he objected, stating that he was not a shareholder; but Lindsay answered that he had put some of his own shares in his name.

That story does not agree with what has been said by the secretary of the company, who claims that, to his knowledge, Mr. Smyth never repudiated his contract to take shares in the company.

In those circumstances should he be held liable for the 50 shares which he subscribed for on the 24th September, 1909?

He complains that the company incorporated is known as Port Arthur Wagon Company, and that his subscription was for a company called Port Arthur Manufacturing Company. It is true that the latter name was mentioned in the document which he signed, but it is stated also in that document that his subscription could cover any other name that the Secretary of State might give. It is no wonder that the name *Port Arthur Manufacturing Company* would not be

accepted by the Secretary of State, because it was too general; and it is no wonder, therefore, that the application, in order to meet that objection which would certainly be made to the name of the company, would have described it the *Port Arthur Wagon Company.* Besides, in his evidence, Mr. Smyth admits himself that it would not be an objection which would have prevented him from carrying out his obligation.

It is likewise argued that the capital of the company is not $1,000,000, as stated in the subscription, but only $750,000. He could not, in my opinion, complain of that fact. If there were evidence to prove that with a capital of less than $1,000,000 the company could not carry out its work, that might be a very serious objection. But there is no such evidence.

He further says:—

> I have subscribed for common shares and not for preferential shares, as were allotted to me.

I do not see how he can complain of that, because the preferential cumulative shares were far more advantageous than the ordinary shares.

He says that he had notified Lindsay that he could not carry out his contract. Well, Lindsay was not the company, and I think his duty was, when he received notice of his allotment, to formally notify the company that his subscription would not cover the allotment which had been made.

He accepted the position of director; he signed the prospectus; and it seems to me now that he is estopped from stating that he is not liable for the agreement which he signed.

For those reasons, I think that he has been properly put on the list of contributories and that the decision of the Master-in-Ordinary should be restored with

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costs of this court and of the courts below. Appeal allowed.

Falconbridge C.J.

FALCONBRIDGE C.J.—For the reasons given in the court below by the Chief Justice of the Common Pleas and Mr. Justice Riddell, I would allow this appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Bain, Bicknell, Macdonnell & Gordon.*

Solicitors for the respondent: *Thomson, Tilley & Johnston.*

FREDERICK K. MORROW, CARRYING ON BUSINESS AS THE MORROW CEREAL COMPANY (DEFENDANT) — APPELLANT;

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*June 13, 14.
*Oct. 9.

AND

THE OGILVIE FLOUR MILLS COMPANY (PLAINTIFFS) ..... — RESPONDENTS.

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

Contract—Evidence—Non-jury trial—Findings of judge—Interference with on appeal—Measure of damages.

In an action claiming damages for breach of contract alleged to be made through the medium of telegrams and letters confirming a verbal agreement, the defence was that there was no completed contract or if there was that it had been terminated by laches of the plaintiff. The trial judge held that there was an existing contract and awarded the plaintiff the damages claimed but his judgment was varied by the Appellate Division which set aside the assessment of damages and directed a reference therefor.

Held, per Davies and Anglin JJ. and Falconbridge C.J. that, though an appeal lies from the judgment of a judge at the trial on questions of fact as well as of law, on the former an appellate court should not interfere with such decision of the judge who has seen and heard the witnesses unless there is some good and special reason for doubting its soundness. In this case there was no such reason and the judgment at the trial should stand.

Held also, that as the damages were assessed by the trial judge on the principle laid down in *Roth* v. *Taysen* (12 Times L.R. 211) and the evidence justified the assessment the judgment should not have been varied.

Brodeur J. also held that the judgment on the trial should be restored.

Idington J. dissented on the ground that the evidence did not prove the existence of any contract between the parties.

Judgment of the Appellate Division (41 Ont. L.R. 58; 39 D.L.R. 463) reversed in part.

APPEAL and CROSS-APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), varying the judgment at the trial in favour of the plaintiffs (respondents).

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

(1) 41 Ont. L.R. 58; 39 D.L.R. 463.

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The matters to be decided are indicated in the above head-note and the facts are fully stated in the judgments published herewith.

Harcourt Ferguson for the appellant.
Tilley K.C. for the respondents.

DAVIES J. concurred with Anglin J.

IDINGTON J. (dissenting)—The appellant's place of business was Toronto, where he carried it on under the name of Morrow Cereal Company. The respondent's was in Montreal. One Weeks, a sales' agent so called of the latter, and appellant travelled on a train from Montreal to Toronto and being engaged in the like business of dealing in flour had naturally a conversation relative to prices of a certain brand of flour which went so far as the appellant naming a price he was likely to agree to for sale to respondent of a large quantity thereof for future delivery.

They parted at Toronto on the morning of the 13th Oct., 1916; appellant stopping there and Weeks going on to London.

On the afternoon and evening of same day they had phone conversations which led to the appellant sending Weeks the following telegrams:—

Toronto, Ont., Oct. 13/16

140 rn bn 30 rush
J. E. Weeks, Esq.,
Tecumseh House, London, Ont.
We confirm sale six thousand bags October shipment four thousand November seven five bulk Montreal also your giving us until to-night on ten thousand more at seven dollars Montreal thanks.

MORROW CEREAL COMPANY.

Toronto, Ont., Oct. 13th, 1916.

J. E. Weeks,
Tecumseh House, London, Ont.
Book ten thousand bags seven dollars bulk Montreal October November shipment our option.

MORROW CEREAL CO.

He further sent respondent on same and next day respectively the following:

Confirmation of sale.

Morrow Cereal Company.

Toronto, Oct. 13th, 1916.
No. 1552.

To: The Ogilvie Flour Mills Co., Ltd.
Address: Montreal, Quebec.
Date wanted, see below.

Price Per
10,000 98's-90% Patent Ontario Winter Wheat Flour...$7.05 Bbl.
Bulk Basis Montreal.

Date of Shipment:
6,000 bags—October,
4,000 bags—November,

10,000 bags.

MORROW CEREAL COMPANY.
Per "Morrow."

Confirmation of sale.

Morrow Cereal Company.

Toronto, Oct. 14th, 1916, No. 1553.

To: The Ogilvie Flour Mills Co., Ltd.
Address: Montreal Que.
Date of shipment (November)
10,000 bags 90% Patent Ontario Winter Wheat Flour,
$7.00 Bbl.
Bulk Basis Montreal.
MORROW CEREAL COMPANY,
Per "Morrow."

The respondent sent on 23rd Oct., 1916, the following letter:—

October 23rd, 1916.

Messrs. Morrow Cereal Co.
Toronto, Ont.

Dear Sirs:—We attach herewith copy of bill of lading covering 20,000 empty bags which we forwarded to you on the 19th inst., to cover our orders 279 and 280 which are being mailed to you to-day under separate cover.

Yours truly,
The OGILVIE FLOUR MILLS CO., LTD.

and on same day wrote the following letter with the enclosures which follow it as hereunder:—

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Idington J.

The Ogilvie Flour Mills Co., Ltd.

Oct. 23rd, 1916.

The Morrow Cereal Co.,
Toronto, Ont.

Gentlemen:—We beg to confirm exchange of wires:—Received: "Kindly confirm sale of Oatmeal Feed quick." Sent: "Sorry too late to confirm. Very best could do would be one car at twenty-three. Heavily oversold."

Also we herewith attach our confirmations of our recent purchase of flour from you. We are pleased to advise the empty bags in which to make shipment of this flour went forward to you last Friday per S.S. J. H. Plummer, and we would caution you to be very careful to number these different bags from the different mills as outlined during the writer's recent interview with you.

We are sorry you did not wire us on Saturday with reference to the Oatmeal Feed as promised, as we only concluded a sale of Oatmeal Feed at $24 a ton on Saturday afternoon, believing you were not going to be able to handle same.

We are now asking everybody $24.00 and confining our sales to small lots in mixed cars, as we are so heavily oversold we cannot take care of any more straight cars, neither do we hope to be able to do so much before the 1st January.

Yours truly,
THE OGILVIE FLOUR MILLS CO., LTD.
J. E. Weeks,
General Sales Agent.

Enclosed in letter of 23rd October, 1916.

Order No. 279.

Original

Oct. 14th, 1916.

The Ogilvie Flour Mills Co. Limited,
Purchasing Department, Montreal, Que.

To Morrow Cereal Co., Toronto.

We beg to confirm purchase of the following goods:—

Quantity 10,000 bags

of 90% Patent Ont. Winter Wheat Flour, at seven dollars cents per barrel of 196 pounds.

Inspection usual.

Delivery November.

Basis of purchase f.o.b. Mill Montreal Bulk.

Ship to Ogilvie's City Mill Sdg., Montreal.

Per Grand Trunk delivery.

Terms cash on acceptance of goods.

Payment in.....funds.

Special terms (if any).

Buyers to have privilege of inspecting cars before paying draft.

Your confirmation of sale No. 1553.

THE OGILVIE FLOUR MILLS CO. LIMITED.

Per.....

Please quote above Order No. on your invoice. Goods bought on grade, or sample, not accompanied by official inspection certificate, must be subject to our examination before payment of draft.

Enclosed in letter of 23rd October, 1916.

Order No. 280.

Original Oct. 13th, 1916.

The Ogilvie Flour Mills Co., Limited.
Purchasing Dept., Montreal, Que.

To Morrow Cereal Co., Toronto.

We beg to confirm purchase of the following goods:—

Quantity 10,000 bags

of 90% Patent Ont. Winter Wheat Flour at seven dollars and five cents per barrel of 196 pounds. Inspection usual. Delivery 6,000 bags in Oct. 4,000 bags in Nov. Basis of purchase f.o.b. Mill Montreal Bulk.

Ship to Ogilvie's City Mill Sdg., Montreal.

Per Grand Trunk delivery.

Terms cash on acceptance of goods.

Payment in.....funds.

Special terms (if any).

Buyers to have privilege of inspecting cars before paying draft. Your confirmation of sale No. 1552.

The OGILVIE FLOUR MILLS Co. LIMITED.
Per.....

Please quote above order No. on your invoice. Goods bought on grade, or sample, not accompanied by official inspection certificate, must be subject to our examination before payment of draft.

On receipt of the foregoing the appellant wired as follows:—

Toronto, Ont., Oct. 24, 1916.

The Ogilvie Flour Mills Co. Ltd.
Montreal, Que.

Your acceptance of flour received this morning twelve days after our offer sorry too late heavily oversold.

MORROW CEREAL Co.

To this respondent same day replied as follows:—

Montreal, Que., Oct. 24, 1916.

Morrow Cereal Co.,
Toronto, Ont.

What does your telegram of even date mean? We do not understand it.

The OGILVIE FLOUR MILLS.

The respondent brought this action on the 7th November, 1916, founded upon part or whole of the foregoing if applicable.

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The respondent contends that the appellant's messages from Toronto to Weeks form the contract, when read in light of the conversations had between him and Weeks.

Obviously it would have some difficulty in making thereout alone a contract complying with the Statute of Frauds and it falls back upon the confirmation of the contract sent by appellant directly to the respondent at Montreal. If there were nothing more in the case, as the courts below evidently have held, there might not be much difficulty in respondent's way. But there are a number of things in the conversations leading up thereto in regard to which the appellant and Weeks differ.

I shall not dwell thereon for I cannot, in my view of the whole case, get rid of the opinion I have formed that the letter of the respondent and the enclosures therein which are specificially referred to as

our confirmation of our recent purchase of flour from you

were intended to form part of the contract from respondent's point of view as originally conceived.

It was clearly the result of the well understood mode of doing business between them that each party should so express its understanding in writing otherwise no such communications would have been resorted to or have existed.

But for some such system the obvious result would be, that he, sending a telegram or letter merely as result of a prior oral bargain, would be bound in law, whilst the other would not.

It is idle to argue that such contracts are possible and that such a one-sided method of bargaining often does occur.

It is not a method, I imagine, of very extensive use.

It is too absurd for business men dealing in commodities of daily fluctuating value to act upon as a rule.

However all that may be with others, I am clearly of the opinion that such loose methods of business formed no part of the daily method followed by those litigants.

The appellant, in compliance with the sane and safe way, did not treat his telegram to Weeks as ending the business, but sent the confirmatory and explicit statement of the contract to the respondent's head office in Montreal, and its replies thereto set forth in the enclosures of 13th and 14th October respectively were doubtless framed on the days they bear date for the purpose of being despatched to the appellant but by some oversight were delayed until Weeks had returned to Montreal and happened to observe the omission when attending to another proposal which takes up a great part of his letter but has no bearing on that in question herein.

By that time it was too late, but none the less it was so begotten of their common understanding or system adopted to express a part of an intended contract that they were sent forward as a matter of course.

It is stoutly argued that they neither formed a part of the contract now in question nor even were so intended.

I cannot agree therewith; or rather, I should say, they ought to have formed part thereof if properly framed and sent in due time.

It is not pretended that the respondent can insist on the maintenance of such contracts if their confirmations such as I indicate were respectively a necessary part thereof. The fluctuating market did not permit of any such suspense or delay.

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Moreover, there is a clear departure from the express terms of the appellant's confirmatory expression of the contract as he understood it.

These points I need not elaborate. They are self-evident to any one closely analyzing each party's confirmations and comparing same.

The result is, in my view, there never was a contract and many other points made and argued at length need not be considered.

The appeal should be allowed with costs.

ANGLIN J.—The evidence of the two witnesses who gave oral testimony about the contracts sued upon is so contradictory that, unless the documents in the record are decisive, the truth of one story or the other must be determined by their respective inherent probabilities or by the comparative credibility of the witnesses. The defendant's witness—he is in fact the defendant—asks us to believe that two writings, each headed "confirmation of sale" and otherwise in the form of a sale note, were merely offers and were sent pursuant to an understanding with the plaintiff's witness that they should be so treated by the plaintiff. This *ex facie* improbable story is denied by the plaintiff's witness, who, in turn, asks us to accept his statement that two other writings, which he calls in his letter

> our confirmations of recent purchase,

and on their face purport to be such—giving the full particulars of bought notes—were sent not to complete the contracts which they evidence but merely to give the defendant the number by which those contracts would be designated in the plaintiff's records—a story perhaps not quite so improbable as that of the defendant's witness, but undoubtedly not free from difficulty.

On the whole, with Mr. Justice Riddell, I cannot say that the trial judge was wrong in accepting the plaintiff's version that two contracts had been concluded between Weeks and Morrow as a result of conversations on the train and by telephone and telegrams, of which the documents above referred to were, as they purport to be, merely confirmations.

I think the trial judge must have thought Weeks' testimony more credible than Morrow's. One or two incidents in the course of the trial indicate that Morrow's manner of giving evidence and the unsatisfactory character of his answers impressed the learned judge unfavourably.

I think it might well be regarded as "a rash proceeding" on our part, under the circumstances of this case, to reverse the finding of the judge who tried it and saw the witnesses who are in conflict in the witness-box, affirmed as it is by the majority of the judges of the appellate court. *Nocton* v. *Ashburton* (1). While I fully appreciate the right of appeal from the finding of a trial judge on fact as well as law so much insisted upon by Meredith C.J.C.P. in his dissenting judgment, his views seem scarcely in accord with very recent statements by their Lordships of the Judicial Committee of the duties of an appellate court in dealing with such an appeal. In *Ruddy* v. *Toronto Eastern Ry. Co* (2), speaking of the judgment of a trial judge their Lordships say:—

> From such a judgment an appeal is always open, both upon fact and law. But upon questions of fact an appeal court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions.

In *Wood* v. *Haines* (3), their Lordships said at page 586:—

(1) [1914] A.C. 932, 945. (2) 116 L.T. 257, 258; 33 D.L.R. 193.
(3) 38 Ont.L.R. 583; 33 D.L.R. 166, 169.

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It must be an extraordinary case in which the appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial judge who has seen and watched them whereas the appellate judge has no such advantage.

There remains to be considered the cross-appeal by which the plaintiffs seek a restoration of the assessment of damages made by the learned trial judge which was set aside by the Appellate Division. The learned appellate judges hold that the sum allowed was excessive but do not state the error in which the trial judge, in their opinion, fell and *advisedly* refrain from indicating the measure of damages to be applied on the reference which they direct. I am, with respect, of the opinion that the award of damages by the trial judge should not have been disturbed and I cannot but think it unwise, to say the least, and calculated unduly to prolong litigation, to leave a referee without any guide as to the proper basis on which to assess the damages when, as here, an appellate court holds that the trial judge was in error as to the principle upon which they should be assessed and that principle is so clear as the learned judges of the Appellate Division apparently thought it.

The trial judge allowed the plaintiffs the difference between what it actually cost them to procure flour to replace what the defendants had failed to deliver and what it would have cost at the contract prices. The latter was $7.05 per barrel for 6,000 bags to be delivered before the 1st of November, and for 4,000 bags, $7.05, and for 10,000 bags, $7 per barrel, to be delivered before the 1st of December. The defendants repudiated their contracts on the 24th of October. The first evidence of any election by the plaintiffs to accept this repudiation and put an end to the contracts is furnished by the commencement of this action on the 7th of November.

I agree with the statement made by counsel for the

defendants in their factum that the correct rule as to the measure of damages under these circumstances is stated, by Lord Esher M.R. in *Roth & Co.* v. *Taysen* (1), in these terms:—

> When there was a repudiation of a contract for the purchase and sale of goods treated as a breach the difference between the contract price and the market price of the goods on the date of the breach was the measure of damages, subject to this, that if the date of the breach was not the day of delivery another rule applied. In this latter case repudiation when accepted was treated as a breach of the contract before the day of delivery, and the damages would not be the difference between the contract price and market price on the day of breach, but must be assessed by the jury having regard to the future day of delivery. But this latter rule was qualified by this, that the plaintiff who had treated the repudiation as a breach was bound to do what was reasonable to decrease the damages.

See also Mayne on Damages, 7th ed., p. 212.

The plaintiffs bought 7,000 bags of flour at $8.10 and 13,000 bags at $8.40 per barrel to replace the flour which the defendants had refused to deliver. As to the 6,000 bags deliverable before the 1st of November, the defendants themselves say in their factum that the Toronto price of flour of the quality contracted for in bags was $8 per barrel at the end of October, to which must be added 15 or 16 cents a barrel for freight to Montreal. They, therefore, can have no cause of complaint as to the purchase made to cover the 6,000 bags then due at $8.10 a barrel.

But they complain of the $8.40 paid for the remaining 13,000 bags. The only evidence of market prices at the end of November is given by John Kennedy and Alex. McLeod. Kennedy says the Toronto Board of Trade quotation at the end of November was $7.65-$7.75 a barrel, to which he would add 15 cents for freight to Montreal. His last transaction, however, was on the 28th of November when he paid $7.90 in Montreal. But McLeod tells us that the prevailing

(1) 12 Times L.R. 211, 212.

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price at the end of November was $8.45 a barrel and, giving reasons for the statement, he says that the Toronto Board of Trade quotations are not a fair indication of current prices of flour. The learned trial judge may have preferred to be guided by Mr. McLeod rather than by Mr. Kennedy. If so, it is impossible to say that this was an error on his part. There is nothing to indicate that Mr. McLeod is not a trustworthy and reliable witness. The learned judge saw and heard both witnesses and was in the best position to determine upon which of them he could most safely rely. If, therefore, the damages in respect of the 14,000 bags then deliverable should be fixed as of the 30th of November, the $8.40 a barrel paid for the 13,000 bags now under consideration was five cents less than the market price. In respect of the other 1,000 bags the defendants have the benefit of the earlier purchase of 7,000 bags at $8.10.

There is no evidence that the plaintiffs could have obtained a contract in the interval between the 7th and the 30th of November on any better terms. The burden was upon the defendants to shew that they could, if that were possible. The plaintiffs had all the inconvenience of having to find flour to replace what the defendants failed to deliver, and it is by no means clear that during that period 20,000 bags of flour could be easily picked up on the market. At all events, I know of no principle on which the plaintiffs could have been required to take the risk of purchasing before the 30th of November at a price higher than those named in the contracts thus exposing themselves to loss should the price decline between the dates of such replacing purchases and the 30th of November.

Applying the rule laid down in *Roth* v. *Taysen* (1),

(1) 12 Times L.R. 211.

I think the trial judge, under these circumstances, did right in taking as the measure of the damages sustained by the plaintiffs the amount by which the cost of the flour procured by them exceeded what would have been the cost to them of the like quantity of flour of same quality if delivered by the defendants pursuant to their contracts.

I would, therefore, dismiss the main appeal and allow the cross-appeal, both with costs, and would restore the judgment of the learned trial judge.

BRODEUR J.—The question is whether the appellant undertook to supply the respondent with 20,000 bags of flour. The negotiations were carried out by the appellant himself and Weeks, the sales' agent of the respondent. They met together on a train going from Montreal to Toronto. After a great deal of talk, it was stated by Weeks that his company would purchase 20,000 bags of flour, 10,000 at $7.05 and the balance at $7, and that with such a quantity they would stay out of the market for a while. Morrow is a large flour merchant in Toronto, and the respondents are likely the most important dealers in that commodity in the country.

The appellant and the respondent are therefore serious competitors and the idea of seeing the Ogilvie company out of the market, and the price of $7.05, were very attractive to the appellant, and he was ready to close at $7.05 for the 10,000 bags, but as the contract had to be made for the whole quantity of 20,000 he would consider the matter and would communicate during the day with Weeks who was going to London, Ontario.

There is some divergence between those two men as to what was their conversation, and if the case had

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to be decided on the oral evidence of those two witnesses the respondent company, being plaintiff and having the onus, must fail. But the trial judge, who saw them both in the box, evidently accepted the statements made by Weeks in preference to those of Morrow. Besides, the written evidence we have shews conclusively that Weeks' story should be accepted.

During the day, on the 13th of October, 1916, Morrow called Weeks on the telephone and said that he was ready to contract for the 10,000 bags at $7.05, but could not give a definite answer as to the other 10,000 bags. He was asked to put that in writing and sent the following telegram:—

Toronto, Ont., Oct. 13/16.

J. E. Weeks, Esq.,
Tecumseh House, London, Ont.

We confirm sale six thousand bags October shipment four thousand November seven five bulk Montreal also your giving us until to-night on ten thousand more at seven dollars Montreal thanks.

MORROW CEREAL CO.

4.05 p.m.

and the same day he sent a confirmation note of the sale of 10,000 bags to the respondent company itself at Montreal:—

Confirmation of Sale.
Morrow Cereal Company.

Toronto, Oct. 13, 1916.

To Ogilvie Flour Mills, Ltd.
Address: Montreal, Que., via date wanted.
Subject to our terms and conditions—see below:—

Quantity	Description	Price per bbl.
10,000	98's 90% Patent Ontario Winter Wheat Flour. Bulk Basis Montreal. Date of shipment. 6,000 bags October. 4,000 bags November	$7.05
	10,000 bags.	

MORROW CEREAL COMPANY.
Per Morrow.

In the evening of the same day, Morrow sent to Weeks another telegram closing the sale for the other 10,000 bags in the following words:—

Toronto, Ont., Oct. 13th, 1916.

J. E. Weeks,
Tecumseh House, London, Ont.

Book ten thousand bags seven dollars bulk Montreal October November shipment our option.

MORROW CEREAL CO.

8.17 p.m.

and the next day he sent to the respondent company a confirmation note for that last sale. There again the document is called "confirmation of sale." Now the defendant, appellant, claims that those sales were made with the condition that the respondents would stay out of the market.

We do not find that condition in his telegrams and in his confirmation notes. The offer, I understand, made by Weeks to purchase those 20,000 bags of flour was made with that condition and, as a matter of fact, he has stated that they were willing to stay out of the market.

However, the condition, as far as the respondents are concerned, has been fulfilled and there is no necessity for laying any stress upon it. It seems to me, with the evidence we have before us, and especially with the telegrams sent by Morrow and his confirmation notes, that there is no doubt about a contract having been entered into by which Morrow, doing business under the name of Morrow Cereal Company, undertook to ship during October and November 20,000 bags of flour, of which 10,000 was to be at $7 and 10,000 at $7.05.

I understand that it is a custom of trade with those dealers that when they make verbal contracts or agreements by telephone or by telegrams, to exchange confirmation notes. But those confirmation notes do not

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prevent the contract from being made from the time and date at which the agreement has been entered into. They are simply evidence of the contract but do not constitute the agreement itself.

The appellant claimed at first that the contract was at an end because the confirmation note on the part of the Ogilvie Flour Mills Company reached him only the week after. If, of course, those confirmation notes constituted the contract itself, the appellant might be right because on account of the market being so fluctuating an acceptance should be made without unreasonable delay. But then it would have been his duty to state in his telegram or confirmation notes the period during which the acceptance should take place. But no such time limit is to be found in the telegram or in the notes.

Now he says that the acceptance of his alleged offer was not made because the confirmation note of the respondent company instructed to ship to Ogilvie's City Mill Siding, Montreal, and because the word *delivery* instead of *shipment* was used with regard to the months in which it should take place.

There is evidence that with regard to the words *delivery* and *shipment* they should be considered as synonomous in the trade; and besides I see that no objection was taken to them when the notes of the respondent company reached Morrow. In fact, the only reason he gave in the telegram of the 24th of October was

> Your acceptance of flour received this morning, twelve days after our offer sorry too late heavily oversold.

No objection then as to the word *delivery* having a different meaning from the word *shipment*. I am sure that this point is the result of an afterthought.

As to the instructions to ship to the Ogilvie's City

Mill Siding, of course that would be a very serious objection if it would incur on the part of the appellant heavier responsibility. But it appears by the evidence that in shipping to that siding it would not cost him one cent more. That should be treated then simply as instructions as to delivery which would not affect the nature of the obligation of the vendor and would not increase his work.

The trial judge maintained the action and gave judgment for a fixed sum of money. His judgment was confirmed by the Appellate Division, but a reference was ordered to ascertain the amount of damages suffered by the plaintiff. In that regard there is a cross-appeal by the respondents. I would be of opinion to maintain this cross-appeal for the reasons given by my brother Anglin.

The appeal is dismissed with costs and the cross-appeal maintained with costs and the judgment of the trial judge restored.

Falconbridge C.J. concurs with Mr. Justice Anglin.

Appeal dismissed with costs; cross-appeal allowed with costs.

Solicitors for the appellant: *Miller, Ferguson & Hunter.*
Solicitors for the respondents: *Thomson, Tilley & Johnston.*

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*Oct. 29.
*Dec. 9.

THE NORTH WESTERN NATIONAL BANK OF PORTLAND (PLAINTIFFS)..... } APPELLANTS;

AND

JOHN FERGUSON AND W. W. FERGUSON (DEFENDANTS) ..... } RESPONDENTS.

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

Principal and surety—Guarantee of debt—Advances by Bank—Giving time to debtor.

F. guaranteed payment of all advances made by a bank to his son up to $10,000, no time being fixed for such payment. The bank advanced $3,000, taking a note at thirty days for the amount.

Held, Idington J. and Falconbridge C.J. dissenting, that the consent of the bank to renew the note at the end of the thirty days without the knowledge of F. did not relieve him from liability on his guarantee.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial in favour of the respondents.

The material facts are stated in the above headnote.

Tilley K.C. and *A. R. Clute* for the appellants.

McKay K.C. for the respondents.

DAVIES J.—I think we are all agreed that the defence set up by the primary debtor, W. W. Ferguson, in this case of misrepresentation on the part of the bank which discharged him from payment of the debt was properly held invalid by the trial judge and the Appellate Division.

The only ground, therefore, upon which the judg-

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

ment below affirming the dismissal of the action as against the defendant guarantor, John Ferguson, can be upheld is that he was a guarantor of a debt due and payable at a fixed time and was discharged from his liability by an extension of that time to the primary debtor without his knowledge or consent.

The guarantee is evidenced by a telegram from John Ferguson, the guarantor, to the bank and a letter confirming the telegram.

The former reads:—

I hereby guarantee advances to my son up to $10,000

JOHN FERGUSON.

And the letter reads:—

I beg to confirm my guarantee to you to the extent of $10,000 if necessary as per your wire to me.

JOHN FERGUSON.

In order to fully understand and construe this guarantee it is necessary to know the chief facts and circumstances under which it was given.

Olmstead, the vice-president of the bank, states in his evidence that W. W. Ferguson, the son and primary debtor, had told him that his father, the defendant John Ferguson, had a contract to buy horses and would be willing to guarantee such sums as the bank would advance to him, W. W. Ferguson, and that he, Olmstead, told him in reply he had looked up his father's financial ability and found it good and that he would submit the matter of an advance to the bank committee and that he did so and the advance was agreed to be made. This was some time in October, 1914.

On the 21st November following, the defendant, John Ferguson, telegraphed the bank as follows:—

All acceptable stock purchased by my son and Robert Smith will be paid for immediately on inspection. I will personally stand behind them in transaction.

To which the bank wired him a reply as follows:

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Referring your telegram Saturday must have guarantee from you for any sum advanced your son up to $10,000 regardless of stock being acceptable.

Whereupon John Ferguson sent the telegram in reply:—

I hereby guarantee advances to my son up to $10,000.

An advance of $3,000 was accordingly made on the 24th December and a short term note of 30 days, with interest at 7 per cent., taken for it by the bank.

Olmstead further states that on the day they made the advance the plaintiff bank telegraphed the defendant, John Ferguson, as follows:—

We loaned your son $3,000 to-day. Wish you would send us a letter confirming your telegram wherein you agreed to pay the advances paid to your son. Do you want Smith's name on the notes?

On the next day, he sent the plaintiff bank the following telegram:—

I appreciate your telegram. Wrote you as requested. I expect my son's associates to join in liability to the proportionate extent of their interest in transaction with him. You may be wired regarding their ability to fill contract which I am negotiating on 25 per cent. profit.

The contract John Ferguson here refers to and for the carrying out of which the advances were being made related to the purchase of horses for the French Government. The exact relations between the son, W. W. Ferguson, and his associate, Smith, in the purchase of these horses does not appear. Whether they were simply agents of John Ferguson receiving a commission or other remuneration, or partners with him is not disclosed.

Reading the guarantee in question in the light of the disclosed facts, I have no hesitation in reaching the conclusion that it was an absolute and a continuing one and covered any advances which might be made from time to time by the bank to Ferguson and Smith up to $10,000.

No reference was made to the time at which the advances were to be repaid. That was a matter with other details left by John Ferguson to the bank and primary debtors.

It was arranged by the bank and primary debtors in accordance with bank usage and custom that a thirty-day note should be given which afterwards was renewed for another thirty days.

Now it does appear to me clear that if the defendant's contention is right, the taking of the thirty-day note in the first instance operated as a discharge of the surety equally with its subsequent extension. The advance in the absence of any time for its repayment being agreed to would become payable at once. Surely no one looking to the facts of the case could put a construction upon the transaction determining that the advance became payable next day after it was made and if extended a day beyond that without guarantor's knowledge and consent would discharge him. The renewing of the thirty-day note had no greater legal effect on the guarantor's liability than the taking of the thirty-day note by the bank in the first instance. In my judgment, the guarantee being an absolute and continuing one guaranteeing whatever advances might be made from time to time under it up to $10,000, and leaving all details with respect to the taking and renewing of notes in accordance with bank custom and usage to the parties giving and taking the advances, was binding on the guarantor notwithstanding the taking of the thirty-day note or its extension.

There was nothing in the guarantee or the evidence anywhere shewing that any definite time for repayment of the advances was contemplated, and in my judgment the extension of the thirty-day note and taking of a new one had no greater or other effect upon the guaran-

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tor's liability under the continuing guarantee than the taking up of the thirty-day note in the first instance. Both were matters of detail which John Ferguson left to be settled between the bank and his son. The defendants knew from the telegram sent to him by the bank at the time the advances were being made that notes were to be taken for them, and he was asked whether he wanted Smith's name also on the notes, to which he replied that he expected his

son's associates to join in liability to the proportionate extent of their interest.

He said nothing about the time the notes were to be taken for, evidently leaving that detail for the decision of the bank and his son and the latter's associate. They settled upon a thirty-day note, and subsequently agreed that it should be renewed for another thirty days.

It may fairly be argued that this renewal should be treated as a fresh advance by the bank within the guarantee. I prefer, however, to rest my judgment upon the facts as I have stated them and my construction of the guarantee as a continuing one, and the fact that the guarantor left all questions of detail as to the time when the advances should be repaid to the bank and his son.

Under these circumstances and for these reasons I would allow the appeal and enter judgment against the defendant, respondent, for the amount claimed with costs in all the courts.

IDINGTON J.—The appellant advanced to W. W. Ferguson, son of respondent John Ferguson, and one Robert Smith, three thousand dollars and got their promissory note for that amount with interest at seven

per cent. per annum dated 24th November, 1914, payable thirty days after date.

The money was intended to have been used in buying horses which they expected to dispose of in filling orders got for the French army through respondent, John Ferguson.

He, in anticipation of such purchases by his son, had wired from New York to appellant, carrying on business in Portland, Oregon, on 28th October, 1914, as follows:—

Will accept and pay all my son's drafts on me.

On the 21st November, 1914, he again wired the appellant to same address as follows:—

All acceptable stock purchased by my son and Robert Smith will be paid for immediately on inspection. I will personally stand behind them in transaction.

The following reply thereto was sent by the appellant to respondent:—

Referring your telegram Saturday must have guarantee from you for any sum advanced your son up to ten thousand dollars regardless of stock being acceptable.

To this he responded as follows:—

Northwestern National Bank,
Portland, Ore.,
I hereby guarantee advances to my son up to ten thousand dollars.
JOHN FERGUSON.

In answer to that appellant sent night message as follows:—

John Ferguson,
c-o Imperial Hotel, New York, N.Y.
We loaned your son three thousand dollars to-day. Wish you would send us a letter confirming your telegram wherein you guarantee to pay the advances made to your son. Do you want Smith's name on the notes?
NORTHWESTERN NATIONAL BANK.

The respondent sent also the following letter and lettergram:—

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Hotel Imperial,
New York, Nov. 25th, 1914.

The Northwestern National Bank,
Gentlemen—Re W. W. Ferguson Loan.

I beg to confirm my guarantee to you to the extent of ten thousand dollars (if necessary) as per your wire to me.

Yours truly,
JOHN FERGUSON.

Northwestern National Bank,
Portland, Ore.

I appreciate your telegram. Wrote as you requested. I expect my son's associates to join in liability to the proportionate extent of their interest in transaction with him. You may be wired regarding their ability to fill contract which I am negotiating on basis of twenty-five per cent. profit.

JOHN FERGUSON.

There seems to have been no further business of buying horses carried on by Ferguson and Smith, and no further application to the appellant for advances falling within the meaning of the said guarantee than covered by the note mentioned above (if even that), yet on the 24th of December, 1914, the appellant accepted in renewal of the said promissory note, without the consent of respondent, or indeed any reference to him as to his wishes, the promissory note of W. W. Ferguson and Robert Smith for $3,000 at thirty days with interest at seven per cent. per annum.

There was no reservation of any recourse against the surety or anything else done to preserve such rights as may have existed up to that date against respondent.

The appellant sued upon the last-mentioned promissory note W. W. Ferguson as the maker thereof and the respondent as guarantor, claiming he was such by virtue of the foregoing telegrams and letters.

The learned trial judge directed judgment against W. W. Ferguson as maker, but dismissed the action as against respondent on the ground that he had been

discharged by the giving of time to the makers without his consent.

The Court of Appeal for Ontario has maintained such dismissal.

I should have supposed, but for the contrary demonstrated before us by ingenious suggestions of able counsel, that an appeal therefrom was hardly arguable.

It was suggested, notwithstanding the fact that this transaction stood and stands quite isolated, that the guarantee must be considered as a continuing one because a ten thousand dollar limit happened to be named.

If there had been further advances and the business carried on, it is conceivable that the conduct of the parties and such complications as might have ensued might have given rise to some such aspect and room for such an argument.

But at the very outset it is evident that the parties all anticipated that the rapid turnover of horses bought and sold could avert any such like condition.

And again it was suggested that the appellant might have made a fresh advance of an equal amount and used the money to take up the first note.

That certainly was not made apparent as within the terms stated in the correspondence I have quoted which is all that passed between appellant and respondent, and would have been a breach of that good faith a surety is entitled to claim.

In short there is nothing in that correspondence to authorise such a mode of treatment of the guarantee.

And all the ingenious suggestions of what might have happened if the parties concerned had done something else than they did, must, in my opinion, go for nothing.

The case submitted must be decided by the actual

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facts and the relevant law governing the rights and liabilities of surety in such circumstances.

The following submission, which I quote from appellant's factum, represents fairly well the nature of the appellant's contention:—

> The note of November 24th, 1914, was payable at the expiration of 30 days after its date and at maturity was renewed for a further period of 30 days. This renewal may be regarded as a fresh advance by the bank which it was then entitled to make. It was within the limit as to amount fixed by the father and the latter's liability was in no way increased beyond the terms of the guarantee given by him. It is submitted that under the circumstances above mentioned John Ferguson's liability on the guarantee is not affected by the time or times when said advances were made or were to be repaid or by the manner in which said advances were evidenced or secured; and is a continuing guarantee effective and binding until all advances up to $10,000 were actually repaid.

Hence unless and until the appellant chose to make advances up to $10,000 it could do as it pleased and call on respondent to implement his guarantee when it pleased.

I need not try to deal with such contentions. I merely submit the contract.

The appeal should be dismissed with costs.

ANGLIN J.—Consideration of the evidence has satisfied me that the conclusions of the learned trial judge, that

> the defendants have (not) made out any case of misrepresentation or concealment which would constitute a defence to the note in question,

and that it was contemplated that the advances to be guaranteed by the defendant, John Ferguson, should be made precisely as they were on the joint liability of Smith and W. W. Ferguson, are so well supported that they cannot be disturbed. There is really no evidence of misrepresentation. I fully concur in the learned judge's appreciation of the testimony of W. W. Ferguson. Nor was there any concealment such as

would afford a defence. *Hamilton* v. *Watson* (1); *London General Omnibus Co.* v. *Holloway* (2); *Royal Bank of Scotland* v. *Greenshields* (3). John Ferguson's letter puts it beyond doubt that he was apprised of Smith's interest with his son and that the joint liability of both for the advances to be made by the bank was what he desired.

The only question at all arguable, in my opinion, is whether the plaintiff bank, by taking a renewal of the Smith-Ferguson note of $3,000 for 30 days, discharged John Ferguson as a guarantor. I think, with respect, that it did not. The question resolves itself into an inquiry whether the terms of the guarantee and the circumstances under which it was made warrant the inference that the parties to it contemplated that any short date note taken to evidence the advance of a part of the $10,000 should be renewable at all events until the whole $10,000 had been advanced (if not afterwards, *Merle* v. *Wells* (4)), or until what would be a reasonable period of credit, having regard to the nature of the transactions which it was proposed to finance, should expire. I think they do.

I fully appreciate the inflexibility of the rule that any material alteration in the terms of a guaranteed contract made by the principals without the guarantor's assent will discharge him and that a binding agreement for extension of time without reservation of rights will always be deemed such a variation because it disables the guarantor, should he be minded to discharge the principal debtor's obligation and seek recoupment from him or to compel him to do so himself, from immediately proceeding against him.

(1) 12 Cl. & F. 109, 119.
(2) [1912] 2 K.B. 72, 83.
(3) [1913-14] Sess. Cas. 259.
(4) 2 Camp. 413.

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The right of the surety to be subrogated to all the means of the creditor is, as it has been said, one of the highest equity, and any act by which it is curtailed will to the extent of the injury inflicted be a defence. *Wilson* v. *Brown* (1)

It has been the law of the court for many years that a surety is entitled to come into equity to compel the principal debtor to pay what is due from him, to the intent that the surety may be relieved. *Ascherson* v. *Tredegar Dry Dock and Wharf Co.*, (2).

But that right accrues only upon the maturity of the debt.

The guarantor's assent to an extension need be neither contemporaneous with it nor explicit. It may be implied in his own original contract assuming the liability. It may be involved in the arrangement or understanding between the principals which he has undertaken to guarantee—perhaps without sufficient inquiry. It must always be a question of the intention of the parties either expressed or, if not, to be inferred from the terms in which they have couched their agreement, construed, if they be "at all ambiguous," in the light of their relative positions and of the surrounding circumstances; *Coles* v. *Pack* (3); *Wood* v. *Priestner* (4); whether an extension without reservation of rights, relied upon as having worked the discharge of the guarantor, was or was not within the purview of the guarantee. To assume that it was not, if the terms are susceptible of the contrary construction, merely because it is not expressly provided for, however strong the grounds of inference that it must have been understood, is certainly unwarranted.

If the word "advances" used by the guarantor does not imply advances from time to time and an extended period of credit, it is at least susceptible of that construction and therefore open to explanation by proof of surrounding circumstances. However strict and

(1) 6 Ont. App. R. 87, 90.
(2) [1909] 2 Ch. 401, 406.
(3) L.R. 5 C.P. 65, 70.
(4) L.R. 2 Ex. 66, 68, 282.

well defined the rights of a guarantor once the nature and extent of the guaranteed liability are ascertained, the contract of guarantee is not to be construed in his favour but rather in that of the creditor (De Colyar on Guarantees, 3rd ed., 199 *et seq.*). The contract guaranteed in this instance was for "advances" up to the sum of $10,000. It is silent as to the time when such advances should be made and the period or periods of credit, and there is nothing to shew that any definite time for repayment was contemplated. The nature of the customer's business—the purchase of horses suitable for army purposes where and as they could be found—makes it clear that the advances were to be made from time to time, as the guarantor says,

to the extent of $10,000, if necessary.

There is no room for doubt that the guarantee was "continuing" in the sense that it was intended to cover a series of transactions. 15 Hals. Laws of England 440; *National Bank* v. *Thomas* (1); *Newcomb* v. *Kloeblen* (2); and cases collected in De Colyar on Guarantees, 3rd ed., pp. 242 *et seq.* The taking of a short date note (30 days) was purely for the bankers' convenience and according to what is well known to be a usual custom, even where a longer period of credit is intended and understood. It was obtained merely to evidence the debt and Smith's joint liability. It was not meant thereby to fix 30 days as the period of credit or to render the money exigible by the bank on their expiry. The obligation of the makers had not then matured either in the sense that the bank would have been justified in taking immediate action to compel repayment, or that the guarantor would have been entitled to force the principal debtor to liquidate the liability or secure his discharge. On the contrary,

(1) 69 Atl. R. 813. (2) 74 Atl. R. 511.

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having regard to the nature of the Fergusons' undertaking and all the circumstances, I think the inference is irresistible that the bank intended to give, and the Fergusons well understood when the $3,000 was advanced that they were obtaining, a more prolonged period of credit and that the 30 days' note would merely evidence the advance and might just as well have been drawn payable on demand, or at 60 days or three months. Any other view of what occurred would seem to me—I say it with respect—highly unreasonable. Thirty days after the advance of the $3,000 the purchasing of horses, so far as appears, was still in progress and the banker might within the terms of the guarantee have allowed the note to remain overdue and unpaid. On the other hand, if entitled then to collect it, had he done so he might immediately have made a fresh advance of $3,000 or of a larger sum for one month or for a longer period and it would have been clearly within the terms of the guarantee.

It is such a well-known custom of bankers to keep their paper "current" by taking renewals of short date notes that business men dealing with them may properly be assumed to have contracted with reference to it. The nature of the customer's business and the other circumstances in evidence in the case at bar indicating that the parties contemplated a comparatively long period of credit during which advances should be made from time to time "if necessary," and the custom of bankers to takes notes for advances at short dates, and to keep them "current" making it reasonably clear that the parties must have contemplated renewals at least of any such notes taken to evidence the earlier advances, it is not surprising to find that the renewal in question was given at the bank's instance,

because it was a time note and the time had elapsed.

The renewal would seem to have been treated as a matter of course—something which was asked for and given pursuant to the understanding of the parties as to the terms on which the advance had been made. Moreover a renewal is usually dealt with by bankers as a fresh discount, the customer's account being debited with the amount of the old and credited with the proceeds of the discount of the new note—a process slightly more advantageous to the bank than it would be to charge interest on the original obligation, and, in effect, tantamount to a fresh advance which, as already stated, would have been clearly within the terms of the guarantee.

I think there is more than room for doubt whether the guarantor would have been entitled under the circumstances of the case at bar, had there been no renewal, either to assert a right to come in at any time after the first thirty days had expired—at all events without some reasonable notice—and pay off the bank and demand subrogation, or to compel the makers of the note to pay it. On the contrary, I rather incline to the view that these rights would accrue only when the bank on the expiry of a reasonable period of credit, having regard to the nature of the Fergusons' undertaking and all the circumstances, would have been entitled to call in the guaranteed loans. In this aspect of the case the renewal of the note did not interfere with or affect any right of the guarantor. But I prefer to rest my judgment upon the view that there was in reality no extension of the guaranteed loan, or that, having regard to the nature of the contract guaranteed, the renewal taken was within its terms in the sense that it was contemplated as one of the things which the creditor might do without affecting his rights against

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the surety. *Grahame* v. *Grahame* (1); *First National Bank* v. *Wunderlich* (2); *Tyson* v. *Reinecke* (3);—*National Bank* v. *Thomas* (4).

I agree with the plaintiff's contention that upon the true interpretation of the guarantee John Ferguson assumed liability to pay any sum or sums advanced by the plaintiff bank to his son within the limit prescribed, should he make default in paying it at such time as the bank should be entitled to and see fit to demand it. It is satisfactory to reach a conclusion which, if it should prevail, will frustrate a plain attempt to evade and defeat what is certainly a moral—I think it is also a legal—obligation.

In the Appellate Division the case was disposed of at the close of the argument, the Chief Justice merely stating that the appellant had failed to shew that the judgment at the trial was erroneous. With great respect, the four Canadian cases cited by the learned trial judge at the conclusion of his judgment, presumably in support of it, seem scarcely relevant. In *Thompson* v. *McDonald* (5), it was merely held that the plea was insufficient because it did not allege a binding extension of time. In *Wilson* v. *Brown* (6), it was not contended, and there was no ground for the contention, that the suretyship was continuing. Moreover, the matter set up as a defence was not a binding extension of time or other alteration of the contract, but a mere forbearance to take steps to recover. *Devanney* v. *Brownlee* (7), was a case of a single promissory note made by two persons jointly, one of whom, to the knowledge of the holder, was a surety for the other.

(1) L.R. Ir. 19 Eq. 249, 259.
(2) 130 N.W. Rep. 98, 99.
(3) 145 Pac. R. 153.
(4) 69 Atl. R. 813.
(5) 17 U.C.Q.B. 304.
(6) 6 Ont. App. R. 87.
(7) 8 Ont. App. R. 355.

The note was renewed by such other maker without the knowledge or consent of him held to be a surety. There was no suggestion of a continuing guarantee. *Fleming* v. *Macleod* (1), was reversed on appeal to this court (2). Again there was no question in this case of a continuing guarantee. The agreement relied upon and found to be established in the New Brunswick court—this court held otherwise—was for an extension of the time for payment of a single note (the entire transaction) to a fixed date without the knowledge or consent of an indorser.

I am, for the foregoing reasons, with deference, of the opinion that this appeal should be allowed and that judgment should be entered for the appellants with costs throughout.

BRODEUR J.—I concur with Mr. Justice Davies.

FALCONBRIDGE C.J.—This is an action by a creditor against a primary debtor and a guarantor. Judgment was given against the primary debtor but the action was dismissed as against the guarantor. The plaintiff unsuccessfully appealed to the Appellate Division of the Supreme Court of Ontario, and now appeals to this court.

The defence of misrepresentation was properly held invalid by the trial judge and the Appellate Division, and the only defence requiring serious consideration is that the guarantor was released by the giving of time by the creditor to the primary debtor without the consent of the guarantor.

As appears by the indorsement on the writ of summons, the action was brought upon a promissory note made by the primary debtor in favour of the

(1) 37 N.B.Rep. 630. (2) 39 Can. S.C.R. 290.

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plaintiff dated 24th November, 1914, for $3,000 and interest payable in thirty days. There is no dispute that the advance represented by this note was covered by the guaranty. The note above mentioned was, however, renewed on the 24th December, 1914, for the same amount. The renewal note was taken without the consent or knowledge of the guarantor. It is, of course, elementary law that a creditor who takes a promissory note or bill from a debtor who is in default impliedly gives him time since he cannot sue the debtor until maturity of the bill or note.

The plaintiff's counsel were apparently not able to find any case which would make this principle inapplicable to the liability in respect to the original note. It was argued, however, that the guaranty in question was a continuing one, and that it covered the liability upon the renewal note which is to be regarded as representing a second advance within the terms of the guaranty. At least this is the way it seems to me the plaintiff must put its case in its endeavour to avoid the consequences of its having released the guarantor as regards the liability on the original note.

The plaintiff strongly relied on *Grahame* v. *Grahame* (1). The guaranty there was in the following terms:—

7th February, 1879.

I hereby undertake to guarantee to the National Bank any advances made to my son Charles James Grahame of the London Stock Exchange, to the extent of £1,000

GEORGE GRAHAME.

The promissory note of C. J. Grahame for £450 of the 11th February, 1879, at six months was renewed several successive times for different amounts. The action was on a note for £440, dated 20th Auguts, 1880, payable six months after date. When the last preceding note came due, 20th August, 1880, the

(1) L.R. Ir. 19 Eq. 249.

amount (£375) was debited to his account and the amount of the latest note (£440) credited to his account. The Vice-Chancellor considered that there was a new advance of £440. The guaranty was admitted to be a continuing one and therefore covered the last advance.

The Vice-Chancellor says, at page 259:—

> The promisory note of C.J. Grahame of the 11th February, 1879, was more than once renewed, and if this claim rested on the original note, the bank might have difficulty in meeting this contention (as to giving time).

It is clear that this case does not help the plaintiff as far as the original note in the present case is concerned, and as I have already mentioned, the indorsement on the writ refers only to the original note. The statement of claim, it is true, refers to both notes, and perhaps on that account the present action might be regarded as an action on the second note. In the view which I take of the case, it is unnecessary to decide this because, in order to bring himself within *Grahame* v. *Grahame* (1), the plaintiff must also shew that the second note represented a real advance. In *Grahame* v. *Grahame* (1), the fact that the amount of the indebtedness fluctuated from time to time and that the amount of the different notes varied, lends some continuance to the view adopted by the learned Vice-Chancellor (I am not saying anything about my opinion as to the correctness of that view), that there was an advance on the occasion of the taking of each note. In the present case, there was simply a renewal and there was no circumstance to support the view that the renewal represented a new advance.

A continuing guaranty ordinarily means one intended to cover successive advances or credits up to a certain amount, and the continuing character may be

(1) L.R. Ir. 19 Eq. 249.

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implied from the circumstances. The appellant was, however, driven to argue that the guaranty in the present case was a continuing one in a very special sense, namely, a guaranty intended to cover the various vicissitudes and renewals of one advance so as to make it unnecessary to get the guarantor's consent to such dealings with the debtor, but there is nothing in the terms of this guaranty or in the circumstances to shew that this was the intention.

The guaranty here is as follows:—

I hereby guarantee advances to my son up to $10,000.

JOHN FERGUSON.

And letter:—

I beg to confirm my guaranty to you to the extent of $10,000, if necessary, as per your wire to me.

Yours truly,

JOHN FERGUSON.

Another case relied upon by the appellant was the *First National Bank of Antigo* v. *Wunderlich* (1), a decision of the Supreme Court of Wisconsin. The effective part of the guaranty was as follows:—

We, the undersigned, hereby guarantee the payment of all future sums of money advanced by you to J. N. S., and guarantee the payment of all notes executed by him to said First National Bank, for loans or sums advanced to him in any amount not to exceed the sum of one thousand dollars ($1,000.00).

This guaranty was clearly continuing and expressly covered successive notes, and it was accordingly held that the guaranty covered the renewal notes which were sued on, independently of any question as to extension of time on the earlier notes.

I am of opinion that the judgment appealed from is right and that the appeal must be dismissed.

Appeal allowed with costs.

Solicitors for the appellants: *Gould & McDonald.*

Solicitors for the respondents: *McGaughey & McGaughey.*

(1) 130 N.W. Rep. 98.

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

AND

LAURA H. CHEESEMAN (PLAINTIFF)..... } RESPONDENT.

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*Nov. 4.
*Nov. 18.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK.

Negligence—Railway Accident—Common Employment—Defective System —Findings of Jury.

A train bound for St. John, N.B., carrying frozen meat to be shipped overseas, in passing through the State of Maine substituted an auxiliary truck for one under the car next the engine that was damaged. The auxiliary truck was not connected with the braking apparatus of the car under which it was placed whereby the braking efficiency was diminished by one-half or more. On approaching Fairville the train had to be taken apart and one of the engines backed five cars, including the one next it with the auxiliary truck, on a siding where said engine was detached without the air-brakes being first released and the hand-brakes applied as required by a rule of the company. The engine then went on the main line but the cars, though the brakes on the foremost were applied, ran down and struck the cab causing the engineer's death. In an action by his widow for damages at common law and under the "Workmen's Compensation Act":—

Held, reversing the judgment of the Appeal Division (45 N.B.Rep. 452; 40 D.L.R. 437) Idington and Brodeur JJ. dissenting, that the use of an auxiliary truck is not evidence of a defective system and there was no other evidence thereof; that the accident was due to placing the car with said truck next the engine thus diminishing the braking efficiency and in detaching the engine on the siding without first attending to the brakes both of which are forbidden by the rules, and that these were acts of employees, fellow servants of the deceased, and could not be imputed to the company; the liability of the company, therefore, was limited to the damages that could be recovered under the "Workmen's Compensation Act."

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick (1), maintain-

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

(1) 45 N.B. Rep. 452; 40 D.L.R. 437.

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ing the verdict awarding the plaintiff $12,000 damages at the trial.

The facts are stated in the above head-note.

Tilley K.C. for the appellant.

Daniel Mullin K.C. for the respondents.

THE CHIEF JUSTICE.—I concur with my brother Mignault.

IDINGTON J. (dissenting)—There was evidence adduced which amply supported the finding of the jury that the equipment of the car in question was, having regard to the operation of the shunting of cars which led to the accident in question, so defective as to have been likely to, and did, produce the result complained of.

It was neither self-evident nor established that the said result was due to the negligence of any fellow employee or workman, and expressly found by the jury that it was not.

If the appellant was entitled to be relieved under the doctrine of common employment, it devolved upon it under such circumstances to demonstrate such defence by evidence, and in that it failed.

Such attempts to do so as were made either failed of proof, or were directed to matters that did not reach so far as to cover the actual cause of the defective equipment, by reason of want of an efficient hand-brake, and trace its non-existence to the neglect of any fellow servant.

The duty of inspection of brakes seems to have been confined to the air-brakes, and no one seems to have had the duty of seeing that the hand-brakes were efficient for such an emergency as was occasioned by the need for the shunting operation in question and

therewith the case of a car with a truck upon which it could not operate effectively. Who was to blame for that? If there was neglect on the part of any such person it was not proven.

I think, therefore, the only defence set up resting upon the doctrine of common employment fails.

Primâ facie the defective condition of the car in question rendered the appellant responsible.

The appeal should be dismissed with costs.

ANGLIN J.—I am, with great respect, unable to perceive in this case any evidence of breach of statutory duty, defective system or operation, or failure to furnish and maintain proper equipment such as would render the defendants liable at common law. On the other hand, negligence and breach of rules on the part of the defendant's servants are so patent that the findings of the jury negativing them can only be adequately characterized as clearly perverse. These findings must be entirely disregarded.

Assuming that the collision happened not owing to failure to back the cars placed on the Fairville siding clear of the main track, as Mr. Tilley suggested, but, as the plaintiff contends and the jury must have found, owing to their having moved down towards the main track after the engines were detached, there can be no doubt that the primary cause of the collision or "side swipe," which resulted in the death of the plaintiff's husband, was the neglect of the train crew to obey the company's air brakes rule No. 7:

* * * If cars are to be detached from a train or engine the air-brakes must be released and hand-brakes immediately applied on train before same are detached.

Notwithstanding the equivocal use of the word "train" in the last line of this sentence, the meaning of the rule is reasonably clear, at all events in the

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case—such as this was—of cars to be detached from an engine. It is on the cars so to be detached that the hand-brakes must be applied before the engine is removed.

The brakes were not applied before the engines were detached, with the result that the cars, which were left on the siding with a slight incline, moved down towards the main track so rapidly that the corner of the foremost car caught the side of the cab in which the plaintiff's husband was as his engine moved back along the main line.

As the cars started to move down the siding towards the main track the brakesman in charge applied the hand-brakes on the foremost car, which had been next to the engine before it was detached and was proceeding, as was proper, also to apply them on the second car of the "train" when the accident occurred. The brakes on the first car were insufficient to stop the train. There is evidence that had they been of full efficiency they would have sufficed. Their efficiency at the most was 50% and there is some evidence that it was even less. The jury has found that this defective equipment was a cause of the accident, and I am not disposed to quarrel with the view, which has prevailed in the provincial courts, that, taking their verdict as a whole, it implies a finding that its presence on the train next to the engine amounted to negligence. For the plaintiff it is maintained that this negligence was of such a character that it must be imputed to the defendant itself and that as to it the defence of common employment is not open.

So far as appears the car in question was in good condition when it was started on its journey to St. John laden with frozen meat intended for transatlantic shipment from that port. It seems reasonably clear that

it was necessary to have this freight reach St. John with all possible expedition. *En route* the rear truck of the car became unfit for further service and if the car was to proceed it was necessary to replace it. It was replaced with what is known as an auxiliary truck which cannot be connected with the braking system of the car. The brakes, however, can be, and, according to the evidence, they were in fact so arranged as to operate on the wheels of the remaining front truck. Hence their partial efficiency.

The change of trucks was made at Greenville in the State of Maine, through which the car was proceeding in bond. At that point only an auxiliary truck could be provided, and the evidence is that transhipment there of the freight to another car would have entailed three days' delay owing to the necessity of obtaining authority from Washington, D.C., to break the bonding seals. The train afterwards passed Brownville, also in the State of Maine, where there are shops and an ordinary truck with brakes attached might have been substituted for the auxiliary truck, but a delay of thirty-six hours would be involved in this operation. The same thing might have been done at McAdam Junction in the Province of New Brunswick after the train had crossed the international boundary, or the load could there have been transhipped to another car which would involve a delay of six hours. The responsible officials, however, thought that even this delay would have been unjustifiable and allowed the train to proceed with the auxiliary truck. Allowing for the car in question and two others with defective brakes, the braking capacity of the train was still over the 90% prescribed by the defendants' rules and of course exceeded the 85% prescribed by an order of the Board of Railway Commissioners.

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But the car in question was wrongly placed or allowed to remain next to the engine when the train left McAdam Junction, in direct violation of the company's rule No. 25 (*a*):

> * * * More than two consecutive brakes must not be cut out on a freight train and none on the car next the engine which must always have a quick action triple in good working order.

Had this car not been in that position—had a car with brakes of full efficiency been next to the engine—when the brakesman set the brakes on the foremost car of the train of detached cars at the Fairville siding it would probably have been held and the accident would thus have been avoided.

There is no evidence of defective system, and a perusal of the record has satisfied me that no such issue was present to the minds of the court, the jury, or counsel, at the trial. Had it been raised, the learned Chief Justice who tried the action would undoubtedly have submitted to the jury some question appropriate to elicit a finding upon it. He did not do so. I am certainly not prepared to hold that under no circumstances should a freight car on which a truck becomes disabled *en route* be permitted to proceed to its destination with an auxiliary truck. Whether it should or should not must depend on the nature of the freight, the degree of urgency in its transmission, and other circumstances, upon all of which the responsible officials of the railway company on the spot must exercise their judgment. In the present case the judgment of these officials may have been erroneous—they may even have grossly neglected their duty—but such mistake or neglect, if any, was that of fellow employees of the plaintiff's deceased husband and cannot be imputed to the company itself, so that such common employment would not afford a defence to a claim based on it.

The law on this branch of the case is fully discussed in the judgment delivered in this court in the comparatively recent appeals in *Bergklint* v. *Western Canada Power Co.* (1). The duty was of such a character that its discharge was necessarily deputed to officials along the line of the railway. There is no suggestion in the evidence that the company had employed incompetent officials for this purpose or had failed to provide all material and equipment necessary to enable them to do whatever they might deem requisite or proper. The case was not one of defective original installation or its equivalent, as in *Ainslie Mining and Railway Co.* v. *McDougall* (2), nor of negligence in allowing a permanent part of a plant to fall into dangerous disrepair, as in *Canada Woolen Mills* v. *Traplin* (3), due to a defective system of inspection.

A master is not bound to give personal superintendence to the conduct of the works, and there are many things which in general it is better for the safety of the workmen that the master should not personally undertake. It is necessary, however, in each case to consider the particular duty omitted, and the providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than of his servants. *Toronto Power Co.* v. *Paskwan*, (4).

If there was any negligence in sending forward the car in question with an auxiliary truck it was in the "subsequent care," rather than in the "providing" of proper plant—it was in the discharge of a duty naturally devolving on the person or persons to whom the company was entitled, and, indeed, from the very necessity of the case, compelled to entrust it. *Wilson* v. *Merry* (5).

No doubt the placing of the car with defective brakes next to the engine or allowing it to remain there when the train left McAdam Junction was clearly a

(1) 50 Can. S.C.R. 39; 54 Can. S.C.R. 285; 34 D.L.R. 467.
(2) 42 Can. S.C.R. 420.
(3) 35 Can. S.C.R. 424.
(4) [1915] A.C. 734, 738.
(5) L.R. 1 H.L. Sc. 326.

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direct violation of Rule 25 (*a*); but it was equally clearly the act of a servant of the company to whom the discharge of the duty of seeing that such a car was not so placed was properly entrusted. The same may be said of the failure to "card" the car as defective.

In no aspect of the case can I discover any evidence which would justify a finding of negligence imputable to the defendant itself as distinguished from its employees—negligence consisting of breach of a duty which it could not delegate so as to relieve itself of responsibility at common law for its discharge—negligence to which the defence of common employment would not afford an answer.

I would, therefore, restrict the plaintiff's recovery to the sum of $2,000 under the "Workmen's Compensation Act," to which her right is now admitted, as it was in the provincial appellate court. The appellant is entitled, should it see fit to exact them, to its costs in this court and the Appellate Division. But, as the company did not admit liability under the "Workmen's Compensation Act" for $2,000 in its plea, or make any tender of that amount, or pay it into court, the plaintiff should have her costs of the action down to and inclusive of the judgment at the trial.

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

MIGNAULT J.—I have given to this case my most serious and anxious consideration, and have carefully read the evidence, but I cannot come to the conclusion that the judgment appealed from was rightly decided.

There is really no dispute or contradiction in the evidence as to the material facts. The respondent's husband, Justus G. Cheeseman, was an engineer in

the employ of the appellant, and on the 21st February, 1917, was in charge of a locomotive which, with another locomotive of the appellant, in charge of one Kaine, was hauling, on that night, a train of forty-seven freight cars from McAdam, N.B., to West St. John, Cheeseman's locomotive being the second, and Kaine's the first. The train was a regular freight train, but was some hours late; it carried a consignment of frozen meat to be transhipped at St. John to Europe, and apparently was proceeding with all possible haste. The car which came into collision with Cheeseman's locomotive was a box car, No. 67639 C.R.I.M.P., and on its way from Montreal had sustained damage to its rear truck, near Greenville, Maine, necessitating the removal of this truck, and its replacing by an auxiliary truck. The latter truck was not connected with the brakes, but the front truck was, and the evidence of the assistant superintendent, David H. Ryan, is that the hand brake connected with the front truck was found, after the accident, wound up and in good condition, but the braking capacity of the car was diminished by at least fifty per cent. The train was made up at McAdam, and car No. 67639 was placed immediately behind Cheeseman's engine. On the way, near Fairville, the train was stalled on an up grade, and even with the aid of the locomotive of the Boston train, which had come up behind, could not be moved, and in the effort to move it, the coupling between the fifth and sixth cars broke, so it was decided to bring the five first cars into Fairville and to return for the rest of the train. At Fairville, the conductor, Sullivan, had the five cars backed on No. 1 siding—how far they were backed being somewhat uncertain, the conductor thinking it was three or four car lengths, but it is possible they

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were left nearer the switch—and then the engines were uncoupled from the cars and went down to the main line, the conductor following them to the switch. Sullivan directed the brakesman, O'Leary, to get on top of the cars and to set the hand brakes. O'Leary states that he wound up the brake on the first car, after the engines were uncoupled, and then went on to the second car, but the evidence of Mr. Ryan—who arrived on the scene about an hour after the accident—shews that he did not wind its brakes. O'Leary noticed, when he was on the first car, that the cars were moving, and he is the only witness who saw that they were moving, but his memory seems hazy on this point, so it is difficult to say whether it was merely the slack between the cars easing off, or whether they started down the siding on account of a slight down grade. At all events car No. 67639 struck the side of Cheeseman's locomotive, which was then backing up the main line, bending in the cab, so that the engineer was pinned in and so severely scalded by escaping steam that he died a couple of days later.

The respondent, Cheeseman's widow, acting for herself and her four young children, sued the appellant both under the New Brunswick "Workmen's Compensation Act," and under chapter 79 of the New Brunswick Consolidated Statutes, 1903, embodying the provisions of "Lord Campbell's Act," claiming $20,000 damages.

The appellant admitted its liability under the "Workmen's Compensation Act" for the full amount allowed by the Act, $2,000, but denied liability under "Lord Campbell's Act."

The case was tried before Chief Justice McKeown and a jury and a verdict was rendered for $12,000, for which sum (including the $2,000 admitted under the

"Workmen's Compensation Act"), judgment was entered. This judgment was affirmed by the Appeal Division of the Supreme Court of New Brunswick, Hazen C.J. White and Grimmer JJ., White J. taking no part in the judgment. It is from the latter judgment that this appeal is taken.

The jury found that Cheeseman's death was not caused by the negligence of any of the employees of the appellant, but that the accident was the result of a defect in the equipment or arrangement of the train, that defect being

auxiliary truck and defective brakes on said car, the brakes being connected with only one truck, therefore not having sufficient power to hold the cars which ran back and struck the engine on the main line at Fairville No. 1 siding.

The jury absolved the deceased from any contributory negligence, and found that there was no negligence on the part of the defendant in the employment and retention of the brakeman O'Leary, and that the latter was not inefficient or incompetent for employment or retention as a brakesman on a freight train. The following question was also put to the jury:—

7. If you find that there was negligence both on the part of the defendant company and on the part of the deceased as well, whose negligence was the final cause of the accident—in other words, who had the last chance of avoiding the accident?

To this the jury answered:—

Canadian Pacific Railway. Co.

Viewing all the evidence, I am of the opinion that the jury could not reasonably find—if their answer to question 7 be construed as a finding of negligence against the appellant—that the accident was caused by the appellant's negligence as distinguished from the negligence of its employees, the fellow servants of the deceased. Leaving aside the use of an auxiliary truck

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for car No. 67639 without brake connection, and the placing of this car immediately behind the locomotive, which—if they amount to negligence—are the negligence of the employees of the company, and coming to the real cause of the collision, it was undoubtedly due to the fact that the conductor failed to comply with the following rule of the company, being rule 7 of the air brakes rules:—

> When necessary for a train with an engine to stand on a grade for over five minutes, air-brakes must be released and train held by hand-brakes. If cars are to be detached from a train or engine, the air-brakes must be released *and hand-brakes immediately applied on the train before same are detached.*

Sullivan knew that there was an auxiliary truck under the first car, and had he caused the hand-brakes to be set before uncoupling the engines, as it was his duty to do, no accident could have happened, and therefore the negligence of Sullivan alone, and his failure to comply with this rule, was the cause of the five cars moving down the siding and colliding with Cheeseman's engine, so that the latter's death was brought about by the negligence of one of his fellow workmen.

There can be no doubt that under these circumstances the defence of common employment is a fatal objection to the respondent's action in so far as it is based on "Lord Campbell's Act," and exclusive of her remedy under the "Workmen's Compensation Act." The object of the latter Act was to give to the workman a remedy where none could be claimed under the common law, the risk of injury through the negligence of a fellow servant being a risk assumed by the workman at common law. *Bartonshill Coal Co.* v. *Reid* (1); *Wilson* v. *Merry* (2).

(1) 3 Macq. 266 (2) L.R.I.H.L.Sc. 326.

The jury have expressly found that O'Leary was not inefficient or incompetent for employment, and even granting that the braking power of the first car was reduced by the fact that an auxiliary truck, unconnected with the brakes, had been placed under the car, this was not the cause of the accident, which would have been impossible had Sullivan complied with rule 7 and had seen that the hand brakes were applied on the five cars before uncoupling the engines.

With all possible deference, it would seem to me somewhat of a mockery to hold the appellant negligent and liable for this accident, when it had done all it could do to render such an accident impossible by expressly ordering that the hand-brakes be applied before the engines are detached, and when no accident could possibly have occurred had this order been complied with.

The "Workmen's Compensation Act" was adopted, as I have said, to provide a remedy in cases where, on account of the negligence of a fellow servant, no remedy existed at common law. The respondent should have been content with the scale of compensation provided by this Act, the maximum amount of which is conceded to her. When she goes further and also claims damages under "Lord Campbell's Act," her claim is clearly, in the circumstances of this case, defeated by the application of the fellow servant rule.

Mr. Mullin argued that the company had allowed a negligent system to be established in operating its cars, whereby the accident in question was caused, and that therefore the company is liable. There was no evidence of any such system; on the contrary, had the system or rules of the company been followed, the accident could not have occurred.

In my opinion the verdict is clearly against the

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weight of the evidence and should be set aside, and the respondent's action dismissed for anything in excess of the $2,000.00 admitted by the appellant under the "Workmen's Compensation Act."

My brother Anglin thinks the respondent should have her costs in the trial court, but should pay those of the appellant in the Appeal Division of New Brunswick Supreme Court and in this court, if the appellant sees fit to exact them. In this I am disposed to concur, but I must say that it deals most liberally with the respondent, who should have been satisfied with the remedy provided for cases like this one by the "Workmen's Compensation Act," liability under which was never denied, but on the contrary expressly admitted by the appellant.

I would allow the appeal.

Appeal allowed with costs.

Solicitor for the appellants: *Hugh H. McLean.*
Solicitor for the respondent: *Daniel Mullin.*

D. H. McKAY AND ANOTHER (DEFENDANTS)..... } APPELLANTS;

AND

JOHN C. DOUGLAS (PLAINTIFF).....RESPONDENT.

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*Nov. 7.
*Nov. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Distress—Rent—Entry—Breaking—Entrance by other than usual mode.

D. was tenant of one part of a building and B. of the other. The parts were separated by a partition in which was a door at one time used in common, but B. had fastened it with a hook on his side and fitted into it the frame of a second door against which he placed a case of type. A bailiff with a distress warrant against D. for rent could not obtain entrance to his premises by the ordinary mode. He went on the premises occupied by B. and induced him to remove or allow to be removed the case of type and the extra door and then entered D.'s premises by lifting the hook on the door in the partition and opening that door. He levied the distress and in an action by D. claiming damages for illegal distress and trespass:—

Held, that B., having the right to remove the obstruction to entrance into the other part of the building, it was immaterial whether he did so himself or allowed the bailiff to do it; and that after such removal entrance to D.'s premises was made without a breaking, and the distress was legal. *Gould* v. *Bradstock* (4 Taun. 562) applied.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), affirming the judgment at the trial in favour of the plaintiff.

The facts are sufficiently stated in the above headnote.

Burchell K.C. for the appellants referred to *Long* v. *Clarke* (2); *Miller* v. *Tebb* (3); *Gould* v. *Bradstock* (4).

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

(1) 40 D.L.R. 314.
(2) [1894] 1 Q.B. 119.
(3) 9 Times L.R. 515.
(4) 4 Taun. 562.

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McKAY. v. DOUGLAS.

The Chief Justice.

Hall K.C. and *McArthur* for the respondent cited *Nash* v. *Lucas* (1); *Miller* v. *Curry* (2).

THE CHIEF JUSTICE.—This appeal is one from the judgment of the Supreme Court of Nova Scotia *en banc* (3), dismissing an appeal from a judgment of the trial judge but reducing the damages from $2,500 to $1,500.

The action was one brought by a tenant against his landlord for, as was alleged, an illegal distress upon his goods in his rented premises, the illegality consisting of a wrongful breaking into by the landlord of the premises.

A majority of the appeal court upheld the illegality of the distress upon the ground that there had been an illegal breaking into by the landlord of the demised premises in order to distrain for the overdue rent, and that, therefore, he was liable in the action for trespass brought.

The facts are not in dispute. The premises leased to the plaintiff were divided off from other premises leased to one Brody, by a wooden partition in which there was a swinging door which had at one time been used by the occupants of both premises to pass from one to the other.

Brody had put a simple latch on his side of the door which could be lifted with one's finger and had also placed another loose or unfastened door up against the latched door, and a case of type against the loose or unfastened door. When the landlord came to distrain he asked Brody to move his case of type, take away the second door and unhook the latch on the first door,

(1) L.R. 2 Q.B. 590. (2) 25 N.S. Rep. 537.
(3) 40 D.L.R. 314.

and it was held by the Chief Justice, Ritchie and Mellish JJ. that these things, having been done by Brody at the landlord's request, the latter was guilty of an illegal entry in pushing open the unlatched door and entering into the premises of the plaintiff tenant. It is right to say that Mr. Justice Ritchie, who was a party to the judgment, expressed himself as concurring with "some doubt" while Mr. Justice Chisholm, with whose judgment Mr. Justice Longley concurred, dissented in a very vigorous and, if I may be permitted to say so, a very luminous judgment.

The question before us being reduced down to the one question whether there was an illegal breaking into the premises by the landlord, I am of opinion, after looking into the authorities on the question of illegal entry, that there was none such in the present case.

Brody, the occupier of the adjoining tenement divided from the one in question by the wooden partition with the swinging door latched on Brodie's side, had, in my opinion, a perfect right to remove the case of type he had placed against the loose door, then to remove the door itself which was not fastened, and finally to lift the latch on the partition door. It does not matter in the least whether he did each and all of these acts of his own mere motion or at the instance and request of McKay the landlord. He had a perfect right to do what he did. When these obstructions were removed the way was open and clear for the landlord to push the door open, enter and distrain.

I am quite unable to follow the Chief Justice's reasoning that, assuming Brody to have the right to remove his own case of type in his own tenement, and his own loose and unfastened door, and then to lift his own latch, which he himself had placed on the swinging

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door on his own side, because he did so at McKay's request,

it must all be regarded as of the landlord,

and was, he thinks,

clearly such an entry as could not be justified for the purpose of distress.

On the contrary, I think that Brody only did what he had an absolute right to do whether spontaneously or at McKay's instance and which, when done, enabled the landlord to enter by pushing open the swinging unfastened door and execute his distress.

Any other person than the landlord who entered to distrain would have committed a trespass, not the landlord who entered without breaking any latch or fastening, simply pushing the swinging door open for the lawful purpose of levying a distress.

I think the modern case of *Long* v. *Clarke* (1), directly in point in this case.

There the plaintiff, being unable to get into the house by the front entrance, went into the next house; from there he went into the yard at the back, and then got over a wall (said to vary in height from 5 to over 10 feet) into the yard at the back of the plaintiff's house, and entered the house by means of a window (the report does not say whether it was closed or not, but the inference from the judgment is that it was open) and distrained on the goods. Held by the Court of Appeal to be a lawful distress. Lord Esher M.R. says, at page 121:—

In this case we are dealing with a landlord's bailiff distraining for rent. What is the ordinary law applicable to such a case? It gives a right to the landlord to do that which, if any other person did it, would be a trespass, and the question is whether what has been done in the present case is within what is permitted by the law of distress. When a landlord goes into a house to distrain, whether the door be open or shut, he does that which, in any other person, would be a trespass, and

(1) [1894] 1 Q.B. 119.

it is just the same if he merely walks across the land to the front door. The sole question is what limitations on the right of the landlord to go on the premises and distrain the law imposes on him. He cannot go into any building or into any house if he can only do so by breaking into it. He can go in at the door, which is the most obvious way of entering; but further, he can get in by a window if it is left open. There is no trespass in doing either of these acts, because he does not break in. So it is incorrect to say, as has been suggested, that the landlord cannot go into the house if he finds a hole in the side of it, and for the same reason, that in so entering he is not breaking in. This law is applicable to any building into which the landlord wants to get for the purpose of distraining, such as a warehouse, a stable, or a barn. Thus, supposing he enters a curtilage without breaking anything, still he cannot break into any stable or building within the curtilage which is locked.

It is unnecessary for me to make further quotations from the judgments of the learned judges in that case. They are all to the same effect as that from Lord Esher and are, to my mind, conclusive on the point now before us.

I would, however, cite the case of *Ryan* v. *Shilcock* (1), where it was held the breaking must be such a breaking as is also equivalent to a forcible entry; and that of *Gould* v. *Bradstock* (2), where the landlord himself occupied a room over that of his tenant beneath him, divided by a flooring of boards nailed on rafters, in which Sir James Mansfield justified the entry of a landlord to distrain on his tenant below him in taking up a portion of the flooring between the apartments, and entering to distrain through this aperture so made.

I think the appeal must be allowed with costs throughout and the action dismissed.

IDINGTON J.—I am, in one respect, in the same frame of mind as the learned trial judge that I have some doubt as to the legality of this act complained of, but, with the greatest respect, I submit that such frame of mind properly directed should, in this case,

(1) 7 Ex. 72. (2) 4 Taun. 562.

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have resulted in a dismissal of the plaintiff's (now respondent's) action with costs.

I, therefore, am of the opinion that the court below which, on a careful analysis of what is expressed, seems to have been in the like predicament, should have come to the conclusion that no court has a right to find a man guilty of wrongdoing unless the law clearly declares him to be so when regard is had to the relevant facts.

It seems to me that the case of *Gould* v. *Bradstock* (1), which seems to go a great deal further than needed to maintain a dismissal of this respondent's action, stands yet as good law, though I find it was not decided by the great Chief Justice Mansfield, as counsel inadvertently assured me it was, when I felt puzzled by the expressions quoted, and hence prompted to inquire.

Everything Mr. Brody did to facilitate the landlord's entry was perfectly legal up to and including the lifting of the hook he had placed there for his own reasons and to serve his own uses. How doing that which a man had an absolute right to do, if he saw fit, can be made in law to demonstrate illegality in someone else's act beyond that, is what I am unable to understand. With the very greatest respect I submit that to so hold only confuses two things, one legal and the other of an undecided quality now to be passed upon, on its merits, and tends to further confusion of thought in trying to solve, or solving, the actual problem when reached.

The problem is, when otherwise approached, reduced to the question of the legality of a landlord entering by a door he presumably had placed there for common use by his tenants, or by himself and the

(1) 4 Taun. 562.

tenant in question, as an easy mode of ingress and egress and requiring no force to open it and enter.

In the situation thus created that door was as much an outer door of the premises in question as any other door. To use the illustration I presented to counsel for consideration in the course of the argument, suppose the part of the appellant's premises occupied by Brody had been dedicated by him as a public street, would it be contended such a door was not an outer door? I submit not.

It clearly was a door in the outer wall of the premises leased by the landlord to the tenant, and it might well have happened that the landlord himself, instead of Brody, might have become the occupant either actively using it or merely as landlord or owner of vacant premises.

Can it be said that in such an event he could not have used the door in question, never fastened or locked in any way by the tenant in question, as a means of entry to distrain?

I think it would be much easier to support as legal such an entry, than the raising of a window partly open as in *Crabtree* v. *Robinson* (1), or the coming down through a skylight as in *Miller* v. *Tebb* (2), after crossing another person's premises, or analogous cases, for which ample authority is shewn hardly consistent with the judgment appealed from.

The trap-door in the roof in question in the Ontario case relied upon could not in principle be called a door in an outer wall.

I should be averse to refining away the law as already established by many decisions, even if that law is the result of over-refinement, to help a plaintiff

(1) 15 Q.B.D. 312. (2) 9 Times L.R. 515.

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with no better case than respondent happens to have here.

And if any doubt, I repeat it should have been resolved at the trial as against him and hence so decided here.

The further ground was taken in argument that there was no tenancy. If so then I fail to see what ground respondent has to stand upon unless and until he established a better title to the goods in question than he did.

But it seems idle to contend in face of all that transpired and is expressed in the correspondence between the parties, that he had not become a tenant of the appellant at the old well-known rental.

It seems rather late, after seemingly abandoning such a ground below, to start it here.

I think the appeal should be allowed with costs throughout and the action be dismissed.

ANGLIN J.—More than a century ago a landlord occupied an apartment over a mill demised to his tenant from which it was divided only by a flooring of boards nailed on rafters. In order to distrain for rent the landlord took up a portion of this flooring in his own apartment and entered through the aperture thus made. Sir James Mansfield held that his interest in the floor entitled him to raise it without incurring liability for trespass, and that the entry into his tenant's premises through the opening so made was lawful. *Gould* v. *Bradstock* (1).

Although I do not find that this decision has been followed in any subsequent reported case in the English courts, it has never been questioned and its authority is recognised by such eminent writers on the Law of

(1) 4 Taun. 562.

Landlord and Tenant as Foa, 5th ed., page 525, and Bullen (on Distress), 2nd ed., p. 154. See, too, 11 Hals. Laws of England 163. Mr. Foa points out that a perpendicular partition between the demised premises and another tenement in the same building formed by boards nailed upon studding would stand in the same position. The boards, if removable without injury to the demised premises, may be likewise taken off without trespass by the lawful occupant of the adjoining tenement.

The facts in the case at bar fully appear in the judgments rendered in the provincial appellate court. Assuming any controverted facts—and there are practically none—in the plaintiff's favour, I am unable to distinguish this case from *Gould* v. *Bradstock* (1). On its authority it would appear that his interest in them entitled Brody, the tenant of the adjoining premises, to remove the board covering, to raise the hook and to push open the door, which it is not pretended would do any injury to the plaintiff's premises. Whether those acts were all done by Brody at the instance of the landlord or by the bailiff with Brody's concurrence or authority, is, in my opinion, quite immaterial. I see no reason why Brody could not authorise the landlord or his bailiff to do all or any of them as his agent, and it seems to be a fair inference from the evidence that some of these acts were done by Brody himself, and the others with his authority by the landlord's bailiff.

If an aperture was thus lawfully made the landlord could certainly enter through it to make his distress just as he might enter through an open window or a hole in an outer wall. The one thing that a distraining landlord must not do is to break into the premises.

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Long v. *Clarke* (1). The case of *Nash* v. *Lucas* (2), relied upon by the learned Chief Justice of Nova Scotia is, I think, with respect, clearly distinguishable. As Mr. Justice Chisholm points out the opening of the window, the entry into the house through it, and the unfastening of the locked door, all done in that case by the landlord's direction, were acts of trespass.

Applying the principle of the decision in *Gould* v. *Bradstock* (3), there was no breaking in in this case. Apart from that authority, however, I confess I should have been inclined to the contrary view. I cannot regard the raising of the hook on the partition door in this case as in any sense equivalent to the raising of a latch on the front door of demised premises (the usual mode of entry) permitted because the fair inference is that it was thus secured in order to keep it closed and not for the purpose of keeping persons out. *Ryan* v. *Shilcock* (4). The partition door had long ceased to be a usual mode of entry into the demised premises. It was, in my opinion, indistinguishable from a closed window. The landlord can justify having opened it only as an act done by Brody or by his authority.

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

BRODEUR J.—I cannot see how we can distinguish the present case from the case of *Gould* v. *Bradstock* (3).

For the reasons given by my brother Anglin I would allow this appeal with costs of this court and of the courts below and would dismiss plaintiff's action with costs.

MIGNAULT J.—I am of opinion that this appeal should be allowed.

(1) [1894] 1 Q.B. 119, 124.
(2) L.R. 2 Q.B. 590.
(3) 4 Taun. 562.
(4) 7 Ex. 72.

The respondent occupied as a tenant a store belonging to the appellant, which was separated from another store in the same building, rented to one Brody, by a partition in which a door had been placed, and this door had, for a while, served as a means of communication between the two stores. Some time before the distress of which the respondent complains, Brody had placed a hook in this door on his side whereby the door could be fastened, and had also put up an outer door, on his side, which had been closed by means of nails or screws. These nails or screws had been removed by Brody on a previous occasion, when it was necessary to enter the respondent's store to close an opening through which the snow came in, and the outer door had been merely placed against the other door without being fastened. At the time of the distress, Brody removed, at the request of the appellant, the outer door, and the hook on the inner door was lifted either by himself or with his permission. In my opinion Brody had a perfect right to unhook the door or to allow it to be unhooked and consequently the appellant, in entering the respondent's premises by this door, was not guilty of trespass, and the distress for rent due by the respondent was not illegally made. Under the authorities cited by my brother Anglin, I am clearly of opinion that the action of the respondent is unfounded.

The appeal should, therefore, be allowed and the action dismissed with costs in this court and in the courts below.

Appeal allowed with costs

Solicitor for the appellants: *A. A. McIntyre.*
Solicitor for the respondent: *Neil R. McArthur.*

1916
*Feb. 9, 10.
*June 19.

THE MONTREAL INVESTMENT AND REALTY COMPANY (DEFENDANT)..... APPELLANT;

AND

ANNA SARAULT (PLAINTIFF)..... RESPONDENT.

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

Sale—Misrepresentations—Knowledge of fraud—Forfeiture clause—Assent—Ratification.

The appellant owned a farm subdivided into lots; and the respondent, member of a syndicate, took an action to set aside an agreement of sale entered into by appellant with the syndicate on the ground that assent to it was procured by fraudulent representations as to the situation of the lots bought. But the respondent, with full knowledge of such fraud and apparently under pressure of a forfeiture clause, gave an option on these lots to a third party and paid without protest to the appellant an instalment due under the contract.

Held, Davies and Anglin JJ. dissenting, that, upon the evidence, the acts of the respondent did not constitute ratification or confirmation of the contract.

Per Fitzpatrick C.J.:—When the validity of a contract is attacked on account of an error as to the identity of its object, the question of confirmation cannot arise, as there can be no confirmation of a thing which has never existed.

Per Anglin J. dissenting:—Where a purchaser knows facts that render his obligation voidable, payment of purchase money and giving options on the property are unequivocal acts of confirmation. While error of law may render such acts inefficacious for that purpose, the person alleging such error must prove it; and the mere presence of a forfeiture clause in an agreement known to be voidable does not constitute moral restraint which will make them involuntary.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), confirming the judgment of the Superior Court, District of Montreal, Panneton J., and maintaining the plaintiff's action with costs.

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

(1) Q.R. 24 K.B. 249.

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

Lafleur K.C. and *Rinfret* for the appellant.
Belcourt K.C. and *Prudhomme* for the respondent.

THE CHIEF JUSTICE.—The appellant company, defendant below, is the owner of a farm at Pointe-aux-Trembles, on the Island of Montreal, which is subdivided into lots and offered for sale to the public. The respondent, plaintiff below, is a member of a syndicate formed to purchase a certain number of those lots.

The action is brought to set aside a contract entered into by the appellant with the syndicate which was intended to operate merely as a promise to sell the lots in question. The respondent's contention is that she was induced to enter into the contract by fraud, treachery and false representations. A preliminary question having reference to the right of the respondent to bring such action without citing the other parties to the syndicate agreement was raised for the first time in the court appealed from. No notice appears to have been taken of this objection in the formal judgment of that court and neither of the two judges whose notes are in the record refer to it. In the appellant's factum the point is dealt with in a few lines, and I do not feel that, under such circumstances, it is necessary for me, in the view which I take of the case, to do more than say that this question of procedure, which certainly suggests difficulties of a serious nature, has not been entirely overlooked.

Dealing with the merits. The false and fraudulent representations complained of relate to statements made by the appellant's agent as to the situation of the lots with respect to Bleau street, the River St. Law-

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rence, the cement factory and the tramway proximity to which would presumably increase their value for speculative purposes. Some point is also made of the fact that one of the members of the syndicate, and the most active, was, unknown to the respondent, the selling agent of the owners of the property and as such in receipt of a secret commission.

It is important, in considering the case, to bear in mind that the respondent was one of a group who jointly purchased a certain number of lots in each one of which all would have an undivided interest, a fact which, in my judgment, adds to the difficulties in one aspect of the case.

If the respondent attached much importance to the precise location of the lots, she would, I think, have taken more trouble to ascertain their exact position. A reference to paragraph 8 of respondent's declaration makes it abundantly clear, however, that she never intended to become a purchaser of any one or more of the lots separately, but rather to acquire an undivided interest in the whole property included within the cadastral area, to be held and disposed of for purely speculative purposes. And the impression left on my mind, after a very careful examination of the whole record, is that the respondent sought to repudiate the transaction and to obtain relief from her obligations thereunder after she realised that the bottom had dropped out of the real estate boom and that her venture would, in all probability, prove unprofitable. To some extent the courts below seem to have been influenc edin the conclusion they reached by a desire laudable in itself to discourage a tendency amounting almost to a mania for wildcat speculations in real estate which seems to have developed in the Montreal district. But I am convinced that in so far as courts are concerned with

such matters the object in view can be more effectively accomplished by holding steadfastly to the rule that men and women also are expected to

keep sacred their covenants.

and that they will be held to a strict fulfilment of their obligations legally contracted. Our duty is, in last analysis, to render justice, not ideal justice, but justice according to law.

To make my point perfectly clear I will refer to the facts.

On or about the 28th May, 1912, the syndicate agreement, which it is now sought to set aside, was signed. On or about 22nd July following the promise of sale was executed in triplicate. The respondent did not, at the outset, attach much importance to the exact location of the lots because it is impossible to understand from her evidence whether she visited the locus before signing the syndicate agreement. In her evidence, she makes two contradictory statements within five lines as to this point. It seems perfectly clear, however, that she did not go on the ground with Mrs. Bessette before signing the promise of sale but was content to pass through the property on a tram car without even taking the trouble to leave her seat. Mrs. Bessette, by a wave of the hand, indicated the approximate location of the lots in question at the upper end of a forty-acre field. Further, it is to be borne in mind, that in the promise of sale the lots are described by reference to a plan which is not disputed, and in the interval between the two agreements the respondent visited the property with Langelier, the selling agent of the appellant. Moreover, before signing the promise of sale, the respondent insisted upon consulting Mr. Charruau, whom she described as her "homme de confiance," and it was only after obtaining his assurance

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that she was making a good bargain that she signed the document. At the time she sought the independent advice of Mr. Charruau she certainly seems to have been placed in possession of all the information she thought necessary to have, and subsequently she gave her cheque for $1,000, and signed the promise of sale.

There were meetings of the syndicate held in early October, 1912, when all the facts were admittedly known and an option was then given Mrs. Boutillier, and another option was given the Charruau Realty Co. In November following a payment on account of the purchase price was made. All this tends to confirm my impression that the respondent sought to repudiate the transaction only after she was satisfied that her venture would not be immediately profitable and the only real error made was in her calculation of the probable result of her investment.

The appellant relied largely on the fact that with full knowledge of the deceit practised on her the respondent subsequently adopted and ratified the contract.

There can be in this case no question of ratification in the sense in which that term is used in the civil law. Planiol says:—

ce mot ratification désigne spécialement l'approbation donnée par le maître aux actes du gérant d'affaires.

In my view of the case, the question of confirmation does not arise either. The alleged error or mistake was with respect to the subject matter of the contract, that is, the identity of the lots. The respondent puts his case on the facts in those words:—

Quelque temps après, l'on a découvert que la terre s'étendait bien au delà du petit bois qui bornait la vue et *que les lots qu'on avait indiqués comme étant situés en deçà du bois* se troinaient situés partie dans le bois et partie au delà du bois, aboutissait au trait carré des terres de St. Léonard de Port Maurice, c'est-à-dire à quatre ou cinq arpents plus

loin que l'endroit que la compagnie appelante avait indiqué à l'intimée et aux autres syndicataires.

The judgment of the Superior Court has this considerant:—

Considérant que la demanderesse n'eut pas acheté sa part dans les dits lots si elle eut su qu'ils n'étaient pas à l'endroit indiqué par l'agent et la sous-agente de la défenderesse.

Mr. Justice Cross, in the Court of Appeal, says:—

Her grounds of action are that her consent to the contract was obtained by fraud, trickery and false representations that it was represented that the lots were on Bleau street whereas they are a long distance from it in a forest at the rear of the farm in the Parish of St. Léonard; that it was represented that the lots were near certain cement works, about ten arpents from the River St. Lawrence, whereas they are more than 20 arpents from there and far distant from and without access to the lower part of the farm of which they form part.

And Mr. Justice Pelletier says:—

Cependant il y a plus. It est établi au dossier que les lots en question ne sont pas situés à l'endroit où on a représenté qu'ils étaient et où on a prétendu les montrer.

If the mistake was brought about by fraud one can regard either the mistake or the fraud, but, in my opinion, the alleged error might have been avoided if the respondent had taken reasonable care and, as I have already said, she did not take care. She was not interested in any one or more lots but in the general scheme. Of course, if one contracting party is induced to enter into a contract by fraud on the part of the other, he can either confirm the contract or impeach its validity But here the respondent says there was no contract because there was error with respect to the identity of the lots and both courts below have so found and therefore the question of confirmation does not arise.

There are some differences of opinion among the authors as to the circumstances under which confirmation must take place, but of course all agree there can be no confirmation of something which never existed.

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"On ne confirme pas une nullité." Planiol, vol. II., Nos. 1293 and following, in a few paragraphs, states the generally accepted opinion.

In last analysis one must bear in mind in a case like this that all the surrounding circumstances must be looked at and the trial judge, who not only sees the witnesses but also breathes the very atmosphere in which the transaction was entered upon, enjoys a position of exceptional advantage. He, no doubt, was to some extent influenced by what Planiol describes as

> la physionomie de l'audience qui est un des éléments impondérables de la jurisprudence.

I am, reluctantly, to confirm and agree to do so because of the concurrent findings below.

DAVIES J. (dissenting)—I think this appeal must be allowed with costs.

There was, no doubt, such misrepresentation of material facts with respect to the location of the lands agreed to be purchased as would have justified the respondent when she discovered the true facts in repudiating the bargain she had made.

The contract, however, was not a void but a voidable one, and when she made the discovery as to the true location of the lands she could, within a reasonable time, have repudiated it. It was within her power, on such discovery, either to adopt or to repudiate the contract.

Now she took plenty of time to reach a decision. She consulted with all those who, like herself, had bought one or more of the lots as to the best course to adopt. They were all speculators sailing in the same boat. They did not buy the lands to use themselves but to sell at a profit.

Several meetings were held at which the question was discussed. The main point as to which they hesitated was as to the chances of a rise in value of the lots.

In the ultimate result, the scales turned in favour of a probable rise in value and the respondent, with full knowledge of all material facts, elected to adopt the contract and paid a further instalment of her purchase money.

Her expectations were not realised, the value of the land did not rise on the market, quite the contrary, and then defendant, respondent, attempted to reverse her election and repudiate her contract.

In my judgment she was then too late. She had already, with knowledge of the facts, elected and was bound by her election.

IDINGTON J.—Mr. Lafleur, of counsel for appellant, having properly conceded at the outset of his argument that, having regard to the jurisprudence of this court, it did not seem open to him to ask a reversion of the concurrent findings of fact by two courts below, but submitted that notwithstanding such findings there was, on undisputed facts, a ratification and adoption by respondent of the contract notwithstanding its originally being liable to repudiation.

I cannot say that under all the peculiar circumstances in which respondent was placed her assenting to the several nominees of the syndicate making attempts to resell was conclusive evidence of an intention on her part to ratify and abide by the contract.

If she alone had bargained and been caught in such a difficult situation I do not think an effort on her part to resell before launching upon a sea of litigation must of itself be held to be proof of ratification.

Again the payment of the November instalment was demanded and pressed for and she had to choose be-

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tween the risk of forfeiting the $1,000 she had already paid before discovering that she had been misled or of making the payment pending the expiration of the time given one of the said nominees to procure a sale.

These two circumstances of assenting to the attempt to resell and the payment of the money in November are thus so connected and dependent upon each other, that it comes back to a question of holding that such attempts as made to avoid litigation were conclusive proof of ratification.

I do not think she can be properly held to have finally determined to abandon her right of revocation.

The few months that elapsed after the payment and expiration of the option to resell before entering this action adds materially very little to the other circumstances.

It is not the length of time alone that is to be looked at for that might not count for much, but that is to be taken in connection with the other circumstances which, in such like cases, must be weighed.

On the whole, all taken together in light of the surrounding facts and circumstances existent herein, and with which I need not labour, do not satisfactorily establish an intention on respondent's part to ratify the contract or waive her right.

In my opinion the appeal should be dismissed with costs.

DUFF J.—In the special circumstances of this case I am satisfied that the judgment below cannot properly be reversed. This conclusion involves no point of general application.

ANGLIN J. (dissenting) — The plaintiff, Dame Sarault, sues to have an agreement made by herself and others for the purchase of suburban land near

Montreal declared void on the ground that her assent to it was procured by fraudulent misrepresentation, and for the return of the sums of $1,037.06 and $148 paid by her on account of the purchase money. Denying the misrepresentations alleged, the defendant also pleads prescription, nonjoinder of necessary parties and confirmation.

The making of the representations, their untruth, their fraudulent character, and that they induced the contract—all these facts have been found by the learned trial judge, whose judgment for the plaintiff was unanimously affirmed by the Court of King's Bench. While not altogether satisfied that, if sitting as a trial judge, I should have reached all these conclusions, there is enough evidence in support of them in the record to render the appeal upon this branch of the case hopeless; and it was practically not pressed.

The plea of prescription is ill founded, the case being governed, as Mr. Justice Pelletier points out, not by art. 1530 C.C., but by art. 2258 C.C.

It may be that joinder of the plaintiff's co-purchasers as parties is not required, if, as she contends, the relief sought by her will merely have the effect of vesting her interest in the defendant. In the view I take of the merits it is unnecessary to pass upon this question, which may be somewhat formidable in view of the joint character of the purchasers' obligations. Arts. 521 and 177 (8) C.P. But see arts. 1124 and 1125 C.C.

The defence of confirmation involves very important questions. That this defence was first raised by a supplementary plea seems to me immaterial. The facts upon which it depends, as accepted by the learned trial judge and in the Court of King's Bench, are that after the plaintiff had obtained full knowledge of the

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untruth of the misrepresentation on which she now relies to obtain rescission of the contract, she and her co-adventurers gave to two persons successively options upon or exclusive agencies to sell the lots in which they were interested and that she also made payment to the defendant of an instalment of the purchase money due by her under the contract.

The trial judge deals with this aspect of the case in a single paragraph:—

> Considérant en ce qui regarde la confirmation subséquente de la vente que vu que la défenderesse refusait d'annuler la promesse de vente, la demanderesse n'a fait des démarches pour vendre ces lots que pour éviter un procès en annulation, si elle pouvait ainsi vendre sans perdre beaucoup d'argent, et que le paiement qu'elle a fait en octobre, 1912, l'a été pour se protéger contre le droit qu'avait la défenderesse de résilier le contrat en gardant le paiement qu'elle avait reçu comptant.

Upon examining the record I have failed to find any evidence of a refusal by the defendant to cancel the contract, if that be material. No demand for rescission appears to have been made until long after the options had been given by the plaintiff and her co-adventurers and the payment relied upon had been made by her.

In the Court of King's Bench reasons for judgment were delivered only by Cross and Pelletier JJ. Mr. Justice Cross deals with the defence of confirmation in these two sentences:

> In regard to the plea of adoption of and adhesion to the contract after having had full knowledge of the facts, it is to be said that what the respondent did in the way of joining in an attempt to sell the lots does not necessarily shew an intention to abandon the right to ask for rescission. It is to be remembered that she stood confronted by a stiff covenant for forfeiture of all she had paid in, if she did not keep on paying.

Mr. Justice Pelletier discusses the question at greater length. In substance he says the payment relied upon was made by the plaintiff under pressure of a forfeiture clause in the agreement and was not accompanied by a protest because she was without professional advice

and a former protest had been of no avail. In making this payment the plaintiff sought only to guard against another danger—the loss of the money she had already invested. That is not acquiescence; it lacks the feature of positive abandonment of the right to rescind which is essential. As to the effort made to sell, it was merely an attempt to get rid of the property without litigation which certainly did not imply acquiescence.

With great respect, I have not found any evidence of a former protest; absence of professional advice also seems to have been assumed. The learned judge's reference to the necessity for

un acte positif abandonnant les droits qu'on a

might seem to imply that in his opinion there could not be tacit or implied confirmation; but he, of course, did not intend that. There is not a single authority cited upon this branch of the case in any of the judgments.

The supplementary plea raising the defence of confirmation is as follows:—

2. Même si cette erreur eût existé, ce que la défenderesse nie la demanderesse a persisté dans le contrat après que, de son propre aveu, tous les faits lui furent connus, et a fait des actes de propriétaire, en chargeant certaines personnes, ou agents d'immeubles, de vendre les lots pour elle, entr'autres le 3 octobre et le 31 octobre 1912.

3. En plus, même après que la demanderesse se fut aperçue de cette prétendue erreur, elle a néanmoins ratifié et confirmé le contrat en faisant des paiements trimestriels subséquemment, sans réserve ni restriction.

The plaintiff's answer is in the following terms:—

1. La demanderesse nie les paragraphes 1, 2, et 3 de la défense;

Et elle ajoute ce qui suit:

2. Qu'elle n'a chargé aucun agent d'immeubles ou autres de vendre les lots vu qu'elle s'est toujours plainte à la défenderesse et à ses agents qu'elle avait été trompée et qu'elle n'avait pas les lots qu'elle avait voulu acheter et que c'était, dans le but simplement de tâcher de rentrer dans les déboursés qu'elle avait faits vu que les agents ne voulaient pas lui remettre son argent;

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3. Elle n'a jamais ratifié ni confirmé en aucune manière que ce soit la promesse de vente qui est maintenant attaquée et si elle a fait un paiement supplémentaire, c'était sous l'empire de l'erreur dans laquelle elle était, ne sachant quoi faire pour préserver le montant de $1,000 qu'elle avait déjà déboursé, grâce aux fausses représentations de la défenderesse et de ses agents.

As will have been perceived the grounds on which the plea of confirmation has been rejected are that the plaintiff attempted to dispose of the lots merely to avoid litigation and loss of her money, and that she made the payment relied upon by the defendant to prevent the latter acting on a forfeiture clause enabling it to cancel the contract, retaining the money which had been already paid on account. The allegation of the plaintiff's answer that when she did the alleged confirmatory acts she was labouring under mistake (sous l'empire de l'erreur) is ignored both by the trial judge and in the court of appeal. If by it the plaintiff means that she was still without knowledge of the defendants' fraud, her allegation is directly contrary to her own evidence and that of her friends, and a finding upon it in her favour could not be supported. If she means that she acted under misapprehension as to the effect of the defendant's fraud on her obligation under the contract, or as to her own legal rights (which was the main contention presented on her behalf in this court) unless it is involved in the holding that she made the second payment under pressure of the forfeiture clause, she has failed to obtain a finding of these facts. The judgment in her favour does not rest upon this plea.

Perhaps a few of the leading features of the law of confirmation may be noticed without inviting a charge of pedantry or incurring the reproach of dwelling upon the elementary.

In Art. 1214 the Civil Code states the essential features of an express act of confirmation. It makes no allusion to implied or tacit confirmation such as is

found in art. 1338 C.N. That, no doubt, was merely because to do so was deemed unnecessary. 4 Langelier, p. 201; 6 Mignault, 31n.

Although the Code apparently ignores the distinction (art. 1214 C.C.), confirmation differs from ratification. 6 Mignault, p. 31; 4 Aubry & Rau, 1902, p. 430; Baudry-Lacantinerie, Des Oblig. III., No. 1985; 6 Larombière, Oblig., Art. 1338, No. 3; 8 Huc, No. 276. There can be no confirmation of the null and void; confirmation applies only to the voidable or annullable. 5 Marcadé, art. 1338, sec. 1, p. 94; Baudry-Lacantinerie, Des Oblig., III., No. 1992; 4 Aubry & Rau, 1902, p. 429; 8 Huc, No. 276.

While error and fraud are causes of nullity in contracts (art. 991 C.C.), they are not causes of absolute nullity; they only give a right of action or exception to annul or rescind them (art. 1000 C.C.) Error in the object of a contract amounting to mistake in its identity precludes consent with the result that the obligation is non-existent, or absolutely null. Error concerning the object short of this, however substantial, does not preclude consent and therefore an obligation results, although voidable and subject to rescission. It is with this kind of error that the Code deals in the articles cited. 5 Mignault, p. 212; 15 Laurent, No. 84; Baudry-Lacantinerie, Des Oblig. III., Nos. 52-53 *et seq.*; Pothier, Des Oblig. No. 17; 4 Marcadé, art. 1110, Nos. 1 & 2; Fuzier-Herman, Rep. Vbo. "Erreur," No. 21 & No. 26; Dalloz, Rép. Pratique, "Contrats et Conventions en général," Nos. 72 (2), 75 (tr.). In the plaintiff's declaration error is referred to not as a ground for relief but as a consequence of the fraud relied upon. Voidability is claimed not on account of error but fraud. The error shewn at the trial was not as to the identity of the property, but only as to whether it all lay be-

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tween the road and a clump of trees or whether part of it lay beyond these trees, and as to its proximity to a cement manufactory.

In answer to the plea of confirmation the plaintiff alleged not that the contract was not susceptible of confirmation because of absolute nullity entailed by mistake as to the identity of the object, but that the circumstances under which the alleged confirmatory acts were done rendered them ineffectual as confirmation The judgments at the trial and in the Court of King's Bench deal with the question of the sufficiency of the confirmation. There is no suggestion of absolute nullity on account of error as to the identity of the object. Nor was any such argument presented in this court. The evidence establishes that while there was no doubt error, induced by fraud, as to features of the property dealt with, which formed the principal consideration for making the contract (art. 992 C.C.) there was not in fact mistake as to the identity of the property such as would preclude consent. The contract was not void or absolutely null; it was voidable or annullable under arts. 991-2-3 and 1000 of the Civil Code, and it was as such a contract that the plaintiff presented it claiming a declaration that it had been obtained illegally and fraudulently.

The existence in Quebec law of the doctrine of implied confirmation and the conformity of some of its main features to those of the corresponding doctrine in English law was recognised by the Judicial Committee in *United Shoe Machinery Co. of Canada* v. *Brunet* (1).

It is clearly logical, says Laurent (XVIII. No. 624), that the requisites of tacit confirmation should be the same as those of express confirmation, since confirma-

(1) [1909] A.C. 330 at page 339.

tion, however evidenced, is one and the same juridical fact (fait juridique).

Under both the English and the French systems of law the essential features of confirmation are that the act invoked as confirmatory must be done voluntarily, with knowledge of the voidability of the principal act or obligation which is to be confirmed, and with the intention of confirming it. Comp. 5 Marcadé, sec. 5, No. IV., p. 98; Aubry & Rau (1902), sec. 337, 2° and n. 21, p. 438, with *Murray* v. *Palmer* (1); and *Moxon* v. *Payne* (2).

Although Toullier (VIII. 519) and Merlin (Quest. Vbo, Ratification, sec. 5, No. 5) were of the opinion that where an act in execution or fulfilment of a voidable obligation is relied upon as confirmatory, the party so preferring it is called upon only to prove that it was done voluntarily (in the sense of freely), the modern writers agree that he must, at least in the first instance, also satisfy the court that it was done with knowledge of the voidability of the principal act and with the intention of confirming. Baudry-Lacantinerie, Des Oblig. III., No. 2010; 6 Larombière (1885), art. 1338, No. 37, p. 346; 4 Aubry & Rau, 1902, p. 439, n. 22.

The burden of establishing knowledge by the obligor or debtor of all facts essential to confirmation always rests upon the obligee or creditor, Fuzier-Herman, Rep. Vbo. Confirmation, No. 172.

The inference of knowledge of voidability must be of actual knowledge and not merely of constructive knowledge through being put upon inquiry and having possession of the means of acquiring actual knowledge, 18 Laurent, 630; 7 Rolland des Villargues, Notariat, Vbo. Ratification, No. 63-4; Fuzier-Herman, Rep. Vbo. Confirmation, No. 132; Dalloz (1856), 1, 292.

(1) 2 Sch. & L. 474 at page 486. (2) 8 Ch. App 881 at page 885.

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Compare *Allcard* v. *Skinner* (1), *per* Lindley L.J. at p. 188, and *per* Bowen L.J. at pp. 192-3. In cases of doubt neither the inference of knowledge of voidability nor that of intention to forego the right of rescission will be drawn. 2 Solon, op. cit., No. 421; 2 Bedarride, Traité du Dol, No. 598. Moreover there must be actual execution; partial execution, however, will suffice, 4 Aubry, & Rau, 1902, p. 442, No. 26; but not a mere expression of intention to execute nor mere conservatory or other equivocal acts, 29 Demolombe 778; 6 Larombière, art. 1338, No. 35; 2 Bedarride, No. 600; Fuzier-Herman, Rép. Vbo. Confirmation, Nos. 155-165. Compare *Morrison* v. *The Universal Marine Ins. Co.* (2).

It must always be borne in mind, however, that mistake in law affords a ground for relief, under the Civil Codes of France and Quebec where it would not avail under English law: art. 1047 C.C.; 20 Laurent, No. 354; 13 Duranton, No. 682; 10 ibid. No. 127; *Bain* v. *The City of Montreal* (3).

I propose now to consider slightly more in detail the contention of the respondent, doubtfully raised in her supplementary answer, but strongly urged at bar, that the acts relied upon do not import confirmation because, though fully apprised of the facts, she was ignorant of her legal rights, and the finding, which she has secured in the provincial courts, that those acts were not voluntary.

The plaintiff's knowledge at the time she performed the alleged acts of confirmation, of the facts upon which her right of rescission depends is affirmatively established by admissions of herself and her associates. When the options were given and the November payment was made they were fully apprised of the fraudu-

(1) 36 Ch. D. 145. (2) L.R. 8 Ex. 197.
(3) 8 Can. S.C.R. 252 at pages 265, 284.

lent deception on which they now rely to avoid their contract.

The requisites of an effectual confirmation may be established by presumptions as well as by direct testimony. These presumptions may be founded on the nature of the vice or defect in the principal obligation and the character of the act preferred as confirmation. 4 Aubry & Rau (1902), s. 337, No. 22; 5 Marcadé (7 éd.), Art. 1338, s. 5, No. 4; 2 Solon, Théorie de la Nullité, No. 414 *et seq.* On this point Larombière says (vol. 6, art. 1338, No. 39):—

> Du reste, les tribunaux peuvent résoudre par l'appréciation des circonstances, les deux questions relatives, soit à la connaissance du vice, soit à l'intention de le réparer.
>
> La nature du vice qui entache l'obligation ou de l'execution volontaire qu'on oppose comme confirmation peut servir elle-même à les résoudre. Tel est le cas où, le vice étant personnel et apparent, celui qui confirme ne peut, avec apparence de raison prétexter cause d'ignorance, et où les actes d'exécution sont tellement énergiques et caractérisés, qu'il est impossible d'admettre qu'il n'ait pas eu l'intention de purger et de couvrir tous vices quelconques, en pleine et entière connaissance.

Whether knowledge of voidability will be presumed or inferred depends upon the nature of the facts of which it appears that the obligor was cognisant, *i.e.*, whether they are such that a person knowing them would be likely to be aware of the consequent right of rescission, Dalloz, 1853, 2, 223. The presumption of the intention to confirm will likewise depend upon the degree of significance which attaches to the act of execution, 29 Demolombe, No. 774. Laurent, Vol. 18, No. 620, says that execution by a person having capacity to renounce the right of rescission, with knowledge of the vice or defect which gives him that right, necessarily implies the intention to confirm. See also 2 Solon, op. cit. Nos. 415, 418, 420; Rolland de Villargues, Notariat, Vbo. Ratification, art. 3, No. 58. That

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such fraud as the plaintiff was fully informed had been practised in this case renders a contract affected by it voidable and gives a right of rescission to the party thus imposed upon are consequences so well known that it is scarcely conceivable that the plaintiff and her associates were ignorant of them. Such knowledge is properly presumed (2 Bedarride, Traité du Dol, No. 603. Compare *Carter* v. *Silber* (1); *Carnell* v. *Harrison* (2)), if not conclusively, as it should be in the opinion of M. Bedarride, at least until lack of it is satisfactorily shewn. That such an act of execution of his obligation as voluntary payment to his creditor by the debtor cognizant of its voidability imports an election to accept that obligation and to forego the right of rescission is the view held by all the text writers of repute. While any act implying intention to renounce the right of rescission will, if unequivocal, suffice as confirmation (18 Laurent, 623; 4 Aubry & Rau, p. 443, n. 31, b., t., & q; Dalloz, 1887, 1, 228: compare *Clough* v. *London & North Western Rly. Co. Ltd.* (3)), Demolombe (vol. 29, No. 780) says:—

> l'exécution, proprement dite, d'une convention consiste pour le débiteur dans le paiement de ce qu'il doit.

See, too, 4 Aubry & Rau, 1902, p. 442, par. (a); 2 Solon, op. cit. No. 427; 18 Laurent, No. 624, *Pineau* v. *La Compagnie Neigette* (4); Fuzier-Herman, Rep. Vbo. Confirmation, Nos. 117, 140. We have in the present case this typical act of implied confirmation. Comp. *Webb* v. *Roberts* (5); *Ex parte Shearman* (6).

Although some acts of execution accompanied by a clear (Fuzier-Herman, Rep. Vbo. Confirmation, No.

(1) [1892] 2 Ch. 278; [1893] A.C. 360.
(2) [1916] 1 Ch. 328 at pages 341, 343.
(3) L.R. 7 Ex. 26, at page 34.
(4) 22 R. L.N.S. 154, 156.
(5) 10 Ont. W.R. 962, at page 966.
(6) 66 L.J. Ch. 25, at page 28.

142, compare *Mutual Reserve Life Ins. Co.* v. *Foster* (1)), protest and reservation of rights will not amount to confirmation, the intention to confirm may be so unmistakably involved in the act itself that the most formal and explicit protest cannot avail; Journal du Palais, 1829, vol. 22, 2nd Part., p. 1287; 18 Laurent 637; 8 Huc, No. 275; Aubry & Rau, 1902, p. 442, n. 25; 2 Solon, op. cit. No. 436; 2 Bedarride, No. 609; Baudry-Lacantinerie, Des Oblig. III. No. 2005 (2). Here we have payment with presumed, if not actual, knowledge of the voidability of the obligation and without protest or reservation of any kind—a precaution (if it could be effectual), of which the absence is not adequately explained by the suggested lack of professional advice. *Bain* v. *City of Montreal*(2). The very fact of making a protest would involve an admission that the obligor knew of the voidability of the obligation and that her act of payment was of a nature implying an intention to confirm.

The presumption of intention to confirm arising from dealing with the property as owner—giving options upon it or creating exclusive agencies to sell it —is in English law equally as strong as that arising from payment. In *Vigers* v. *Pike* (3), Lord Cottenham said:—

> In a case depending upon alleged misrepresentation as to the nature and value of the thing purchased the defendant cannot adduce more conclusive evidence or raise a more effectual bar to the plaintiff's case than by shewing that the plaintiff was from the beginning cognizant of all the matters complained of or, after full information concerning them, continued to deal with the property. * * * As parties to these transactions and cognizant of the facts during the time they were acting upon the arrangement now complained of, using and appropriating the property they derived under it, they were precluded from asking any relief to which they might otherwise have been entitled, I confine my observations to the part of the relief which prays the rescinding of the transactions.

(1) 20 Times L.R. 715. (2) 8 Can. S.C.R. 252, at pages 285-7-9.
(3) 8 Cl. & F. 562, at pp. 650-2.

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See, too, *Campbell* v. *Fleming* (1); *Ex parte Briggs* (2). Compare Baudry-Lacantinerie, Des Oblig. III. No. 1991 (*a*); 29 Demolombe, No. 782, and 6 Larombière, art. 1338, No. 44.

In English law we are familiar with these presumptions. Indeed English jurists are perhaps in some cases inclined to regard them as conclusive more readily than the French. Instances have just been referred to. Others are to be found in such cases as *Carter* v. *Silber* (3); *Carnell* v. *Harrison* (4); *Seddon* v. *North Eastern Salt Co.* (5); *Croft* v. *Lumley* (6).

No doubt there are several leading text writers who incline to the view that notwithstanding the presumption in favour of confirmation which arises from acts such as we are dealing with, where the voidability of the obligation is obvious from facts known to the obligor, a bare allegation in his plea that he was ignorant of the legal effect of those facts upon his obligation, or of his right to rescission, or of the confirmatory operation of his own subsequent acts, casts upon the obligee the burden of proving by positive testimony that the obligor was in fact fully cognizant of all these matters. 18 Laurent, 632, 3; 650-1, 2; Baudry-Lacantinerie, Des Oblig. III. No. 2111. I am, with respect, unable to accept that view. It would render the establishment of tacit or implied confirmation impracticable. The reasoning of the writers who uphold the contrary opinion (4 Aubry & Rau, 1902, p. 440, n. 23; 6 Larombière, Art. 1338, No. 38; 2 Bedarride, Traité du Dol, No. 603; Fuzier-Herman, Rep. Vbo. Confirmation, Nos. 136, 137, 177) com-

(1) 1 A. & E. 40.
(2) L.R. 1 Eq. 483.
(3) [1892] 2 Ch. 278, at pages 286, 288; [1893] A.C., 360.
(4) [1916] 1 Ch. 328, at pages 341, 343.
(5) [1905] 1 Ch. 326, at page 334.
(6) 6 H.L.Cas. 672, at page 705.

mends itself to my judgment and is, I think, more in harmony with the view taken by the Judicial Committee in the *Brunet Case* (1). M. Solon (2 No. 415, p. 375 to No. 420, p. 383) would preclude the obligee in cases of apparent or patent voidability from setting up error of law in answer to a plea of confirmation. He will not be allowed to prove that he was unaware of the voidability unless he can shew some error of fact. But it is otherwise in cases of concealed or latent voidability.

In the foot-note to the report of *Lenoble* v. *Lenoble* in Sirey, 1860, p. 35, we find the following:—

L'exécution d'un acte nul peut avoir été consentie dans des circonstances et dans des termes tels que la preuve de la connaissance de la nullité paraisse en ressortir; c'est alors à celui qui prétend que cette connaissance n'existait pas à prouver son allégation, surtout quand il s'agit d'une nullité de droit, comme celle dont se trouvait viciée la donation attaquée dans l'espèce. Il peut arriver, au contraire, que rien n'indique que la cause de nullité ait été connue de celui qui a exécuté l'acte nul; et alors, c'est à celui qui prétend qu'il y a ratification à prouver que la ratification a eu lieu avec connaissance de la cause de nullité.

In English jurisprudence the line between mistake in law and mistake in fact is not so clearly and sharply drawn in equity as at common law: *Daniell* v. *Sinclair* (2). But see *Stanley Bros. Ltd.* v. *Corporation of Nuneaton* (3). A mistake in regard to a legal right dependent upon the doubtful construction of a grant or will, or having an obscure or uncertain legal foundation, will be a ground for relief in equity (*Earl Beauchamp* v. *Winn* (4); *Livesey* v. *Livesey* (5); *McCarthy* v. *Decaix* (6)), while ignorance of the legal consequences of known facts dependent upon a well-established rule of law will not (*Carnell* v. *Harrison* (7); *Midland Great*

(1) [1909] A.C. 330.
(2) 6 App. Cas. 181, 190.
(3) 108 L.T. 986, at pages 990, 992.
(4) L.R. 6 H.L. 223, at page 234.
(5) 3 Russ. 287.
(6) 2 Russ. & My. 613.
(7) [1916] 1 Ch. 328, 343.

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Western Rly. Co. v. *Johnson* (1); *Worrall* v. *Jacob* (2); *Harriman* v. *Cannon* (3)) unless it is so gross as to warrant an inference of imbecility, surprise, or blind and credulous confidence calling for the protective intervention of a Court of Equity (Story's Equity, 2nd Eng. ed., ss. 122, 124, 128), or is accompanied by other circumstances affording equitable grounds on which relief should be granted. *Rogers* v. *Ingram* (4). (But see criticism of the distinction between well-known and other rules of law, in Story's Equity, 2nd Eng. ed., ss. 126-7, where it is suggested that a distinction between action taken in entire ignorance of title or right and action when there is doubt or controversy rests on more solid foundation.) It may be necessary in some cases of private rights of the class dealt with in *Beauchamp* v. *Winn* (5), to prove affirmatively that the party alleged to have confirmed a voidable obligation had actual knowledge of his rights (*Cockerell* v. *Cholmeley* (6)); but ordinarily the presumption is that every person is acquainted with his own rights. (Story, 2nd Eng. ed., sec. 111; *Lindsay Petroleum Co.* v. *Hurd* (7); *La Banque Jacques Cartier* v. *La Banque D'Epargne de la Cité et du District de Montreal* (8)).

Such mistakes are not commonly easy of clear proof and courts of equity, in assuming to correct alleged mistakes, must of necessity require the very clearest proof, lest they create errors in attempting to correct them. There is, too, great opportunity for the practice of fraud through alleged mistakes of law, when courts listen readily to such grounds (Story, 2nd Eng. ed., s. 138a).

Assuming, as is the view of MM. Laurent and Baudry-Lacantinerie, that the presumption *juris et de jure* that everybody knows the law exists only in

(1) 6 H.L.Cas. 798.
(2) 3 Mer. 256, at page 271.
(3) 4 Vin. Abr. 387, pl. 2.
(4) 3 Ch. D. 351-357.
(5) L.R. 6 H.L. 223.
(6) 1 Russ. & My. 418, at page 425; I Cl. & F. 60.
(7) L.R. 5 P.C. 221, at page 241.
(8) 13 App. Cas. 111, at page 118.

regard to matters of public interest and does not ordinarily apply to matters of merely private right (compare *Cooper* v. *Phibbs* (1)), knowledge of private rights, as a presumption of fact, may and should be inferred where, as here, the circumstances are such that an ordinary man of the world would have been aware of those rights. (*Carnell* v. *Harrison* (2)). When with that knowledge an obligor does an act in fulfilment of a voidable obligation of a nature which ordinarily implies an intention to accept the obligation and to forego any right of cancellation or rescission (the payment made by Mme. Sarault and the options given to Mme. Bouthillier and the Charruau Realty Co. were undoubtedly such acts), the intention to confirm should also be inferred. In some cases these inferences may be so cogent that an assertion of error in law made to rebut them will not be tolerated. But the weight of authority favours the view that to an alleged confirmation error of law may usually be set up as an answer, though proof of it lies upon the person alleging it and may be very difficult.

As Demolombe puts it (vol. 29, No. 775):—

A supposer maintenant que le débiteur puisse fournir la preuve que l'erreur de droit, dans laquelle il était, a eu pour résultat d'empêcher l'effet confirmatif de l'exécution de l'obligation, du moins est-il nécessaire qu'il la fournisse.

See, too, Bedarride, No. 603; Fuzier-Herman Rep. Vbo. "Confirmation," No. 130; *Bain* v. *City of Montreal* (3).

As already pointed out it is very doubtful whether the plaintiff has in her pleading alleged error of law on her part. It is certainly impossible from her answer to the defendant's supplementary plea to determine in what respect she has alleged that she was ignorant—

(1) L.R. 2 H.L. 149, at p. 170. (2) [1916] 1 Ch. 328, at page 343.
(3) 8 Can. S.C.R. 252, at page 282.

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whether of the legal consequences of fraud, of her right of rescission, or of the confirmatory effect of the acts now invoked against her. There is really no evidence that she was not fully informed as to all these matters and there is nothing to shew that her conduct was determined by any mistake as to her legal rights. *Stone* v. *Godfrey* (1). Under these circumstances the contention that what she did does not amount to confirmation because of error of law on her part, in my opinion, fails.

The evidence in support of the finding that the alleged confirmatory acts were not voluntary is very slight indeed. In view of the proof that the facts as to the fraud of the defendant were fully known to the plaintiff and the presumption of her knowledge of the voidability of her contract and of her consequent legal rights (Fuzier-Herman, Rep. Vbo. Confirmation, No. 119; 18 Laurent, 631-3; 8 Huc., 274) and of the undoubtedly confirmatory character of her subsequent acts, the only aspect of voluntary execution still to be considered is whether the plaintiff was subject to such pressure that in doing the alleged acts of confirmation she acted under constraint and therefore not voluntarily.

No action to compel payment was brought either against the plaintiff or against any of her associates: nor was any such action threatened. The secretary of the defendant company merely telephoned to the plaintiff notifying her that her second payment was due. She asked him to call at her house and upon his doing so, without complaint or protest, gave him her cheque dated the 22nd November, 1912, for $148, the amount for which he asked. The fraud had then been

(1) 5 De G.M. & G. 76, at page 90.

fully known for some time. It had been considered at more than one meeting of the syndicate. At these meetings the deception practised was discussed and at one of them Mme. Bessette, a sub-agent of the defendant, and MM. Langelier and Beauchemin, its agents, who were present, were charged with the deceit of which the purchasers complained. The chief purpose of these meetings, however, seems to have been to consider the possibility of selling the property on terms which would be profitable or would at least save the members of the syndicate from loss. At one of them Isaie Denis, a member of the syndicate, tells us that, in reply to Mme. Bessette who urged them to hold out for $25,000 (their purchase price had been $16,600), he said:—

> If you can find $20,000, sell as fast as you can.

Mme. Casavant, another member, speaking of the third meeting of the syndicate held at the residence of M. Denis, on the 3rd October, 1912, says that it was called to discuss the best means of getting rid of the lands as quickly as possible; that Mme. Bouthillier was urged to undertake the sale of the property, that she was unwilling to do so, but that she finally yielded to the pressure of the members of the syndicate and accepted a written option or authorisation to sell as agent which the members of the syndicate signed. Mme. Bouthillier confirms these statements. When giving evidence several members of the syndicate denied having given this option. But when Mme. Bouthillier produced the document bearing their signatures they found themselves obliged to admit it. The plaintiff was one of the signatories. They had previously engaged Mme. Bessette to sell on their behalf. Pursuant to the mandate given her, Mme. Bouthillier, with the concurrence of members of the syndicate, on the 31st October,

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placed the property in the hands of the Charruau Realty Company with an exclusive right of sale. It is true that Mme. Sarault says in a vague and indefinite way that the reason she made the payment of $148 in November was because she feared that if she did not make it she would lose the $1,000 which she had already put into the property. But upon all the evidence it is, I think, reasonably clear that the members of the syndicate who had bought for speculation, although they knew they had a right of rescission, deliberately decided to hold the property in the hope of realising a profit by selling it and the plaintiff paid her second instalment rather for this reason than because of any duress or pressure due to the forfeiture clause in the contract. The suggestion of constraint seems to have been an afterthought.

I am unable to find in the evidence proof of such pressure or constraint as would vitiate the acts of confirmation relied upon or would justify a court in finding that they were not performed voluntarily. Certainly pressure due to fear of litigation or of losing the money already invested was not the sole inducement for the giving of the agency or option to Mme. Bessette and afterwards to Mme. Bouthillier. The possibility of disposing of the property to advantage affected the action of the syndicate in taking both these steps.

In a number of the French authors we find it stated that the execution of an obligation cannot be considered voluntary where it has taken place in order to escape action or suit by the creditor (pour échapper aux poursuites exercées par le créancier). Aubry et Rau (1902) p. 443; 29 Demolombe, No. 777; Fuzier-Herman, Rep. Vbo. Confirmation, No. 154. Indeed Baudry-Lacantinerie (Des Oblig. III., No. 2005) says

that "moral pressure" will suffice to render an act of execution involuntary. As an instance of such pressure, however, he gives an action or suit by the creditor.

Bedarride very forcefully and effectively combats the view that the mere threat, or even the actual institution by the creditor, of an action to compel performance, to which the debtor knows he has a complete defence (*ex hypothesi* that is the case here), can amount to such pressure or constraint as will render his execution of a voidable obligation ineffectual as confirmation. Traité du Dol II., No. 604-5. See, too, *Bain* v. *City of Montreal* (1).

Larombière (vol. 6, art. 1338, No. 41), says:—

> 41. L'exécution doit enfin être volontaire, c'est-à-dire qu'elle ne doit être ni surprise par dol, ni arrachée par violence, ni *forcée par les voies de droit*. Elle ne serait pas volontaire si elle était entachée de vices qui invalident le consentement, ou si elle n'avait eu lieu qu' à la suite et en exécution d'une poursuite judiciaire ou d'une contrainte légale, ou dans le seul but de s'y soustraire.

See also 8 Toullier, No. 512.

Payment under or to escape process of law, is the typical instance of performance under legal compulsion. Short of this there may be constraint of law, or "moral violence" sufficient to destroy the freedom of consent or liberty of action essential to a voluntary act, Story's Equity (12 ed.), s. 239. But the mere presence of a forfeiture clause in an agreement known to be vitiated by fraud in my opinion cannot, at all events, in the absence of evidence that the obligor was ignorant of her legal position and rights, warrant the conclusion that such significant acts of execution as the payment of purchase money and dealing with the land under the contract in a manner consistent only with an affirmance of it, unaccompanied by protest or reservation of any sort, were done involuntarily.

(1) 8 Can, S.C.R. 252, 284 *et seq.*

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The peculiar position of Mme. Bessette, who, while acting as a paid sub-agent for the vendors, posed before the members of the syndicate as a fellow-purchaser, having interests with their own, might have afforded the plaintiff another ground for rescission. But she does not allege these facts in her declaration and, although evidence of them was given at the trial, they were not alluded to in the judgments either in the trial court or in the Court of King's Bench. Presumably in those courts, as here, they were not urged as entitling the plaintiff to relief. There is nothing to shew when the members of the syndicate first learned of Mme. Bessette's sub-agency. It may be that it was known to them when the confirmatory acts relied upon were done, and if so, it would, of course, be affected by those acts in the same way as the misrepresentations on which the plaintiff has based her claim.

I am, for these reasons, with great respect, of the opinion that this appeal should be allowed with costs in this court and in the Court of King's Bench and that judgment should be entered for the defendant dismissing the action with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Loranger, Loranger & Prud'homme.*

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT).... APPELLANT;

AND

JOSEPH WALKER (PLAINTIFF) ..... RESPONDENT.

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*Oct. 18, 21, 22.
*Nov. 18.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Negligence—Railways—Master and Servant—Switch stand—"Fixed signal"—"Knowledge."

The respondent was an engineer on an east-bound train which collided on a west-bound track with another train through the improper setting of a switch. He alleged that he could not see the switch lights from his side of the engine owing to clouds of escaping steam and drifting snow obstructing his vision and that he passed them, on his fireman's assurance that they were "all right," without feeling any motion to cause him to realize that he had diverged to the west-bound track. Rule 401 of the Rule Book of the appellant company provided that "engineers must know the indication of all fixed signals before passing them," and a "fixed signal" was thus defined: "A signal of fixed location indicating a condition affecting the movement of a train."

Judgment of the Court of Appeal (11 Sask. L.R. 192), affirming on equal division the judgment of the trial court with a jury, against the company, confirmed, Davies C.J. and Duff J. dissenting.

Per Idington and Brodeur JJ.:—Upon the evidence, the signals on the target of a switch stand are not "fixed signals" within the meaning of Rule 401. Davies C.J. *contra.*

Per Anglin J.:—The words "must know" do not import knowledge acquired by the use of the engineer's own eyes to the exclusion of every other source of knowledge however reliable.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), affirming, on equal division, the judgment of the trial court with a jury which maintained the plaintiff's action.

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

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

(1) 11 Sask. L.R. 192; 40 D.L.R. 547.

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Tilley K.C. and *Reycraft K.C.* for the appellant.
P. M. Anderson for the respondent.

THE CHIEF JUSTICE (dissenting).—This was an action brought by the plaintiff, respondent, to recover damages for injuries sustained by him in a head-on collision which occurred between the east-bound express, of which he was the engineer in charge, going out from Moose Jaw to Regina, and the west-bound express coming in to Moose Jaw, about a mile east of that station. The collision was the result of the plaintiff's train improperly getting across from its proper track to the track of the west-bound express, and the broad question to be determined is whether the plaintiff contributed by his negligence to the collision which caused his injuries. The jury found in his favour and awarded him $15,820 damages, made up of special damages $2,320, and general damages $13,500, and the trial judge entered judgment for that amount.

On appeal to the Appeal Court of Saskatchewan the court was equally divided. The Chief Justice and Elwood J.A. being to allow the appeal and dismiss the action, while Newlands J.A. and Lamont J.A. were to dismiss the appeal, so that the judgment in plaintiff's favour stood.

This is an appeal from that judgment of the Court of Appeal.

The two learned judges of the Court of Appeal, Newlands and Lamont JJ., who supported the judgment in plaintiff's favour, did so on the sole ground that, in their opinion, the switch light was not a "fixed signal" according to the rules of the company and that the plaintiff therefore did not break the rule 401 requiring that

engineers must know the indications of all fixed signals before passing them.

Newlands J. says:—

It was admitted by counsel on the argument before this court that if a switch light is a "fixed signal" the plaintiff, respondent, should not have passed this point without ascertaining that this light was burning, and if so, the colour of it,

and Lamont J. says:—

It was not a question of construing the rule. The rule is clear. It is a question of determining whether or not a disc or light placed on a switch brings it within the rule and this, in my opinion, is a question for the jury.

The other two judges held, as did also the trial judge, that it was a fixed light and they pointed out that the plaintiff himself admitted in his evidence that there was nothing to which the definition of a target signal would apply except the disc or target set on a switch stand.

There was no difference of opinion in the Court of Appeal as to what the result should be if the switch lights were held to be *fixed* signals.

As to the damages awarded plaintiff, which is made a ground of appeal as being excessive, I am inclined to think them very large and beyond what the evidence justified, but in the view I take of the law and the evidence upon the other points of the case I do not feel it necessary to deal with the question of damages.

The essential points on which this appeal must be decided are whether the disc or target on a switch stand is a "fixed signal" within the rules, and whether the engineer was justified in passing on the occasion in question the switch signals at points X and Y shewn on the sketch of the railway track at Moose Jaw without knowing the indications they gave would lead the train from No. 3 track, which was its proper track, to No. 2 track, which was the track of the incoming express with which the plaintiff's train collided.

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The Tri Cities Express, so called, with plaintiff as engineer in charge, left Moose Jaw about 10 p.m. for Regina on the night of the 4th January, 1916.

The plaintiff had been running as an engineer over the route for a year and five months previous to this date, and always left the depot at Moose Jaw by the same tracks as on the night of the accident and was well acquainted with defendant's east yard at Moose Jaw.

In my opinion, the trial judge properly charged the jury on the question as to whether the target signal on the switch stand was a "fixed signal" or not, but the jury ignored his direction and found, contrary to the evidence, which was all one way, that the switch stand and target signals at X and Y did not comply with the rules defining a target signal. Even Walker himself admitted that there was nothing to which the definition of target signal would apply except the disc or target set on a switch stand. I think in the light of the trial judge's charge to them on this point the finding of the jury that these signals were not "fixed signals" was "perverse," and I cannot understand why, after having charged them as he did on the point, the trial judge left the question to them at all.

A "fixed signal" is stated in the rules to be a

signal of fixed location indicating a condition affecting the movement of a train.

Now the target on a switch is of fixed location and admittedly indicates

a condition affecting the movement of a train.

For myself I do not entertain a doubt upon the question.

That leads us to the second question, whether the engineer was justified in passing the switch signals at points X and Y on the plan of the track without know-

ing the indications the lights gave that they would lead his train from its proper track No. 3 on to track No. 2, which was the track of the incoming express.

Rule 401 says:—

> that engineers *must know* the indications of all fixed signals *before* passing them.

The reason why such imperative language is used is obvious. The lives in many cases of hundreds of innocent passengers may be imperilled by the engineer of an express train ignoring the rule. In the case before us the engineer not only did not *know* but took everything for granted and did not attempt personally to acquire knowledge of what indications the signal lights upon them gave. He knew all about the incoming express, all about the "cut-off" at the switches X and Y which, if improperly set, would carry him over to the west bound express track. He knew the location of these two switches and what the lights upon the target of the switch stand indicated. It appears to me after carefully reading his evidence that he knew everything necessary to be known by an engineer in charge of an express passenger train to induce him to take special precautions before passing these switches X and Y to assure himself beyond doubt and to know, as the rule states,

> the indications of all fixed signals before passing them.

If these signal lights shewed green, then he could safely go straight ahead along his own track, while, if they shewed red, he would know that the switches were set for a divergence to the west-bound main line, in which case, of course, he must *stop* and have the switches properly set.

As a fact, though unknown to plaintiff, signal lights on these two switch stands X and Y shewed red, and consequently the train passed over the cut-off to the

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west-bound line and proceeded along it some three quarters of a mile until a head-on collision occurred.

Neither before or when his train passed across from its proper track to the west-bound track or afterwards did the engineer know anything about the lights or what track he was on. He neither looked himself nor did he instruct the fireman to look. He ran his train across to the west-bound track in ignorance, inexcusable, I think, of what the signals indicated.

The plaintiff's excuse for not knowing how the switches were set and what the lights on their targets indicated was that he could not see them from his side of the engine as they were on the left, or fireman's side, of it and the wind was blowing the smoke and steam past his, that is, the plaintiff's side of the engine cab. It was a stormy night and one which called for more than ordinary precautions. The train was going very slow, just crawling through the station yard and for about seven car lengths before coming to the switches the fireman, to plaintiff's knowledge, was not looking out. Curiously enough, although, as he says, he had instructed him to watch for the signals on the several switch stands which they had first passed on leaving the station, he did not instruct him to look out for these in question. The plaintiff knew the fireman had ceased to keep a look out when the engine was at least seven car lengths or 140 yards from the switches in question, as Walker himself testifies. The fireman was attending to his fire, plaintiff knew he was so attending. Two paces across the car would have enabled him to see and know for himself whether the lights on the targets of these switch stands entitled him to go on or required him to stop and avoid going over to the west-bound track. But the plaintiff neither took this, what one would think, necessary precaution nor instructed the

fireman to look out and see what the signals indicated, and so the train passed across to the wrong track and along it for three-quarters of a mile till it collided with the incoming express. The plaintiff simply ignored rule 401, which said:—

> engineers *must know* the indications of all fixed signals before *passing them.*

But this man not only did not himself know or find out what the signals indicated before passing them, nor did he instruct the fireman to see although he knew the latter had given up looking out and was attending to his fires for some considerable distance before reaching the signal lights on these two switch stands X and Y. The fact is he took everything for granted, ignored the rule I have quoted and assumed all was right.

In the face of the facts I have stated, the perfect knowledge the plaintiff possessed with regard to all the necessary facts relating to this railway yard, the location of the different switches, the indications which the signals on the targets of these switches gave as to the train's movements, &c., the necessity imposed upon him of *knowing* the indication of all fixed signals before passing them, and the utter ignorance he acknowledges himself to have been in as to the indications of the signal lights on the switches X and Y when he diverged to the west bound track,—I am at a loss to understand how any jury could be found in the face of the judge's charge to them as to what were "fixed signals" to say that plaintiff was not guilty of negligence in passing these switches at the time he did and without any knowledge of the indications they gave.

In my humble opinion, the plaintiff should have been nonsuited on his own evidence. As he was not, I can only hold the verdict to have been perverse.

The excuse put forward that he got what he called

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a high ball or proceed signal from the switch tender at the station and that this entitled him to assume that the line was safe and the switches all right for him is not, in my judgment, worthy of consideration That he did not believe in it himself is shewn by his own evidence that as they were leaving the station he instructed the fireman "to keep a sharp look-out" for the switches, which, he says, he did until the train reached what is shewn on the plan in evidence as the Creek Bridge, when the fireman got down from looking out and said "all right". But this place where the fireman got down from looking out was quite a distance from the switches in question, some seven car lengths plaintiff says, and the train was just crawling at a rate of two to four miles an hour. During all this time no one was looking out and the plaintiff simply assumed, without knowing, as the rule required him to do, that the switches were set properly for his train's track. The plaintiff himself, on his evidence, shewed clearly why he was so careless and negligent respecting the indications which the light signals of switches X and Y gave. He relied upon the signal given to him, as he says, by the switch-tender when he was leaving the station.

Q.—Do you think there was no duty after you passed those switches to see again whether you were on the right track or not?

A.—No, as long as I had got the signal from that man, whose place and duty it is to line up those switches, and has always done it.

Q.—That is Mr. Weeler?

A.—Yes. As long as he gave me the signal that all those switches were lined up, that relieved me.

Q.—Having got the signal or high ball from the switch-tender at the station?

A.—Yes.

Q.—You then felt perfectly warranted in going ahead. A. Yes.

Q.—Notwithstanding you could not see your track?

A.—Yes. Because he gave that signal to me to say that those switches were all lined up.

Q.—Having got the signal from Mr. Weeler on the station, and

started on the right track, you would have felt—in consequence of that you would have felt perfectly safe in going on without anything further? A. Yes. I did.

Q.—And there was no further duty cast upon you? A. No.

Q.—And that was what you relied on? A. Yes.

HIS LORDSHIP:—Why did you tell the fireman to keep an extra look out?

A.—As an extra precaution.

Those clear and explicit statements of the plaintiff himself as to why he passed the fixed signals X and Y without knowing what they indicated as to his proceeding or stopping effectually disposed of the other excuses offered by him as to his not crossing the engine cab and seeing for himself what these signals indicated; one of these excuses was that possibly he might, by crossing over, miss seeing a fusee burning or flaring on the track indicating danger. The fact being that he had already sworn positively that remaining in his post on his right hand side of the cab he could see nothing outside on the track because of the wind blowing the smoke and steam on his side of the car. This fusee excuse in the light of his sworn reasons for passing the switch stands without knowing the indications they gave respecting the movements of his train seems to me to be simply an afterthought and a very questionable one at that.

My conclusions, after a very full study of the evidence and after hearing the arguments at bar, are that the signals on the target of a switch stand are "fixed signals,' within the meaning of the rules beyond reasonable doubt, and that the plaintiff, in running his car across the "cut-off" at the switch stands X and Y on to the west-bound track, did so in ignorance of what these signals indicated and in careless and negligent assumption that they indicated all was right for him to go ahead on his own proper track because of the signal or high ball, as he called it, he got from the

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switch-tender when leaving the station; and that, in acting on such unwarranted assumption, he violated rule 401 which required him unless and until he knew what the signals indicated to stop his train and find out; that the train was running at a very slow rate and could be stopped in a moment as he himself said and that there was nothing to justify him in acting as he did upon his unwarranted assumption that the signals indicated all was right for him to proceed; that his duty clearly was if his fireman was busy with his fire in order to get up speed to step across the engine cab before reaching the switch stand and see for himself what their lights indicated, and if anything prevented his doing that to stop the train till he did know whether safety or destruction lay ahead of him.

I think the appeal should be allowed and the action dismissed.

IDINGTON J.—The question raised herein of the interpretation and construction of the rules bearing upon the duty of the engineer in charge of a locomotive drawing a train when it involves, as herein, the determination of whether a switch stand in a railway yard constitutes a "fixed signal" or not, is of such a technical character as to require expert evidence to assist the learned trial judge in order that he may direct the jury aright.

Notwithstanding the apparent simplicity of such a phrase as "movement of a train," I am unable to hold that these rules, so far as defining a "fixed signal" when using such said phrase, are framed in such plain ordinary language that the learned judge could and must, unaided by such like evidence as I have indicated, direct the jury as to the meaning thereof in the way that the law requires relative to documents framed in plain ordinary language.

I take the law to be correctly laid down in Taylor on Evidence, 10th ed., at pp. 45-6, as follows:—

> Matters of great nicety arise in connection with this subject. But the clear general rule is that the construction of all written documents is for the court alone. The construction of these is, as we have said, for the court alone so soon as the true *meaning of the words* in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court, either absolutely. if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. The term "written documents" includes Acts of Parliament, judicial records, deeds, wills, negotiable instruments, agreements and letters. A misconstruction by the court is the proper subject of appeal to a court of error; but a misconstruction by the jury cannot in any way be effectually set right. The effect of the rule consequently is to render the law certain. A marked instance of its application occurs in the case of the construction of the specification of a patent, for, though the interpretation of such an instrument—relating as it does to matters of science and skill—would seem peculiarly adapted to the practical information of jurors, the court must construe it after merely ascertaining from the jury an explanation of technical terms. Again, the construction of all written contracts is for the court.

The onus of making appellant's contention in that regard clear rested upon it in order to establish that respondent had been guilty of contributory negligence.

It failed at the trial to adduce any evidence save such as elicited by its counsel in the cross-examination of the respondent.

That evidence clearly declared that none of the switch stands passed by him in the Moose Jaw yard at the time in question were fixed signals.

He had long experience and before that had passed an examination on these rules and acted according to his understanding thereof.

The requirements of the rules as to fixed signals, in relation to switch stands in the yard, do not seem to have been observed, for he passed three or four of them in the same yard in his usual manner; which was hardly consistent with a rigid and literal observance of his

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duties relative to actual "fixed signals" well known to be such.

Indeed, such observance would hardly be practicable in a station yard where many switches had to be passed in the course of shunting trains.

Moreover, the switch-tender's signal, given respondent, seems to have been something intended to have been done and acted upon in the usual manner, and as if a necessary requirement which he was accustomed to observe; clearly in disregard of the switch stands being treated as fixed signals.

The incident of that non-observance strongly suggests that the switch stands in the yard were not considered by any one in appellant's service as fixed signals.

There were two trials in this case, and if such a vital point as raised herein really in fact seriously intended to be determined I should have expected the appellant to have met it fully and fairly and to have put beyond doubt the true solution of the question involved by proving that switch stands were in fact part of that which expert railwaymen understood by the ambiguous term in question.

The learned trial judge submitted the question to the jury and they answered adversely to appellant.

I am not surprised at the result in face of the evidence. Nor, leaving aside the propriety of the submission of the question, can I see how the appellant can complain.

Indeed, it seems to me that the plain duty of the appellant was to have proved conclusively that such switch stands were fixed signals which every engineer knew and in relation to which the respondent was bound to observe duties relative thereto as such. Failing to do so, or even make an attempt to aid the

court in the way the law as laid down in the above quotation, and much more, from, Taylor indicates, I cannot see how it can now complain.

Had it done so and proved as it now claims instead of the contrary as its counsel seems to have intentionally or otherwise done, I could see some ground of complaint.

The minor inferences and arguments based on suggestions of other neglect on the part of respondent were clear'y all for the jury and its verdict final.

I th nk the appeal should be dismissed with costs.

DUFF J. (dissenting).—I am to allow this appeal with costs.

ANGLIN J.—The plaintiff was the engineer on an east-bound train of the defendants running from Moose Jaw to Saskatoon. On a cold and windy winter night this train collided on the west-bound track with a west-bound train about a mile and a half east of Moose Jaw. It is now admitted that the plaintiff's train had been diverted to the west-bound track owing to the misplacing of two switches controlling a "cut-off" or cross-over track connecting the two main tracks, at a point about three-quarters of a mile west of the place of collision and that this constituted actionable negligence imputable to the defendants which renders them liable unless the collision should be ascribed to fault or negligence of the plaintiff.

If the mechanism of the switches in question was not out of order, of which there is no evidence—and no such suggestion was made at the trial—set as they were for diverging tracks they must have shewn red lights. Had he seen or been otherwise informed that the switch stands shewed red lights the plaintiff would have known that should his train proceed it would pass from

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the east-bound to the west-bound track. He was under orders to proceed on the east-bound track.

The defendants assert that in passing these red switch lights, as he did, not merely was the plaintiff grossly negligent but that he broke a definite rule of the company sanctioned by the Board of Railway Commissioners. They also charge him with further neglect in having failed to discover that he was on the west-bound track before the collision became inevitable.

In reply he asserts that from the right hand side of the engine cab—admittedly "the engineer's side" on which he says it was his duty to be—he was unable, owing to clouds of escaping steam and drifting snow obstructing his vision, to see the switch lights in question, which were on the left-hand side of the track, and that he passed them without being aware that they were set for the "cut-off" and did so in reliance on his fireman's assurance that they were "all right"—an assurance which he the more readily accepted (as he maintains he was entitled to do) because he had already received from the switch tender what is known as a "high ball" signal to the same effect. In his evidence he says that owing to the slow speed of his train he did not feel any motion that would cause him to realise that he had diverged at the "cut-off," and that, after it had passed to the west-bound track, although he was looking out, the clouds of steam and drifting snow prevented his noticing that there was a parallel track to his right which would not have been there had he been on the east-bound track.

The plaintiff's fireman was killed in the collision, and the only evidence of the circumstances preceding it is given by the plaintiff himself. The defendants offered no evidence. Upon a charge not objected to

at the trial, or now, a jury has found that there was no negligence on the part of the plaintiff. This implies that they believed the plaintiff's evidence and found all controverted matters of fact bearing upon that issue in his favour. They accepted as sufficient his explanation of his inability to see the indicating lights of the switches set against him and of his failure to realise that his train had passed to and was proceeding on the west-bound track. These were matters which it was within their province to pass upon and I am not prepared to hold that their implied findings in regard to them were so clearly perverse that we should set them aside.

It follows that, unless the defendants can establish that the p aintiff disregarded some rule which he was bound to obey at a'l hazards—a rule so imperative that failure to comply with it would conclusively debar him from recovery regardless of any considerations of negligence or reasonable excuse—the judgment for the plaintiff cannot be disturbed. The defendants submit that rule 401 is such a rule and that it was disregarded by the plaintiff. The relevant part of that rule reads as follows:—

Engineers must know the indications of all fixed signals before passing them.

Conceding this rule to be imperative, the p aintiff answers the defendants' contention based upon it by averring that the switch stand signa's which he passed although set against him were not "fixed signals," and that if they were, he complied with the requirements of the rule properly interpreted.

On the first of these two questions there has been much divergence of judicial opinion The trial judge asked the jury to determine it and acted upon their negative answer. The Court of Appeal would appear

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to have regarded it as a question proper to be dealt with by the court. The four learned appellate judges were equally divided in opinion upon it, Newlands and Lamont JJ. agreeing with the construction placed by the jury on the term "fixed signals" and the Chief Justice of Saskacthewan and Elwood J. holding that switch stand signals are "fixed signals" within the definition of that term contained in the book of rules.

It would almost seem to be a hardship for the plaintiff should he, against his sworn statement of his understanding to the contrary, which the jury must have accepted and without any expert or other evidence opposed thereto, be held bound, (at the peril of being held blameworthy should he act on the contrary view), by an adverse interpretation of this term as used in rule 401, as to which learned judges have disagreed. While there is a great deal to be said for the opposite view, with such light as we now have on the question I would be inclined to agree with the contention put forward by the defendants, substantially for the reasons stated by Elwood J. (1) I am satisfied moreover, that without any such special rule as that under consideration, an engineer's disregard of a switch stand signal or indicator set against him, whether it be technically a "fixed signal" or not, would disentitle him to recover for injury sustained in an ensuing collision, if he saw, or if, under the circumstances, it should be held that but for his own fault he would have seen that it was set against him. But I find it unnecessary, and on this record I think it would be unwise, to express a definite or concluded opinion on the question whether switch stand signals are or are not "fixed signals."

Assuming that they are, whether the plaintiff did or did not comply with rule 401 depends, in my

(1) 40 D.L.R. 547, at page 552; (1918) 2 W.W.R. 336, at page 342.

opinion, on the meaning to be attached to the words "must know." In the strict sense knowledge is, of course incompatible with error. One cannot "know" that which is not the fact. But nobody contends that rule 401 means that fault on the part of an engineer will be conclusively established should he proceed under a mistaken conviction as to the indication of a switch light although he had exhausted every means humanly possible to ascertain the fact. "Must know" does not import that there must be a certainty which it is quite beyond our finite and fallible powers to attain—does not imply that mistake however caused will always be inexcusable. The defendant's contention is not that. It is that the engineer is obliged to have a conviction that the indication of every fixed signal entitles him to proceed, *based on personal ocular observation*, before he does so; that if he proceeds without "knowledge" thus acquired he does so at his peril If the words "must know" import exclusively, as the defendants contend, knowledge acquired from the testimony of the engineer's own eyes, rule 401 admittedly was not obeyed. If, on the other hand, information on which a reasonably prudent man would, under the circumstances, have been justified in believing that there was certainty, as great as the limitations of human fallibility permit should exist, that the switches in question were set in his favour suffices as the foundation of the "*knowledge*" of that fact demanded by the rule, and the jury was satisfied, as it must have been, that the plaintiff had information of that character, his right to recover cannot be successfully impugned although the switch signals were in fact set adversely to him and personal observation, if feasible, might have so informed him.

I have selected the following definitions of the

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active verb "to know" from standard English dictionaries:—

To have cognizance of (something) through observation, inquiry or information; to be aware or apprised of (F. savoir, Ger. wissen) to become cognizant of, learn through information or inquiry, ascertain, find out:

To be congnizant, conscious, or aware of (a fact), to be informed, to have learned; to apprehend (with the mind), to understand. With various constructions: a. with dependent statement, usually introduced by *that*. Murray.

To be convinced or satisfied regarding the truth or reality of; to be informed of; as, to know things from information. The Imperial.

To perceive or understand as being fact or truth (primary definition) and, in a general sense to have definite information or intelligence about; be acquainted with either through the report of others or through personal ascertainment, observation, experience or intercourse. The Century.

To perceive or apprehend as true; to recognize as valid or as a fact on the basis of information possessed, or of one's understanding or intelligence, to have mental certitude in regard to, together with a clear comprehension of; to perceive with understanding and conviction. Webster.

A moment's reflection will suggest many material truths within our certain knowledge of which, although not founded upon any testimony afforded by our eyesight, we would immediately challenge any denial. Knowledge based on the testimony of our fallible senses is far from being universally accepted as the highest or the most certain. There are other sources of moral certitude.

Walker, in his evidence, asserts that he had duties to discharge which required him, at least while running within the Moose Jaw yard limits, to remain on the right-hand side of his engine. He particularises the necessity of his being in a position to see a possible flagman's signal or a burning fusee on his side of the track which, were he on the left-hand side of the engine, might escape his attention. Rule 11 forbids passing a burning red fusee. A flagman's light swung across the track would have required him to stop (r. 12). Any

object waived violently by any one at or near the track is a signal to stop (r. 13). Common knowledge tells us that he might have added that the position of the throttle, the lever and the air-brake controller, all of which he might be suddenly required to use with the utmost promptitude to meet an emergency, also made it incumbent upon him, at least while within yard limits, to retain his position on the right-hand side of the engine cab. While there appears to be no rule imposing on the engineer in explicit terms the duty of remaining on his own, or the right-hand side of the cab, rule 35, in three places, implies such a duty:

35.—A yellow flag or a yellow light placed beside the track on the same side as the engineer of an approaching train, indicates that the track 3,000 feet distant is in condition for speed of but six miles an hour unless otherwise instructed, and the speed of a train will be controlled accordingly. A green flag or a green light, placed beside the track, on the same side as the engineer of an approaching train, at a point beyond the slow track, indicates that full speed may be resumed.

A "slow" sign placed beside the track, on the same side as the engineer of an approaching train, may be used to mark a point where a slow order is in effect.

Having regard to the definitions, the uncontradicted evidence and the passages from the rules to which I have referred, I have no hesitation in concluding that the words "must know" in rule 401 do not import knowledge acquired by the use of the engineer's own eyes to the exclusion of every other source of knowledge however reliable. The rule may be satisfied by knowledge acquired by inquiry or information from the fireman, when the engineer cannot himself see the signal indication from the place he occupies in the cab, provided he takes adequate precautions to ensure, as far as reasonably possible, the accuracy of such information. Thus the engineer may rightly be required to see that his fireman, if he is relying upon him to communicate

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information as to signals, is in a position to see them, has taken what appear to be reasonably sufficient means to ascertain what they are and has communicated the information in such a manner as to obviate any reasonable possibility of misunderstanding. The plaintiff has sworn that he discharged his duty in all these particulars, and the jury whose function it was to pass upon his credibility, have accepted his statement. I find nothing in the rules which prevents an engineer, under these circumstances, from relying upon the information given by his fireman that switch stand signals or indicators on the left-hand side of the track which he may be unable to see himself appear to be in order and "ranged up" to allow the train to proceed. On the contrary, were an engineer obliged to cross over to the left-hand side of the cab to verify with his own eyes the indication of every switch light on the left-hand side of the track encountered in a yard such as that at Moose Jaw, not only would the running of trains be seriously impeded but other dangers above indicated, against which it was his duty to guard, would not be provided for.

Upon the findings of the jury the proper conclusion, in my opinion, is that Walker had the "mental certitude"—the "conviction" based on information—necessary to satisfy rule 401.

If I thought that on its proper construction rule 401 imposes on the engineer the duty under all circumstances of ascertaining by personal observation the indications of every switch stand light on the left-hand side of the track before passing it, I should have had to consider very carefully indeed before holding the plaintiff disentitled to recover, whether the discharge of duties inconsistent with the observance of it was not also required of him, and, if so, whether the

defendants could invoke against him a failure to comply with that rule caused by the necessity of fulfilling such other duties.

The verdict is no doubt large, but it is not so excessive that it is possible to say that the jury must have been influenced by improper considerations in arriving at it, and while I might, if trying this action, have reached different conclusions as to some facts deposed to by Walker relevant to the question of contributory negligence, I could not, without usurping the functions of the jury in regard to these matters, substitute my views for theirs

I would, for these reasons, dismiss this appeal.

BRODEUR J.—This is a railway accident in which the plaintiff, respondent, was seriously injured. He was the engineer on a passenger train of the appellant company and he was bound to go east on a double track.

His train was then on track No. 1 at the station at Moose Jaw, and in order to reach track No. 3 or the east-bound main track, on which he was to run to reach the next station, the switches had to be lined up by an employee called the switch-tender.

Having received from the conductor of the train the order to start, and having received from the switch-tender the high ball signal indicating that the switches were properly laid, he started his train, which went down on the east-bound track; but by a very serious and evident mistake of the switch-tender the switch at the end of the yard through which the train could be transferred from the east-bound track to the west-bound track had been left open and the train engaged itself on the west-bound track and came into collision with another train a few minutes after.

It is common ground that the switch, which I will

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call the Y switch because it is indicated in that way on the plan filed in the case, was not properly set. There was negligence on the part of the company's employees in giving Walker instructions to proceed with his train when that switch was not properly lined up. Then there is no doubt as to the company being liable for that negligence.

But the contention of the company is that the proximate cause of the accident was the negligence of Walker, because he should have ascertained and known the indication that this switch was set in such a way that his train would be brought on a west-bound track instead of being kept on the east-bound track. He is then charged with having failed in the duties which he had to perform and with being guilty of contributory negligence.

The jury found in favour of the plaintiff on that question of contributory negligence and that verdict was accepted by the trial judge and confirmed by the Court of Appeal.

Mr. Tilley, for the company, relied on rule 401 of the General Train Rules, approved by the Railway Commission, which says:—

> Engineers must know the indication of all fixed signals before passing them. At railway crossings, drawbridges, junctions or train order offices, they will require the fireman to observe and communicate the indications of signal.

It is contended on the part of the respondent that he had ascertained through his fireman that the Y switch was properly set and that he could proceed and, besides, he adds that a light on a switch stand is not a fixed signal and that rule 401 does not apply in this case.

The accident happened during the night of the 4th of January, 1916. It was a dark, stormy and very

cold night, 30 below zero. A strong wind was blowing from the north and the steam coming from the engine was passing over to the right side of the engine, the engineer's side, so that the latter was enveloped in a fog, it being practically impossible for him to see on his side. His fireman had been instructed to keep a look-out. The switches were on the side of the fireman, and he reported that everything was all right. The poor fireman was killed as a result of the collision and his evidence unfortunately was not available at the trial.

The jury has found, as I have said, that the engineer, in those circumstances, was not guilty of contributory negligence. He could not see himself, in view of the fog which was surrounding his side of the engine, and it was proper for him to instruct his fireman to look and see.

Besides, has that rule any reference to the lights on the switch stand? I do not think so, because then there would be a conflict between the rules 10 and 661 and rule 401. Rule 10 says that a red light means that the train should stop. Rule 661 says:—

Trains or engines may be run to but must not be run beyond a signal indicating stop.

These two rules read together mean that when a red light is seen the engine must stop and the train must not go further. It could not apply to lights on switch stands, because there the trains are not bound to stop; but lights on the switch stand simply indicate that the green is set for the main track and the red is set for the diverging track. If rule 401 was to be read as applying to switch stands, then the duty of the engineer in this case would have been to stop at the four red lights which were on the switch stands before he reached the Y switch, and nobody contends that.

The plaintiff has said in his evidence, and it was not

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contradicted, that those switch stands are simply indicators and not fixed signals as included in rule 401. I think he was right in his contention; because otherwise there would be conflict between the rules 10 and 661 on one side and rule 401 on the other.

I have come to the conclusion that the jury was right in declaring that there was no contributory negligence on the part of plaintiff.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Willoughby, Craig & Company.*

Solicitors for the respondent: *Anderson, McNiven, Fraser & Rose.*

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THE MUNICIPALITY OF THE TOWN OF MACLEOD (PLAINTIFF) } APPELLANT;

*Oct. 15, 16.
*Nov. 18.

AND

AGNES M. CAMPBELL (DEFENDANT) ..... } RESPONDENT.

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

Assessment and taxes—Municipal corporation—Excessive valuation—Statutory appeals—Res judicata—"The Town Act", (Alta) 1911-12, c. 2, ss. 285, 267.

When a town Act provides a means of relief, in case of excessive assessment, by way of appeal to a municipal Court of Revision and thence to a District Judge, the decision not appealed against of either of these courts, confirming the assessment, is *res judicata*: the assessed party cannot afterwards invoke such excessive assessment as a ground of defence in an action for the recovery of the tax.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), which affirmed the judgment of Ives J. at the trial, by which the plaintiff's action was dismissed with costs.

The appellant, incorporated under the provisions of "The Town Act" of the Province of Alberta, brought action against the respondent for taxes in respect of certain real property owned by her within the limits of the municipality, alleging that the respondent was duly assessed for such property. The respondent founds her defence in particular upon the provisions of section 267 of "The Town Act," complaining that the assessment was obviously excessive and illegal. The appellant's answer was that, no appeal having

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

(1) 41 D.L.R. 357; [1918] 2 W.W.R. 718.

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been taken prior to the confirmation of the assessment by the municipal council, the respondent has no status to resist payment of the taxes.

A. H. Clarke K.C. for the appellant.
Lafleur K.C. and *E. V. Robertson* for the respondent.

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

IDINGTON J.—The judgment of the learned trial judge upheld by the Court of Appeal for Alberta decided that because the assessment complained of is obviously excessive and that the assessment of the lands in question does not bear a fair and just relation to the value at which other land in the immediate vicinity is assessed, this action for the recovery of taxes imposed should be dismissed with costs.

The Act under which the assessment was made provides a means of relief in such cases by way of appeal to the municipal court of revision and from that court to the District Judge. The respondent had taken an appeal from the assessment to the Court of Revision which consisted of members of the appellant's council, and that court, of which four members heard the appeal, decided to confirm the assessment, and dismissed the appeal.

The respondent did not pursue the matter further by an appeal to the District Court Judge which was open to her. The result was that the assessment roll stands supported by section 285 of "The Town Act" which reads as follows:—

285. The roll as finally passed by the council and certified by the assessor as so passed shall be valid and bind all parties concerned notwithstanding any defect or error committed in or with regard to such roll or any defect, error or mis-statement in the notice required by section 276 of this Act or any omission to deliver or to transmit such notice.

I have long entertained the opinion that the only remedy which a ratepayer, complaining of an assessment being excessive, has, is to pursue such remedies as the "Assessment Act" may furnish for the redress of such a grievance.

If in the way of exceeding its jurisdiction a municipality or its officers have attempted to impose a tax which they, or it, have no power to impose, as, for example, in the case of property exempt from taxation, such taxes cannot be collected for the attempted imposition thereof is void.

It has been strenuously argued before us that inasmuch as the basis of such taxation as imposed and in question herein is imperatively required by law to rest upon an actual value, of the kind defined, that a serious departure therefrom is also beyond the jurisdiction of appellant and hence void.

Such a view of the law would be to render the collection of taxes dependent in many cases upon the very doubtful result of an issue to try what is actual value such as defined in the statute in question herein.

No decision binding us has ever gone so far.

And experience, for example in the hearing of many appeals in cases of expropriation here, tempts one to suggest that the result of such a decision as sought herein by maintaining the judgment appealed from, would bring some appalling consequences, not only to us but also to those concerned in collecting taxes.

Of course that is no reason for shrinking from so declaring the law if we so find it, but it makes one pause and reflect upon the view presented by many judges in dealing with similar legislation. I may be permitted to say that I never knew any one better qualified to speak upon such a subject than the late Chief Justice Hagarty, who so long presided in Ontario

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courts, including the Court of Appeal for Ontario, and in dealing with such a proposition in the case of *Canadian Land & Emigration Co.* v. *The Municipality of Dysart et al.* (1), he spoke as follows:—

> If we were to pronounce illegal some of the proceedings here complained of, I am afraid we would be exacting an ideal perfectibility in the working of our municipal system. * * * I think the design of the legislature was to work out the whole system of assessment by the machinery provided. Firstly, the action of the assessor; secondly, the appeal to the Court of Revision; thirdly, the final appeal to the County Judge or stipendiary magistrate. * * * The intervention of the courts in the manner sought for by this appeal would be disastrous to the working of the municipal system. If the Court of Revision is to be in effect prohibited from enforcing the assessment, what is to be done?

It seems to me that this was good law and sound sense (which generally coincide) and must be accepted as our guide.

The logical results of the maintenance of the argument presented on behalf of respondent would be that an over or under valuation in the assessment would be void for want of jurisdiction and hence bring the case within the line of cases such as furnished by decisions on exemption already referred to, as the statute only permits actual value as defined as the basis therefor, and hence that that issue must be determined by trial of the fact in each case of such like dispute. There is no room for drawing any other line if that mode of thought is to be applied in deciding this case.

It is not the excessive departure from actual value as defined that is involved in such a proposition. Perhaps a hair divided the false and true. The absolutely true line must be discovered if the proposition is sound.

I cannot think that such is the correct interpretation and construction of the statute in question.

The evident purpose of the legislature was to tax

(1) 12 Ont. App. R. 80.

such actual values as the assessor, and the special appellate courts designated, might determine to be the true value of the property assessed.

When the question of excessive assessment is raised I can see another possible alternative in the way of a defence founded thereon. It is a finding of fraud which vitiates everything.

There is much to be said as to this appellant's assessor's conduct being akin to that which would lay a good foundation for such a defence when he treated, as he says, the line laid down for him in the statute as a joke.

But there are others involved besides him who are said to be respectable men composing the town council.

Although such a line of attack was open to respondent she did not pursue it.

I only refer to it now as apparently a quite possible defence which some municipal authorities may have to face if they persistently disregard the law, as there is too much reason to believe there is a tendency to do in that regard in some places.

If ever such a case arise the party suffering and feeling he cannot succeed by the ordinary course of appealing must raise the issue distinctly.

As the law stands I see no relief for those upon whom excessive assessments are imposed but the remedies by way of appealing or a charge of fraud if it exist.

I am not surprised to learn from Chief Justice Harvey's judgment that subsection 3 of section 267 of "The Town Act" has done much harm. It facilitates and probably protects the perpetration of fraud by putting an impediment in the way of appellants who should be encouraged as so many inspectors, as it were, checking the careless assessor's slovenly work.

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It tends to confusion of thought and to defeat the purpose of a just valuation which is the object of the law.

The appeal should be allowed but the costs should be withheld. I feel so inclined for I agree with the courts below that there has not been that observance of the statute which there should have been.

DUFF J.—I am of opinion that this appeal should be allowed with costs.

ANGLIN J.—The purport and intent of section 285 of "The Town Act," having regard to the provisions by which it is preceded, is to make the assessment roll valid and binding in respect of all matters within the cognizance of the Court of Revision. The chief subject of the jurisdiction of that court is the determination of appeals based on the ground that assessments are "too high or too low." In regard to these questions its jurisdiction is exclusive.

The complaint of the defendant is that her assessment is "too high"—too high because the assessor flagrantly disregarded the basis of assessment prescribed by the legislature—but nevertheless "too high." To make an assessment of the property in question as part of the "ratable land in the town" (ss. 265 and 266) was the duty of the assessor. Whether in the making of it he erred wilfully or through ignorance as to the application and effect of s. 267, it was an assessment which it was within his jurisdiction to make and, therefore, essentially different from attempted assessments of exempted property held so utterly void, because made wholly without jurisdiction that they would not support taxation at all in such cases as *Toronto Railway Co.* v. *City of Toronto* (1); *Canadian Oil Fields Co.*

(1) [1904] A.C. 809 at page 815.

v. *Village of Oil Springs* (1). While the method of assessment prescribed by section 267 is more than merely directory, I cannot regard an intention to follow its provisions as a condition of the jurisdiction to make an assessment. An assessment in fact for an amount equal to the "actual cash value" of the land would not be a nullity merely because in arriving at it the assessor had disregarded or ignored section 267 of the statute.

That it is within the jurisdiction of the Court of Revision, the District Court Judge, and, on appeal from him, of this court in cases involving an assessment of appealable amount to entertain taxpayers' appeals based on excessive assessments made in utter disregard of the method of assessment prescribed by the legislature is, I think, sufficiently established by such decisions as *Rogers Realty Co.* v. *Swift Current* (2), where my brother Idington pointed out

> that in making the assessment in question the assessor had ignored the statute which ought to have bound him—

precisely as in the case at bar. Although in that case the question of jurisdiction does not appear to have been raised in argument it should scarcely be assumed that this court unconsciously exercised jurisdiction to reduce the assessment which it would not possess unless the Court of Revision had it in the first instance.

Moreover, the defendant exercised her right of appeal to the Court of Revision in the present case. She did not further appeal as she might have done, against its adverse judgment to the District Court Judge and, had his decision been likewise adverse, to this court. *Rogers Realty Co.* v. *Swift Current* (2); *Grierson* v. *Edmonton* (3); *Pierce* v. *Calgary* (4), are

(1) 13 Ont. L.R. 405.
(2) 57 Can. S.C.R. 534; 44 D.L.R. 309; [1918] 2 W.W.R. 214.
(3) [1917] 2 W.W.R. 1138.
(4) 54 Can. S.C.R. 1; 32 D.L.R. 90.

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recent instances of such appeals having been successfully taken. The judgment of the Court of Revision upon a matter within its jurisdiction is binding on the defendant as *res judicata*. It cannot be ignored in this or any other court merely because deemed erroneous either in law or in fact. As Mr. Justice Burton said, in *London Mutual Ins. Co.* v. *City of London* (1):

> If in the exercise of his functions, but acting within his jurisdiction, the assessor does an erroneous act, it is no more null and void, while unquestioned by appeal, than an erroneous decision of this court on a matter within its jurisdiction, while unreversed. * * * The legislature has thought fit to entrust the power of adjudicating upon the correctness of that act (an assessment, right or wrong) to certain persons and as a general rule those persons alone can do so.

The observations of Hagarty C.J.O., in *Canada Land & Emigration Co.* v. *Dysart* (2), are also in point as to matters within the jurisdiction of the Court of Revision under section 274 of the "Town Act."

It was suggested in the course of the argument by my brother Duff that whatever may be said of what the assessor did there is nothing to shew that the Court of Revision in dismissing the present defendant's appeal and confirming the assessment ignored the requirements of section 267 of the statute. But, as my learned brother himself pointed out later, if there was really no assessment there probably was no subject matter of appeal within the jurisdiction of the Court of Revision. Moreover, it is probably a fair inference, having regard to the evidence in the present record, that the Court of Revision must have committed the same error as that charged against the assessor. I prefer not to rest my judgment on this somewhat doubtful ground.

Because the only defence, in my opinion, arguable which has been set up raises a question which, I think,

(1) 15 Ont. App. R. 629, at p. 633.

(2) 12 Ont. App. R. 80, at page 84.

it was within the jurisdiction of the Court of Revision to determine, subject to appeal, and because, whether the jurisdiction of that court over it is exclusive or not, having been invoked and exercised its unappealed decision establishes a case of *res judicata*, I would, with respect, allow this appeal. The plaintiff is entitled to judgment with costs throughout.

BRODEUR J.—The question in this case is whether the respondent, having been assessed for a property in the town of Macleod and having appealed to the Court of Revision on the ground that the assessment was too high and not having pursued further, can now resist on the same ground an action instituted by the town for the collection of the taxes.

By virtue of the law of Alberta, provision is made as to the way municipal assessments on lands should be made and courts are provided in those statutes for the purpose of hearing and determining whether the assessments are too high or too low.

It appears that the assessors might have put on the lands of the respondent a higher amount than the cash value for which the property should have been assessed; but at the same time it is admitted that the assessment was uniform throughout the town and that no real injustice is being suffered by the respondent as a result of that assessment. However, she appealed to the Court of Revision and she was entitled in case she would have been displeased with the decision of the Court of Revision to go before the District Judge and she could even have come up before the Supreme Court. *Pearce* v. *Calgary* (1). She seemed to be satisfied with the judgment of the Court of Revision and did not bring her case further. When she was

(1) 54 Can. S.C.R. 1; 32 D.L.R. 790.

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sued for the taxes she pleaded that the assessment was too high and should not be maintained.

She relies mostly on a judgment which has been rendered in the Privy Council in the case of *Toronto Railway Co.* v. *City of Toronto* (1). I think that that case should be distinguished from the present one. In the *Toronto Railway Case* (1) the question to be determined was not the quantum of assessment but the assessability of electric tramways as real estate or as fixtures. The Privy Council decided that the courts which had been established for the purpose of determining whether the assessment was too high or too low could not have jurisdiction in a case where there was a question as to the assessability of the property.

In the present case it is not a question of the validity of the assessment, because it cannot be seriously disputed that the lands in question were to be assessed; but it is simply a question of quantum. This case, then, is very different from the *Toronto Railway Case*(1). The respondent has found it advisable to go before the courts provided by the statute to have it determined whether her assessment was too high or too low. It becomes *res judicata,* as far as she is concerned, and she could not invoke the same reason in an action for the recovery of the taxes. The judgment of the Appellate Division of the Supreme Court of Alberta which decided in her favour should be reversed.

The appeal should be allowed with costs of this court and of the court below.

Appeal allowed with costs.

Solicitor for the appellant: *T. B. Martin.*
Solicitor for the respondent: *W. M. Campbell.*

(1) [1904] A.C. 809.

LA COMPAGNIE GENERALE D'ENTREPRISES PUBLIQUES (PLAINTIFF) ..... APPELLANT;

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*Nov. 2.
*Nov. 28.

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Negligence — Crown — Injury to "property on public work"—Scow attached to public wharf—"Government railways"—"Exchequer Court Act," R.S.C. (1906) *c.* 140, *s.* 20 (*c*).— 9 & 10 *Edw.* VII, *c.* 19.

Held, Davies J. dissenting, that a scow, lying beside and attached to a public wharf, being used in making repairs to that public work, must be deemed to be engaged "on public work" within the meaning of section 20 (c) of the "Exchequer Court Act." Duff J. expressing no opinion and dismissing the appeal for want of jurisdiction.

Per Fitzpatrick C.J.:—The intention of the Parliament of Canada, in adding paragraph (f) to section 20 of the "Exchequer Court Act" (9 & 10 Edw. VII c. 19) was to include all Government railways, in mentioning "the Intercolonial Railway" and "the Prince Edward Island Railway."

Per Anglin J.:—"Public work" means not merely some building or other structure or erection belonging to the public, but any operations undertaken by or on behalf of the Government in constructing, repairing or maintaining public property.

APPEAL from a judgment of the Exchequer Court of Canada(1) dismissing the plaintiff's petition of right(2).

The appellant, under a contract with the Commissioners of the Transcontinental Railway, was ordered by them to do some repairs to a wharf situated at Levis and belonging to the Commissioners. In order

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

(1) 32 D.L.R. 506.

(2) Reporter's Note.—Since the judgment of the Exchequer Court, section 20, par. c. of the Exchequer Court Act has been amended. (7-8 Geo. V. c. 23, s. 2).

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to do the work, the appellant had to use a derrick-scow and to make her fast to the face of the wharf. The "Leonard," a ferry-boat belonging to respondent, was also using the wharf for ferrying the cars of the Transcontinental Railway from Quebec to Levis. The scow was crushed against the wharf by the "Leonard" and was sunk.

Marchand K.C. for the appellant.
Meredith K.C. for the respondent.

THE CHIEF JUSTICE.—It is a little difficult to say from the record in what way this appeal comes before this Court. The Assistant Judge of the Exchequer Court before whom the petition of right came on for trial took all the evidence, but in his judgment says—

> at the opening of the case, it was ordered, both parties agreeing thereto' that the questions of law raised herein should be first disposed of before entering into the question of the quantum of the damages.

It would seem from this either that the Crown admitted negligence of its officers or servants or else that the case was argued on demurrer. No point of law is raised by the statement of defence which simply alleges negligence on the part of the petitioner.

The learned judge has held that

> the case does not come within the ambit of sub-section (f) of section 20 of the "Exchequer Court Act," since that section only applies to the Intercolonial Railway or the Prince Edward Island Railway.

In this I think he is wrong.

By the "Government Railways Act," R.S.C. 1906, ch. 36, s. 80, the Intercolonial Railway is defined as follows:—

> 80. All railways, and all branches and extensions thereof, and ferries in connection therewith, vested in His Majesty, under the control and management of the Minister, and situated in the Provinces of Quebec, Nova Scotia and New Brunswick, are hereby declared to constitute and form the Intercolonial Railway.

By the "National Transcontinental Railway Act," as amended by the Act to amend the "National Transcontinental Railway Act," 4 & 5 Geo. V., ch. 43, it is provided:—

> After the Eastern Division is completed and until it is leased to the company, the said Eastern Division shall be under the control and management of the Minister of Railways and Canals who shall have power to operate the whole or any part of the said Division as a Government railway under the provisions of the "Government Railways Act," R.S.C. 1906, ch. 36.

Paragraph (f) added to section 20 of the "Exchequer Court Act" by the Act to amend the "Exchequer Court Act" (9 & 10 Edw. VII., ch. 19) was, no doubt, intended to include, and did in fact then include, all Government railways in mentioning the Intercolonial Railway and the Prince Edward Island Railway.

Since, then, the Eastern Division of the National Transcontinental Railway is certainly now a Government railway, and as regards the locus with which we are now concerned is within the letter of the statute a part of the Intercolonial Railway, I think we are justified in holding that, for the purposes of the present case at any rate, it forms part of the Intercolonial Railway so as to entitle the appellant to rely upon paragraph (f) of section 20 of the "Exchequer Court Act."

It does not perhaps necessarily follow from the case falling within the extended terms of liability in this paragraph (f) that the appellant is entitled to relief even if negligence is proved, as to which we have no finding by the Exchequer Court.

Inasmuch as the appeal was really from a decision on a point of law which is overruled, the case should, I think, go back to the Exchequer Court for determination and, if necessary, assessment of damages.

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Davies J.

DAVIES J. (dissenting)—I am of opinion that Mr. Justice Audette of the Exchequer Court was perfectly right in holding that the damages sustained by the scow or dredge of the suppliants while lying alongside of the Quebec Warehouse Wharf were not recoverable under sub-section (*c*) of section 20 of the "Exchequer Court Act," because the injuries complained of did not occur "on a public work."

The scow or dredge was at the time of the accident moored at the face of the wharf and a diver was preparing to descend the river at the face of the wharf to ascertain whether the foundation was strong enough to build on.

He had not, however, completed his preparations when the collision with the steamer "Leonard" occurred and to hold that the scow or dredge at the time of the collision was "on a public work" within the terms of the section would be to run counter to the construction of the sub-section established by this court in the cases of *Chamberlin* v. *The King* (1); *Paul* v. *The King* (2); *The Hamburg American Packet Co.* v. *The King* (3); and *Olmstead* v. *The King* (4).

Paul's Case (2) is, in many respects, like this one and the construction of the section in question there determined must prevail in the case now before us unless that case is overruled. The decision, however, in *Paul's Case* (2) has been consistently followed ever since.

As my colleagues, however, have reached the conclusion that the cases I have referred to can be distinguished from this one, this case must, of course, go back to the Exchequer Court to have it determined

(1) 42 Can. S.C.R. 350.
(2) 38 Can. S.C.R. 126.
(3) 39 Can. S.C.R. 621.
(4) 53 Can. S.C.R. 450; 30 D.L.R. 345.

whether there has been such negligence as the Crown is liable for and, if such is held, to assess the damages.

As far as I am concerned, I would dismiss the appeal and the suppliant's petition of right with costs.

IDINGTON J.—I agree with the learned trial judge below that a very narrow construction has unfortunately been placed upon the words "on a public work" in the statute in question, but I cannot agree that any of them have gone quite so far as the judgment now appealed from. There was always something to distinguish physically the spot where the alleged negligence took place from the actual spot where the work was actually being conducted.

In this case it is hardly possible unless we give the meaning to the word "on" of "upon" and insist that the scow in question could not be said to be "on a public work" unless it was on the top of the very spot in the wharf under and with which the appellant's men were engaged. I have also come to the conclusion that there was negligence attributable to the servants of the respondent which caused the destruction of the said scow whilst on the work in question. This court must, when the issues have been fully tried out as admittedly they were here, and all the evidence has been adduced that either party desires to present, give the judgment which the court below should have given. The judgment, I conceive, in this case should be to adjudge the respondent liable for the amount of the damages which the suppliant sustained in consequence of such negligence. Inasmuch, however, as the actual quantum of the damages was not dealt with in the evidence adduced, it will be necessary to refer the matter to the learned judge to assess the damages.

I think the appeal should be allowed and judgment entered accordingly.

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LA COMPAGNIE GENERALE D'ENTREPRISES PUBLIQUES v. THE KING.

Anglin J.

DUFF J. (dissenting).—I am of the opinion that the appeal should be dismissed for want of jurisdiction.

ANGLIN J.—This case seems to me, with respect, to be distinguishable from the series of decisions on the construction of clause (*c*) of section 20 of the "Exchequer Court Act (R.S.C., ch. 140), culminating in *Piggott* v. *The King* (1), the facts in which perhaps most nearly resemble those now presented. In none of those cases was the property injured, in respect of which damages were sought, employed at the time of injury in the construction or repair of a public work. Here, though not physically "on a public work," the injured scow, lying beside and attached to a public wharf, was in the course of being used in making repairs to that public work. It may properly be said to have been engaged "on a public work" just as the men on the scow and the diver (to whose claims, if they had sustained personal injuries in the crushing of the scow, I think the clause in question would have applied) might properly be said to have been "on a public work." It does not seem to me to involve any undue straining of the language of the statute to hold that it covers a claim for injury to property so employed. "Public work" may, and I think should, be read as meaning not merely some building or other erection or structure belonging to the public, but any operations undertaken by or on behalf of the Government in constructing, repairing or maintaining public property. In this sense the appellant's scow was "on a public work" when it was injured. The judgment of the Exchequer Court cannot therefore be sustained on the ground on which it was based.

In the view he took the learned trial judge found it

(1) 53 Can. S.C.R. 626; 32 D.L.R. 461.

unnecessary to pass upon the issue of negligence. To determine that issue without the benefit of the trial judge's view as to the credibility and weight of the testimony, and without ourselves having had the opportunity of hearing the evidence and seeing the witnesses would be most unsatisfactory. The question of damages was not considered at all.

The case must, therefore, be remitted to the Exchequer Court to deal with it in accordance with the judgment now pronounced.

Appeal allowed with costs.

Solicitors for the appellant: *Rivard, Chauveau & Marchand.*

Solicitor for the respondent: *F. E. Meredith.*

1918
*March 5.
*March 25.

ROGERS REALTY COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF SWIFT CURRENT (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE LOCAL GOVERNMENT BOARD OF SASKATCHEWAN.

Appeal—Jurisdiction—Assessment and taxation—"Supreme Court Act," R.S.C. 1906, *s.* 41.

An appeal lies to the Supreme Court of Canada under section 41 of the "Supreme Court Act" from the judgment of the Local Government Board of Saskatchewan sitting in appeal from the Court of Revision in respect of assessments for taxation purposes. Fitzpatrick C.J. *dubitante. Pearce* v. *Calgary* (54 Can. S.C.R. 1, 32 D.L.R. 790, 23 D.L.R. 296, 9 W.W.R. 195, 668), followed.

Judgment of the Local Government Board of Saskatchewan reversed, Brodeur J. dissenting.

APPEAL from the decision of the Local Government Board of the Province of Saskatchewan confirming the decision of the Court of Revision, in respect of assessment, for taxation purposes, of subdivided lots of land belonging to the appellant.

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

F. H. Chrysler K.C. for the appellant.
Harold Fisher for the respondent.

THE CHIEF JUSTICE.—I concur in the disposition of this appeal made by Mr. Justice Anglin.

I have, however, much reluctance in allowing the appeal because, firstly, I rather doubt our jurisdiction. *Montreal Street Railway Company* v. *City of Montreal* (1); and, secondly, because the local authorities ought

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

(1) 41 Can. S.C.R. 427.

to be more competent to fix the value of the properties in question than I can assume to be.

IDINGTON J.—I think this appeal should be allowed and the assessment of the lands in question put at $100 an acre, or the equivalent thereof for the lots which are said to be a tenth of an acre each.

The parties, it is said, agreed that the evidence taken in another appeal, by the Hudson Bay Company, should be read along with that taken in this. The only evidence directly taken in this case was that given by Mr. Reith, and he values the land in question at $75 to $100 per acre. The use of the evidence in the *Hudson Bay Case* being agreed to, suggests, as well as did the location on the map in evidence, that the land in each case was practically of about the same value. But it seemed to be as to either that as subdivisions into town lots they are for the present time worthless.

In regard to the other lands the assessor was examined and gave the following evidence:—

Q.—How did you arrive at the assessment of $350.00 per acre?
A.—We know of acreage being sold much in excess of $350.00.
Q.—Then your witness stated it is valueless. Do you agree with that?
A.—I do, to a certain extent.
Q.—You do not think it could be sold at the present time? A. No.
Q.—Could you trade it for anything? A. I do not know.
Q.—You know nothing you could trade it for? A.—I do not know.
Q.—The nuisance ground occupies 40 acres? A.—Yes.

It is not difficult to understand from that evidence of the assessor, in regard to land which other evidence in the same appeal shewed was not good for much else than for subdivision, although not subdivided, that in making the assessment in question he had ignored the statute which ought to have bound him. I infer that if subdivided it would probably be more valu-

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Idington J.

able in subdivisions than that in question in this case. When evidence was given, in regard to either property, of values some years ago, we cannot shut out from our minds the common knowledge that such values, founded upon delusions that prevailed some years ago, exist no longer.

The statute imperatively requires that land shall be assessed at its fair actual value and buildings and improvements thereon at not more than 60% of their actual value. That statutory obligation clearly was not observed by the assessor, nor has it been observed by the Court of Revision or the Local Government Board.

Indeed it was not argued that the evidence would warrant the finding. It was argued, however, that inasmuch as under section 415, s.s. 11, of the city's Act, it was provided as follows:—

> The board may, of its own motion, revise the assessment of the city generally, or of any part thereof, or of any individual properties in respect of which no notice of appeal has been given, and for such purpose it may set a day or days for the hearing and adjourn the same from time to time, and may cause such notices to be given and such parties to be served as may be deemed expedient.

that it was not competent for us to interfere and that the judgment of the board must be accepted as infallible notwithstanding the evidence. I do not so read the statute. That section certainly gives the board unusual powers, but it was not sitting in pursuance of the sub-section just quoted, which relates to causes in which no notice of appeal has been given and requires it to give notice of the sitting of such court, and the parties concerned to be served. That is not the proceeding that is in question here. All that is in question here is a judgment of that board sitting in appeal from the Court of Revision.

It is quite competent for the legislature, if it see fit, to treat such a board, when discharging other duties than its appellate ones, as infallible, as section 11 seems to contemplate according to the argument presented.

The legislature, however, has not seen fit to attach that weight of infallibility to the board in question or to attach any importance whatever to an inspection or judgment based upon an inspection of the premises.

The powers given for the board to revise of its own motion, cannot be made to imply more than giving it jurisdiction to initiate a revision of its own.

Reason and common sense suggest that when it is required to give notice to those concerned of its intention to proceed to such a revision, that it must hold a sitting and hear evidence just as any other tribunal. That it has not done in any such capacity as indicated by the sub-section.

All it did pretend to do was to hear the appeal from the Court of Revision upon which there is only the one witness's evidence which bound, or should have bound, the board appealed from, as it binds us.

This is the fourth appeal of this kind of property, once valuable in booming times, now greatly depreciated, and in each instance heretofore the value placed by the witness has been taken for our guide. I see no reason for departing from the mode of disposing of an appeal which has been used heretofore.

The respondent should bear the costs of this appeal.

ANGLIN J.—Our jurisdiction to entertain this appeal under section 41 of the "Supreme Court Act" is unquestionable. Our duty, if the evidence satisfies us that the assessment appealed against exceeds the "fair actual value" or the "true value" of the property to a "substantial" extent (stats. of Sask., 1915, ch. 16,

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s. 387), is to allow the appeal and to reduce the assessment to such "fair actual value" as disclosed by the evidence. *Pearce* v. *Calgary* (1).

We have not the advantage of any statement of the grounds on, or the reasons for, which the Local Government Board affirmed the assessment of the appellants' Rosemount property. We are informed, only by the the certificate of the city clerk, that

> the members of the Board made a personal inspection of the property and also made personal inspection of adjoining properties and personal inspection of various other properties throughout the city of Swift Current and compared the assessment upon such properties with the assessment in question.

We can merely surmise to what extent the conclusion reached was influenced by these inspections and comparisons.

The right of the board sitting as an appellate tribunal, in the absence of statutory provision therefor, to take a view has been challenged. It is at least questionable. There is nothing to indicate that the special jurisdiction conferred by s.s. 11 of section 415 of the City Act (stats. of Sask. 1915, c. 16) was exercised by the board. In the case of "individual properties" that jurisdiction appears to be confined to those

> in respect of which no notice of appeal has been given.

But, making every possible allowance for the effect of the board's inspection of the property (assuming it to have been rightly made) and for the facts that the weight to be attached to the evidence in regard to the Hudson's Bay Company's property (introduced by consent) is materially lessened by the circumstance that the property now under consideration is in immediate proximity to the city's nuisance ground, that the

(1) 54 Can. S.C.R. 1; 32 D.L.R. 790.

original assessment was supported by the oath of the assessor, and that only one witness was called to give evidence in regard to the value of the Rosemount subdivision, I am nevertheless satisfied that the assessment of the latter as building lots at an average value of about $120 apiece—a valuation approximating $1,200 an acre—was improper and grossly exceeds its true or fair actual value.

The evidence of J. K. Reith, a real estate dealer of some years' experience in Swift Current, who was the sole witness that spoke as to Rosemount, was that

> there is not any lot in the whole subdivision worth $25 * * * ; the only thing you could use it for is farm land,

and he placed its value at $75 to $100 per acre. This witness's testimony was not affected by his cross-examination; and the city chose to leave it uncontradicted. The assessor, in giving evidence in regard to the assessment of the Hudson's Bay Company's property, which he had placed at $350 per acre, said that he agreed to a certain extent with a witness called for the appellants in that case who had stated that that property was valueless. Other witnesses had valued it at from $25 to $30 and from $25 to $50 an acre—none at any higher figure. Mr. Reith added that Rosemount "is not any better" than the Hudson's Bay quarter.

It must always be extremely unsatisfactory for an appellate court, lacking the local knowledge, the familiarity with assessment work and the opportunity of personal inspection possessed by a local tribunal, to attempt to revise its valuations on the mere record of oral testimony of witnesses called before it. While such a duty is imposed upon us, however, we must discharge it as best we can.

In the present case I am satisfied that the assess-

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ment is not merely substantially but grossly excessive. It would almost appear that the board, regarding the maintenance of "a fair and just proportion" between the assessment of the land in question and

> the value at which lands in the immediate vicinity of the lands in question are assessed

as the dominant requirement of the statute, had subordinated, if it did not ignore, the imperative provision that

> land shall be assessed at its fair actual value.

The maintenance of "a fair and just proportion" between it and other assessments in the vicinity becomes material only where there is not a substantial difference between the amount of the assessment in question and the "true value" of the property. The only evidence of "fair actual value" or "true value" before us is "from $75 to $100 per acre."

I would allow the appeal and reduce the assessment to $100 per acre.

BRODEUR J. (dissenting)—This is an appeal from the judgment of the local Government Board of the Province of Saskatchewan against the assessment of subdivided lots of land known as Rosemount in the City of Swift Current. The judgment of the Local Government Board had confirmed the decision of the assessor of the municipality and of the Court of Revision.

The Local Government Board was instituted a few years ago for the purpose of controlling the municipal authorities concerning the raising of moneys by way of debentures, to supervise the expenditure of moneys borrowed, to revise the assessment of municipalities and to hear assessment appeals. Their powers are very extensive, since, as regards assessments,

the Board may, of their own motion, revise the assessment of a city, even when there is no notice of appeal and no complaint (Sask. statute 1915, ch. 16, sec. 415, s.s. 11). It is declared by the Act that the decision of the board shall be final and conclusive in every case adjudicated upon (sub-section 15).

The evidence that we have in this case is very meagre and we have no reasons of judgment either from the Court of Revision or from the Local Government Board. It is common ground, however, that members of the board have made a personal inspection not only of the properties at issue but also of adjoining properties and various other lands throughout the city of Swift Current and have compared the assessment upon such properties with the assessment in question in this case. The certificate of the city clerk states that in the opinion of the board the properties in question had been given their fair actual value and it bore a fair and just proportion to the value at which lands in the immediate vicinity of the land in question was assessed.

In those circumstances, it seems to me that we could not very easily interfere with the views expressed by the board, since the members thereof had an opportunity of visiting the land and forming a fair opinion upon the assessment of the properties in the municipality.

It may be that at the present moment those properties could not be sold for the price at which they have been assessed because we are at a time when money is very scarce and when it is likely very hard to dispose of properties. But this is only temporary, and on that point the board is in a far better position to determine the actual value of the property than we are ourselves.

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I am of opinion then that the judgment appealed from should be maintained with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Begg & Hayes.*

Solicitor for the respondent: *C. E. Bothwell.*

GREAT NORTHERN INSURANCE COMPANY (DEFENDANT)..... APPELLANT;

AND

WILLIAM D. WHITNEY (PLAINTIFF)..... RESPONDENT.

1918
*Mar. 4.
*Mar. 11.

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

Insurance—Horse—Materiality—Alteration—Inquiry by Company.

An insurance company cannot invoke as material a representation, in an application for insurance, as to the cost price of the thing insured, when a palpable alteration of the figures appears on the face of the application and no inquiry is made by the company as to the reason for such alteration.

Judgment of the Appellate Division (10 Alta. L.R. 292; 32 D.L.R. 756, affirmed).

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Walsh J. at the trial and maintaining the plaintiff's action with costs.

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

G. H. Ross K.C. and *Barron* for the appellant.
Auguste Lemieux K.C. for the respondent.

THE CHIEF JUSTICE.—The respondent sued for $800, the amount of an insurance on the life of a stallion. The only defence raised is that in the application for the insurance it was stated that the price paid for the horse was $1,500, whereas in reality it was only $800.

There is no suggestion that there was any bad

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

(1) 10 Alta. L.R. 292; 32 D.L.R. 756; [1917] 1 W.W.R. 1159.

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faith on the part of the respondent. The facts are that the company's agent who procured the insurance took the documents home and filled them out and sent them back to the respondent to sign. The respondent's sight is not very good and he did not check the statement over; the agent told him to sign it, that it was all right. The respondent, however, swears, and there is no contradiction, that the question of price as to what he paid was never mentioned, that the agent merely asked what the value of the horse was. The trial judge has found that

> it is quite clear from the evidence that this stallion at the time this application was made was really worth $1,500.

Mr. Justice Walsh gave judgment for the plaintiff for $800, which he reduced to two-thirds thereof, *i.e.*, $533.33, on his attention being called to clause 11 of the policy regarding the payment of not more than two-thirds of the amount

> and in view of the defendant counsel's consent.

The judgment proceeds on the ground that it was the agent's and not the plaintiff's fault that the payment made for the horse was given as $1,500, and that notwithstanding the clause in the application which provides that if another person other than the applicant fills out this form or any part of it he shall be deemed the agent of the applicant and that Luckwell was the agent of the defendant and not the agent of the plaintiff.

The defendant's appeal was unanimously dismissed by the four judges composing the court.

The judgment may be upheld for the reasons given in the courts below and further because it is submitted the cost and the value are not sufficiently distinguished. The cost or price paid for the animal, though important for the purpose of checking the value at the time of the

application for insurance and preventing over-insurance, can be no absolute criterion of the value, for, first, it must depend on how long before the insurance the purchase was made; and in this case, it was two years before; and, secondly, a horse may be bought cheap like anything else, or indeed more so than most things. Curiously enough, it is the company's counsel who in his cross-examination of the respondent suggests that this was so in the present case and that the real price of the horse was then $1,500.

The contract contains a mass of complicated conditions under some or one of which the company could probably wriggle out of most insurance they might write. The officials of the company suggested a settlement. But the company, apparently seeing a loophole to avoid making any payment, repudiated its liability *in toto*.

If the appellant company gave to the statement made with respect to the price paid for the horse the importance it now seeks to attribute to it, I cannot understand why, when the application for insurance was received, the attention of its officers was not drawn to the palpable alteration of the figures which appear on the face of the document. The original price of the horse was, in the first instance, given at $800 and this was changed to $1,500; and apparently no inquiry was made about the reason for this alteration.

It is, in my opinion, clear that the respondent throughout acted in good faith; when he filed his proof of loss he stated the price of the horse at $800.

Appeal dismissed with costs.

IDINGTON J. — I think, in the peculiar circumstances presented in this case that the knowledge of Luckwell, the agent, was that of the appellant.

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Indeed I am disposed to infer from an inspection of the alterations in the figures in the parts of the application of which so much has been made, that no one else than Luckwell, on behalf of the appellant, ever read and passed upon them or there would have been an inquiry started as to why the obviously altered figures were in the condition they were.

In such an event no doubt the result would have been due rectification and a very ready acceptance of the risk which never involved more than the judgment recovered.

Treating Luckwell as the agent of the company and it responsible for the condition of the application, I see no escape from the conclusions unanimously reached by the learned judges who have had occasion to pass upon the defence set up, and hence agree that the appeal should be dismissed with costs.

ANGLIN J.—This appeal, in my opinion, lacks merit.

I am not satisfied, if the answer in the application as to the "price paid" for the horse should be taken, as against the insured, to have been $1,500, that it was absolutely untrue. There is more than a suggestion in the record that the horse had been sold by one Hodges for $1,500 to Harker, that Harker had re-sold him for the same price to a purchaser, who paid only $700 and made default for the balance of $800, and that in consideration of the plaintiff paying this balance, he then obtained the animal from Harker, to whom the price paid was thus actually $1,500. But on both the "application" and the "description" furnished with it the figures "$1,500" have manifestly been written over other figures, which may well have been $800. If the representation as to the cost price was regarded as material, it is scarcely conceivable that an application

and description with such obvious alterations in these figures should have been acted upon without verification or inquiry. The almost irresistible inference is that as only $800 of insurance was sought upon a horse valued at $1,500 the price paid by the assured was deemed negligible.

The fact that the policy limits the risk of the insurer to "two-thirds of the actual cost" of the animal insured confirms this view.

Clause 22 of the policy provides for immunity of the insurance company

> where it shall be found that the material statements set forth in the application upon which the acceptance of the risk was based were untrue.

If the statement as to cost was untrue and was binding on the assured, it has not been established that it was in fact, or was deemed, material, or that the acceptance of the risk was induced by, or based upon, it.

BRODEUR J.—This is an action on a contract of insurance of a horse. The insurance company contends that the application contains a false statement which was material to the risk, namely, that the plaintiff paid $1,500 for the horse, whereas, in fact, he paid only $800.

The application, which was declared by the contract to form part of the policy, was prepared by the agent of the company and was signed by the applicant. It was a condition of the policy that if the application is prepared by a person other than the applicant that person should be deemed the agent of the applicant and not the agent of the company.

The applicant was never asked by the agent how much he had paid for his horse. There is a question,

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however, in the application by the answer to which he would have been supposed to declare that the horse had cost him $1,500.

All the parties seem to be in good faith in the matter, and the mistake which has occurred was likely due to the fact that the applicant declared to the agent that the horse was worth $1,500. The evidence shews that the horse was worth that price.

It is in the circumstances of the case somewhat of a technical defence that is raised by the insurance company. Luckwell, the agent who filled up the application, was acting as agent of the company; and if he has not thought fit to inquire as to the price paid for the horse, his negligence would be the negligence of the company. Besides, the statement which was made would not be considered as being a material statement in the circumstances of the case because it is pretty clear by the application that the figures $1,500 or $800 seem to have been changed and altered. That fact should have been sufficient for the company to inquire as to it. They have not done so however. I think that the company should be called upon to pay the insurance.

The judgment of the courts below which dismissed its plea should be maintained with costs.

Appeal dismissed with costs.

Solicitors for the appellant : *Short, Ross, Selwood, Shaw & Mayhood.*

Solicitors for the respondent: *Ball & Cameron.*

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*Feb. 28.
*Mar. 25.

THE STOKES-STEPHENS OIL COMPANY (PLAINTIFF)..... } APPELLANT;

AND

JOSEPH YOUNG McNAUGHT (DEFENDANT)..... } RESPONDENT.

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

Contract—Arbitration—Breach of Contract—Stay of Action—"Arbitration Act" (Alta), 9 Edw. VII. c. 6, s. 4.

A contract for the drilling of an oil well provided: "That if at any time during the prosecution of the said work, or after the completion thereof, any dispute, difference or question shall arise between the parties hereto, or any of their representatives, touching the said work, or the construction, meaning, or effect of these presents, or anything herein contained, or the rights or liabilities of the parties or their representatives, under these presents or otherwise in relation to the premises, then every such dispute, difference or question shall be referred to" arbitration. After an award had been made, the appellant took an action in damages for breach of contract and the respondent applied for a stay of action.

Held, Idington J. dissenting, that the intention of the parties was to refer to arbitration not only the disputes between them but also the question whether these disputes fell within the arbitration clause; and that the issues between the parties ought to be determined by arbitration rather than by action.

Per Fitzpatrick C.J. and Anglin and Brodeur JJ.:—The provision "at any time during the prosecution of the work or after the completion thereof" relates to time and not to the condition of the work and is applicable even if the work is not being prosecuted through the default of one party.

Judgment of the Appellate Division (12 Alta. L.R. 501; 34 D.L.R. 375), affirmed. Idington J. dissenting.

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Hyndman J. and maintaining an application by the defendant to stay the plaintiff's action for damages for breach of contract.

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

(1) 12 Alta. L.R. 501; 34 D.L.R. 375.

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The appellant and the respondent entered into an agreement for the drilling of a well for the discovery of oil or gas. The principal clause of the agreement is cited in the above head-note. The respondent proceeded under the contract, but at a depth of 2,400 feet, a joint of the casing collapsed and broke. Continuance of the work had been agreed on, but a dispute occurred between the parties as to the size of the casing; the respondent appointed an arbitrator and called upon the appellant to do the same under the terms of the arbitration clause. The appellant notified the respondent of the appointment of an arbitrator, though maintaining at the same time that no dispute had arisen and that the appointment was without prejudice to its right to so maintain and to dispute the validity of any award.

A third arbitrator was subsequently named and an unanimous award was made in favour of the respondent. The appellant then took an action in damages for breach of contract. The respondent made an application for stay of that action, pursuant to section 4 of the "Arbitration Act" (Alta.), 9 Ewd. VII. ch. 6. This application was refused by Hyndman J., but granted by the Appellate Division.

Eug. Lafleur K.C. and *J. H. Charman* for the appellant.

A. H. Clarke K.C. for the respondent.

THE CHIEF JUSTICE.—I have had the advantage of reading the judgment which will be delivered by my brother Anglin. He has dealt very fully with the matter and there is little need that I should add anything to his reasons, with which I agree.

I may say, however, that I think the courts should be reluctant to permit an appeal to them by one of the

parties to an agreement to refer questions that may arise between them to a domestic forum rather than the ordinary courts, when that agreement is couched in such wide terms as in the present case. The bringing of an action in such cases on a technical point even if necessarily held permissible is likely to defeat the intention of the parties to the agreement, as I cannot doubt would be the case here. I think the parties to this agreement intended at the time it was entered into that all questions that might arise between them touching the subject matter of the contract should be settled by arbitration without proceedings before the courts.

This is the second attempt on the part of the appellants to withdraw these matters from the arbitrators and such proceedings would go far to render agreements for arbitration undesirable as rather increasing than avoiding litigation.

The appellants appointed an arbitrator "without prejudice," by which I can only understand that they were willing to wait and see if the award were in their favour and accept or refuse to be bound by it accordingly. This, I think, is also a proceeding to be discouraged and is an additional reason why I would dismiss the appeal.

IDINGTON J. (dissenting)—There are several rather important and difficult questions raised herein which, in the last analysis, depend upon the construction of the submission, and that ought to be determined by the court under the circumstances existent in this case.

Allowing the action to proceed will facilitate that being done. I therefore think the appeal should be allowed with costs. I may be permitted to add that I am very far from holding that every case dependent

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upon the construction of the submission must be tried out by a court. Many documents, penned by commercial men especially, I believe, would often find, if submitted to men of the class that framed them, a construction more in accord with what the parties concerned contemplated than would be apt to be given by a court.

In this case, however, I think the court probably will be the better tribunal to determine the questions raised.

I purposely abstain from intimating or discussing what points of construction may be involved, or presenting any views thereupon, and thereby embarrassing those who will have to consider and dispose thereof.

ANGLIN J.—Under the terms of sec. 5 of the "Alberta Arbitration Act" (1909, ch. 6), if the defendant desired to obtain a stay of this action he was obliged to apply for it

> before delivering any pleadings or taking any other steps in the proceedings.

To determine on a mere perusal of a statement of claim whether the real issues between the parties are within the scope of an agreement for arbitration, or are such that, notwithstanding that they fall within its purview, the court should, in the exercise of its discretion (*Lyon* v. *Johnson* (1)), refuse to stay the action is often a difficult matter. It is so in the case at bar. The judges of the provincial courts have differed upon this question. For my part I should, therefore, have preferred to have taken the course adopted by North J. in *Re Carlisle* (2), and have directed that the motion to stay should stand over until the pleadings should be

(1) 40 Ch. D. 579. (2) 44 Ch. D. 200.

closed and such evidence taken (if any) as the judge before whom the case might come for trial should deem necessary to develop and make plain the real matters in controversy. The issues would probably then be defined and it could be determined more readily and satisfactorily whether they do or do not fall within the scope of the arbitration clause in the agreement between the parties.

I understand, however, that two of my learned brothers think the adoption of this dilatory course unnecessary and therefore unjustified. In deference to their view I shall express my opinion upon the question whether the cause of action disclosed in the statement of claim is such that the judgment granting a stay should be reversed.

The appellants seek to distinguish the case of *Willesford* v. *Watson* (1), cited by the learned Chief Justice of Alberta, and refer to some observations upon it made by Jessel M.R. in *Piercy* v. *Young* (2). In the *Willesford Case* (1), Lord Chancellor Selborne held that under the submission there before the court

> the very thing which the arbitrators ought to do (was) to look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of is inside or outside of the agreement.

His Lordship declined to have the court

> limit the arbitrators' power to those things which are determined by the court to be within the agreement.

The words of the submission, to which effect was thus given, were as follows:—

> Any dispute, question or difference * * * between the parties to these presents * * * touching these presents or any clause or matter or thing herein contained, or the construction hereof * * * or touching the rights, duties, and liabilities of either party in connection with the premises.

(1) 8 Ch. App. 473. (2) 14 Ch. D. 200, at p. 208.

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This arbitration clause was contained in a mining lease. The question between the parties was whether a claim arising out of the sinking by the lessees of a shaft through the leased land in a slanting direction into adjoining mining land, of which they were also lessees, was in violation of the lessors' rights. They alleged that it was, and also maintained that such a dispute was not within the provision for arbitration and accordingly they brought action for an injunction. Their action was stayed. In the case at bar the agreement provides for the arbitration of

> any dispute, difference or question between the parties hereto * * * touching * * * the construction, meaning or effect of these presents or anything herein contained or the rights or liabilities of the parties * * * under these presents or otherwise in relation to the premises.

I am, with respect, of the opinion that it is impossible to distinguish this language from that in the Willesford agreement. The scope of the arbitration clause now before us is, if anything, wider than that dealt with by Lord Selborne and vests in the arbitrators the power to determine whether or not any claim presented to them is within the purview of the submission. In *Piercy* v. *Young* (1), the agreement was merely for the reference to arbitration of

> any differences or disputes which may arise between the partners.

Such an agreement was clearly distinguishable from that in the *Willesford Case* (2), as the Master of the Rolls points out, and the only relevancy of his judgment is his observation that

> Of course persons can agree to refer to arbitration not merely the disputes between them, but even the question whether the disputes between them are within the arbitration clause.

I may add that, except for whatever limitation may be involved in the words

(1) 14 Ch. D. 200, at p. 208. (2) 8 Ch. App. 473.

at any time during the prosecution of the work or after the completion thereof,

I see no serious difficulty in treating the cause of action stated in the statement of claim as a

dispute, difference or question * * touching the effect of these presents * * or the rights or liabilities of the parties under these presents or otherwise in relation to the premises,

within the meaning of those terms as used in the agreement. To quote Lord Selborne, the parties here seem to have taken more than ordinary pains to throw in words that cover all things collateral as well as things expressed.

The plaintiffs complain of an alleged wrongful withdrawal by the defendant of the casing thereby destroying the well and depriving them of an opportunity to exercise an option to purchase the casing (presumably in place) given by the agreement. They also complain of the non-completion of the well to a depth of 2,500 feet. They claim payment of a balance of $10,875 of moneys deposited by them with the Royal Bank of Canada as a guarantee for the carrying out of the contract by them, out of which payments were to be made to the defendant as they accrued due. They also claim damages to the amount of $21,625.

Whether the casing was properly or improperly withdrawn from the well by the defendant in an unsuccessful effort to remove 300 feet of it from the bottom after it had collapsed, whether the failure to complete the contract is attributable to the fault of the defendant or to a wrongful failure of the plaintiffs' managing director to give proper directions as to the diameter of the well if it should be continued below the depth attained at the time of the collapse, whether the removal of the 300 feet of casing at the bottom of the well was impracticable as alleged by the defendant, whether the plaintiffs' managing director was within

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his rights in insisting that the defendant should furnish him with "conclusive evidence" of the impracticability of removing 300 feet of casing and of the necessity for reducing the diameter of the well if the work were to be continued, whether any damage sustained by the plaintiffs is attributable to fault or misconduct of the defendant and, if so, what would be a reasonable sum to allow as compensation, and whether the plaintiffs are entitled to the balance of $10,875 deposited in bank —all these appear to be questions

> touching the effect of these presents * * * or the rights or liabilities of the parties under these presents or otherwise in relation to the premises.

It is true that the determination of the practicability of carrying an 8¼-inch casing to the full depth of 2,500 feet is by the agreement left with "the owners' managing director" whose decision upon it is made final. But whether such a decision was given or was wrongfully withheld and what was the effect upon the rights of the parties of such a wrongful withholding if it occurred, or of the defendants' failure to carry out a proper and lawful direction if given, appear to be questions

> touching the effect of these presents or the rights or liabilities of the parties under these presents or otherwise in relation to the premises.

It may be that if they should find the withdrawal of the casing to have been tortious, the arbitrators would determine that a claim in respect of it is not covered by the arbitration agreement. It would be competent for them to so hold, though for my part I find it difficult to understand how such a claim can be other than

> in relation to the premises * * * under these presents or otherwise—

just as was that based on the alleged wrongful sinking of a transverse shaft in the *Willesford Case* (1). The

(1) 8 Ch. App. 473.

parties have seen fit, to use the language of Jessel M.R.,

> to refer to arbitration not merely disputes between them, but even the question whether the disputes between them are within the arbitration clause.

I agree with Chief Justice Harvey that the opening words

> relate to time and not to condition of the work and the parties would naturally be considering the contract as one to be performed and not one to be broken and in that case everything would happen "during the prosecution of the work or after the completion thereof," and in their contemplation at the time of the making of the agreement it appears to me that these words would be considered comprehensive enough to cover every question that might arise out of the contract.
>
> Then it may be that the work has been completed. It is true that the work has not been completed by the drilling of a successful well, but if this is due to the default of the plaintiff the work has been completed in so far as the contract imposes any obligation on the defendant to complete it, and the arbitrators have so found.

I think the parties meant to provide, and have provided, for the arbitration of any dispute or difference arising between them in relation to the premises, whether under the contract or otherwise, after the commencement of the work.

But it is said that although they should be within the arbitration clause of the agreement the plaintiffs' claims as disclosed in the statement of claim are of such a character that the court in the exercise of its discretion should not stay the action. It is the case presented by the statement of claim that must be dealt with (*Monro* v. *Bognor Urban District Council* (1)).

If the judge of first instance had refused a stay in the exercise of judicial discretion the Appellate Court might properly have declined to entertain an appeal from his order. *Clough* v. *County Live Stock Ins. Association* (2); *Walmsley* v. *White* (3); *Vawdrey* v.

(1) [1915] 3 K.B. 167. (2) 85 L.J.K.B. 1185.
(3) 40 W.R. 675.

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Simpson (1). But the learned judge based his refusal on the ground that the claims set up in the statement of claim are not within the agreement for arbitration. He apparently did not exercise any discretion.

In the Appellate Division, on the other hand, the majority of the court held the cause of action to be within the scope of the arbitration agreement, one learned judge thinking it proper to go outside of the statement of claim and to

> look at the affidavit evidence and discover what the real dispute is about.

Although there is no explicit reference to any consideration of discretion in the opinions delivered by the learned Chief Justice (concurred in by Walsh J.) and Mr. Justice Stuart, it should not be assumed that those learned judges overlooked the fact that, although the cause of action should be within the purview of the arbitration agreement, the court would have a discretion—to be exercised judicially, not arbitrarily—to grant a stay. On the contrary, it should be assumed that the conclusion was reached that the circumstances did not call for an exercise of this discretion.

If the sole matter to be dealt with by the arbitrators were a question of law, a stay of the action on that ground might be properly refused: *Edward Grey & Co.* v. *Tolme & Runge* (2). But where there are important questions of fact to be determined, such as the practicability of continuing the well with a diameter of ten inches, the propriety of taking out the casing, whether the managing director did or did not exercise the power conferred on him by the agreement, and the amount of damage sustained by either party, the circumstance that important questions of law are also involved will not justify the refusal of a stay if the claims in the

(1) [1896] 1 Ch. 166 at p. 169. (2) 31 Times L.R. 137.

action be otherwise proper for submission to arbitrators. *Rowe Bros.* v. *Crosley Bros.* (1); *Lock* v. *Army, Navy and General Assurance Association* (2). Especially must this be so where the parties have, as here, expressed their purpose that all questions of the construction of the agreement, which may be the chief legal questions to be determined, should be dealt with by the arbitrators. That circumstance, with the fact that there is no claim in the present case which is clearly outside the purview of the arbitration clause, distinguishes it from *Printing Machinery Co.* v. *Linotype and Machinery Ltd.* (3).

Neither, in my opinion, does it appear that the claim in the pending action is in itself, or that it involves, a question of such a character or arising under such circumstances that a judge in the exercise of his discretion should retain it for decision by the court. Such a case was *Barnes* v. *Youngs* (4), as is explained in *Green* v. *Howell* (5). On the contrary, having regard to the terms of the arbitration agreement, the questions presented by the statement of claim seem to me to be such as may very properly be dealt with by arbitration under it.

Once the conclusion is reached that the agreement for arbitration is wide enough to embrace the claims presented in the action it is the *primâ facie* duty of the court to allow the agreement to govern (*Willesford* v. *Watson* (6)), and the onus of shewing that the case is not a fit one for arbitration is thrown on the person opposing the stay of proceedings. *Vawdrey* v. *Simpson* (7). In my opinion the appellants have not satisfied that onus.

(1) 108 L.T. 11.
(2) 31 Times L.R. 297.
(3) [1912] 1 Ch. 566.
(4) [1898] 1 Ch. 414.
(5) [1910] 1 Ch. 495, at p. 506.
(6) 8 Ch. App. 473, at p. 480.
(7) [1896] 1 Ch. 166, at p. 169.

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The arbitration already had—the appellants' arbitrator having been appointed under protest—resulted in a determination that it is not economically practicable to carry the well beyond its present estimated depth of 2,400 feet at the diameter of ten inches and that the delay in arriving at a decision as to the course to be adopted for the completion of the well is attributable to the appellant company and C. W. MacMillan, its managing director, and in an award to the respondent of the contract price for drilling to an estimated depth of 2,400 feet and his cost of the reference. It does not appear whether the claims now made by the plaintiffs were or were not presented to the arbitrator. The submission of "all questions between the parties" by the respondent's notice appointing his arbitrator, was accepted by the appellants when they appointed their arbitrator under protest, was broad enough to include those claims. If they were not presented or dealt with, however, it may yet be open to the appellants to have "the matters referred" remitted to the same board, take them up and dispose of them (s. 11) or possibly to have a new board constituted for that purpose. On this phase of the case, which was not discussed at bar and is not before us for decision, I express no view.

I am, for the foregoing reasons, of the opinion that the order of the Appellate Division granting a stay of proceedings in this action should not be disturbed.

BRODEUR, J.—By a contract made between the parties on the 25th of February, 1915, it was agreed that McNaught should drill a well to a depth of 2,500 feet for the purpose of discovering oil on the Stokes-Stephens Oil Company's property. Clause 4 of that agreement provided that

if at any time during the prosecution of the said work or after the completion thereof any dispute, difference, or question shall arise between the parties thereto touching the said work, or the construction, meaning or effect of those presents, or anything herein contained or the rights or liabilities of the parties under these presents or otherwise in relation to the premises, then every such dispute, difference or question shall be referred to arbitration.

An action was instituted by the oil company claiming damages for breach of that contract. They claim that the well has been destroyed by withdrawing the casing therefrom. Application was then made by the contractor McNaught, to stay this action, pursuant to section 5 of the "Arbitration Act" of Alberta.

The latter section is to the effect that if a party to a submission commence legal proceedings in any court against any other party to the contract, the latter may before pleading apply to the court to stay the proceedings.

The honourable judge of original jurisdiction refused the application but his decision was reversed by the Appellate Division.

The question is whether the matters disclosed in the action come within the arbitration clause stipulated by the parties in their contract.

The plaintiff company claims that the work has been destroyed by the fault or negligence of the contractor.

The work of drilling oil wells is a peculiar one and known only to a somewhat limited class of persons. It is no wonder then that the parties have agreed to refer to arbitration matters concerning it and that their rights or their liabilities under the contract should be decided upon by arbitrators. They went even so far as to declare that the meaning of the contract itself should be passed upon by those arbitrators.

It seems to me that the intention of the parties in that respect is as formal as it could be and it would

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require very exceptional circumstances to prevent arbitrators from acting.

The plaintiff contends, however, that those circumstances must arise during the prosecution of the work or after its completion and that in the present case the work has not been completed and is not being prosecuted.

That provision in the contract relates to time and not to the condition of the work and we could construe it as relating as well to a breach of the contract as to its performance. All the rights of the parties arising out of the contract as well as all their liabilities are within the terms of the submission.

The claim which is now being made by the appellant company arises out of the contract and its rights will have to be determined by the construction or meaning of that contract.

The parties have agreed to determine that they will have arbitrators to decide their claims, instead of resorting to the ordinary courts of the land. It is our duty, therefore, to act upon that agreement.

It is highly desirable, as was stated in the case of *Bos* v. *Helsham* (1), that

> where an arbitration of any sort has been agreed to between the parties those (claims) should be held to apply.

I would rely also on the case of *Willesford* v. *Watson* (2).

For those reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. H. Charman.*

Solicitors for the respondent: *Clarke, Carson, Macleod & Company.*

(1) L.R. 2 Ex. 72, at page 78.

(2) 8 Ch. App. 473.

JOSEPH LECOMTE (DEFENDANT).....APPELLANT;

AND

J. M. DE C. O'GRADY (PLAINTIFF)...RESPONDENT.

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*Oct. 15.
*Oct. 21.
**Oct. 29.
**Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Appeal—Final judgment—Substantive part of action—Promissory note—Security—Conditional Payment.

In an action in the Court of King's Bench, Man., on a document providing for payment of money a case was stated for the opinion of the court as to whether or not said document was a promissory note. On appeal from the judgment of the Court of Appeal thereon:—

Held, that the judgment disposed of substantive rights of the parties, and was a final judgment as the same is defined in sec. 2 (*e*) of the "Supreme Court Act."

The document was in the following form:—

"On the 15th Sept., 1911, without grace, after date I promise to pay to the order of O'G., A. & Co. at the Bank of Nova Scotia, Winnipeg, the sum of three thousand dollars, value received."

"Stock certificate for 50 shares
Gas Traction Co. Ltd., attached
to be surrendered on payment."

The memo. as to shares was written on the document before it was signed.

Held, Brodeur J. dissenting, that the memo. was not an integral part of the document, that it was not a condition but a consequence of payment, and the document was, therefore, a valid promissory note.

Judgment of the Court of Appeal ([1918] 2 W.W.R. 267; 40 D.L.R. 378) reversing ([1918] W.W.R. 115), affirmed.

APPEAL from a decision of the Court of Appeal for Manitoba (1), reversing the judgment at the hearing (2), on a stated case.

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

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

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

(1) [1918] 2 W.W.R. 267; 40 D.L.R. 378. (2) [1918] 1 W.W.R. 115.

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A motion was made to quash the appeal on the ground that the judgment of the Court of Appeal was not final.

W. L. Scott for the motion referred to *St. John Lumber Co.* v. *Roy* (1); *Jones* v. *Tucker* (2).

Geo. F. Henderson K.C. contra was not called upon.

THE CHIEF JUSTICE.—This is an action to quash for want of jurisdiction. In this case an action was brought on a document claimed to be a promissory note for $3,000. After the statement of claim had been amended a stated case was prepared by the parties which, after reciting the document, asked the opinion of the court as to whether it was a promissory note, and if the court should decide that the document was not a promissory note the plaintiff should have leave to amend, whereas if the court should hold that the document was a promissory note the defendant should have the right to set up any defence he desired. The stated case was heard by Mr. Justice Metcalfe, who held that the document in question was not a promissory note. Appeal was taken to the Court of Appeal, where the judgment below was reversed, the court holding that the document was a promissory note. The defendant now appeals to the Supreme Court and the respondent moves to quash on the ground that the judgment is not a final judgment.

In my opinion the judgment below finally disposes of an important element of the defendant's defence and with respect to which he is without remedy if the appeal here is refused.

Motion dismissed with costs.

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

(1) 53 Can. S.C.R. 310; 29 D.L.R. 12.

(2) 53 Can. S.C.R. 431; 30 D.L.R. 228.

ANGLIN J.—The respondent moves to quash this appeal on the ground that the judgment appealed against is not final. That judgment disposed of a preliminary issue of law submitted upon a stated case. It determined that the document sued upon was a promissory note. It follows, should the judgment stand, that rights peculiar to a promissory note as distinguished from an agreement to pay money not of that character have been finally accorded to the plaintiff, and the defendant has been deprived of defences which he might have had to a mere promise to pay money not in the form of a negotiable instrument. Such rights I cannot but regard as substantive rights within the meaning of the definition of final judgment adopted by Parliament in 1913.

The motion, in my opinion, fails and should be dismissed with costs.

BRODEUR J.—This is a motion to quash for want of jurisdiction.

An action had been brought on a document claimed to be a promissory note and a stated case was prepared by the parties which, after reciting the document, asked the opinion of the court as to whether it was a promissory note or not. The trial judge held that the document in question was not a promissory note. An appeal was taken and the Court of Appeal held that the document was a promissory note. The defendant now appeals to this court.

It seems to me that we have jurisdiction. The right which has been determined by the court below is a substantive right and, in view of the "Supreme Court Act" as amended in 1913, we have the power to determine now which of the parties was right as to their contentions affecting the document in question.

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The motion to quash should be dismissed with costs.

On a later day the appeal was heard on the merits.

Geo. F. Henderson K.C. for the appellant.
E. K. Williams for the respondent.

THE CHIEF JUSTICE.—This appeal comes to us in the form of a stated case, and we are asked whether a certain document is a promissory note or not.

The document in question was on a printed form, except the memorandum in the lower left-hand corner and reads as follows:—

Winnipeg, 1st December, 1910.

On the 15th of September, 1911, without grace, after date I promise to pay to the order of O'Grady, Anderson and Co. Ltd., at the Bank of Nova Scotia, Winnipeg, the sum of three thousand dollars.

Value received.

JOSEPH LECOMTE.

Stock certificate for
50 shares Gas Traction Co. Ltd.
attached to be surrendered on
payment.

I am of the opinion that the document is a promissory note, and I answer the question submitted in the affirmative.

The point to determine was whether the memorandum on the lower left corner of the note formed an integral or substantive part of the note. I am of the opinion that it did not and answer accordingly.

IDINGTON J.—I am of the opinion that the instrument in question herein is clearly a promissory note, and hence this appeal should be dismissed with costs.

ANGLIN J.—On the short ground that the appended words do not qualify the obligation created by the

unconditional promise to pay which precedes the maker's signature, I would hold the document before us to be a promissory note within s.s. 1 of sec. 178 of the "Bills of Exchange Act" (R.S.C. 1896, ch. 119). Any rights which the maker of the note may have under the appended memorandum will not arise until payment of the note has been made. It is, therefore, not necessary for the holder to aver or to prove readiness and willingness at the date of maturity of the note to deliver to the maker the stock certificate mentioned in the memorandum as a condition of his right to recover on the note. Still less can he be required to aver or to shew tender of the certificate either then or before action.

As Hawkins J. said, with the concurrence of Wills J., in *Yates* v. *Evans* (1), at p. 448:—

> The early part of the document is a complete note in itself—there is nothing in the memorandum to qualify the terms of the note and there is no ambiguity in the note * * * All that is necessary for the purpose of suing is that the amount claimed is due.

The decision of the English Court of Appeal in *Kirkwood* v. *Carroll* (2), overruling *Kirkwood* v. *Smith* (3), and holding that s.s. 3 of sec. 83 of the Imperial statute (our s.s. 3 of sec. 176) does not import, as Lord Russell C.J. had held in the earlier case, that

> if the document contains anything more than is there referred to it would not be a valid promissory note,

very materially weakens, if it does not wholly destroy, the value of a number of Canadian cases relied on by the appellant.

I would dismiss the appeal.

BRODEUR J.—The question we are called upon to decide is whether the written document on which the action is based is a promissory note.

(1) 61 L.J.Q.B. 446.
(2) [1903] 1 K.B. 531.
(2) [1896] 1 Q.B. 582.

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It reads as follows:—

Winnipeg, 1st December, 1910.

On the 15th of September, 1911, without grace, after date I promise to pay to the order of O'Grady, Anderson and Co. Ltd., at the Bank of Nova Scotia, Winnipeg, the sum of three thousand dollars.

JOSEPH LECOMTE.

Stock certificate for
50 shares Gas Traction Co. Ltd.
attached to be surrendered on payment.

The part in italics was written on the document before it was signed. The other part was on the ordinary printed form of a promissory note.

It cannot be disputed that these written words, providing that the stock certificate for 50 shares should be surrendered on payment of the $3,000 agreed upon, form part of the document. The signature is inserted in such a manner as to have the effect of authenticating them. Halsbury, vbo. Contract, No. 775.

In a case of *Campbell* v. *McKinnon* (1), decided in 1859, some words had been written on the back of an ordinary form of promissory note, and Chief Justice Robinson said, at page 614, that

> The agreement written on the back must be looked upon as part of the instrument, being upon it before and at the time it was signed.

The respondent is, then, under abligation to pay to O'Grady, Anderson & Co., or to their order, at such a date a certain sum of money provided that a certain stock certificate should be at the time of payment surrendered to him.

And O'Grady, Anderson & Co., in accepting that document, become entitled to claim under it on the condition that they surrender that stock certificate.

And any subsequent assignee who becomes the holder of that promise to pay cannot claim payment without tendering that stock certificate.

(1) 18 U.C.Q.B. 612.

But is that document an unconditional promise to pay?

It was decided in England, in a case of *Bavins* v. *London and South Western Bank*(1), that a document in the form of an ordinary cheque ordering a banker to pay a sum of money

provided the reciept form at the foot hereof is duly signed, stamped and dated

was not unconditional and, therefore, was not a cheque within the meaning of the Act.

In the case of *Bavins*, as in the present case, the document provided payment to order and was in that respect apparently negotiable; but the obligation for the payee or the bearer to sign a certain receipt in that case, and the obligation for the bearer or the payee in this case to deliver a certain stock certificate, rendered the document a conditional one. As a result, the document we have to construe is not a negotiable instrument the property in which is acquired by any one who takes it *bonâ fide* and for value notwithstanding any defect of title in the person from whom he took it. The engagement contained therein could not be transferred by simple delivery of it (Stevens Mercantile Law, 5th ed., page 286).

Several decisions have been brought to our attention in connection with this question of unconditional promise to pay.

I may divide them into two groups:—

One has reference to those promissory notes called lien notes because in the body of the notes it is stipulated that the money which is to be paid is the consideration for sale of property and that neither the title nor the right to possession is to pass until payment.

(1) [1900] 1 Q.B. 270.

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The other group has reference to what I will call suretyship notes. They are notes signed by two persons of whom one is a surety, and stipulation is made in the body of the note that the time given to one of the makers of the note will not prejudice the right of the holder to proceed against the other maker.

With regard to the cases on lien notes the jurisprudence was at first somewhat uncertain. They were generally used in connection with the sale of agricultural implements. By the contract, the vendor would retain the ownership of the machines sold to the farmers, but would put the latter in possession thereof. Then the farmers would give their promissory notes, and it would be stipulated in the body of the notes that the title to the machine for which the note was given should remain in the vendors until the note was paid.

In 1894, in a case of *Merchants Bank* v. *Dunlop*, decided in Manitoba (1), it was held that the recital in the notes should be construed as simply stating the consideration for which the note was given, viz., the sale of the article and the vendor's promise to complete the sale upon payment. The note was held a valid promissory note.

In the same year (1894) the same question came before Mr. Justice Maclennan in Chambers in Ontario, on an appeal from the County Court in a case of *Dominion Bank* v. *Wiggins* (2). In rendering his decision Mr. Justice Maclennan said that in view of the general interest and importance of the question he had conferred with the other members of the Court of Appeal, of which he was a member, and that they agreed in his conclusions, viz., that the maker of the

(1) 9 Man. R. 623.

(2) 21 Ont. App. R. 275.

note is not compellable to pay when the day of payment arrives, unless at the same time he gets the property with a good title, and the payment to be made is, therefore, not an absolute unconditional payment at all events, such as is required to constitute a good promissory note.

In the following cases, the decision of the Ontario case was followed:—

1897.—*Prescott* v. *Garland* (1), by the full court of New Brunswick; 1899.—*Bank of Hamilton* v. *Gillies* (2), by the full court of Manitoba; 1906.—*Frank* v. *Gazelle Live Stock Association* (3).

In the group of suretyship cases there are three decisions:—

1892.—*Yates* v. *Evans* (4); 1896.—*Kirkwood* v. *Smith* (5); 1903.—*Kirkwood* v. *Carroll* (6).

The document on which those decisions were based was in the form of a joint and several promissory note by a principal debtor and a surety with a proviso that time may be given to either without the consent of the other, and without prejudice to the rights of the holders to proceed against either party.

In the *Yates Case*(4), which was the first decided, the court held that the clause was a mere consent or licence that time may be given to the principal debtor and that if time may be so given the surety will not avail itself of that as a defence.

In *Kirkwood* v. *Smith* (5), it was held that the documents were not valid promissory notes.

But in 1903, in *Kirkwood* v. *Carroll* (6), the Court of King's Bench decided that those additions to the promissory notes did not qualify them, and it was

(1) 34 N.B. Rep. 291.
(2) 12 Man. R. 495.
(3) 6 Terr. L.R. 392.
(4) 61 L.J.Q.B. 446.
(5) [1896] 1 Q.B. 582.
(6) [1903] 1 K.B. 531.

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declared that *Kirkwood* v. *Smith* (1), could not any longer be regarded as an authority.

In those documents the makers did not stipulate any conditions in their favour; the words added to the promissory notes were simply licences in favour of the holders; and they are in that respect very different from the lien cases and the present case, where the makers practically said: I am ready to pay at such a date, but provided you give me a full title to the machine sold, or provided you give me my stock certificates.

It is a condition which is imposed upon the creditor of the debt and in favour of the maker of the alleged promissory note.

The payment of the money and the surrender of the stock certificates are to be contemporaneous acts.

Anson, Contracts, 7th ed., p. 299, says:—

> It is safe to say that, in the absence of clear indications to the contrary, promises, each of which forms the whole consideration for the other, will be held to be concurrent conditions.

Applying these principles to the present case I come to the conclusion that the document in question is a conditional one, and that it does not constitute a valid promissory note as defined by section 176 of the "Bills of Exchange Act."

I would adopt the views expressed by the Court of King's Bench and by Mr. Justice Fullerton in the Court of Appeal.

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

Appeal dismissed with costs.

Solicitor for the appellant: *L. A. Delorme.*
Solicitor for the respondent: *Philip C. Locke.*

(1) [1886] 1 Q.B. 582.

LOUIS DINGLE (PLAINTIFF).....APPELLANT; 1918 *Dec. 12.

AND

THE WORLD NEWSPAPER COMPANY OF TORONTO (DEFENDANTS).....RESPONDENTS.

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

Pleading—Libel—Action against newspaper company—Advantage of want of notice—Averment in plea—Denial—R.S.O. [1914], c. 71, ss. 8 (1) and 15 (1).

By sec. 15, sub-sec. 1, of the "Libel and Slander Act" (R.S.O. [1914], ch. 71), the defendant, in an action against a newspaper company, is not entitled to take advantage of the want of notice required by sec. 8 unless the name of the proprietor and publisher is stated at a specified place in the paper. In a case in which there was no proof that the name was so stated:—

Held, reversing the judgment of the Appellate Division (43 Ont. L.R. 218; 43 D.L.R. 463), that the failure of the plaintiff to allege non-compliance with the requirements of sec. 15 (1) in his reply to a plea setting up want of notice is not an admission of the fact of such compliance.

Held, also, that under the practice in Ontario, even if the defendant by his plea alleges such compliance, the same is not admitted by the absence of denial in the replication.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming, by an equal division of opinion, the judgment at the trial by which the plaintiff's action was dismissed.

The plaintiff brought action for an alleged libel published in the Toronto *World*, having served the notice required by sec. 8, sub-sec. 1, of the "Libel and Slander Act" on the city editor of the paper. The defendant company, claiming that this was not service on the defendant as the section required

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

(1) 43 Ont. L.R. 218; 43 D.L.R. 463.

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pleaded want of notice to which plea issue was joined. The trial judge dismissed the action on this ground and his judgment was affirmed by the Appellate Division. An appeal was taken to the Supreme Court of Canada, and when it came on for hearing, the question was raised by the court of there being no proof on the record that the requirements of sec. 15, sub-sec. 1, had been complied with, and counsel for the respondents contended that it was admitted by the pleadings.

D. J. Coffey for the appellant.
Kenneth Mackenzie for the respondents.

The judgment of the court was delivered by

ANGLIN J.—The plaintiff appeals from the judgment of the Appellate Division of the Supreme Court of Ontario (1), affirming, on an equal division of opinion, the judgment of Middleton J. granting a motion by the defendant for the dismissal of this action on the ground of non-compliance by the plaintiff with sub-sec. 1 of sec. 8 of the "Libel and Slander Act" (R.S.O., ch. 71). The notice of the alleged libel complained of, addressed to "The Editor of the *World*," was delivered to the city editor of that newspaper. Middleton J. held this insufficient, following *Burwell* v. *London Free Press Co.* (2), and *Benner* v. *Mail Printing Co.* (3). By his appeal the plaintiff seeks to have these decisions overruled.

The defendant's motion was made under Ont. Con. Rule 222, upon admissions contained in the plaintiff's pleadings and examination for discovery disclosing the fact above stated.

Sec. 15, sub-sec. 1, of the "Libel and Slander Act" (R.S.O., ch. 71) provided that:

(1) 43 Ont. L.R. 218; 43 D.L.R. 463. (2) 27 O.R. 6.
(3) 24 Ont. L.R. 507.

No defendant shall be entitled to the benefit of sections 8 and 14 of this Act unless the name of the proprietor and publisher and the address of publication are stated either at the head of the editorials or on the front page of the newspaper.

We had occasion recently to consider a corresponding provision of the "Alberta Libel Act" in *Scown* v. *Herald Publishing Co.* (1). Nowhere in the material before the court does it appear that the defendant company complied with the requirements of sub-sec. 1 of sec. 15. The newspaper itself, the production of a copy of which is made *primâ facie* evidence by subsection 2, is not in the record.

To meet this difficulty, raised by the court itself, counsel for the defendant invoked paragraph 7 of his client's plea, which avers the plaintiff's neglect to give the notice prescribed by sub-sec. 1 of sec. 8, and his failure in his reply to set up the defendant's noncompliance with sub-sec. 1 of sec. 15. But assuming paragraph 7 of the statement of defence to be a good plea without an averment that the defendant had complied with sub-sec. 1 of sec. 15, the absence from the reply of an allegation of non-compliance therewith is not an admission that it had in fact been complied with. Even if the defendant had expressly averred compliance with sub-sec. 1 of sec. 15 in his statement of defence, the failure of the plaintiff in his reply to deny that allegation would not amount to an admission of its truth under the Ontario practice. Con. R. 144.

The appeal to this court is upon a case stated ("Supreme Court Act," section 73), on which it is our duty to give the judgment which the court whose decision is appealed against should have given (section 51). We cannot, whether for the purpose of upholding or for that of impeaching the judgment

(1) 56 Can. S.C.R. 305; 40 D.L.R. 373; [1918] 2 W.W.R. 118.

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appealed from, supplement the appeal case by admitting evidence that should have been placed before the provincial courts. *Red Mountain Railway Co.* v. *Blue* (1).

On the ground, therefore, that compliance by it with sub-sec. 1 of sec. 15 of the "Libel and Slander Act" is a fact which cannot be presumed in the defendant's favour on a motion made under Con. R. 222 but must be established by it, and that the record contains no admission of that essential fact by the plaintiff such as that rule requires the appeal must be allowed and the judgment dismissing the action set aside.

It should be unnecessary to add that from the allowance of the plaintiff's appeal no inference may be drawn as to the opinion of the court in regard to the soundness of the two decisions followed by Mr. Justice Middleton.

Appeal allowed with costs.

Solicitor for the appellant: *D. J. Coffey.*
Solicitors for the respondents: *McKenzie & Gordon.*

(1) 39 Can. S.C.R. 390.

1918
*Oct. 29.
*Dec. 9.

THE NORTH AMERICAN ACCIDENT INSURANCE COMPANY (DEFENDANTS)..... APPELLANTS;

AND

CHARLES HENRY NEWTON AND OTHERS (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Accident insurance—Employer's indemnity—Assignment by insured—Right of assignee against insurer—Payment of claim—Money advanced by outside party—Measure of damages.

By an employer's liability policy N. was insured against loss from liability on account of bodily injuries to, or death of, an employee. N. incurred such liability but made an assignment for benefit of his creditors before he paid his employee's claim. With money advanced by a third party the assignee paid it and brought action against the insurer to be reimbursed.

Held, that the insurance company was liable; that the right of N. to pay his employee and collect the amount from the insurance company passed to his assignee; that payment to the employee before the assignment was not essential; that the insurer could not inquire into the source from which the money came to make the payment; and that the insurer's liability was not limited to the amount of the dividend which the insolvent estate would be able to pay the employee.

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

The facts are stated in the above head-note.

Chrysler K.C. for the appellants.

E. K. Williams for the respondents.

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

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

(1) [1917] 2 W.W.R. 1120.

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NORTH AMERICAN ACCIDENT INSURANCE CO. v. NEWTON.
Idington J.

IDINGTON J.—The contract evidenced by the appellant's policy was a chose in action and the benefit thereof clearly passed to respondent by virtue of the assignment of Nelson and Foster under and pursuant to the provisions of the "Assignments Act," R.S.M. [1913] ch. 12 in the same plight and condition as it was held by the assignor at that time.

The respondent assignee was just as much entitled to comply with the condition which, being complied with, gave vitality and force to the appellant's obligation as his assignor had been and would have had if no assignment had been made.

It matters not then where the money came from—the condition has been fulfilled.

It so turns out that the estate was in an insolvent condition. To-morrow the like case might arise under circumstances in which the insured, although driven to make an assignment, might be possessed of an ample estate which could liquidate all the obligations of the insured.

Are we to hold that such an unfortunate insured was deprived of the right to have his assignee recover on such an obligation? No case has been cited deciding any such thing or anything like it.

The case of *Connolly* v. *Bolster* (1), is the only one counsel claimed as being so. It, on examination, bears no resemblance to this.

What was attempted there was to get a receiver appointed in hope that by such means such steps could be taken as might place the party concerned in funds to raise the money to meet the condition and give force and thereby vitality to the obligation.

That appointment was refused. And I venture with some confidence to think that, in the case of *Collinge* v.

(1) 187 Mass. 266.

Heywood (1), had someone been kind enough to lend or give the plaintiff before action the money to pay, and he then had paid the bill of costs there in question, the plaintiff, even if hopelessly bankrupt and his benefactor never likely to receive any return for his advance, must have succeeded. The motive for such generosity could not have been inquired into.

I think the case has been rightly decided by the court below, and that in doing so they have not had to rely upon any principles of equity, but upon the rigid common law. Everything nominated in the bond has been complied with.

The appeal should be dismissed with costs.

ANGLIN J.—I am disposed to agree with the appellant's contention that under the terms of the policy sued upon actual payment by the assured of a liability of the class insured against imposed upon him by law was not merely a condition precedent to his right of action, but the very thing against loss from which the insurance was effected. In other words, not only would no right of action against the insurer arise until such payment but no actual or absolute liability on its part would exist.

Nevertheless, when his employee, Fornell, was injured a contingent right arose in favour of the assured against the insurer and there was a corresponding contingent liability on the part of the latter. Upon payment of whatever liability the law imposed in consequence of the injury sustained by Fornell, ascertained by due process, that contingent right, as well as the correlative contingent liability, would become absolute. This was the situation when the insured, having become insolvent, made an assignment for the benefit of his creditors under the "Assignments Act" (R.S.M. [1913],

(1) 8 L.J.Q.B. 98; 9 A. & E. 633.

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ch. 12). I am satisfied that the contingent right of the assured against the defendant company thereupon passed to his assignee. Neither can there be any reasonable doubt that it was the intention of the parties to the insurance contract that this should happen. Condition 1 of the policy provides that, while the policy shall terminate upon an assignment by the insured for the benefit of his creditors,

> such termination shall not affect the liability of the company as to any accident theretofore occurring.

This condition is not limited in its terms to cases in which the assured shall have actually paid the claim of an injured employee before the assignment, and it would, in my opinion, be unwarrantable to place such a restriction upon its application. It follows that the parties to the contract sued upon must have contemplated that the assignee might make the payment (which the assured would by the assignment have divested himself of the means of making) necessary to convert the contingent right which passed by the assignment into an absolute right and the corresponding liability of the insurer into an absolute liability.

Nor does this view do violence to the condition precedent to his client's liability of payment of the employee's judgment by, and loss thereby to, the assured so much pressed by counsel for the appellant.

> An assignee for creditors is a trustee not only for the creditors but also for the debtor. It is his duty to make the most of the estate and pay the debts; but it is the debtor's estate all the time; and when the debts are paid it is his duty to restore the surplus or what is not required for debts, if there be any, to the debtor. The assignee is accountable to the debtor for his dealings with the estate and if he is guilty of any wrongdoing or breach of trust or if he neglects or refuses to do his duty in respect of the estate he can be held to his duty and be compelled to perform it at the debtor's instance. The covenant in question was a counter security which the debtor possessed to protect him against the claim of the plaintiffs and others * * *. The debtor still had an interest in the covenant notwithstanding the assign-

ment and that interest was the right to have it enforced against the defendant the moment anything fell due on the mortgage. That beneficial right he could assign and transfer * * * *Ball* v. *Tenant* (1), *per* Maclennan J.A.

The fallacy in the appellant company's contention is that it ignores the assured-assignor's continued interest in its liability. Because of that interest payment by his trustee to his judgment creditor (Fornell) out of the assigned estate would be payment by the assured-assignor and to his loss. It would diminish the fund to meet his creditors' claims. In the event of a deficiency he would in consequence of such payment remain liable for a larger balance to his other creditors. Should there be a surplus returnable to him it would be less *pro tanto* than it would have been had the Fornell claim not existed.

Nor is the appellant entitled to inquire, or to base a defence upon, the source from which the money paid by the assignee to Fornell came any more than he would be entitled to make a like inquiry or to raise such a defence if the payment had been made by the assured himself. It would be intolerable that a person bound to indemnify or reimburse a judgment debtor should escape liability because the latter had borrowed or had received as a gift from some kindly disposed friend either of himself or of the judgment creditor the money required to meet his obligation. The assignee has paid a judgment against the assured-assignor as he was entitled to do in the interest of all his *cestuis que trustent*—the other creditors as well as the debtor. He is accountable only to them for the money so expended. The source from which it came is their business but not that of the insurer.

Moreover, the insurer's liability is not measured by the amount of the dividend to which the judgment

(1) 21 Ont. App. R. 602, at p. 610.

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creditor would ultimately have been entitled on a distribution of the debtor's estate had his judgment not been satisfied. It is the full amount of the judgment of which, when satisfied, it covenanted for reimbursement. The assured, as already pointed out, is directly interested in having the entire liability to his judgment creditor discharged. Were it not he would remain personally liable for any unpaid balance of it. Since the payment of the judgment the respective rights and liabilities of the parties in the present case are, in my opinion, indistinguishable from those dealt with in such English cases as *In re Law Guarantee, Trust & Accident Society*; *Liverpool Mortgage Insurance Company's Case* (1); *Cruse* v. *Paine* (2); *Re Perkins. Poyser* v. *Beyfus* (3).

The appellant's contingent liability for the full amount of Fornell's judgment existed when the assured made his assignment. The correlative contingent right of the assured passed to his assignee and payment of the judgment by him has converted the latter into an absolute right, enforceable for the benefit of the estate in which both creditors and debtor are alike interested, and the former into an absolute liability.

The appeal fails and should be dismissed with costs.

BRODEUR J.—This is an action for the recovery under a contract commonly known as an employers' liability policy. That policy undertook to indemnify Nelson & Foster against loss from the liability for damages on account of bodily injuries suffered by an employee of the company. One condition of that policy was that no action could be instituted against the company to recover unless it shall be brought for

(1) [1914] 2 Ch. 617. (2) L.R. 6 Eq. 641, 653; 4 Ch. App. 441.
(3) [1898] 2 Ch. 182, 189.

loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue.

An accident occurred to an employee of Nelson & Foster and an action was instituted against them. While the case was pending, Nelson & Foster made an assignment under the provisions of the "Assignments Act" of Manitoba, R.S.M., [1913] ch. 12. Judgment having been rendered against Nelson & Foster in favour of that employee, the assignee paid the amount of the judgment with money which was handed over to him by a man named Brandon, who does not seem to have been a creditor, but who seems to be interested in some way or other in the distribution of the assets of Nelson & Foster or in the discharge of their liability with regard to that employee. An action was then instituted by the assignee, the respondent Newton, to recover from the insurance company for the loss which had been suffered and the reimbursement of the money which he had paid to that employee.

The applicant company claims that it should not be held responsible for a larger sum than the amount of dividend to which that employee was entitled. That question came up in a case which was decided in 1914 in England, viz., the case of *In re Law Guarantee Trust & Accident Society; Liverpool Mortgage Ins. Co's Case* (1). It was there held that in a contract of insurance or indemnity the insurance company was liable to pay to the liquidator the amount of the deficiency and not merely the amount of dividend payable.

Lord Lindley, in his work on Partnership, 5th ed., page 375, says that:

where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually

(1) [1914] 2 Ch. 617.

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been indemnified; and the limit of defendant's liability to the plaintiff is the full amount for which he is liable; *or if he is dead or insolvent the full amount provable against his estate and not only the amount of dividend which such estate can pay.*

The contention of the appellant is that this contract is not only a contract of indemnity to but also of previous payment by the insured. But in this case there was a previous payment which had been made and we are not concerned with the question whether that payment has been rightly or legally made by the assignee. The condition of previous payment has been fulfilled and the insurance company cannot pretend now that it is not bound to reimburse the amount which has been paid by the assignee.

A question has been raised also with regard to the power of the assignee under the "Assignment Act" to recover. The contract of assignment disposes of that contention, since it is therein declared that the assignor has handed over to the respondent all his personal estate, rights and credits, choses in action and all other personal estate.

I may say with the learned trial judge, Mr. Justice Prendergast, that the assignee was bound to protect the trust, to save all that could be saved of the estate and to make out of it all that could be made. There was a chose in action that could be left barren or could be made to develop into an actual asset. It was then the assignee's duty to do what was necessary to preserve or to enforce the claim which he now exercises against the appellant company.

The appeal should be dismissed with costs.

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

Appeal dismissed with costs.

Solicitors for the appellants: *Coyne, Hamilton & Martin.*
Solicitors for the respondents: *Murray & Noble.*

1918
*Nov. 15.
*Dec. 9.

THE COLONIAL REAL ESTATE COMPANY (PLAINTIFF)..... } APPELLANT;

AND

LA COMMUNAUTÉ DES SOEURS DE LA CHARITÉ DE L'HOPITAL GÉNÉRAL DE MONTRÉAL (DEFENDANT)..... } RESPONDENT.

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

Principal and agent—Contract—Sale—Real estate—Conditional option —Expiration of delay—Commission—Art. 1082 C.C.—Art. 1176 C.N.

S. gave to C. an option to purchase lots for $395,176, and promised to pay him a commission of one per cent if a sale was effected "during the currency of the option * * * and not otherwise." Within the time limit, C., at the request of S., named as the purchaser of the property one D., who had himself made arrangements to sell it to M. for $425,000. On the last day of the option, as M. declined to execute his undertaking, D. refused to sign a draft deed of sale and the transaction fell through. Three weeks later S. sold the property to M. on terms similar to those under which it was to be sold to D. C. then claimed from S. $3,951.76, being the commission of one per cent. on the price of sale.

Held, Davies C.J. and Idington J. dissenting, that, under the law of the Province of Quebec, a conditional obligation fails when the condition itself fails; and when a term is fixed during which the condition must be accomplished, the obligation ceases if the condition is not accomplished during the term.

Per Anglin J.—When time is made of the essence of a contract, strict compliance with the stipulation is exacted under the English equity system as well as at common law.

Per Anglin, Brodeur and Mignault JJ.—On a question arising under Quebec law, a decision rendered according to the rules of the English law should not be relied on unless it appears that there is no difference between the two systems of law in regard to the subject matter. *Burchell* v. *Gowrie* ([1910], A.C. 614) and *Stratton* v. *Vachon* (44 Can. S.C.R 395), distinguished.

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

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COLONIAL REAL ESTATE CO. v. LA COMMUNAUTÉ DES SOEURS DE LA CHARITÉ DE L'HOPITAL GÉNÉRAL DE MONTRÉAL.

Per Davies C.J. dissenting—The relation of M. as purchaser from S. was brought about by C.; and S., by directly dealing with M., even after the expiration of the stipulated delay of the option, waived the time limit and adopted the contract negotiated by C. within the stipulated time. S., having taken advantage of C.'s work as its agent, cannot repudiate its liability to pay the agreed commission. *Burchell* v. *Gowrie* ([1910], A.C. 614) and *Stratton* v. *Vachon* (44 Can. S.C.R. 395), followed.

Judgment of the Court of King's Bench (Q.R. 27 K.B. 433), Davies C.J. and Idington J. dissenting, affirmed.

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

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

Eug. Lafleur K.C. and *T. P. Butler K.C.* for the appellant.

H. Gérin-Lajoie K.C. and *J. H. Gérin-Lajoie* for the respondent.

THE CHIEF JUSTICE (dissenting)—This was an action to recover a commission claimed by the plaintiffs, appellants, upon a sale made by the respondent Sisters of Charity to Messieurs Mignault and Morin of a parcel of real estate in Montreal.

The action was maintained by the trial judge for the sum claimed, $3,951.76, and on appeal was dismissed by the Court of Appeal.

No material facts are in dispute. The question to be decided is whether on these facts the defendants, respondents, are liable to pay the plaintiffs the commission sued for.

Respondents, in September, 1912, gave the appellants an option to purchase the lands in question for

(1) Q.R. 27 K.B. 433.

$395,176 good until Friday 13th September, 1912, noon, and on the same day, by a separate letter referring to the option, bound themselves to pay appellants a commission of one per cent. on the amount of the purchase-money if the sale was effected by them during the currency and on the terms of the option.

It is common ground that the time limit for carrying out the option was extended until 12th November, 1912.

The plaintiffs accepted the option, and, at the time of accepting, paid the respondents $5,000 on account.

Afterwards, on the 11th and 12th November, within the time limit, the appellants, having secured a purchaser ready and willing to take the property on the terms provided in the option, attended with such purchaser, one Desjardins, at a notary's office to carry out the agreement of purchase. Respondents were present by their attorney. Desjardins was present and ready and willing to carry out the purchase but was prevented from doing so by the claim set up by two third parties, Messrs. Mignault and Morin, to the effect that they, and not the purchaser Desjardins, had bought the property through the agency of the appellants and its sub-agent, one Rollit, and that they were entitled to a deed of the property for the sum of $395,176 instead of some $425,000 which Desjardins contended they had agreed to pay as the purchase-price from him to them.

The result of the dispute was the withdrawal of Desjardins from the purchase of the property.

Owing to the disputes between the two alleged purchasers, Desjardins on the one hand and Mignault and Morin on the other, each one claiming to be entitled as the purchaser through the appellants of the land and to receive a deed of the same for the con-

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sideration price of $395,176, the transaction was not completed. The respondents, defendants, were not responsible for this.

A few days afterwards, however, and after the time limit had expired, namely, on the 4th December, the defendants, respondents, agreed to accept the claim of Mignault and Morin to be the purchasers as opposed to the claim of Desjardins to be such and executed to them a deed of the property in question for the sum of $395,176 on the same conditions as those stipulated for in the option they had given to the plaintiffs, appellants, and at the same time credited the said Mignault and Morin on the purchase-price with the $5,000 paid to them by the plaintiffs, appellants, on the 12th September previously.

By accepting these parties as the purchasers it is contended the defendants adopted the contract made by the plaintiffs, appellants, or their sub-agent with Mignault and Morin as purchasers, profited by the same, and could not deprive the appellants of their right to a commission on the sale, even though it was not completed until after the time stipulated for in the option and in the accessory obligation with respect to the commission.

The relation of Mignault and Morin as purchasers from the respondent defendants of the land in question was, it seems to me, brought about by the plaintiffs and by directly dealing with them even after the expiration of the stipulated delay for closing the transaction, the respondents waived the delay, adopted the contract negotiated for them by the plaintiffs within the stipulated time, and having done so and taken advantage of the plaintiffs' work as their agent, cannot be permitted to repudiate their liability to pay the commission.

The rule which should govern in cases of this kind has been laid down by the Judicial Committee of the Privy Council in the case of *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.* (1), and has been followed in this court in *Stratton* v. *Vachon* (2).

That rule is that where an agent has brought the landowner into relation with an actual purchaser he is entitled to recover his commission although the owner has sold, behind the agent's back, on terms which he had advised them not to accept. Lord Atkinson, in delivering the judgment of their Lordships, said, in answer to the contention that the acts of an agent cannot be held to be the efficient cause of a sale which he has opposed:—

> The answer * * * is that if an agent such as Burchell was brings a person into relation with his principal as an intending purchaser the agent has done the most effective and, possibly, the most laborious and expensive, part of his work, and that if the principal takes advantage of that work and, behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale.

There can be no doubt in my judgment that the plaintiffs, appellants, brought the purchasers in this case, Mignault and Morin, into direct relation with the respondent vendors and that the plaintiffs were the efficient cause of the actual sale or acceptance by the defendants, respondents, of Mignault and Morin as the purchasers. The knowledge that they had when so accepting of Mignault and Morin having been brought as purchasers into relations with them as vendors by plaintiffs; the adoption of the terms of sale contained in the option they had given the plaintiffs; the crediting on the purchase-price to Mignault and Morin of

(1) [1910] A.C. 614. (2) 44 Can. S.C.R. 395.

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the $5,000 paid by the plaintiffs to them when the option was given and the commission agreement entered into; all combine to convince me that the respondents cannot be permitted to escape through the time limit from their liability to pay plaintiffs the stipulated commission sued for. They must be held to have clearly waived this time limit.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment of the trial judge.

IDINGTON J. (dissenting)—I would allow this appeal with costs here and below and restore the judgment of the learned trial judge.

ANGLIN J.—The material facts of this case and the relevant documents appear in the judgment delivered by Mr. Justice Pelletier in the Court of King's Bench (1), and in the opinion of my brother Mignault, which I have had the advantage of reading. I fully concur in my learned brother's view that the question presented must be determined not by the principles of English law, but by those of the civil law which obtain in the Province of Quebec.

Although art. 1082 C.C. omits the first, or positive, clause of art. 1176 C.N.:—

> Lorsqu'une obligation est contractée sous la condition qu'un évènement arrivera dans un temps fixe, cette condition est censée défaillie lorsque le temps est expiré sans que l'évènement soit arrivé,

the reproduction of the second clause in these terms,—

> if there be no time fixed for the fulfilment of a condition it may always be fulfilled,

clearly implies the converse proposition, that, where a contract contains a stipulation as to the time for the fulfilment of a condition to which the obligation

(1) Q.R. 27 K.B. 433.

imposed is made subject, that condition cannot be fulfilled so as to render the obligation absolute after the time so fixed has elapsed. On the expiry of the delay, if the condition remain unperformed, the obligation entirely ceases.

Art. 1082, according to the codifiers' foot-note (first report, p. 71, No. 102), is based on Pothier (Bugnet) 209, 210 and 211, and 6 Toullier 623 *et seq.* The opening paragraphs of section 209 of Pothier read as follows:—

209. Lorsque la condition renferme un temps préfix, dans lequel elle doit être accomplie, comme si je me suis obligé de vous donner une certaine somme si un navire était cette année de retour dans les ports de France, il faut que la chose arrive dans le temps préfix; et lorsque le temps est expiré sans que la chose soit arrivée, la condition est censée défaillie, et l'obligation contractée, sous cette condition, est entièrement évanouie.

Mais si la condition ne renferme aucun temps préfix dans lequel elle doive être accomplie, elle peut l'être en quelque temps que ce soit; et elle n'est pas censée défaillie, jusqu'à ce qu'il soit devenu certain que la chose n'arrivera point.

Toullier deals with certain exceptions indicated by Pothier, not material to this case, which the codifiers did not adopt. In the codifiers' First Report, p. 71, No. 102 (art. 1082 C.C.), art. 1178 C.N. would seem to be erroneously referred to instead of art. 1176 C.N. While the comment of the codifiers, at p. 20 of their report, does not explain the omission from art. 1082 of the first sentence of art. 1176 C.N., it must, I think, be assumed, in view of the reference to Pothier, that in their opinion it was unnecessary because of its obvious implication in the second sentence which they reproduced as art. 1082. The purview of that article is further evidenced by art. 1084, which is a reproduction of art. 1178 C.N. and presents the only case in which a condition is deemed to have been accomplished though actually not so. Art. 1083 C.C., which corresponds to art. 1177 C.N., throws further

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light upon the meaning of art. 1082 and the effect which it must have been intended to have. As to the operation of the last mentioned article—see *Letang* v. *Renaud* (1).

I entertain no doubt whatever, for the reasons stated by my brother Mignault, and by Carroll and Pelletier JJ. in the Court of King's Bench, that the failure of the plaintiff to bring about within the time stipulated the event on the happening of which, according to the terms of the contract, the defendants' obligation would arise amounted to the failure of a condition precedent with the result that the defendants were thereby entirely freed from any obligation to the plaintiff. *Deschamps* v. *Goold* (2), is in point. I rest my judgment on this view of the case and add the references to English law which follow merely to indicate that, in my opinion, the result, if ruled by its principles, would be the same. The contrary view, if I may say so with respect, in the last analysis of it would appear to rest upon some misapprehension as to the scope and application of the equity doctrine that time, unless made so expressly or by necessary implication, is not to be deemed of the essence of contractual obligations.

Here the stipulation as to the time for its fulfilment is made of the essence of the condition on which the defendants assumed an obligation to pay commission as distinctly as language could make it so. The promise which the plaintiff accepted was that the defendants would pay a commission of 1%

if said sale is affected during the currency of said option which expires on Friday the 13th instant at noon, and provided also this sale is completed, the deed signed and first payment of one hundred thousand dollars ($100,000) duly paid to the Grey Nuns within fifteen days after the acceptation (*sic*) of said option and not otherwise.

(1) 19 R.L. 221. (2) Q.R. 6 Q.B. 367.

Terms more explicit and emphatic it would be difficult to indite. Where time is thus made of the essence of a contract strict compliance with the stipulation is exacted under the English equity system as well as at common law. *Conventio vincit legem.* An extension of the time for completion and payment of the first instalment (which was reduced from $100,000 to $50,000) until the 11th of November was agreed to, but, as appears from the letter of the defendants' agent, St. Cyr, of the 11th September,

all other conditions (were) to remain the same.

Even if, upon a proper construction of it, time should not be regarded as having been expressly made of the essence of this contract, neither its character nor the nature of the relief sought admits of the application of the doctrine of equity which, under some circumstances, treats a term as to the time of performance as not of the essence of a contract. The contract before us would, under English law, create an ordinary common law obligation to pay money upon the happening of a stated event. The plaintiff's action, if brought in an English court, would be strictly a common law action to recover the money so contracted to be paid, and the common law rule as to the effect of the stipulation as to time would govern it. *Noble* v. *Edwardes* (1). The case is not one in regard to which a court of equity would, before the "Judicature Act," have entertained a bill for specific performance, or to restrain proceedings at law, or for other equitable relief. It is, therefore, not one in which, under the "Judicature Act," the equity view as to the effect of a stipulation as to time would control. *Stickney* v. *Keeble* (2); *Reuter* v. *Sala* (3). The equit-

(1) 5 Ch. D. 378, at p. 393. (2) [1915] A.C. 386, at p. 417.
(3) 4 C.P.D. 239, at p. 249.

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able doctrine could not be invoked to take such a case out of the rule of the common law, which exacts performance of a condition within the delay allowed as the foundation of the right to enforce the obligation to which it is attached.

Having made a contract under which it would become entitled to a commission only upon the happening of a stated event within a definite period "and not otherwise," the plaintiff in effect agreed to forego all claim to commission unless that event should happen within the time stipulated. In order that an action on such a contract should succeed the plaintiff must shew fulfilment of the condition according to its terms. *Alder* v. *Boyle* (1); *Peacock* v. *Freeman* (2). The authority of the case last cited, so far as relevant to that at bar, is not affected by a distinction in regard to it made by the Court of Appeal in *Skinner* v. *Andrews* (3).

The plaintiffs cannot recover merely because although the condition of the defendants' obligation is not fulfilled, they have derived a benefit from what it did. *Barnett* v. *Isaacson* (4). This case, in some aspects, closely resembles that at bar. The defendant had promised the plaintiff a commission of £5,000 in the event of his introducing a purchaser of the defendant's business. An accountant, introduced to the defendant by the plaintiff as a person likely to procure a purchaser of the business, eventually bought it himself. Construing the contract on which the plaintiff claimed as entitling him to a commission if his introduction brought about the sale, but also as meaning that if it failed to produce that result he should not be paid the commission (implying the term expressed in

(1) 4 C.B. 635.
(2) 4 Times L.R. 541.
(3) 26 Times L.R. 340.
(4) 4 Times L.R. 645.

the "and not otherwise" of the contract in the present case) the Court of Appeal held that the plaintiff could not recover. As the Master of the Rolls put it:—

All that the plaintiff did under the contract was done upon the terms that he was not to be paid unless he was successful. The jury gave him £2,000 (upon a *quantum meruit*) though he failed, and so the verdict could not stand.

* * * * *

To entitle the plaintiff to sue upon a *quantum meruit* the rule was that if the plaintiff relied upon the acceptance by the defendant of something he had done, he must have done it under circumstances which led the defendant to know that if he, the defendant, accepted what had been done it was on the terms that he must pay for it.

Lord Justice Lopes said:—

As to the claim upon a *quantum meruit*, it could only arise upon a promise to be implied from a request by the defendant to the plaintiff to perform a service for him, or upon the acceptance of services of the plaintiff so as to imply a promise by the defendant to pay for those services. Neither of these alternatives occur here. Nothing was done outside the contract.

In *Lott* v. *Outhwaite* (1), another authority for the latter view, Lindley L.J., in rejecting a claim for *quantum meruit*, observed that

there could be no implied contract where there was an express one.

See also *Green et al.* v. *Mules* (2).

The case of *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.* (3), chiefly relied on by the appellant, is, in my opinion, clearly distinguishable as my brother Mignault points out. The agent's employment in that case was a general one. The contract was, as Lord Atkinson puts it at p. 626:—

that should the mine be eventually sold to a purchaser introduced by him, he (Burchell) would be entitled to a commission at the stipulated rate.

There was no such condition as in the case at bar that to entitle the agent to his commission the sale

(1) 10 Times L.R. 76. (2) 30 L.J. C.P. 343.
(3) [1910] A.C. 614.

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must be effected and carried out and part of the purchase-money paid within a fixed period—still less an agreement that unless all these things should happen within the time stipulated there should be no claim for commission—"and not otherwise."

The ground of Burchell's recovery was that the defendants had wrongfully deprived him of the benefit of his contract. The judgment proceeded, as my brother Mignault says, on the principle enunciated in art. 1184 C.C. as the citation by Lord Atkinson of *Inchbald* v. *Western Neilgherry, Coffee Plantation Co.*(1), in support of it shews. Here, on the contrary, the defendants put no obstacle whatever in the way of the plaintiff earning its commission. They were ready and willing, on the date fixed for completion and payment, to convey to the purchaser designated by the plaintiff. The failure to carry out the sale was not due to any fault of theirs or because of the intervention of Mignault and Morin as rival purchasers, as the appellant suggests, but solely and simply because Desjardins, the plaintiff's nominee as purchaser under its option, refused to carry out the transaction. When that occurred, the time within which the plaintiff might fulfil the condition entitling it to a commission having expired, the defendants were freed from all obligation to it.

In the case at bar the plaintiff was not "generally employed" to sell. Its employment was limited. Lord Watson, in *Toulmin* v. *Millar* (2), clearly indicates the difference between a general employment and a limited mandate to sell according to stated terms and not otherwise. In order to entitle a plaintiff to recover for services rendered under such a limited mandate its terms must be fulfilled.

(1) 17 C.B.N.S. 733. (2) 58 L.T. 96.

Stratton v. *Vachon* (1), was a case of general employment similar to that of Burchell.

When Mignault and Morin came to the defendants some time afterwards seeking to acquire their property on the terms on which they were willing to dispose of it, the defendants were at perfect liberty to sell to them. The mere fact that they had been prospective sub-purchasers from Desjardins in the event of a sale to him (procured for him by one Rollit, who had acted as a sub-agent for the plaintiff in procuring Desjardins himself to accept its option from the defendants) could not, after the expiry of that option, deprive the latter of the right to accept an offer from Mignault and Morin. *Sibbitt* v. *Carson* (2), is in point and, in my opinion, was well decided.

Much is made of the fact that the defendants credited to Mignault and Morin on account of their purchase-money this $5,000 received from the plaintiff when it had written to St. Cyr taking up the option which it held. It might have been more prudent had this not been done. But the defendants had offered the $5,000 back to the plaintiff from whom they had received it, thus evidencing their understanding that the option and the incidental commission agreement were at an end. The plaintiff had refused to accept the money. It, in fact, belonged to Mignault and Morin. Under all the circumstances the crediting of this sum to Mignault and Morin on account of the purchase-price payable by them for the property affords no ground for holding that the defendants adopted and carried out a sale which the plaintiff had arranged. On the contrary, it is abundantly clear that all relations between the defendants and the plaintiff

(1) 44 Can. S.C.R. 395. (2) 26 Ont. L.R. 585; 5 D.L.R. 193.

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in connection with the sale of the property in question had been terminated and that the defendants sold it to Mignault and Morin as they might have sold it to any other purchaser who might offer to buy it.

In my opinion the plaintiff has neither a legal nor a moral claim against the defendant for the commission for which it sues.

BRODEUR J.—I concur in the opinion of Mignault J.

MIGNAULT J.—The question involved in this appeal is whether the appellants are entitled to a commission of $3,951.76 on a sale made by the respondent, on the 4th December, 1914, to Messrs. Mignault and Morin, of a property on Sherbrooke Street, Montreal, for the price of $395,176, the appellants claiming to be entitled to a commission of one per cent. under an agreement with the respondent. The Superior Court, Greenshields J., maintained the appellants' action, but this judgment was reversed by the Court of King's Bench, Cross J. dissenting. Hence the appeal to this court.

It is important to state at the outset that the appellants' action is based on a contract, and is not a claim of the nature of a *quantum meruit*. If this contract does not support the appellants' action, there seems no escape from the conclusion that their action was rightly dismissed by the judgment appealed from.

The contract is contained in two letters of Mr. Alfred St. Cyr, the respondent's agent, to the Colonial Real Estate Company. These letters are as follows:—

Montreal, September 3rd, 1912.

The Colonial Real Estate Company,
Montreal, P.Q.

Dear Sirs:—

I hereby agree to give you the option of purchasing from the Grey Nuns that certain piece of land situated on the corner of Sherbrooke, St. Lawrence and Milton streets, in the city of Montreal, having a frontage of one hundred and sixty-six (166) feet on Sherbrooke

st. Three hundred (300) on St. Lawrence st. and two hundred and three (203) feet on Milton st., comprising a total area of about forty-nine thousand three hundred and ninety-seven (49,397) feet, English measure, being lot No. one hundred and eighteen (118) of the official plan and book of reference of St. Lawrence ward, in the said city of Montreal, for the price of eight dollars ($8) per superficial square foot, English measure; one hundred thousand dollars ($100,000) payable cash on passing deed of sale and the balance, that is two hundred and ninety-five thousand one hundred and seventy-six dollars ($295,176), payable within five years from date with interest at the rate of five and a half per cent. (5½%) per annum payable semi-annually. The purchaser to pay taxes from first September, 1912, and proportion of insurance premiums from the same date.

Balance of the purchase-price payable at any time by giving a three months' written notice to that effect. The vendors declare that there is still a mortgage on the property of about fifty thousand dollars ($50,000) which the purchaser will assume. All buildings erected on grounds to be sold and all buildings to be erected shall be insured against loss by fire by companies and through insurance agencies approved by or chosen by the Grey Nuns. Said insurance to be not less than eighty per cent. (80%) of their value and the same to be transferred to the Grey Nuns to the extent of their interest. The sale to be made free of commission or expense to the Grey Nuns who, nevertheless, will supply to the purchaser their title deeds to said property. The purchase to be passed before our notary.

This option is good only until Friday the thirteenth instant at twelve o'clock noon and not later.

Yours truly,
ALFRED ST. CYR,
Agent Grey Nuns.

Montreal, September 3, 1912.

The Colonial Real Estate Company,
Montreal, P.Q.

Dear Sirs:—

In reference to the option given you this day on behalf of the Grey Nuns for the purchase of their property, situated corner of Sherbrooke, St. Lawrence and Milton streets, I beg to inform you that the Grey Nuns bind themselves to give you a commission of one per cent. (1%), that is to say, three thousand nine hundred and fifty-one dollars and seventy-six cents ($3,951.76), on the total amount of the sale of said property, if said sale is effected during the currency of said option which expires Friday the 13th instant at noon, and provided also that this sale is completed, the deed signed, and the first payment of one hundred thousand dollars ($100,000) duly paid to the Grey Nuns within fifteen days after the acceptation of said option and not otherwise.

Yours truly,
ALFRED ST. CYR,
Agent Grey Nuns.

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The terms of these letters can give rise to no difficulties of construction. The contract was a conditional one, the condition being the sale of the described property for the price of $395,176,

during the currency of the option * * * and not otherwise.

It is common ground between the parties that the term for the completion of the sale and the signing of the deed was extended to the 12th November, 1912, when it finally expired, and also that certain modifications were made as to the amount in cash which had to be paid on passing the deed of sale. These latter modifications, however, are not material for the decision of the case, the whole question being whether the appellants can claim a commission on a sale made by the respondents after the expiration of the option.

On the 12th September, the Colonial Real Estate Company wrote to Mr. St. Cyr, on behalf of an unnamed client, the following letter:—

September 12th, 1912.

MR. ALFRED ST. CYR,
Agent, Grey Nuns, Montreal, P.Q.

Dear Sir:—

On behalf of our client we hereby accept your option dated September 3, 1912, for that certain piece of land situate on the corner of Sherbrooke, St. Lawrence and Milton streets, being lot No. 118 of the official plan and book of reference of St. Lawrence ward, in the city of Montreal, said to contain 49,397 square feet for the price of eight ($8) dollars per square foot or a total price of three hundred ninety-five thousand one hundred and seventy-six ($395,176) dollars, on the following conditions: Forty-five thousand one hundred and seventy-six ($45,176) dollars payable cash on passing of deed of sale. Fifty thousand ($50,000) dollars in one year from date of passing deed, and the balance, that is, three hundred thousand ($300,000) dollars payable within five years from that date with interest at the rate of five and a half (5½%) per annum, payable semi-annually. Taxes, interest and insurance to be adjusted as from September 1st, 1912.

We enclose our cheque for five thousand ($5,000) dollars on account of the purchase-price.

As per your letter of the 3rd inst. it is distinctly understood that you will pay us a commission of one per cent. of the sale price, that is to

say, three thousand nine hundred and fifty-one dollars and seventy-six cents ($3,951.76) on the completion of sale.

Yours truly,

THE COLONIAL REAL ESTATE COMPANY.

It appears that the appellants were then dealing with one Rollit who had made them an offer, also on behalf of the unnamed clients, for this property, with a cheque for $5,000, and this was the sum which the appellants sent to the respondent. Rollit was to get one-half of the commission from the appellants.

Subsequently, at the request of the respondent, the appellants named, by a letter dated the 11th November, 1912, Mr. J. A. Desjardins as the purchaser they had obtained for the property. This gentleman, the proof shews, had made arrangements to sell the same property to Messrs. Mignault and Morin for the sum of $425,000, thus making a clear profit of nearly $30,000. The respondent had nothing to do with this resale.

The respondent ordered notary Prud'homme to prepare a deed of sale of the property, and, on the 11th November, duly authorised representatives of the respondent went to the office of the notary to sign a deed of sale of the property which had already been prepared. However, as Messrs. Mignault and Morin declined to execute their undertaking to buy the property from Desjardins for $425,000, Desjardins refused to sign the deed of sale and to make the cash payment required, and the whole transaction fell through. The option expired the next day without the appellants having obtained a purchaser for the property.

At this stage there can be no doubt that the conditional contract the respondent had made with the appellants could give the latter no right to a commission, the condition having failed.

And now because the respondent, on the 4th

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December, 1912, when it was free from any obligation towards the appellants or any one else, sold their property to Messrs. Mignault and Morin for $395,176, on terms similar to those under which it was to be sold to Desjardins, the appellants, basing their action, as I have said, on the expired contract, and not on a *quantum meruit*, claim the commission of one per cent. from the respondent.

I am, without any hesitation whatever, of the opinion that, under the law of the Province of Quebec, the appellants' action cannot succeed. Nothing is more elementary than that a person obliging himself to pay a sum of money upon the happening of a certain event, within a fixed term, is free from any obligation should the term expire before the happening of the event. In other words, a conditional obligation fails when the condition itself fails, and where a term is fixed during which the condition must be accomplished, the obligation is at an end if the condition be not fulfilled during the term. Art. 1082 of the Civil Code clearly implies this when it says:—

> If there be no time fixed for the fulfilment of a condition, it may always be fulfilled; and it is not deemed to have failed until it has become certain that it will not be fulfilled.

This article, although negative in form, while art. 1176 C.N. is affirmative, makes it clear that where a term has been fixed, the condition cannot be accomplished after the expiration of this term. This rule is really elementary and seems to require no argument, but I will nevertheless quote from Pothier and Baudry-Lacantinerie to shew that there is no possible room for doubt. Pothier, vol. 2, Obligations, ch. 3, no. 209, says:—

> Lorsque la condition renferme un temps préfix, dans lequel elle doit être accomplie, comme "si je me suis obligé de vous donner une certaine somme si un tel navire était cette année de retour dans un

port de France;" il faut que la chose arrive dans le temps préfix; et lorsque le temps est expiré sans que la chose soit arrivée, la condition est censée défaillie, et l'obligation contractée sous cette condition est entièrement évanouie.

Baudry-Lacantinerie, vol. 13, in his treatise on Obligations, No. 799, expresses the same opinion:—

Si les parties ont fixé un délai pour l'accomplissement de la condition et que l'évènement ne se produise qu'après l'expiration de ce délai, en réalité, par celà seul qu'il n'a pas lieu dans le temps assigné, l'évènement qui arrive n'est pas celui que les parties avaient en vue. Comme le dit excellemment Demolombe: "La fixation du temps forme, dans ce cas, l'un des éléments constitutifs et comme une partie intégrante de l'évènement lui-même" (Demolombe XXV., n. 339).

Il s'ensuit que les juges ne sont pas admis à proroger le délai. S'ils le prorogeaient, ils changeraient la condition et méconnaitraient la loi du contrat.

Reliance is placed by the appellants on the decision of the Judicial Committee of the Privy Council in the case of *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.* (1). This decision was rendered in a case originating in Nova Scotia, and obviously is based upon the English law.

May I say, with all possible deference, that I would deprecate, on a question under the Quebec law, relying upon a decision, even of the Privy Council, rendered according to the rules of the English law. It would first be necessary to shew that there is no difference between the two systems of law by referring to authorities binding under the French law, and this has not been done. Very earnestly, I am of the opinion that each system of law should be administered according to its own rules and by reference to authorities or judgments which are binding on it alone. What I have said also disposes of the decision of this court in the case of *Stratton* v. *Vachon* (2), an Alberta case, also relied on by the appellants.

I may, however, say that the decision of the Privy

(1) [1910] A.C. 614. (2) 44 Can. S.C.R. 395.

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Council in the *Burchell Case* (1) has no application whatever to the present case. The head-note of the report says:—

In an action by the appellant to recover an agreed commission on the proceeds of a sale of mining property by the respondent company the latter contended that he was not the efficient cause of the particular sale effected:—

Held, that as the appellant had brought the company into relation with the actual purchaser he was entitled to recover although the company had sold behind his back on terms which he had advised them not to accept.

There was no conditional contract with the agent in the *Burchell Case* (1). The referee had held that Burchell had a *continuing power of sale*, which their Lordships construed as meaning that his employment was "*a general employment.*" And they cite as applicable to such cases the rule laid down by Willes J. in *Inchbald* v. *Western Neilgherry Coffee Plantation Co.* (2).

I apprehend that whenever money is to be paid to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it.

I could entirely concur in this rule, and base my opinion on art. 1084 of the Quebec Civil Code, but there is absolutely nothing in the present case which would justify this court in applying it to the respondent. There is no suggestion of any fraud or collusion chargeable against the respondent. It did what it could do to execute its obligation, and the transaction failed because the purchaser found by the appellants refused to sign the deed within the term.

Will it now be said that the respondent could not sell its property without incurring liability towards the appellants? Or for how long a time should it abstain from exercising its rights as an owner? And can it be contended that, assuming that the respondent could,

(1) [1910] A.C. 614. (2) 17 C.B. (N.S.) 733.

after the term, sell its property, it should not, at any time, sell it to any purchaser with whom the appellants had dealt, unless it was prepared to pay to the appellants a commission to which the latter never had more than a conditional right, which right had come to an end on the 12th November by the failure of the condition?

The Superior Court held that the respondent had adopted the appellants' contract and was, therefore, liable for the commission. With deference, I would say that it is immaterial whether it adopted it after the appellants' right had ceased to exist, provided it had done nothing to prevent the happening of the condition during the specified term.

It is also said that the respondent kept the $5,000 it had received from the appellants and afterwards, on the 4th December, credited it to Mignault and Morin, to whom it really belonged. The respondent, on the 25th November, tendered back this money to the appellants and the latter refused to accept it. What more could the respondent do?

I have carefully examined the Quebec decisions of which the learned counsel for the appellants has since the argument filed a list. None of these decisions support the contentions of the appellants. I may add that nothing in the record shews any extension of the delay beyond the 12th November, 1912, or any waiver whatever by the respondent.

For these reasons my opinion is that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *T. P. Butler.*
Solicitors for the respondent: *Kavanagh, Lajoie & Lacoste.*

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Oct. 24, 25
Nov. 18

FRIESEN & SON v. ALSOP PROCESS CO.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent—Process—Importation.

APPEAL from the judgment of the Exchequer Court of Canada (1), in favour of the plaintiffs (respondents).

The respondents by their action claimed damages for infringement of their patent for the process of bleaching flour and an injunction. The defendants alleged that the patent was void for importation of the invention.

The invention was for bleaching flour by subjecting it to a specified oxidising agent and what was imported was a machine for making this agent. The Exchequer Court held that this was not importation of the invention.

The Supreme Court of Canada after argument reserved judgment and eventually affirmed the judgment of the Exchequer Court.

Appeal dismissed with costs.

Fetherstonaugh K.C. and *Russell Smart* for the appellants.

McKay K.C. for the respondents.

(1) 16 Ex. C.R. 507; 35 D.L.R. 353.

CLARK v. NORTHERN SHIRT CO.

1918
Oct. 31
Nov. 18

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent—New invention—Adaptation of old device—Seam in overalls.

APPEAL from the judgment of the Exchequer Court of Canada (1), in favour of the plaintiff (respondent).

The action was brought by respondent to set aside a patent for "an alleged new and useful improvement in methods of producing overalls." The claims presented for the invention are set out in the report of the decision of the Exchequer Court and are, shortly, for constructing the side openings in overalls between the front and back legs by slitting the front leg in advance of the seam and applying a band to the edges of the slit. The object was to overcome the difficulty of sewing over the thickness of the seam.

The Exchequer Court and the Supreme Court of Canada held that a similar device had existed in reference to shirt sleeves and that the alleged invention was merely the application of this old device to overalls and was not patentable.

Appeal dismissed with costs.

Lafleur K.C. and *Russell Smart* for the appellant.
E. K. Williams for the respondent.

(1) 17 Ex. C.R. 273; 38 D.L.R. 1.

1918
Dec. 11
Dec. 23

BURKETT v. OTT.

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

Contract—Money in bank—Instructions to banker—Undue influence.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming, by an equal division of opinion, the judgment for the defendants (respondents) at the trial.

The plaintiff, Emma Burkett, brought action to have it declared that money in a bank, formerly belonging to her deceased father, was the property of his personal representatives. The defendants, plaintiff's mother and sister, claimed the money as their own.

The father, not long before his death, executed a document addressed to the bank in which he had on deposit some $3,000 and directing an account to be opened in the name of himself, his wife Catherine Ott, and his married daughter, Minerva Barrick (the two latter being defendants in this action), the money to be drawn out on the cheque of any one of the three. The defendants alleged an agreement to maintain the father and mother while they lived as consideration for this agreement. The trial judge held that the money belonged to the defendants, there being good consideration and no fraud nor undue influence proved. On appeal, that judgment stood affirmed by equal division in the Appellate Division.

The Supreme Court of Canada reversed this judgment, holding that it was an improvident arrangement which should not be allowed to stand.

Appeal allowed with costs.

Colter for the appellant.

Morwood for the respondents Ott and Barrick.

Bradford for the respondent Bank of Hamilton.

(1) 41 D.L.R. 676; 41 Ont. L.R. 578.

JUDGE v. THE TOWN OF LIVERPOOL.

1918
Nov. 7
Nov. 18

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Municipal corporation—Negligence—Drainage—Damage to property—Extraordinary rainfall.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), maintaining the verdict for the defendant (respondent) at the trial.

The appellant claimed damages by reason of water entering his cellar when the drain overflowed during a heavy rain. He contended that a stand-pipe placed in the drain was the cause of the overflow.

The trial judge gave judgment for the defendant, holding that the damage suffered was entirely due to the extraordinary fall of rain and that the stand-pipe was not a contributing cause. The full court affirmed this judgment.

The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the appeal, Idington J. dissenting.

Appeal dismissed with costs.

Burchell K.C. for the appellant.
Hall K.C. for the respondent.

(1) 28 D.L.R. 617; 49 N.S. Rep. 513.

1918
Dec. 9
Dec. 23

ECKERT v. LONDON ELECTRIC RAILWAY CO.

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

Contract—Sale of Copper—Quantity—Evidence.

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

The respondents sued for the price of copper wire sold to appellant who counterclaimed for damages on account of a deficiency in the quantity agreed upon. The contract was verbal, the appellant offering to buy and the respondents to sell the wire the latter had on hand, which was represented to be about seventy tons. It turned out that respondents only had a little over fifty tons and the appellant claimed damages for breach of the contract.

The trial judge held that the contract was for a specific quantity, but his judgment was reversed by the Appellate Division, which held that on the evidence respondents only agreed to sell the quantity they had on hand.

The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the appeal.

Appeal dismissed with costs.

Tilley K.C. for the appellant.
D. L. McCarthy K.C. for the respondents.

(1) 40 Ont. L.R. 208.

GILBERT BROTHERS ENGINEERING CO. v. THE KING.

1918
Dec. 9, 10
1919
Feb. 4

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Public work—Contract—Payment to contractor—Certificate of engineer.

APPEAL from the judgment of the Exchequer Court of Canada (1), in favour of the Crown.

In 1897 the appellants obtained the contract for clearing out the channel through the Gallows Rapids in the St. Lawrence and later, under the same contract, of deepening and widening the channel. Payments were to be made only on the certificate of the engineer, the contractors, if not satisfied with any such certificate, being obliged to file their claims within thirty days from its receipt.

The work was completed, the securities released, and the plant handed over to the contractors, after which they filed a claim for about $130,000 which two engineers had certified they were entitled to. The Exchequer Court judge dismissed an action to recover this amount on the ground that no claim for any part of the amount was filed as the contract required and the final certificate had been issued.

The Supreme Court of Canada affirmed this judgment after hearing and consideration.

Appeal dismissed with costs.

Tilley K.C. and *Pringle K.C.* for the appellants.
Howard K.C. and *Tyndale K.C.* for the respondent.

(1) 17 Ex. C.R. 141; 40 D.L.R. 723.

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