REPORTS

OF THE

SUPREME COURT

OF

CANADA

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Sir 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. R. B. Bennett K.C.

" Sir Lomer Gouin K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. André Fauteux K.C.

" D. D. McKenzie K.C.

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF VOL. 63 OF THE SUPREME COURT REPORTS.

Attorney General of British Columbia v. *The King* (63 *Can. S.C.R. 622*). Leave to appeal granted 23 Mar., 1923.

Canadian Northern Ry. Co. v. *The King* (64 Can. S.C.R. 264). Leave to appeal granted 28 Nov. 1922.

Hydro-Electric Power Commissioners of Ontario v. *Albright.* Leave to appeal refused 30 Nov. 1922.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ELIZA J. McDOUGALL AND OTHERS (DEFENDANTS).....} APPELLANTS;

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*Feb. 14, 15.
*May 2.

AND

R. G. MacKAY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Sale of land—Equity—Same property orally sold to two purchasers—Agreements then reduced to writing—Statute of Frauds—Equal equities—Priority in time—Caveat—Plea by a purchaser for value without notice—Onus.

The appellants in 1919 entered into an agreement to purchase certain land from one McC. A condition thereof being that no assignment of it should be valid unless approved by the vendor. The respondent became, on the 21st June, 1920, by oral agreement the purchaser of the equitable interest of the appellants for $6,500; and, on the evening of the 22nd June, 1920, this oral agreement was reduced into writing, differences in the agreements being as to the time when possession was to be given and as to the terms of

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

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payment of the purchase price. About noon on the 22nd June, 1920, the appellants orally agreed to sell the same property to R. for $6,550, which agreement was immediately put into writing; and on the 23rd June, 1920, R. paid $1,550 to the appellants. The respondent, on the 30th June, 1920, registered a caveat. On the 6th July, 1920, McC., having received the balance of the purchase price from R., executed a transfer of the property to the latter, who, on the 8th July, 1920, had it registered subject to the respondent's caveat.

Held that, upon the evidence, the respondent's written agreement sufficiently embodied the terms of the oral agreement to warrant its being taken as a memorandum of the latter which satisfied the Statute of Frauds; therefore, the respondent had a valid agreement prior in time to that of R.; and, the equities of R. and of the respondent being equal at the time of the registration of the caveat, the respondent's equity being first in time, must prevail. *McKillop and Benjafield* vs. *Alexander* (45 Can. S.C.R. 551) followed.

Per Duff J.—When a party sets up that he is a purchaser for value without notice, the *onus* is on him to prove absence of notice. *Laidlaw v. Vaughan, Rhys.* (44 Can. S.C.R. 458).

Judgment of the Court of Appeal (15 Sask. L.R. 24) affirmed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of MacDonald J. at the trial (2) and maintaining the respondent's action for specific performance of an agreement for sale.

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.

Gregory K.C. and *Hodges* for the appellants.—By reason of the additional terms as to the time of going into possession of the land and as to the change in the method of payment of the purchase price, the written agreement is not sufficient to satisfy the Statute of Frauds.

(1) 15 Sask. L.R. 24; [1921] 3 W.W.R. 833.

(2) 14 Sask. L.R. 111; [1921] 1 W.W.R. 419.

The caveat filed by the respondent being in respect of a contract dated June 22nd, 1920, did not protect his rights under the oral contract of June 21st, 1920. At the time of the registration of the caveat the equities of the respondent and of R. were not equal; and R. had at that time a better right to call for the legal estate.

Tingley K.C. for the respondent.—The respondent was prior in equity up to the registration of his caveat, which preserved that priority.

If the respondent was not prior in equity when he registered his caveat, he obtained priority for his interest by the registration of the caveat.

THE CHIEF JUSTICE.—For the reasons stated by Mr. Justice Lamont when delivering the unanimous judgment of the Court of Appeal, I am of the opinion that this appeal should be dismissed with costs.

IDINGTON J.—For the reasons assigned in the judgment of Mr. Justice Lamont speaking on behalf of the Court of Appeal, I think the prior equity of respondent ought to prevail and hence this appeal should be dismissed with costs.

DUFF J.—The question upon which the Court of Appeal proceeded presents no difficulty to my mind. In principle this court decided in *McKillop* v. *Alexander* (1), that notwithstanding the terms of the agreement between McClellan and Mrs. McDougall the effect of the agreement of sale made by Mrs. McDougall and Mackay was to give to Mac-

(1) [1911] 45 Can. S.C.R. 551.

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Duff J.

kay an equitable interest in the lands of which McLellan was the legal owner. Now it is found by the trial judge, and the Court of Appeal have accepted his finding, that on the 21st of June, 1920, the McDougalls agreed to sell the property to Mackay. The agreement, it is true, was an oral one, but it was long ago established that the effect of the Statute of Frauds was only to prescribe the kind of evidence required for proving a contract for the sale of land and not to lay down a statutory condition of the valid constitution of such a contract. The agreement of the 21st June was a valid contract and enforceable, it is true, speaking generally, only against the party signing a memorandum complying with the requirements of the 4th section of the Statute of Frauds, but a valid contract none the less.

It is true, no doubt, as often has been said (*Howard* v. *Miller*) (1), that the proposition that a purchaser having only an agreement for sale of land has an interest in the land rests upon the assumption that the agreement is enforceable by equitable process *in personam* against the legal owner and, generally speaking of course, this would not be so in the absence of the evidence required by the 4th section of the Statute of Frauds. But as I have just said, the memorandum prescribed by the statute is required as evidence only and when the evidence is forthcoming and the agreement is consequently enforceable by legal process the interest of the vendee is deemed to have sprung into existence at the time when the agreement was actually made. On behalf of the appellant it is argued that the formal agreement entered into on the 22nd June between Mrs. McDougall and the respondent differs from the oral agreement made on the 21st June in a material

(1) [1915] A.C. 318.

particular and that consequently the oral agreement must be deemed to have been superseded and that the only interest vested in the respondent came into existence on the date of the execution of the written agreement.

This argument wholly ignores the distinction between rescission and variation. The subject was much discussed by the law lords in *Morris* v. *Baron* (1), and it was there pointed out that where the terms of an existing agreement are varied as, for example, by a change in price, the first agreement is not necessarily rescinded. That may of course be the effect of the second agreement because rescission may take place in one of two ways. It may take place because the parties have explicitly agreed *simpliciter* to rescind the agreement; and it may take place because upon the same subject matter the parties have entered into a fresh agreement complete in itself and that an intention to rescind the former agreement is implied because these two agreements cannot be simultaneously operative. But on the other hand, as the learned law lords pointed out in the case mentioned, you may have a variation of one or more terms of the contract without rescission of the contract, either express or implied. A very obvious case is the case in which the change which has been made merely varies the mode in which the contract is to be carried into effect. The question in any particular case must be a question of fact because it is a question of intention as to whether or not there was to be only partial rescission, that is to say, a variation, the original contract being kept on foot, or whether there was to be a complete rescission, a second and a new contract being substituted for the first.

(1) [1918] A.C. 1.

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Now you could not reach the conclusion that what occurred between the parties to the present litigation belonged to the second category of arrangements rather than to the first without concluding at the same time that it was the intention of the respondent to abandon his rights under the agreement of June 21st. There is a presumption against that; see *Thorne* v. *Cann* (1); and there is not the slightest evidence of any such intention. My conclusion is that on this point the decision of the Court of Appeal was right.

Another question of a different kind is raised by the appellant, and the question arises in this way. Rusconi entered into an agreement with the McDougalls by which in effect he agreed to take over the burden of the contract paying $1,500, the amount of the purchase money already paid by the McDougalls in cash and paying direct to McLellan the residue of the purchase money. He entered into communications with McLellan, the result of which was that McLellan executed a transfer, and deposited apparently the transfer in escrow to be delivered to Rusconi upon the payment of the residue of the purchase money to him. The contention put forward is that Rusconi was entitled to fortify his position by getting in the legal estate from McLellan and this, it is contended, he did because he had acquired the right to call for the legal estate by the arrangements he had made with McLellan and in consequence it is argued he had, upon settled principles, the better equity. The question as to the circumstances in which the acquisition of the right to call for the legal estate will be held to impart superiority in point of equity to a later over an earlier equitable interest is a question upon which it is difficult to lay down with confidence a precise general rule; the subject

(1) [1895] A.C. 11.

need not be considered because there is one answer to the appellant's contention which is conclusive against him. That answer is this; the position which he seeks to assume is that of purchaser for value without notice; and it is settled law (the subject is fully discussed in *Laidlaw* v. *Vaughan-Rhys* (1)), that the defence of purchase for value without notice is a defence which must be pleaded and proved affirmatively. It is a defence in respect of which the onus in the strict sense is on the party claiming the benefit of it. He must affirmatively establish absence of notice. In the present case the appellants have not even pleaded that Rusconi entered into his contract with the McDougalls without notice of the McDougalls' contract with Mackay; absence of notice was not found by the learned trial judge or by the Court of Appeal and there is no evidence before this court enabling us to make a finding upon the point. This contention therefore also fails.

The appeal should be dismissed with costs.

ANGLIN J.—One McClellan, the registered owner of the property in question, sold it to the defendants, the McDougalls, in October, 1919, the contract containing a provision that no assignment of it should be valid unless approved and countersigned by the vendor.

The plaintiff, MacKay, became the purchaser, by oral agreement, of the equitable interest of the McDougalls on the 21st June, 1920, paying $100.00 on account of the purchase price of $6,500. Subject to a question as to discrepancies, this oral agreement was reduced into writing on the evening of the 22nd June. The plaintiff lodged a caveat to protect his interest on the 30th June.

(1) [1911] 44 Can. S.C.R. 458.

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About noon on the 22nd of June, the McDougalls agreed orally to sell the property to the defendant Rusconi for $6,550. Subject likewise to some discrepancies, this agreement was also put into writing and on the 23rd of June Rusconi paid $1,550 on account of the purchase price. His agent immediately prepared and sent to McClellan, for execution by him, a transfer of the property to Rusconi. McClellan executed this transfer and on the 26th of June sent it to his bankers with instructions to hand it to Rusconi on receipt of the balance due McClellan on his agreement with the McDougalls. On the 29th June, McClellan wrote the McDougalls that he had accepted Rusconi's cash offer and would "not accept Mr. MacKay on contract." On the 6th of July, Rusconi paid the balance of the purchase price to McClellan's bankers and obtained the transfer, and on the 8th of July had it registered subject to MacKay's caveat.

The learned trial judge took the view that because his written contract of the 22nd of June differed in two particulars from the oral agreement of the 21st, MacKay had no enforceable contract until the evening of the 22nd. These two differences are thus stated in the judgment of the Court of Appeal, delivered by Mr. Justice Lamont:

> (1) Under the oral agreement possession was to be given on July 15th, while in his written agreement it was to be given on July 10th, or sooner if possible, and (2) under the oral agreement the price was stated to be $6,500, while in the written agreement the plaintiff, although he was to pay $6,500 in all, was to pay the McDougalls their equity in cash and pay the balance to McClellan, in accordance with the terms in the agreement with the McDougalls, which was to be assigned to him.

The learned trial judge therefore held that Rusconi had the prior equity under his verbal agreement made at noon on the 22nd of June and on that ground

dismissed MacKay's action against the McDougalls and Rusconi for specific performance. He also took the view that, because MacKay's caveat referred only to the agreement in writing dated the 22nd of June, the interest thereby protected must be taken to have originated when that agreement was executed.

In the Court of Appeal, the view prevailed that the written agreement with MacKay of the 22nd of June sufficiently embodied the terms of the oral agreement of the 21st to warrant its being taken as a memorandum of the latter which satisfied the Statute of Frauds and that MacKay, therefore, had the prior equity, dating from the making of his oral agreement on the 21st, and was on that ground entitled to succeed.

On this question I am inclined to accept the conclusion reached by the Court of Appeal.

On the first point:—

There was nothing to prevent the parties, who had agreed on the 21st of June that possession would be given on the 15th of July, changing that arrangement on the following day and providing, as they did, for possession on the 10th of July, or sooner if possible. Did that change make of the document of the 22nd of June a new contract in substitution for that of the 21st so as to prevent its being regarded as a memorandum thereof? That would seem to depend on whether the provision as to the date of possession should be deemed a material term of the agreement, or either an immaterial term or a collateral arrangement only. Fry on Specific Performance (6 ed) par. 368. An arrangement as to date of possession may be of the latter character: *McKenzie* v. *Walsh* (1); *Anderson* v. *Douglas* (2). On the whole case, I incline to the

(1) [1920] 54 N.S. Rep. 26, at pp. 34-35; (2) [1918] 18 Man. R. 254.

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opinion that the provision as to the date of possession was not such an essential term of the oral agreement of the 21st of June that the change made in respect to it precludes the view taken in the Court of Appeal that the document of the 22nd was really a formulation of the oral contract of the 21st and not a new contract. As put by Mr. Justice Lamont:

> The difference as to the time when possession was to be given is not material.

On the other point:—

The evidence detailed by Mr. Justice Lamont seems to make it clear that the terms as to payment set forth in the written agreement of the 22nd did not differ from those discussed and agreed to orally on the 21st.

The three following objections raised by the defendants call for consideration:

1. That the MacKay caveat protects only such interest as he acquired by the written agreement of the 22nd of June and therefore cannot be invoked to protect rights acquired under the oral contract of the 21st;

2. In view of what has since transpired, specific performance of the MacKay agreement has been rendered impossible;

3. The defendant Rusconi by his diligence acquired the better right to call for a conveyance of the legal estate held by McClellan.

1. As is pointed out in the respondent's factum the caveator claimed an interest as purchaser under the agreement in writing dated June 22nd. This "agreement in writing" is the formal embodiment of the oral agreement of the 21st of June. I think the caveat sufficiently indicated the claim of the plaintiff as

purchaser under the oral agreement of the 21st of June, evidenced by the writing of the 22nd, and therefore protected his equity under the oral agreement. Whatever rights MacKay had in or to the land in question covered by the caveat registered on the 30th of June were thereby preserved to him. *McKillop & Benjafield* v. *Alexander* (1).

2. Nothing had occurred prior to such registration which would prevent the McDougalls transferring their equitable interest to MacKay. All that was done after the caveat was lodged was subject to MacKay's rights as they then existed and cannot interfere with the enforcement of them. For that purpose Rusconi has assumed McClellan's position. This ground of appeal cannot be maintained.

3. Although impressed with the contention that by what he had procured to be done—the execution of the conveyance to him by the holder of the legal estate and the depositing of it with his bankers for delivery on payment to them of the balance of the purchase money and the writing of the letter by McClellan to the McDougalls—Rusconi had acquired a better right than MacKay to call for the conveyance of the legal estate, on further consideration I am satisfied that this is not the case. In dealing with an equitable estate in land the doctrine of obtaining priority by notice to the holder of the legal estate does not prevail; *Hopkins* v. *Hemsworth*, (2). Rusconi did not obtain anything from McClellan which was tantamount to a declaration of trust in his favour or an undertaking to hold the land for him. Until delivery the deed sent to the bankers was wholly inoperative. Whatever might have been the effect of

(1) 45 Can. S.C.R. 551.

(2) [1898] 2 Ch. 347, at p. 351.

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a similar letter from McClellan to Rusconi, McLellan's letter to the McDougalls carried no right to Rusconi. In what took place prior to the lodging of MacKay's caveat there was nothing to displace the original priority of his equitable claim. The uncompleted steps taken to obtain the legal estate had not that effect. *Société Générale de Paris* v. *Walker* (1). McClellan's intention to convey the legal estate to Rusconi remained unexecuted on the 30th of June. Whatever rights were conveyed by the delivery of the transfer on the 6th of July and its subsequent registration were acquired subject to MacKay's prior equity.

I fully recognize that a court of equity will not prefer one equity to another on the mere ground of priority of time until it has found by examination of their relative merits that there is no other sufficient ground of preference between them; that such examination must cover the conduct of the parties and all the circumstances; and that the test of preference is the broad principle of right and justice which courts of equity apply universally. *Rice* v. *Rice* (2). Here after most careful consideration, I find nothing prior to the registration of MacKay's caveat which disturbed the equality between the two equities in all respects other than priority of time, which is therefore effective and entitles MacKay's equity to prevail.

The provision of the McClellan-McDougall agreement that no assignment of it should be valid unless approved and countersigned by McClellan is a stipulation for his benefit and can be invoked only by him. It did not prevent MacKay acquiring an equitable

(1) [1885] 11 App. Cas. 20.

(2) [1853] 2 Drew. 73, at pp. 78, 83.

interest in the property good as against the McDougall's and the subsequent purchaser Rusconi. *McKillop* *Benjafield* v. *Alexander* (1); *Sawyer & Massey Co.* v. *Bennett* (2).

I would for these reasons affirm the judgment of the Court of Appeal and dismiss this appeal with costs.

BRODEUR J.—I concur in the result.

MIGNAULT J.—It is necessary to consider what was the legal position of MacKay and Rusconi respectively on the 30th of June, 1920, when MacKay registered his caveat. If on that date neither of these parties had more than an equitable right, MacKay being prior in time should be preferred. And any title to the legal estate which Rusconi obtained and registered after that date would be subject to MacKay's caveat.

As matters stood on June 30th, 1920, both MacKay and Rusconi had verbal agreements from the equitable owner for the sale of the property, which agreements had been reduced to writing. Rusconi, at that date, had not obtained the legal estate from McClellan, the legal and registered owner. It is true that on June 26th, McClellan signed in favour of Rusconi a transfer of his estate and interest in the property, but this transfer was sent to the bank to be delivered to Rusconi on full payment of the price, and it was delivered to him after June 30th. He therefore took the legal estate subject to MacKay's caveat.

Did Rusconi, on June 30th, have a better right to call for the legal estate than MacKay? I think not. As matters then stood both MacKay and Rusconi had made an agreement of sale with the equitable

(1) 45 Can. S.C.R. 551.

(2) [1909] 2 Sask. L.R. 516; 46 Can. S. C.R. 622.

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owner, but MacKay was first in time. McClellan was then the registered owner of the property. He apparently objected to the sale to MacKay, and was willing to transfer the property to Rusconi, but no transfer had then been delivered to the latter. McClellan is not a party to these proceedings and MacKay and Rusconi must stand on the rights they had acquired from the McDougalls up to June 30th. These were purely equitable rights and the equities being equal MacKay is entitled to preference, for he was first in time. I would therefore agree with the Court of Appeal which decided in his favour.

The defence based on the Statute of Frauds, in my opinion, fails.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McNeel & Hodges.*

Solicitor for the respondent: *A. R. Tingley.*

THE GRAND TRUNK RAILWAY COMPANY (DEFENDANTS)..... APPELLANTS;

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*Feb. 21, 22.
*May 2.

AND

DAME FLORIDA LABRÈCHE (PLAINTIFF)..... RESPONDENT.

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

Negligence—Railways—Excessive speed—Thickly populated locality—Railway yard—Recklessness of employee—"The Railway Act," (D.) 9 and 10 Geo. V., c. 68, s. 309.

The appellant company would only be liable in case of negligent or unreasonable use of its statutory right to operate its trains, of which there was no evidence in this case; moreover, upon the evidence, the determining cause of the accident was the act of respondent's husband in projecting himself in front of the coming train. Idington and Brodeur JJ. *contra.*

Per Idington and Brodeur JJ. dissenting.—It was for the jury to determine whether or not the appellant company was guilty of fault; and its verdict for the respondent, upheld unanimously on appeal, should be maintained by this court.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the trial judge with a jury, and maintaining the respondent's action.

The plaintiff's husband, Hector Sarrazin, was killed on the 1st August, 1920, about 6.19 p.m., in the Turcot yard of the defendant company, by a fast express train which had come from Ottawa and was then travelling at about 25 miles an hour—its usual

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speed at that place. Sarrazin was engaged as a repair mechanic. He had been working at a car standing on a track to the north of the two main tracks passing through the yard and had crossed over to them to the south, presumably to procure a steel knuckle which he required. In returning he passed between two freight cars standing on the track immediately to the south of the main tracks, having apparently climbed over the coupling. He was first seen by the only eye-witness of the accident—the engineer of the incoming express train—jumping from between the two freight cars towards the main tracks, about 25 feet in advance of the oncoming locomotive, the buffer beam of which struck him on the left shoulder. The space between the southerly main track and the next track to the south was about six feet wide.

The plaintiff charged that the defendants were negligent in not moderating the speed of the express train while passing through the Turcot yard and in placing the car which the plaintiff was required to repair on one of the principal tracks towards the centre of the yard instead of on an outside track. By amendment, made towards the close of the trial, it was also alleged that where the accident occurred was a thickly peopled portion of the City of Montreal, that the tracks were not fenced or protected according to law and that the speed of the train therefore contravened s. 309 of the "Railway Act" (9 & 10 Geo. V., c. 68).

The action was tried by a jury who found that the death of Sarrazin was caused solely by the fault of the defendant's servants, consisting "dans la vitesse du train à cet endroit." Sarrazin was acquitted of contributory fault.

In his charge the trial judge barely alluded to the allegation of excessive speed apart from the requirement of s. 309. He dwelt at some length on that section and discussed the evidence as to the number of houses in the neighbourhood and the character of the fencing of the right of way. Judgment was entered in the Superior Court on the jury's finding for $8,000 damages and this judgment was unanimously affirmed in the Court of King's Bench on the ground that there was evidence on which the jury could reasonably find that the cause of Sarrazin's death was the speed of the train and that such speed was so excessive as to amount to fault.

Lafleur K.C. and *Beckett K.C.* for the appellants. Except in cases within s. 309, there is no legal restriction on the speed of the defendant's trains and it is not competent for a jury to find excessive speed as a fault. Sec. 309 does not apply to a railway yard. There is no evidence that the locality of the accident was a thickly populated portion of the city or that the fencing was insufficient.

The determining cause of the accident was not the speed of the train, but Sarrazin's rash act in jumping or running in front of it when only 25 feet away.

Curran K.C. and *Forest* for the respondent. Having regard to the number of men required and of locomotives used in Turcot yards, 25 miles an hour might reasonably be found to be an excessive speed, apart altogether from s. 309.

The locality was thickly populated and the fencing defective, and therefore s. 309 applies and a speed over 10 miles an hour was illegal.

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Had the speed been less, Sarrazin might have escaped. There is evidence to warrant the jury's finding of fault.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, with which I fully concur, I would allow this appeal.

IDINGTON J. (dissenting).—The respondent herein sued for damages caused to herself and children by the death of her husband and their father whilst working in the Turcot yard of the said railway company. The case was tried by the court with a special jury. The learned trial judge submitted to the jury a number of questions of which the three following and answers thereto are all that call for our consideration on this appeal:—

3.—Est-ce que le dit accident a été causé par la seule faute et négligence du dit Hector Sarrazin? Si vous répondez oui, dites en quoi cette faute et cette négligence consistent? Non, 9 à 2.

4.—Est-ce que le dit accident a été causé par la seule faute et négligence de la défenderesse, ses employés ou serviteurs? Si vous répondez oui, dites en quoi cette faute et cette négligence consistent? —Oui—9 à 2, dans la vitesse du train à cet endroit.

5.—Est-ce que cet accident est dû à la faute commune ou contributoire du dit feu Hector Sarrazin et de la défenderesse, ses employés ou serviteurs? Si vous répondez oui, dites en quoi la faute et la négligence de chacun consistaient? Non—unanimes.

The answer to the first is most stoutly denied by the appellant's factum herein which seeks to attribute the sole proximate cause of the accident to the act of the deceased going from where he was working to the car standing on a track on the other side of the main tracks, to get a pin needed for use in the repair work he was engaged in and on his return therewith jumping down from between said cars without waiting till the main lines were clear.

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Idington J.

It is alleged that had he taken due care he would not have jumped as he did and no accident would have happened. There is something to be said for this contention. It might have had more force with fair minded men if the appellant at the trial had not pressed rather far its contention that the deceased was entirely in the wrong and without excuse in attempting to get the pin from the place he did.

The alleged printed notice on which appellant so rested what it calls absolute prohibition of such an appropriation was only in English and not liable thereby to have been brought home to the mind of deceased.

And when read it impliedly permits under stress of circumstances the very act complained of, for it directs if done it must be returned or rather replaced by another.

I imagine the rather unfair use of such a notice did appellant more harm than good.

The circumstance of the deceased having jumped down was perhaps no more than an error of judgment.

It was however entirely a matter for the jury to determine whether so or not, giving due heed to all the attendant circumstances.

No one saw him jump except the engineer on the eastward bound train from Ottawa who had his own work to engage his attention.

He tells that there would be six feet between the cars on that train and the cars on the next track from which deceased jumped.

If so it is quite conceivable that deceased had hoped, without being negligent but merely erring in judgment to so land in that six feet of space as to be entirely safe but possibly he stumbled slightly further

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than he expected, and was struck on the shoulder by a part of the engine of the incoming train. He certainly did not intend to jump or in fact jump across the six feet of space between the car he stood on and the main track and thus land in front of the train though his shoulder got so far.

I cannot therefore see how we can say the jury reached a conclusion, that no nine reasonable men could reach, that he was negligent.

I thus eliminate the answers to questions three and five as deserving here of no further consideration.

Indeed that to question five, for evident reasons, was not seriously pressed by either side.

The answer to question four in assigning its answer of fault "dans la vitesse du train à cet endroit" is a most comprehensive one and may cover both the illegal conduct of running a train at more than ten miles an hour in a thickly populated locality contrary to the provisions of section 309 of the "Railway Act" and the running of a train at too high a rate of speed consistent with the safety of others in passing through such a busy railway yard as that in question.

There is evidence tending to shew to those conversant with the locality that both grounds were conceivably supportable in favour of the respondent.

One, if well grounded, is sufficient.

It seems quite clear that appellant had been habitually offending against said section 309, if not at the exact point of the accident perilously close to it and hence would not likely have been running at twenty-five miles an hour there but for this disregard of the statutory prohibition.

Of course it is not what was done on other occasions than the one in question, but that on the latter alone which must govern what is in question herein.

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I regret to say that the evidence was not presented on either side in such a way as to render quite clear to my mind the conditions and surrounding circumstances and bearing thereon.

Yet I imagine a jury from the district which paid as close attention as this one did to the case before it, as evidenced by very many pointed questions they put, could find a stronger case on that ground than I can by a perusal of the evidence with such a defective plan such as presented by appellant.

On the ground that passing through such a yard two trains at the same time, and the one in question, at all events, moving at the rate of twenty-five miles an hour, the case is one for the jury to determine whether or not appellant was guilty of fault.

And certainly, at all events, it is not, I submit, for us to interfere and reverse the unanimous judgment of the Court of King's Bench better situated in many ways to determine the bare question of whether or not there was evidence to submit to the jury.

I observe that there was no motion at the trial to dismiss the action on that ground.

I think the appeal here should be dismissed with costs.

ANGLIN J.—It is quite impossible to know whether the jury dealt with this case as falling within s. 309 of the "Railway Act" or intended to find excessive speed amounting to fault quite apart from that provision. It will therefore be necessary to examine the case in both these aspects.

I doubt whether upon the evidence it can be said that the locality through which the train was passing when it struck Sarrazin was thickly populated. But, if that fact be assumed in the plaintiff's favour, having

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regard to the conditions as to fencing shewn by the evidence, it would probably have been incumbent on the defendants to restrict the speed of their train at that place to 10 miles per hour. Granting this, however, it does not, in my opinion, entitle the plaintiff to recover, because the excess of speed over 10 miles per hour was not the cause of Sarrazin being killed, and probably also because s. 309 was not passed for the protection of yard employees of the railway company whose duties require them to be within the fences erected along the right of way.

The evidence in my opinion leaves no room for doubt that the determining cause of Sarrazin's death was not the speed of the train but his own act—whether culpable or wholly innocent is on this issue quite immaterial—in projecting himself almost immediately in front of the Ottawa express. That fact of course likewise affords a peremptory answer to the plaintiff's case if the jury's finding should be taken to mean that the speed of the train at 25 miles per hour in Turcot yard amounted to fault although s. 309 of the Railway Act did not apply. Moreover such a finding of fault in my opinion could not be maintained. There are no circumstances in evidence which indicate that there is any greater danger, or need for reduction in the speed of the trains, in the Turcot yard than exists in any other railway yard. I am not prepared to accede to the view that in the absence of proof of such special circumstances a jury may fix the standard of what is or is not a proper speed for express trains passing through such a yard. There may no doubt be special circumstances—such, for instance, as the known presence of some unusual concourse of people in the yard—which would render the running of a train through it at 25 miles

per hour sheer recklessness. In such a case the railway company would in vain invoke its statutory right to operate its trains. *Columbia Bithulitic Ltd.* v. *British Columbia Electric Ry. Co.* (1). Statutory authorization affords a complete immunity for injury caused by the use of the powers so conferred so long as they are exercised without negligence. *Canadian Pacific Ry. Co.* v. *Roy* (2). But the statute does not sanction or protect negligent or unreasonable use of the rights it confers. *East Fremantle Corporation* v. *Annois* (3). Here there is nothing of that kind.

On the other hand the running of fast express trains at high speed on the main tracks passing through railway yards is such a well known feature of our railway traffic that resultant danger to persons employed in such yards may well be regarded as a risk of such employment assumed by them, so long as there is no negligence either in the management of such trains or in the direction or control of the persons so employed, which increases the danger.

In my opinion not only is the finding that there was fault on the part of the defendants which caused the death of Sarrazin unwarranted but

it is absolutely clear from all the evidence in the case that no jury would be justified in finding any verdict other than one in favour of the

appellant-defendant. Art. 508 (3) C.P.C.

I would therefore allow this appeal; and, pronouncing the judgment which, in my opinion, the Court of King's Bench ought to have rendered ("Supreme Court Act," s. 51), I would dismiss the action, with costs throughout if the defendant company should see fit to exact them.

(1) [1917] 55 Can. S.C.R. 1, at pp. 31-2. (2) [1902] A.C. 220.
(3) [1902] A.C. 213, at pp. 217-8.

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BRODEUR J. (dissenting).—Cette cause présente de sérieuses difficultés; mais, après avoir soigneusement considéré les points en litige, j'en suis venu à la conclusion que l'appel de la compagnie devrait être renvoyé.

La compagnie a prétendu dans sa plaidoirie devant nous qu'elle pouvait donner à ses convois la vitesse qu'elle jugerait à propos, à moins qu'ils ne soient dans la partie populeuse d'une ville ou d'un village. Je ne puis pas acquiescer à une telle proposition. Je reconnais bien que l'endroit où l'accident a eu lieu n'était pas de ceux que l'article 309 de "l'Acte des Chemins de Fer" vise quand il déclare que la vitesse ne doit pas y dépasser dix milles à l'heure. Mais en vertu de la loi qui s'applique à tout le monde, les compagnies de chemins de fer sont tenues en tout temps et en tout endroit d'agir avec prudence et avec soin. La question de faute dépend des faits et des circonstances de chaque cas. Ce serait, suivant moi, un cas de négligence de sa part si dans une de ses cours où il y a une multitude d'employés au travail, elle se permettait d'y faire traverser ses convois à une vitesse immodérée. La situation particulière de ses voies principales dans cette cour Turcot en fait un endroit excessivement dangereux. Et alors prétendre que ses trains pourraient y passer à n'importe quelle vitesse me paraît contraire aux principes élémentaires de la saine prudence. En dehors de toutes dispositions statutaires, la vitesse d'un train doit être conforme à la prudence requise pour la sûreté de ceux qui ont le droit d'être sur la voie.

Il y a des circonstances particulières qui imposeront l'obligation de ralentir la vitesse des trains à certains endroits, comme dans une cour, par exemple, ou encore lorsque le mécanicien voit qu'une personne est sur la voie ou en train de la traverser.

C'est donc une question de fait qui doit être laissée au jury. Il me semble que son verdict dans cette cause, qui a été unanimement confirmé par les cours inférieures, ne devrait pas être renversé.

L'appel devrait être renvoyé avec dépens.

MIGNAULT J.—L'intimée a obtenu, sur verdict d'un jury, jugement contre l'appelante pour $8,000.00, dont $3,000.00 pour elle-même et $5,000.00 pour ses cinq enfants mineurs, à raison de la mort de son mari, le nommé Hector Sarrazin, blessé par une locomotive de l'appelante, et ce jugement a été confirmé à l'unanimité par la cour d'appel. L'appelante demande l'infirmation de ce jugement et la cassation du verdict.

Il n'y a aucune contradiction quant aux faits saillants de la cause. Le 1er août 1920, vers six heures du soir, Hector Sarrazin et un compagnon nommé Lamer faisaient l'inspection de trois convois de marchandises qui devaient partir le même soir, le but de leur inspection étant de constater si tout était en bon état et de faire les petites réparations nécessaires. Ce travail se faisait dans la cour Turcot, qui est une grande cour de chemin de fer dans les limites de la cité de Montréal, longue d'environ deux milles, avec plusieurs voies tant au nord qu'au sud des deux voies principales où circulent les trains de l'appelante. Aucun chemin public ne traverse cette cour.

Immédiatement avant l'accident, Sarrazin et Lamer travaillaient sur une des voies latérales, étant la deuxième au nord des voies principales. A part ces voies principales qui étaient libres, les autres voies étaient occupées par un grand nombre de wagons de marchandises qui devaient plus tard être expédiés à leur destination. Pour faire leur ouvrage et se pro-

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curer les outils nécessaires, le défunt et son compagnon n'avaient qu'à rester du côté nord où se trouvaient les chantiers de l'appelante et où il n'y avait aucun danger provenant de la circulation des trains. Cependant, pour une raison qu'on ne peut s'expliquer que par des conjectures, Sarrazin quitta l'endroit où il travaillait, traversa les deux voies principales et se rendit au sud de ces dernières, avec l'intention sans doute de revenir à son ouvrage qui n'était pas achevé. Quelques instants plus tard, précisément à 6 h.19, le temps étant beau et clair, le train rapide d'Ottawa à Montréal arrivait à une vitesse de 25 à 30 milles à l'heure, qui est sa vitesse ordinaire à cet endroit. Le seul témoin de l'accident, le nommé Weston, ingénieur de la locomotive, était à son poste. Il dit:

Q.—Did you see the man Hector Sarrazin, the plaintiff's husband, when you were crossing Turcot Yard.

A.—Coming into Turcot Yard?

Q.—Yes.

A.—Yes.

Q.—In what spot did you see him.

A.—Well, when I saw him first he was jumping between the cars that way (indicates).

Q.—What.

A.—He jumped out from between the cars in front of the engine.

Q.—I understand you to say that he jumped between two cars.

A.—Yes, he jumped from between two cars.

Q.—From the side.

A.—On to the track. From the side on to the main line. From the siding on the same side of the track on to the main line in front of me.

I am coming in here (indicates) he jumped out from the cars on that side right immediately in front of the engine.

Weston appliqua immédiatement les freins et réussit à arrêter le train dans un espace de 500 pieds, mais rien au monde ne pouvait sauver Sarrazin qui fut frappé par la locomotive et eut le crâne fracturé. Il mourut le lendemain.

Le jury fut d'opinion que Sarrazin était exempt de toute faute et que l'accident était arrivé par la seule faute de l'appelante. A une question qui demandait en quoi consistait cette faute, le jury répondit: "dans la vitesse excessive du train à cet endroit." Le verdict n'indique pas pourquoi la vitesse du train était fautive à cet endroit.

Il est élémentaire de dire que si rien dans la loi ni dans les circonstances de l'espèce n'exigeait une vitesse moindre, il ne pouvait pas y avoir faute à conduire ce train à une vitesse de vingt-cinq à trente milles à l'heure ou même davantage. La faute, par définition, est un manquement à un devoir. S'il n'y a pas de devoir, si on exerce un droit, il n'y a pas de faute. Or, je le répète, si rien dans la loi ou les circonstances de l'espèce n'imposait une vitesse moindre, le jury ne pouvait raisonnablement dire que la vitesse du train à cet endroit était une faute.

Je ne vois dans la preuve aucune circonstance qui ait exigé une réduction de vitesse à cet endroit, éloigné de quatre milles et demi du terminus où le train se rendait. Il n'y avait pas de groupements de travailleurs, même la preuve ne fait voir à cet endroit-là que Sarrazin et son compagnon. Et c'est l'acte de Sarrazin lui-même, en se jetant au devant de la locomotive, qui a causé sa mort. Quand il parut là tout à coup, il n'y avait pas de possibilité d'éviter l'accident.

La loi, non plus, ne prohibait pas cette vitesse. Vers la fin de l'enquête la demanderesse obtint la permission d'amender sa déclaration en alléguant que l'endroit où l'accident est arrivé est

un endroit populeux situé dans la cité de Montréal et qui n'est pas protégé ni clôturé suivant la loi.

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Le but de l'amendement était d'invoquer l'article 309 de "l'Acte des chemins de fer," qui, dans un tel endroit, veut que la vitesse des trains ne dépasse pas dix milles à l'heure.

Mais au lieu de prouver que l'endroit de l'accident fût populeux, on a prouvé qu'il y a des rues et des maisons près d'un mille de là, en approchant de la station de St-Henri. Là où Sarrazin s'est fait tuer, il n'y a ni rues ni maisons; c'est un vaste terrain plat, terminé au nord par une côte élevée au sommet de laquelle se trouve le chemin de Lachine, et au sud par le canal Lachine. Près de là, au sud, il y a les usines du Canada Car Company, séparées de la voie de l'appelante par le chemin de fer électrique du Parc et de l'Ile et une double clôture. Il n'y a pas un témoin qui prétende qu'il y a de la population là où Sarrazin a été blessé. Il est par conséquent évident que l'article 309 ne s'applique pas. Si donc la loi ne défendait pas une vitesse de vingt-cinq à trente milles à cet endroit, et si rien dans les circonstances de l'espèce ne rendait cette vitesse imprudente, aucun jury ne pouvait raisonnablement trouver l'appelante en faute à cause de la vitesse du train à cet endroit. *Canadian Pacific Railway Company* v. *Roy* (1).

Voici un homme qui se jette tout à coup au devant d'un train, un homme qui travaille depuis une année dans cette cour et qui sait qu'il y passe de nombreux trains, quatre, dit-on, par heure. Et le jury répond que cet homme est exempt de toute faute. Au contraire, la défenderesse qui, en faisant circuler ses trains, exerce un droit que lui confère la loi, est, dit le jury, coupable de faute et responsable de la mort de Sarrazin. Un tel verdict, pour citer le langage de

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

l'article 501 C.P.C., est un verdict que le jury, en examinant toute la preuve, ne pouvait raisonnablement rendre. Dans un tel cas, la loi permet au tribunal de rendre un jugement différent de celui qui a été rendu par le juge président au procès (art. 508 C.P.C.).

L'intimée, jeune mère de vingt-quatre ans, ayant déjà cinq enfants, le dernier posthume, se trouve dans une situation déplorable. Elle n'a eu, comme assurances, que $250.00 de l'association des employés de chemin de fer et $741 des Forestiers Indépendants. Cependant ce n'est pas là une raison de lui allouer une indemnité aux dépens de l'appelante, si aucune faute de celle-ci n'a été prouvée et si Sarrazin, par son imprudence grossière, a causé sa propre mort.

Sans doute, comme le font remarquer les honorables juges de la cour d'appel, le jury est souverain juge des faits; mais il n'en est pas moins vrai que sa décision doit être raisonnable. L'honorable juge Martin dit que peut-être Sarrazin aurait pu éviter le coup qui l'a tué si la vitesse du train avait été moindre. En supposant que telle ait été l'opinion du jury, la forme de ses réponses nous réduit aux conjectures, peut-on déclarer fautive une vitesse que la loi permettait, surtout quand la voie était droite et libre et que la victime de cet accident s'est subitement jetée au devant du train? Et est-ce une faute de n'avoir pas pensé qu'un homme commettrait cette imprudence incroyable? Le verdict du jury est entièrement pervers et déraisonnable; et s'il était maintenu le service des chemins de fer serait notablement entravé en ce pays.

Il est bien regrettable que le salaire annuel de Sarrazin ait dépassé le chiffre qui donne lieu à l'application de la loi des accidents du travail. L'intimée

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n'avait d'action que sous l'empire du droit commun, et elle ne pouvait réussir sans prouver la faute de l'appelante. J'ai lu la preuve très attentivement, mais je ne trouve rien qui puisse justifier le verdict.

L'appel doit être maintenu et l'action de l'intimée renvoyée. L'appelante a droit à ses dépens dans toutes les cours si elle veut les exiger de l'intimée.

Appeal allowed with costs.

Solicitor for the appellants: *A. E. Beckett.*

Solicitors for the respondent: *Forest, Lalonde & Coffin.*

C. FAGUY AND OTHERS (PLAINTIFFS)...APPELLANTS; 1922

*Feb. 23, 24.
*May 2.

AND

W. C. CARRIER AND OTHERS (DEFENDANTS).....RESPONDENTS.

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

Debtor and creditor—Tutorship—Sale of goods—Credit account to estate—Minor children—Promissory note signed by tutrix—Liability of children when of age—Joint and several or divisible—Prescription—Interruption—"Bills of Exchange Act," R.S.C. (1906) *c.* 119, *ss.* 47, 52—*Arts.* 290, 290a, 736, 1067, 1077, 1105, 1159, 1233, 2030, 2117, 2186, 2227 *C.C.*

O. C. died in 1897 leaving as heirs three minor children, the widow being a creditor of the estate to an amount of $6,000. When living, he used to buy goods at the appellants' general store. After his death their mother, living with her children, continued to buy whatever was necessary for her own use for their maintenance, with the authorization of the tutor R., a credit account being then opened under the name of "Estate O. C." In September, 1911, the appellants ceased to supply goods and the account then amounting to $1,705.53 was closed. On the 1st of August, 1912, the mother was appointed tutrix and, at that time, being requested to pay the account she promised to do so as soon as a valuable claim by the estate would be settled. On the 30th July, 1915, payment being again insisted upon by the appellants, the tutrix consented to sign a promissory note for $2,413.56, being $1,705.53 for the account due and $708.03 for interest at 7%, the said note bearing also the same rate of interest. In May, 1920, the appellants brought action against the respondents, the three children then of age, for $3,030.67 being the amount of the note with interest accrued. Before filing their plea the respondents asked for particulars as to the consideration of the note and the appellants produced a detailed account of the merchandise sold and delivered.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Held, Idington J. dissenting, that the respondents were liable, each for one-third, for the payment to appellants of the sum of $2,195, being the amount of the account with interest at 5%.

Held, also, that the tutrix had not the authority to bind the estate for a rate of interest above the legal rate of 5%, Idington J. expressing no opinion.

Per Duff, Anglin and Brodeur JJ.—Such interest is to be computed from the demand of payment made in 1912 and *per* Mignault J. from the date of the signing of the note.

Held, also, that prescription of the appellants' account was interrupted by the promise to pay made by the tutrix in 1912, evidence of which, though illegal, had not been objected to; and it was further interrupted by the signing of the promissory note, Idington J. expressing no opinion.

Per Duff and Brodeur JJ.—Under special circumstances, such as in this case, the tutrix acted as a prudent administrator in signing a promissory note in acknowledgment of a debt legally owed by the estate and not prescribed, so as to obtain delay for payment to the benefit of the estate.—Mignault J. *contra.*

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec, reversing the judgment of the Superior Court, which had maintained the appellant's action, and maintaining said action for $192.91 only.

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.

Jolicoeur for the appellants.

Gelly K.C. for the respondents.

IDINGTON J. (dissenting).—The legal consequences of our allowing this appeal would lead to very remarkable results in law and be most unjust.

I think the appeal should be dismissed with costs.

DUFF J.—I concur with the judgment of Mr. Justice Brodeur.

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ANGLIN J.—With some hesitation I accept the views of my brothers Brodeur and Mignault that the defendants are liable each for an equal part of the indebtedness of the plaintiffs.

I have no difficulty in finding that there was an interruption of prescription in 1912 for the reasons fully stated by my brother Mignault and I also agree that there was a second interruption when the 1915 note was given.

On the question of interest, unless we impute to the tutrix an intention to do a distinctly unwarranted act in including arrears of interest in the note which she gave in 1915, it would seem to be a reasonable implication from her having done so that she then recognized liability for such arrears either because of a demand for payment having been made in 1912 (Arts. 1067 and 1077 C.C.), or because of a promise then given to pay interest in consideration of the creditors' forbearance. I am, therefore, disposed to assent to the view of my brother Brodeur, shared by Mr. Justice Martin, and, as I read his opinion, by the learned Chief Justice of Quebec, that interest at the legal rate of 5% should run from the date of the acknowledgement of 1912.

BRODEUR J.—Il s'agit d'une action sur billet promissoire signé le 30 juillet 1915 par Madame Carrier comme tutrice aux trois défendeurs-intimés, qui étaient alors mineurs mais qui étaient en majorité au moment de l'institution de l'action.

Le père des défendeurs, Omer Carrier, est décédé en 1897 laissant une femme et trois enfants.

On ne sait pas s'il y avait communauté de biens ou séparation de biens entre Omer Carrier et sa femme. A tout événement, cette dernière avait une réclamation de $6,000.00 contre la succession de son mari.

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Joseph-Edmond Roy, notaire, fut nommé en 1897 tuteur à ces trois enfants qui ont continué à vivre avec leur mère. Avec l'autorisation de leur tuteur, un compte a été ouvert en faveur de ces mineurs sous le nom de "Succession Omer Carrier" chez les demandeurs-appelants, qui sont marchands de nouveautés à Québec et qui font affaires sous le nom de Faguy & Lépinay. Il paraît que la succession avait des embarras financiers et que son principal actif consistait en une réserve forestière qui n'aurait pu alors être vendue qu'à sacrifice, et qu'il fallait s'endetter pour obtenir des fournisseurs les articles nécessaires pour la subsistance des enfants et de leur mère.

La veuve Carrier aurait bien pu prendre jugement contre les héritiers de son mari et faire vendre cette réserve forestière; mais cela n'aurait été à l'avantage de personne, car il est fort possible que cette réserve n'aurait pas réalisé suffisamment pour payer sa créance de $6,000.00 et qu'il valait mieux attendre des jours meilleurs et pour elle et pour ses enfants.

Le tuteur Roy, chargé d'administrer la succession, a cru devoir faire acte de bon administrateur en ouvrant un compte chez les demandeurs et en payant à ces derniers des acomptes de temps en temps à même les revenus qu'il percevait par ailleurs. Il paraît avoir été aussi l'administrateur des biens de Madame Carrier, et il utilisait l'argent de cette dernière pour faire des versements sur ce compte des appelants. Dans ce compte entraient les articles nécessaires à l'entretien du ménage commun de la mère et des enfants, et les effets dont Madame Carrier et les enfants avaient besoin pour leur usage personnel.

En septembre 1911, les demandeurs cessèrent de faire des avances de marchandises, et le compte fut

apparemment fermé avec une balance de $1,705.53. Environ un an après, soit le 1er août 1912, M. Joseph-Edmond Roy, qui était employé à Ottawa, démissionnait comme tuteur et Madame Carrier était nommé tutrice pour le remplacer.

Les demandeurs auraient, peu de temps après, demandé à la tutrice de régler et payer ce compte de $1,705.53 dû par la succession; mais elle leur a demandé du délai et elle dit dans son témoignage:

Il y avait une entente avec chez Monsieur Lépinay que le compte serait réglé lorsque la succession serait rentrée dans leur argent, chose qui ne pouvait pas se régler à cause des procès que la succession avait avec la Banque de Montréal.

En juillet 1915, la succession étant encore incapable de payer son compte, la tutrice, Madame Carrier, a été obligée de demander aux demandeurs de nouveaux délais; et alors ces derniers ont pris d'elle le billet qui fait la base de la présente action et qu'elle a signé comme tutrice à ses trois enfants mineurs.

Ce billet était pour une somme de $2,413.56 et couvrait la balance du compte ci-dessus mentionné, $1,705.53, et des intérêts à 7%, soit $708.03. Il était stipulé sur le billet qu'il porterait intérêt au taux de 7%.

Les défendeurs Carrier étant devenus majeurs et ayant refusé de payer ce billet avec intérêt, ils ont été poursuivis en mai 1920 par les appelants Faguy et al. qui ont réclamé d'eux la somme de $3,030.67, montant du billet ci-dessus en capital et intérêts.

Les défendeurs ont alors demandé des particularités qui montreraient la considération du billet, et les demandeurs ont produit le compte qui accusait une balance de $1,705.53 en 1911, qui, avec les intérêts accrus, formaient le montant du billet base de l'action.

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Les points en litige sont de savoir

1° si la tutrice pouvait signer ce billet;

2° si les défendeurs ont eu bonne et valable considération;

3° s'ils peuvent être condamnés solidairement à payer cette dette.

I.

Capacité.

Sur le droit de signer un billet promissoire, je réfère d'abord à la section 47 de "l'Acte des Lettres de Change" qui déclare que la capacité de s'engager à titre de partie à une lettre de change est corrélative à la capacité de contracter. Il me semble qu'un tuteur a parfaitement le droit de signer un billet en reconnaissance de l'existence d'une dette et pour obtenir du délai.

C'est un acte de bonne administration pour un tuteur que de donner des billets lorsque l'actif de son pupille ne peut pas être facilement réalisé et qu'il vaut mieux ajourner à plus tard la vente de ces biens. Dans le cas actuel, nous avons une succession dont le principal actif faisait l'objet d'un litige devant les tribunaux. Je considère alors que la tutrice, Madame Carrier, n'excédait pas ses pouvoirs en signant un billet qui lui permettrait de faire attendre son créancier jusqu'à ce que des jours meilleurs aient fait leur apparition.

L'article 290 du code civil impose au tuteur l'obligation d'administrer les biens de son mineur en bon père de famille et de faire enregistrer sur ses immeubles l'hypothèque légale dont ils sont affectés pour la protection de son pupille (arts. 2030 et 2117 C.C.); et si sa gestion est mauvaise, il répond des dommages intérêts qui peuvent en résulter.

Le tuteur a dans l'exercise de ses fonctions une certaine latitude sur laquelle peuvent compter ceux qui font affaires avec lui comme tuteur. L'article 52 de "l'Acte des lettres de change donne implicitement au tuteur le droit de se servir du billet promissoire si c'est là un acte dont un bon père de famille ferait usage dans des circonstances semblables.

La preuve que nous avons devant nous n'est pas très complète, mais elle est certainement suffisante pour dire que la tutrice pouvait parfaitement donner un billet en reconnaissance de la dette due aux demandeurs. Il en aurait été autrement si la dette eût été, en 1915, prescrite. Elle n'aurait certainement pas eu le droit de faire revivre une dette éteinte. Cela n'aurait pas été un acte d'administration, mais la reconnaissance que Madame Carrier avait faite de cette dette peu de temps après qu'elle eût été nommée tutrice était valable et avait eu pour effet d'interrompre la prescription (art. 2227 C.C.).

II.

Considération.

Le billet a-t-il été donné pour bonne et valable considération?

Ceci nous amène à examiner si le tuteur Roy a agi en bon père de famille en ouvrant ce compte chez les demandeurs, Faguy & Lépinay. Si nous avions devant nous tous les documents qui ont trait à l'administration de cette succession ou de cette tutelle, comme le contrat de mariage, les inventaires, les faits et les circonstances affectant l'actif et le passif de cette administration, les autorisations qui ont pu être données sous l'article 290a du code civil, nous serions peut-être en meilleure position pour juger si le tuteur Roy a agi en bon père de famille en ouvrant un

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compte chez les demandeurs pour fournir à ses pupilles et à leur créancière, leur mère, les choses nécessaires à la vie. Mais nous ne saurions blâmer les demandeurs de ces lacunes dans la preuve de la présente poursuite, vu que toutes les circonstances seront plus faciles à établir sur la reddition de compte du tuteur ou de la tutrice à leurs pupilles; si ce tuteur ou cette tutrice leur ont de fait occasionné des dommages par une mauvaise gestion, ces enfants auront respectivement les recours que la loi leur accorde. Ce débat pourra se faire plus facilement et plus équitablement sur la reddition de compte entre la tutrice et les pupilles que sur une poursuite instituée par leur créancier contre les pupilles devenus majeurs.

Le tuteur était un homme de grande réputation et de grand savoir. Il paraît avoir agi dans le meilleur intérêt de ses pupilles; et alors les pupilles devraient faire leurs débats de compte avec lui ou avec leur tutrice et non pas avec les demandeurs qui avaient bonne raison de croire que ce tuteur et cette tutrice agissaient dans la limite de leur mandat.

Le tuteur Roy devait payer à Madame Carrier les $6,000.00 que ses pupilles lui devaient; et s'il a jugé plus avantageux de la payer partiellement au moyen de ce compte ouvert chez les appelants Faguy et autres, il me semble que ces derniers ne devraient pas souffrir de ce qui pourrait être considéré comme un bon acte d'administration, si surtout, comme le prétend Madame Carrier dans son témoignage, une grande partie de son actif a été absorbé pour le bénéfice des mineurs.

On peut dire la même chose pour la reconnaissance de la dette que la tutrice aurait faite vers 1912 et qui aurait interrompu la prescription. Mais si elle pouvait valablement reconnaître au moyen d'un billet l'exis-

tence de ces dettes et en interrompre par là même la prescription, pouvait-elle s'obliger de payer un taux d'intérêt plus élevé que celui édicté par la loi. Pouvait-elle leur créer une obligation nouvelle ou une dette pour laquelle ses pupilles ne recevaient aucune considération?

Du moment qu'il y avait mise en demeure par la demande de paiement (articles 1067 et 1077 C.C.), les défendeurs devaient l'intérêt légal sur leur compte; mais leur tutrice ne pouvait pas s'obliger de payer plus que l'intérêt légal, à moins de certaines circonstances qui feraient de cette obligation un bon acte de gestion; mais ces circonstances n'apparaissent pas au dossier.

J'endosse sur ce point l'opinion exprimée par l'honorable juge Lamothe et par l'honorable juge Martin. Le billet n'aurait pas dû être signé par la tutrice que pour la somme de $1,961.28.

III.

Reste la question de solidarité.

Les trois défendeurs peuvent-ils être tenus conjointement et solidairement au paiement de ce compte de $1,705.53 avec intérêt à 5% depuis qu'il y a eu demande de le payer. Je ne le crois pas.

Ce compte ayant été contracté au nom de la succession d'Omer Carrier, cela comporte pour les membres de cette succession obligation conjointe et non solidaire.

En principe général, les dettes d'une succession n'obligent les héritiers que fractionnairement. Tous les héritiers contribuent à l'acquittement des dettes chacun en proportion de sa part dans la succession (art. 736 C.C.). Les trois héritiers que nous avons devant nous étaient tous héritiers au même degré; alors ils doivent acquitter cette dette par parts égales.

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Il est fort possible cependant que tous n'aient pas retiré de cecompte chacun un montant absolument égal. Mais cela pourra être l'objet de débats de compte entre eux. Quant aux demandeurs, ils peuvent retirer de chacun des trois héritiers un tiers de leur créance.

Maintenant la solidarité ne se présume pas (art. 1105 C.C.). Elle s'applique, il est vrai, aux affaires du commerce; mais les ventes par un commerçant à une succession laisse présumer que le commerçant a voulu faire de sa créance une dette conjointe seulement mais non solidaire.

Pour ces raisons l'appel devrait être maintenu avec dépens de cette cour et de la Cour Supérieure. Les frais de la Cour du Banc du Roi pourraient être accordés aux défendeurs Carrier parce qu'ils avaient eu à porter leur cause devant ce tribunal pour se libérer de la solidarité prononcée contre eux en Cour Supérieure. Il devrait y avoir jugement en faveur des demandeurs contre les défendeurs conjointement pour la somme de $2,195.00 avec intérêt depuis l'institution de l'action, laquelle somme serait calculée comme suit:

Balance de compte	$ 1,705.53
30 juillet, 1915, intérêt à 5% lors de la signature du billet	255.75
	$ 1,961.28
25 octobre, 1919, intérêt depuis la date du billet jusqu'à date	362.45
	$ 2,323.73
Cr. par argent	200.00
	$ 2,123.73
27 mai, 1920, intérêt à date	71.27
	$ 2,195.00

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MIGNAULT J.—On soulève un assez grand nombre de questions légales dans cette cause, mais je pense qu'il est possible, comme l'a dit l'honorable juge en chef Lamothe, de la juger d'après ses circonstances d'espèce et sans porter atteinte aux principes.

Les appelants sont des marchands de nouveautés de Québec et, de son vivant, feu Omer Carrier avait un compte chez eux. Omer Carrier est décédé en 1897, laissant trois enfants en bas âge, et sa femme, Dame Corinne Hamel. Cette dernière, qui ne s'est pas remariée, a continué, après la mort de son mari, à tenir maison avec ses enfants. Le tuteur des enfants était feu le notaire J.-E. Roy que remplaça Madame Carrier elle-même le 1er août, 1912. Pendant quelque temps la famille recevait des revenus de l'usine Carrier & Lainé de Lévis, et la succession avait des limites à bois dont elle ne pouvait disposer à cause d'un procès avec la Banque de Montréal. Il n'appert pas clairement que ce soit M. Roy, le tuteur, qui a continué, chez les appelants, le compte qu'avait ouvert feu Omer Carrier, mais à partir de la mort de ce dernier le compte a été continué au nom de la succession Omer Carrier, 33 rue Fraser, Lévis. C'était Madame Carrier qui faisait les achats; le notaire Roy payait de temps à autre, mais la plupart des achats étaient pour Madame Carrier elle-même ou pour la maison, les effets achetés pour l'usage des enfants étant assez peu de chose. Madame Carrier ne paraît pas avoir eu de biens personnels, mais son contrat de mariage lui assurait $6,000.00, et elle croit que le notaire Roy payait les comptes avec son argent parce qu'elle avait cette créance encore impayée contre la succession de son mari. Le compte dont il s'agit ici (mais il y avait eu d'autres comptes auparavant qui ont dû être payés par M. Roy) commence à la date du 11 novembre,

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1907 et a été clos le 30 septembre, 1911, avec un débit de $1,705.53, sans qu'on paraisse avoir fait des paiements en acompte durant ces quatre années. Le 30 juillet, 1915, Madame Carrier, comme tutrice de ses trois enfants mineurs, signa en faveur des appelants un billet à demande pour $2,413.56, soit le débit de $1,705.53 avec $708.03 d'intérêts, le billet portant lui-même intérêt à sept pour cent. Le 25 octobre, 1919, un acompte de $200.00 fut payé par Mde Carrier, et le 27 mai, 1920, les appelants poursuivirent les intimés, qui sont les trois enfants de Mde Carrier devenus majeurs, leur réclamant conjointement et solidairement le montant du billet, $2,413.56, avec en sus intérêt à 7%, lequel intérêt, lors de l'action, s'élevait à la somme de $816.61, et sur demande de particularités, ils produisirent le compte dont je viens de parler. Analysant cette demande, nous trouvons que le montant des marchandises achetées est de $1,705.53 et celui des intérêts réclamés $1,524.64.

Voilà en traits bien rapides l'espèce que nous avons à juger, la cour supérieure ayant accordé aux appelants le montant entier de leur réclamation, et la cour d'appel ayant réduit la condamnation aux montants suivants: $22.68, $76.41 et $93.82, avec intérêt du 30 juillet, 1915, dus respectivement par Camille Carrier, Eléonore Carrier et Florence Carrier pour des marchandises fournies pour leur usage respectif et dont le montant n'était pas prescrit lors de la signature du billet. Les honorables juges Lamothe et Martin, dissidents, auraient accordé aux appelants le montant de leur compte, avec intérêt depuis la demande de paiement au taux de cinq pour cent.

La première question, c'est de savoir si Mde Carrier, comme tutrice, avait le droit de signer le billet sur lequel l'action est basée. Cela équivaut à se demander

si la signature de ce billet est un acte d'administration permis à la tutrice, et elle ne l'était pas si par là la tutrice rendait pire la condition de ses pupilles. C'est précisément ce qui est arrivé ici, car le billet porte intérêt à sept pour cent et entraîne obligation solidaire. Je serais donc d'avis que ce billet ne peut servir de base à l'action des appelants, mais, heureusement pour eux, ils conservent leur créance à laquelle le billet n'a pas fait novation. C'est donc ce compte qu'il va falloir discuter.

Reste la question de prescription, et si les appelants ne peuvent invoquer le billet signé par Mde. Carrier, ils sont en mauvaise posture pour la discuter. A la date du billet, 30 juillet, 1915, s'il n'y avait pas eu interruption de prescription en temps utile, une grande partie du compte se serait trouvée prescrite, et la tutrice n'aurait pas eu le droit de renoncer à la prescription acquise, car elle ne pouvait aliéner les droits de ses pupilles (art. 2186, code civil). Cependant Mde Carrier dans son témoignage reconnaît qu'après sa nomination comme tutrice, en août, 1912 (il n'y avait pas alors prescription), elle avait promis de payer le compte des appelants aussitôt que les affaires de la succession seraient réglées. Cette preuve a été faite sans objection de la part de la défense et malgré le droit que l'article 1233 du code civil lui donnait de s'y opposer. Il faut donc prendre cette preuve sous considération (*Schwersenski* v. *Vineberg*) (1), et il en résulte qu'il y a eu reconnaissance de la dette et promesse de la payer. Et je crois qu'il a toujours été entendu que la succession payerait les appelants quand elle aurait disposé de sa réserve forestière.

Admettant donc comme interruptive de prescription la promesse faite par Mde Carrier en août, 1912,

(1) [1890] 19 Can. S.C.R. 243.

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il y a encore un laps de temps de près de huit ans, car l'action n'a été instituée qu'en mai, 1920. Il est vrai qu'en octobre, 1919, Mde Carrier a payé aux appelants un acompte de $200.00, mais alors tous ses enfants étaient majeurs et Mde Carrier ne pouvait plus les lier. Si le billet à demande signé par elle est non avenu à l'égard des intimés comme titre de créance, ne peut-il au moins valoir comme reconnaissance de la dette et interrompre ainsi la prescription?

Il est de principe que le billet donné pour une dette existante ne comporte pas novation. La dette continue d'exister et peut servir de base à une action en justice. Et indubitablement le billet sert de reconnaissance de la dette et le fait qu'il ne peut valoir comme titre contre l'une des parties ne le prive pas d'effet interruptif si la reconnaissance de la dette n'est pas elle-même nulle. Car on enseigne que l'aveu résultant d'un acte juridique peut produire son effet interruptif alors même que cet acte serait entaché de nullité, si la nullité n'entache pas l'aveu lui-même et lui est étrangère. (Baudry-Lacantinerie et Tissier, *Prescription*, n°. 529). Il y a une décision intéressante au même effet dans notre jurisprudence où la cour de revision à Montréal a jugé qu'une donation rémunératoire, nulle comme faite à cause de mort, pouvait cependant servir d'interruption de la prescription d'un compte de services que la donation avait voulu rémunérer: *Boucher* v. *Morrison* (1). Je crois donc que le billet en question a interrompu la prescription du compte.

Cela étant, les trois intimés sont-ils responsables seulement des effets achetés pour leur usage personnel, comme la majorité de la cour d'appel l'a décidé?

(1) [1901] Q.R. 20 S.C. 151.

Représentons-nous bien la situation de cette famille au décès d'Omer Carrier. Il y avait trois jeunes enfants, le dernier posthume, héritiers de leur père décédé sans testament. La veuve n'avait pas de biens personnels, mais seulement une créance contre la succession de son mari. Les enfants avaient d'abord des revenus qui provenaient de l'usine à Lévis et ensuite il ne leur restait que la perspective de disposer des réserves forestières de leur père. Pour tenir la jeune famille ensemble avec la mère et avoir un toit pour l'abriter, il fallait obtenir du crédit. Le compte en question a été ouvert au nom de la succession parce que c'est la succession qui devait le payer; et la succession, ce sont les enfants. Dans ces circonstances, les enfants devenus majeurs sont-ils responsables d'un compte fait par leur tuteur pour leur bénéfice commun et pour celui de leur mère avec qui ils vivaient et dont les soins leur étaient indispensables?

Je suis d'opinion que les enfants en sont responsables. Ils devaient des aliments à leur mère qui était sans biens. Leur tuteur pouvait reconnaître cette obligation sans attendre qu'elle prît la forme d'une demande en justice, car le tuteur a le droit de payer les dettes de ses pupilles. C'est une obligation assez semblable qu'envisage Demolombe quand il dit (tome 7, n°. 692):—

> Mais nous avons vu aussi qu'il appartient au tuteur d'acquitter les dettes légitimes du mineur; et si le tuteur reconnaît en effet que l'ascendant de celui-ci est dans le besoin, il pourra d'autant mieux acquitter, au nom du mineur, cette dette d'aliments, qu'une demande judiciaire pourrait être infiniment pénible pour toutes les parties et qu'il serait même du devoir du tuteur de la prévenir.
>
> Au reste, en pareil cas, il fera bien d'en référer au conseil de famille.

Le conseil de famille dans la province de Québec n'a pas les pouvoirs de contrôle du conseil de famille en France, et il serait bien inutile de le consulter.

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La seule alternative dans un tel cas serait de mettre les enfants à l'hospice, et de condamner la mère à gagner sa vie. Je n'éprouve aucune hésitation à croire que, dans un cas comme celui que j'envisage, c'est le devoir des enfants, lorsqu'ils ont des biens, d'assumer, chacun pour sa part, la charge qui incombait à leur mère, et que si leur tuteur a fait des comptes chez les fournisseurs pour les besoins de la famille, les enfants en sont responsables.

Mais comme il s'agit ici d'un compte ouvert au nom d'une succession, je condamnerais les intimés à le payer tout comme si c'était une dette héréditaire, c'est-à-dire par parts et portions égales et non conjointement et solidairement.

Je maintiendrais donc l'appel et j'accorderais jugement aux appelants contre chacun des intimés pour un tiers du débit du compte, $1,705.53, avec intérêt à cinq pour cent à partir du 30 juillet, 1915.

Je crois devoir motiver ma condamnation quant aux intérêts. L'intérêt peut être réclamé soit en vertu d'une convention, soit comme dommages pour le retard de payer une somme d'argent. Il n'y a pas de preuve de convention ici. Mde Carrier a reconnu devoir le montant du compte et a promis de le payer, sans qu'on paraisse avoir mentionné l'intérêt. Et si le billet signé par elle ne peut servir de base à l'action des appelants, il ne peut certainement prouver une convention de payer les intérêts à compter de la clôture du compte ou d'aucune autre date. Si on réclame les intérêts comme dommages, alors ils ne sont dus qu'à compter de la mise en demeure (art. 1077 C.C.). Il n'y a pas de preuve directe de mise en demeure, mais on peut probablement inférer que Mde Carrier a signé le billet après une mise en demeure de payer.

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Cela donne la date du 30 juillet, 1915, et c'est à partir de cette date que la majorité des juges de la cour d'appel font courir les intérêts. Je suis disposé—non sans une certaine hésitation, car lorsque j'étais au barreau les juges ne faisaient courir les intérêts sur un compte courant que de la signification de l'action—à accepter le 30 juillet, 1915 comme point de départ des intérêts.

Il faut toutefois déduire du chiffre global des intérêts l'acompte de $200.00 payé par Mde. Carrier en octobre, 1919, qui doit s'imputer de préférence sur les intérêts (art. 1159 C.C.). Les frais de la cour supérieure et de cette cour, que les intimés devront payer aux appelants, se diviseront entre eux comme la dette. Ils avaient raison d'appeler du jugement de la cour supérieure qui les a condamnés à plus qu'ils ne devaient, et ils conserveront en conséquence contre les appelants la condamnation aux dépens que la cour du Banc du Roi leur a accordée.

Appeal allowed with costs.

Solicitors for the appellants: *Gingras & Jolicoeur.*

Solicitors for the respondents: *Gelly & Dion.*

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*May 2, 3, 31.

UNITED STATES FIDELITY AND GUARANTY COMPANY (DEFENDANT)..... } APPELLANT;

AND

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

AND

L. J. QUAGLIOTTI (DEFENDANT).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Succession Duty—Guaranty bond—Executor also devisee—Application for bond by executor—"Coming into the hands"—"Succession Duty Act," R.S.B.C., c. 217, ss. 2, 23, 24, 29, 36, 37, 42, 43.—"Administration Act," R.S.B.C., c. 4, ss. 74, 75.

Action was brought by the respondent upon a bond given by the defendant Q., executor and sole devisee of the estate of P. Q. and by the appellant as his surety, for the payment of succession duties. The bond stipulated that "the condition of this obligation is such that if L. J. Q., the executor of all the property of P. Q., * * * do * * * pay to (the respondent) any and all duty to which * * * the * * * estate * * * of the said P.Q. coming into the hands of the said L. J. Q. may be found liable under the 'Succession Duty Act' * * * , then this obligation shall be void * * * ."

Held, per Duff, Anglin and Mignault JJ.—According to the terms of the bond, the appellant would become liable under it only if the real property came into the hands of Q. as executor. Idington and Brodeur JJ: *contra*.

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

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Per Duff, Anglin and Mignault JJ.—Although section 37 of the "Succession Duty Act," gives the executor of an estate the power to sell so much of the real estate devised as would enable him to pay succession duty on it, such real estate is not thereby deemed to have "come into the hands" of the executor within the meaning of the terms of the bond which follow the statutory form. (Sect. 24 of the Act). Davies C.J. and Brodeur J. *contra*. *Ianson* v *Clyde* (31 O. R. 579) dist.

Per Davies C. J., Idington and Brodeur JJ.—Upon the terms of the bond the appellant must be held to be liable, as Q.'s guarantor, for succession duties on real and personal property of the estate.

Judgment of the Court of Appeal (30 B.C. Rep. 440) affirmed on equal division of this court.

APPEAL from a judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Gregory J. at the trial (2) and maintaining the respondent's action upon a bond given to secure the payment of succession duty upon an estate.

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. and *H. B. Robertson K.C.*, (*L. B. Campbell* with them) for the appellant.

Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal for the reasons stated by Mr. Justice Galliher when delivering the judgment of the Court of Appeal and with which reasons I fully concur.

IDINGTON J.—This is an action brought by the respondent under the 42nd section of the "Succession Duty Act," upon a bond given, 29th July, 1912, by

(1) 30 B.C. Rep. 440; [1922] 1 W.W.R. 389; 63 D.L.R. 469.

(2) [1921] 2 W.W.R. 697.

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the defendant, Quagliotti, the executor and sole devisee of the estate of his late wife, and the appellant ash is surety, for the payment to the respondent of the succession duties under the said Act.

The bond was given by them in the penal sum of $88,575 and the condition thereof is as follows:—

> The condition of this obligation is such that if Lorenzo Joseph Quagliotti, the executor of all the property of Petronilla Quagliotti late of the City of Victoria, in the Province of British Columbia, deceased, who died on or about the 20th day of May, 1913, do well and truly pay or cause to be paid to the Minister of Finance of the Province of British Columbia for the time being, representing His Majesty the King in that behalf, any and all duty to which the property, estate and effects of the said Petronilla Quagliotti coming into the hands of the said Lorenzo Joseph Quagliotti may be found liable under the provisions of the "Succession Duty Act," within two years from the date of the death of the said Petronilla Quagliotti, or such further time as may be given for payment thereof under the provisions of said Act, or such further time as he may be entitled to otherwise by law for the payment thereof, then this obligation shall be void and of no effect, otherwise the same to remain in full force and virtue.

The said Quagliotti applied to the Supreme Court of British Columbia for a grant of letters probate of the will of his said late wife, and as required by the said Act and the "Administration Act" and rules made thereunder, made the required affidavit estimating the value of the property of deceased at the date of her death on the 29th of May, 1913, at the sum of $886,000, as set forth in the statutory inventory annexed thereto.

That was referred by the registrar of the court to the Minister of Finance who duly authorized the Auditor General to determine the amount of the succession duty thereon.

The duty of verifying same was assigned to one Burdick who reported thereupon a slightly less value than the said sum, and thereupon the Auditor General accepted the said valuation of Quagliotti and

determined that the succession duties should be the sum of $44,287.50, and directed the said registrar to collect the said sum as provided by sec. 23 of the Act, and grant him his consent to the issue of letters probate.

The said Quagliotti not having the cash availed himself of the privilege given by sections 23 and 24 of the said "Succession Duty Act," allowing the authorities to be satisfied by such a guarantee bond as was given as set forth above.

Thereupon the probate of the said will was granted as prayed for in consideration of the said bond having been given, but no payment having been made of the succession duty as above determined to be the proper amount; hence this action.

The several defences set up may be briefly condensed into the one that the property had fallen in value and, in fact, never had the extreme value the executor had set up, and the Auditor General had assented to, no doubt with the knowledge of the appellant.

The learned trial judge held, and I think rightly, that the appellant is clearly liable upon its bond, and this has been upheld by the Court of Appeal.

A great deal of unnecessary confusion has been brought into the case both here and in the courts below by the appellant's contentions, first, that the amount had not been finally determined by what had transpired as related above, because there was no commissioner appointed to determine same, and next, that the said Quagliotti was only executor and it was only what came to his hands as such upon or in respect of which the appellant is liable. In short, as the entire estate (except a trifling five hundred dollars of personalty) consisted of real estate, the appellant was not liable at all, according to that contention.

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If we apply a little general knowledge of the world and the business therein, we must assume that the appellant was paid on the basis of the amount involved in this bond as guarantor and not otherwise, and that it certainly did not intend to be taking the money paid it for doing nothing but writing out the bond and application therefor, which would be the case if its present contention that there never was any liability incurred be correct.

I hold that all parties concerned, by their conduct towards each other, agreed that the amount determined by the Auditor General was to be and consequently remained the correct amount of succession duty as intended by the Act that it should, unless and until otherwise determined by one or other proceeding which the Act furnishes as a means of substituting another amount.

In the first place the Crown is sometimes imposed upon by a fraudulent or mistaken estimate leading up to the consent to granting of probate.

There is given by the 29th and following sections of the "Succession Duty Act" a means of rectifying this by appointment of a commissioner to inquire and proceed as directed under the "Public Inquiries Act" and the relevant sections of the "Succession Duty Act."

No occasion has arisen therefor herein, hence all argument based thereon is, I respectfully submit, but idle confusion.

It matters not whether the party called in to assist the Auditor General is, in the ordinary speech of those concerned, called a commissioner or agent, or aught else. That furnishes no excuse for the pretension that the power of the Crown to so investigate must be invoked and exercised by it as a necessary preliminary to any liability upon the bond in question herein.

The converse case of an executor or administrator having been misled into an over estimate, or having misunderstood the operation of the Act, or of any other person concerned being erroneously held by the executor, or others concerned, the proper party to pay any part of the duty is amply provided for by section 43 of the Act, which reads as follows:—

43. A judge of the Supreme Court shall also have jurisdiction upon motion or petition, to determine what property is liable to duty under this Act, the amount thereof, and the time or times when the same is payable, and may himself or through any reference exercise any of the powers which by sections 29 to 31, both inclusive, of this Act are conferred upon any officer or person.

This never was invoked by the parties concerned herein though it was the proper remedy if any unjustifiable mistake made as against the executor or his surety the appellant.

If there is anything in the pretension set up in the defence, that seems to have been the proper and only mode of relief and enables the resort to all the powers conferred on the Crown as already pointed out when it has ground of complaint.

Independently of either of these proceedings the respondent is enabled by section 42 to sue as has been done herein. And in the event of doing so the proceedings authorized by sections 29 to 32 seem to be excluded from operation by the latter part of the section, which reads as follows:

42. Any sum payable under this Act shall be recoverable with full costs of suit as a debt due to His Majesty from any person liable therefor by action in the Supreme Court, and it shall not in any case be necessary to take the proceedings authorized by sections 29 to 32, both inclusive, of this Act.

Unless and until the amount determined by the Auditor General and in compliance therewith made

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the condition upon which probate was granted, has been displaced by either of the said proceedings provided by the Act, I hold it is conclusively established.

The contention that the executor as such, or his surety, is not liable because the executor has, as such, only to deal with personalty, seems wholly unfounded in face of the express language of the bond and manifold provisions in the "Administration Act," extending his powers and duties beyond those originally devolving on him, and especially sections 74 and 75 cited in illustration of what he can do as pointed out by Mr. Lafleur in relation to the law created by the "Succession Duty Act."

I am, however, of the opinion that the plain meaning of the bond in question made it the duty of the executor to exercise his powers of devisee and meet thereby the obligations he entered into and that the appellant surety could at any time have insisted upon his furnishing the means thereby to relieve it.

I do not think it necessary or indeed quite proper to express herein any opinion as to the rights of the Crown to assert at any time and stage the lien declared by the Act.

If the contention made in that regard be correct, the right of subrogation given by the judgment appealed from can be attempted by appellant thereunder.

I think this appeal should be dismissed with costs.

DUFF J.—The bond is the bond required by the statute. The registrar has no authority to exact and the applicant was under no obligation to give a security of wider limits than required by the law. I agree with the view of the Court of Appeal that sec. 24 in prescribing that the bond shall be

conditioned for the due payment to His Majesty of any duty to which the property coming into the hands of the applicant * * * may be found liable

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is imposing a condition which must be observed before the application is granted and since that is the subject of this provision the words "coming into the hands of the applicant" must be read as coming into his hands under the authority with which he is petitioning the court to clothe him. The condition of the bond is that as regards property acquired by him under the authority vested in him by the probate or the letters of administration, as the case may be, he is to be responsible for the payment of all duty to which that property is liable under the Act.

The sole remaining question is that arising under the contention of the respondent that this property came "into the hands" of the executor within the meaning of the condition.

Now it is quite clear that as executor he acquired no title to the testatrix' real estate. In that sense it did not come into his hands. But there is, it is contended, an authority conferred upon him—an authority (under sec. 37) to sell the real estate of the testatrix, for the purpose of paying the duty to which the property itself is liable—and that circumstance, it is argued, is sufficient to bring that property within the category of property to which the condition applies.

The construction of sec. 37 of the Act is not, I think, free from doubt. But for the purpose of deciding the question now raised I shall assume that it has the scope ascribed to it by the judgment of the Court of Appeal. It does then, we may assume, give authority to the executor to sell for the purpose mentioned. But it is surely a non-natural construction of the language to hold that property has come "into the

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hands" of an official or a person charged with the performance of duties merely because by statutory enactment he has been endowed with authority to sell for the purpose of paying a public charge upon it, an authority which has never been exercised. I think the construction is not an admissible one.

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

ANGLIN J.—Having regard to the terms in which the statute (R.S.B.C., c. 217, s. 24) directs that the bond (to be furnished by the personal representative applying for probate or letters of administration) to secure payment of succession duties shall be conditioned, I agree with the interpretation put upon the bond of the appellant by the Court of Appeal, namely, that it secures payment of succession duties only upon property which came into the hands of its co-obligor in his quality as executor of his deceased wife. As real estate, the property in question came into the hands of Quagliotti not as executor but only as devisee of his wife. In interpreting the statute and the bond, in my opinion, the adventitious circumstance that Quagliotti was both executor and devisee must be put aside and the position of the executor and his surety considered as if the devise of the property had been to another person.

I incline to accept the contention of Mr. Tilley that the words "the said duty" in sec. 37 of the statute refer to the duty which a personal representative or trustee is by sec. 36 required to deduct, i.e., duty on "any estate, legacy or property in (his) charge or trust" which is subject to duty. I am, moreover, with great respect, unable to assent to the view that because the power to sell conferred on the executor

by s. 37 (assuming its applicability) would empower him to sell so much of the real estate devised as would enable him to pay the duty on it, that property can be said to have come in (or into) his hands as executor within the meaning of the bond sued upon and s. 24 of the statute. *Ianson* v. *Clyde et al.* (1), cited by Mr. Justice Galliher, seems to me to be clearly distinguishable. Although only for the purpose of enabling the personal representative to sell it to pay the debts of the *de cujus* the effect of the Ontario legislation there dealt with was to vest in him the title to the decedent's real estate *ad interim* and to postpone the vesting of it in the devisees or next-of-kin until the right of the personal representative thereto was determined. Sec. 37 of the British Columbia "Succession Duty Act" has no such effect.

There is no doubt force in the contention that ss. 23-4 prescribe that the security to be given shall be

> in a penal sum equal to ten per centum of the sworn value of the property of the deceased person,

including his real estate. *Prima facie* the object would seem to be to secure payment of succession duties on the real estate as well as on the personal property of the decedent. But we are here dealing with the obligation of the executor and his surety and it is trite law that the surety is entitled to the benefit of the most favourable construction of its obligation which the instrument embodying it reasonably admits of. Section 24 of the statute and the terms of the bond itself, as already indicated, in my opinion entitle the appellant to maintain that its obligation is restricted to the satisfaction of the respondent's claim for unpaid succession duties in respect of such of the property of the *de cujus* as

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came into the hands of Quagliotti in his capacity as executor of his deceased wife. The real estate devised to him did not come into his hands in that quality.

I would therefore allow this appeal with costs here and in the Court of Appeal and would direct the entry of judgment dismissing the action with costs.

BRODEUR J.—This is an appeal concerning a bond given under the provisions of sec. 23 of the "Succession Duty Act" of British Columbia as security for the payment of succession duty.

Mrs. Quagliotti died in 1913 and by her will she gave all her real and personal estate to her husband and appointed him her executor.

Having applied for letters probate Quagliotti filed an affidavit of value and relationship required by the "Succession Duty Act" in which it is shown that the estate was estimated at nearly a million dollars and was, with the exception of $500 of personal estate, composed of lands situated in the city of Victoria.

This inventory was accepted by the provincial authorities and Quagliotti gave a bond of the United States Fidelity and Guarantee Co. as security for the payment of the succession duty to which the property of the deceased might become liable.

The condition of the bond was that Quagliotti

> the executor of all the property of Petronilla Quagliotti * * * do well and truly pay * * * to the Minister of Finance of the Province of British Columbia for the time being representing His Majesty the King in that behalf any and all duty to which the property estate and effects of the said Petronilla Quagliotti coming into the hands of Laurenzo Joseph Quagliotti may be found liable under the provisions of the Succession Duty Act.

It is contended by the appellant company that the real estate never came in the hands of L. J. Quagliotti as executor but was in his hands as devisee.

The bond given was made according to the provisions of the Act. It is true that at first the bond describes Quagliotti as executor; but the condition is that payment be made "of all duty to which the property, estate and effects of the said Petronilla Quagliotti coming into the hands of her husband may be found liable." Whether this estate came into the hands of L. J. Quagliotti as executor or devisee does not make any difference, because the intention of the Act is that the security should cover all succession duties to which the estate might be liable.

Besides, by section 37 of the "Succession Duty Act" it is formally enacted that an executor has the power to sell so much of the property of the deceased as will enable him to pay the duty, and by section 2 the word *property* is defined as including real property of every description. Some similar powers are to be found in sections 74 and 75 of ch. 4 of the Revised Statutes of British Columbia, and show that the executors exercise authority with regard to both personal and real estate. If the executor, Quagliotti, had been only liable for succession duty on $500 for the personal estate, why should he and the appellant company give a bond for nearly $100,000?

The appellant also contended that the trial judge should have revalued the assets.

The value of those assets was declared by the affidavit of value and relationship filed by the applicants for letters probate. The Government authorities were satisfied with such a value and the bond was given in conformity with the decision of the authorities. In these circumstances, there was virtually an agreement which relieves us from reconsidering this question of value.

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It is to be expected, however, that the provincial authorities, when they come to consider the case, will not forget the suggestion which has been made by the court below as to the advisability, in view of the peculiar circumstances of the case, of reducing the amount for which they obtained judgment.

The appeal should be dismissed with costs.

MIGNAULT J.—The action of the respondent is on a bond for succession duties given by the defendant, now appellant, and by one Lorenzo Joseph Quagliotti, who was also a defendant. The respondent sets up the bond and alleges that the succession duties have not been paid and asks for judgment for $44,287.50, being the succession duties due the province of British Columbia on an estate of which Quagliotti was sole devisee and testamentary executor under the will of his wife, and which estate Quagliotti, in his affidavit, accompanying his application for probate, valued at $885,750.00. Among other defences, the appellant alleges that the property never came into the hands of Quagliotti as executor of his wife's estate, and further, in the alternative, that the valuation was made by Quagliotti by mistake and inadvertence, that the property was valueless or its value was grossly exaggerated, and asks that the amount of the duty be ascertained by the court.

As briefly as possible, I will say that the "Succession Duty Act" of British Columbia requires that an applicant for probate shall make and file with the registrar of the court two duplicate original affidavits of value and relationship, with inventories annexed. One of these originals is sent by the registrar to the Minister of Finance at Victoria, who authorizes the Auditor General to determine the amount of succession

duty and forwards a statement of the same to the registrar. The latter then requires immediate payment of the amount due or security therefor to be given by bond. This bond, as stated by section 24 of the Act, is in a penal sum equal to 10% of the sworn value of the property of the deceased liable to succession duty; it must be executed by the applicant or applicants and two or more sureties to be approved by the registrar, and is conditioned for the due payment to His Majesty of any duty to which the property coming to the hands of the said applicant or applicants may be found liable.

The bond sued on is by its terms a promise to pay $88,575.00, which is 10% of $885,750.00, the valuation mentioned in the affidavit, and the condition of the obligation is that if Lorenzo Joseph Quagliotti, the executor of all the property of Petronilla Quagliotti, pays to the Minister of Finance the duty to which the property, estate and effects of the said Petronilla Quagliotti coming to the hands of the said Lorenzo Joseph Quagliotti may be found liable under the provisions of the "Succession Duty Act" within two years from the death of Petronilla Quagliotti, or such further time as may be given, the obligation shall be void and of no effect, otherwise the same to remain in full force and virtue. This bond follows the statutory form.

Although the non-payment of succession duty by Quagliotti, by the terms of the bond, renders the sum of $88,575.00 payable, the claim of the Crown is for $44,287.50, the alleged amount of the succession duty, with interest, the respondent stating, in the indorsement on the writ, that the bond was entered into to secure the succession duty. This construction of the bond carries out the intention of the statute

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which, when the applicant for probate does not immediately pay the succession duty, requires this security as to all property coming to the hands of the applicant liable for the payment of the succession duty. I will therefore treat this bond as being security for the payment of the succession duty. This payment, as I have said, is all that the respondent demands. The main ground of defence of the defendant is that Quagliotti, as executor of his wife's estate, was the applicant for probate, that this bond was given by him and the appellant to secure the payment of any duty to which the property coming to the hands of the applicant, i.e., Quagliotti as executor, might be found liable, that none of this property came to the hands of Quagliotti, as executor, and consequently the condition of the bond was not fulfilled.

The Court of Appeal construed the bond as being conditioned on the property coming to the hands of Quagliotti as executor. The learned trial judge found that Quagliotti, who was devisee of the property which principally consists in real estate, took possession of the property, managed it and received the profits. He was, however, not registered as owner.

The question is whether, assuming, as I think we must assume, that the condition of the bond was that the property should come to the hands of Quagliotti *qua* executor, this possession by Quagliotti as devisee fulfils this condition.

Undoubtedly the appellant, being a surety under this bond, is entitled to the most favourable construction which can be placed on its bond. The construction which I adopt conforms strictly to section 24 of the statute which must govern the interpretation of the bond it requires from the applicant, and it is only when the property comes to the

hands of the applicant that the amount of the bond becomes payable. Here it never came to the hands of the applicant, the executor, for, as Mr. Justice Galliher, who rendered the judgment for the Court of Appeal, states:

> under our law in British Columbia real estate did not, at the time of Mrs. Quagliotti's death, devolve upon the executor.

The possession taken by Quagliotti therefore was and could only be as devisee under the will. It is true the executor and the devisee were in fact the same person but, in law, the situation is the same as if the devisee and the executor were different persons. And although, as Mr. Justice Galliher observes, the executor had the power to sell the lands of the testator to pay the succession duty, I do not think that the mere existence of this power would warrant us in saying that this property came to his hands. The learned judge cites the case of *Ianson* v. *Clyde* (1), where Chancellor Boyd explains the meaning of the words "in the hands of the executors," but the learned Chancellor was not construing a statute like the one in question but merely discussing the effect of a judgment which had been rendered by the county court against the property in the hands of the executors, and I do not feel bound by his definition.

I may add that were I convinced that any obligation arises under this bond, I would not grant the respondent the amount of succession duty demanded. The learned trial judge found that the gross value of the property was $500,000, the valuation in the affidavit being the result of the boom in the real estate prevailing in 1913. The learned judge, if the bond was obligatory on the appellant, should, in my opinion,

(1) 31 O.R. 579 at p. 585.

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have based the amount of the succession duty on this value and not on the value stated by obvious mistake by Quagliotti's affidavit. Both courts were under the erroneous impression that a commissioner was appointed under the Act to value this property and that Quagliotti had failed to appeal from his award. No commissioner, the parties admit, was ever named. Under all the circumstances, I think the learned trial judge could fix the valuation of the property notwithstanding the valuation in the affidavit, and the least that can be said is that no higher valuation should have been considered than $500,000.00.

But, in my opinion, no obligation exists under the bond and I would allow the appeal with costs throughout and dismiss the respondent's action.

Appeal dismissed without costs.

Solicitors for the appellant: *Robertson, Heisleman & Tait.*

Solicitor for the respondent: *W. D. Carter.*

THE GALIBERT GLOVE WORKS LIMITED (PLAINTIFF) ..... APPELLANT;

AND

C. A. SHARPE (DEFENDANT) ..... RESPONDENT.

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*May 18.
*May 31.

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

Lease—Notice to vacate premises—Absence of judicial proceedings or physical act of eviction—Damages to lessee—Liability of lessor—Arts. 1612, 1616, 1617, 1618, 1663, 2128 *C. C.*

A lessee, who vacates the leased premises upon a simple notice by the owner to whom these prenises have been sold by the lessor, that proceedings in eviction will be taken against him, is not entitled to claim damages against his lessor. There must be either judicial proceedings in eviction or some physical act of eviction by the owner.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court and dismissing the appellant's action.

The appellant had leased from the respondent for the term of three years, from the 1st of May, 1918, the second flat of a building in Montreal. On the 24th of June, 1919, the respondent gave to one C. an option on the property, which was accepted the same day, with the condition that "the buyer (was) to respect and assume all existing leases on the said premises,"

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

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which clause was by inadvertence omitted in the deed of sale passed on the 24th of July, 1919. At this last day, C. gave appellant a notice that he must vacate the premises on the 1st of May, 1920; and C. having re-sold the property to T., T. also gave to the appellant a similar notice on the 30th of July, 1919. On the 5th of August, 1919, the appellant notified C., T. and the respondent that it intended to occupy the premises until the expiration of the term of the lease. On the 9th of August, C. and T. reiterated their intention to institute proceedings in ejectment on the 1st of May, 1920, if the premises were not then vacated. On the 5th of November, 1919, the respondent instituted an action against C. and T., in order to correct the deed of sale and have inserted into it the clause omitted from the option. On the 18th of March, 1920, the latter action being still not adjudicated upon, the appellant notified the respondent that the sale of the premises has caused the appellant to be "ejected from the premises before the expiration of his lease according to the terms of legal notices duly served on the appellant by said purchasers," and that the appellant had succeeded in finding other premises at a loss of $6,443.75. On the 23rd of March, 1920, the respondent answered this protest by reciting the above facts, advised the appellant that it had the right to remain in the premises and notified it that it would vacate them at its own risk and peril. On the 19th of April, 1920, the appellant leased other premises, vacated the premises leased from the respondent and instituted an action against the respondent to recover $6,443.75 damages. Subsequently, on the 7th of October, 1920, C. and T. acknowledged that there was an error in the deed of sale; and they consented that it be corrected accordingly.

Thibodeau Rinfret K.C. for the appellant.

Aimé Geoffrion K.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Mignault with which I fully concur, I would dismiss this appeal with costs.

IDINGTON J.—I think this appeal should be dismissed with costs.

DUFF J.—I concur in dismissing the appeal with costs for the reasons given by the learned Chief Justice of Quebec, as well as those by Martin and Guerin JJ.

ANGLIN J.—I would dismiss this appeal for the reasons stated by the learned Chief Justice of Quebec and Martin and Guerin JJ. in the Court of King's Bench, to which I would merely add a reference to *Great North Western Telegraph Co.* v. *Montreal Telegraph Co.* (1), cited by Mr. Geoffrion.

BRODEUR J.—Il s'agit d'une action en dommages instituée par un locataire contre son locateur dans les circonstances suivantes.

Sharpe avait loué pour trois ans, à partir du 1er mai 1918, à la compagnie Galibert, une propriété à Montréal. Ce bail ne fut pas enregistré.

Le 24 juin 1919, Sharpe fit une promesse de vente à Creelman de la propriété louée; et il était stipulé dans cette promesse de vente que le promettant acheteur aurait à maintenir les baux existants.

(1) [1891] 20 Can. S.C.R. 170; M.L.R. 6 Q.B. 257; M.L.R. 6 S. C. 74.

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Le 24 juillet 1919 l'acte de vente était fait devant notaire; mais, par erreur ou autrement, l'obligation pour l'acheteur de maintenir les baux n'y fut pas stipulée.

Le même jour Creelman faisait enregistrer son acte de vente; et il donnait avis par écrit à la compagnie Galibert d'avoir à délaisser cette proprieté au 1er mai 1920.

Peu de jours après, Creelman qui évidemment s'était porté acquéreur de cette propriété pour la compagnie Tuckett, signait une vente, en faveur de cette dernière, de la propriété louée; et, le 30 juillet 1919, la compagnie Tuckett notifiait la compagnie Galibert d'avoir à déguerpir le 1er mai 1920.

Cet avis d'expulsion a été évidemment dénoncé au bailleur Sharpe par son locataire: car, peu de temps après, savoir le 5 novembre 1919, Sharpe poursuivait Creelman et la compagnie Tuckett pour faire condamner ces derniers à reconnaître que la compagnie Galibert avait le droit de rester sur les lieux loués jusqu'au 1er mai 1921, et il invoquait à cette fin la convention spéciale qui avait été insérée dans la promesse de vente.

Cette action fut contestée par Creelman et la compagnie Tuckett en disant que leur contrat de vente ne contenait aucune obligation de respecter le bail de la compagnie Galibert et qu'ils n'étaient pas alors tenus de garder cette dernière comme locataire après le 1er mai 1920.

La situation devenait très embarrassante pour la compagnie Galibert, vu que l'industrie qu'elle exploitait demandait une propriété difficile à se procurer, et qu'elle ne pouvait pas s'exposer à être obligée de déguerpir à quelques jours d'avis au cas où Sharpe ne réussirait pas dans son action contre ces tiers acquéreurs.

La demanderesse s'est alors mise à chercher à louer une autre propriété; mais elle n'a pas pu réussir qu'en payant un loyer et des taux d'assurance plus élevés. Elle a alors laissé les lieux loués le premier mai, ainsi qu'elle en avait été notifiée par les tiers acquéreurs et, en juin 1920, elle a poursuivi son bailleur Sharpe en dommages pour réclamer de lui le surplus de loyer et d'assurances qu'il lui fallait payer.

Sharpe a plaidé que dans les circonstances il n'y avait pas de responsabilité de sa part et que la menace d'éviction qui avait été faite contre la compagnie Galibert ne la justifiait pas de poursuivre en dommages.

Pendant l'instance sur la présente cause, soit le 11 octobre 1920, Sharpe, Creelman et Tuckett ont réglé leur poursuite. Et ces deux derniers ont reconnu qu'ils étaient tenus de maintenir les baux affectant la propriété qu'ils avaient achetée de Sharpe.

La Cour Supérieure, dans ces circonstances, a renvoyé l'action de la compagnie Galibert, et ce jugement a été confirmé en appel, les honorables juges Allard et Rivard dissidents. La compagnie Galibert porte maintenant cette cause devant nous.

Pour décider cet appel, il convient d'examiner les obligations et les droits respectifs des locateurs et locataires.

Le locateur est obligé de procurer au locataire la jouissance complète et paisible de la chose louée (art. 1612-3, C.C.). En d'autres termes il est obligé de la garantir contre le vice de la chose louée et contre les troubles apportés à la jouissance.

Les troubles sont de deux sortes; ils sont de fait ou de droit. Les troubles de fait sont régis par les articles 1616 et 1617 du code civil. Les troubles de droit,

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c'est-à-dire ceux qui consistent dans la prétention élevée par un tiers d'avoir sur la chose louée un droit de propriété, de servitude ou tout autre, sont régis par l'article 1618 du code civil.

Nous sommes dans la présente cause en présence d'un trouble de droit, c'est-à-dire d'une prétention élevée par Creelman et Tuckett que la compagnie Galibert ne pouvait pas occuper la propriété louée après le 1er mai 1920. Nous devons alors examiner l'article 1618 C.C. qui déclare que

> si le trouble est causé par suite d'une action concernant la propriété ou tout autre droit dans et sur la chose louée, le locateur * * * est obligé de payer des dommages-intérêts suivant les circonstances, pourvu que le trouble ait été dénoncé par le locataire au locateur.

Dans le cas actuel, le trouble a été dénoncé par le locataire, et le locateur a institué une action pour le faire cesser.

Je comprends la situation difficile et dangereuse où se trouvait Galibert. Je reconnais que Creelman et Tuckett armés d'un acte de vente qui ne les obligeait pas de reconnaitre les baux existants, avaient apparemment le droit d'expulser la compagnie Galibert au 1er mai 1920 (art. 1663 & 2128 C.C.) et cette dernière n'ayant pas un bail enregistré ne pouvait pas prétendre y rester jusqu'au 1er mai 1921. Je reconnais également que les exigences de son commerce lui imposaient l'obligation de se chercher un nouveau local si elle ne voulait pas s'exposer à déguerpir d'un jour à l'autre et à être incapable de se trouver un logement convenable pour le maintien de son commerce et que c'était dangereux pour elle de s'en rapporter aux hasards d'un procès.

Mais tout cela la justifiait-elle de poursuivre son bailleur en dommages? Elle était menacée d'éviction par Creelman et Tuckett. Ces derniers, au mépris

de leur convention avec Sharpe, ainsi que la preuve nous le revéle maintenant, sont après tout la cause de tout ce trouble. Leur prétention qu'ils avaient le droit de chasser la compagnie Galibert après le 1er mai 1920 ayant été mise à néant sur leur propre aveu, je serais porté à croire qu'ils seraient eux responsables des dommages qui ont été causés. (Labori, vo. Bail, no. 144).

Le bailleur Sharpe a fait tout son possible pour écarter la cause du trouble. Il a pris une action pour la faire cesser. Il est bien vrai qu'il n'avait pas dans son contrat de vente formellement stipulé que ses acheteurs maintiendraient les baux, mais ces derniers s'étaient tout de même obligés de le faire; et s'ils ont violé leurs obligations et s'ils ont exposé par leur mauvaise foi la demanderesse, la compagnie Galibert, à des dommages, Sharpe ne devait pas en être tenu responsable, du moment qu'il a pris les procédures nécessaires pour réparer l'oubli qui avait été fait dans l'acte de vente.

Les honorables juges Allard et Rivard sont d'opinion que le trouble a été causé par le locateur lui-même et que l'article 1618 ne doit pas s'appliquer au cas actuel. Le trouble a été causé par Creelman et Tuckett. Il est vrai qu'ils se sont autorisés d'une lacune dans leur acte de vente pour faire cette menace d'éviction. Mais il n'en reste pas moins avéré que Creelman et Tuckett sont les véritables auteurs du trouble.

Pour ces raisons l'appel doit être renvoyé avec dépens.

MIGNAULT J.—L'appelante avait loué un étage d'une bâtisse appartenant à l'intimé, et son bail devait encore durer un an et neuf mois environ quand,

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le 24 juillet 1919, l'intimé vendit la propriété à Monsieur J. J. Creelman, C.R. qui la revendait ensuite à The Tuckett Tobacco Company Limited. Les deux acheteurs donnèrent immédiatement avis à l'appelante qu'il lui faudrait évacuer l'édifice le 1er mai 1920. La compagnie Galibert répondit que son bail lui donnait le droit d'occuper l'étage en question pour une autre année à partir de cette dernière date; mais les acheteurs prétendirent en retour qu'on ne pouvait invoquer contre eux ce bail puisqu'il n'avait pas été enregistré. L'acte de vente ne mentionnait pas que la vente était sujette aux baux existants, bien que l'option qui en était la base contînt cette condition; et plus tard l'intimé prit une action contre les acheteurs pour faire amender l'acte en y insérant l'obligation de respecter les baux et il obtînt jugement en ce sens au mois d'octobre 1920.

Dans l'intervalle cependant l'appelante paraît avoir omis de notifier l'intimé, son locateur, de l'avis qu'elle avait reçu des acheteurs et se mit en quête d'un autre local. Ce n'est que le 18 mars 1920 que l'appelante fit servir un protêt à l'intimé déclarant que les acheteurs l'avaient évincée de la bâtisse, qu'elle s'était procuré un autre local et qu'elle réclamait $6,443.75 de dommages. L'intimé répondit par un autre protêt à l'effet que l'appelante n'était pas et ne pouvait pas être évincée de la bâtisse, que la vente avait réellement été faite sujette aux baux, et que l'intimé avait pris une action contre les acheteurs pour faire modifier l'acte de vente en y insérant cette condition qui avait été omise par oubli dans l'acte. Le 19 avril 1920, l'appelante loua un autre local d'un nommé Valiquette et y déménagea. Elle prit alors cette action contre l'intimé,

demandant jugement pour le montant ci-dessus mentionné pour dommages. Cette action a été renvoyée par la cour supérieure, et la cour du Banc du Roi a confirmé le jugement, les honorables juges Allard et Rivard différant. L'appelante en appelle maintenant à cette cour.

La question à décider est de savoir si dans les circonstances l'appelante a un droit d'action contre l'intimé.

Il est hors de doute que le locateur doit procurer au locataire la jouissance paisible de la chose louée pendant la durée du bail (art. 1612). Mais après avoir posé ce principe, le code distingue entre le trouble de fait, dont le bailleur n'est pas garant (art. 1616), et le trouble de droit dont il est responsable envers le locataire (art. 1618). Ce trouble de droit peut donner lieu soit à une réduction du loyer, soit à une demande de dommages-intérêts, suivant les circonstances, pourvu, dit l'article 1618, que le trouble ait été dénoncé par le locataire au locateur.

Le locataire, n'étant qu'un simple détenteur, n'a jamais qualité pour discuter le bien fondé d'une action concernant la propriété ou tout autre droit dans ou sur la chose louée. Cette action doit être dirigée contre le bailleur, propriétaire de la chose. Si le locataire prenait sur lui de contester cette action quand elle est à tort dirigée contre lui, il le ferait à ses risques et périls. Du reste la loi lui fournit un moyen bien plus simple de s'en débarrasser, car il peut demander congé de la demande en faisant connaître au poursuivant le nom de son locateur (art. 1618). C'est ce dernier, je le repète, qui doit être poursuivi quand il s'agit d'une telle action.

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Pothier (Louage, no. 91), parlant de l'action en garantie du locataire contre le bailleur, dit:

> Il y aura lieu à cette action de garantie lorsque, sur la condamnation intervenue contre le locateur contre qui le tiers a été renvoyé à se pourvoir, ou sur l'acquiescement donné par le locateur à la demande de ce tiers, le locataire ou le fermier aura été contraint de quitter la jouissance de l'héritage qu'il tenait à ferme ou à loyer, ou de partie d'icelui ou d'y souffrir l'exercice du droit de servitude prétendu par le demandeur.
>
> Ce n'est que de ce jour, ou tout au plus du jour de la sommation de vider les lieux, faite au fermier ou locataire par ce tiers, en exécution de la sentence de condamnation intervenue contre le locateur au profit de ce tiers, ou de l'acquiescement du locateur à la demande de ce tiers, que naît l'action *ex conducto* qu'a le fermier ou locataire contre le locateur, aux fins que le locateur soit tenu de le faire jouir, et que, faute par lui de le pouvoir faire, le dit locataire ou fermier sera déchargé de la ferme pour le restant du temps du bail, et le locateur condamné envers lui en ses dommages et intérêts.

Voilà la véritable doctrine de notre droit. La menace d'un trouble de droit ne suffit pas pour donner ouverture à un recours en dommages du locataire contre le bailleur et sous ce rapport le louage et la vente sont soumis aux mêmes règles. Il faut qu'il y ait éviction consommée, ou au moins, dit Pothier, sommation au locataire de vider les lieux après condamnation intervenue contre le bailleur.

Ici l'appelante, après avoir reçu avis des acheteurs qu'ils l'expulseraient au 1er mai suivant, aurait dû dénoncer cet avis à l'intimé et le mettre en demeure d'écarter la menace d'éviction qui lui était faite. L'appelante, au lieu de prendre cette mesure que la prudence la plus élémentaire conseillait, a pris sur elle de décider que l'intimé ne pouvait écarter cette menace. En cela elle s'est trompée, car l'intimé, aussitôt qu'il s'est aperçu de l'erreur dans l'acte de vente, a intenté une action contre les acheteurs pour faire rectifier cet acte. L'appelante n'aurait jamais

été évincée—et elle a abandonné les prémisses de son plein gré—si elle avait tenu la conduite que la loi et la prudence lui conseillaient.

Je suis d'avis de renvoyer l'appel avec dépens.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Brown, Montgomery & McMichael.*

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*May 8, 9.
*May 31.

N. ALLEN (DEFENDANT).....APPELLANT;

AND

C. P. HAY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Bills and notes—Bank and Banking—Estoppel—Note given to bank without consideration—Intention to deceive bank examiner—Liability of maker—Foreign law—Evidence by experts.

The appellant gave his promissory note, in renewal of a previous note given without consideration, to a bank in the state of Washington so as to create a false appearance of assets and deceive the bank examiner, the appellant receiving contemporaneously from the bank a written acknowledgment that there would be no liability. Upon the insolvency of the bank the respondent, the Bank Commissioners of the State, sued the appellant upon the renewal note for the benefit of the bank's creditors.

Held, Idington J. dissenting, that under the law in force in the State of Washington, as proved by experts who referred to American statutes and precedents in support of their evidence, the appellant was estopped from raising a plea of want of consideration.

Per Duff J.—If such evidence is conflicting or obscure the court may examine and construe for itself the passages cited by the experts.

Judgment of the Court of Appeal ([1922] 1 W.W.R. 646) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Macdonald J. at the trial (2), and maintaining the respondent's action on a promissory note.

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1922] 1 W.W.R. 646. (2) 29 B.C. Rep. 323 [1921] 2 W.W.R. 33.

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.

Craig K.C. for the appellant.—The appellant is not estopped from alleging want of consideration.

The fact that the appellant did not pay the note sued on is not a sufficient prejudice to create an estoppel.

The question of estoppel is to be decided by the law of British Columbia and not by the law of the State of Washington.

The trial judge did not accept the evidence of experts as it was, but made his own investigation of the American authorities and misconstrued the effect of some of them.

D. L. McCarthy K.C.—The appellant is estopped from denying liability according to the law of the State of Washington, as put in evidence by the experts.

IDINGTON J. (dissenting).—Respondent sued in his capacity of Bank Commissioner of the State of Washington upon a promissory note for $10,521.00 given by the appellant to the Northern Bank & Trust Company of which and by virtue of statutory enactments of said state the said respondent has become by reason of its insolvency the administrator and as such entitled, instead of said bank, to sue upon said promissory note.

There never was any consideration for said promissory note. It therefore never was a valid security. This is established by the evidence of appellant and a memorandum of agreement given by the president of the bank cotemporaneously with the giving of the said note.

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It is sought, and so far successfully, before the learned trial judge and in the Court of Appeal, to overcome that difficulty be virtue of the law, it is said, estopping the appellant from setting up any such defence under the circumstances in question which are alleged to have constituted fraud on the part of the appellant.

To render such an estoppel *in pais* an effective answer to the defence of no valuable consideration, there must be shown on the part of the party setting up such an estoppel, not only the existence of actual misrepresentation or fraud, but also that the party contracted with was ignorant thereof and was thereby induced to change his position on the faith of it.

Such, as I understand the evidence of the expert giving the law of the State of Washington, is the law of that state on the issue thus raised herein, as it is our law on the subject.

The only doubt created as to such statement of the law was the hesitation of the witness as to the effect of the decision by the Supreme Court of that state in the case of *Moore* v. *Kildall* (1), to which he referred the learned trial judge for his consideration.

I find, on reading it for myself therefore, that the court found and, as I agree, correctly so, if I may be permitted to say so, that there was in fact valuable consideration for the note in question therein.

I am unable, therefore, to attach much importance to that case for what we are concerned with herein.

The estoppel, as pleaded in some of the pleas, sets up the misleading of the state examiner as something the respondent can rely upon.

There seem to be several answers thereto.

(1) [1920] 191 Pac. Rep. 394.

It is the claim of the bank that is here in question. And there is no evidence that the bank was either misled or that it was induced in any way to change its position by reason of the alleged fraud.

The evidence in support of the claim of the respondent so far as the evidence before us goes, proves that he, by virtue of his taking over the administration of the assets, stands on no higher ground than that of the bank itself.

And if the evidence of such officers as had the duty at various times of examining the bank's assets is to be considered at all, it falls very far short of maintaining any such pretension as set up. Indeed on the contrary, it shews for the most part that the result would have been the same.

And if the suggestion in respondent's factum that Moore was only the examiner and not the commissioner is worth considering, we have no evidence of that officer who was then the superior of Moore.

In short, despite what counsel sets up that the burden of proof is on the appellant, I submit it clearly is upon him pleading any defence to prove it, and this has not been done, or pretended to have been done, by anything presented in this case.

To render the contention, if possible, more absurd this note was given before the statute law was changed, as it was in 1917, to render it more drastic, and there is no pretence that it was retroactive so far as the evidence goes. The references in same and in respondent's factum to Remington's Code are not very helpful as these books are not available.

Indeed we have cases cited to us from American authorities, in other jurisdiction than Washington State, which are of no more binding force on the Washington courts than they would be on us.

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We are asked to extend the law of estoppel *in pais* beyond anything sworn to be the law of Washington, and far beyond anything in our own law, in a way that we should not for a moment countenance.

The conduct of the appellant may have been the result of crass stupidity, or of deliberate fraud, but that is, I most respectfully submit, no reason for our departing from the principle of the law, which is to take the law of a foreign state from the sworn evidence of expert witnesses testifying thereto, and so far as that is not established thereby relying upon our own law.

To confuse the duty towards the party to the contract with that due to someone else is as yet no part of our law and is not proven to be the law of Washington.

The case cited by counsel for respondent of *Smith* v. *Kay* (1), is in no way applicable to what is in question herein. That was indeed the converse of this case. Indeed it suggests rather the thought that the fraud in question herein was one joined in by the bank, if not wholly the product of the bank, and hence suggests another remedy for the kind of fraud involved herein than can be afforded in such cases as this.

The joint effort of the bank and the appellant to deceive may have laid a foundation for an action of deceit, but that would not help here where only the neat question of the proper application of the doctrine of estoppel *in pais* is all that should concern us.

The appeal should be allowed with costs throughout.

DUFF J.—It is not disputed that the plaintiff must fail if the right of recovery depends upon the rules of the law of British Columbia. It is therefore incumbent upon him to prove the law of the State of Washington. This he must prove as matter of fact by the evidence

(1) [1859] 7 H. L. Cas. 750, at p. 770.

of persons who are experts in that law. These experts may, however, refer to codes and precedents in support of their evidence and the passages and references cited by them will be treated as part of their testimony; and it is settled law that if the evidence of such witnesses is conflicting or obscure the Court may go a step further and examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion. *Nelson* v. *Bridport* (1); *Bremer* v. *Freeman* (2); *Di Sora* v. *Phillipps* (3); *Concha* v. *Murietta* (4); *Rice* v. *Gunn* (5).

In *Bremner* v. *Freeman* (2), Lord Wensleydale's judgment delivered on behalf of the Privy Council included a most searching examination of the French authorities bearing upon the point of French law in dispute.

I think, applying these principles, the learned trial judge, Mr. Justice Macdonald, was entitled to examine the authorities upon which he relied. The decision in *Moore* v. *Kildall* (6) was based upon more than one ground; but the substantive ground upon which the court proceeded in pronouncing the judgment was that the note sued upon, having been given for the express purpose of enabling the officials of the bank to present a false appearance of assets, the plaintiff was, representing as he did the interests of the creditors, entitled to insist as against the defendant that the instrument sued upon was an enforceable obligation. The court cited with approval and relied on a passage quoted from a decision of the Supreme Court of Illinois in the case of *Golden* v. *Cervenka* (7). That passage in full is in the following words:—

(1) [1845] 8 Beav. 527.
(2) [1857] 10 Moo. P.C. 306.
(3) [1863] 10 H. L. Cas. 624.
(4) [1889] 40 Ch. D. 543.
(5) [1884] 4 O. R. 579 at p. 589.
(6) 191 Pac. Rep. 394.
(7) [1917] 116 N.E.Rep. 273 at p. 281.

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Where notes or other securities have been executed to a bank for the purpose of making an appearance of assets, so as to deceive the examiner and enable the bank to continue business, although the circumstances may have been such that the bank itself could not have collected the securities, it has been held that the receiver, representing the creditors, could maintain the action and the makers were estopped upon the insolvency of the bank, to allege want of consideration. *Hurd* v. *Kelly* (1); *Best* v. *Thiel* (2); *Sickles* v. *Herold* (3); *State Bank of Pittsburg* v. *Kirk* (4); *Peoples' Bank* v. *Stroud* (5); *Dominion Trust Co.* v. *Ridall* (6); *Lyons* v. *Benney* (7). In one such case (*Lyons* v. *Benney*, supra) the defence was set up by an affidavit which the court held insufficient, saying:—

"The substance of this affidavit of defence is that the appellant made and delivered his note to the bank in furtherance of a scheme to deceive the bank examiner, under a promise made to him by the bank that he would not be held liable upon the obligation. He agreed that it should appear as one of the assets of the institution for the purpose of deceiving those whose duty it was to examine them, and he now sets up the defense that, as it was to serve no other purpose, it is to be regarded as a worthless piece of paper under this agreement with the bank * * * . So this appellant was a party to a scheme of the officers of the bank to enable them to make a deceptive and fraudulent showing of assets, and as the fraud was perpetrated upon the creditors now represented by the bank's receiver, he can maintain an action on the note for their benefit * * * . Neither the law nor good conscience can sanction the contention of the defendant that he ought to be permitted to take advantage of the fraudulent agreement between him and the bank to which its creditors were not parties and for whom the receiver sues."

One of the decisions mentioned in this passage, *Lyons* v. *Benney* (7) a decision of the Supreme Court of Pennsylvania is referred to by the learned trial judge; and the court in that case cited and relied upon the following passage from the judgment of Ross J. delivered in *Pauly* v. *O'Brien* (8), in the Circuit Court of California. In his judgment Ross J. says at pp. 461-2:—

(1) 78 N.Y. 588; 34 Am. Rep. 567.
(2) 79 N.Y. 15.
(3) 149 N.Y. 332; 43 N.E. 852; affg. 15 Misc. Rep. 116; 36, N. Y. Supp. 488.
(4) 216 Pa. 452, 65 Atl. 932.
(5) 223 Pa. 33.
(6) 249 Pa. 122; 94 Atl. 464.
(7) 230 Pa. 117; 79 Atl. 250; 34 L.R.A. (N.S.) 105.
(8) [1895] 69 Fed. Rep. 460.

If, however, this was not really the case, but that, in truth, the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same, for, when parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice, to leave him bound who has bound himself. It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. Undoubtedly, the transaction in question originated with the officers of the bank, but to it the defendant became a willing party. It would require more credulity than I possess to believe that the defendant, when his brother, who was the book-keeper of the bank, came to him with the proposition of its vice-president, in its every suggestion and essence deceptive and fraudulent, did not know its true character and purpose. So far as appears, Naylor was a total stranger to him. Why should he execute his note to take up the note of Naylor? What moved him to do it, except to enable the officers of the bank to supplant the overdue note of Naylor with a live note, which he now insists was without consideration and purely voluntary, but which enabled the bank officers to make a deceptive and therefore fraudulent, showing of assets? Obviously nothing. There will be judgment for the plaintiff for the amount due upon the note sued upon, according to its terms, with costs.

The law as laid down in this passage cited from the judgment of Ross J. delivered in 1895 and in that cited from the judgment of Dunn J. speaking on behalf of the Supreme Court of Illinois, in 1917, appears from the evidence given in this case to be the law of the State of Washington.

Mr. Craig in a very able argument contended that the oral witnesses who spoke as to the law of the State of Washington deposed in effect that the liability of the defendant, if it existed at all, arose from the application of the general principle of estoppel *in pais*, being conditioned consequently by the existence of the constituents of estoppel including a change of position on part of the party relying upon the estoppel brought about in consequence of the conduct

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of the other party. I think if Mr. Craig's minor premise is sound, namely, that the rule invoked by the plaintiff does rest upon a strict application of the doctrine of estoppel as recognized in the law of the State of Washington as well as in English law his conclusions necessarily follow. But in truth this premise is much more than doubtful; the cause of action and the only cause of action vested in the plaintiff is the bank's cause of action; to that he succeeds by force of the statute and if the principles of the common law were to be applied it is quite plain that nothing done by the defendant with the concurrence of the bank could, consistently with such principles, preclude the defendant from resisting the bank's claim.

The rule expounded in the authorities already referred to is a rule resting on broader and deeper principles. The statutory custodian of the property of the insolvent corporation while he succeeds to the assets of the corporation does so primarily in the interest of the creditors and (although in the first instance his right to the assets is not the right of the creditors but the right of the corporation in liquidation), the legal relations of the corporation undergo some alteration by reason of the change of status involved in its statutory dissolution and the rule above mentioned has been established as a rule of policy, a rule required in such circumstances by justice and convenience. A person who has participated in an attempt on the part of officials of the corporation to present a false appearance of prosperity and for that purpose has been content to represent himself as a debtor of the company is not permitted to deny the existence in law of this liability; but this rule is a substantive rule of law, it is not a

mere rule of evidence. It is analogous to the rule by which a person improperly placed on the list of shareholders of a joint stock company and entitled therefore to have his name removed must act promptly. If he fail to act promptly he will be denied relief and in winding up proceedings will be compelled to pay for the shares, because it is conclusively presumed against him that the presence of his name has added to the credit of the company.

The appeal should be dismissed with costs.

ANGLIN J.—If the plaintiff, in order to succeed, were obliged to establish the facts necessary to make a case of estoppel against the defendant, including proof of prejudice ascribable to the defendant's conduct, I should be of the opinion that such a case was not made out. But the evidence in the record establishes to my satisfaction that it is a rule of substantive law in the State of Washington that

> one giving a note as "live paper" to make an appearance of assets so as to deceive the bank examiner is estopped, on the insolvency of the bank, to allege want of consideration.

Moore v. *Kildall* (1); *Barto* v. *Nix* (2); *Skagit State Bank* v. *Moody* (3). That is undoubtedly what the defendant did in the present case.

Other cases cited at bar and in the judgments delivered in the Court of Appeal indicate that a similar rule obtains in other American jurisdictions. *Lyons* v. *Benney* (Penn.), (4); *Pauly* v. *O'Brien* (Cal.) (5); *Golden* v. *Cervenka* (Ill.) (6).

The judgment holding the defendant liable was in my opinion right and should be upheld.

(1) 191 Pac. Rep. 394.
(2) [1896] 46 Pac. Rep. 1033-4.
(3) [1915] 150 Pac. Rep. 425.
(4) 79 Atl. Rep. 250.
(5) 69 Fed. Rep. 460.
(6) 116 N.E. Rep. 273, at p.281.

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BRODEUR J.—The action is on a promissory note, and is instituted by the Bank Commissioner of the State of Washington. In 1914, the defendant Allen, who was then living in the United States, gave an accommodation note to The Northern Bank & Trust Company for the purpose of making an appearance of assets so as to deceive the Bank examiner. The Northern Bank & Trust Company, in spite of these misrepresentations as to its assets, had, a few years later, to be put in the hands of the Bank Commissioner of the State who, according to the laws of the State of Washington, proceeded to the liquidation of the affairs of the bank. He found among the assets Allen's promissory note; and as Mr. Allen is now living in British Columbia he is sued before the courts of this province by the bank examiner for the payment of this note.

His defence is that there was a total failure of consideration.

This case has to be decided by the laws of the State of Washington where the note was signed and the liability was incurred.

There is no doubt that no consideration was given. But it is contended by the Bank Commissioner Hay that, according to the laws of the State of Washington a note given in similar circumstances can be sued upon by the official liquidator of the bank.

This note was evidently given for a fraudulent purpose viz., for the purpose of showing in the bank returns assets which did not in reality exist, and also for the purpose of inducing the public to deposit their moneys in the bank. Very severe laws have been passed in that state in order to put an end to such

fraudulent transactions; and the jurisprudence is to the effect that the Bank Commissioner could sue on these notes though they were originally given without consideration.

In a case of *Golden* v. *Cervenka* (1), the Supreme Court of Illinois, where similar legislation exists, decided that

> where notes or other securities have been executed to a bank for the purpose of making an appearance of assets, so as to deceive the Examiner and enable the bank to continue business although the circumstances may have been that the bank could not have collected the securities, it has been held that the receiver representing the creditors could maintain the action and the makers were estopped upon the insolvency of the bank to allege want of consideration.

In two cases of *Lyons* v. *Benny* (2), and *Pauly* v. *O'Brien* (3), the principle of law which was enunciated is that the giving of such notes is a fraud upon the creditors of the bank.

A decision of the Appellate Division of the Supreme Court of Washington rendered in 1920 is to the same effect. It was held in the case of *Moore* v. *Kildall* (4), that "one giving a note as live paper" to make an appearance of assets so as to deceive the bank examiners is estopped on the insolvency of the bank from alleging want of consideration.

It is contended by the defendant that the prejudice which is essential to constitute in a case of estoppel has not been proven in this case.

We have in this case facts which are absolutely similar to those that were in issue in *Moore* v. *Kildall* (4) and there is no doubt, according to my opinion, that if Allen was still living in the State of Washington and had been sued there he would have been condemned to pay the note. We have then here to apply the same principles of law and to render the same

(1) 116 N.E. Rep. 273.
(2) 79 Atl. Rep., 250.
(3) 69 Fed. Rep. 460.
(4) 191 Pac. Rep. 394.

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decision as should have been rendered there, and even if our general notions as to the application of the rule of estoppel are violated in some respects we have to disregard these notions and apply the law as it is enunciated in the Washington decisions.

I consider that the appellant has been legally condemned to pay his note and that his appeal should be dismissed with costs.

MIGNAULT J.—There is no difficulty here as to the facts. The defendant appellant, without consideration, signed at the request of one Phillips, then President of the Northern Bank and Trust Company of Seattle, State of Washington, a note for $10,000.00 in favour of the said bank, and a year later, at the request of one Collier, who had replaced Phillips as president of the bank, he signed a renewal note for a like amount, receiving from Phillips and subsequently from Collier a written acknowledgement that there was to be no liability under the note and its renewal. This note was given to the bank to create a false appearance of assets and so deceive the State bank examiner and prevent the closing up of the bank.

The law to be applied is that of the State of Washington, proved by expert witnesses. The respondent, the Bank Commissioner of that State, is entitled to sue on this note. He represents the bank and its creditors. The vital question is whether in a suit by the Bank Commissioner, acting on behalf of the creditors of the insolvent bank as well as of the bank itself, the appellant is estopped from setting up the collateral agreement with the bank that he should not be liable on this note?

I think, according to the evidence made of the law of estoppel in force in the State of Washington, and under the decisions cited by the learned trial judge,

who was referred to them by the expert witness called by the appellant for a statement of the law governing estoppel in the State of Washington, that the appellant is estopped from raising the defence of non-liability or want of consideration against the respondent.

My only doubt, at the hearing, was whether prejudice to the creditors, necessary for estoppel, had been shewn. But I think on consideration that prejudice must be assumed, for to allow an insolvent bank to continue in business by a show of fictitious assets is certainly prejudicial to all who deal with the bank and acquire rights against it. It may well be that had the appellant not given his note, the bank might have been allowed by the bank examiner to remain open for a further period, but that is merely a surmise, and too much reliance must not be placed on the statement of Moore, one of the bank examiners, that he thinks he would not have done more than he did had the appellant's note not been exhibited to him. But the intention, to which the appellant weakly allowed himself to become a party, was unquestionably to deceive the State bank examiner, and under these circumstances the decisions which, in the State of Washington, are accepted as the law and which apply to such a case the doctrine of estoppel, are consonant with the true principles of justice and fair dealing, and I think they fully support the judgment appealed from.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Craig & Parkes.*

Solicitors for the respondent: *Tiffin & Alexander.*

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*May, 3, 4.
*June 17.

STANDARD MARINE INSURANCE COMPANY (PLAINTIFF)... } APPELLANT;

AND

WHALEN PULP AND PAPER MILLS, LTD. (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Insurance—Marine—Floating policy—Facts subsequent to its execution—Insured barge—Unseaworthiness—Previous uninsurability—Non-disclosure.

The appellant issued to the respondent a floating policy of marine insurance to cover wood pulp during transportation (including loading) between certain termini. The respondent chartered a barge; while in the course of being loaded, she sank at respondent's wharf. The respondent, being bound to "declare" all shipments made and to pay premiums thereon at rates fixed by a schedule to the policy, complied with these conditions as to the above cargo and the premium was accepted by the appellant. The claim for insurance was also paid by the appellant; but, subsequently, it took an action to recover the amount on the ground that the barge was unseaworthy and uninsurable to the knowledge of the respondent at the time the cargo was declared and the premium paid.

Held, that the appellant was liable under the floating policy. The evidence did not show that the respondent had known of the unseaworthiness of the barge. As all the conditions of the policy had been complied with, the appellant would have been bound even if the fact of the uninsurability of the barge had been communicated to it so that the non-disclosure of that fact, although known by the respondent at the time the premium was paid, did not vitiate the contract.

Judgment of the Court of Appeal ([1922] 1 W.W.R. 679) affirmed.

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

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STANDARD MARINE INSURANCE CO. v. WHALEN PULP AND PAPER MILLS, LTD.

APPEAL from the Court of Appeal for British Columbia (1), reversing the judgment of Murphy J. at the trial and dismissing the appellant's action.

The appellant issued to the respondent a floating policy of marine insurance to cover wood pulp to be transported from Mill Creek, near Vancouver, "in the ship or vessel called the steamers approved, including risk of North Bend barge and 2 scows." The respondent chartered a barge or scow called the *Baramba* from the Kingsley Navigation Company, of Vancouver and sent her to Mill Creek to be loaded and while in the course of being loaded she sank at respondent's wharf. The claim for insurance was paid. After proceedings had been commenced against the Kingsley Navigation Company by the appellant, who had been subrogated to respondent's rights, for damages, the appellant alleged that they discovered that the respondent was aware of the unseaworthiness of the *Baramba* prior to loading and had not disclosed this fact to the appellant. The latter then discontinued that action and sued the respondent to recover the insurance money paid to them.

The trial judge found that the *Baramba* was unseaworthy but that the respondent did not consider her so; but he also found that the respondent did know that she had been refused insurance, and on that ground he maintained the appellant's action.

The Court of Appeal reversed the judgment of the trial judge on practically the same grounds as the Supreme Court of Canada, McPhillips, J.A., dissented, held that the material fact of the uninsurability of the barge should have been disclosed.

(1) [1922] 1 W.W.R. 679.

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STANDARD MARINE INSURANCE CO. v. WHALEN PULP AND PAPER MILLS, LTD.

E. P. Davis K.C. and *E. F. Newcombe* for the appellant.—The duty of an insurer is to make a full disclosure to the underwriter of every material fact which might, if correct, affect the contract of insurance, otherwise such contract is void.

The respondent did not disclose to the appellant the following facts known to them, i.e., that the *Baramba* was unseaworthy and that no insurance could be obtained upon her.

W. N. Tilley K.C. and *A. H. Douglas* for the respondent.—There is no duty of disclosure upon an assured at any time after the formation of a contract such as the one in this case. *Ionides* v. *The Pacific Fire and Marine Insurance Co.* (1). The *Baramba* was not unseaworthy to the knowledge of the respondent at the time of her sailing. The appellant had absolved the respondent from any duty of disclosure, if such duty had existed.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, with which I fully concur, I am of the opinion that this appeal must be dismissed with costs.

IDINGTON J.—I think for the reasons respectively assigned by the learned Chief Justice and Mr. Justice Martin in the Court of Appeal (taken as a whole, for each covers different ground) with which I entirely agree, that this appeal should be dismissed with costs throughout.

I desire, however, in deference to the argument of counsel presented here, to add a few words.

(1) [1871] L.R. 6 Q.B. 674.

The action is in principle founded upon a mistake of fact and, if well founded, might as well have been brought by resorting to the simple old fashioned count of a case for money had and received.

That was long ago declared by Lord Mansfield in the case of *Moses* v. *Macferlan* (1), to be a form of action in which the question raised is whether or not it is inequitable that the defendant should retain the money he has been paid.

The facts presented here fall far short of fulfilling such a condition and hence the money should remain where it is.

The policy was specifically amended so as to avert any reliance upon an implied warranty of seaworthiness in the vessel that might be in question. Hence the appellant's counsel frankly admits that even if unseaworthy he could not rely upon that alone.

Yet he tries to induce us to believe that if the facts come to the knowledge of the respondent that the owner of the vessel had said something tending to shew the vessel was uninsurable though in good condition and fitted for the service she was to be put to in quiet inland or almost inland waters, that if the appellant had been told this same story its agents would, beyond doubt, have rejected the risk so to be taken.

I am not quite sure that he consistently stated his proposition quite so broadly for at times and for the most part he put it as if connected with the fact of undoubted unseaworthiness.

I do think, however, that unless the story can be relied on as ground of relief quite independently of that question, there is nothing to stand upon unless fraud, which is not argued for.

(1) [1760] 2 Burr. 1005, at p. 1010.

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Idington J.

I fail to see how its connection with either seaworthiness or unseaworthiness is at all material in this case where it is not contended that respondent knew it was so and if it is so put the evidence contradicts it.

He in effect asks us to assume that appellant would, beyond doubt, have, if told the story in question, rejected the declaration made by the respondent. I certainly cannot accept that as proven.

Nor, in face of the overwhelming evidence that such barges and scows as in the service this one was engaged for, would not be insured by a large part of the insurers in the Vancouver district and by the other part only when induced by the chance of obtaining thereby other large and important business, can I believe that the appellant, doubtless well aware of that condition of the insurance business there, would have paid any attention to such a story as of any significance, any more than respondent did.

It is shewn that a very large part of the business handled by the respondent was for the long time the appellant was its insurer of pulp so carried by what were practically uninsurable scows and barges. Yet not a word of inquiry as to whether these vessels were insured or insurable in that district.

Surely, if faith is to be kept by business men, these now laying stress upon an omission which had consistently been observed throughout, as if quite permissible, cannot be permitted to be thus treacherously set up.

The only difference (if it is one, which is not clear from the evidence) in this case would seem to be that the owner of this barge, now in question, refused to accept the risk and insisted and had his way that respondent become its own insurer by agreeing to return the *Baramba* in same good condition as got.

The *Baramba* was, twice before the occasion now in question, used under more onerous conditions than existed at the loading under which she sank.

The mystery has not been solved.

The appellant got Mr. Cullington, an expert, to try to solve it. He did not. Of course he tells us how it was possible for water to have got in through certain holes, but these holes were there for all the prior trips and under as heavy loading as had taken place when she began to sink.

The *Baramba* had been duly declared to the appellant by respondent, and the accident duly reported on the 25th of February, and Mr. Cullington immediately summoned by the appellant to investigate, which he did, twice, yet no solution that appeals to one's common sense in light of the immediately preceding history or its carrying powers.

The appellant was not surprised nor did it ask any questions of the respondent as to past history or relation between the owner and respondent, and yet it agreed to pay on the 14th of April, six weeks after the curious accident, the amount found due, and nearly two years later the balance of same arising out of general average.

It seems asking too much to try to make of a most equitable principle of our law the basis for a most inequitable operation of the law.

I am, therefore, not surprised to find that the appellant has been unable to cite to us any case in which anything like what it asks us to decide was ever decided, much less decided in its way of presenting the law.

It cites case of actions by insured against insurer in which were set up a variety of defences of failure to disclose something material.

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Idington J.

What might be material and have weight in such a case is very far from being the same as setting it up by way of founding an action to recover back money voluntarily paid.

The only case it cites of that kind is the case of *Kelly* v. *Solari* (1) where, through the clearest inadvertence, the insurance company had, when paying life insurance, included the amount of a policy which had not only expired, but been marked so.

Yet in so clear a case of mistake of fact, which is the only basis for this action, as it was for that, the court had to give a second trial.

I fail to see the semblance between the two cases if we have any regard to the principles to be observed.

A mere voluntary payment, as this may have been for aught we ought to care, is not recoverable whatever the motives behind it on the part of appellant so paying.

Having referred to all the cases cited by the appellant and then turned to respondent's citations, I imagine the decisions in the judgments, especially that of Willes J. in the case of *Thompson* v. *Hopper* (2), sets forth what is still good law and a safe guide.

DUFF J.—This action is brought to recover moneys paid to the respondent by the appellant company under an insurance policy covering pulp, the policy having been issued by the appellant to the respondent.

The insurance was on

> wood pulp, * * * shipped, or to be shipped, per steamers approved or held covered from Howe Sound to Vancouver (including risk per scows &/or *North Bend* barge) &/or Seattle and thence per steamer approved or held covered to a direct port in Japan.

(1) [1841] 9 M. & W. 54.

(2) [1858] E. B. & E. 1038.

On the policy there was indorsed a memorandum by the appellant that

> seaworthiness of the vessel as between the assured and the assurers is hereby admitted.

In February, 1919, the defendant hired a craft named the *Baramba* and on the 25th of that month, while the *Baramba* was being loaded with pulp which the respondent company intended to ship to Japan by way of Vancouver, she sank and the pulp was lost. The defendant declared the cargo under the policy and on the 31st of March, 1919, paid the premium according to rates provided by the policy, and on the 14th of April, 1919, the plaintiff paid to the defendant the sum of $12,715.20, the amount of the respondent company's loss.

The appellant company having first sued the owners of the *Baramba* for breach of a warranty of seaworthiness under an assignment to them by the defendant of the defendant's rights, and the action having been discontinued upon the discovery that no such warranty could be established, the appellant company brought the action out of which the present appeal arises, alleging that at the time the insurance was effected, that is to say, when the premium was paid and accepted by the appellant, the respondent company was aware of the fact that the *Baramba* was an uninsurable craft and that this fact ought to have been disclosed to the appellant company when the cargo was declared under the policy, and that for default in this duty of disclosure the contract of insurance effected by declaration and the acceptance of the premium was voidable at the option of the appellant company. The payment of the loss in April was, the appellant company

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alleges, a payment in ignorance of facts entitling them to avoid the policy and a payment consequently which they are entitled to revoke as made under a mistake of fact.

The appellant company relied also upon another ground. It was contended that the *Baramba* when she sank was in such a state as to be utterly unfit for the carriage of cargo even from Mill Creek to Vancouver; that the respondent company was aware of this and that the loading of the cargo in such circumstances was a wrongful act, which was the real cause of the respondent company's loss, a loss for which upon the sound principle that a plaintiff is not entitled to recover reparation for damages resulting from his own wrongful act, the appellant company was not obliged to make good under its policy. As to this I think the appeal fails because I think the evidence does not establish that the officials of the respondent company can have seriously doubted that the *Baramba* was in a fit state to carry a cargo from Howe Sound to Vancouver.

The conditions of the appellant company's right to recover are of course, first, that the moneys paid in April were paid under a mistake of fact and, second, that this mistake arose from the supposition of the appellant company of the existence of a state of facts which did not exist but which if it had existed would have disentitled the respondent company to the moneys paid.

In the view I take of the appeal, the question of substance is: Were the moneys paid under a mistake of fact which was relevant in the sense above indicated? I think it sufficiently appears that the appellant company was not aware of the fact that the respondent company knew the *Baramba* to be uninsurable, although

the evidence does not convince me that the appellant company did not know the condition of the *Baramba* and the probable state of the respondent company's knowledge with respect to her condition at the time the premium was paid.

But was the plaintiff company's ignorance of the respondent company's non-disclosure of the uninsurability of the craft a relevant mistake—a mistake within the meaning of the rule? That depends upon the answer to this question: Did the fact of non-disclosure absolve them from the obligation to pay in execution of which the moneys were paid?

Now the obligation to pay under which they acted was undoubtedly the obligation of the policy. The cargo was declared under the policy; the premium was paid and accepted under the policy; the insurance moneys were paid as moneys due under the policy. That this was so in fact is on the evidence incontrovertible.

The cargo was treated as a cargo covered by the policy, notwithstanding the fact that the appellant company was fully aware of the character of the *Baramba*.

It is now said indeed that the policy did not contemplate shipment from Howe Sound in barges but only in scows, except in the case of the barge *North Bend* and that, consequently, a shipment by the *Baramba* which it is said was a barge and not a scow was not covered by the policy.

But it is to be observed not only that the character of the *Baramba* herself was known when the insurance moneys were paid; but as the appellant company admits, the appellant company had acquiesced in the

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Duff J.

use by the defendant company of barges other than the *North Bend* for shipment from Howe Sound, and that the cargoes so shipped had been treated as cargoes under the policy.

If, therefore, there was any mistake in this connection there was no mistake of fact. It could only be a mistake as to the construction of the policy and a mistake in this sense that in point of law the policy is incapable of a construction such as would cover shipment by a craft like the *Baramba*.

Now in construing a commercial contract such as this policy, it is unquestionably open to the parties to show that in the locality in which the contract is made and is to operate a word such as the word "scow" is commonly used and understood to denote craft of a particular kind. The word "scow" is not a word of fixed legal significance and therefore such evidence would be admissible. And when one reads the evidence, noting the application of the words "scow" and "barge" by witnesses who must be familiar with the uses of such terms in Vancouver and Seattle, and indeed when one refers to the pleadings, one is left without a doubt that had the contention been put forward at the early stages of the litigation it would inevitably have raised a contest on the meaning of the word "barge" in such a contract and it is therefore too late now to rely upon it.

Such being the scope of the policy, was there any legal duty of disclosure resting on the respondent company? I think there was no such duty. The contract of insurance had been effected, the subject matter had been ascertained, the seaworthiness had been admitted of all craft within the contemplation of it; and the risk attached as soon as the conditions of the policy were complied with. Mr. Davis' con-

tention as to the premium must, I think, be rejected; the premium was fixed by the policy itself. The case cited by the Chief Justice in the court below, *Ionides* v. *Pacific Fire and Marine Ins. Co.* (1), seems to be in point and is conclusive.

I think the appeal fails and should be dismissed with costs.

ANGLIN J.—The floating insurance in question covered any and all "declared" cargoes of pulp belonging to the respondent during transportation (including loading) between certain termini. The respondent was bound to "declare" all such shipments and to pay premiums thereon at rates fixed by a schedule to the policy and, as I read the policy, the appellant was obliged to insure the respondent, at the appropriate rate so fixed, against loss of, or injury to, any such cargo so declared. In the absence of fraud upon the policy in the making of the declaration (as there would have been in declaring the shipment by the *Baramba* if the respondent had known of her unseaworthiness, *Thompson* v. *Hopper* (2)), the appellant could not reject the insurance of any declared shipment however unseaworthy the craft on which it was, or was to be, transported from Mill Creek to an "approved" steamship either at Vancouver or Seattle, as the case might be, provided such craft was a scow or the *North Bend* barge. *Ionides v. Pacific Fire and Marine Insurance Co.* (3). The practice of allowing the plaintiff to use any scow or barge it chose for the transportation from Mill Creek to the steamship's side seems to have been well established.

(1) L.R. 6 Q.B. 674 at p. 682.
(2) [1856] 6 E. & B. 172, 937; [1858] E.B & E. 1038.
(3) L.R. 6 Q.B. 674 at p. 682; L. R. 7 Q.B. 517.

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Anglin J.

The shipment in respect of which the loss occurred was undoubtedly to be carried by the *Baramba* from Mill Creek to Vancouver. The rate of premium for pulp shipped via Vancouver was fixed in the schedule to the policy at 5-8% from Howe Sound to Japan whether a scow or the barge *North Bend*—or, according to the practice, any other barge—was employed to transport the cargo from Mill Creek to Vancouver. By some error—probably due to the date having been given as the 17th of February instead of the 25th—the shipment was treated by the appellant as having been intended to be carried via Seattle instead of via Vancouver, and consequently the rate of premium was inserted by it at 1 1-8% instead of 5-8%. If, as I think, the appellant had no option to reject the insurance of the cargo in question because of any exception that it might have taken, when the respondent's declaration was communicated, to the use of the *Baramba*, the rate of premium being also fixed, as it was, it is difficult to appreciate the materiality of non-disclosure of the fact that the *Baramba* could not be insured. *Ionides* v. *Pender* (1); *Ionides* v. *Pacific Fire and Marine Insurance Co.* (2).

The evidence fully warranted the findings of the learned trial judge that the *Baramba* was unseaworthy, but that that fact was not known to the respondent, and also that the respondent was aware that the *Baramba* could not be insured when it was last hired. That her unseaworthiness was the cause of her sinking was, I think, the only inference reasonably open on the evidence. The voyage from Mill Creek to Vancouver on inland waters involved very slight risk to

(1) [1874] L.R. 9 Q.B. 531. (2) L.R. 6 Q.B. 674, at p. 685.

the *Baramba*. The respondent readily assumed that risk and itself became the insurer of it to her owners. It was no doubt believed that the Baramba would make the trip in perfect safety.

Upon this state of facts the declaration of the cargo intended to be sent by the *Baramba* from Mill Creek to Vancouver was not such a fraud on the policy as would avoid the risk. *Thompson* v. *Hopper* (1).

The loss was not paid by the plaintiff under mistake as to any facts which, if known, would have afforded it a valid defence to the respondent's claim under the policy. The existence of such facts has not been shown.

I would for these reasons uphold the judgment appealed from and dismiss this appeal with costs.

BRODEUR J.—I concur with my brother Idington.

MIGNAULT J.—I concur in the judgment dismissing this appeal.

The appellant had insured the defendant's shipments under a floating policy. While a shipment of pulp was being loaded on a barge called The *Baramba* the barge sank and the loss was incurred. In due time the appellant paid this loss to the respondent, but subsequently took an action to recover back the money paid, alleging that the payment had been made in error on substantially two grounds: 1, that the barge was unseaworthy to the knowledge of the respondent; 2, that no insurance could be obtained on this barge, and that the respondent although aware of this fact had failed to disclose it to the appellant.

(1) 6 E. & B. 172, 937; [1858] E.B. & E. 1038.

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Mignault J.

The learned trial judge found that the barge was unseaworthy, but that the respondent had no knowledge of its unseaworthiness. He, however, came to the conclusion that the respondent company knew that the barge could not be insured and for that reason he rendered judgment in favour of the appellant.

The Court of Appeal set aside this judgment agreeing with the trial court that, although the barge was unseaworthy, the respondent was not aware of it, which was shewn by the fact that the respondent had undertaken to return the barge in good condition to its owners. And as to the non-disclosure of the fact that the barge had been refused insurance, the learned Chief Justice of British Columbia did not consider that non-disclosure of such a fact coming to the knowledge of the insured only after a policy of this description, i.e., a ship or ships policy, was issued, would vitiate the contract. Mr. Justice McPhillips dissented from the judgment of the Court of Appeal.

Had the respondent been aware of the unseaworthiness of The *Baramba*, the concealment of this fact, when the respondent declared its shipment to the appellant, would have amounted to fraud. But no such knowledge is proved. No doubt the respondent was aware that the barge had been refused insurance. It is, however, suggested that insurance companies as a rule refuse to insure barges. And unless refusal of insurance on this barge brought home to the respondent the knowledge that it was unseaworthy, and that has not been shewn, I do not think that refusal of insurance for other reasons than unseaworthiness, for instance, because barges in general are not considered by insurers as desirable risks (a fact which the appellant

company must have known), was something which under the policy in question should have been disclosed to the insurer under pain of forfeiture of the right to claim the insurance.

On the question whether The *Baramba* came within the description of the policy, this was a fact which could have been ascertained by the appellant before it paid the insurance. I am therefore not impressed by the contention that it was not a "scow" within the meaning of the policy.

I would not disturb the judgment appealed from.

Appeal dismissed with costs.

Solicitors for the appellant: *Davis & Company.*

Solicitors for the respondent: *Bowser, Reid, Wallbridge, Douglas & Gibson.*

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*May 8.
*June 17.

CANADIAN GOVERNMENT MERCHANT MARINE, LIMITED. (DEFENDANT) } APPELLANT;

AND

CANADIAN TRADING COMPANY (PLAINTIFF) } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Affreightment—Ships named under construction—Delay in—completion—Impossibility of performance—Right of shipper to damages—Whether condition as to completion implied—Express condition as to continuance of service.

The respondent, in March, 1920, entered into two contracts of affreightment with the appellant for loading with timber two named ships and carrying it from Vancouver to Australia, the shipments to be made in early April and in April or May respectively. The ships were, to the knowledge of the respondent, under construction for the appellant at the time of the agreements. The contracts contained the following clause: "This contract * * * is entered into conditional upon the continuance of the steamship company's service and the sailings of its steamers between the ports named therein." Owing, apparently, to a dispute between the ship-builders and the appellant a delay occurred in the completion and delivery of the ships, which were not ready to sail in the named months. The respondent cancelled the contracts of affreightment and sued to recover damages.

Held, that the respondent was entitled to succeed. The above quoted provision covers the possibility of the abandonment of the appellant company's undertaking and the complete cessation of its service "between the ports named" and does not cover a temporary suspension of sailing not caused by either of the contingencies mentioned in the clause. Moreover, the principle of *Taylor* v. *Caldwell* (3 B. & S. 826), as to impossibility of performance is not applicable to this case; the contracts cannot be held to be subject to an implied condition excusing performance by the appellant if the ships were not fit for sailing during the months specified through no fault of the appellant.

Judgment of the Court of Appeal ([1922] 1 W.W.R. 662) affirmed.

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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CANADIAN GOVERNMENT MERCHANT MARINE, LTD. v. CANADIAN TRADING CO.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Gregory J., and maintaining the respondent's action for damages for breach of two contracts of affreightment.

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

D. L. McCarthy K.C. for the appellant.—The contracts sued upon were not absolute, in the sense of binding the appellant to produce the named ships in any event, but the obligations of the appellant were expressly made conditional upon the actual sailing of the contract ships.

The appellant's obligations under the contracts were subject to an implied condition, that if without any default on the part of the appellant, the contract ships were not in existence when the date arrived for the performance of the contracts, then the appellant was to be excused from performance. *Taylor* v. *Caldwell* (2); *Roche* v. *Johnson* (3); *Howell* v. *Coupland* (4); *Kerrigan* v. *Harrison*(5); *Bank Line Limited* v. *Arthur Capel & Co.*(6).

E. P. Davis K.C. for the respondent.—The appellant was not excused from performance by the express conditions of the contracts; *Elderslie Steamship Co.* v. *Borthwick* (7).

No condition should be implied in the contracts relieving the appellant from responsibility for not performing the contracts. *Baily* v. *De Crespigny* (8); *Krell* v. *Henry* (9); *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (10).

(1) [1922] 1 W.W.R. 662.
(2) [1863] 3 B. & S. 826.
(3) [1916] 53 Can. S.C.R. 18.
(4) [1876] 1 Q.B.D. 258.
(5) [1921] 62 Can. S.C.R. 374.
(6) [1919] A.C. 435.
(7) [1905] A.C. 93.
(8) [1869] L.R. 4 Q.B. 180.
(9) [1903] 2 K.B. 740.
(10) [1916] 2 A.C. 397.

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CANADIAN GOVERNMENT MERCHANT MARINE, LTD. v. CANADIAN TRADING CO.

Idington J.

IDINGTON J.—The respondent sued to recover damages for breaches of two contracts which were respectively made on the 19th and 24th of March, 1920, by the appellant to carry lumber from Vancouver to Australia of which that quantity named in the earlier contract was to be received early in April of said year, and that in the later contract was to be received in April or May of same year.

The respondent incurred considerable preparatory expense for the purpose of performing, if permitted, its part of the contract, by assembling the lumber to be re-loaded, and lost part of a bargain it had made for the sale and delivery of said lumber in Australia, but the appellant failed to produce the vessels named, or either of them, to receive the said lumber.

The defence set up is that the vessels were not finished in time and that the respondent knew when these contracts were entered into that they had not been quite finished.

It relies on the following clause in each of the contracts:

> This contract is not transferable and is entered into conditional upon the continuance of the steamship company's service and the sailing of its steamers between the ports named herein. If, at any time, in the judgment of the steamship company or its authorized agents, conditions of war or hostilities, actual or threatened, are such as to make it unsafe or imprudent for its vessels to sail, or if the vessels of the company shall be taken, sold, or chartered for the use of any Government, or in the event of loss of, or damage to, any of the vessels of the company, or vessels chartered by them, resulting from actions of an enemy, perils of the sea, or other cause, the steamship company may discontinue or curtail its service; and in that event the steamship company shall be relieved from any liability hereunder, except that if its service be only curtailed the shipper shall be entitled to the carriage of a proportionate part of this contract.

It contends that under the first sentence I quote it was, under the circumstance, discharged from all liability.

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Idington J.

I cannot so construe the said conditions, nor can I read the first sentence as at all intended to excuse the appellant unless the failure to produce either of the vessels named was the result of its having fallen within some one or other of the conditions set forth in the second sentence above quoted, which is not pretended to have been the case.

On the contrary, the only excuse given at the trial was the failure, through a petty squabble between the contractor who had the contract and those who had let the contract to him, about something in regard to which he ultimately yielded.

A further pretence is set up that a strike, or threatened strike, was to blame in part for the delay.

Resting upon this failure of the contractor the appellant invokes the doctrine of impossibility upon which the case of *Taylor* v. *Caldwell* (1) was decided.

I do not think that can be made applicable herein unless we are to so extend the operation of the doctrine as to render almost any and every conceivable contract of little value.

And especially so does that appear to me to be the case when each of the contracts here does absolutely and imperatively provide the implied undertaking on the part of said appellant that unless upon the happening of any of the said events named the vessel named would be available at the time named. And yet at the same time that it provides for its protection the conditions above set forth, it fails to anticipate the possibility of so common a condition of things as a strike against which it is usual to provide if such protection desired.

The appeal, I think, fails and should be dismissed with costs.

(1) 3 B. & S. 826, at p. 833.

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Idington J.

But I see the Chief Justice and Mr. Justice Galliher seem to think assessment of damages needed, yet the formal judgment indicates the contrary.

If any error that had better be spoken to.

DUFF J.—I think the contention of the respondent company as to the construction of the contract must be given effect to. It is a commercial contract. Any plain man reading the second paragraph would read the first and second sentences together and treat the first as subject to the qualifications contained in the second. The distinction between constitutive conditions and resolutory conditions upon which the appellant relies is sadly out of place here. In a practical business sense, if the sweeping scope which the appellant gives to the first sentence is conceded, then the second sentence, or nearly the whole of it, is useless and out of place. In such circumstances it is legitimate to restrict the generality of the first sentence by reading the two together. And it is sufficient to reach the conclusion that such may be the proper construction of the document. An ambiguous document is no protection, as Lord Macnaghten said. *See Nelson* v. *Nelson* (1).

The second ground of appeal relied upon is that the principle of *Taylor* v. *Caldwell* (2), and analogous cases applies and that in conformity with this principle the contracts should have been held to be subject to an implied condition that the ships should be in existence and fit for sailing at the time when the date of sailing arrived and if that fail through no fault of the appellants, the appellants were to be excused from performance.

(1) [1908] A.C. 16 at p. 20. (2) 3 B. & S. 826.

The principle of *Taylor* v. *Caldwell* (1) has unquestionably been extended to cases in which parties having entered into a contract in terms unqualified it is found when the time for performance arrives, that a state of things contemplated by both parties as essential to performance according to the true intent of both of them fails to exist. *Krell* v. *Heney* (2); *Chandler* v. *Webster* (3). For the purpose of deciding whether a particular case falls within the principle you must consider the nature of the contract and the circumstances in which it was made in order to see from the nature of the contract whether the parties must have made their bargain on the footing that a particular thing or state of facts should be in existence when the time for performance should occur. *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (4). And if reasonable persons situated as the parties were must have agreed that the promissor's contractual obligations should come to an end if that state of circumstances should not exist then a term to that effect may be implied. *Dahl* v. *Nelson* (5). But it is most important to remember that no such term should be implied when it is possible to hold that reasonable men could have contemplated the taking the risk of the circumstances being what they in fact proved to be when the time for performance arrived. *Scottish Navigation Co.* v. *Souter* (6).

The doctrine of English law is that generally a promissor except to the extent to which his promise is qualified warrants his ability to perform it and this notwithstanding he may thereby make himself answerable for the conduct of other persons.

(1) 3 B. & S. 826.
(2) [1903[2 K. B. 740.
(3) [1904] 1 K.B. 493.
(4) [1916] 2 A.C. 397.
(5) [1880] 6 A.C. 38 at p. 59.
(6) [1917] 1 K.B. 222, at p. 249.

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Duff J.

The seeming rigour of this doctrine is mitigated in the case of commercial contracts by the application of the principle above referred to which rests upon the assumption, as Lord Watson said in *Dahl* v. *Nelson* (1), that in relation to possibilities in the contemplation of the contract but not actually present to the minds of the parties, the parties intended to stipulate for what would be fair and reasonable having regard to their mutual interests and to the main objects of the contract.

The contracts were made on the 19th of March and provided for shipment at the end of April or the beginning of May. Is there anything in the circumstances affording a ground for saying that the agents of appellant and of the respondent as reasonable men could not have contracted on the footing that the appellants should assume the risk of what subsequently happened?

It is important to remember that there is no evidence to indicate that the delay was due to any extraordinary occurrence, to anything outside the ordinary course of events. There is a suggestion of a strike and there is a suggestion of a dispute between the Government and the contractors who were building the ships. The respondents were not aware of the precise relations between the appellants and the contractors and were entitled to assume that the contractors in entering into the contract were duly taking into account the possibilities incidental to those relations. There was nothing in the facts known to them making it unreasonable from the respondent's point of view that they should expect an undertaking as touching the date of sailing unqualified, at all events, in respect of any of the matters

(1) 6 A.C. 38 at p. 59.

which have been suggested as accounting for the appellants' default. Real impossibility of performance arising from destruction of the ships by fire, for example, would have presented a different case. There is nothing in the evidence inconsistent with the hypothesis that the impossibility which no doubt did arise at the last moment was due to lack of energy on part of the Government or to supineness or indifference on part of the appellants. Impossibility arising from such causes is not the impossibility contemplated by the case of *Taylor* v. *Caldwell* (1). See *Hick* v. *Raymond* (2).

The appeal should be dismissed with costs.

ANGLIN J.—The Court of Appeal, reversing the judgment of Gregory J., who dismissed the action, awarded the plaintiff $7,701.93 for breach of a contract of affreightment.

The defendant failed to provide two vessels in which it had contracted to carry lumber of the plaintiff from British Columbia to Australian ports. The contractor for the construction of the vessels delayed delivery of them to the owner—the Dominion Government—which was consequently unable to turn them over to the defendant, an operating company.

Two distinct defences and grounds of appeal are preferred:—(a) that by an express term of each of the two contracts of affreightment performance of it by the defendant is made contingent upon the named ship sailing on the contract voyage; (b) that, if performance was not excused by the express term relied upon, it was an implied condition of the defendant's obligation that the named vessels should be available for the service.

(1) 3 B. & S. 826.
(2) [1893] A.C. 22 at 37.

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Anglin J.

(a) The express provision on which the defendant relies reads as follows:

> This contract * * * is entered into conditional upon the continuance of the steamship company's service and the sailings of its steamers between the ports named herein.

I agree with the construction put on this clause by Mr. Davis that

> conditional upon the continuance of the steamship company's service

covers the possibility of the abandonment of the company's undertaking and the complete cessation of its service. If the word "service" were qualified by the phrase "between the ports named herein," it would mean the cessation of such service between those ports. I incline however to the former construction. This member of the clause, in my opinion, is not open to the view that it covers any merely temporary interruption in the service such as that which actually occurred. The word used is "continuance" and not "continuity" which the construction urged by the defendant would require.

> Conditional upon the continuance * * * of the sailings of its steamers between the ports named

provides, I think, for the service between these ports being abandoned although the company's vessels should be placed on other routes. The phrase "between the ports named" gives the cue to the scope and purpose of this member of the provision. Mr. Justice Galliher very succinctly states the purview of the two members of the clause now under consideration in these words:

> I think it simply means that if the company went out of business or ceased sailing vessels between these ports, then the contract was off.

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Neither member of the clause relates merely to an interruption in the continuity of the company's service between Canada and Australia due to the vessel named in either contract being temporarily unavailable. I am quite satisfied that an omission of a schedule trip or trips due to that fact is not within the purview of the express provision of the contracts on which the defendant relies.

(b) Neither, in my opinion, do the circumstances admit of the implication of a term excusing performance because the Government failed to deliver to the defendant the two ships for carriage by which the contracts were made.

In addition to the stipulation already mentioned, each of the contracts expressly provides that performance by the defendant shall be excused in several events—loss of, or damage to, its vessels, suspension of service owing to hostilities actual or threatened, and requisition of its vessels by the government. It may be that the parties should be held in this enumeration to have exhausted the conditions on which the defendant was to be excused for not fulfilling its contract; *Horlock* v. *Beal* (1); but see *Nickoll and Knight* v. *Ashton, Edridge & Co.* (2).

It was known to the contracting parties that the vessels in question were still under construction, although nearly completed when the contracts were made. The following statement of the law by Hannen J., in *Baily* v. *De Crespigny* (3), is generally recognized as authoritative:

(1) [1916] 1 A.C.486 at pp. 496, 506.
(2) [1901] 2 K.B. 126, at pp. 134, 140.
(3) L.R. 4 Q.B. 180 at p. 185.

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We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor.

Subject to certain expressed conditions, none of which covers this case, the defendant bound itself by contracts absolute in form to transport the plaintiff's goods by named vessels at a stated time. I am not disposed to take the view that this should be regarded as a case of

impossibility arising from any act or default of the promissor.

But I find it difficult to conceive that delay in the delivery of the vessels was not a contingency which

was or might have been anticipated and guarded against in the contract—

that it was an event that cannot reasonably be said to have been in the contemplation of the parties at the date of the contract. *Krell* v. *Henry* (1). If it was, having failed to provide for it, a term containing an additional qualification of the defendant's contractual obligation, in order to cover default due to non-availability of the vessels due to this cause, should not be implied. Such a term will not be implied merely because the court may think it reasonable, but only if the court think it necessarily implied in the nature of the contract the parties have made. *Lazarus* v. *Cairn Line of Steamships* (2); *Hamlyn* v. *Wood* (3).

(1) [1903] 2 K.B. 740 at p. 751. (2) [1912] 106 L.T. 378.
(3) [1891] 2 Q.B. 488 at p. 491-2.

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If, on the other hand, delay in delivery of the vessels was a contingency which neither was in fact, nor might have been, anticipated, the court should not imply the term that the contracts will thereby be put an end to without inquiring what the parties, as reasonable men, would presumably have agreed upon had that contingency been present to their minds. *Dahl* v. *Nelson Donkin & Co* (1); *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2). I find it difficult to believe that the plaintiff would have assented, or could have been expected to assent, to such a term as the defendant asks to have implied. Why should the plaintiff be expected to assume the entire risk of the consequences of the defendant's default, however innocent? The case, in my opinion, is not one for the application of the doctrine of *Taylor* v. *Caldwell* (3), and kindred authorities relied upon.

I would for these reasons dismiss this appeal.

BRODEUR J.—The Canadian Trading Company, in March, 1920, entered into two contracts of affreightment with the Canadian Government Marine for loading with timber two ships of the latter called the *Inventor* and the *Prospector* plying between Canada and Australia. The shipment was to be made in early April 1920 on the *Inventor* and in April or May 1920 on the *Prospector*.

When the contracts were made, the ships were under construction and should have been quickly completed. But for reasons which are not clearly shown in the evidence, they were not delivered to the appellant company to permit the Canadian Trading Company to load its timber at the time stipulated in the contracts.

(1) 6 A.C. 38, at p. 59. (2) [1916] 2 A.C. 397 at p. 404.
(3) 3 B. & S. 826.

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The Canadian Trading Company now claims damages from the Canadian Merchant Marine for not having fulfilled its obligation.

The defendant company pleaded that the contracts were not absolute; that it was not bound to produce the ships in any event; but that its obligation was made with the express or implied condition that the actual sailing of the contract ships should take place.

The defendant appellant company relies on a clause in the contract which declares that

> This contract is not transferable and is entered into conditional upon the continuance of the steamship company's service and the sailing of its steamers between the ports named therein.

These provisions of the contract were embodied in the defendant's own form and they are evidently put in for its own protection. They should not be extended and should be construed in their ordinary meaning.

The breach of contract which is charged upon the company defendant has reference to delays in sailing. The contracts contemplated in the condition above quoted a cessation of the service and the discontinuance of the sailing. No such thing has occurred. The company continued its service and the sailings went on without any real interruption.

The condition which I quoted is formed of two sentences which should be read together. They carry out the same idea, viz., a cessation of the appellant's service and not a merely temporary one. *Elsderlie Steamship Co.* v. *Borthwick* (1).

The appellant company contends that there was impossibility on its part to carry out its contract and that there was an implied condition relieving it from responsibility for the performing of the contract.

(1) [1905] A. C. 93.

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This defence of impossibility rests on an implied condition. The case of *Taylor* v. *Caldwell* (1), is to the effect that if the impossibility arises subsequently to the making of the contract, it will be no excuse if in its nature the performance might have been possible. In this case there is no evidence that the performance was impossible. The vessel could have been delivered on time and nothing in the evidence shows the impossibility to which reference is made in *Taylor* v. *Caldwell* (1).

Besides the circumstances causing the impossibility could have been very easily foreseen when the contract was made. Many conditions were stipulated and the strike which is alleged as cause of the delay likely existed at the time the contract was made and so provision could have been made in the contract. The ships at the time the contract was made were already late in delivery and in the light of the following decisions, *Lebeaupin* v. *Crispin* (2), *Baily* v. *De-Crespigny* (3), *Krell* v *Henry* (4), I come to the conclusion that there was no implied condition which would relieve the appellant company from liability.

Under these circumstances the appeal should be dismissed with costs.

MIGNAULT J.—The two contracts in question, for the breach of which the appellant was declared liable by the Court of Appeal of British Columbia, were for the shipment of lumber by two named ships, the *Canadian Inventor* and the *Canadian Prospector*, then, to the knowledge of the parties, under construction for the Canadian Government. At the time of the contracts the vessels were nearing com-

(1) 3 B. & S. 826.
(2) [1920] 2 K.B. 714.
(3) L.R. 4 K.B. 180.
(4) [1903] 2 K.B. 740

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pletion and no doubt the parties thought that they would be ready to take on their cargo and sail at the time mentioned in the contracts. However trouble ensued between the Government and the ship builders and the vessels were not ready in time. The respondent sues to recover damages by reason of the appellant's failure to have these ships ready for loading.

The defence was that the appellant was relieved from liability under the conditions of the contracts which said that the contracts were "conditional upon the continuance of the steamship company's service and the sailing of its steamers between the ports named." The contracts also stated that if, at any time, in the judgment of the steamship company, or its authorized agents, conditions of war or hostilities, actual or threatened, were such as to make it unsafe or imprudent for its vessels to sail, or if the vessels of the company should be taken, sold or chartered for the use of any government, or in the event of loss of, or damage to, any of the vessels of the company, or vessels chartered by them, resulting from actions of an enemy, perils of the sea, or other cause, the steamship company might discontinue or curtail its service; and in that event the company should be free from any liability, except that if its service were only curtailed, the shipper would be entitled to the carriage of a proportional part of the contract.

The appellant relies on the first condition as to the continuance of the steamship company's service and the sailing of its steamers between the ports named, and, in the alternative, on an alleged implied condition that if, without any default on its part, the contract ships were not in existence when the date arrived for the performance of the contract, then the appellant was to be excused from performance.

As to the express condition, the learned trial judge was of opinion that it relieved the appellant from liability, but his judgment was set aside by the Court of Appeal. After much consideration, I do not think that this condition can be said to apply to the contingency which happened. It expressly refers to a discontinuance of the company's service and sailing of its steamers between the ports named. This would not comprise a temporary suspension of sailing other than one caused by one of the contingencies mentioned in the rest of the clause, conditions of war, etc. Much less would it include the failure under these contracts to have the ship ready at the sailing time, for if it was known to both parties that it was nearing completion, the appellant certainly considered that it would be completed in time, and the non-completion of the ship or its failure to be ready was surely not meant by the parties to be guarded against by the general clause as to discontinuance of service. Such a contingency as happened could have been specially provided for and I do not think that it is now open to the appellant to say that it was covered by a general clause like the one in question. And it certainly does not come within the language of this clause reasonably construed.

Whether the implied condition relied on by the appellant relieves it from liability is a question of much nicety. Mr. Justice Blackburn, in *Taylor* v. *Caldwell* (1), laid down a rule which is accepted as settled law. He said:

> Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering

(1) 3 B. & S. 826.

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into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

Blackburn J., it is interesting to note, referred to the civil law and to Pothier, *Obligations*, No. 668, as laying down the rule that the debtor *corporis certi* is freed from the obligation when the thing has perished neither by his act, nor by his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.

It seems to me—and that is certainly the rule of the civil law as I understand it—that the contingency which relieves a party from performing a contract on the ground of impossibility of performance, is an unforeseen event. I take it that this is the rule laid down by Hannen J., in *Baily* v. *DeCrespigny* (1):

> There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was, or might have been, anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor. But, where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.

So that if the event which causes the impossibility could have been anticipated and guarded against in the contract, the party in default cannot claim relief because it has happened.

(1) L.R. 4 Q.B. 180.

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The case of *Nickoll and Knight* v. *Ashton, Edridge & Co.* (1), is an interesting one and I have derived much benefit from the consideration I have given to it. There a cargo had been sold to be shipped by the steamship *Orlando* at an Egyptian port during January, 1900, and to be delivered to the plaintiffs in the United Kingdom. The contract provided that, in case of prohibition of export, blockade or hostilities preventing shipment, the contract or any unfulfilled part should be cancelled. In December, 1899, the *Orlando* was stranded through perils of the sea without default on the defendant's part, and was so much damaged as to render it impossible for her to arrive at the port of loading in time to load during January. It was held by A. L. Smith M.R., and Romer L. J., Vaughan Williams L. J. dissenting, that the contract should be construed as subject to an implied condition that if, at the time for its performance, the *Orlando* should, without default on the defendant's part, have ceased to exist as a ship fit for the purpose of shipping the cargo, the contract should be treated as at an end.

This case may be distinguished from the one at bar in that the stranding of a particular ship can reasonably be said to be an unforeseen event, for although any ship is exposed to the perils of the sea the stranding of a particular ship mentioned in a contract, so as to prevent it from taking on its cargo at the specified time, is certainly something which can be said to be unforeseen. But here the appellant undertook to carry a cargo on a ship nearing completion. It could certainly have been foreseen that something might occur in the ship yard, especially in these days of labour troubles, to delay completion, and by making

(1) [1901] 2 K. B. 126.

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an absolute contract without providing against the contingency of non-completion in time, the appellant, in my opinion, assumed the risk of this contingency. The respondent prepared all its cargo for the ship in time and would be subject to considerable loss if the appellant were relieved from the consequences of non-performance. Such a condition, if it had been stipulated, might not have been accepted by the respondent, which possibly would have preferred to ship its lumber through another steamship company. And I think that the risk of such a contingency cannot be imposed on the respondent as an implied condition now that the loss has occurred.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Coburn & Duncan.*

HARRY H. ELFORD (DEFENDANT) . . APPELLANT;

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*May 15, 16.
*June 17.

AND

MERCIE A. ELFORD (PLAINTIFF) . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Husband and wife—Fraudulent conveyance—Property in wife's name to defeat creditors—Principal and agent—Power of attorney to husband—Transfer by attorney to himself—Right of wife to relief.

A husband (the appellant) had certain property put in his wife's (the respondent's) name, with her knowledge, for the purpose of defeating his creditors. He held a general power of attorney from her. A quarrel having occurred between them the husband registered this power and, as his wife's attorney, he had the property transferred into his own name. The wife sued to have the property re-transferred to her.

Held, Idington and Brodeur JJ. dissenting, that the wife was entitled to have the transfer to her husband set aside. In order to succeed, she had only to invoke the illegal act of her husband in executing as her attorney the transfer of the property to himself and she was not obliged to disclose the alleged fraud connected with her own title; on the contrary, the husband, in order to succeed in his defence, had to invoke such fraudulent arrangement made to defeat his creditors.

Judgment of the Court of Appeal ([1921] 2 W.W.R. 963) affirmed, Idington and Brodeur JJ. dissented.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Taylor J., at the trial (2) and maintaining the respondent's action.

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

(1) [1921] 2 N.W.R. 963. (2) [1921] 1 W.W.R. 341.

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

John Feinstein for the appellant.

R. Hartney for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin with which I fully concur, I would dismiss this appeal with costs.

IDINGTON J. (dissenting)—This is an action between husband and wife who during twelve or thirteen years had resorted to various devices to defeat the creditors of the husband who pretended to act for the wife and acting under powers of attorney from her to preserve for him or her the fruits of his labour and enterprise in fraud of his creditors.

But for his course of so dealing having been properly held by the learned trial judge a legal barrier in his way he was entitled to claim that his wife was his trustee of the properties in question herein.

The correct inference to be drawn from the history of the dealings between them is that in her giving the power of attorney in question it was given for the sole purposes of continuing to protect his property from and in fraud of his creditors.

She herein complains of his unexpected abuse of such power of attorney in conveying the property to himself.

I cannot think that a suitor depending upon an instrument so designed to perpetuate a fraudulent course of dealing, and thus tainted with illegality, can properly ask the court to protect her from any abuse of such power. She has already had the benefit

of the application of such a principle of law by being freed from any liability to account to her husband by reason of the trusteeship by which she would have had to account to him but for the whole being tainted with illegality.

I do not see that she can properly complain after invoking the principle to defeat his claim of it being in turn applied to the residue of their illegal undertakings.

The principle upon which the decision of the Court proceeded in the case of *Scheuerman* v. *Scheuerman* (1), works both ways.

Notwithstanding her illegal acquisition of the properties, I recognize that if she had given a power of attorney to a stranger to sell and dispose of same and he had dealt with them as the husband has done, she might have been entitled to relief by way of having him so empowered declared her trustee, quite independently of the abstruse questions arising under the "Land Titles Act".

In my view of the case I need not either try to resolve that question or deal with many others discussed here and below.

But let us suppose that power of attorney to her husband had expressly provided that he might convey thereby to himself, and she had applied to the court to have such an instrument rectified because it had been inserted by mistake, would she have been entitled to any such rectification of an instrument so tainted with fraudulent purpose as I think this was?

With some confidence I submit not, and that all that which is involved herein is essentially of that character.

(1) [1915] 52 Can. S.C.R. 625.

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It was mentioned during the course of the argument that the creditors, or some of them, had issued executions and registered judgments against the lands in question.

Nothing I have said herein is to be taken (even if concurred in by others of my brother judges) as in anyway deciding the effect thereof in light of the legal puzzle arising out of the registration of the conveyance by the appellant to himself having been recognized by the registrar.

The creditors, of course, may, until that is solved, have a mesaure of protection meanwhile.

I would allow the appeal herein with costs here and below and restore the judgment of the learned trial judge.

DUFF J.—This appeal appears to present little difficulty once the facts are understood. The respondent was the registered owner of the lands under dispute. She had given her husband a power of attorney conferring upon him a wide general authority to deal with them, but this general authority did not embrace the power to execute a conveyance in favour of the agent himself. Any attempt to acquire a title by such a use of the authority vested in him would be a fraud upon the power. *Prima facie,* therefore, the wife is entitled to have the husband declared trustee for her.

The question therefore arises whether the husband can displace this *prima facie* right of the wife's by alleging that she held her title to the property for his benefit, but for the purpose of protecting it from his creditors. In other words, whether her title was acquired in pursuance of an unlawful design and plan to defeat the creditors of the husband.

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It is quite clear, I think, that such a defence is not competent to the husband. As Lord Hardwick said in *Cottington* v. *Fletcher* (1), as long ago as 1740 such "fraudulent conveyances" are "absolute against the grantor." It is quite clear that the husband would not be heard in an action to impeach the wife's title brought by himself to set up a claim based upon an arrangement of the character he now seeks to rely upon. If authority were needed for such a proposition it would be found in the judgment of Lord Selborne in *Ayerst* v. *Jenkins* (2), and it is equally clear that the wife is entitled to assert her rights as owner, that is to say the rights incidental to her ownership against the husband as well as against a stranger, so long as it is not necessary for the purposes of her case to rely upon the fraudulent arrangement with her husband. The principle is illustrated admirably in the judgment of Mr. Justice Maclennan in *Hager* v. *O'Neil* (3), and in the decision of the Court of Appeal in *Gordon* v. *Chief Commissioner of Metropolitan Police* (4). The appeal should be dismissed with costs.

ANGLIN J.—I would dismiss this appeal.

The transfer to himself executed by the defendant as his wife's attorney transgresses one of the most elementary principles of the law of agency. It was *ex facie* void and should not have been registered.

In order to succeed the plaintiff merely requires to establish that in executing the transfer to himself of the property in question, which stood registered in her name, her husband committed a fraud on the power of attorney from her under which he professed

(1) [1740] 2 Atk. 155.
(2) [1872] L. R. 16 Eq. 275.
(3) [1891] 20 Ont. App. R. 198 at p. 218.
(4) [1910] 2 K.B. 1080.

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to act. She does not have to disclose the alleged intent to defraud her husband's creditors in which her own title to the land is said to have originated, or to invoke any of the transactions tainted by that fraud. *Simpson* v *Bloss* (1); *Taylor* v. *Chester* (2); *Clark* v. *Hagar* (3). It is the defendant who brings that aspect of the matter before the court in his effort to retain the fruits of his abuse of his position as his wife's attorney; and to him the maxim applies *memo allegans turpitudinem suam est audiendus. Montefiori v. Montefiori* (4).

Neither does the plaintiff seek any equitable relief. The equitable maxim invoked by the defendant—"he who comes into equity must come with clean hands"—is therefore inapplicable.

Nor did the defendant by making an unauthorized and illegal use of his wife's power of attorney put himself in a position to assert rights to property which the court would not have allowed him to prefer had that property remained registered in the plaintiff's name, as it was prior to his wrongful attempt to vest the legal title to it in himself.

The rights of the husband's creditors are not affected by this litigation, to which they are not parties. The confessedly guilty defendant cannot now shelter himself under the rights of his creditors whom he sought to defraud—if indeed the creditors would be entitled to claim under the void transfer here in question.

BRODEUR J. (dissenting)—This is a very sad case. This is an action between husband and wife. The husband used his wife's name to shield himself

(1) [1816] 7 Taunt, 246.
(2) [1869] L.R. 4 Q.B. 309, at p. 314.
(3) [1893] 22 Can. S.C.R. 510, at p. 525; 20 Ont. App. R. 198, at pp. 221-2.
(4) [1762] I W. Bl. 363.

against the actions of his creditors. The properties acquired were put in his wife's name. All this was done by the husband himself under a power of attorney which he had from his wife. They both conspired together to defraud his creditors.

It has been found by the trial judge that the husband most brazenly lied in a suit instituted by one of his creditors to gain an advantage for his wife and himself; and that in this case the husband and wife evaded telling the truth or would not hesitate to tell falsehoods.

The wife in that atmosphere of purity developed, what is not surprising, an intimacy with a man named Iceton, whom she had as a boarder in her house. The husband realizing how far this intimacy would lead to, ordered this man to leave his house, but with not much success. He even found his wife and that man searching in his papers the title deeds of the properties which had been acquired. He then, using the power of attorney which he had from his wife, had the properties transferred to his own name and registered under the "Land Titles Act."

The wife now sues him to have the properties retransferred and registered in her name.

Her action was dismissed by the trial judge on the ground that these properties had orginally been put in her name for the purpose of defrauding the creditors of her husband and that the courts of justice could not assist her in carrying out that fraud. Besides some creditors in the meantime have registered claims to have the properties made available for payment of their claims; and the claims constitute a charge and lien upon the land.

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The trial judge decided also that the power of attorney was not wide enough to authorize the agent to transfer the lands in his name.

The Court of Appeal agreed with the trial judge that the power of attorney was insufficient to authorize the husband to transfer the properties in his name; but they reversed his judgment and decided that the transfers and their registration should be set aside.

If the husband had taken proceedings to claim that the properties in question belonged to him he could certainly not have succeeded; a man who is obliged to set up his own fraud as the basis for the granting of an equitable relief should not succeed. The wife would have been entitled to retain the property for her own use, notwithstanding that she was a party to the fraud.

The husband, in such a case, could not be relieved from the consequence of his actions done with intent to violate the law. In other words, the courts are always refusing to assist in any way, shape or form those who violate the law or who act fraudulently. *Ex dolo malo non oritur actio. Gascoigne* v. *Gascoigne* (1), *Scheuerman* v. *Scheuerman* (2).

It is disclosed in this case that the wife had conspired with her husband to deprive the creditors of the payment of their legitimate claims and that the power of attorney she gave her husband was given for the purpose of continuing the fraud intended against her husband's creditors. She seeks however to have the courts transfer to her the properties in question. It seems to me that, applying the principle mentioned in the cases above quoted, we should refuse to assist her. The properties should remain in the hands of the husband, to be sold for the payment of the legitimate claims of the husband's creditors.

(1) [1918] 1 K.B. 223. (2) 52 Can. S.C.R. 625.

The appeal should be allowed with costs of this court and of the courts below and the judgment of the trial judge restored.

MIGNAULT J.—In my opinion the appeal fails.

It seems hopeless to contend that the husband (appellant) under the power of attorney which he held from his wife (respondent), could transfer to himself the properties standing in the land registration office in the name of his wife. His counsel could cite no authority permitting such a transfer, and it certainly cannot stand.

The wife's action to set aside this transfer was therefore well founded. The husband, however, resisted her action by alleging that the properties in question really belonged to him and that they had been placed in his wife's hands merely as a trustee to hold them for him. In the evidence it was disclosed that the husband, who formerly lived in Halifax, had left unsatisfied judgments there when he moved to the West, and for that reason, although these properties were purchased with his moneys or from moneys coming from a partnership in which his wife was nominally a partner, they were placed in her own name to hinder or defeat the action of the husband's creditors.

If the wife was a trustee for her husband to further any such purpose, the husband cannot be listened to to claim from his wife the properties thus held by her. *Montefiore* v. *Menday Motor Components Co.* (1). To demand their return he would have to rely on an illegal contract, and this he cannot do. The wife's position is different in this sense that the proper-

(1) [1918] 2 K.B. 241.

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ties already stand in her name and all she does or has to do is to attack the transfer which the husband made to himself under the power of attorney granted by his wife. To succeed she does not have to rely on an illegal contract, while the husband cannot get back the properties without claiming them under a contract made in furtherance of an unlawful purpose.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Irvine & Feinstein.*

Solicitors for the respondent: *Hartney & Boyce.*

IN THE MATTER OF CERTAIN QUESTIONS SUBMITTED BY HIS EXCELLENCY THE GOVERNOR GENERAL FOR THE HEARING AND CONSIDERATION OF THE SUPREME COURT OF CANADA, IN REGARD TO THE POSITION OF CHIEF JUSTICE OF ALBERTA AND THE FFFECT OF CERTAIN LETTERS PATENT NOMINATING THE HONOURABLE HORACE HARVEY, CHIEF JUSTICE OF THE TRIAL DIVISION OF THE SUPREME COURT OF ALBERTA, AND THE HONOURABLE DAVID LYNCH SCOTT, CHIEF JUSTICE AND PRESIDENT OF THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

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*Mar. 14, 15.
*May 2.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

Statutes—"Judicature Act" and its amendments—Construction—Letters Patent as to Chief Justiceship—Validity—B. N. A. Act, (1867), *ss.* 92, 96, 99, 100, 101—*"The Alberta Act,"* (*D.*) 1905, 4 & 5 *Edw. VII, c.* 3—*"The Supreme Court Act,"* (*Alta.*) 1907, 7 *Edw. VII., c.* 3, *ss.* 5, 30—*"The Judicature Act,"* (*Alta.*) 1919, 9 *Geo. V., c.* 3, *ss.* 1, 2, 3, 5, 6, 7, 9, 10, 28, 59.—(*Alta.*) 1913, 4 *Geo. V., c.* 9, *s.* 38; 4 *Geo. V., 2nd sess., c.* 2, *s.* 11—(*Alta.*) 1920, 10 *Geo. V., c.* 3, *s.* 2; *c.* 4, *s.* 43.

The Appellate Division of the Supreme Court of Alberta, as established by the "Judicature Act" of 1919, was not abolished as the result of the new section 6 of the Act enacted in 1920, which section did not create a new judicial office of Chief Justice of Alberta. Consequently, in the opinion of this court, the Honourable Horace Harvey, who had been appointed Chief Justice of the Supreme Court of Alberta in 1910, is still "by law entitled to exercise and perform the jurisdiction, office and functions of the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta" instead of the Honourable D. L. Scott who had been appointed as such subsequently to the said amendment of 1920. Davies C. J. and Idington J. *contra.*

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

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REFERENCE by the Governor General in Council of questions respecting the validity of letters patent appointing a Chief Justice of the Appellate Division of the Supreme Court of Alberta and a Chief Justice of the Trial Division of that court, for hearing and consideration pursuant to section 60 of the "Supreme Court Act."

The questions so submitted are as follows:—

A Report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 15th February, 1922.

The Committee of the Privy Council have had before them a report, dated 6th February, 1922, from the Minister of Justice, submitting herewith certified copy of the letters patent of 12th October, 1910, whereby the Honourable Horace Harvey was, as therein expressed, constituted and appointed to be The Chief Justice of the Supreme Court of Alberta, with the style or title of The Chief Justice of Alberta; also certified copy of the letters patent of 15th September, 1921, whereby the said Horace Harvey was, as therein expressed, constituted and appointed to be The Chief Justice of the Trial Division of the Supreme Court of Alberta, and *ex-officio* a judge of the Appellate Division of the said court; also certified copy of letters patent of 15th September, 1921, whereby the Honourable David Lynch Scott was, as therein expressed, constituted and appointed to be the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta as constituted under the "Judicature Act" of Alberta, chap. 3, 9 George V., as amended, and to be styled the Chief Justice of Alberta, and to be *ex-officio* a judge of the trial division of the said court.

The following questions have arisen upon which, in the opinion of the Minister, it is advisable that Your Excellency in Council should be advised by the Supreme Court of Canada, viz.:

1. Are the aforesaid letters patent of 15th September, 1921, nominating the said David Lynch Scott, effective to constitute and appoint him to be the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta as constituted under the "Judicature Act" of Alberta, chap. 3, 9 George V., as amended, and to be styled the Chief Justice of Alberta, and to be *ex-officio* a judge of the Trial Division of the said court?

2. If the last mentioned letters patent be not effective for all the purposes therein expressed, in what particular or particulars, or to what extent, are they ineffective?

3. Are the said letters patent of 15th September, 1921, nominating the said Horace Harvey, effective to constitute and appoint him to be the Chief Justice of the Trial Division of the Supreme Court of Alberta, and *ex-officio* a judge of the Appellate Division of the said court?

4. If the last mentioned letters patent be not effective for all the purposes therein expressed, in what particular or particulars, or to what extent, are they ineffective?

5. Is the said Horace Harvey by virtue of the aforesaid letters patent of 12th October, 1910, or otherwise, constituted and appointed to be, or does he by law hold the said office of, or is he by law entitled to exercise and perform the jurisdiction, office and functions of the Chief Justice and President of the Appellate Division of the Supreme

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Court of Alberta, as constituted under the "Judicature Act" of Alberta, Chapter 3, 9 George V., as amended, and what judicial office or offices does he hold other than as provided by his said letters patent of 15th September, 1921?

The Minister therefore, recommends that the aforesaid questions be referred by Your Excellency in Council to the Supreme Court of Canada for hearing and consideration pursuant to the authority of Section 60 of the "Supreme Court Act."

The Committee concur in the foregoing recommendation and submit the same for approval.

(Signed) G. G. KEZAR,
Asst. Clerk of the Privy Council.

The answers of the Supreme Court of Canada to these questions are printed at the end of this report.

E. L. Newcombe K.C. for the Attorney-General of Canada.

Eug. Lafleur K.C. for the Honourable Horace Harvey.

THE CHIEF JUSTICE.—The questions submitted to us are five in number and ask us to advise whether, in our opinion, the letters patent issued to the Honourable David Lynch Scott of 15th September, 1921, as the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta as constituted under the "Judicature Act" of Alberta, chapter 3, 9 Geo. V, as amended, are effective to so constitute him Chief Justice and President, and whether the letters patent of same date appointing the Honourable Horace Harvey Chief Justice of the Trial Division of said court are effective so as to constitute and appoint him as such Chief Justice.

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From the copy of the report of the Committee of the Privy Council, approved by His Excellency the Governor General, submitted to us, it appears that the Honourable Horace Harvey was by letters patent of the 12th October, 1910, appointed Chief Justice of the Supreme Court of Alberta with the style and title as such Chief Justice and by letters patent of 15th September, 1921, the said Horace Harvey was constutited and appointed to be the Chief Justice of the Trial Division of such Supreme Court and *ex-officio* a judge of the Appellate Division of said court, whereas by letters patent of the same date the Honourable David Lynch Scott was appointed Chief Justice and President of the Appellate Division as constituted under the said "Judicature Act" as amended and to be styled the Chief Justice of Alberta and to be *ex-officio* a judge of the trial division.

As the Honourable Horace Harvey had never resigned his office as Chief Justice of Alberta to which he had been appointed in 1910 the submission to us was that by virtue of the amendments made to the Supreme Court Act of the province from time to time his commission as Chief Justice of the old appellate division dated in 1907 had practically come to an end by the creation of a new appellate division with new judicial officials.

The question immediately arose not whether he could be re-appointed as Chief Justice of the new Appellate Division for that, of course, no one questions, but whether he must necessarily receive a new commission appointing him as such Chief Justice or whether His Excellency's power on that regard was untrammelled and he could appoint any other eligible person from the bench or bar.

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To determine the question we had, of course, to consider all the statutes of Alberta bearing upon the creation and constitution of the Supreme Court of Alberta and its branches and divisions.

The Act of 9 Geo. V, chap. 3, called the "Judicature Act, 1919," came into force by proclamation on the 15th day of September, 1920, on which date the letters patent or commissions in question were issued and in my judgment it is upon the proper construction of the several sections of this Act as amended by the statute of 1920, passed before the Act of 1919 was brought into force, that the question submitted to us must be answered.

I may premise that the difficulties of reaching a firm and clear conclusion upon these questions are very great owing to the slipshod and inartistic manner in which the amendments to the Act of 1919 were framed and passed. However inartistically and loosely framed these amendments may be, there is no doubt in my mind that they indicate a clear and radical change in the intention of the legislature with respect to the Appellate Division in several important respects from the intention apparent from the sections as passed in 1919. First it was not to be a "continuance" of the then existing Appellate Division. Every word in the section of the Act as passed in 1919 and being amended indicating that, was struck out and secondly it was not necessarily to be presided over by the then Chief Justice of Alberta but by any eligible person of the bench or bar who his Excellency might appoint.

The 6th section of the Act of 1919 called "The Judicature Act of 1919" as originally passed read as follows:

The Appellate Division shall continue to be presided over by the Chief Justice of the Court who shall continue to be styled as the Chief Justice of Alberta and shall consist of the said Chief Justice and four others of the Court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal and three judges shall constitute a quorum.

The result of the amendment made in section 6 by the Act of 1920 made the section to read as follows:—

The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the Court and who shall be styled the Chief Justice of Alberta and shall consist of the said Chief Justice and four others of the Court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for hearing of appeals from any district court, but the Appellate Division when hearing such appeals may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the trial division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

And on the day when the Act of 1919 was proclaimed as coming into force the 6th section of the Act read as I have above set out.

The result of that amendment was that instead of the old Appellate Division being continued and presided over by the then Chief Justice of Alberta as was expressly provided for in the Act of 1919 as originally passed, an Appellate Division of the Supreme Court was created which was to be presided over by a Chief Justice to be appointed by His Excellency the Governor General and to consist of that Chief Justice so appointed and four other judges of the court to be assigned to it by His Excellency the Governor General.

The Act in other words before being amended provided for the continuance of the then existing Appellate Division and that the then Chief Justice should continue to be its presiding officer while the amendment deliberately struck out the words providing for

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the continuance of the Appellate Division and of the continuance in office as its Chief Justice of the then existing Chief Justice and created an Appellate Division with a Chief Justice to be appointed by the Governor General who might be chosen and taken from those eligible either from the existing bench or bar. By thus expressly striking out the words that the Appellate Division should be "continued" and the further words providing that the existing Chief Justice should be the Chief Justice of the reconstituted Appellate Division leaving the appointment of the new Chief Justice untrammelled with His Excellency, it seems to me that the intention of the legislature was clearly not to continue the old Appellate Division but to so construct it as to create a new Appellate Division leaving the presiding officer to be any one eligible chosen by the Governor General. Further the amendment provided for an appeal to the Appellate Division from the newly constituted Trial Division and that when hearing such appeals the Appellate Division should be composed of five judges. The new and additional jurisdiction thus given to the reconstructed Appellate Division, the elimination from the section being amended of all words making the new Appellate Division a continuance of the old division and also of the words making the then Chief Justice of the court the Chief Justice of the new Appellate Division thus leaving the appointment of the new Chief Justice in His Excellency's hands untrammelled and the declaration that the Chief Justice to be appointed and four other judges of the court to be assigned to it by His Excellency the Governor General and to be called Justices of Appeals should constitute the Appellate Division, thus abolishing the old plan of the judges in a body selecting yearly these

four judges combine to satisfy me that the Appellate Division so established was a new division with new judicial offices and some additional functions. It is strongly argued that such a construction is at variance with sections 3 and 5 which read as follows:—

3.—There shall continue to be in and for the province a superior court of civil and criminal jurisdiction known as "The Supreme Court of Alberta.

* * *

5.—The Court shall continue to consist of two branches or divisions which shall be designated respectively "The Appellate Division of the Supreme Court of Alberta," and "The Trial Division of the Supreme Court of Alberta."

I respectfully submit there is no real or necessary inconsistency between these two sections and the amended section 6. Indeed it may be said they rather support the argument as to the intention of the legislature not to leave it open to the slightest doubt that the "Supreme Court of Alberta" was continued but that it should thereafter consist of two branches or divisions respectively designated as the Appellate Division and the Trial Division, and with the respective jurisdictions and appointees assigned to each, and emphasizing such intention of creating a new division by striking out the word "continue" in two places of the section and by further expressly striking out the words of the section amended which provided for the former Chief Justice continuing as President of the Appellate Division.

Having reached this conclusion I would answer the first question and the third question in the affirmative and question 5 in the negative. Questions 2 and 4 do not require any answer in view of my answers to questions 1, 3 and 5.

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IDINGTON J.—The Province of Alberta was established by 4 and 5 Ed. VII., ch. 3, assented to 20th July, 1905, and known as "The Alberta Act," which came into force on the 1st day of September, 1905.

Prior thereto it had formed part of the North West Territories and fell within the jurisdiction of the Supreme Court of the said Territories.

The Legislature of Alberta was, by said Act, given power for all purposes affecting or extending said province to abolish said court. That power does not seem to have been exercised until the Supreme Court was constituted by the legislature of that province acting within its powers under said "Alberta Act," and the "British North America Act," section 92, item 14 thereof, by the enactment of 7 Edw. VII., to be cited as "The Supreme Court Act."

Section 5 of said Act declared that the said court

> shall consist of a Chief Justice who shall be styled the Chief Justice of Alberta and four puisne Judges who shall be called the justices of the court.

The power of appointment of said Chief Justice and puisne judges rested, as it always has done in like cases, under sec. 96 of said "British North America Act," with the Governor-General, and appointments were duly made pursuant thereto of the Chief Justice and puisne judges as specified by the said "Supreme Court Act."

The appellate work of the court was referred to as *en banc* according to ancient form of speech, and it would seem to have been left to the judges to arrange amongst themselves who should sit *en banc* and who attend to *nisi prius* work, observing, however, the term times for *en banc* sittings fixed in regard to time and place by the Lieutenant Governor in Council, as required by section 30 of the said "Supreme Court Act."

That condition of things (save as to an amendment in 1908 increasing the number of puisne judges to five instead of four) existed when, on the resignation of the then Chief Justice, the late Honourable A. L. Sifton, the then Honourable Horace Harvey, a puisne judge of said court, was appointed to succeed him in 1910 as Chief Justice.

In 1913 tentative amendments were made and part thereof repealed and parts left to be brought into force by proclamation and the net result was that the power was given the Lieutenant Governor in Council at the second session of 1913 to proclaim an increase in the number of puisne judges from five to six, seven or eight, and, in January 1914, by proclamation the desired increase to eight was brought into effect.

In March following, another proclamation brought into effect subsection 2 of sec. 38 of ch. 9 of the Statutes of Alberta, 1913 (first session) being an amendment to sec. 30 of the "Supreme Court Act."

That amendment was as follows:

(2) by repealing sec. 30 and substituting therefor the following: 30. The court *en banc* shall be known as the Appellate Division of the Supreme Court and shall sit at such times and places as the judges of the court shall determine and three judges shall constitute a quorum.

(2) The judges of the Supreme Court shall, during the month of December, and at such other times as may be convenient, select four of their number to constitute the Appellate Division for the next ensuing calendar year, but every other judge of the said court shall be *ex officio* a member of the Appellate Division.

(3) The terms "court *en banc*" or "court sitting *en banc*," and "Appellate Division" wherever used in this or any other Act or in any rules made thereunder, shall be deemed to be interchangeable and to have the same meaning.

The enabling the judges to fix their own term times, instead of being dependent as previously on the directions of the Lieutenant Governor in Council, and

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to distribute their work for the coming year, one can easily understand, but the mere changing of the name of the division would seem absolutely unimportant unless to keep up with the fashions of modern times.

But for the stress laid upon it by counsel in argument herein I should not have thought it worth mentioning.

If memory serves me correctly, he was under the impression that the rest of the court was at the same time designated the "Trial Division" which was not the case until the Act of 1919, presently to be referred to.

No change in the jurisdiction nor change in the organization of the court seems to have been pointed to as in contemplation at that stage in the history of the legislation we are concerned with.

The word "court" used in that connection is, by the interpretation clause of the Act the "Supreme Court."

Such being the condition of things there was enacted in 1919 an Act styled, by sec. 1 thereof, "The Judicature Act" which in its growth gives rise to our present troubles.

It does not profess to be a consolidation of Acts relative to the Supreme Court, nor does it begin by recognizing the existence of that court but, on the contrary, after giving the name of the Act as just stated, and in sec. 2 an interpretation clause, by sec. 3 enacts as follows:

> There shall continue to be in and for the province a superior court of civil and criminal jurisdiction known as "The Supreme Court of Alberta."

It is to be observed that this enactment is under the caption of "Constitution of court" and clearly refrains from continuing the Supreme Court then existent, and instead of doing so declares there shall continue to be a Supreme Court of civil and criminal jurisdiction.

That circumstance, in connection with much else to be presently referred to, suggests a clear intention not to continue the then existing court.

It is the intrepretation and construction of this "Judicature Act," and amendments thereto, before it was brought into effect by proclamation as provided by the Act itself, as to which we are now interrogated.

The questions raised thereby are whether or not the legislature had created a new court or courts, to which the Dominion Government was entitled to appoint judges, or created new judicial offices which the said Government was entitled to fill.

The 6th section of the "Judicature Act" above referred to as originally enacted, reads as follows:

> 6. The Appellate Division shall continue to be presided over by the Chief Justice of the Court, who shall continue to be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor in Council and to be called Justices of Appeal and three judges shall constitute a quorum.

That, which clearly contemplated the continuation of the then Chief Justice as such and his filling the new office, was amended before the proclamation was issued bringing the said "Judicature Act" into effect, by ch. 3, sec. 2, of the Statutes of Alberta, 1920, as follows:

> Sec. 6 is amended as follows:
>
> (*a*) by striking out the words "continue to" where the same occur in lines 1, 2 and 3 thereof, and by striking out the expression "of the court" where the same occurs in line two thereof; and by striking out the first 'the" in the second line thereof, and substituting in lieu thereof the article "a."
>
> (*b*) by striking out the words "three judges shall constitute a quorum" where the same occur in the seventh line thereof, and substituting the following in lieu thereof:—

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Three judges shall constitute a quorum for the hearing of appeals from any district court, but the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the Trial Division of the Supreme Court of Alberta and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

That in turn was amended the same year, 1920, before the proclamation bringing the said "Judicature Act" into effect was issued, as follows:—

(1) By adding after the article "a" in the 6th line of subsection (*a*) of section 2, the following: "and by adding thereto after the words "Chief Justice" in the second line thereof, the expression "who shall be Chief Justices of the Court and."

Thus the said section was made to read at the date of said proclamation as follows:

The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the court and who shall be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for the hearing of appeals from any district court, but the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the Trial Division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

The said "Judicature Act" thus, and otherwise, amended was duly declared by proclamation, on the 15th of August, 1921, to come into force and effect on, from and after the 15th of September, 1921.

The other amendments, though substantial, have no important bearing on what we are concerned with herein.

The 59th section of the "Judicature Act," enacted as follows:

59. The "Judicature Ordinance," being ch. 21 of the Consolidated Ordinances, 1898, and the "Supreme Court Act," being ch. 3 of the Acts of 1907, and all amendments of the said Ordinance and Act, are hereby repealed.

I submit that by said repealing section of the said Act, all the legislation effective prior to the 15th September, relevant to the Supreme Court of Alberta, was rendered nul, and in effect the said court was abolished as the legislature had power to do if it saw fit.

The only use such legislation thus drastically repealed could thereafter serve was as a possible historical means of helping to interpret the actual meaning of the "Judicature Act," so brought into effect.

The clear meaning of the language used in said section 6 of the "Judicature Act," as finally amended, as I read it, was to constitute the Appellate Division of the Supreme Court of Alberta a new court of appeal requiring the appointment of a Chief Justice thereof and that when he was appointed he would be styled the Chief Justice of Alberta.

The party chosen for such position might be he who had been under the "Supreme Court Act" styled Chief Justice of Alberta, or any other person qualified by law to accept such a position. On such appointment the party so appointed would thereby become but not otherwise entitled to be styled such Chief Justice.

It seems to me in face of the several legislative attempts to make, by the amendment above quoted clear the purpose of the legislature, idle to contend that such was not the intention of the legislature, whatever may be urged as to the exact extent of the effect of the repealing section 59, which I quote above.

The Dominion Government evidently acted upon one or other of these interpretations, and proceeded upon the assumption that the new Court of Appeal and the new Trial Division, each required the appointment of a Chief Justice and as to the Court of Appeal,

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new puisne judges, and appointed accordingly Mr. Justice Scott to be Chief Justice of the Appellate Division and Chief Justice Harvey to be Chief Justice of the Trial Division, and reappointed some of those previously named to serve as puisne judges of the Trial Division.

It is stated that each accepted the respective position thus assigned to him, except the Honourable Mr. Justice Harvey who has declined so far as to refrain from taking the required oath of office, yet has continued to act as a judge.

His status on which he relies for his present contention was expressed thus by sec. 5 of the "Supreme Court Act."

> The court shall consist of a Chief Justice who shall be styled "The Chief Justice of Alberta," etc.

The oath of office prescribed by sec. 7 of said Act which he presumably took, reads as follows:

> I, * * * solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, exercise the powers and trusts reposed in me as Chief Justice (or one of the puisne judges) of the Supreme Court. So help me God.

That oath, it is to be observed, makes no mention of the style now so much relied upon and, I respectfully submit, having been swept away by the repealing section above quoted before the present divisional courts could come into existence, is a rather slender thread to rely upon.

Five months later we are asked the questions I will presently refer to.

Counsel for Chief Justice Harvey in his factum remarks in dealing with the changes of sec. 6, upon the want of modification of sections 3, 4, 5, 7 and 9, of the statute of 1919.

Sec. 3 I have already dealt with by pointing out that the legislature seems to have purposely abstained from continuing the then existing Supreme Court and, I may add, did so in light of the very different mode of treatment given by prior legislation relative to the Supreme Court of the North West Territories, when superseded by the creation of the Supreme Court of Alberta.

For many reasons apart from the situation we are confronted with it seems to me that example demanded some provisions which have not been made.

Section 4 is simply another illustration of same spirit. Both show a determination to ignore the possibly continued existence of the old Supreme Court of Alberta, and detract from the force sought in such suggestion.

Section 5 continues two branches or divisions of the court constituting one the Appellate Division and the other the Trial Division.

As a matter of fact, there always existed two classes of duties to be performed by the judges of the Supreme Court, but not until this Act of 1919 was there any such description given legislatively of a Trial Division.

It is brought into existence as a distinct entity by that Act, and the word "continue" is simply one of the many absurdities to be found in this legislation.

There was nothing in fact continued, but an existent duty was given over to a new court, called, in section 7, for the first time "Trial Division."

I fail to see how that helps in any way unless to uphold the action of the Dominion Government of which counsel complains.

Section 9, when read in light of the amendments made to sec. 6 before it was brought into force and the plain language thereof especially when we consider sec. 59 had obliterated all styles resting upon prior legislation, clearly is consistent also with said action.

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It is contended, however, that said section 6 as it stands amended, when brought into effect, constituted him who had been heretofore styled "Chief Justice of Alberta," the actual Chief Justice of the new Appellate Division, and hence to continue to be styled the "Chief Justice of Alberta."

In other words, despite the several amendments to the contrary so clearly designed to remove any possibility of such being held to have been the intention of the legislature, we are asked to say that such amendments must be treated as null. One of the alleged reasons for such contention is that he had been theretofore styled the Chief Justice of Alberta.

He had been so styled, but only by virtue of the "Supreme Court Act" so directing; but that Act and all else bearing upon such a question was repealed the moment that the "Judicature Act" came into force on the 15th September, 1921.

From the earliest hour of that date, according to Alberta time, he ceased to be entitled any longer to be so styled.

The Act must be read as of the date when it came into force unless there is in it some clear intention to the contrary, which is not the case.

Again it is submitted by counsel for the Minister of Justice and I think quite correctly, that any attempt by the legislature to dictate to His Excellency who should be appointed to hold the new judicial office, would have been *ultra vires*.

Indeed I should not be surprised to learn that the discovery thereof was the reason for the numerous changes made in said section 6, for as it stood originally it was clearly open to that objection.

And as to the question of styling the head of the new court, or if you will, him called to fill the new judicial office created, the Chief Justice of the province, that is entirely within the power of the legislature.

I was at first blush disposed to look upon that as emanating from the Royal Prerogative exercised on behalf of the Dominion, but on considering the matter fully I find nothing to found such a pretension upon, for section 96 of the B.N.A. Act limits the power of His Excellency the Governor General to merely nominating him who is to fill the office as created by the legislature.

All that legislation can do relevant to the creation or constitution or recreation or reorganization or abolition of the court, rests with the legislature except the nomination of the person to fill the office which alone rests with the Governor General of the Dominion as advised by his ministers.

What has been done in that regard cannot now be undone by anything we may say herein for in answering such interrogatories, we and all concerned, I most respectfully submit, must never forget a single sentence contained in the judgment of the Judicial Committee of the Privy Council in the case of *Attorney-General for Ontario* v. *The Attorney-General for Canada* (1), wherein that court said:

> But the answers are only advisory and will have no more effect than the opinion of the law officers.

I have no doubt that the Alberta Legislature aimed at having, as Ontario long had had, and other provinces later, a new Court of Appeal separated from that dealing with the other work of its Supreme Court.

(1) [1912] A.C. 571 at p. 589.

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As now constituted the judges of either division are qualified *ex officio* to sit in the other, but, I assume, only to be made available in case of possible necessity.

I submit these suggestions as probably explaining what was aimed at and hence helping to illuminate the language used.

I may be permitted here to say that I prefer the method adopted in British Columbia, and betimes in Ontario, to that adopted by the Alberta legislature, to produce substantially the same result. In the first named of these the legislature whilst creating a court of appeal and, of course, styling the head thereof "Chief Justice" of the new court, preserve the title of Chief Justice of the province to him who then filled it and, on his vacating the place, to be passed on to the head of the appellate court.

Yet I must look at the case presented purely as a matter of law free from all such sentiment, and try to realize what those concerned were in truth about.

It cannot, I submit, be contended for a moment that the legislature could not have created a new appellate court and eliminated from the jurisdiction of the Chief Justice, and all other judges of the old Supreme Court, all the appellate powers it had theretofore exercised, and then leave him and them no other powers than those of trial judges.

That in effect is all the legislature, I imagine, really desired to bring about.

By the united efforts of the respective executives of the Dominion and of Alberta acting in harmony, that is all that has transpired.

The same result as I have pointed out could have been reached by pursuing another and possibly better method, at all events by some one of the several methods I have mentioned as adopted in other provinces.

It is not my desire to criticize herein, but to try to realize from the past history of our country and its several provinces the probably justifiable object the legislature had in view, and then give to a rather peculiar growth of six years in way of legislation the exact measure of vitality it was intended to have.

Approached in such a mood and attitude as such considerations are likely to produce, the contention set up by able counsel seems to me rather an undue strain upon the English language.

Clearly there were to be two courts where only one existed before, and two Chief Justices to be appointed.

It was then thrown upon the Dominion Executive to select him it chose for each respectively.

We have no facts stated relative to how this duty was to be discharged, though we may suspect or indeed infer from the remarkable coincidence of events which took place, that it was well understood between the two Executives concerned that the old Chief Justice and such of his puisne judges as the Dominion Executive chose to fill the positions they respectively were chosen to fill, should be effected by such a manner as would substantially protect them and the due administration of justice at the same time.

Clearly it so happens that some men are by nature and attainments better fitted for appellate courts than trial courts, and *vice versa*.

The salaries allotted the new Chief Justices were, we are told, in each case to be the same.

It may be pointed out that this is not the first instance on record of a legislature having taken upon itself to change the status of judicial officers, for I find that in pre-confederation days, though the old "Court of Error and Appeal Act," chapter 13 of the Consolidated Statutes of Upper Canada, by section

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5 thereof, had declared that the Chief Justice of the Queen's Bench, for the time being, and the judge entitled to precedence over all other judges should preside, yet by 24 Vic., ch. 36, sec. 1 that was repealed.

Much stress seemed to be put by counsel for Chief Justice Harvey upon the fact that uncertainty as to the tenure of the position of Chief Justice of Alberta may be attended with serious consequences, inasmuch as important powers are conferred upon the Chief Justice of that court, the exercise of which by an incompetent judge might lead to serious consequences, and he cites the example of the "Bankruptcy Act" assigning the power to the Chief Justice to make the appointments to certain officers in certain contingencies.

I should have thought that the doctrine of *de facto* applied to any officer would relieve any person so embarrassed and should be surprised if any one thought of applying to any one else than Chief Justice Scott.

But if that is not enough, clearly the true remedy must be that applied in the cases of *Buckley* v. *Edwards* (1), and *McCawley* v. *The King* (2), instead of the adoption of the opinion of this court as mere law officers of the Crown as intimated in the case cited above, which surely cannot be held especially if divided as entitled to override the opinions of the law officers of the Crown who presumably must have held in line with what I have concluded was the correct course.

For the foregoing reasons I would answer the first question in the affirmative. Hence the second needs no answer. I would also answer the third question in the affirmative, and the fourth I would answer by

(1) [1892] A.C. 387. (2) [1920] A.C. 691.

saying that his being *ex officio* a judge of the Appellate Division of the said court only qualifies him to act in the place or stead of some member of the court not being able to take the place to which he or his successor may have been assigned.

The fifth question I would answer in the negative and that he holds only the office provided by his said letters patent of 15th September, 1921.

DUFF J.—The fundamental question raised by the present reference is this: Had the amendments of 1919 (9 Geo. V., ch. 3) and 1920 (ch. 3, s. 2 and c. 4, s. 43) the effect of abolishing the office of Chief Justice of the Supreme Court of the Supreme Court of Alberta, an office created by the Supreme Court Act of 1907? If the office still exists then The Honourable Mr. Harvey is still the incumbent of it and he is also the President of the Appellate Division because the intention of the statutes mentioned is indubitably that the two offices shall be held by one and the same person.

The statutes of 1920 by their terms were to come into force on proclamation and they were passed as amendments of the statute of 1919 which was also to come into force on proclamation. The proclamation by which they became operative is dated 11th August, 1921. I shall speak of these statutes by reference to their respective dates.

Now the statutes of 1913 (4 Geo. V, ch. 9) and 1919 (as originally framed) although they made some changes in relation to the functioning of the Supreme Court left quite unaffected most important matters of substance. 1st, the Supreme Court itself was not abolished—the legislation did not create a new Supreme Court bearing the old name; secs. 2 and 3 of the statute of 1919 which were left untouched by the Act

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of 1920 demonstrate this; 2nd, in the division of the court into two branches effected by these Acts (of 1913 and 1919) the legislation does not appear to have proceeded by the way of the creation of new judicial offices save in respect of two matters which are not relevant to the present discussion—the provisions made for a Chief Justice of the Trial Division and an additional judge of the Supreme Court.

An examination of the pertinent sections seems to give this result. Section 30 of the Act of 1913 which first authorized the designation "Appellate Division" provides simply that such shall be the designation by which the "Court *en banc*" shall be known; and by sub-section 3 of that section it is declared in terms that the phrases "Court *en banc*" and "Appellate Division" shall have the same meaning in that very statute of 1913 as well as elsewhere. By the Act of 1919 an important provision is introduced touching the selection of judges for duty in the "Appellate Division" and the weight and significance of this circumstance must of course be considered; but the phraseology of secs. 2, 3, 5, 10 and 28 shews that the legislature in using the designation Appellate Division was still applying it to the Supreme Court of Alberta sitting *en banc*.

By section 5, for example, it is enacted that "the Court" that is to say, the existing Supreme Court of Alberta, which when sitting *en banc* is, by force of the Act of 1913, known as the "Appellate Division,"

shall continue to consist of two branches or divisions.

In section 6 the form of words used is

the Appellate Division shall continue to be presided over by the Chief Justice of Alberta,

a turn of phrase implying an intention to preserve the identity of the Appellate Division; section 10 provides that all the judges of the Supreme Court shall *ex officio* be members, with equal jurisdiction, power and authority, of both divisions; and finally, by section 28 it is declared again that the terms "Court *en banc*" and "Appellate Division" wherever

> used in any Act or Ordinance * * * shall be deemed to have the same meaning.

These features of the statute afford good reasons for thinking that the legislature was not in 1913 or in 1919 erecting a new court under the existing style of the "Appellate Division;" and that in providing for the assignment of judges of the Supreme Court to duty in that Division the statute does not contemplate the establishment of new judicial offices.

As inconsistent with this view of the statute it is pointed out that the four judges who, under section 6 of the Act of 1919, together with the Chief Justice normally constitute the Appellate Division, are to be

> assigned to it by His Excellency the Governor General in Council

and this provision is relied upon as giving support to the contention that the office of judge of that court is a new judicial office created by this statute. I may say at once, that—after examining the *indicia* afforded by this legislation for determining the true character of this section (I am speaking now of the section as passed in 1919) whether, that is to say, in the context in which it is found it ought to be read as prescribing the duties or providing machinery for prescribing the duties appertaining to judicial offices already existing (or created by enactment *aliunde*) or on the other hand as establishing a new judicial tribunal or a new judicial office—I think on the whole those *indicia*

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point rather directly to the conclusion that the office of the section is limited to making provision for the administration and exercise of the judicial duties and powers of the existing court, and the judges of that court. One consideration weighs very powerfully with me; and it is that arising from the circumstance that while the judges other than the Chief Justice constituting the Appellate Division are to be named by the Governor in Council, these judges are to be chosen—that I think is the meaning of the section—from among persons who are already judges of the Supreme Court of Alberta. If the office of judge of that court were a new judicial office the appointment by force of section 100 of the B.N.A. Act would rest with the Governor in Council and I am unaware of any authority possessed by a province to regulate the exercise of the Dominion authority in relation to judicial appointments by prescribing the class of persons from whom the appointees to judicial office shall be selected. The provision moreover for assignment by the Governor in Council would be pointless unless it be, as apparently it is, intended as an invitation by the legislature to the Governor in Council to act on its behalf in performing that duty.

The Act of 1919, that is to say the Act which received the Royal assent in the year 1919 as ch. 3 was by its terms, as already mentioned, not to come into force until after proclamation; and before proclamation two statutes were passed (in the year 1920) amending sections 2 and 6 of this Act of 1919. The effect of this amendment of section 6 was that for the section so numbered as it stood in the statute as originally passed in the year 1919, the following was substituted:—

The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the court and who shall be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for the hearing of appeals from any district court, but the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the Trial Division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

The language of this section undoubtedly lends some colour to the contention that the legislature had in view the creation of a new office of Chief Justice of the Appellate Division, the incumbent of which should be *ex officio* the Chief Justice of the Supreme Court in substitution for the old office of Chief Justice of the Supreme Court, the incumbent of which under the statute of 1919 as originally passed would have been the *ex officio* President of the Appellate Division. But it must be remembered that sections 3, 5, 9, 10 and 28 of the Act as amended in 1920 stand as they originally stood in the Act of 1919 as conditionally passed in that year; that the Appellate Division is still, after the amendments of 1920, the Supreme Court of Alberta sitting *en banc*; that it is the Chief Justice of the Supreme Court who, by section 9, takes rank and precedence over all the judges of any court in the province and not the Chief Justice of the Appellate Division; and that in the Act even as it now stands there is no office formally designated in terms as that of the Chief Justice of the Appellate Division. And although section 6 in the form it assumes under the amendments of 1920 is capable of a construction according to which the then existing office of Chief Justice of the Supreme Court would cease to exist,

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that is not the necessary meaning of the words used. And the other construction, that which regards the whole section in so far forth as pertains to the office of Chief Justice (as well as in other respects) as an enactment designed to make provision for the distribution and assignment of judicial duties among existing judicial offices or judicial offices elsewhere provided for seems to accord better with the general tenour of the statute of which it is a part.

The answers which I think should be returned to the questions submitted are these:—

To question No. 1:—No.

To question No. 2:—Wholly inoperative.

To question No. 3:—No.

To question No. 4:—Wholly inoperative.

To question No. 5:—He is Chief Justice of the Supreme Court of Alberta and as such is entitled by law to perform and exercise the jurisdiction, office and functions of Chief Justice and President of the Appellate Division.

ANGLIN J.—Seldom has the embarassment which may be occasioned by requiring this court to answer any question that the executive department of the Government may see fit to propound for its consideration and opinion been so forcibly brought to our attention as in the reference now before us. The court is called upon to express its opinion as to the status of two gentlemen on behalf of each of whom it is asserted that he holds the highest judicial office of the province of Alberta under letters patent from His Excellency, the Governor-General. Unfortunately only one of them has been represented before us by counsel, the other, although duly notified, having, as was his right, declined to appear.

Nor is our embarrassment materially lessened because our

answers are only advisory and will have no more effect than the opinions of the law officers.

But the right of the Governor in Council to refer questions to this court touching any matter in regard to which he may see fit to do so, and our duty to consider and answer questions so referred ("Supreme Court Act," s. 60) are conclusively settled. *Attorney-General for Ontario* v. *Attorney-General for Canada* (1). A suggestion made by their Lordships of the Judicial Committee that the court may point out in its answer considerations which render difficult the discharge of the duty imposed upon it or that the answer itself is of little value, or may make representations to the Governor-in-Council looking to the withdrawal of the reference in whole or in part (p. 589) would seem, with respect, to have little practical value.

The facts out of which the questions referred in the present case have arisen are fully stated in the opinion of my brother Mignault. I shall not repeat them. The answers to these questions I think depend upon whether the Alberta "Judicature Act" of 1919 (9 Geo. V, c. 3), as amended in 1920 (c. 3, s. 2 and c. 4, s. 43), should be regarded as having created a new Supreme Court for that province, or, at least, an entire new set of judicial officers, or should be deemed to have continued the existing Supreme Court and judicial officers, merely adding to the number of the latter and creating an additional Chief Justiceship. The constitutional validity of the statute has not been challenged. The question argued at bar was one of construction—what was the intention of the legislature as expressed in the several enactments?

(1) [1912] A.C. 571.

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In view of the tenure of judicial office (s. 99 of the B.N.A. Act) I should be disposed to hold that the Alberta "Judicature Act" of 1919 as amended, had either the effect of abolishing the existing Supreme Court of Alberta and creating in its stead a new court under the same name, or of doing away with the existing judicial offices and substituting therefor new judgeships of the same class, only if it does not reasonably admit of another construction.

Far from that being the case, however, it seems to me that another construction is not merely quite possible but is much more probably that intended by the legislature.

I regard it as not arguable that, as enacted in 1919, the Alberta "Judicature Act" did aught else than continue the existing Supreme Court with its existing judicial officers, by s. 6 assigning to one of them—the Chief Justice of Alberta—by his title of office, the duty of presiding over the Appellate Division of the Supreme Court and entrusting to the Governor General in Council the selection of four of the puisne judges who should, with the Chief Justice of Alberta, ordinarily constitute the membership of that division of the court. As amended in 1920 this may not so clearly be the purpose and effect of s. 6. Indeed, Mr. Newcombe strongly pressed that these amendments predicate an intention to create five appellate judgeships as new positions to be filled by the Governor General in Council. It may be a little difficult to assign another purpose to the amendments. But no mere implication can suffice to overcome the explicit term of s. 3 that

> there shall continue to be * * * a superior court of civil and criminal jurisdiction known as "The Supreme Court of Alberta,"

and of s. 5 that

the court (i.e. the existing court continued by s. 3) shall continue to consist of two branches or divisions which shall be designated respectively the "Appellate Division of the Supreme Court of Alberta" and "The Trial Division of the Supreme Court of Alberta."

Sec. 6 as amended must be read and construed with sections 3 and 5, which remain as they were enacted in 1919. These provisions, in my opinion, make it quite impossible to contend successfully either that a new Supreme Court was established or that new divisions of that court were constituted. The existing court and the existing divisions are expressly "continued"—one of them retaining the name given to it at its birth in 1914, "The Appellate Division" (4 Geo. V., ch. 9, sec. 38; 4 Geo. V., 2nd sess., c. 2, s. 11; Alberta Gazette Vol. X, pp. 164-5), and the other, likewise born in 1914 and existing since that date, as is evidenced by s. 5 of the Act of 1919, being by that section christened for the first time "The Trial Division."

It is, I think, equally impossible to maintain that all the existing judicial positions in the Supreme Court were abolished and eleven new Supreme Court Judgeships created. If that had been the case, all the judges theretofore in office might have been superseded and a judiciary consisting of an entirely new personnel appointed by the Governor General in Council. Is it conceivable that the legislature intended to create a situation admitting of such a possibility? Again, although the judges theretofore in office should be reappointed, the former Chief Justice of Alberta might have been appointed a puisne judge and two of his former puisnes, or it may be the two additional judges provided for by the Act of 1919, appointed to the two Chief Justiceships. If a new court was con-

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stituted, or wholly new judicial positions were created by the legislation of 1919, as amended in 1920, it was undoubtedly the right of the Governor General in Council to select whom he would (subject, it may be, to prescribed requirements of qualification) to fill those positions. It was not competent for the provincial legislature to place any restriction upon the freedom of choice.

I am of the opinion that the existing Supreme Court, the existing two divisions of that court and the existing judicial positions were continued by the Alberta "Judicature Act," 1919-1920, and that the only new offices thereby created to which the Governor in Council was authorized to make appointments were the Chief Justiceship of the Trial Division and an additional puisne judgeship of the Supreme Court. Placing on s. 6, as amended, a construction in harmony with secs. 3 and 5 and within the competence of a provincial legislature, I read it as assigning to the Chief Justice of Alberta for the time being the duty of presiding over the Appellate Division, and to four of the nine puisne judges provided for, to be nominated by the Governor General in Council, the duty of sitting as ordinary members of that Division. To the Chief Justiceship of the Trial Division and to one of the nine puisne judgeships, as new positions the appointment lay exclusively with the Governor General in Council, subject, however, to this restriction, that the same person could not fill the two Chief Justiceships for which the "Judicature Act" provides.

It follows that the position of Chief Justice of the Supreme Court of Alberta, with the style and title of the Chief Justice of Alberta, to which the Hon. Horace Harvey was appointed by letters patent of the 12th October, 1910, still exists and continues to be filled

by that gentleman, he having neither resigned nor been removed from office by competent authority. While holding that office he was not eligible for appointment as Chief Justice of the Trial Division.

I would for these reasons respectfully return the following answers to the questions referred by His Excellency in Council:

(1) No; (2) Wholly; (3) No; (4) Wholly; (5) (a) Yes; (b) Chief Justice of the Supreme Court of Alberta with the style and title of the Chief Justice of Alberta.

BRODEUR J.—Five questions have been submitted to us by the Governor in Council under the provisions of sec. 60 of the "Supreme Court Act."

We are called upon to give our opinion on the effect of the letters patent of the 12th October, 1910, nominating The Honourable Horace Harvey Chief Justice of the Supreme Court of Alberta and on the effect of the letters patent of 15th September, 1921, nominating the same Mr. Justice Harvey, Chief Justice of the Trial Division of the Supreme Court of Alberta, and the Hon. D. L. Scott, Chief Justice and President of the Appellate Division of the same Supreme Court.

The effect and validity of these different letters patent depends very largely upon the construction of the statutes concerning the Supreme Court of Alberta and upon the respective powers of the federal and provincial authorities concerning the constitution, maintenance and organization of provincial courts and the appointment of judges of these courts.

The legislature of Alberta created in 1907 (7 Edw. VII ch. 3) "The Supreme Court of Alberta" which consisted of a Chief Justice and of a certain number of puisne judges, and determined that the Chief Justice (s. 6) who

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should be designated as Chief Justice of Alberta, should have rank of precedence over all other judges of any court in the province and should preside when the court sitting *en banc* (sec. 31) would hear appeals from any decision of any judge of the Supreme Court.

In 1910, Mr. Justice Harvey was appointed by the federal government to fill the position of Chief Justice of the Supreme Court of Alberta.

In 1913, the legislature of the province enacted that the court *en banc* should be known as the Appellate Division of the Supreme Court. In 1919, a "Judicature Act" was passed declaring (sec. 3) that

> there *shall continue* to be in and for the province a superior court of civil and criminal jurisdiction known as the Supreme Court of Alberta,

and that the court *should continue* to consist of two branches or divisions which shall be designated as the Appellate Division and the Trial Division (sec. 5).

It was declared in sec. 6 of that "Judicature Act" that the Appellate Division *should continue* to be presided over by the Chief Justice of the court and by four other judges who should be assigned to it by the Governor General in Council.

This section six was amended twice in 1920 and reads now as follows:

> The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the court and who shall be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor-General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for the hearing of appeals from any district court, but the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division shall be composed of five judges when hearing appeals from the Trial Division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

We have no information before us to the reasons why section 6 was amended in 1920, but I presume by what has been contended by Mr. Newcombe at the argument that the federal government found in this original section 6 an encroachment upon its right to appoint the judges of the provincial courts.

I fail to see, however, how section 6 as originally enacted could be considered as *ultra vires*.

By the B.N.A. Act (sec. 92, s.s. 14) the constitution and organization of the courts are within the domain of the provincial legislature. The legislature of Alberta had then the power to create a Supreme Court and to determine that it could be presided over by a Chief Justice whose powers and rank in its branches and divisions could be fixed by the provincial authorities.

On the other hand, it was for the federal authorities to determine whom they would select for the position of Chief Justice of the Supreme Court. In the exercise of its power, the federal government had in 1910 appointed Mr. Justice Harvey as the Chief Justice of this court and according to the B.N.A. Act, Mr. Justice Harvey would hold such office and could not be removed therefrom except on address of the Senate and House of Commons or unless the provincial legislature would abolish the court or the office.

It is no wonder then that in 1919, when the provincial legislature intended to call with specific names the trial and appellate divisions which practically existed before, it declared that the Appellate Division which was naturally more important than the other, should continue to have as its presiding officer the Chief Justice of the Supreme Court.

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The right to regulate and provide for the whole machinery for the proper administration of civil justice in its widest sense is with the provincial legislatures subject to the appointing power of the federal government and subject to the reserved power for the federal Parliament to create certain additional courts (sec. 101). The powers and authority of these judges is to be determined by the province; and once a person was appointed Chief Justice of a court he could not be removed except on the recommendation of the Senate and the House of Commons. On the other hand, this Chief Justice could see his powers and authority curtailed by the provincial legislature and even the court of which he is a member, or his title or both could be abolished by the province. At the same time, the province could extend his powers and authority in connection with the administration the same as the provincial legislature could impose additional authority or powers on the other judges.

The legislature of Alberta, in my opinion, had the power to state that the Chief Justice of the Supreme Court appointed by the federal authorities could continue to preside over the more important of the divisions of this court.

Section 6 of the Act of 1919 as originally drawn was then *intra vires*.

But the legislature found it advisable to amend sec. 6 and to declare that the Appellate Division would be presided over

> by a Chief Justice who shall be Chief Justice of the court and who shall be styled the Chief Justice of Alberta.

It is contended that this amendment gave the authority to the Governor in Council to select any person to act as Chief Justice of the Appellate Division.

This contention has undoubtedly a great deal of force. The legislature has shown its disposition not to interfere with the power of appointment. At the same time we have to construe in the light of this amendment the other sections of the Act and particularly sections 3 and 7.

Section 3 states that the Supreme Court has not been abolished and continues to exist. The main purpose of the Act is to provide for two specific divisions, viz., the Appellate Division and the Trial Division of the Supreme Court and that there will be at the head of each division a Chief Justice. It gives, however, to the one who is to preside over the Appellate Division the additional title of Chief Justice of Alberta and gives him by sec. 7 rank and precedence over all other judges, even the Chief Justice of the Trial Division.

The Supreme Court of Alberta being continued, the Governor in Council having in the discharge of its power of appointment nominated in 1910 the Honourable Mr. Harvey as Chief Justice of this court and Chief Justice of Alberta, it seems to me that the new legislation concerning the Chief Justice could not be construed as providing for a new office. It is the old office of Chief Justice of Alberta which is continued and maintained, though the legislature has assigned to this Chief Justice the duty to preside over the Appellate Division.

The legislature never intended to abolish the old office of the Chief Justice. The statute could not be construed as maintaining the old position of Chief Justice and as creating a similar position. The idea of having two Chief Justices of Alberta with the same power and authority has certainly not entered into the mind and intention of the legislature. The old position stands and has not been superseded by the one mentioned in section 6 of the Act of 1919.

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I therefore come to the conclusion that Mr. Justice Harvey being already the Chief Justice of Alberta, should have imposed upon him, under the new Act, the duty of presiding over the Appellate Division or should be confirmed in his right to preside over this Appellate Division.

I would answer the questions as follows:—

To the first question:—No.

To the second question:—The letters patent of the 15th September, 1921, nominating Honourable Mr. Scott Chief Justice of Alberta are wholly ineffective.

To the third question:—No.

To the fourth question:—The letters patent nominating Mr. Justice Harvey Chief Justice of the Trial Division are wholly ineffective.

To the fifth question:—The Honourable Horace Harvey holds the office of Chief Justice of the Supreme Court of Alberta with the style and title of Chief Justice of Alberta and is by law entitled to exercise the jurisdiction and perform the duties and functions of Chief Justice and President of the Appellate Division of the Supreme Court of Alberta.

MIGNAULT J.—The questions submitted by this reference are very important and, if I may say so, somewhat unusual. They call for an expression of opinion as to the status and authority of two eminent members of the judiciary in the province of Alberta. They also touch on some important constitutional problems which have seldom been discussed before the courts of this country. It seems impossible to satisfactorily deal with them unless they are prefaced by a very brief statement of what I may perhaps call the history of the case.

The Provinces of Alberta and Saskatchewan were created in 1905 out of what was known as the North West Territories. These territories had a court of superior jurisdiction called the Supreme Court of the North West Territories, which administered justice either by sitting *en banc* or by trial judges, and which the legislature of each province was empowered to abolish for all purposes affecting or extending to the province.

The legislature of Alberta, in 1907, passed an Act, 7 Edw. VII, c. 3, creating the Supreme Court of Alberta, consisting of a Chief Justice, styled the Chief Justice of Alberta, and four puisne judges. When sitting as an Appellate Court this court was called the Supreme Court *en banc*, its quorum was three judges and it was presided over by the Chief Justice, or in his absence by the senior judge. The Chief Justice had rank and precedence over all judges and the latter between themselves ranked according to seniority of appointment.

While this statute was in force the Hon. Horace Harvey, then a puisne judge of the Supreme Court of Alberta, was appointed Chief Justice of the Supreme Court of Alberta with the style or title of the Chief Justice of Alberta, his commission bearing date the 12th of October, 1910.

In 1913, by 4 Geo. V., c. 9, the "Supreme Court Act" above referred to was amended by changing the name of the court *en banc* to that of "The Appellate Division of the Supreme Court," and it was enacted that during the month of December, or at some other convenient time, the judges of the Supreme Court should select four of their number to constitute the Appellate Division for the next ensuing calendar year, but that every other judge of the said court should be *ex officio* a member of the Appellate Division.

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These two statutes were repealed by the "Judicature Act" 1919 (9 Geo. V, c. 3), which was to come in force upon a day to be named by proclamation of the Lieutenant Governor in Council. This proclamation was issued on the 11th day of August, 1921, and fixed the 15th of September, 1921, for the coming in force of the Act.

By the provisions of this statute it is declared that there shall continue to be in and for the province a Superior Court of civil and criminal jurisdiction known as "The Supreme Court of Alberta" (sec. 3) and that the court shall continue to consist of two branches or divisions which shall be designated respectively "The Appellate Division of the Supreme Court of Alberta" and "The Trial Division of the Supreme Court of Alberta" (sec. 5).

As enacted in 1919, sec. 6 was as follows:

> The Appellate Division shall continue to be presided over by the Chief Justice of the court, who shall continue to be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal and three judges shall constitute a quorum.

In 1920 (before the Act was proclaimed and had come in force), sec. 6 was twice amended, by c. 3 of the Statutes of that year, sec. 2, and by c. 4 of the same statutes, sec. 43. As thus amended—and the changes can easily be noticed by careful reading—sec. 6 is in the following terms:

> The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the court and who shall be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other judges of the court to be assigned to it by His Excellency the Governor General in Council and to be called Justices of Appeal, and three judges shall constitute a quorum for the hearing of appeals from any district court. But the Appellate Division, when hearing such appeals, may be composed of five judges. The Appellate Division

shall be composed of five judges when hearing appeals from the trial Division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of judges.

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By sec. 7 of the "Judicature Act, 1919," the Trial Division consists of a Chief Justice, styled the Chief Justice of the Trial Division of the Supreme Court of Alberta, and five other judges, called justices of the Supreme Court of Alberta.

The Chief Justice of the court has rank and precedence over all other judges of any court in the province; the Chief Justice of the Trial Division has rank and precedence next after the Chief Justice of the court; the other judges of the court rank among themselves according to seniority of appointment (sec. 9). Every judge is *ex officio* a judge of the division of which he is not a member (sec. 10).

Referring very briefly to these enactments, it will be noticed that although the term "Supreme Court *en banc*" was used from the origin of the court, and the term "Appellate Division" from 1913, the expression "Trial Division" was introduced only by the "Judicature Act" of 1919. Section 5 of the latter statute however appears to have recognized by the words "the court shall continue to consist of" that there had been hitherto two divisions of the Supreme Court. The second, or then unnamed Trial Division, was composed of the judges who did not sit in the Appellate Division, although no doubt any of the latter could hold trials if thought advisable.

The "Judicature Act," 1919, as amended in 1920, came in force, I have said, on the 15th September, 1921. It increased the number of judges and added a Chief Justice for the Trial Division. For the salaries of

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these judges, Parliament made provision by 10-11 Geo. V., c. 56, s. 14 a (1920) which came in force by proclamation of the Governor in Council also on the 15th September, 1921.

On the same day, the 15th September, 1921, the Governor General, by commission under the Great Seal of Canada, appointed the Honourable David Lynch Scott described as

> one of the judges of the Supreme Court of Alberta, as heretofore established,
>
> (to be)
>
> the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta, as constituted under the "Judicature Act" of Alberta, Ch. 3, 9 Geo. V., as amended, and to be styled the Chief Justice of Alberta and to be *ex officio* a judge of the Trial Division of the said court.

Also, on the same day, the Governor General, by Commission under the Great Seal of Canada, appointed the Honourable Horace Harvey described as

> Chief Justice of the Supreme Court of Alberta as heretofore established (to be) the Chief Justice of the Trial Division of the Supreme Court of Alberta and *ex officio* a judge of the Appellate Division of the said court.

The reference states that the following questions have arisen upon which the advice of this court is desired by the Governor in Council: (see page 137).

Notice of the hearing under this reference was given by order of the court to the Hon. Horace Harvey and to the Hon. David Lynch Scott, as well to the Attorney-General of Alberta. The two latter were not present or represented at the hearing. The Honourable Horace Harvey appeared by Mr. Eugene Lafleur K.C., and the Attorney-General of Canada by Mr. E. L. Newcombe K.C., Deputy Minister of Justice.

The administration of justice in the province, including the constitution, maintenance and organization of the provincial courts, both of the civil and criminal jurisdiction, is by the British North America Act, (sec. 92, para. 14), assigned to the provinces. The appointment of judges of superior, district and county courts belongs to the Governor General, and their salaries are provided for by the Parliament of Canada (same Act secs. 96, 100). Judges hold office during good behaviour but are removable only by the Governor General on address of the Senate and House of Commons (B.N.A. Act, sec. 99).

Mr. Newcombe's contention was that the Alberta "Judicature Act, 1919," created, if not a new court, at least new judicial offices which could be filled only by appointments made by the Governor-General; that anything in the said Act purporting to vest these offices in any existing Chief Justice or judge would be *ultra vires* of the legislature of Alberta, and that consequently the commissions issued on the 15th September, 1921, were effective for the purposes therein stated.

Mr. Lafleur argued that no new court and no new judicial office, with the exception of the Chief Justiceship of the Trial Division and the additional judgeships, had been created by the "Judicature Act, 1919;" that the Hon. Horace Harvey, as Chief Justice of the Supreme Court of Alberta and Chief Justice of Alberta, could not be removed nor his offices taken away except by the method specified in the B.N.A. Act, sec. 99; that, as the Hon. Mr. Harvey still filled the said offices, no other person could be thereunto appointed, and consequently the commissions of the 15th September were inefficient to appoint the Hon. Mr. Scott to be Chief Justice and President of the

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Appellate Division of the Supreme Court of Alberta and Chief Justice of Alberta, and the Hon. Mr. Harvey to be Chief Justice of the Trial Division of the Supreme Court of Alberta, for obviously the two offices could not be filled by the same person.

Assuming, but not deciding, that the legislature could destroy an existing judicial office, so as to deprive thereof the person duly appointed thereto, it would require a very clear enactment to make me come to the conclusion that the judicial office had been destroyed and that the titulary thereof was no longer entitled to exercise the powers, authority and jurisdiction thereunto appertaining. Still less would I be disposed to find—in the reorganization and rearrangement by the legislature of an existing court, with provisions for the appointment by the proper authority of the Chief Justice and judges of the court, where the court had already, as it naturally would have had, a Chief Justice and judges,—the creation of new judicial offices or the destruction of the existing ones. It is only when the legislature by legislation such as that under consideration, increases the number of judges of an existing court, or when, in dividing the court into different branches, it provides for additional Chief Justices, that I would readily conclude that a new judicial office has been established. It follows that if the existing judicial offices are filled and have not been destroyed, no new appointments can be made thereto.

Bearing these considerations well in mind, I will take up the proper construction of the Alberta "Judicature Act, 1919," and I have no difficulty whatever in coming to the conclusion that the only new judicial offices created by this Act were the additional judgeships required to complete the number of judges provided for and the Chief Justiceship of the Trial Division.

In other respects, in my opinion, the existing Supreme Court of Alberta continued. This is shown by sec. 3 of the Act. Sec. 5 assumes that there were already two existing branches or divisions of the court and it gives a name to the Trial Division. Sec. 6, as first enacted in 1919, shows that that was clearly the intention of the legislature, for the language was

> the Appellate Division shall continue to be presided over by the Chief Justice of the court, who shall continue to be styled the Chief Justice of Alberta. * * *

But it is contended that the 1920 amendments show that this intention of the legislature was not persisted in. No doubt the present language of sec. 6 does not as emphatically express the intention not to create a new office of Chief Justice of the Supreme Court of Alberta, but even were I of opinion that the new language of the section is equivocal or consistent with either construction, I would not, for the reasons above stated, give the preference to a construction that would deprive the existing Chief Justice of the Supreme Court of his high office, and possibly leave the Governor in Council free not to reappoint him to any judicial office. Furthermore, the language of sections 3 and 5 was not changed in 1920, and I find in these sections the clearly expressed intention to continue the existing court with its existing Chief Justice and judges, the number of which, however, was increased.

It appears unnecessary to express any opinion upon the right of the legislature to make these enactments. I assume, for the purpose of answering the questions submitted, that it acted within its powers.

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Answering now these questions, I will reply to the first and third questions in the negative. I do not think, in view of this answer, that questions 2 and 4 call for a reply; it is clear that the letters patent in question are wholly ineffective for the purposes therein expressed. I would answer question 5 by saying that in my opinion the said Horace Harvey holds the office conferred on him by his Commission of 1910, which office is continued under the "Judicature Act" of Alberta, 1919, and entitles him to be the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta.

At the sittings on the 2nd day of May, 1922, the Supreme Court of Canada answered the questions submitted as follows:

To the first question:—No.

To the second question:—Wholly.

To the third question:—No.

To the fourth question:—Wholly.

To the fifth question:—The Hon. Horace Harvey holds the office of Chief Justice of the Supreme Court of Alberta with the style and title of Chief Justice of Alberta and is by law entitled to exercise and perform the jurisdiction, office and functions of the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta.

The Chief Justice and Idington J. answer questions 1 and 3 in the affirmative, that the Honourable David Lynch Scott is the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta and that the Honourable Horace Harvey is the Chief Justice of the Trial Division of such

Supreme Court. The Chief Justice answers the fifth question in the negative and holds therefore that no answer is required to questions 2 and 4. Idington J. holds no answer to 2 necessary, but answers the fourth question by saying that the Honourable Horace Harvey being *ex officio* a judge of the Appellate Division of the Supreme Court only qualifies him to act in place or stead of some member of the court not being able to take the place to which he or his successor may have been assigned. To the 5th question Idington J. answers in the negative and that the Honourable Horace Harvey only holds the office provided by his patent of September, 1921.

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*Mar. 8, 9,
*May 2.

THE CANADA LAW BOOK COMPANY (DEFENDANT)..... } APPELLANT;

AND

THE BOSTON BOOK COMPANY (PLAINTIFF)..... } RESPONDENT.

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

Contract—Purchase of books—Entire set—Price fixed per volume—150 vols. more or less—Estimate—Representation—Warranty—Breach—Action for price—Counterclaim for damages.

The B. B. Co. executed a contract agreeing to give the C. L. B. Co. the sole Canadian market for sale of the English Reports Reprint to be published in Edinburgh and of which it had the sole rights for the United States and Canada. The C. L. B. Co. by said contract agreed to buy a certain number of copies "of each volume of the set (150 vols. more or less)" at a price named per vol. The publishers of the work had issued a prospectus which was given to the C. L. B. Co. stating that the set would consist of about 150 vols. of about 1,500 pages each and the latter company solicited subscriptions on that basis. Most of the volumes after the first few contained considerably less than 1,500 pages and when 150 had been published it was seen that to complete the work over forty more would be necessary. The C. L. B. Co. refused payment for the following four volumes published and, in an action by the B. B. Co. for the price, counterclaimed in damages for breach of the contract.

Held, reversing the judgment of the Appellate Division (48 Ont. L. R. 238) which affirmed that on the trial (44 Ont. L.R. 529) that the C. L. B. Co. did not contract to purchase the entire set of whatever number of volumes it might consist but only to take 150 vols., more or less; that the contract must be construed in view of the statement in the prospectus as to the extent of the work; that the number of volumes and contents of each to be reprinted were known and the extent of the work to contain the reprint could be calculated

*PRESENT:—Duff, Anglin, Brodeur and Mignault JJ. and Cassels J. *ad hoc*.

within very narrow limits; therefore the term in the contract sued on that it would consist of "150 vols., more or less" was not an estimate but part of the description of the subject matter and the phrase "more or less" would permit only a slight increase over the 150 vols. and the excess of 40 vols. or more is so unreasonable as to constitute a breach of the contract.

Held also, that the C. L. B. Co. is entitled to claim damages by counterclaim to the action of the B. B. Co. and not obliged to wait until the entire work is published.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial in favour of the plaintiff (2).

The material facts of this case are stated in the headnote. The Boston Book Co. sued to recover the amount due for the stipulated number of copies of volumes 151 to 154 inclusively. The defendant denied any liability therefor and counterclaimed in damages for breach of the contract to supply the whole set in about 150 volumes.

The trial Judge gave judgment for the plaintiff for the amount claimed and dismissed the counter-claim (2). His judgment was affirmed by the appellate Division (1).

Lafleur K.C. and *Harding K.C.*, for the appellant. The prospectus was a part of the contract and contained its material terms. The court must consider it in order to be in the same position as the parties were when the contract was made. See *McLeod* v. *McNab* (3); *Chapman* v. *Bluck* (4).

The statement in the prospectus amounts to a warranty. The parties did not intend that the written agreement should contain all the terms of the contract and the warranty does not contradict any of its terms. See Benjamin on Sale (6 ed.) pages 663 and 672.

(1) 48 Ont. L. R. 238.
(2) 44 Ont. L. R. 529.
(3) [1891] A.C. 471.
(4) 4 Bing. N.C. 187. at page 193.

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It was possible to ascertain with almost absolute precision the extent of the contemplated work so that the number of volumes mentioned in the contract cannot be a mere estimate and the expression "more or less" admits of only a slight variation. *Reuter Co.* v. *Sala* (1).

The damages are capable of being ascertained and the defendant can assert its claim in this action. *Findlay* v. *Howard* (2).

Bicknell K.C. and *Gordon*, for the respondent. The subject of the contract was a work of an extent that could not be ascertained in advance. Therefore the words "150 volumes more or less" were words of expectation and estimate only *Tancred, Arrol & Co.* v. *Steel Co. of Scotland* (3); *In re Harrison* (4).

The words "more or less" should be given the widest interpretation in a case of this kind *Eckert* v. *London Electric Ry. Co.* (5) and cases cited above.

These words cannot be construed as a warranty since, in a matter of such importance, specific terms of warranty would be necessary. *Heilbut, Symons & Co.* v. *Buckleton* (6).

The defendant has for many years been aware of the terms of the prospectus and has accepted and paid for the books issued. It has, therefore, elected to affirm the contract and lost its right to rescind; *Clough* v. *London and North Western Ry. Co.* (7); *Erlanger* v. *New Sombrero Phosphate Co.* (8); *In re Cape Breton Co.* (9) per Pearson J. at page 229.

(1) [1879] 4 C.P.D. 239.
(2) 58 Can. S.C.R. 516.
(3) [1890] 15 App. Cas. 125.
(4) [1917] 1 K.B. 755.
(5) 57 Can. S.C.R. 610.
(6) [1913] A.C. 30 at pages 37 and 47.
(7) [1871] L.R. 7 Ex. 26 at page 34.
(8) [1878] 3 App.Cas. 1218 at p. 1277.
(9) [1884] 26 Ch. D. 221.

DUFF J.—The decisive point in the controversy is that raised by the question, what was the subject matter of the contract—or rather that branch of the contract which in effect is a contract of sale? The respondents advance the view that they agreed to supply the appellants with sets of reports as they were published and only as they were published by Greene & Sons. The appellants, on the other hand, rest their case upon the proposition that the contract contemplated the delivery of sets, each set consisting of a number of volumes fixed within very narrow limits and each volume containing an approximately determined number of pages and each set being a complete reprint of certain specified law reports.

The document of the 5th day of June, 1900, is one which can only be fully understood by one who is informed of the circumstances in which it was executed. The phrase "English Reports Reprint to be published by Wm. Greene & Sons, of Edinburgh, Scotland, first volume to appear about September 1st"

points to something which was known to and in contemplation of both parties to the contract and with reference to which they contracted; and in order to construe and apply the contract you must ascertain what

this was. Lord Davey, whose words I have been quoting, (*Bank of New Zealand* v. *Simpson* (1) proceeds to say

"extrinsic evidence is always admissible not to contradict or vary the contract but to apply it to the facts which the parties had in their minds and were negotiating about.

It will be very useful also to bear in mind the words of Lord Haldane in *Charrington & Co.* v. *Wooder* (2). Where, says Lord Haldane,

(1) [1900] A.C. 182 at page 187. (2) [1914] A.C. 71 at page 77.

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the description of the subject matter is susceptible of more than one interpretation, evidence is admissible to shew what were the facts to which the contract relates. If there are circumstances which the parties must be taken to have had in view when entering into the contract it is necessary that the court which construes the contract should have these circumstances before it.

There are certain circumstances which the parties must be taken to have had in view. Mr. Soule had in his possession a copy of the circular of Greene & Sons and this circular gave a list of the reports which were to be republished. It stated explicitly that all the reports mentioned could be republished in about 150 volumes of about 1,500 pages each.

It is indisputable that this estimate was one which could be subjected to rigorous tests; the precise works which were to be reproduced were known and the number of volumes required into which the whole series would run could be determined subject to a very narrow margin of error.

The appellants moreover, as well as the respondents, were publishers and booksellers and were, of course, known to be purchasing with a view to re-selling to their customers, the legal profession in Canada. It was quite well understood that they would follow the usual procedure in such a case. That is to say they would issue an advertisement or prospectus inviting subscriptions and inviting these subscriptions upon the faith of the essential terms, at all events, of the prospectus of Greene & Sons—that a set of the reprint would contain the reports specified and that it would consist of 150 volumes of about 1,500 pages each. These were essential terms of the prospectus of Greene & Sons because on the basis of this prospectus subscriptions were being invited by them at the rate of a named price per volume and the total cost of the work to the subscriber would necessarily depend up on the number

of volumes he was agreeing to buy; and, as this was a matter easily ascertainable by the publishers within, as I have said, very narrow limits the publishers' estimate, so called, would naturally be treated by the publisher and subscriber alike as within such limits, determining the number of volumes which the subscriber would ultimately be called upon to pay for. Precisely the same considerations would govern the relations between the Canada Law Book Company and its customers. A proposed subscriber's first question would be a question concerning the number of volumes and it was necessary that the appellants should be in a position to give such assurance upon this point as subscribers would naturally exact. The Boston Book Company dealing with Greene & Sons would expect from Greene & Sons, just as the individual subscribers would expect from the Canada Law Book Co., a contractual stipulation upon this point and that such a contractual stipulation had been or would be procured by the Boston Book Company from Greene & Sons must, I think, be taken to have been one of the assumptions upon which Mr. Cromarty and Mr. Soule proceeded in concluding their arrangements.

All these things, the character of the publication which Greene & Sons were offering to the public as the English Reports Reprint; the fact that the exact identity of the publications to be reproduced was known and the precise number of pages of a given size required to reproduce them could be ascertained; the fact that the appellants and the respondents were themselves publishers and dealers in books and fully understood this; the fact that the publication was being offered at a fixed price per volume, and consequently that the ascertainment of the number of volumes in each set as one of the conditions of the

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subscribers' contract within such limits as aforesaid was a point on which the appellants must be prepared for the purpose of securing subscriptions to enter into explicit engagements; these facts not only may but must be considered in construing the document signed by Mr. Soule and Mr. Cromarty for the purpose of ascertaining what was the subject matter of the sale.

Reading the document in light of the facts mentioned, two things appear to me to be almost manifest, 1st, that the English Reports Reprint means a reprint of all reports mentioned in Greene & Sons circular; and 2nd, a reprint embodied in about 150 volumes of about 1,500 pages each. In other words, that the parenthetical language "150 volumes more or less" is part of the description of the thing sold.

The phrase "more or less" has of course no fixed quantitative significance. Its precise import and bearing upon the meaning and effect of any instrument in which it occurs must depend upon the subject matter and circumstances of the transaction. It is questionable perhaps whether decided cases ascribing to it a precise effect in particular circumstances can safely be taken as a guide in other cases. It has sometimes been treated as manifesting simply an intention that the figure given should be regarded as an estimate only, *e.g.* in *Cockerell* v. *Aucompte* (1) and in other cases it has been considered to denote that the quantitative expression which it qualifies though not mathematically exact is accepted as expressing an approximation to the number or other magnitude in relation to which the parties are contracting as closely as the particular business in a practica

(1) [1857] 2 C.B.N.S. 440.

way admits of, *e.g.*, in *Finch* v. *Zenith Co.* (1). Here this phrase is to be construed in light of the considerations already mentioned and those considerations seem to give the key to its meaning. In a sense the number given —150—is an estimate but it is an estimate given by experts in possession of all the data required for the purpose of arriving at a judgment almost exact as to the number of volumes required. This number must necessarily, in some degree, be matter of uncertainty because it was thought, no doubt for very good reasons, desirable that in every case a volume of the reprint should contain only completed volumes of the republished reports, a condition necessarily resulting, no doubt, in some disparity in the size of different volumes of the reprint; and other circumstances also may have contributed to the uncertainty on this point. Some latitude therefore must be allowed as to the number of volumes which each set was to contain, but to that latitude strictly ascertainable limits might be set; and bearing in mind the fact the appellants had no contractual relations with Greene & Sons while it was quite understood that the figure given (150) must be the basis of contractual stipulations by the appellants in the agreements with their customers, I think these words "more or less" must be considered to contemplate only such departure from the estimate (of 150) as should be regarded as reasonably arising from exigencies of publication which in the circumstances might naturally be unforeseen or overlooked; and that the figure given (subject to such reasonable degree of inexactitude as would not be incompatible with the skill and care to be expected in such circumstances) was accepted as part of the description of the thing they were dealing with.

(1) 146 Ill. App. 257.

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The law applicable in such circumstances is settled. Where goods are sold by description there is an implied condition that they shall correspond with the description; *Bowes* v. *Shand* (1); and such implied conditions go to the root of the contract and if the appellants when delivery of the first volume was tendered had been informed that the work was to be in sets of 200 instead of 150 volumes they could have declined to accept the book and would also have had a right of action for breach of an implied contract that the designated reports would be contained in a set of about 150 volumes. *Bowes* v. *Shand* (1).

Having accepted the volumes delivered the right to reject is lost, but they have a cause of action as upon a warranty that the work as delivered would comply with the description in the contract. This right the appellants are entitled to assert in an independent action; and they are entitled also in the action brought by the respondents to set up in diminution of, or as a complete answer to, the respondents' claim the loss they have suffered by reason of the difference in value between the thing agreed to be sold and that delivered; *Mondel* v. *Steel* (2). This reduction or extinction of price is not by way of set off, and is regarded as satisfaction only *pro tanto* (1) (per Parke B. at pages 870 and 871); and consequently damages in excess of the amount so allowed can be recovered in another action or by counter-claim. In this case if this exceed the amount sued for the action should be dismissed with costs. There should be a reference to ascertain the damages and further consideration and costs (except costs of the appeals which the appellants should have) should be reserved.

(1) [1877] 2 App. Cas. 455. (2) [1841] 8 M. & W. 858.

ANGLIN J.—I agree with the view which prevailed in the provincial courts that what we have to deal with in this case is not an agreement for an agency, but a contract for the sale and purchase of goods. The parties put that contract in writing, in June 1900, in the following terms:—

> The Canada Law Book Company agree to take two hundred copies of each volume of the set (one hundred and fifty volumes more or less) at a price of ten shillings and sixpence (10s. 6d.) per volume, bound in half roan, f.o.b. Edinburgh; payment to be made by the Canada Law Book Company on each volume three months after shipment of the volume from Edinburgh.

The "two hundred copies" was a few months later changed by mutual consent to 150 copies and was eventually fixed at 175 copies.

The "set" had reached 160 volumes at the time of the trial; 164 volumes have now been delivered; and it seems reasonable to expect that when complete the "set" will comprise from 187 to 195 volumes. The vendor sues for the price of volumes nos. 151, 152, 153 and 154. The purchaser contests this demand and counterclaims for $20,000 as damages for breach of contract, and for specific performance.

The question presented is whether the words "one hundred and fifty volumes more or less" were introduced into the contract as mere words of estimate so that the purchaser bound itself to take and pay for the entire "set" at the price of 10s. 6d. per volume, however great the number of volumes it should be made to comprise, or whether these words constituted a part of the description of the subject-matter of the contract, non-fulfilment of which, as a "condition" would entitle the purchaser to reject the goods and repudiate all liability, or, in the alternative, taking the goods, to recover damages *as* for breach of a warranty.

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The law on this subject is fully discussed in the judgment of the late Lord Justice Fletcher-Moulton in *Wallis, Son & Wells* v. *Pratt & Haynes* (1), unanimously and wholly approved by the House of Lords (2)

I say not "for a breach of warranty", but "*as* for a breach of warranty," because, after a careful study of the evidence, I agree with the learned judges who have held that intention on the part of the vendor to enter into an undertaking (as to the number of volumes to be comprised in the set) *collateral* to the express object of the contract (*Chanter* v. *Hopkins* (3) has not been shewn. *Heilbut, Symons* v. *Buckleton* (4). With very great respect, the effort to make of this case one of warranty collateral to the sale from the outset, if I may so put it, seems to have introduced confusion of thought and led to misconception of the true issue. If the statement of the number of volumes imports contractual obligation on the part of the vendor it is because it forms a part of the description of the goods sold. Was that the purpose of its insertion in the contract? The words in themselves are susceptible of being so regarded or of being treated merely as an estimate. In which sense they were in fact used must be determined by the context, if it affords the necessary cue, and, if not, by consideration of

> the circumstances and the grounds upon which the contract was entered into

(Beal on Legal Interpretation, 2nd ed. p. 123) and the object with which the words in question were inserted. *Hart v. Standard Marine Ins. Co.* (5).

(1) [1910] 2 K.B. 1003, 1011.
(2) [1911] A.C. 394.
(3) [1858] 4 M. & W. 399, 404.
(4) [1913] A.C. 30, 37, 47.
(5) [1889] 22 Q.B.D. 499, 501.

While the "set" is described in an earlier clause of the contract as "the English Reports Reprint," to be published by William Green & Sons of Edinburgh, it is common ground that in order to have an adequate description of the subject-matter of the sale recourse must be had to a prospectus issued by the Edinburgh firm which the vendor (The Boston Book Company) placed in the hands of the purchaser (The Canada Law Book Company) before the contract was made. In its statement of claim the vendor says that its contract with the defendant

> wsa entered into with reference to this prospectus, which is made a part of the said contract, and to which the plaintiff craves leave to refer at the trial of this action.

Although the truth of this allegation, because not admitted in the statement of defence, was in issue under the Ontario practice, the evidence fully warrants the conclusion that the subject-matter of the contract sued upon was the set of books described in the Edinburgh prospectus. The learned trial judge found that

> this circular was before the parties to this action as the foundation of the contract made, and may, I think, be referred to as shewing what was meant by the English reprint referred to in the agreement.

Extraneous evidence is admissible (even in the case of a memorandum required to satisfy the Statutes of Frauds)

> of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument,

or, in other words, to understand the subject-matter of the contract. *Bank of New Zealand* v. *Simpson* (1).

The description of the subject-matter given in the heading of the prospectus is

> a complete re-issue of all the decisions of all the English Courts from the earliest times to 1865, in one uniform set of 150 volumes, forming "The English Reports," 1,300 to 1865.

(1) [1900] A.C. 182, 187-8.

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In the body of the prospectus was the following paragraph:—

With the object of proving whether it were possible to print such an enormous mass of material in a good readable type and in a series of volumes which could be accommodated in an ordinary small book-case, careful calculations and experiments in paper and printing have been made. It has been found as the result of these * * * that a complete set of all the decisions, from the earliest times to 1865, can be given to the profession in about 150 volumes of 1,500 pages each, * * * . *The set when complete will occupy actually less room than a set of the official Law Reports from 1865 to date.* How this desirable result will be attained is shewn on the specimen pages enclosed.

The accompanying specimen pages, printed as part of the prospectus, exhibited a copy of the original of page 127 of volume IX of Clark & Finnelly's House of Lords Reports and, opposite to it, a proposed page of the reprint containing all of pages 127 and 128 and most of page 129 of the Clark & Finnelly volume. In a note, printed between these two specimen pages, it is stated that

the re-issue will be printed in volumes of about 1,500 pages each. * * * By these means from 6 to 8 volumes of the Reports will be condensed into one volume of the "English Reports", of the handy size shewn on the other side.

On another page of the prospectus occurs the following:—

The number of volumes in each series will be approximately as follows:—

House of Lords	11	volumes
Privy Council	6	"
Chancery	23	"
King's and Queen's Bench	32	"
Rolls Court	7	"
Vice Chancellor's Court	13	"
Common Pleas	19	"
Exchequer	12	"
Ecclesiastical, Admiralty and Probate and Divorce	8	"
Bankruptcy and Mercantile Cases	5	"
Crown Cases	3	"
Nisi Prius	6	"
Bail Courts	5	"

It requires little argument to prove that a series containing all these reports in a moderate number of well printed volumes at one-eighth of their present cost and occupying only about one-tenth of their shelf-room must certainly become for all time coming the accepted edition for general use and reference.

The subject-matter of the contract in my opinion was not a set of "the English Reports" to comprise an indefinite number of volumes—merely estimated at 150—but a set of the English Reports to consist of "one hundred and fifty volumes more or less"; and the vendor represented that its undertaking would be carried out by making each volume contain about 1,500 pages printed as indicated in the specimen page submitted.

The plaintiffs thus state the purview of the contract in their reply:

> According to the said contract * * * the defendant agreed to purchase from the plaintiff company one hundred and fifty copies of each volume of the set of English Reports reprinted, each set to contain one hundred and fifty volumes more or less, and each volume to contain fifteen hundred pages, more or less, for the price mentioned, and the plaintiff denies that there was any agreement that each volume of said sets was to contain at least fifteen hundred pages.

Except, perhaps, that the statement of the paginal content of each volume was rather a representation as to the intended method of carrying out the stipulation as to the number of volumes than itself a term of the actual agreement, this is, in my opinion, a correct statement of the contract between the parties; and upon it the defendant is, I think, entitled to maintain its counter-claim.

Much was made in argument of the fact that the price stipulated for in the contract is not a lump sum, but so much per volume. But the volume for which the fixed price was agreed to be paid was a volume not of indefinite size but to contain "about", or "approximately," 1,500 pages, or, at least, a number of pages

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sufficient to permit of the whole "set" being completed in about 150 volumes, the size of the pages, the number of lines in each and the style of type being specified. If the very different view of the contract now contended for on behalf of the vendor were correct the defendant would have been bound to accept as a fulfilment of it volumes of say 200 pages each and to pay for a set comprising not 150 volumes or thereabouts, but upwards of 1,000 volumes, should the publishers see fit to extend the series to that extent. The suggestion that the parties intended any such contract is simply preposterous.

The evidence leaves no room for doubt that had the set been published in uniform volumes of about 1,500 pages each, with pages of the size and printed with the type shewn in the specimen exhibited in the prospectus, the entire set would have been completed in the "150 volumes more or less," contracted for. What the defendant bought and had a right to expect to receive was uniform sets of "150 volumes more or less" of "about 1,500 pages each". The number of volumes was in my opinion an essential part of the description of the goods bought.

I extract the following passage from the judgment of Mr. Justice Riddell:—

> The first matter calling for comment is that in 1902 the publishers, whose prospectus was for the publication of the Privy Council Reports in 6 volumes, after publishing volumes 12-17 of the series, and thereby completing the Privy Council Reports ordinarily referred to, added three volumes, 18-20, of Indian Appeals, not, it is said, contemplated in the original proposition. This, the plaintiff says, was due to Stevens & Sons, whose name appears with Green & Sons as publishers, owning the copyright, and that they were unwisely grasping in extending these additional volumes to three reprint books, when they could easily have been put into two at most, or even by maintaining the size of the early volumes consistently these additions could have been so combined as to make only one extra volume beyond announcement (letter May

21st, 1902). When we see that volumes 12-17 have an average of 820 pages only, 4,960 pages in all, and volumes 18, 19 and 20 have 999, 1,099, and 926 respectively, an average of 1,008 pages, 3,024 pages in all, the truth of the statement just referred to is manifest. The total paging of the Privy Council Reports is 7,984 less than 6 volumes of 1,500 each.

Six volumes containing an average of 820 pages each certainly did not evince a genuine effort to produce a set of uniform volumes containing about 1,500 pages each. Volume 16 contains 837 pages; volume 17, 596 pages, the two volumes together making 1,433 pages, or less than the proposed 1,500 of a single volume. It is difficult to conceive of any honest explanation for not including these two books, which contain Moore's (N.S.) Privy Council Reports, vols. 3-6 and 7-9 respectively, in one volume. In the absence of the publisher I withhold further comment.

Had the complete set as actually published been all tendered for delivery at once the defendant, in my opinion, would have been entitled to reject it as not corresponding to the particular description under which it was sold. But the books had, as was contemplated by the parties, been resold by the defendant to its subscribers before, or immediately upon, the contract being made with the plaintiff. The volumes were delivered not in a complete set but as each came from the press. The first six volumes contained, respectively 1,606, 1,335, 1,491, 1,403, 1,439 and 1,619 pages—or an average of 1,482 pages apiece. There was no substantial ground for complaint up to this point. The six volumes averaged "approximately" or "about" the 1,500 pages each mentioned in the prospectus. By the delivery of these six volumes to the subscribers the defendant was fully committed to the enterprise and its opportunity for rescission was gone forever.

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It retained, however, its right to recover damages for non-fulfilment of the contract in the subsequent deliveries. That right it preserved, so far as may have been necessary, by frequent letters of protest. It is perhaps worthy of note in passing that one of those letters elicited from the plaintiff, on the 13th of November, 1902, the statement:—

> I think Green (the Scotch publisher) said that he had found that volumes of the average of 1,200 pages would bring the whole series of the reprint into 150 volumes.

It is argued, however, by the plaintiff that the words "more or less", appended to the words "one hundred and fifty volumes" in the contract, must be read in the broadest sense and provide a margin wide enough to cover the extra 37-45 volumes which it now seems reasonable to anticipate will be required to complete the set. Indeed, as Mr. Justice Riddell observes, the attitude of the plaintiff throughout, as indicated in the correspondence and the pleadings, has been that "the number of volumes is not stated absolutely but qualifiedly." It has not treated the "one hundred and fifty volumes more or less" as the mere estimate for which it now seeks to have it taken, but rather as importing merely the right to exceed 150 volumes by such margin as the words "more or less" might afford.

Regard being had to all the circumstances, and more especially to the terms of the prospectus, I find in the addition of the words "more or less' an indication not that a mere estimate was imported by the statement in the contract of the projected number of volumes, but rather that the plaintiff always recognized in the words "one hundred and fifty volumes" an essential part of the description of the subject-matter of the sale and accordingly qualified what would otherwise have been an absolute undertaking that the number of

volumes should not exceed 150. The facts in evidence shew that the governing words of the description are those specifying the number of volumes. Benjamin on Sale (9 ed.) 803, 813.

I am, with great respect, unable to accept the view that the defendant's counter-claim should be rejected as premature. There may not have been a breach of the plaintiff's contract when it delivered the first volumes containing substantially less than "about 1,500 pages". For some time it was possible that the deficiency might be remedied by making subsequent volumes larger. That possibility, however, is long since past, and the breach was complete when it ceased to exist. There is no reason why, applying the principle of *Mondel* v. *Steel* (1) the damages for such breach already sustained should not be applied, as far as the value of the "set" is thereby diminished, *pro tanto* in diminution or extinction of the contract price, so far as unpaid—no reason why the defendant should be compelled to pay for the volumes already delivered in excess of "150 volumes more or less", and for those yet to be delivered, and be obliged to take the chance of subsequent recoupment on its counter-claim. *Government of Newfoundland* v. *Newfoundland Railway Co.* (2).

The defendant has asserted that counterclaim for the whole of the damages it has sustained and will sustain by reason of the plaintiff's breach of contract. It can probably now be ascertained with at least approximate exactness how many additional volumes will be required to complete the "set". In arriving at this figure care must of course be taken that it is not put higher than will be entirely fair to the plaintiff.

(1) 8 M. & W. 858. (2) [1888] 13 App. Cas. 199, 212.

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I agree with Mr. Justice Riddell's view, however, that the damages should now be assessed once for all and that the proper course to adopt for this purpose is the reference which he suggests. A new trial seems to me to be unnecessary under the Ontario practice. (Ont. J.A., R.S.O., c. 56, ss. 64, 65.)

What number of volumes in excess of 150 the plaintiff may claim it was within the contemplation of the parties might be comprised in the "set" without breach of contract, by virtue of the margin provided for by the words "more or less", must still be determined. No doubt these words sometimes have the effect of rendering the statement of quantity in the contract nothing more than an estimate, as was held in *McLay* v. *Perry* (1); but see *McConnell* v. *Murphy* (2). Here, having regard to the circumstances under which, and especially to the terms of the prospectus "with reference to which the contract was entered into," consideration of which is vital to its construction (*Morris* v. *Levison* (3), it is impossible to give them any such effect. The materiality of the number of volumes is too apparent. The number of volumes requisite to furnish a complete reprint, (the size of the pages, number of lines to each page, and type being specified) was susceptible of precise mathematical determination; and the prospectus stated that it had been so determined. The case then was not one for an estimate at all. The only element of uncertainty was due to the desirability that the whole of each of the original volumes should be found in a single volume of the reprint—that an original volume should not be split, or divided, so that part of it would appear in one volume and the rest in the succeeding

(1) 44 L.T. 152. (2) [1873] L.R. 5 P.C., 203, 212, 220
(3) [1876] 1 C.P.D., 155 at pages 156-7, 160.

volume of the reprint. This might necessitate some of the volumes of the latter falling slightly short of, and others slightly exceeding the average of 1,500 pages projected. Hence the statement in the prospectus that the volumes would each contain "*approximately*" or "*about*" 1,500 pages and the contractual provision that the set would number "150 volumes *more or less*". The words "more or less"—equivalent to "about"—are introduced in such a case.

for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.

Brawley v. *United States* (1); *British Whig Publishing Co.* v. *Eddy* (2). "More or less' are words of general import and the excess or deficiency, as the case may be, which they cover bears a very small proportion to the amount named. *Cross* v. *Eglin* (3). They provide "a margin for a moderate excess or diminution of the quantity." *Reuter* v. *Sala* (4).

In *Morris* v. *Levison* (5) 3 per cent either way was, under the circumstances, held to be a fair allowance under the word "about". In "*The Resolven*" (6) a margin of 5 per cent was allowed under the word "thereabouts." No doubt any margin fixed must be "more or less" arbitrary. Having regard to the terms of the propectus, however, as affording some indication of what the parties must have had it in mind to provide for, and to the precision with which the number of volumes requisite to complete the set could have been, and was in fact, stated to have been ascertained, I think an

(1) 96 U.S.R. 168, 172.
(2) 62 Can. S.C.R. 576.
(3) [1831] 2 B. & Ad. 106, 110.
(4) 4 C.P.D. 239, 244.
(5) 1 C.P.D. 155.
(6) 9 Times L.R. 75.

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allowance affording "a reasonable latitude" must be confined to such excess as suitable arrangement of the matter in volumes and trifling error in calculation, practically unavoidable, might entail.

I would allow the appeal with costs here and in the Appellate Division. There should be a reference to the master to ascertain any balance of purchase money due the plaintiff and the amount of the defendants' damages and the balance due either party, after making set-off.

Other costs and further directions should be referred to the Supreme Court of Ontario.

BRODEUR J.—I concur with my brother Sir Walter Cassels.

MIGNAULT J.—I concur with my brother Anglin J.

CASSELS J.—I have given the best consideration that I am capable of to the appeal argued before this court on the 9th day of March, 1922. With all due respect to the opinions of a majority of the judges who heard the case at the trial and on the appeal, I am unable to arrive at the conclusions they have come to. With some exceptions of a minor character, which I will subsequently deal with, I am of opinion that the view pronounced by Mr. Justice Riddell is the correct one, that there was a warranty on the part of the Boston Book Company, and that the Canada Law Book Company, Limited, were entitled to have damages for a breach of such warranty.

The facts are so fully dealt with in the various judgments under review that it is unnecessary for me to repeat them.

I agree with the view arrived at by Mr. Justice Riddell, that the contract between the Boston Book Company and the Canada Law Book Company is a contract of sale and purchase.

In the plaintiff's statement of claim, after referring to the two contracts of the 5th June, 1900, and the 19th November, 1900, the plaintiff states as follows:—

> At the time the said agreements were entered into the defendant had in its possession a prospectus issued by William Green & Sons stating in general terms their plans for the issue of the English Reports Reprint and the contract between the plaintiff and the defendant was entered into with reference to this prospectus which was made a part of the said contract and to which the plaintiff craves leave to refer at the trial of this action.

There is no privity between the Canada Law Book Company, Limited, and William Green & Sons.

In his reasons for judgment Mr. Justice Middleton is reported as stating as follows:—

> In other words, the estimate of 123 volumes for the work so far as it has gone has been exceeded to the extent of 37 volumes, the publication having actually yielded 160 volumes, and if the same proportion holds good for the 27 remaining estimated volumes the actual result will be 192 or 193 volumes, an excess of result over estimate of one-third.

It is stated in the same judgment:

> As contemplated by the parties, the defendants have sold to individual customers.

It was known to the Boston Book Company, that the object of the purchase by the Canada Law Book Company, Limited, was to re-sell them to their customers.

Mr. Justice Middleton states:—

> Unfortunately I have before me only the parties to this action, and cannot deal in any way with those really at fault—the publishers. Mr. Tilley presented various theories which might account for some discrepancy between the number estimated and the number produced, but slight investigation has made it plain that this will not account for more than a small fraction of the excess; and, so far, I am convinced that there has been on the part of the publishers a deliberate design to increase the number of volumes over the estimate.

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He states further:—

> I can only regret that the parties did not join in an attack upon the publishers, against whom, unless more appears than was developed in the evidence in this case, a remedy ought to be found.

It seems to me that if the learned trial judge's views are correct, and that the Boston Book Company would have a remedy over against the Edinburgh publishers, it would follow that the contract between the Boston Book Company and the Canada Law Book Company, Limited, based upon the same representations as were made by the Edinburgh company to the Boston Book Company, would entitle the Canada Law Book Company, Limited, to a remedy against the Boston Book Company for breach of their representation which practically amounts to a warranty. The Boston Book Company would have their remedy against the Edinburgh Company.

In addition to the authorities referred to by Mr. Justice Riddell, I would quote from the case of *Lloyd Limited* v. *Sturgeon Falls Pulp Co.* (1). It is a case decided by two judges of eminence, and was very fully argued by very eminent counsel on both sides. The case arose out of a contract of sale, the facts of which are set out in the letters marked "S. T. and U" at the foot of page 164 of the report. There had been a reference under the English statute to arbitration,—the arbitrator named being the present Sir Charles Fitzpatrick. A reference was directed by the arbitrator for the decision of the English court upon a question among others of very great importance. On page 163 of the report in the Law Times, it is stated that the claimant sought to give evidence that the contract between the parties was not confined to the

(1) 85 L.T. 162.

documents above referred to, S. T. and U, but that amongst the terms of the contract which they claimed was partly in writing and partly verbal, upon which they purchased the properties in question, or in the alternative amongst the matters verbally warranted to them by the defendants in consideration of which they agreed to and did enter into the contract of purchase were the following; the important one is contained on page 163, par. 8 (b):

> That there was an inexhaustible supply of pulp wood upon the area comprised in the Government concession and more than the claimants operating on the scale contemplated by the parties or any other possible extension of such scale could exhaust within twenty-one years.

Bruce J states:

> A warranty in a sale is not one of the essential elements of a contract, but the sale is none the less complete in the absence of a warranty —but it is a collateral undertaking forming part of the contract by the agreement, etc.

On page 166 on the top of the second column, the judge states:

> We must decide that the verbal warranty alleged in paragraph 8 (b) must be regarded as a term so far collateral to the contract set out in the letters S. T. U. that oral evidence is admissible to establish the warranty.

There is no suggestion that the respondents, the Canada Law Book Company, Limited, are not sufficiently responsible for the amount awarded by the judgment of the trial judge, and in my view the proper order that should be made is to allow the appeal with costs in this court, and in the Appellate Division, with a direction that if the parties fail to agree there should be a re-trial enabling the present appellants to set up their claim for damages, and if they succeed then

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to the amount to which they may be held entitled, there should be a set-off as against the amount awarded by the judgment. See *Government of Newfoundland* v. *Newfoundland Railway Co.* (1). The costs of the former trial and of the second trial to be in the disposition of the trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Harding & Hanley.*

Solicitors for the respondent: *Bain, Bicknell, Macdonell & Gordon.*

(1) 13 App. Cas. 199

GUARDIAN REALTY COMPANY OF CANADA (PLAINTIFF.....) APPELLANT;

AND

JOHN STARK & COMPANY (DEFENDANTS)..... RESPONDENTS.

1922
May 30.
June 17.

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

Lessor and lessee—Lease for years—Covenant to renew at option of lessee—Right to renew after term expires—Continuance of possession —Sanction of lessor.

If a lease for years contains a covenant for renewal at the option of the lessee the option can be exercised at any time after the lease expires so long as the lessee remains in possession with the sanction of the lessor. Mignault J. *hesitante.*

It is not necessary that the continuance of possession shall be with the consent of the lessor evidenced by some positive act. Mere non-interference therewith on his part suffices.

Per Duff J. The interest created by a covenant to renew a lease for years at the option of the lessee is a present interest defeasible only by the election of the latter to discontinue possession. It is a vested right not one subject to fulfilment of a condition precedent.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial (2) in favour of the plaintiff.

The appellant company leased property to the respondents for five years with a covenant for renewal at expiration of the term for the same period at the

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

(1) 21 Ont. W. N. 373. (2) 21 Ont. W. N. 156.

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option of the lessee. The term expired at the end of December 1920. Respondents remained in possession and on Jan. 7th, 1920, appellant verbally notified the manager of the respondents that their lease and option had expired, that they were overholding tenants and possession of the premises was demanded. The respondents immediately after wrote to appellant that they had accepted the option to renew, enclosing a cheque for one month's rent at the increased rent called for by the terms for renewal. The appellant in answer reiterated its possession and returned the cheque. They they then began proceedings to recover possession under the Landlord and Tenant Act.

The trial judge held that the respondents had not remained in possession with the express consent of the lessor and that their right to renew was gone. The appellate Division reversed his decision on the ground that they were bound by the case of *Brewer* v. *Conger* (1) which decided that express consent was not necessary. The plaintiffs then appealed to the Supreme Court of Canada.

Nesbitt K.C. and *K. F. Mackenzie* for the appellant. *Prima facie* the option to renew granted by the lease must expire with it. The natural conclusion then is that it must be exercised within a reasonable time before the term ends as said by Bruce J in *Lewis* v. *Stephenson* (2).

The respondents were only tenants at sufferance and their possession was adverse and might have ripened into a title. See *Ley* v. *Peter* (3).

(1) 27 Ont. App. R. 10. (2) [1898] 78 L. T. 165.
(3) 3 H. & N. 101.

The decisions relied on by the Appellate Division are based on *Hersey* v. *Giblett* (1). That case had been misunderstood. A house was let to Hersey as a yearly tenant thereof and he was in possession under that agreement when he exercised the option given therein to take a lease. *Moss* v. *Barton* (2) and *Buckland* v. *Papillon* (3) follow *Hersey* v. *Giblett* (1) considered as deciding that the option can be exercised so long as the lessee is in possession with the lessor's consent.

R. J. McLaughlin K.C. for the respondents. An option to renew contemplates continuation of the relation of lessor and lessee and its exercise is not restricted to the duration of the term. See Halsbury vol. 18 page 393, par. 845. The only authority to the contrary which is cited is *Lewis* v. *Stephenson* (4). But that is only a dictum by a single judge which is dissented from in *Allen* v. *Murphy* (5).

Brewer v. *Conger* (6) is in line with the decisions in England and the rule there followed should be confirmed.

THE CHIEF JUSTICE.—I am of opinion that this appeal must be dismissed with costs.

IDINGTON J.—The appellant seeks to eject respondents as overholding tenants from office premises which had been held by them under it by virtue of a lease for the term of five years to be computed from the 1st day of January, 1916, and they, by way of defence, rely upon the following option of a renewal given in and by said lease:—

(1) [1854] 18 Beav. 174.
(2) [1866] 35 Beav. 197.
(3) [1866] L.R. 1 Eq. 477.
(4) 67 L.J.Q.B. 296.
(5) [1917] 1 Ir. R. 484 at page 487.
(6) 27 Ont. App. R. 10.

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The lessees are hereby granted the option of renewing this lease for a period of five years from the expiration of the term hereby granted at a rental of $2,575.00 per annum on the same terms and conditions as herein set out except that as to renewal.

There is nothing restricting respondents to exercise said option within any specified time as usually is in the like cases of lease, and hence what is reasonable must be the limits of the right so existent.

Nothing was expressly said by either party as to renewal until the 7th of January, 1921, when appellant's manager intimated it did not intend to renew, and respondents instantly expressed their intention to exercise the option so given and, by letter reiterating same and enclosing a cheque for the first month's rent, repeated the exercise of the option. Preceding this there had been an expenditure of nearly four hundred dollars by appellant, at the expense of the respondents, in way of changes in the office partitions during the last few months of the expiring term which must have made plain to appellant the intention to renew.

The appellant was bound by the terms of the lease to perform many daily services in way of lighting, heating, elevating, supplying water, etc., which it does not pretend by any proof adduced to have interrupted and thereby asserted its claims as it might have done against a mere wrongful overholder.

In argument its counsel stoutly asserts that there is no evidence on the point and suggests the burden of proving that rested on the respondents.

With deference, I submit that in reply to any one trying to apply the rather narrow argument, put forward, that respondents were debarred from exercising their option after the 1st of January, 1921, unless they can and do shew that the appellant actually

did something in way of assenting to their stay, it is not an unfair inference of fact in our climate, in order to meet such an argument, that if it had been possible to support it by evidence that would have been adduced.

In the court below there seems to have arisen an error as to the date of the first meeting between the manager of the appellant and one of the respondents. It is stated as having taken place on the fifth instead of the seventh, which counsel on each side are agreed is the correct date.

That shews how instantaneous the response on the part of the respondents was to the suggestion of the manager of appellant as to renewal.

It meets the situation which both the Master of the Rolls and Lord Chelmsford respectively suggested as the duty of a landlord before setting up delay as an answer to the exercise of an option.

These possibly new features of argument adduced before us are all, I think, that are not amply covered by the reasons assigned in the judgment of the Chief Justice of Ontario in dealing with the case as presented below and in which reasoning I fully concur and need not repeat here.

I think this appeal should be dismissed with costs.

DUFF J.—The operation of a covenant by a lessor to renew at the option of the lessee is a subject which has been much discussed and especially as touching the application of the rule against perpetuities. Such a covenant, even where the original lease is a lease for lives, does not come under the ban of the rule where it is wholly in the control of persons having vested interests in the lease. It has been said that this is an exception to the rule against perpetuities (Jessel,

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M. R. in *London and South Western Ry. Co.* v. *Gomm* (1) at page 579); but the so called exception has been supported upon another ground, namely, that the covenant to renew is part of the lessee's present interest. And in the case of an absolute covenant to renew a lease for years at the option of the lessee, it seems to be undeniable that the equitable interest created is not an interest to arise in future on fulfilment of a condition precedent but a present interest annexed to the land from its inception defeasible on a condition subsequent depending upon the election of the lessee to continue or to drop his possession. The vesting of a longer term does, no doubt, depend upon the happening of another event, namely, the application for renewal, but the present right, the right to have a renewal on application, is a different thing. That is a vested right, not a right to arise in future upon the happening of a condition precedent. This is the view expressed by the learned author of Gray on Perpetuities, 1915, pages 203-204, and by the learned author of Williams on Vendors and Purchasers in an elaborate discussion of the subject in 42 Solicitors Journal, at page 630. In support of it there is the statement of Jessel M. R. in *Moore* v. *Clench* (2), and of Farwell J., in *Muller* v. *Trafford* (3).

This view of the effect of such a covenant is not without its bearing upon the question raised by the present appeal. It harmonizes with the reasoning upon which the decision of Sir John Romilly, in *Moss* v. *Barton* (4), as well as that of Lord Chelmsford in *Buckland* v. *Papillon* (5), is based. Both treat the covenant to renew as vesting a right in the lessee which the lessee

(1) [1882] 20 Ch. D. 562.
(2) [1875] 1 Ch. D. 447 at page 452.
(3) [1901] 1 Ch. 54 at page 61
(4) 35 Beav. 197 at page 200.
(5) [1866] 2 Ch. App. 67 at pages 70-71.

may exercise so long as he has not lost his right by electing not to exercise it. By going out of possession at the end of the term he would obviously exercise his option against renewal. If he continue in possession the lessor is in a position to call upon him at any time to say whether he will remain or take a lease; that the lessor is entitled to do, and the corelative obligation would rest upon the lessee to exercise his right by taking a lease or to lose it. This view appears to have been acted upon by the Court of Appeal of Ontario in *Brewer* v. *Conger* (1).

It is now argued that the decisions in England in effect establish the rule that at the expiry of the term the right to exercise the option is gone if the lessee has not already exercised it unless he continue in possession with the consent of the landlord—consent meaning in this connection something more than a consent inferred from mere passivity.

I do not so interpret the decisions in question. The principle as appears sufficiently, I think, from the reasoning of Lord Chelmsford as well as that of Sir John Romilly, which, as I have intimated already, accords with the view that in other connections has been taken of the effect of such a covenant, is that the lessee's option remains open and exercisable until he has done something which concludes it. It is quite true that in both these cases the lessee who had remained in possession for some years after the expiry of the lease had been in possession with the active assent of the lessor who had accepted rent and given the lessee thereby the status of tenant from year to year. But there

(1) 27 Ont. App. R. 10 at pages 14-15.

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must have been a period in both cases in which the lessee was in occupation without the assent of the lessor. There is nothing, I think, in the language of the judgments to indicate that during this period the right of the lessee to renew was supposed to be in suspense. On the contrary, both the Lord Chancellor and the Master of the Rolls pointedly emphasize the power of the lessor over the situation by reason of the circumstance that he is entitled at any time to call upon the lessee to elect whether he will take a lease or not. That is something which could hardly have reference to a time when the lessee was in possession under a tenancy from year to year, but must refer to a time when the lessor was entitled to demand possession of the premises but for the lessee's right to have a lease. In the result this view seems to accord with the convenience of the situation because the lessor, who admittedly remains until the last day of the term in the lands of the lessee as to the matter of renewal, is entitled the moment the term is expired to require the lessee to make his election; and it is entirely consistent with the view of such covenants that excludes them from the operation of the rule against perpetuities. There is moreover weighty evidence shewing that this is the accepted view. In Fry, Specific Performance, it is laid down without qualification that where no time is limited and where the landlord has never called on the tenant to declare his option, mere lapse of time will not preclude the tenant or his assign from exercising it. To the same effect is a decision of the Irish Court of Appeal in *Allen* v. *Murphy* (1), and a long series of American decisions.

(1) [1917] I.R. 484 at page 487.

Indeed the view advocated by the respondent seems necessarily to involve the proposition that the option, unless exercised, does terminate with the lease, in the absence of something done by the lessor to extend it. For the lessee who merely remains in possession does nothing indicating an intention to abandon his right to a lease; he fails to procure the lessor's consent, that is all.

This is not enough because the basis of the cases above referred to is no more verbal formula. It rests upon this very substantial foundation that the lessee has a present interest arising from the covenant and that this interest is not conditioned by his duty to ask for a lease before the expiration of the term or within any limited period. His right to call for a lease is qualified by the condition that if he gives up possession at the end of the term he loses it because thereby he exercised his option. If he remains in possession the landlord can force him to exercise his election by setting up his right to a lease in response to the landlord's demand for possession.

It is argued by Mr. Nesbitt that the principle of the English cases is excluded in consequence of the presence of a special provision that the lessee remaining in possession with the assent of the lessor should be deemed to be held as monthly tenant on specified terms.

I am unable to agree with this conclusion. The Lord Chancellor points out in *Buckland* v. *Papillon* (2) that the right to demand a lease would not be one of the terms under which a tenant from year to year holds the premises after the determination of the orginal term. The right to demand a lease, he said,

(1) 2 Ch. App. 67.

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"had nothing whatever to do with the tenancy from year to year". The option continued to exist not because the lessee holding over had become a tenant from year to year, but because the option had not been determined by the conduct of the lessee.

The appeal should be dismissed with costs.

ANGLIN J.—Much can be said for the opinion that convenience and certainty in regard to the position of landlord and tenant on the expiry of the original term would have been promoted by holding that the right of election for the renewal of a lease, under an option in which no time therefor is fixed, must be exercised before the expiry of the term to be renewed. The weight of American authority would appear to favour this view. The law, as so stated in 29 Cyc. 999, is approved or supported by the following authorities; *Robertson* v. *Drew* (1); *Shaw* v. *Bray* (2); *Renoud* v. *Daskam* (3); *Perry* v. *Rockland Lime Co.* (4); *Thiebaud* v. *First National Bank* (5). A similar opinion was expressed *obiter* by Bruce J. in *Lewis* v. *Stephenson* (6). But that opinion has been disregarded, if not overruled; *Allen* v. *Murphy* (7); and, at least since Lord Romilly's decision in *Moss* v. *Barton* (8), it must be taken as settled that in English law the exercise of such an option is not restricted to the duration of the original term, if nothing else has occurred to determine it, but endures so long as the lessee continues in possession with the sanction of the lessor. In *Moss* v. *Barton* (8) Lord Romilly may have unwittingly

(1) 34 Cal. App. 143.
(2) 147 Ga. 567.
(3) 34 Conn. 512.
(4) 94 Me. 325.
(5) 42 Ind. 212.
(6) 67 L.J.Q.B. 296.
(7) [1917] 1 Ir. R. 484.
(8) 35 Beav. 197.

extended the effect of his own previous decision in *Hersey* v. *Giblett* (1), as Mr. Mackenzie contends in his very able factum. The yearly tenancy created by the agreement which contained the option for the lease no doubt subsisted when the tenant, Hersey, sought to exercise the option. But *Moss* v. *Barton* (2) was expressly approved in *Buckland* v. *Papillon* (3) and no dissent from it was suggested by Lord Chelmsford on the appeal in that case (4). There an assignee of the tenant, who had continued in possession as a yearly tenant after the expiry of a three year's term, under an agreement for lease, was held entitled to exercise an option to take a lease for a further term. Lord Chelmsford says:—

> He continued in possession, and so became tenant from year to year, under the terms of the original agreement. I do not mean to include in those words the right to demand a lease, for that had nothing whatever to do with the tenancy from year to year; but I think that continuing in possession, with the sanction of the landlord, he was entitled to exercise his option. He had done nothing whatever to preclude him from demanding that lease at any time; and if the landlord wished to know upon what terms the tenant held, he might have called upon him to say whether he meant to have a lease or not. As the landlord did not choose to do so, it appears to me that the time was unlimited in which the tenant could demand a lease. As long as he continued tenant with the sanction of the landord, so long he retained his option.

The law appears to have been accepted as settled in this sense by leading English text writers; Foa, Landlord and Tenant, 5th ed. page 307; Fry on Specific Performance, 6th ed., page 516; 18 Halsbury L. of E., page 393, No. 845. It was so recognized in Ontario in the case of *Brewer* v. *Conger* (5).

(1) 18 Beav. 174.
(2) 35 Beav. 197.
(3) L.R. 1 Eq. 480.
(4) 2 Ch. App. 67.
(5) 27 Ont. App. R. 10.

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In so far as the case last cited, notwithstanding the special circumstances mentioned in the judgment of Maclennan J. A. at page 14, indicative of communication having been made before the expiry of the lease of the tenant's intention to renew, should be regarded as authority for the proposition that an option for renewal, containing no time limit and no condition, may be exercised after the expiry of the term although the landlord's sanction to the tenant's retaining possession has not been shewn, I find it unnecessary to express an opinion upon the accuracy of the decision. Having regard to all the circumstances in the present case, some of which are noticed in the judgment of Meredith C. J. O. (1)—I accept the view of that learned judge that when the landlord's agent, on the seventh day after the expiry of the term, notified the tenants that their lease had expired and they immediately asserted their right to a renewal and promptly sent a cheque for a month's rent at the renewal rate specified in the option, they were still in possession with the lessor's consent within the meaning of the English authorities. Their intimation of an intention to exercise their option was concurrent with the first intimation from the landlord that they could no longer hold possession with its consent and that they would be regarded as overholding tenants.

There is nothing to indicate that there had been any consent by the lessor to the creation of a monthly tenancy under the special provision therefor made in the lease. On the contrary, the notification of the 7th of January by the appellant's agent that the respondents would be regarded as overholding tenants negatives any such consent.

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

(1) 21 Ont. W.N. 373.

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BRODEUR J.—The question to be decided is as to the right of John Stark & Company to a renewal of a lease from the Guardian Realty to them.

The lease was made for five years from the 1st of January, 1916, and it was provided that John Stark & Company, the lessees, had the option of renewing the lease for a further period of five years on the same terms.

Some time before the expiry of the lease the lessees asked for some somewhat extensive repairs which the lessor agreed to make provided their costs should be paid by the lessees. These repairs were made and paid for by the lessees, which shews the intention of the latter to remain on the premises and likely to exercise the option they had by the lease to renew it for a further period of five years.

The lessees remained in possession of the premises after the expiry of the lease on the 1st of January, 1921; and on the 7th they wrote the lessor that they had duly accepted the option of renewing the lease and sent their cheque in payment of rent for the then current month.

The lessor refused to accept the cheque and claimed that the lease and option had expired and that the lessees were liable for double rent as overholding tenants.

The question is whether the option should be accepted during the term of the lease.

The contract does not provide as to the date at which the option should be exercised. The law, as stated in Halsbury, vol. 18, page 393, is to the effect that if a lease which creates a tenancy for a term of years confers on the lessee an option to take a lease for a further term, the exercise of the option is not necessarily restricted to the duration of the general original term.

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This statement of the law is based upon the following decisions:—

Moss v. *Barton* (1); *Hersey* v. *Giblett* (2); *Buckland* v. *Papillon* (3).

In the latter case the Lord Chancellor, Lord Chelmsford, stated that the option continued after the expiration of the original term until something had been done to determine it and that it would continue so long as the tenant remained in possession with the assent of the landlord; that if the landlord wished to know upon what terms the tenant held he might call upon him to see whether he meant to have a lease or not.

Fry on Specific Performance, 5th ed. par. 1105, expresses a similar view in the following terms:—

> But where no time has been originally limited within which the tenant's option to have a lease must be exercised, and the landlord never called upon the tenant to declare his option, mere lapse of time will not preclude the tenant or his assignee or personal representative from exercising it.

We have in Ontario the case of *Brewer* v. *Conger* (4), which is to the same effect and which holds that the option continues until something is done to terminate it.

In the case of *Lewis* v. *Stephenson* (5), there is a dictum of Bruce J. to the effect that the option should be exercised before the termination of the original lease. But this dictum has been dissented from in *Allen* v. *Murphy* (6).

In view of those authorities, I am of opinion that John Stark & Company properly exercised their option.

The appeal should be dismissed with costs.

(1) 35 Beav. 197.
(2) 18 Beav. 174.
(3) 2 Ch. App. 67.
(4) 27 Ont. App. R. 10.
(5) 67 L.J.Q.B. 296.
(6) [1917] 1 L.R. Ir. 484 at page 487.

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Mignault J.

MIGNAULT J.—With some doubt, I concur in the judgment of my brother Anglin dismissing the appeal. Independently of the authorities cited by him which, I think, conclude the matter, it would seem reasonable that an option to renew a lease should be exercised while the lease is still current, and not as in this case several days after it has come to an end. It is true that the lessees had remained in possession, but there was a clause in the lease stating that if they did so with the consent of the lessor they should be deemed monthly tenants. Now they say that having remained in possession with the consent of the lessor they can exercise their option for a renewal term and are not to be deemed monthly tenants. I bow to the authorities allowing them to do so, but I could not help feeling some doubt.

Appeal dismissed with costs.

Solicitors for the appellant: *Mackenzie, Roebuck & Sanderson.*

Solicitors for the respondent: *McLaughlin, Johnston, Moorehead & Macaulay.*

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*May 29.
*June 17.

LAURENT LEMAY AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

DAME EMELIE HARDY (PLAINTIFF) RESPONDENT.

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

Action possessoire—Lane—Common use—Prescription—Absence of title—Right of passage—Obstructions—Servitude.

After common use by them for more than thirty years, without interruption and *animo domini*, of a lane each of the owners of adjoining premises is, without other proof of title, presumed to be a co-owner thereof and is entitled to have an obstruction of the right of passage restrained by action in court. Mignault J. dissenting.

Per Mignault J. dissenting—The appellants claiming a right of passage as a servitude, their action cannot be maintained; no documentary title has been shown and servitude cannot be acquired by prescription.

Judgment of the Court of King's Bench (Q.R. 32 K.B. 311) affirmed Mignault J. dissenting.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec (1), affirming the judgment of the trial judge, Gibsone J. and maintaining the respondent's action.

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

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1921] Q.R. 32 K.B. 311.

Moraud K.C. for the appellants.

Demers K.C. and *Marchand K.C.* for the respondent.

IDINGTON J.—For the reasons assigned by the learned justices Guérin and Bernier, constituting the majority of the court below, I think this appeal should be dismissed with costs.

DUFF J.— I concur with Mr. Justice Brodeur.

ANGLIN J.—I concur with Mr. Justice Brodeur.

BRODEUR J.—Le présent litige est au sujet d'une ruelle ou ou d'un passage qui dessert les propriétés des parties en cette cause et de quelques autres personnes. Cette ruelle est dans une des plus vieilles parties de la cité de Québec; et, si l'on en juge par les murs qui la bordent et par le pavage qui la recouvre, elle existe depuis un temps immémorial et remonterait à deux cents ans et peut-être plus. Les titres en sont perdus et ne peuvent pas être retracés.

Lorsque la cité de Québec a été cadastrée en 1870 en vertu des dispositions des articles 2166 et suivants du code civil, cette ruelle a été portée au plan sous le nom de "passage", mais les autorités administratives, comme dans le cas des chemins publics, n'ont pas jugé à propos de lui donner de numéro ni d'en indiquer le propriétaire. Au livre de renvoi officiel qui accompagne le plan, nous voyons que dans les descriptions des lots 3023, 3023-2 et 3026 cette ruelle est mentionnée comme passage entre les nos 3023-3024,3025-3026-3027.

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Les personnes dont les propriétés bordaient ce passage s'en sont toujours servi comme de bons voisins, sans molestation et sans embarras. Mais, en 1918, les défendeurs Lemay ont acheté l'une de ces propriétés, soit le n° 3023 du cadastre, et ont apparemment exigé que leur vendeur leur cède la moitié du passage; mais le vendeur fut assez prudent de déclarer dans l'acte qu'il ne donnait aucune garantie quelconque "as to his title and his rights thereto".

Quelque temps après leur achat, les défendeurs Lemay ont commencé à obstruer le passage en y faisant séjourner des voitures et en y déposant d'autres objets, et l'ont rendu, sinon impossible, du moins difficile d'accès et d'usage pour les autres propriétaires qui l'avoisinaient.

La demanderesse, Madame Emilie Hardy, a cru devoir alors instituer la présente action en alléguant qu'elle était propriétaire du n° 3026 qui bordait ce passage à sa profondeur et a demandé à ce que les défendeurs soient condamnés à cesser le trouble; et elle a allégué à cette fin qu'elle

> a toujours été en possession, d'un droit de passage dans une ruelle * * * laquelle ruelle a toujours servi de passage commun pour l'utilité de tous les héritages y aboutissant, entr'autres celui de la demanderesse et celui des défendeurs.

Les défendeurs ont plaidé qu'ils sont propriétaires en commun, avec le propriétaire du n° 3022, de ce droit de passage et que les titres de la demanderesse n'établissent en sa faveur aucun droit ni servitude de passage.

La cour supérieure a maintenu l'action de la demanderesse, et ce jugement a été confirmé par la cour d'appel qui a décidé que les défendeurs devaient

> cesser le trouble apporté par eux à l'exercice du passage dont la demanderesse avait la possession conjointe dans la dite ruelle.

La question qui se présente est donc de savoir si la demanderesse avait dans cette ruelle ou ce passage un droit qui lui permettrait de faire disparaître les obstructions que les défendeurs y mettaient.

Les défendeurs ont beaucoup insisté devant cette cour sur le fait que l'action de la demanderesse, qui est de la nature d'une action possessoire, demandait à être déclarée possesseur d'un droit de passage, en d'autres termes, d'un droit de servitude pour lequel elle ne présentait aucun titre.

Il est vrai que l'expression "droit de passage" s'est glissée dans la déclaration. Mais il me paraît évident par les plaidoiries, et surtout par le plaidoyer des défendeurs, que la véritable question en litige est de savoir si la demanderesse a un droit de propriété dans cette ruelle ou ce passage, ou encore si elle y a des droits suffisants pour lui permettre de demander que les défendeurs soient tenus de lui laisser la libre jouissance d'y passer.

Chose assez intéressante, c'est que ces expressions "passage" et "droit de passage" ont souvent prêté à l'équivoque, même chez les auteurs et dans la jurisprudence, et qu'il n'y a pas lieu d'être surpris alors si nous trouvons la même absence de précision dans la déclaration.

Ainsi, par exemple, Pardessus, Traité des servitudes, vol. 1er, n° 231, nous dit:

> Le mot *passage* est équivoque, puisqu'il peut très grammaticalement être expliqué dans le sens de propriété du terrain sur lequel on passe, ou dans le sens d'une servitude consistant à passer sur le fonds d'autrui * * *
>
> Ce serait aux juges à les résoudre (*les doutes qui peuvent provenir de l'emploi de ce mot*).

La cour de cassation, en 1836, (Sirey, 1836-1-1867), a déclaré que le passage reconnu nécessaire sur un

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terrain communal pour mener des bestiaux à l'abreuvoir peut être considéré non comme une servitude de psssage mais bien comme un mode de jouissance de la chose commune.

Fuzier-Herman, Répertoire, vbo. Servitudes, n° 17, nous déclare que la distinction entre l'usage d'une chose à titre de servitude et l'usage d'une chose à titre de propriété est parfois difficile à établir.

> Il pourra arriver, (dit-il) qu'un demandeur dans l'impossibilité de prouver sans titres certaines servitudes comme celle de passage ou de puisage, s'appuie sur des faits de passage ou de puisage pour prétendre droit à la propriété d'un chemin ou d'un puits.

Laurent, vol. 7, n° 162.

La cour d'appel a, je crois, ramené la question sur son véritable terrain en décidant que la demanderesse avait la possession conjointe du passage. L'honorable juge Guerin a cité dans ses notes de nombreuses autorités qui dénotent beaucoup de travail et de recherches.

Comme je l'ai dit plus haut, cette ruelle, ou ce passage, existe depuis un temps immémorial. La ruelle a toujours été à l'usage des propriétaires voisins, et le pavage qui la recouvre indique un usage qui remonte à des temps très reculés. Il me semble que les défendeurs sont mal venus aujourd'hui à essayer de s'approprier exclusivement l'usage de cette ruelle et à détruire les rapports de bon voisinage qui ont toujours existé entre toutes les personnes dont les propriétés donnaient sur la ruelle.

Mais en dehors de la question morale et de justice que je viens de poser, il y a les principes consacrés par la loi et la jurisprudence qui établissent le droit de la demanderesse de se plaindre et de réclamer ce qu'elle réclame.

La cour de cassation, appelée à juger un cas semblable à celui qui nous occupe, a déclaré dans une cause en partage (Sirey, 1842.1.311) que si deux propriétaires contigus ont joui en commun pendant trente ans sans interruption et *animo domini* d'un passage formé, pour la desserte de leurs héritages, d'une parcelle de chacun d'eux, cette jouissance dispense de la représentation de tout titre et constitue une présomption *juris et de jure* qu'il y a eu originairement convention respective de laisser à toujours ces parcelles indivises et que ni l'une ni l'autre des parties n'est plus admise à en demander le partage. Sirey 1891.1. 122; Sirey 1899-1-85.

La doctrine nous enseigne qu'il y a copropriété sur les cours, ruelles, allées, passages et chemins destinés au service de plusieurs maisons et sur les cours et canaux affectés à l'exploitation de divers fonds.

Aubry et Rau, 4e éd. vol. 2. parag. 221ter, p. 413; Demolombe, n° 444, vol. 11; Baudry-Lacantinerie et Walh, Succession, 3e éd, vol. 2. no. 2153.

Fuzier Herman, vbo. *Passage*, au n° 65, nous enseigne que

> l'impossibilité d'acquérir un droit de passage par des faits répétés de possession a amené les plaideurs à soutenir que ce qu'ils avaient ainsi prescrit était un droit non de servitude mais de propriété, ou tout au moins de copropriété, du terrain sur lequel ils passaient depuis trente ans après l'avoir pavé ou macadamisé. Et les tribunaux ont accueilli cette prétention. [*Il cite, au no. 67, plusieurs jugements de la cour de cassation à l'effet qu'une*] demande tendant à être reconnu propriétaire du droit de passer par un chemin peut être interprétée dans le sens d'une demande afin d'être reconnu copropriétaire du chemin lui-même, et, par conséquent, se fonder sur la prescription; à la différence du cas où il s'agirait d'un simple droit de servitude."

Il y a eu en France au sujet de ces chemins une question de savoir si la commune avait pu acquérir un droit de propriété ou de servitude sur un chemin

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de desserte par le seul fait du passage de ses habitants depuis un temps immémorial. Les propriétaires avoisinants réclamaient, au contraire, que ce chemin de desserte appartenait aux propriétaires riverains. Le législateur a cru devoir trancher la question par une loi adoptée le 10 août 1881 par laquelle on déclarait que ce chemin était présumé appartenir aux propriétaires riverains.

Il résulte donc de la doctrine et de la jurisprudence que les circonstances qui ont été prouvées dans la présente cause démontrent que la demanderesse avait un droit de copropriété dans la ruelle ou le passage en question. Elle avait donc le droit de se plaindre de l'obstruction que les défendeurs y faisaient, et alors pouvait demander aux tribunaux de la faire cesser. Mais si on en venait à la conclusion que cette ruelle, au lieu d'être propriété privée, appartenait aux propriétaires riverains, et pourrait être considérée comme ruelle publique, cela pourrait donner lieu tout de même à la présente action de la demanderesse, ainsi qu'il a été jugé dans la cause de *Johnson* v. *Archambault* (1).

Le jugement qui a été rendu par la cour d'appel est bien fondé et l'appel doit être renvoyé avec dépens.

MIGNAULT J. (dissenting)—L'intimée, Madame Dion, est propriétaire de l'immeuble n° 3026 du cadastre officiel du quartier du Palais, en la cité de Québec, qu'elle a acheté, le 2 février 1910, de Dame Fabiola Smith, veuve de E. F. E. Roy. L'acte décrit cet immeuble comme étant borné en arrière, à l'extrémité de sa profondeur, par un passage ou ruelle conduisant à la rue Ste-Hélène, aujourd'hui MacMahon, et ne confère à l'intimée aucun droit de passage ou autre

(1) [1864] 8 L.C.J. 317.

droit sur la ruelle. L'acte de vente dit que Madame Roy a acquis cet immeuble par le testament de son mari, mais ne trace pas le titre de propriété plus loin. Toutefois un extrait du cadastre produit au dossier ferait voir qu'à une date non mentionnée ce lot aurait appartenu à une Dame Veuve John Vanderheyden et à ses enfants, et le déclare borné au fond par un passage mitoyen entre les lots 3023, 3024, 3025, 3026 et 3027.

Les appelants sont propriétaires de l'immeuble n° 3023, subdivision n° 2, du même cadastre, pour l'avoir acquis de Walter John Ray par vente datée du 23 mars 1918. L'acte décrit l'immeuble comme étant borné au sud-ouest par un passage mitoyen. Par le même acte Ray a vendu aux intimés, sans garantie même quant à son titre ou à ses droits, la moitié indivise

of a strip of land now and which in the future can only be used as a common passage between the said lot no. 3023, no 2 * * * and the lot no. 3022 belonging to the Congregation of St. Patrick's Church, which said strip of land is indicated as forming part of a passage bearing apparently no cadastral number, but whereof the larger part (east side) ought to form part of the said lot 3023-2.

Ray avait acheté le lot n° 3023-2 de Dame Annie Sophia Bell, veuve de Roderick McLeod, le 11 février, 1896, et avait également acquis d'elle, aussi sans garantie, les droits dans le passage mitoyen qu'il a a plus tard transportés aux intimés. Dans l'acte de vente, Mde McLeod dit qu'elle avait acquis cet immeuble de G. E. Borlase, le 28 mars 1890, et que Borlase l'avait acheté du shérif de Québec, par acte passé le 31 mars 1890 (c'est peut-être une erreur de date). Ces deux derniers titres ne sont pas produits et nous ne savons s'ils ont prétendu céder un droit quelconque quant au passage en question en cette cause.

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Par des extraits du cadastre qui sont au dossier, nous constatons que Mde McLeod était propriétaire du lot n° 3023 et qu'elle l'avait subdivisé en deux lots, les n^{os} 1 et 2, et en vendant le n° 2 à Ray elle a stipulé un droit de passage sur ce n° 2 en faveur du n° 1, pour communiquer de ce dernier immeuble au passage dont il a été fait mention et de là à la rue McMahon.

Si nous consultons le plan du cadastre dont une copie est également au dossier, nous voyons un terrain marqué "passage" entre le n° 3022, où se trouve l'église St-Patrice, au sud-ouest, et le côté du lot n° 3023-2 et le fond du lot n° 3026, au nord-est. Au fond du passage se trouve une partie du lot n° 3022 et une partie du lot 3027 appartenant à M. Alphonse Pouliot. Toutes ces propriétés, dit-on, ont des portes ouvrant sur ce passage. Cependant les parties ne peuvent nous renseigner sur l'histoire du passage, mais il semble invraisemblable, s'il est réellement mitoyen, qu'il n'existe dans les titres provenant des auteurs des parties ou dans les titres de la congrégation de St-Patrice aucune mention qui ferait voir comment le passage a été établi. L'acte de vente de Mde Roy à l'intimée oblige celle-ci à payer une rente de terrain constituée à l'Hotel-Dieu de Québec. Aurait-on pu découvrir l'histoire du passage dans les archives de l'Hôtel-Dieu? Je l'ignore. J'ajoute que les extraits du cadastre ne peuvent prouver la mitoyenneté du passage, mais peuvent diriger les recherches, car ceux qui ont fait le cadastre ont sans doute consulté des anciens titres que les parties ne paraissent pas avoir trouvés.

Dans tous les cas, il est clair que les documents produits ne confèrent aucune servitude à l'intimée sur ce passage. Et sans titre elle ne peut réclamer un

droit de passage comme servitude, ni exercer à cet égard, et à titre de propriétaire d'un fonds dominant, l'action possessoire, car la servitude ne pouvant s'acquérir sans titre, et la possession même immémoriale ne suffisant pas à cet effet (art. 549 C. C.), il ne peut être question d'action possessoire fondée sur la simple possession en matière de servitude.

Je me contente de citer Pothier, Traité de la Possession, n° 90, alinéa 1. (L'alinéa 2 envisage le cas où celui qui a joui d'un passage rapporte un titre justifiant sa jouissance.)

> Quoique les droits de servitude prédiale soient des *droits réels* que nous avons dans un héritage, néanmoins celui qui a joui du passage par un héritage, ou quelque autre espèce de servitude, par quelque temps que ce soit, sans avoir aucun titre pour en jouir, n'est pas reçu à former la complainte, lorsqu'il en est empêché; parce que, suivant les principes de notre droit français, la jouissance que quelqu'un a du passage par un héritage, ou de quelque autre espèce de servitude, sans avoir aucun titre, est présumée une jouissance de pure tolérance; or une telle jouissance n'est pas suffisante pour former la complainte. L'article de l'ordonnance de 1667, ci-dessus rapporté, dénie en termes formels cette action à celui qui n'est que possesseur précaire.

L'article de l'ordonnance de 1667 mentionné par Pothier est l'article 1er du titre 18, qui est la source de notre article 1064 du code de procédure civile.

L'intimée, dans l'action qu'elle a intentée aux appelants, allègue son titre de propriétaire du lot n° 3026, et dit que depuis son achat elle a toujours été en possession d'un *droit de passage* dans la ruelle en question, que les défendeurs la troublent dans l'usage et possession du dit *droit de passage*, et qu'elle a requis les défendeurs de laisser le dit passage libre et de lui permettre de *jouir librement et constamment du dit droit de passage pour l'utilité de son susdit héritage dans la dite ruelle.*

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L'intimée réclame donc la jouissance du dit droit de passage "pour l'utilité de son susdit héritage", c'est-à-dire du lot nº 3026.

Or la servitude réelle est une charge imposée sur un héritage pour l'utilité d'un autre héritage appartenant à un propriétaire différent (art. 499 C. C.). Visiblement l'intimée prétend exercer l'action possessoire pour réclamer la jouissance d'une servitude. Il n'y a pas moyen d'interpréter autrement son action si on a égard à la signification ordinaire des mots dont l'intimée se sert, et elle réclame ce droit de jouissance pour l'utilité de son héritage, partant à titre de servitude.

Et cependant le jugement de la cour du Banc du Roi (l'honorable juge Dorion a fait enregistrer son dissentiment) traite l'action possessoire intentée par l'intimée comme étant une action réclamant, comme possesseur à titre de copropriétaire de ce passage, la cessation du trouble apporté à sa jouissance par les appelants. C'est changer la base même de l'action de l'intimée, et cela sans qu'aucun amendement ait été fait ou même demandé.

La théorie de la Cour du Banc du Roi, c'est qu'il peut exister des passages entre deux ou plusieurs fonds que les propriétaires de ces fonds possèdent à titre de copropriétaires avec indivision forcée. Ces passages sont appelés des passages communs et sont l'objet d'une communauté entre les riverains, et un des copropriétaires du passage peut exercer l'action possessoire pour se protéger contre le trouble apporté à sa jouissance même par un des communistes. Et on cite une jurisprudence qui paraît s'être établie en France, et qui présume assez facilement que cette communauté ou cette copropriété avec indivision forcée a été créée par un accord entre les riverains.

Cette jurisprudence, qui avait d'ailleurs provoqué des dissentiments notables, a été consacrée par la loi française du 20 août 1881 sur les chemins et sentiers d'exploitation, dont l'article 33 se lit comme suit, (Voy. Duvergier, Collection des lois, tome 81, p. 363).

> Les chemins et sentiers d'exploitation sont ceux qui servent exclusivement à la communication entre divers héritages ou à leur exploitation. Ils sont, en l'absence de titre, présumés appartenir aux propriétaires riverains, chacun en droit soi; mais l'usage en est commun à tous les intéressés. L'usage de ces chemins peut être interdit au public.

N'ayant pas une loi semblable dans la province de Québec, il est clair qu'on ne peut invoquer ici la présomption de copropriété qu'elle établit. Et une telle présomption exigerait un texte de loi, car c'est une présomption légale (art. 1239 C.C.).

Etant donnée la nature de l'action de la demanderesse, il ne faut pas s'étonner que la preuve de la possession de la copropriété par elle soit nulle. L'intimée prouve qu'elle passe dans la ruelle, et d'autres riverains y passent. Mais sérieusement de tels actes de passage, aussi équivoques, puisque ce sont des actes qu'accomplissent d'ordinaire les créanciers d'une servitude plutôt que des actes qu'exercent les propriétaires d'un fonds, pourraient-ils jamais conduire à la prescription de ce terrain appelé passage ou ruelle? Il est évident que non. Et il est clair que de tels actes ne peuvent conduire à la prescription d'une servitude qui est un droit moindre que le droit de propriété.

Logiquement donc, et quelle que soit la jurisprudence française en matière de copropriété avec indivision forcée, je ne puis venir au secours de l'intimée. Je le regrette, car les appelants sont évidemment de de mauvais voisins, et c'est une prétention ridicule qu'ils émettent d'avoir acquis par les titres qu'ils allè-

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guent la propriété indivise de la moitié du passage. Avec de tels titres, ils ne pourraient jamais empêcher l'intimée de passer dans la ruelle. Cependant l'action de l'intimée tombe par elle-même. Cette action est juridiquement non recevable. L'intimée, du reste, n'est pas privée du droit d'exercer une action confessoire si, en recherchant dans les titres de ses auteurs, elle peut trouver un titre à une servitude de passage qui serait l'accessoire de son droit de propriété du lot 3026.

Je maintiendrais l'appel et je renverrais l'action de l'intimée avec frais de toutes les cours.

Appeal dismissed with costs.

Solicitors for the appellants: *Moraud & Alleyn.*

Solicitors for the respondents: *Demers & Demers.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF WEST CALGARY

1922

*June 12, 13.
*June 17.

RICHARD B. BENNETT (PETITIONER) ..... APPELLANT.

AND

JOSEPH T. SHAW (RESPONDENT) .. RESPONDENT.

Election law—Scrutiny—Ballots—Marking—Provision as to lead pencil and cross—"Dominion Elections Act", 10 & 11 Geo. V, c. 46, s. 62, ss. 3.

The provision of sub-section 3 of section 62 of the "Dominion Elections Act" that "the voter shall * * * mark his ballot by making a cross with a black lead pencil * * * is imperative.

Ballot papers marked in ink or with a coloured pencil, or marked with an upright stroke resembling figure "1", are not valid.

Duff and Mignault JJ. expressed no opinion as to ballots other than those marked with figure "1".

Bothwell Election Case (8 Can. S.C.R. 676) and *Jenkins* v. *Brecken* (7 Can. S.C.R. 247) ref. to.

Judgment of the trial judges ([1922] 1 W.W.R. 993) affirmed.

APPEAL from the judgment of Stuart and Ives JJ., (1) sitting as trial judges under the provisions of the "Dominion Controverted Elections Act," R.S.C. (1906) chapter 7, in the matter of the controverted election of a member for the Electoral District of West Calgary in the House of Commons of Canada, rendered on the 1st of April 1922, dismissing the appellant's petition with costs and declaring that the respondent was the duly elected member of the Dominion Parliament for that district.

*PRESENT: Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1922] 1 W.W.R. 993.

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The election was held on the 6th of December, 1921. At the election the candidates were the petitioner, the respondent and one Ryan. On the 14th of December, 1921, the returning officer added up the votes and declared the result of the poll, as follows:

Bennett	7,372
Shaw	7,366
Ryan	1,354

A recount was then applied for by the respondent and held before Winter District Judge. On such recount, the District Judge, on the 23rd of December, 1921, certified the result of poll, as follows:—

Shaw	7,369
Bennett	7,353
Ryan	1,351

The principal grounds, upon which the District Judge held that a certain number of ballots should be rejected, were that some were marked in ink, some with a coloured pencil and some with the figure "1".

To this ruling and certain other rulings on the recount, which were given on grounds of minor importance, the petitioners objected and accordingly filed this petition.

The case was tried before Stuart and Ives JJ., who declared that the respondent was duly elected for West Calgary Electoral District, with a majority of 17 instead of 16 votes, affirming on the main grounds the decision of the District Judge.

Aimé Geoffrion K.C. and *A. McL. Sinclair K.C.* for the appellant. The provisions of the "Dominion

Elections Act" are directory and not mandatory; *Jenkins* v. *Brecken* (1); *Bothwell Election Case* (2); *Haldimand Election Case* (3); *Wentworth Election Case* (4).

All ballots, marked other than with a cross or with a black lead pencil but so marked as to indicate clearly the intention of the voters, and which the judges are not by statute directed to reject, should be counted. *Woodward* v. *Sarsons* (5).

Eug. Lafleur K.C. and *Geo. H. Ross, K.C.* for the respondent. The ballot must evidence a clear intention on the part of the voter to comply with the provisions of the "Dominion Elections Act," and if it does not the ballot should not be counted. *Bothwell Election Case* (2). The voter must make a cross with a black lead pencil; *Jenkins* v. *Brecken* (1); *South Oxford Election Case* (6) *North Bruce Election Case* (7).

IDINGTON J.—This appeal arises out of the dismissal by Mr. Justice Stuart and Mr. Justice Ives of an election petition claiming for the appellant the seat for West Calgary in the Dominion Parliament.

The first ground taken is that a recount had before the district judge ought to have been confined to the objections taken before the deputy returning officer and in turn that the trial should have been restricted accordingly.

The like objections having been taken unsuccessfully long ago, and never successful when taken since, tends to arouse a suspicion that counsel feels his other grounds of appeal are not so strong as he would desire.

(1) 7 Can. S.C.R. 247.
(2) 8 Can. S.C.R. 676.
(3) 15 Can. S.C.R. 495.
(4) 36 Can. S.C.R. 497.
(5) Q.R. 10 C.P. 733.
(6) 32 Ont. L.R. 1 at p. 13.
(7) Referred to in 4 Ont. L.R. 380.

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I see nothing in the grounds thus taken; and do see some useful purposes which subsection (3) of section 70 of the "Dominion Elections Acts" serves, without making a basis for such objections.

Turning to the more arguable grounds taken, relative to the marking of the ballots, I am of the opinion that section 62, subsection (3) in the first sentence thereof, which reads as follows

> (3) the voter, on receiving the ballot paper, shall forthwith proceed into one of the polling compartments and there mark his ballot paper by making a cross with a black lead pencil within the white space containing the name of the candidate or of each of the candidates for whom he intends to vote,

means just what is says, in imperative terms, and is mandatory.

If there ever had been a doubt of what Parliament intended it has, I submit, been entirely removed by the successive enactments spread over nearly fifty years, referred to in the judgment of Mr. Justice Stuart speaking on behalf of the trial court, in each amendment using more distinct and imperative terms ending in that which I have just now quoted.

The course of said legislation may be summarized thus:—

It began in 1874 with merely directing a cross to be placed opposite the name of the candidate for whom the vote was intended to be cast; that in 1878 directed the cross to be made by a pencil; that in 1894 directed a cross with a pencil on the white portion of the ballot paper, opposite, or within the division containing, the name of the candidate intended to be voted for; that in 1900 directed the elector to make a cross with a black lead pencil within said white space, and in 1920, as above stated.

The possible toleration of use of pen and ink only lasted four years and for very obvious reasons ceased to have any semblance of right.

In light of such a course of legislation I cannot see how any English decision, under an Act essentially different in its wording and containing no such restrictions, can help us. And as no Canadian decision binding us upholds the right to use pen and ink in making the cross, I fail to see how any votes so made can be counted. And equally so any made with a red pencil, or anything but a black lead pencil, must be discarded.

The question of cross or no cross comes next to be considered, and in connection with that feature of this appeal we are asked to count ballots marked with the figure 1, which was used instead of a cross on twenty-nine Calgary ballots.

It is urged that this use of the figure 1 arose out of voters having to use it at municipal elections, carried on under the proportional representation system, adopted therefor in Calgary.

As an explanation of a curious development, when no better can be got, it is interesting, as the latest thing to be tried on judges in an election case, but beyond that I do not see in it a good argument especially to induce them to ignore the plain provisions of a statute.

It happens to be a rather inappropriate one in fact, for under proportional representation the figure 1 is only used to express the first choice of the voter, and he is expected to go on and name his second and third choices by using the figures 2 and 3.

Seeing there were three candidates, at the election in question, one would have expected to find some one

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of the many voters using the figure 1, to have gone on, if acting in truth as if on the supposition of the voting being under the proportional representation system, and given the figures 2 and 3 also a chance.

The habit of using 1 in two previous municipal elections does not seem a very satisfactory explanation for refraining from using a cross. I fear the right habit had not been fully formed. It may be better than none in the way of looking at the possible character of the Act, but I doubt if it is.

Long ago many voters who had no choice went to the poll merely as a means of getting rid of the importunities of the canvassers; and possibly that is a better explanation for the peculiar form adopted.

So far as I am concerned I cannot count the figure 1 as a cross, or intended as a cross, and am of the opinion that all such ballots, so marked, ought to be discarded.

I observe Mr. Justice Stuart regrets that Parliament could not have used language that would have settled the matter of marking ballots, without leaving it to judges to cudgel their brains over.

I am rather inclined to regret, with great respect, that some judges in the past, happened occasionally to be dissatisfied with the common sense use and application of plain language, lest some perverse or stupid electors should by its application lose their votes.

Common sense says the loss of such electors' votes is no harm to the country, and it happens generally, though not here, that they are equally distributed between or amongst the candidates.

The conclusion I have reached render it unnecessary for me to pursue the matters in question further, for, in my opinion, the appeal fails and should be dismissed with costs.

DUFF J.—The appeal has been presented on behalf of the appellant in a manner which enables me to proceed at once to the consideration of the ground of appeal which admittedly, in the view I take, is decisive.

A certain number of ballot papers were marked by an unright stroke which it may be assumed was a figure representing the number one. All such ballots were rejected and the point upon which it is necessary to pass is whether or not they were rightly rejected. The argument on behalf of the appellant is two-fold. 1st, it is said that the requirement of sec. 46, of the "Dominion Election Act" that the ballot papers shall be marked with a cross is directory only, and that if the paper is marked in such a way, (that is to say, by some mark placed within the division containing the name of the candidate) as to indicate an intention to vote for that candidate and is not of such a character as to fall within the description of s.s. 2 (c) of sec. 66 of the "Elections Act" of 1920

upon which there is any writing or mark by which the voter could be identified,

then the ballot ought to be counted. 2nd, it is said that the procedure in the counting of votes is exhaustively laid down by s.s. 2 and s.s. 4 of sec. 66 and that by those two subsections it is the duty of the deputy returning officer to count all ballot papers not rejected by him as falling within one of the classes *a, b or c,* enumerated in s.s. 2, which classes include only ballots not supplied by the deputy returning officer. ballots by which votes have been given for more candidates than are to be elected and ballots upon which there is some writing or mark by which the voter could be identified, and it is contended that ballots marked as those which are now under consideration do not fall within any one of these categories.

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In support of these contentions the appellant appeals to the course of decision under the English Act of 1872 and the schedules thereto. If we were free to consider the question without reference to previous decisions and pronouncements of judges of this court I should be disposed to attach a good deal of weight to the argument that it is not easy to distinguish in substance and effect the statutory provisions now before us from those upon which the English and Scotch judges have from time to time been called upon to pass; and it is really not suceptible of dispute that the English and Scotch judges have arrived at a view of the statute they are accustomed to administer under which the ballot papers now under consideration would be held to be sufficiently marked and would be counted as votes.

But we are, I think, relieved from the duty of approaching the question from that point of view. In the *Bothwell Case* (1) the Chief Justice of this court formulated a rule that where a voter had placed upon his ballot a mark indicating

> a clear intent not to mark with a cross as the law directs, as for instance, by making a straight line or a round 0, then such non-compliance with the law, in my opinion, renders the ballot null.

This is only one branch of the rule enunciated there by the Chief Justice with the object of providing a formula capable of practical application in determining the sufficiency or insufficiency of the marking of a disputed ballot. It is implied in what the learned Chief Justice says that it is essential that the mark shall be something capable of being described as a cross; he finds it impossible, he says, to lay down

(1) 8 Can. S.C.R. 676.

a hard and fast rule by which it can be determined whether a mark is a good or a bad cross and the test is, he thinks, to be found in the answer to the inquiry whether

> the mark evidences an attempt or an intention to make a cross.

That is the inquiry the result of which determines whether or not the mark is a sufficiently good cross. If there is evidence of such an attempt then the ballot is to be counted unless the mark or marks on the paper are of such a character as to exhibit an intention to provide means for indentification, in which case the ballot should be rejected. But a mark made with the intention of making a cross is essential, and a straight line is therefore insufficient as clearly shewing an intention not to do what the law requires, to make a cross. This pronouncement of the learned Chief Justice was formally concurred in by Mr. Justice Fournier and by Mr. Justice Gwynne. Mr. Justice Fournier's judgment is interesting as shewing that these three members of the court explicitly adopted the rule enunciated by the Chief Justice as furnishing at least one test which deputy returning officers might apply in deciding whether disputed ballots should be counted or not counted. I emphasize this for reasons which will appear presently.

The decision in the *Bothwell Case* (1) followed a decision in the previous year, *Jenkins* v. *Brecken* (2) and on that appeal it had been decided by a court including all the judges who sat in the *Bothwell Case* (1) with the addition of Mr. Justice Taschereau, that an upright stroke placed in the compartment containing the candidate's name was not a sufficient mark;

(1) 8 Can. S.C.R. 676. (2) 7 Can. S.C.R. 247.

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and indeed was considered to be of so little importance or significance that where two candidates were to be elected and a cross was placed in each of two compartments containing the names of candidates and an upright stroke opposite the name of a third candidate in another compartment it was held that the upright stroke might be ignored and that the crosses should be counted as valid votes; and it was also held that an ✕ as distinguished from a cross, a mark in which apparently there was no intersection of the lines, was not a sufficient mark.

There is in the report of this case no reasoned discussion of the questions raised touching the marking of the ballots. But in the *Bothwell Case* (1) we find the key, I think, to the decision; the marks referred to did not evidence an attempt to make a cross and were therefore treated as inoperative.

Mr. Geoffrion argued that the last sentence of the passage in the judgment of the Chief Justice in which he expounds his rule shews that the Chief Justice was not enunciating a rule of law but drawing an inference of fact and that the substance of his judgment upon this point is that the proper inference from the circumstance that a voter who has used an upright stroke, for example, to mark his ballot instead of attempting to make a cross, is that he is attempting to provide some means by which his ballot paper can be identified. It is undeniable that one sentence of the judgment is a little perplexing. After stating that noncompliance with the direction to make a cross in the sense above indicated evinces a wilful departure from the direction which nullifies the ballot paper, he proceeds,

(1) 8 Can. S.C.R. 676.

the irresistible presumption from such a plain and wilful departure from the terms of the statute being that it was so marked for a sinister purpose.

This sentence is, I agree at first sight a little puzzling; but reflection has confirmed the view I intimated upon the argument that the learned Chief Justice was not laying down what he conceived to be a just inference of fact in every particular case from the circumstance that a ballot is found to be marked with a single stroke or a round 0, an inference which I am quite sure the Chief Justice would not have considered justified, but is stating what he conceived to be the theory upon which the statute, on his construction of it, might have been rested, namely, that the requirement of the cross in the sense explained might reasonably be made imperative because speaking generally people marking their ballots with an honest intention to vote and no desire to provide a means of indentification would follow the direction of the law and attempt to make a cross.

I think the learned Chief Justice while impressed on the one hand with the danger of excluding ballots marked only with an honest intention of giving a vote was at the same time fearful of opening a wide door to the employment of corrupt devices if the direction of requiring a cross should be wholly disregarded.

But I do not think the method by which the Chief Justice arrived at his result is important. The rule itself is stated in a manner leaving no room for doubt. If it is clear that the voter has not attempted to make a cross the ballot is not to be counted; if the mark by its character sufficiently evidences an attempt to make one the ballot is to be counted unless there is

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adequate evidence of an intention to provide means of identification; and the exposition of the formula by his colleagues who concurred with him is equally clear. At p. 706 Fournier J. says:—

> Dans le cours de la discussion de cette cause l'honorable juge en chef ayant soumis à l'examen de ses collègues une règle formulée de manière à couvrier à peu près toutes les difficultés qui peuvent être soulevées à propos de la marque des bulletins, tous les membres de la cour y ont donné leur adhésion. Cette règle n'est toutefois pas susceptible d'une application aussi générale que celle énoncée dans la cause de *Woodward* et *Sarsons* (1) car on ne pourrait pas l'invoquer pour valider un bulletin, comme dans les cas ci-dessus cités, ne portant par exemple qu'une seule ligne perpendiculaire ou horizontale. Dans ce cas, suivant notre règle, on ne peut pas considérer qu'il y eut de bonne foi une tentative de faire une croix, et les bulletins marqués de cette manière seraient rejetés. Je n'ai pas besoin de répéter ici la formule de cette règle que l'honorable juge en chef a déjà lue tout au long dans ses notes sur cette cause.

And at p. 717 Mr. Justice Gwynne says:—

> To avoid therefore, as far as possible running the risk of avoiding an honest vote, I concur in adopting as the rule by which the court shall be governed in all questions to arise as to the sufficiency of a mark upon ballot papers in order to constitute a good vote, the rule as laid down in the judgment of his lordship the Chief Justice in this case.

Mr. Justice Henry seems to have concurred with the judgment of the Chief Justice. Mr. Justice Strong declined to express any opinion upon the point now under discussion.

It is quite true that for the purpose of deciding the *Bothwell Case* (2) it was unnecessary to express any opinion upon the question now discussed although I am inclined to think that the two decisions referred to when read together constitute a binding authority upon it.

I do not, however, rest my decision upon that. The rule laid down by the Chief Justice and by at least two of his colleagues in the most explicit terms gives a concrete formula "by which" to quote

(1) L.R. 10 C.P. 733. (2) 8 Can. S.C.R. 676.

Mr. Justice Gwynne again,

> the Court shall be governed in all questions to arise as to the sufficiency of a mark upon ballot papers to constitute a good vote;

and that rule must have passed into and governed election practice and have been the decisive factor in numerous cases depending upon the validity or invalidity of disputed ballots. In that sense it is impossible to suppose that the rule has not become part of the election law of Canada. It was formally declared to be the rule of this court in 1884 by three judges of the court and it should be noted in passing that the appeal to this court is given upon such questions with the object of providing a standard and attaining uniformity in decision. Meanwhile, the "Elections Act" has been consolidated and re-enacted many times; and it is a legitimate presumption of fact that the pronouncements of this court on such a point are not unknown to members of Parliament and others responsible for the form of such legislation; and no amendment of the relevant enactments justifies a suggestion that Parliament did not accept the rule in the *Bothwell Case* (1) as a rule conforming to the spirit and intention of the law.

The force of these considerations is not, in my opinion, affected by the fact that circumstances are disclosed in this record which might have affected the minds of Ritchie C. J. and his colleagues and led them to another view had they been before this court in the *Bothwell Case* (1). Whatever one may think of the reasoning upon which the rule is based the rule itself is, I think, too firmly established to yield to anything less cogent than a statutory amendment.

(1) 8 Can. S.C.R. 676.

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Duff J.

My conclusion therefore is that the requirement of the statute providing for the marking of the ballot with a cross is obligatory in the sense indicated by the judgments in the *Bothwell Case* (1), in the sense, namely, that the mark made by the voter must at least be one evidencing an intention to comply with the statutory direction by making a cross; and that in this sense the requirement is imperative—nullity being the consequence of non-compliance.

The other points of substance involved, I do not discuss—a decision upon this point adversely to the appellant involving, as I have already said, the failure of the appeal.

The appellant's contention remains that the only objections open on the recount were the objections presented on the counting of the ballots by the deputy returning officers at the conclusion of the poll. This contention, I think, also fails, for a reason which may adequately be expressed in half a dozen words. The recount is, in my judgment, as its name implies, intended to be a re-examination of all the "ballot papers returned by the several deputy returning officers" and in this the judge is to be guided by

> the directions of the Act set forth for the deputy returning officers.

The appeal should be dismissed with costs.

ANGLIN J.—The determination of this appeal depends upon whether the provision of s.s. 3 of s. 62 of the "Dominion Elections Act" (10-11 Geo. V. c. 46), that

> the voter shall * * * mark his ballot by making a cross with a black lead pencil,

is absolute and imperative, or merely directory.

(1) 8 Can. S.C.R. 676.

Twenty-nine ballots, disallowed by the Election Court, are marked with a single stroke (1) instead of with a cross (X) as the statute prescribes. Of these 20 are marked for the appellant and 9 for the respondent.

Twenty-three ballots, likewise disallowed, are marked with pen-and-ink. Of these 18 are marked for the appellant and 5 for the respondent.

Nine ballots, also disallowed, are marked with coloured pencils. Of these 5 are marked for the appellant and 4 for the respondent.

Counsel for the appellant suggests no distinction between the nine coloured pencil and the twenty-three pen-and-ink marked ballots.

The majority against the appellant as found by the Election Court being seventeen, unless all the ballots now in question are held to be good, counsel for the appellant very properly concedes that his client's claim to the parliamentary seat cannot succeed.

Apart entirely from authority, I should be of the opinion that the provision of s. 62 quoted is absolute and imperative—and equally so in both its prescriptions—that a ballot not marked with a cross, or, at least with something that can be regarded as an honest attempt to make a cross, or a ballot marked in ink or in lead pencil of any other colour than black does not fulfil its requirements and must be rejected. In this view I am confirmed by the judgments of this Court in *Jenkins* v. *Brecken* (1), where, affirming the judgment of Peters J., a ballot marked with an X instead of a cross was disallowed and in the *Bothwell Election Case* (2) where Ritchie, C. J., Fournier, Henry and Gwynne, JJ. concurring, held that

(1) 7 Can. S.C.R. 247.

(2) 8 Can. S.C.R. 676 at p. 696.

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if the mark indicated no design of complying with the law, but on the contrary, a clear intention not to mark with a cross as the law directs * * * such non-compliance with the law * * * renders the ballot null.

The soundness of the added remark of the learned Chief Justice,

the irresistible presumption from such a plain and wilful departure from the terms of the statute being that it is so marked for a sinister purpose,

I regard as at least questionable. But that observation was unnecessary to the clear and precise decision that the statutory prescription is absolute and imperative (which therefore remains unaffected by it) and does not appear to have had the concurrence of the other members of the court who adopted the Chief Justice's conclusion. The rule thus formulated by this court should, in my opinion, be accepted as decisive of the character of the prescription of s. 62 (3) as to the marking of ballots and as to what is essential in order to fulfil the requirements of a cross.

The enacting provision of the English Ballot Act (s. 2) of 1872, merely speaks of

the voter having secretly marked his vote on the paper.

By rule 25 in the annexed schedule of rules he is simply required to "mark his paper". It is only in the "Directions for the Guidance of Voters" in the schedule of forms that there is any statement as to the kind of mark to be used by the elector in marking his ballot. The significance of this, notwithstanding the provision s. 28 that the schedules shall be construed as part of the Act, and the distinction between the effect of enactments as to the rules and forms which are directory only, and that of the absolute enactments of the sections in the body of the Act, is pointed out by Lord Coleridge C. J. in *Woodward* v. *Sarsons* (1).

(1) L.R. 10 C.P., 733 at pp. 746-8.

English decisions, therefore, as to the form and method of marking ballots are scarcely applicable under our more rigorous statute. In England the tendency of the decisions has been in the direction of treating as sufficient any mark, in whatever form, from which it can be deduced that the elector intended to vote for a certain candidate. In Canada, on the other hand, the tendency has been to make more rigid and precise the statutory prescriptions as to the form and method of marking the ballot.

Section 66 (2) is, in my opinion, not so exhaustive of the grounds on which a deputy returning officer should reject ballots as to require him to count a ballot not marked in accordance with the imperative requirements of s. 62 (3), unless, indeed, we should consider it to be the manifest intention of the legislature that any marking not in conformity therewith should be deemed

a writing or mark by which the voter can be identified

within the meaning of the clause c. of s.s. 2 of s. 66.

I am unable to accede to the view urged by Mr. Sinclair that the judge on a scrutiny, or the Election Court on a petition where the seat is claimed, is restricted to the consideration of such objections to ballots as were taken before the deputy returning officers and dealt with by them under s.ss. 2-3 of s. 66. By s. 70 the judge is required to recount all the votes (s.s. 3) according to the directions set forth in the Act for the guidance of deputy returning officers at the close of the poll (s. s. 4). His duty is not confined to reconsideration of such ballots as were objected to and passed on by the several deputy returning officers. It is a recount that the statute provides for—not merely an appeal from the decisions of the deputy returning officers.

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Mignault J.

I am for the foregoing reasons of the opinion that this appeal fails and must be dismissed with costs.

BRODEUR J.—I concur with Mr. Justice Anglin.

MIGNAULT J.—On the opening of the argument, the learned counsel for the appellant informed the court that the rejected ballots could be conveniently placed in three classes, to wit:

1. 23 ballots marked in ink, 18 being for the appellant and 5 for the respondent;

2. 9 ballots marked with a coloured pencil, 5 for the appellant and 4 for the respondent;

3. 29 ballots marked with the figure "1", 20 for the appellant and 9 for the respondent.

Besides these ballots, there is the case of Mrs. Baird who testified that she had voted twice, each time for the respondent, and the appellant applies to have one of these votes deducted from the respondents' total.

The majority against the appellant, according to the judgment appealed from, was 17, so that unless he succeeds as to classes 1 and 3 above mentioned, he will be unable to overcome this majority.

This will simplify my consideration of the case, for if the appellant cannot have the ballots marked "1" counted, his appeal fails.

After due consideration I think we are bound by authority to reject these ballots. In the *Bothwell Case* (1) Chief Justice Ritchie, while disclaiming any intention to lay down a hard and fast rule, said at p. 696:

(1) 8 S.C.R. 676.

Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, it should be counted, unless, from the peculiarity of the mark made, it can be reasonably inferred that there was not an honest design simply to make a cross, but there was also an intention so to mark the paper that it could be identified in which case the ballot should, in my opinion, be rejected. But, if the mark made indicates no design of complying with the law, but, on the contrary, a clear intent not to mark with a cross as the law directs, as for instance, by making a straight line or a round 0, then such non-compliance with the law, in my opinion, renders the ballot null.

Fournier, Henry and Gwynne, JJ. concurred with the Chief Justice in formulating this rule which is therefore binding on us. I must consequently hold that the court below rightly rejected these ballots. In so deciding I follow the decision of this court in the *Bothwell Case* (1) and do not think it necessary to pass upon the contentions of the parties as to the construction of sections 62 and 66 of the "Dominion Elections Act."

Mr. Geoffrion, for the appellant, said that in the City of Calgary there is a system of proportional representation, whereby voters indicate their first or second preference in figures, such as "1" and "2" and are told not to mark the ballot with a cross. This no doubt was a very unfortunate circumstance, but the law is the same for all the Dominion and no local circumstances can suffice to set aside so plain a requirement as the marking of ballots with a cross. I think therefore that these ballots were rightly rejected.

In view of the rejection of the ballots marked with the figure "1", the appellant cannot succeed and I do not think it necessary to pass on the validity of the ballots marked with a pen instead of a black lead pencil or on the validity of the other ballots. As I understand it, there are no decisions of this court dealing with the validity of ballots marked with a pen and ink.

(1) 8 Can. S.C.R. 676.

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Mignault J.

The result is that the appellant, although a considerable majority of those who marked the disputed ballots evidenced the intention of voting for him, loses the election as well as the appeal he has entered against the decision of the election court. At this late day, it is strange that citizens of this country should not be familiar with the manner of voting. And however regrettable it may be that the will of the majority should not prevail, still that will must be expressed in the required manner. Otherwise it is of no effect.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

J. E. CARON (DEFENDANT).....APPELLANT; 1922

*May 17.

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Constitutional law—Federal taxation—Official of provincial government—Taxation on income.

The Dominion Government has the right to impose income taxes upon the salaries of provincial officials. *Abbott* v. *The City of Saint John* (40 Can. S.C.R. 597) fol.

Judgment of the Exchequer Court (21 Ex. C. R. 119) affirmed.

APPEAL from the judgment of the Exchequer Court of Canada (1), maintaining the respondent's action to recover from the appellant the sum of $210 as income tax.

The appellant is the Minister of Agriculture for the Province of Quebec, receiving as such a salary of $6000 and an indemnity of $1,500 as a member of the Legislature. In computing the amount of income tax for which the appellant is claimed to be liable for the year 1917, there is shown a liability to the Dominion Government for such income tax of the sum of $210.

Belcourt K.C. and *St. Laurent K.C.* for the appellant.

Newcombe K.C. and *Plaxton* for the respondent.

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

(1) [1921] 21 Ex. C.R. 119.

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CARON v. THE KING.

The Chief Justice.

The judgment of the court was delivered by:—

THE CHIEF JUSTICE.—We were all of the opinion, at the close of the argument of the plaintiff, that the appeal must be dismissed and that we are bound by our decision in the case of *Abbott* v. *City of St. John* (1).

In that case the appellant, who was an official of the Dominion Government (in the Customs services) was assessed on his income as such under the provincial law, and this court held that the provinces of the Dominion had the right under the B.N.A. Act to impose income taxes upon Dominion officials resident in the respective provinces upon the official salaries paid to them in those provinces by the Dominion.

The present case is the converse of that and raises the question whether the Dominion has the right to impose income taxes upon the salaries of provincial officials. We are unable to distinguish the present appeal from our decision and the reasons therefor in the *Abbott Case* (1) and would therefore dismiss this appeal.

Appeal dismissed.

Solicitors for the appellant: *Geoffrion, Geoffrion & Prud'homme;*

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

(1) [1908] 40 Can. S.C.R. 597.

CANADIAN CAR AND FOUNDRY COMPANY (DEFENDANT)..... APPELLANT;

1922
June 12.
June 17.

AND

J. PHILIP BIRD (PLAINTIFF)..... RESPONDENT.

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

Appeal—Jurisdiction—Action en reddition de compte—Judgment ordering account—Final Judgment—"Supreme Court Act"—R.S.C. (1906) c. 139, s. 2, s.s. e.

In an action *en reddition de compte*, the judgment directing an account is not a "final judgment" within the provision of sub-section (e) of section 2 of the "Supreme Court Act" as it stood prior to the amendment of 1920 (10 & 11 Geo. v. c. 32).

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court and condemning the appellant to an accounting upon an action *en reddition de compte*.

Gregor Barclay for the motion.

Elder contra.

IDINGTON J.—I am of the opinion that the motion to quash should be granted with costs.

PRESENT: Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Duff J.

DUFF J.—The appeal should be quashed with costs. The judgment appealed from is a judgment directing an account. It was not a judgment whereby the action was "finally determined and concluded." Therefore it is not a final judgment within the relevant statutory provision (sec. 2 of the "Supreme Court Act") as it stood prior to the amendment of 1920.

ANGLIN J.—This case is, in my opinion, not distinguishable in principle from *Crown Life Insurance Co.* v. *Skinner* (1); *Dunn* v. *Eaton* (2) and *Stephenson* v. *Gold Metal Furniture Manufacturing Co.* (3); *Leroux* v. *Juillet* (4) also seems to be in point.

Until the accounting, directed by the judgment from which it is sought to appeal, takes place and judgment upon it is pronounced there will not be a

> judgment * * * * * * whereby the action * * * is finally determined and concluded,

(3 & 4 Geo. V, c. 51, s. 1). Whatever may be its character under the law of the Province of Quebec. the judgment directing the accounting is for the purpose of appeal to this court not final but interlocutory because of the statutory definition of "final judgment" in the Supreme Court Act, as it stood when this action was begun. The accounting when it takes place will be a further step in the prosecution of this action, of which the purpose is to determine the defendant's liability (if any) to the plaintiff and the amount thereof and to obtain a judgment of the court for its payment.

In my opinion the motion to quash the appeal should be granted with costs.

(1) [1911] 44 Can. S.C.R. 616.
(2) [1912] 47 Can. S.C.R. 205.
(3) [1913] 48 Can. S.C.R. 497.
(4) 2 Cam. Sup. Ct. Pr. 5.

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Brodeur J.

BRODEUR J.—Lors de l'argument sur la motion pour casser l'appel, je croyais que nous avions juridiction et que cette motion devait être renvoyée. Mais après avoir pris connaissance du dossier et des jugements, j'en suis arrivé à la conclusion que nous n'avions pas juridiction. Le jugement *a quo* n'est pas un jugement final où la matière en litige excède la somme de $2,000.

L'action est en reddition de compte. Le demandeur allègue qu'il a fait un contrat avec la défenderesse par lequel cette dernière devait lui payer certains percentages sur les profits découlant de ventes de munitions qu'elle faisait au gouvernement russe, que la défenderesse refuse de lui fournir un état de ces profits et il conclut à ce que la défenderesse soit condamnée à lui rendre compte des recettes et dépenses qu'elle a faites dans l'exécution de ces contrats, à ce que des comptes soient faits représentant les intérêts respectifs du demandeur et de la défenderesse dans les profits qui ont été réalisés sur ces contrats, à ce que la défenderesse soit condamnée à payer au demandeur le percentage stipulé dans le contrat et à ce qu'à défaut de rendre compte la défenderesse soit condamnée à payer $1,000,000.00 pour tenir lieu du reliquat.

La défenderesse a plaidé qu'elle n'était pas tenue de rendre compte, vu que ces contrats n'étaient pas encore terminés et réglés; que certains percentages stipulés au contrat devaient être déduits des profits bruts et que, ces percentages déduits, il ne resterait aucun profit de réalisé et que le demandeur se trouvait en conséquence sans intérêt pour réclamer une reddition de compte.

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La Cour Supérieure a décidé qu'il y avait lieu de rendre le compte qui était demandé et que la défenderesse devait payer les percentages stipulés au contrat, mais elle a ajouté que les charges dont parlait la défenderesse devraient être déduites des profits bruts et elle a réduit la pénalité à $350,000.00 si la défenderesse ne rendait pas de compte.

La Cour du Banc du Roi a modifié ce jugement de la Cour Supérieure et a simplement déclaré que la défenderesse devait rendre compte et payer les percentages stipulés au contrat.

Cette dernière partie de la condamnation, si elle était prise littéralement, pourrait être considérée comme une condamnation à une somme quelconque. Mais j'y vois plutôt une condamnation de rendre compte suivant les termes du contrat qui stipule un certain percentage sur les profits.

La Cour du Banc du Roi n'a donc virtuellement prononcé de condamnation que sur l'obligation de rendre compte. Elle a décidé que la défenderesse qui voulait se soustraire à cette obligation devait s'y soumettre.

L'objet de l'action en reddition de compte est de forcer toute personne qui a géré les affaires d'une autre personne à rendre un compte devant la justice des recettes et des dépenses et de remettre ses pièces justificatives et de condamner celui qui du rendant ou de l'oyant compte sera le reliquataire. D'ordinaire ces comptes se rendent hors les tribunaux; mais si le débiteur ne remplit pas son obligation, alors il peut être assigné en justice. S'il n'y a pas de contestation quant à l'obligation, une ordonnance est rendue obligeant le rendant compte de déposer

ses comptes et ses pièces justificatives dans un certain délai; et s'il fait défaut de rendre son compte dans le délai fixé, alors on peut, comme dit Pothier, *Procédure civile*, ch. 2,

obtenir sentence portant que faute par lui de le rendre il sera contraint de payer une certaine somme par provision.

Le jugement, dont on fait appel en la présente cause, est simplement un jugement ordonnant la reddition de compte.

Ce judgment est-il un jugement définitif? Aux termes de la section 37 de l'"Acte de la Cour Suprême," il n'y a appel que des jugements définitifs, et on entend par jugements définitifs ceux à la suite desquels "l'action * * * est définitivement jugée et décidée." (Sec. 2, s.s. (e) ch. 139 S.R.C.).

Sous cette législation de nombreuses décisions ont été rendues, surtout dans des causes venant d'autres provinces que celle de Québec; et il a été jugé qu'un jugement qui détermine des matières en litige entre les parties mais qui ne donne pas le montant de la condamnation que le demandeur doit recouvrer n'est pas un jugement définitif qui peut être porté devant la Cour Suprême.

Voir: *Clarke* v' *Goodall* (1); *Crown Life Assurance Co.* v. *Skinner* (2); *Windsor & Essex* v. *Nelles* (3).

A la suite de ces jugements qui avaient pour effet d'empêcher l'appel dans un grand nombre de cas où la véritable question en litige était déterminée, le parlement a cru devoir en 1913 abroger l'alinéa 2 de l'article 2 de la loi de la Cour Suprême et le remplacer par le paragraphs suivant:.

(1) [1911] 44 Can. S.C.R. 284. (2) [1911] 44 Can. S.C.R. 617.
(3) Cameron's Pr., 2nd ed. p. 23.

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Brodeur J.

Sauf ce qui concerne des appels de la province de Québec "jugement définitif" signifie tout jugement * * * qui détermine en totalité ou en partie un droit essentiel de l'une quelconque des parties en litige * * * et quant aux appels de la province de Québec, "jugement définitif" signifie comme ci-devant tout jugement. * * * où l'action, la poursuite * * * est déterminée et conclue.

Je comprends que la raison pour laquelle le législateur n'a pas jugé à propos d'étendre l'appel aux causes de Québec, c'est que dans cette province l'interlocutoire ne lie pas le juge et que lors du jugement final ces interlocutoires peuvent être modifiés et renversés.

Le jugement qui a été rendu en la présente cause n'est certainement pas un jugement définitif au sens de l'"Acte de la Cour Suprême".

Nous avons déjà eu devant nous une action en reddition de compte dans la cause de *Généreux* v. *Bruneau* (1), où nous avons décidé que nous n'avions pas juridiction. Il est vrai que dans cette cause de *Généreux* v. *Bruneau* (1), le montant pour lequel le défendeur aurait pu être reliquataire aurait été bien minime et n'aurait pas atteint $2,000; mais je considère que le motif du jugement devait certainement porter aussi sur le fait qu'un jugement ordonnant une reddition de compte n'est pas un jugement définitif et par conséquent n'est pas appelable.

Je puis aussi citer la cause de *Leroux* v. *Juillet* (2) où sur un jugement ordonnant la nomination d'un arpenteur dans une action en bornage nous avons décidé qu'il n'y avait pas d'appel.

Je dois ajouter que les amendements faits en 1920 à "l'acte de la Cour Suprême" ont fait disparaître cette difference entre les appels venant de Québec et

(1) 47 Can. S.C.R. 400. (2) 2 Cam. Pr. 5

ceux venant des autres provinces, et que si la présente action avait été instituée après juin 1920, elle aurait pu être portée en appel ici sur le jugement *a quo*.

Pour ces raisons, la motion doit être accordée avec dépens.

MIGNAULT J.—For the reason that the judgment appealed from is not a final judgment within the meaning of section 2 subparagraph (e) of the "Supreme Court Act" as it stood before the 1920 amendment, I am of opinion that the appeal should be quashed with costs of the motion to quash.

Motion granted with costs.

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*May 12, 15.
*June 17.

THE CANADIAN NORTHERN RAILWAY CO. AND THE CANADIAN NATIONAL RAILWAYS CO. (DEFENDANTS)..... } APPELLANTS;

AND

HIS MAJESTY THE KING AND THE PROVINCIAL TREASURER OF ALBERTA (PLAINTIFFS)..... } RESPONDENTS.

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

Statutes—Construction—Meaning of "any statute" in provincial Act—Penalties—Statutes of limitations—Statutory penalties—Power in court to relieve—"Act to supplement the Revenues of the Crown" Alta. s. [1906] c. 30—31 Eliz. c. 5, s. 5—3 & 4 Wm. IV, c. 42, s. 3.

Under the provisions of "An Act to supplement the revenues of the crown", the province of Alberta claimed from the railway companies double taxes for 1913 to 1918, both inclusive and also penalties for 2,191 days at $20 a day for failure to deliver to the provincial treasurer in each year a written statement showing the number of miles of railway, whether exempt from taxation or not (Alta. S. [1906] c. 30, s. 4).

Held, that under the provisions of the Statutes of Limitations (31 Eliz. c. 5, s. 5 and 3 & 4 Wm. IV, c. 42, s. 3), the respondent's right to recover is restricted to such penalties as accrued within two years previous to the commencement of its action.

Held, also, Idington and Anglin JJ. dissenting, that the words "any statute" in the proviso (added by s. 10 of c. 5 of Alta. s. [1909]) to section 12 of the Revenue Act above cited "that no tax shall be payable under this Act upon or with respect to any portion of a line of railway aided by a guarantee of bonds * * * under the provisions of any statute * * * " are not restricted to a statute of the Province of Alberta but also comprise a statute of the Parliament of Canada.

*PRESENT: Idington, Duff, Anglin, Brodeur and Mignault, JJ.

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THE CANADIAN NORTHERN RY. CO. v. THE KING.

Per Idington, Duff and Anglin JJ.—The power given to the court to relieve against penalties ("Supreme Court Act", Alta. s. [1907]) c. 3, as amended by Alta. s. [1907] c. 5) does not authorize it to relieve against statutory penalties.

Judgment of the Appellate Division ([1921]) 1 W.W.R. 1178) varied, Idington and Anglin JJ. dissenting in part.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Hyndman J at the trial (2) and maintaining the respondents' action to recover taxes and penalties alleged to be due and owing in respect of 176.23 miles of railway owned by appellant companies.

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.

Maclean K.C. for the appellants: "Any statute" includes Dominion statutes.

The Statutes of Limitations must be applied to the respondents' claim for double taxes and penalties.

The Supreme Court of Alberta, under the provisions of the Supreme Court Act, had power to relieve against the penalties and forfeitures sued for in this action.

Lafleur K.C. for the respondents.

IDINGTON J. (dissenting in part)—The respondent sued the appellant for taxes due under the provisions of an "Act to supplement the Revenues of the Crown in the Province of Alberta," being chapter 30 of the Statutes of 1906 of said province, and for penalties thereby provided for.

(1) [1921] 1 W.W.R. 1178. (2) [1920] 3 W.W.R. 283.

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The learned trial judge having dismissed the action, the Appellate Division reversed that and allowed everything claimed; hence this appeal here.

I agree with the view taken by the Appellate Division that if the order in council upon which respondents rely for the determination of the value of the railway is to be held ineffective, then the $20,000 a mile provision set forth in the statement of claim would become operative and that the lesser sum claimed herein would still be recoverable herein.

The mileage seems to have been admitted in the course of the trial and that seems to answer the objection taken on that score.

A much more difficult question is raised by the use of the words "any statute" in the following amendment passed in 1909, c. 5, sec. 10:—

> Provided, however, that no tax shall be payable under this Act upon or with respect to any portion of a line of railway aided by a guarantee of bonds, debentures, debenture stock, or other securities under the provisions of any Statute for a period of fifteen years from the date of the commencement of the operation of the portion of the line so aided, and thereafter during the currency of the guarantee as aforesaid the amount of taxes payable hereunder upon or with respect to such portion of any line of ralway so aided shall not exceed an amount equal to $30 per mile of the mileage of such portion of such line in the Province.

It seems that in respect of a small part of the line of railway in question herein the appellant or those through whom it claims got such aid as specified from the Dominion government by virtue of a statute of Parliament and thus it is contended the exemptions provided for were made operative in relation to said part of the line.

The Appellate Division divided on this question. I agree with the majority of said court in holding that the word "statute" in the said provision covers only the case of a statute of Alberta.

To avoid the absurdity of giving with one hand and taking away with the other, might seem a very good reason for the legislature of Alberta, if passing such a statute, exempting the object of such a bounty from taxation:

I do not see any good reason for the legislature concerning itself in that regard about what other legislative bodies might or might not have done in that regard.

And the amendment made later to give effect to that view indicates that the legislature had so intended to restrict the operation of the exemption.

The action seeks to recover for penalties imposed by the following, which is section 5 of the said Act of 1906:—

5. Every person, company or corporation who, or which, and the manager or agent in the province of any company or corporation as aforesaid who neglects to conform to the provisions of the preceding section shall each be liable to a penalty of twenty dollars per day for each day during which default is made; and the person, company or corporation aforesaid shall also be liable to pay a tax of double the amount for which he or it would have been liable under this Act, and any penalty or such double tax may be recovered with costs in any court of competent jurisdiction in an action brought in the name of the provincial treasurer.

The preceding section therein referred to required a return to be made by parties defined, of whom appellant answers the description, on or before the first of July in each year, beginning with July, 1906, shewing the number of miles of railway line, or part thereof, which such like parties as appellant were operating, and whether claimed to be exempt, etc.

The appellant never made any such return and became liable to said penalties.

It however got leave from the learned trial judge to amend its pleadings, setting up the defences in paragraphs 7, 8, 9 and 10 of its amended statement of claim.

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It pleads therein the statutes of 18 Elizabeth, c. 5; 31 Elizabeth, c. 5, section 5, and 3 & 4 Wm. IV. c. 42, section 3.

The Appellate Division seems to have overlooked this though counsel, as I understand, say the matter was mentioned in argument there.

Indeed one of the grounds taken in the notice of appeal from the learned trial judge is that he had given leave to so plead, as appellant did by said amendments.

I find in Darby & Bosanquet, 2nd ed., a reference to the statute of Elizabeth, stating it is in force but intimating that it was held in Noy's Reports, 71, that it did not apply to an action brought by the party aggrieved, and that, in such case, is now provided for by the 3rd section of 3 & 4 Wm. IV, cap. 42. In looking at said case in Noy's Reports, page 71, the matter is cleared up as the statute of Elizabeth relied on was held only applicable to a common informer, which respondent will hardly assent to be called but rather as a party aggrieved.

Hence I take it that the latter statute is that which must govern herein.

Therefore I hold the action for penalties herein, which I hold the double tax to be, as well as the *per diem* penalty of $20.00 a day, is barred beyond the two years preceding the 10th of October, 1919, when the action was brought.

The time began to run on the 1st July, 1917, as to the *per diem* penalty, and can only be computed as to that year for the last six months of the year 1917, and the like period between the 1st of July, 1918, and the end of that year. And as to the double tax it can only apply to the years 1917 and 1918.

The amount of the judgment in the Appellate Division should be reduced accordingly.

The appeal, I think should be allowed to that extent with costs of this appeal and in the Appellate Division and no costs of the trial.

I do not see how the other defence set up in the other amended defences can avail appellant anything.

I am by no means clear as to what the treasurer rests his right upon to recover the penalties, though it may be implied from the provisions of the Act.

The contention founded upon the power of the court to relieve from such penalties as mentioned in the Amending Act of 1907, c. 5, seems to me to be applicable only to such contractual penalties and forfeitures as the Court of Chancery had exercised jurisdiction in regard to.

DUFF J.—The chief question arises under the proviso to sec. 12; and the point in dispute is whether the lines of railway in respect of which the taxes sued for are said to have accrued or any part of them fall within the description

> line of railway aided by a guarantee of bonds, debentures, debenture stock or other securities under the provisions of any statute.

I am not in agreement with the view which prevailed with the majority of the Appellate Division touching the effect in this proviso of the words under the provisions "of any statute".

It is serviceable sometimes to repeat the exact words of Lord Wensleydale's canon enunciated in *Grey* v. *Pearson* (1), and described as the golden rule of reading Acts of Parliament by Jarvis C. J. in *Mattison* v. *Hart* (2). These are Lord Wensleydale's words:—

(1) [1857] 6 H. L. Cas. 61 at p. 106. (2) [1854] 14 C.B. 357 385.

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> In construing wills, and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity or some repugnance or inconsistency with the rest of the instrument; in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity, repugnancy, or inconsistency, but no further.

Now what is the ordinary meaning of the words in dispute? I do not in the least doubt that, for the purpose of determining that, you must consider that it is a statute of the legislature of Alberta which is speaking; but you may and must also consider what it is that the statute is dealing with. The subject is the taxation of railways and the clause to be construed is a clause exempting certain railways from its operation. Generally, both as to railways wthin the incidence of the tax and those excepted from its operation. it deals with railways constructed or in operation under the authority of statute, that is to say under the authority of an Act of the Parliament of Canada or of an Act of the Legislature of Alberta.

I can see little reason to doubt that the ordinary meaning of the words quoted when employed in a statute dealing with railways of these two classes (railways in operation under the authority of the Parliament of Canada and railways in operation under the authority of the local legislature) includes statutes of the Parliament of Canada as well as those of the Alberta Legislature. There might of course be something in the context excluding that meaning; to attribute such meaning to the words might give rise to some repugnancy to the declared or apparent object of the statute and if so, then the literal meaning would give way to an interpretation more in harmony with the ascertained purpose of the legislature.

In *Vacher* v. *London Society of Compositors* (1), Lord Macnaghten said:

> In the absence of a preamble there can, I think, be only two cases in which it is permissible to depart from the ordinary and natural sense of the words of an enactment. It must be shewn either that the words taken in their natural sense lead to some absurdity or that there is some other clause in the body of the Act inconsistent with or repugnant to, the enactment in question construed in the ordinary sense of the language in which it is expressed.

Now there is nothing absurd in the notion that the legislature should grant exemption from taxation in respect of railways, construction or maintenance of which has been aided by a guarantee of bonds given under the authority of the Dominion Parliament. There is nothing absurd in such a notion being a motive of legislation by the Alberta legislature. On the contrary, joint action or combined action by the Dominion and a province in lending financial aid to railway enterprises in different forms has been a not uncommon type of legislative activity in the past history of this country. It can, I think, offer no sort of clue to the intention of the legislature as expressed in this enactment to contrast the financial advantages in a strictly provincial point of view of subsidizing by way of tax exemption a railway company whose obligations the province has guaranteed on the one hand with the advantages to be derived from lending assistance to a company supported by the Dominion Parliament alone. Such speculations as to the relative weight of possible motives which may be conceived as prompting such legislative action would carry us far beyond the strict limits of the judicial function and would expose us to the risk, as Lord Haldane said in the same case on p. 113, of "going astray in a labyrinth" where one has "no sufficient guide".

(1) [1913] A.C. 107 at p. 118.

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These considerations have no application with regard to any taxes accruing after the 13th April, 1918, that is to say to taxes claimed for any year subsequent to 1917. The respondent was therefore not entitled to recover in respect of any part of the railway in question aided by a guarantee of securities under the provisions of any Dominion or Provincial statute. This condition appears to be fulfilled only in the case of the line from Lloydminster to Edmonton. As regards the other points made, the invalidity of the order in council is I think, of no importance. The respondent relies upon it, it is true, but the only possible effect of that is to limit the respondent's claim for assuming the order in council to be invalid the respondent would be entitled to recover upon the basis of a valuation of $20,000 a mile. As to the statutes of limitation, I think the appellants have made good their contention. The combined effect of 31 El. cap. 5 and 3 & 4 Wm. IV, cap. 42 is, I think, to impose a limitation of two years and this applies, I think, to the claim for double taxation as well as to the sums claimed *nominatim* as penalties.

I am unable to accept the contention that the authority to relieve from forfeitures expressed in general terms and conferred upon the Supreme Court by the statute of 1907 extends to penalties and forfeitures declared by a public enactment and thereby made exigible upon the non-performance of a general duty created by such enactment, such as a duty to pay taxes or to make a return under a taxing statute.

In the result the appeal should be allowed in part and the judgment below varied. The respondent is entitled to recover taxes for the year 1918 on the footing of the valuation of the order in council of the 29th August, 1908 at the rate of 2 % of the value as

fixed by such valuation of the railway in question and for the year 1919 at the rate of 1%. For the years preceding 1918 the respondent is entitled to recover taxes at the rate of 1% on the same valuation in respect of the line between Edmonton and Strathcona and is also entitled to recover a penalty of $20.00 a day for each day of the period from the 30th day of August, 1917 to the 31st day of December, 1918. The appellants are entitled to the costs of the appeal to this court. The respondents should have the costs of the action and of the appeal to the Appellate Division.

ANGLIN J. (dissenting in part)—On the points which it covers the judgment delivered by the learned Chief Justice of Alberta is, to me, entirely satisfactory and I feel that I cannot usefully add to it.

The only point not covered is the application and effect of the statute 31 Eliz. c. 5 s. 5 invoked by the appellant. Its applicability seems to be established. The right of the plaintiff to recover is thereby restricted to such penalties as accrued within two years previous to the commencement of the action in August, 1919.

By section 5 of the Alberta statute of 1906 (c. 30), the appellant is made liable for a penalty of $20.00 a day for each day during which default is made in delivery of the return prescribed by section 4, and also to pay double the amount of the tax for which it was liable. The appellant urges that it has been ordered by the Appellate Division to pay for penalties $20.00 per day for six years, from 1913 to 1918, inclusive—2,991 days in all. This is in accordance with the prayer in the statement or claim. These penalties appear to have been awarded solely in respect of default in making the return for the year

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1913. Recovery of penalties for defaults in regard to the returns for the years 1914, 1915, 1916, 1917, was not prayed for. In a penal action such as this, I would not be disposed to allow the plaintiff to alter or enlarge the claim by amendment.

I am, however, unable to assent to the suggestion that default in respect of the return for each year ceased when delivery of that for the succeeding year became due.

In the result the recovery of penalties claimed should be restricted to such *per diem* penalties as accrued in respect to the 1913 tax from the 30th of August, 1917. The double tax is recoverable only in respect of the 1918 taxes.

The judgment should be modified accordingly and the appellant should have its costs in this court.

BRODEUR J.—By an Act passed in 1906, the legislature of Alberta declared that any railway company not exempt from taxation was bound to pay a tax to the provincial government; that the executive authorities could determine the actual value of the railway; and if they failed to do it, then the actual value should be taken to be $20,000.00 for each mile.

On the 29th of August, 1908, the Lieutenant Governor in Council fixed the value of all the railway lines at a sum of $11,985.34 per lineal mile.

The Canadian Northern Railway was then operating 176.23 miles of railway in Alberta and became liable to taxation. But a statute was passed in the same year 1908 declaring that

> no tax shall be payable under this Act upon or with respect to any portion of a line of railway aided by a guarantee of bonds, debentures, debenture stock or other securities under the provision of *any statute*.

The evidence shows that the Dominion Parliament had guaranteed the debentures of the Canadian Northern in 1903 to the extent of 169 miles of its railway from Lloydminster to Edmonton and that a subsidy in money had been granted by the federal authorities for the other 7.23 miles from Edmonton to Strathcona operated by the Canadian Northern. It is claimed by the appellants that this aid by the federal authorities would constitute the Alberta lines of the Canadian Northern exempt from taxation.

On the other hand, the respondent, the provincial treasurer, contends that the exemption would cover only railways aided by a provincial statute, and that as far as the 7.23 miles between Edmonton and Strathcona the exemption could not be claimed because there was only a cash subsidy for them and not a guarantee of bonds.

The main question which we have to decide is whether the words "any statute" in the Act of 1908 above quoted refer to provincial laws only or to both Dominion and provincial laws.

A law imposing taxation should always be construed strictly against the taxing authorities, since it restricts the public in the enjoyment of its property. These taxing laws are not to be extended beyond the clear import of the language used and the powers granted to the officers charged with their execution must be strictly pursued. *Tennant* v. *Smith* (1); *Clerical Assurance Soc.* v. *Carter* (2).

At the time this railway taxation act was passed, there were no railways subsidized or aided by the province and the statute must have had in contemplation the exemption of railways aided by the federal authorities.

(1) [1892] A.C. 150 at p. 154. (2) [1889] 22 Q.B.D. 444.

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The words "any statute" in the Alberta Act of 1908 should then include all the statutes in force, viz, the Dominion as well as the provincial statutes.

This interpretation which I give to the statute of 1908 appears to me so well founded that in 1918, on the 13th of April, the Legislature of Alberta amended this provision in such a way that the statute referred therein was a provincial statute.

It is contended that the amendment has a retroactive effect, but the declaration is not made in terms sufficiently wide to be construed retroactively. If there were some doubt, the doubt should be solved against the retrospective effect; and besides, in this case, it would disturb vested rights.

I then come to the conclusion that the Canadian Northern was exempt from municipal taxation on the 169 miles of railway extending from Lloydminster to Edmonton until the statute of 13th of April, 1918 was passed. As to the 7.23 miles between Edmonton and Strathcona, the company should be held liable because it received only a cash subsidy and did not obtain from the federal authorities a guarantee of bond.

The plaintiff in his claim also asked that the defendant company be condemned to pay penalties imposed by the law. The law provided that any railway company would be bound to deliver to the provincial treasurer each year a written statement correctly showing the number of miles of railway, whether the same is exempt from taxation or not, and that any company which failed to file a statement should be liable to a penalty of $20.00 per day for each day during which default is made and to double taxation.

The railway company invokes against this penal claim the statutes of 31 Elizabeth, c. 5, s. 5, and 3 & 4 William IV, c. 42, s. 3, which declare that all actions for forfeiture upon a penal statute should be brought within two years after the offence has been committed, whether the action is brought by the party aggrieved or by a common informer.

These statutes are such that they leave no doubt that the claims for penalties should be restricted to two years. The action having been instituted on the 30th day of August, 1919, the penalty of $20.00 a day should cover the period from the 30th of August, 1917. As the double taxation is in the nature of a penalty, it should also be restricted to two years on the 7.23 miles of railway from Edmonton to Strathcona. Since the exemption from taxation on the 169 miles has ceased since the law of the 13th of April, 1918, the company should be condemned to pay double taxation for part of the year 1918 on these 169 miles.

The plaintiff has amended his original statement of claim to cover the taxation for the year 1919 but he has made no claim for penalties for the other period. The plaintiff is entitled to recover the full taxes on the basis of 1% for this year 1919.

The appeal should be allowed in part and the judgment below varied in the manner I have indicated. The appellants are entitled to the costs of the appeal to this court. The respondents should have the costs of the action and of the appeal to the Appellate Division.

MIGNAULT J.—Two questions raised under this appeal have received my serious consideration.

1. Were the appellants exempt from the tax claimed from them?

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2. Are they liable for the penalties demanded for failure to deliver to the provincial treasurer a statement showing their mileage?

On the first question as to the construction of the words "any statute" in section 10 of chapter 5 of the Alberta statutes of 1909, which exempts certain lines of railway from the tax, I share the opinion of the learned trial judge and of Mr. Justice Beck in the appellate divisional court that these words should not be restricted to a statute passed by the legislature of the province of Alberta but comprise also a statute of the Parliament of Canada which of course would be in force in Alberta as well as in any other province of the Dominion. No more comprehensive term could be used than "any statute" and I feel that I should give it its ordinary and grammatical meaning.

In 1918, the legislature of Alberta amended the "Interpretation Act" by ch. 4, sect. 48, assented to on April 13th, by inserting immediately before clause 11 of section 7 thereof the following new clause:—

> 10a. The expression "province" means the province of Alberta, and the expressions "Act" and "statute" mean an Act or statute of the province.

For the reasons fully stated by the learned trial judge, I am of opinion that this amendment is not retrospective and that it applies only in the future. Therefore if the appellants were, before April 13th, 1918, aided in respect of their line of railway by a guarantee of bonds, debentures, debenture stock or other securities under the provisions of a statute of the Dominion of Canada, no tax was payable by them under the Act in question for a period of fifteen years from the date of the commencement of the operation of the portion of the line so aided, and thereafter during the currency of the guarantee

as aforesaid the amount of taxes payable upon or with respect to such portion of the line of railway so aided, could not exceed an amount equal to $30.00 per mile of the mileage of such portion of such line in the province.

I take it as established that the portion of the line of railway between Lloydminster and Edmonton was aided by a guarantee of bonds by the Dominion of Canada under a Dominion statute. The order-in-council authorizing the guarantee is dated the 20th July, 1903, so that the fifteen years period would extend to July, 1918. The portion of the line known as the Edmonton, Yukon and Pacific Railway (from Edmonton to Strathcona, 7.23 miles) was aided merely by a cash subsidy, and this portion would not come within the operation of the exemption clause.

The tax in question was payable on September 1st in each year (sect. 9). Applying the 1918 amendment from the date of its enactment as excluding any statute granting a guarantee of bonds, etc., other than an Alberta statute, the 1918 taxes, for the aided portion of the line, could only be claimed for the broken period from April 13th to December 31st, and the taxes for 1919 in entirety. The taxes demanded in this action for 1913, 1914, 1915, 1916, 1917, and the broken period of 1918 from January 1st to April 13th are not due in respect of the portion of the appellant's line from Lloydminster to Edmonton.

The second question is whether the appellants are liable for the penalties demanded by this action for failure to deliver to the provincial treasurer the statement required by section 4 of the Act (chapter 30 of the statutes for 1906)?

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This statement is required whether or not the line of railway is claimed to be exempt from taxation, and it is admitted that during these years no such statement was delivered to the provincial treasurer.

The respondent claims a penalty for the years 1913 to 1918 both inclusive, to wit 2,191 days at $20.00 which is the statutory penalty, and further a double tax, also a penalty, which is claimed for 1913, 1914, 1915, 1916, 1917 and 1918. By an amendment, the respondent demanded $21,121.76 for taxes for 1919, but no double tax as a penalty.

Therefore the demand is for the following amounts:—

Taxes for 1913 to 1919, both inclusive..	$147,852 32
Double taxes for 1913 to 1918, both inclusive.....	126,730 56
Penalty for 2,191 days at $20.....	43,820 00
	$318,402 88

And the respondent prays for interest at 7% on the aforesaid sums from the dates on which they respectively fell due.

As to the claim for the $20.00 penalty, it is made for a single penalty of $20.00 per day for the 2,191 days. No penalty running concurrently with other like penalties for each separate default is demanded, and this being a penal action, I would strictly restrict the respondent to the demand made by its particulars and by the prayer of the statement of claim.

The double tax, I have said, is also a penalty and must be treated as such.

The appellant pleaded by an amendment the statute 31 Elizabeth ch. V., restricting a demand of penalties to two years from the date of the action, which is August 30th, 1919. I am of opinion that this

point is well taken and consequently the penalty of $20.00 per day cannot be claimed for the period preceding the 30th August, 1917. This, I take, would reduce the number of days for which the penalty can be claimed to 488, from August 31st, 1917 to December 31st, 1918, which, at $20.00 per day, would amount to $9,760, instead of $43,820.00, a difference in favour of the appellants of $33,860.00.

This statute of limitation applies to the double tax, also a penalty, so that this double tax can only be claimed for 488 days, that is to say for one year, four months and one day. I have not calculated the amount, but it can easily be determined.

I am therefore of opinion that the taxes due the respondent are those which accrued from April 13th 1918 to December 31st, 1919, on the appellants' line of railway from Lloydminster to Edmonton, and on the other portion of the line which does not come within the exemption clause, the taxes due are those which accrued from 1913 to 1919, both inclusive; that double taxes can only be demanded in this action from August 30th, 1917 to December, 31st, 1918; and that the penalty of $20.00 per day for the failure to deliver the statement required by section 4 can only be demanded from August 30th, 1917 to December 31st, 1918.

The appeal should be allowed in part and the judgment below varied. The respondent is entitled to recover taxes for the year 1918 on the footing of the valuation of the order in council of the 29th August, 1908 at the rate of 2% (this 2% comprising the double tax demanded as a penalty) of the value as fixed by such valuation of the railway in question and for the year 1919 at the rate of 1%. For the years preceding 1918, the respondent is entitled to recover taxes at

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the rate of 1% on the same valuation in respect of the line between Edmonton and Strathcona (7.23 miles) and is also entitled to recover a penalty of $20.00 a day for each day of the period from the 30th day of August, 1917 to the 31st day of December, 1918. The appellants are entitled to the costs of the appeal to this court. The respondents should have the costs of the action and of the appeal to the Appellate Division.

Appeal allowed in part with costs.

Solicitors for the appellants: *Short, Cross, Maclean & McBride.*

Solicitors for the respondents: *H. H. Parlee and G.B. Howatt.*

LA VILLE DE MONTREAL-NORD (DEFENDANT) ..... APPELLANT;

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*May 17, 18.
*Oct. 10.

AND

QUINLAN & ROBERTSON LIMITED (PLAINTIFF) ..... RESPONDENT.

LA VILLE ST-MICHEL (DEFENDANT) . APPELLANT;

AND

QUINLAN & ROBERTSON LIMITED (PLAINTIFF) ..... RESPONDENT.

LA VILLE DE MONTREAL-NORD (PLAINTIFF) ..... APPELLANT;

AND

QUINLAN & ROBERTSON LIMITED (MISE-EN-CAUSE) ..... RESPONDENT;

AND

THE BANK OF TORONTO ..... DEFENDANT;

AND

LA BANQUE D'HOCHELAGA ..... MISE-EN-CAUSE

Municipal corporation—Work by one municipality in the territory of another—Contract—Payment by debentures—Acceptance by contractor of these debentures in lieu of cash—Interest accrued before work done—Right of contractor to interest coupons—(Q) 3 Geo. v., c. 58—(Q) 5 Geo. V., c. 10, s. 39—(Q) 5 Geo. V, c. 108, s. 23.

*PRESENT:—Sir Louis Davies CJ. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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LA VILLE DE MONTREAL-NORD v. QUINLAN & ROBERTSON LTD.

In 1912, the Quebec legislature authorized the town of Maisonneuve ([Q] 3 Geo. V. c. 58) to construct a highway outside its limits on the territories of the municipalities appellants. In accordance with the provisions of the statute, the town of Maisonneuve enacted a by-law, by which, after an estimate of the cost of the works had been given, liability was imposed on the appellant municipalities for the payment in cash of the cost of the highway within their limits "as soon as the by-law shall have received the sanction "of the Lieutenant-Governor in Council." On the 3rd of November, 1914, an Order-in-Council was passed approving the by-law but declaring that the payment to the town of Maisonneuve should be made by means of debentures, payable in forty years, bearing interest at a rate not exceeding 6% per annum, which the town of Maisonneuve was bound to accept at par, provided the cost should not exceed 5% of the estimate. In the same month, the appellant municipalities passed by-laws for the issue of debentures bearing date 1st of December, 1914, with interest coupons payable semi-annually. These by-laws also enacted that the councils of the municipalities might transfer the debentures and coupons to the City of Maisonneuve, "upon a certificate "of (the appellants') engineer and according to the progress "made, in the territory of (each municipality) of such proposed" highway. These by-laws were ratified by the legislature (5 Geo. V, c. 10, s. 34 and c. 108, s. 23). A contract for the construction of the highway was entered into between the town of Maisonneuve and the respondent company, by which the latter agreed to accept, in payment of the contract price for work done in their territory the debentures issued by the appellant municipalities. When these municipalities proposed to make their payment to the town of Maisonneuve, they passed a resolution in conformity with powers given by the order-in-council for the deposit of the debentures in a bank and giving directions to the bank that the contractor should be paid only upon the certificate of their engineer according to the progress of the work. They also instructed the bank to detach from the debentures such coupons as should have at the time of the delivery of the debentures entirely or partially matured. The respondent company received from the town of Maisonneuve debentures in payment of the work done on the territories of the appellant municipalities. The respondent company, by its action, claims the amount of the interest coupons accrued between the date of the issue of the debentures and the time when it became entitled to receive delivery of them on engineer's progress certificates.

Held, Idington and Duff dissenting, that the respondent company was entitled to recover the amount of their interest coupons.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, reversing the judgment of the Superior Court, Maclennan J. and dismissing the appellants' actions.

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.

L. E. Beaulieu K.C. for the appellants. The appellants, original owners of the coupons in dispute, never assented to their right of ownership being transferred to the respondent company.

The documents relied upon by the respondent company do not show that the latter was entitled to recover the amount of these coupons nor do they create any right of ownership in them.

T. Rinfret K.C. for the respondent.

THE CHIEF JUSTICE.—I confess that at the close of the argument on this case I had some doubt as to the right of the appellant to succeed. Since then I have given the case much consideration and have had the opportunity of reading the reasons for judgment of my colleagues. In the result I have come to the conclusion that the appeal should be dismissed with costs.

I do not think it necessary to repeat the reasons advanced in the several judgments dismissing the appeal which I have read. They are quite satisfactory and have removed my doubts.

The appeal should be dismissed with costs.

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LA VILLE DE MONTREAL-NORD v. QUINLAN & ROBERTSON LTD.

Idington J.

IDINGTON J. (dissenting).—These appeals are said by counsel to all turn upon the same or substantially the same or similar state of facts, with minor differences which should not affect the result. These facts are no doubt set forth in some of the records which are thrown together somewhat confusedly before us.

In the Superior Court the lengthy formal judgment sets forth all I intend to rely upon save what is set forth hereinafter and appears in the several opinions in the Court of King's Bench, appeal side, presenting what the learned judges respectively rely upon.

I have read all said judgments and conclude that the substantial point of difference between the Superior Court and the Court of King's Bench, is that the latter considers that the terms and conditions upon which the Lieutenant-Governor in Council ratified by-law no. 143 of Maisonneuve are conclusive and binding upon all concerned.

In so holding I, with great respect, submit that they overlook a number of substantial later happenings.

They also overlook, I submit, the true nature of the following conditions imposed by the Lieutenant-Governor in Council in the first place. They read as follows:—

Que les travaux soient faits par contrats accordés sur soumissions demandées, en la manière usitée par cette cité.

Que l'ingénieur des deux municipalités intéressées soit adjoint à celui de la cité de Maisonneuve pour la surveillance des travaux à être faits et pour le bénéfice des municipalités qu'il représente, sans aucune direction cependant dans l'exécution des dits travaux.

Que le paiement de ce qui sera dû à la cité de Maisonneuve à ce sujet soit fait au moyen de bons ou débentures à quarante ans et portent intérêt à un taux n'excédant pas 6% par an payable semi-annuellement, que la cité de Maisonneuve devra accepter au pair, pour le montant du coût réel de cette ouverture et de cette construction du dit boulevard, à condition que le coût de ces travaux n'excède pas cinq pour cent des estimés préparés par les ingénieurs de la cité de Maisonneuve.

The appellant's council passed its by-law providing for the issue of the debentures in question.

By the seventh section thereof it is provided as follows:—

> The council of the corporation may at any time, and from time to time, issue, convey and transfer the said debentures and coupons, to the city of Maisonneuve, either directly or through a trustee, if necessary, chosen by resolution and into whose hands the same may be deposited and kept for the purposes aforesaid, after having been issued and signed as aforesaid but, in every case, upon a certificate of its engineer, and according to the progress made, in the territory of the municipality of Sault-au Récollet, of such proposed undertaking of the boulevard Pie IX, and the city of Maisonneuve shall take and receive them at par, and as such in payment, acquittance and extinction of the above obligation of the corporation with regard to such portion of the boulevard Pie IX.

Other provisions conformable therewith follow and then by section 10 it provides as follows:—

> 10. Notwithstanding what is stated above, the said debentures shall not, directly or through a trustee chosen by resolution as aforesaid be surrendered by the corporation of the parish of Sault-au-Récollet to the city of Maisonneuve and be of any value in the hands of the latter except on condition that this by-law shall previously have been ratified and confirmed by the legislature of the Province of Quebec, and that it be enacted by the same Act of the legislature that such issue of debentures shall not affect the corporation's borrowing power.

The ratification took place by 5 Geo. V. c. 108, sec. 23.

In pursuance thereof the debentures were given to a bank as trustee with some specific instructions which I need not quote.

I may observe here that in the case of the town of St. Michel de Laval a similar by-law was passed relative to its debentures with somewhat clearer language as to what was meant. And that by-law was validated by 5 Geo. V. c. 10, sec. 34.

The validation by the legislature of these respective by-laws containing provisions clearly conflicting with the earlier by-law no. 143 of Maisonneuve must,

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I submit, be held to govern so far as necessary to give effect thereto the legal relations of the parties concerned herein in question, instead of giving the predominant effect which the court below did in 1917, and in the case now in appeal herein.

Turning to the contract of Maisonneuve with the respondent contracting company, which undertook the work, we find therein the following statement of the terms of payment:—

> La partie de seconde part acceptant d'être payée par la partie de première part, s'y engageant, pour les travaux plus haut mentionnés, en débentures des dites municipalités de la paroisse du Sault-au-Récollet et de la paroisse de St-Michel de Laval pour les montants plus haut mentionnés. Le tout suivant les termes, charges, clauses et conditions des plans, devis et spécifications préparés par M. l'ingénieur Marius Dufresne, comme susdit.

It is to be noted that it is the word "debentures" that is used, but no word of coupons is mentioned.

That could have been literally fulfilled by the delivery of debentures of either of said municipalities named bearing the respective dates of the engineers' certificate of progress, estimates and so on to the end had the parties chosen that course.

And beyond any doubt I see no answer the respondent contracting company could have had hitherto or how it could pretend to have the right to get debentures of any earlier date.

However that may be, I see no reason at all why the company should get interest antecedent to the time when the work was done, for that was not contemplated by the contract.

The debentures and cash were treated as equivalent. True I observe a remark in respondent's factum that the debentures would not be so, but I see no evidence to support the pretension.

The truth seems to be that the usual business precautions do not seem to have been observed by those concerned. And hence I am led to conclude that cash and 6% debentures were looked upon as equivalent until some afterthought, possibly begotten by changed conditions, led to this contention.

I am of the opinion therefore that the appellants never parted with their property and that each is respectively entitled to recover same or the value thereof.

I cannot, with due respect to the court which decided otherwise in 1917, and whose finding seems to have bound its successors, though I see the late Mr. Justice Cross (whose opinion I always held in respect) had dissented, so hold. Whatever remedy the contractors may have had that, I am clear, was not open to it, in my opinion, on the foregoing facts.

Supposing the contract had been delayed in its completion for a number of years and, rather than cancel it, Maisonneuve had forborne, could it be said that respondent should get all the arrears of interest for those years?

In such a case the legal consequences would have been more apparent but in principle I can see no difference.

There seems to be some question raised, but not very clearly put forward, that in any event the rule which I submit should govern, does not cover the actual rights as developed in the actual facts.

If there is any room for doubt in regard thereto I may say that in my opinion any coupon for current interest at the time when the respective certificates of the engineers were given, the coupon relative thereto should be allowed the respondent and, if parties cannot agree, the question should be referred to someone to take account thereof.

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Duff J.

Subject thereto I think the appeal should be allowed with costs of one appeal here and of costs of appeal to the court below.

DUFF J. (dissenting).—This appeal, I think, should be allowed. Section 4 of the enabling statute, 3 Geo. V. c. 58 is in the following words:—

> 4. The Lieutenant Governor in Council may, after hearing the municipal corporations interested notice to that effect having been served by the city of Maisonneuve, and on such conditions as he may deem advisable, ratify the by-law mentioned in the foregoing article; and the municipalities through which the said boulevard runs, with the exception of the said city of Montreal, shall, after such sanction be liable for the payment of all sums both principal and interest, so expended for such expropriation, purchase, opening, macadamizing and maintenance in the same proportion and in the same way as if each had adopted such by-law.

The Order in Council by which the by-law of Maisonneuve was ratified contains this paragraph:—

> Que le paiement de ce qui sera dû à la cité de Maisonneuve à, ce sujet soit fait au moyen de bons ou débentures à quarante ans et portant intérêts à un taux n'excédant pas 6% par an payable semi-annuellement, que la cité de Maisonneuve devra accepter au pair, pour le montant du coût réel de cette ouverture de cette construction du dit boulevard, à condition que le coût de ces travaux n'excède pas cinq pour cent des estimés préparés par les ingénieurs de la cité de Maisonneuve.

These provisions of the statute and the by-laws of Maisonneuve, as confirmed by the order in council, constitute, I think, the fundamental conditions by which any responsibility of the appellant municipality must be limited. The condition that the debentures shall be accepted at par is to be found also in the by-law of Montreal Nord, then Sault-au-Récollet, of the 27th Nov., 1914. What is the meaning of this provision? In order to determine this it is necessary to consider carefully the language of section 4 of the statute quoted above. That section makes the muni-

cipality responsible for moneys actually expended in the construction of the work provided for and for interest on such moneys. It was not within the authority of the Lieutenant Governor in Council to give validity to a by-law of Maisonneuve professing to impose upon the appellant municipality any more onerous responsiblity, and the by-law and order in council must be read subject to that condition. I may also add that the subsequent ratifying legislation in my judgment does not, when properly construed, enlarge this responsibility.

Now one can quite understand that Maisonneuve might stipulate before undertaking the work for some sort of security over and above that derived from the terms of the statute itself. This no doubt accounts for the provision in the by-law that the total estimated cost is to be paid to Maisonneuve as soon as the by-law receives the sanction of the Lieutenant Governor in Council. Assuming payment in cash it would be utterly absurd to suppose that Maisonneuve was to enjoy the use of (or of the interest derived from) such moneys during the period elapsing between the payment of them to Maisonneuve and the actual disbursement of them under the statute and by-law. Precisely the same observation applies to the debentures which, by the provisions of the order in council above quoted, were to be substituted for cash. These debentures were not to become the property out and out of Maisonneuve but were to be placed in the hands of Maisonneuve to be used for a particular purpose, that is to say, to be applied in payment of liabilities incurred by Maisonneuve in the construction of the work. They were to be accepted by Maisonneuve at par, that is to say, they were to be treated as the

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equivalent of cash. Manifestly it results from this that interest was not to run upon them until the date arrived at which the principal moneys were applied to their destined purpose.

This is the construction which must be put upon the by-law and the order in council if they are to be read in such a way as to bring them within the authority conferred by the statute. So read they justify the contention of the appellant municipality that the bonds do not become the property of Maisonneuve or of the contractors until the time arrives when, conformably to the enactments of the statute, Maisonneuve is entitled to have them delivered in payment of its obligations to the contractors.

I do not understand that the Court of King's Bench has held the decision in the former litigation between Quinlan-Robertson and the city of Maisonneuve to be binding on the appellant municipality. It was a decision which the Court of King's Bench felt itself bound to follow, being a decision of that court itself upon the identical facts and the identical transaction under consideration in the present case, but I do not understand that court to have held the present controversy to be *chose jugée* by reason of the former decision. The appellant municipalities were no parties to the former litigation and in my opinion the previous judgment is not binding upon them.

ANGLIN J.—The material facts are fully stated in the opinion of my brother Mignault, which I have had the advantage of reading.

At the instance of the appellant municipalities their liabilty, under the statute of 3 Geo. V., c. 58, and by-law no. 143 of the city of Maisonneuve, to pay in cash their respective shares of the cost of the

Boulevard Pie IX was commuted by order in council of the 3rd November, 1914, into payment by forty year debentures carrying interest at 6%. The debentures to meet these payments, as issued by the appellants, bore the date 1st of December, 1914, and carried interest from that date. It was these debentures that the city of Maisonneuve was required to accept as the equivalent of cash. I find nothing remarkable in the city of Maisonneuve stipulating for and being accorded the benefit of the interest to accrue between the date of the issue of the debentures and the time when it should become entitled to receive delivery of them on engineer's progress certificates. On the contrary such a premium might well be asked and given to compensate *pro tanto* for a probable difference between the actual market value of the bonds and their face value, at which the city of Maisonneuve was required to accept them in lieu of cash.

Neither is there anything in the by-laws of the appellant municipalities authorizing the issue of these debentures at all inconsistent with this view. They merely provide that the debentures shall be handed over to the city of Maisonneuve by a trustee-depository from time to time as the works progress and as payment therefor shall be certified to be due by the engineer representing the obligor. There is nothing either in the by-laws or in the statute confirming them in the least inconsistent with the respondent's right to have the debenture bonds delivered to them in the form and condition in which the by-laws provide for their issue, *i.e.*, with coupons attached carrying interest from the 1st December, 1914. That, as I read the relevant statutes, order in council and

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by-laws, was what the city of Maisonneuve agreed to take and was entitled to receive in lieu of the cash payments provided for in the original statute, 3 Geo. V., c. 58, and by-law no. 143 of the city of Maisonneuve enacted pursuant thereto.

As I appreciate the judgment of the Court of King's Bench, this was also the view which prevailed there.

In my opinion the appeal fails and should be dismissed with costs.

BRODEUR J.—Ces trois causes soulèvent la même question qui est de savoir si les municipalités appelantes sont tenues de livrer certains coupons de débentures.

La législature de Québec a, en 1913, autorisé la cité de Maisonneuve à construire un boulevard qui serait appelé Pie IX sur le territoire des corporations appelantes qui étaient alors de simples corporations rurales de villages et de paroisses; et elle lui a en même temps donné le pouvoir d'adopter un règlement à cet effet. Ce règlement devait être communiqué aux municipalités intéressées et le lieutenant-gouverneur en conseil, après les avoir entendues, pourrait sanctionner ce règlement. La loi déclarait qu'après cette approbation les municipalités appelantes deviendraient responsables envers la cité de Maisonneuve du coût de ce boulevard.

Un règlement de la cité de Maisonneuve, qui porte le n° 143, fut dûment adopté par son conseil; il pourvoyait à l'ouverture de ce boulevard à travers les municipalités de Montréal-Nord et de St-Michel et déterminait le montant que chaque municipalité aurait à lui payer comptant aussitôt que le règlement serait sanctionné par le gouvernement.

Le règlement fut alors soumis aux autorités gouvernementales; et, le 4 novembre 1914, le règlement était approuvé avec quelques modifications; et entre autres, il était déclaré

que le paiement de ce qui sera dû à la cité de Maisonneuve à ce sujet, soit fait au moyen de bons ou débentures à quarante ans et portant intérêt à un taux n'excédant pas 6% par an payable semi-annuellement, que la cité de Maisonneuve devra accepter au pair, pour le montant du coût réel de cette ouverture et de cette construction du dit boulevard à condition que le coût de ces travaux n'excède pas cinq pour cent des estimés préparés par les ingénieurs de la cité de Maisonneuve.

En d'autres termes, au lieu d'un paiement comptant ces municipalités auraient le pouvoir de payer la cité de Maisonneuve au moyen de débentures à quarante ans, portant intérêt à 6% et la cité de Maisonneuve devait accepter ces débentures au pair.

C'était là un avantage considérable pour les municipalités appelantes, si surtout l'on prend en considération le fait que la grande guerre venait d'être déclarée et que la négociation de débentures devait nécessairement se faire à sacrifice.

Les deux municipalités appelantes ont été apparemment heureuses de voir qu'elles n'étaient pas tenues de payer argent comptant comme la législation et le règlement municipal de Maisonneuve paraissait le décréter. Elles se sont mises de suite à l'oeuvre pour adopter un règlement les autorisant à émettre des débentures pour le coût estimé des travaux, lesquelles débentures devaient être datées du 1er décembre 1914 et devaient porter intérêt à compter de cette date, et devaient être remises, comme dit le règlement,

à la cité de Maisonneuve et servir ainsi à payer et acquitter l'obligation qu'elle a ou aura vis-à-vis cette cité aux termes du susdit règlement n° 143 de cette dernière.

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Ce règlement des municipalités appelantes, qui était en termes presque identiques, pourvoyait également à ce que les débentures et les coupons fussent remis à un fidéicommissaire qui en ferait la livraison à la cité de Maisonneuve au fur et à mesure que les travaux avanceraient. Le règlement devait être sanctionné par la législature. C'est ce qui fut fait.

La cité de Maisonneuve se mit en frais de construire le boulevard et à cette fin elle a fait un contrat avec Quinlan et Robertson Ltd., qui ont accepté les débentures des municipalités appelantes en paiement de leur contrat.

Les appelantes, après avoir remis au fidéicommissaire les débentures et les coupons, lui ont ensuite donné instruction de ne pas livrer à la cité de Maisonneuve ou aux entrepreneurs, Quinlan & Robertson, les coupons qui représentaient les intérêts échus avant l'émission des certificats que les ingénieurs devaient donner suivant le progrès des travaux.

Ce refus de livrer les coupons avec les débentures a déjà fait le sujet d'un débat judiciaire entre la cité de Maisonneuve et Quinlan & Robertson; et ces derniers ont eu gain de cause et il a été décidé que la cité de Maisonneuve était obligée de livrer non seulement les débentures mais les coupons qui y étaient attachés.

Le même débat judiciaire se renouvelle aujourd'hui entre les municipalités appelantes et les constructeurs.

Pour le décider, il faut rechercher dans les lois et les règlements la portée de l'obligation des appelantes.

Par le règlement n° 143 de Maisonneuve, il était décrété que les appelantes devaient payer aussitôt que le gouvernement l'aurait sanctionné. Cette disposition du règlement était apparemment conforme

à la loi elle-même qui avait été adoptée par la législature en 1913. Le lieutenant-gouverneur en conseil avait apporté un adoucissement à cette disposition en disant que St-Michel et Montréal-Nord pourraient se libérer en livrant des débentures avec intérêt de 6%. Ces dernières ont naturellement accueilli cette concession avec plaisir et elles se sont empressées quelques jours après, soit le 1er décembre, 1914, d'émettre leurs débentures avec les coupons et de les remettre au fidéicommissaire qu'elles avaient choisi.

La portée de leur obligation consistait à livrer à la cité de Maisonneuve des débentures avec leurs coupons d'intérêt. C'était le contrat d'aliénation d'une chose certaine et déterminée laquelle devait être temporairement remise entre les mains d'un tiers qui la retiendrait jusqu'à ce que les travaux fussent suffisamment avancés. Autrement, pourquoi les appelantes auraient-elles émis des débentures avec coupons datés du 1er décembre 1914 quand elles savaient que ces travaux ne seraient pas terminés plusieurs mois et peut-être plusieurs années plus tard? Elles ont par leurs règlements qui ont été approuvés par la législature émis ces débentures avec leurs coupons pour payer et acquitter l'obligation qui lui incombait envers la cité de Maisonneuve.

Si ces municipalités voulaient garder certains coupons et faire la distinction entre les débentures et les coupons qu'elles essaient maintenant de faire, elles auraient dû alors faire une stipulation à cet effet dans leur règlement.

Le paiement d'une obligation comprend non seulement la livraison d'une somme d'argent mais l'exécution de toute chose à laquelle une partie est obligée.

Dans le cas actuel les appelantes ont compris que leur obligation consistait à livrer des débentures et leurs coupons, et ils ont sans réserve adopté des

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règlements qui ont reçu une sanction législative; elles ne pouvaient pas subséquemment se libérer en retenant une partie de la chose certaine qu'elles avaient promis de remettre.

Leur appel doit être renvoyé avec dépens.

MIGNAULT J.—Ces trois causes présentent la même question savoir, si les deux corporations municipales appelantes sont tenues de payer aux intimés, Quinlan & Robertson Ltd., certains coupons d'intérêt sur des débentures émises par elles.

En 1912, par la loi 3 Geo. V, ch. 58, la législature de la province de Québec ajoutait quelques dispositions assez extraordinaires à une loi amendant la charte de la cité de Maisonneuve. On y validait le plan d'homologation du boulevard Pie IX qui devait s'étendre depuis les limites nord de la cité de Montréal jusqu'à la rivière des Prairies, traversant le village de St-Michel (maintenant ville St-Michel) et la paroisse du Sault au Récollet (maintenant ville de Montréal-Nord). La cité de Maisonneuve fut autorisée à adopter un règlement pour exproprier, acheter de gré à gré, ouvrir, macadamiser et entretenir ce boulevard à travers ces municipalités, et il fut décrété que le lieutenant-gouverneur en conseil, après avoir entendu les corporations municipales intéressées, pourrait, aux conditions qu'il jugerait convenables, ratifier ce règlement et que les municipalités traversées par le boulevard, à l'exception de la cité de Montréal, deviendraient, après telle sanction, responsables pour le paiement de toutes sommes, tant en capital qu'en intérêt, qui seraient ainsi dépensées pour ces fins, et ce dans la même proportion et de la même manière que si elles eussent chacune d'elles adopté tel règlement.

La cité de Maisonneuve passa un règlement conforme à cette autorisation, portant le No. 143. Par ce règlement on déclara que les municipalités appelantes seraient responsables envers la cité de Maisonneuve pour le paiement de toutes sommes, tant en capital qu'en intérêt, qui seraient dépensées pour le boulevard, et après avoir indiqué le coût de la construction (on n'avait pas encore determiné le montant requis pour l'achat de l'assiette du boulevard), on ajoutait que la somme totale serait payée aussitôt que le règlement aurait reçu la sanction du lieutenant-gouverneur en conseil.

Cette sanction fut donnée par un arrêté-en-conseil du 3 novembre 1914, comportant certaines conditions quant à l'exécution du travail, et déclarant que le paiement de ce qui serait dû à la cité de Maisonneuve serait fait au moyen de débentures à quarante ans, portant intérêt n'excédant pas 6% par an, que la cité de Maisonneuve accepterait au pair, pour le montant du coût réel de l'ouverture et construction du boulevard, à condition que le coût des travaux n'excédât pas 5% des estimés des ingénieurs.

Chacune des corporations appelantes adopta alors, en novembre 1914, un règlement pour l'émission de débentures au montant de $373,000 pour St. Michel de Laval et de $210,000 pour le Sault au Récollet, ces débentures devant porter la date du 1er décembre 1914, avec coupons d'intérêt payables semi-annuellement le 1er juin et le 1er décembre de chaque année. Chaque règlement decrète que le conseil pourrait céder et transporter, soit directement, soit par l'entremise d'un fidéicommissaire, ces débentures et leurs coupons, mais dans tous les cas sur un certificat de l'ingénieur de la corporation et au fur et à mesure

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qu'avancerait l'entreprise, à la cité de Maisonneuve qui les prendrait et recevrait au pair en paiement de l'obligation de la municipalité au sujet de la partie du boulevard traversant son territoire.

Ces deux règlements furent approuvés et ratifiés par la législature, celui du Sault au Récollet par la loi 5 Geo. V, ch. 108, art. 23, et celui de St. Michel de Laval par la loi 5 Geo. V, c. 109, art. 34.

Le contrat de construction du boulevard fut donné par la cité de Maisonneuve à Quinlan et Robertson Ltd., le 30 janvier 1915, et il fut stipulé que ceux-ci accepteraient d'être payés pour le montant du contrat en débentures des municipalités du Sault au Récollet et de St. Michel de Laval.

Il est important de constater, avant de poursuivre le récit des faits, que l'obligation des corporations appelantes était envers la cité de Maisonneuve. Celle-ci aurait pu transporter à n'importe qui les débentures qu'elle recevrait des appelantes. Elle s'en est servie pour payer les intimés, et c'est comme porteurs de ces débentures et cessionnaires des droits de la cité de Maisonneuve que les intimés sont devenus créanciers des appelantes.

En février et en mars 1915, les conseils des appelantes adoptèrent des résolutions identiques donnant des instructions à la banque d'Hochelaga, choisie comme fidéicommissaire et dépositaire des débentures, de détacher, des débentures remises aux vendeurs des terrains ou constructeurs du boulevard, les coupons d'intérêt dont le terme serait totalement ou partiellement expiré le 1er février 1915, pour les vendeurs des terrains, et à la date des certificats des ingénieurs, pour les montants dus aux constructeurs. Les intimés prétendent avoir droit à tous les coupons d'intérêt

attachés aux débentures qui leur ont été remises en paiement de leur compte, même ceux échus avant l'acceptation des travaux par les ingénieurs.

Cette prétention a été soulevée par les intimés dans une action intentée par eux contre la cité de Maisonneuve et la banque d'Hochelaga, mise en cause, en décembre 1915. La banque avait remis aux intimés des débentures pour le montant de leur compte, mais en avait détaché les coupons d'intérêt échus le premier juin et le premier décembre 1915 et les coupons à échoir le 1er juin 1916, et l'action demandait que ces coupons fussent remis aux intimés. La cité de Maisonneuve, défenderesse, appela en garantie les corporations appelantes et celles-ci contestèrent l'action en garantie qui, nous informe-t-on, est encore pendante. Sur l'action principale, la cour du Banc du Roi, en décembre 1917, condamna la cité de Maisonneuve à remettre les coupons détachés à Quinlan & Robertson Ltd. où à leur payer $12,420.00. Le motif sur lequel ce jugement est basé se lit comme suit:

> Considérant que la stipulation du contrat intervenu entre les parties que l'appelante serait payée en débentures au pair, comporte que des débentures et les coupons d'intérêt forment un seul tout, et que l'appelante a droit aux coupons attachés à ces débentures, même pour ceux de ces coupons qui représentent l'intérêt échu avant l'exécution des travaux.

Après la reddition de ce jugement, la cité de Maisonneuve remit aux intimés 372 coupons d'intérêt qui avaient été détachés des débentures de la paroisse du Sault au Récollet, et les intimés ayant déposé ces coupons entre les mains de la Banque de Toronto, la ville de Montréal-Nord, mettant les intimés en cause, revendiqua ces coupons comme sa propriété. Cette demande fut contestée par les intimés et nous est maintenant soumise.

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Il y a une deuxième action par les intimés contre la ville St. Michel. Les intimés avaient reçu de la cité de Maisonneuve, en vertu du jugement susdit, 776 coupons d'intérêt qui avaient été détachés de débentures du village de St. Michel de Laval, et ils en demandent le paiement à la ville de St. Michel, soit $26,449.78. Cette action fut contestée par cette dernière et nous est également soumise.

Il appert aux procédures que dans cette deuxième action, la défenderesse produisit une confession de jugement pour $11,053.68, et jugement fut immédiatement rendu en faveur des intimés pour cette somme, réservant tout recours aux intimés pour la différence; ce n'est que cette différence qui soit maintenant en question.

Enfin il y a une troisième action par les intimés contre la ville de Montréal-Nord, et contestée par cette dernière, demandant le paiement de $4,214.22, montant de 124 coupons d'intérêt provenant de débentures de la paroisse du Sault au Récollet.

Toutes ces actions, qui avaient été réunies, ont été jugées en faveur des appelantes par la Cour Supérieure, mais sur appel la Cour du Banc du Roi a infirmé ces jugements. Les honorables juges de cette cour ont accepté l'autorité de la décision de la même cour en décembre 1917, sans toutefois regarder cette décision comme chose jugée à l'égard des deux municipalités, qui, bien qu'assignées en garantie par la cité de Maisonneuve, n'étaient pas parties à l'action principale contre cette dernière. Je suis également d'avis pour ce motif qu'il n'y a pas chose jugée ici, mais comme cette cour n'est pas liée par la décision de la cour d'appel en décembre 1917 il faut juger la question soumise indépendamment de cet arrêt.

Les appelantes prétendent qu'elles ne devaient payer à la ville de Maisonneuve que le montant que celle-ci a dépensé pour les boulevards, que ces dépenses n'ont été encourues qu'après l'émission des débentures, que les appelantes ne pouvaient être tenues de payer l'intérêt avant la naissance de leur dette, et qu'ainsi les coupons d'intérêt représentant les intérêts échus sur les débentures avant la création de cette dette de remboursement ne pouvaient être réclamés, ni par la cité de Maisonneuve, ni par les intimés qui les avaient recus en exécution du jugement qu'ils avaient obtenu contre cette cité dans une instance à laquelle les appelantes n'étaient pas parties.

A première vue, on peut être frappé par ce raisonnement; mais pour déterminer s'il est bien fondé, il faut avoir égard aux documents législatifs et autres qui ont créé la dette des appelantes envers la cité de Maisonneuve et pourvu au mode de paiement de cette dette.

La loi, 3 Geo. V. ch. 58, a commencé par créer une obligation à la charge des deux municipalités de payer après la sanction du règlement de la cité de Maisonneuve par le lieutenant-gouverneur en conseil, aux conditions qu'il jugerait convenables, toutes sommes en capital et en intérêts qui seraient dépensées pour le boulevard Pie IX.

D'après le règlement n° 143, adopté par la cité de Maisonneuve sous l'autorité de cette loi, la part de chaque municipalité dans l'achat des terrains et la construction du boulevard, devait être payée aussitôt que le règlement aurait reçu la sanction du lieutenant-gouverneur en conseil.

Il n'était question jusqu'ici que d'un paiement à être effectué en argent. Mais, nous dit-on, les appelantes, forcées ainsi de payer pour un ouvrage

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au sujet duquel elles n'avaient apparemment pas été consultées, ont plaidé devant le gouvernement leur manque de moyens, et pour cette raison le gouvernement modifia leur obligation leur permettant de solder cette dette au moyen de débentures payables en quarante ans avec intérêt n'excédant pas 6% et que la cité de Maisonneuve devait accepter au pair.

C'est pour solder cette dette que les corporations appelantes ont chacune d'elles adopté un règlement qui fixe la date de ces débentures au 1er décembre 1914, à partir de quelle date les coupons d'intérêt doivent être payés, et ce règlement déclare (clauses 1 et 7 combinées) que les débentures avec leurs coupons seront remises, soit directement ou par l'intermédiaire d'un fidéi-commissaire, à la cité de Maisonneuve qui les acceptera au pair, au fur et mesure qu'avancera, sur le territoire de la municipalité, l'entreprise du boulevard, et sur certificat de l'ingénieur,

> en paiement, acquittement et extinction de l'obligation susdite de la corporation au sujet de cette partie du boulevard Pie IX.

Il n'y a aucune réserve ici des coupons d'intérêt qui pourraient échoir avant la construction du boulevard, mais on ordonne le paiement de la dette de la corporation au moyen de ces débentures à être acceptées au pair, quoique leur valeur réelle puisse être bien moindre.

Les règlements des corporations appelantes, je l'ai dit, ont été confirmés et ratifiés par la législature, et les appelantes ne pouvaient modifier leur obligation après ces règlements par les instructions qu'elles ont données à leur fidéicommissaire ou agent.

En d'autres termes, les appelantes ont obtenu la faculté de solder une dette d'une somme d'argent au moyen de leurs débentures dont elles ont elles-mêmes

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fixé la date et dont, par la teneur de ces débentures, elles ont promis payer l'intérêt à compter de cette date. La cité de Maisonneuve, créancière de la dette des appelantes, a droit de recevoir ces débentures avec tous leurs coupons d'intérêt qui en font partie intégrante, et les intimés, cessionnaires de cette cité, y ont le même droit.

La question de savoir si par suite de leurs règlements, les appelantes se trouveront à payer l'intérêt avant la confection du boulevard ou un intérêt excédant 6% —mais les débentures ne comportent que cet intérêt— ne peut donc pas être soulevée dans l'espèce. Les débentures émises par les appelantes avec leurs coupons servent au paiement de la dette des appelantes, et la cité de Maisonneuve a droit à ces débentures telles qu'émises. Les appelantes ont promis d'en faire une dation en paiement, ce qui équivaut à la promesse de vendre ou transporter ces débentures, et il est clair que le débiteur qui convient d'acquitter sa dette au moyen d'une dation en paiement ne peut, après la convention stipulant cette dation en paiement, changer la chose qu'il a promis de donner en paiement ou en diminuer la valeur.

Pour ces raisons, qui ne diffèrent pas sensiblement du motif qui a déterminé le jugement de la cour du Banc du Roi, en décembre, 1917, je suis d'avis que les jugements dont on se plaint sont bien fondés et que les appels doivent être renvoyés avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Letourneau, Beaulieu, Marin & Mercier.*

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

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March 2, 3.
May. 2.

THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO AND THE ONTARIO POWER COMPANY OF NIAGARA FALLS (PLAINTIFFS) ..... } APPELLANTS;

AND

JOHN JOSEPH ALBRIGHT (DEFENDANT) ..... } RESPONDENT.

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

Contract—Purchase of shares in company—Mortgage on company property—Security for bonds—Covenant to provide sinking fund—Earnings for calendar year—Payments at fixed date—Payments "accrued but not yet due"

As security for its bond issue the Ont. P. Co., in 1903, gave a mortgage of all its property to a trust company and agreed to provide a fund to redeem said bonds by paying, on the first of July in each year from 1903, one dollar for each electrical horse power sold and paid for during the preceding calendar year. In 1906 it gave another mortgage to secure debentures and again agreed to provide a sinking fund on the same terms and conditions except that the rate was twenty-five cents per h.p. payable out of net earnings. In 1917 the Hy. El. Com. entered into a contract with A. (acting for himself and other shareholders) to purchase ninety per cent of shares in the Ont. P. Co. and as much of the remaining ten per cent as A. controlled when the sale was completed. In this contract A. covenanted that when the sale was completed he would leave with the Ont. P. Co. a sum estimated by him to be equal to " * * sinking fund payments on the bonds and debentures * * * which shall have accrued but shall not be due at the time for completion." The time for completion was fixed at Aug. 1, 1917. On that date A. left with Ont. P. Co. a sum representing the power sold and paid for during the preceding month of July.

PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Held, Anglin J. dissenting, that the phrase "payments * * accrued but not due" meant that the obligation to pay accrued (in the conventional sense meant by the parties) as soon as sufficient h.p. was sold and paid for and continued to accrue *de die in diem* so that A. was obliged to leave an amount equal to one dollar per h.p. sold and paid for from the first of Jan. the beginning of the calendar year 1917.

Per Duff J. The interest and sinking fund payments under the second mortgage where payable out of net profits. As the existence of such profits has not been shown there is no liability to pay.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the defendant.

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

Lafleur K.C. and *MacInnes K.C.* (*E. F. Newcombe* with them) for the appellant.

Anglin K.C. for the respondent.

IDINGTON J.—By agreement dated 12th April, 1917, the respondent (hereinafter called the *vendor*) entered into an agreement with the Hydro-Electric Power Commission of Ontario (hereinafter called the *purchaser*) to which The King, represented by the Lieutenant Governor of Ontario; The Ontario Power Company of Niagara Falls; The Ontario Transmission Company, Limited; and Niagara, Lockport & Ontario Power Company, were also parties, whereby the vendor agreed, by the first operative part thereof, as follows:—

First: Vendor agrees to sell to the purchaser and the purchaser agrees to purchase from the vendor, ninety thousand (90,000) shares of the par value of one hundred dollars ($100.00) each, of the capital stock of the Power Company and the remaining ten thousand (10,000,) of the par value of one million dollars ($1,000,000) to the extent that the holders thereof put the vendor in a position to make delivery of such shares to the purchaser prior to the time for completion as hereinafter defined.

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It is rendered clear by further parts of the agreement that the object of the purchaser was to acquire the practical ownership of the Power Company and certain other properties or assets set forth in a schedule, and that the Power Company had given mortgages by the terms of which certain debentures and interest were to be secured and further that to improve the security and reduce the amount of such liabilities certain sums were to be paid annually into a so-called sinking fund kept by the Trust Company holding said mortgage securities on behalf of the debenture holders secured by said mortgages.

The agreement provided that it should not become operative unless and until executed and delivered by all the parties.

The vendor agreed that neither the Power Company nor the Transmission Company would, before the the time for completion, create any further shares of their capital stocks respectively, or any bonds, debentures or like securities.

The time for completion was to be the first day of the calendar month that should fall next after sixty days from the execution and delivery of said agreement by all the parties thereto, which turned out according to the course of such events to be the 1st of August, 1917.

The agreement contained the following provisions:

> The vendor agrees with the Power Company and the purchaser that in addition to the assets set out in said schedule "C" hereto, there shall be left in the hands of the Power Company at the time for completion a sum estimated by the vendor to be equal to—
>
> (*a*) Interest and Sinking Fund payments on the bonds and debentures of the Power Company and the Transmission Company mentioned in the said Schedule "D" which shall have accrued but shall not be due at the time for completion, and

(*b*) The proper proportion of all rentals and payments to the Commissioners of the Queen Victoria Niagara Falls Park, and of all unpaid rates, taxes and assessments for the year 1917, adjusted to the time for completion, and if such estimate shall, after completion, prove inaccurate, the excess of deficiency when determined shall be paid by the vendor to the Power Company, or by the Power Company or the purchaser to the vendor as the case may require.

The vendor and purchaser have disagreed over the construction of item (*a*) of the foregoing part of the agreement and hence this litigation over the correct computation of the amount to be left in the sinking fund.

It seems to me clear that the very nature of what the parties were contracting for was to get the stock and other assets at the actual value they had on the price basis of the stock purchased being fixed but subject to the encumbrances being increased by interest or being reduced by what had accrued in favour of the sinking fund, but not yet payable, and to be adjusted accordingly as if payable on the 1st of August.

They seem to have agreed to treat everything else mentioned but the sinking fund in that way.

And, as an illustration of such mode of adjustment counsel for respondent told us in answer to a question I put that the taxes were computed up to the 1st of August and so agreed on.

Counsel's suggestion about taxes being due in Ontario according to the statute declaring them so from the beginning of the year, does not, I respectfully submit, seem a very convincing reason for refusing to apply same rule to the sinking fund item.

To fall back upon the first of July pay day for the amount earned in the previous calendar year according to the agreement with the Trust Company does not seem to me any more convincing.

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The respondent allowed for the month of July and paid accordingly, but refuses to pay for the six previous months.

I cannot follow the reasoning which allows for July but refuses that which in like manner had accrued in the sense the parties so evidently used the word in relation to the words following it "but shall not be due at the time for completion".

The argument founded on the terms of one or more of the mortgages to the Trust Company seems rather far afield.

And supposing the agreement had been fully executed by all parties on its date, and thus the 1st of July had become the date for adjustment, some of the arguments would, so far as founded on these incidents, have to be changed somewhat.

Perhaps then it would have been argued that the sum to be left in the sinking fund being due but unpaid need not be paid at all because it was in regard only to what "shall have accrued *but shall not be due*" that this provision was applicable.

I must say that I fully agree with the reasoning of the learned trial judge as applied when correcting in the formal judgment the amount recoverable as being what was within the reasonable contemplation of the parties.

Agreeing as I do with that and the reasoning of the Chief Justice of the Exchequer Court, presiding in the second Appellate Division when the further documents in evidence were presented for the first time, I need not repeat what has been well said.

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

DUFF J.—The majority of the Appellate Division has held that the sinking fund payments are, for the purposes of the agreement of April, 1917, to be treated as accruing *de die in diem* between the dates fixed for payment and as apportionable accordingly. This, it is not seriously disputed, involves the attribution to language giving rise to the dispute of an unusual and unnatural meaning. It is the basis, indeed, of the respondent's argument that these payments accrue due as an entirety on the date of payment and that there is not in the interval any accrual in any sense known to the law and that accordingly, apart from some special understanding that they should be considered apportionable for the purposes of the agreement out of which the dispute arises, they are not apportionable. I am convinced that the language of the clause in question is perfectly sensible with reference to the subjects to which it relates, the interest and sinking fund payments dealt with, and applying the language of the clause in its ordinary and well understood meaning the appellants have established their contention with reference to the first trust deed but have failed to establish it with reference to the second.

The controversy concerns the effect of the words

> interest and sinking fund payments on the bonds and debentures of the Power Company and the Transmission Company mentioned in Schedule D which shall have accrued but shall not be due at the time for completion

I agree with the argument presented on behalf of the respondent that we must be informed of the provisions of the instruments dealing with the payments for interest and sinking fund here referred to in order to ascertain the meaning and effect of the words "shall

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have accrued but shall not be yet due". But the object of looking at these instruments, it must be observed, is to ascertain the meaning expressed by the words themselves in the context in which they appear having regard to the particular circumstances with reference to which they are used. The subjects of this provision are such interest and sums payable for the purpose of a sinking fund as shall have accrued but shall not be due at the time mentioned; and in order to apply the provision you must ascertain what interest and what sums of the character mentioned fall at the specified time within the described category—the category defined by the words

> interest and sinking fund payments * * * accrued * * but not yet due.

The word "due" in relation to moneys in respect of which there is a legal obligation to pay them may mean either that the facts making the obligation operative have come into existence with the exception that the day of payment has not yet arrived, or it may mean that the obligation has not only been completely constituted but is also presently exigible. That it is used in the latter sense in the present instance is perfectly clear—otherwise the contrast expressed between payments "accrued" and payments "due" would, especially in the case of interest, be patent nonsense. The most natural meaning of such a phrase as "accrued payments" would be, and standing alone it would *prima facie* receive that reading, moneys presently payable; but the word "accrued" according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted —and it may have this meaning although it appears from the context that the right completely constituted

or the liability completely constituted is one which is only exercisable or enforceable *in futuro* —a debt for example which is *debitum in praesenti solvendum in futuro*. It is in this sense that it has been widely applied to express the fact that such a liability has been created in relation to a sum of money, part of a whole (made up of an accumulation of such parts) which is not to be payable until a later date, and it is in this sense that it seems to be used in the clause before us.

I fear I must, in view of the arguments advanced on behalf of the respondent and of the opinions expressed in the Appellate Division to which I shall refer with more particularity later, elaborate a little this point as to the meaning of the word "accrued." Generally sums received as rent, for example, and other sums of money payable periodically at fixed times are not, apart from statute, apportionable unless by reason of express provision or by implication an intention is manifested that they should become due *pro rata* from day to day. This intention is sometimes implied from the purpose of the payment as for instance in the case of charges for the maintenance of children which, though payable at fixed times, are considered to accrue from day to day because intended for the daily maintenance of the children. *Hay* v. *Palmer* (1). So in the case of interest where the interest payable on money lent was payable at fixed periods, it was held none the less to become due *de die in diem* and this upon the ground that the creditor might call in his capital at any time and interest was considered to be earned and to become due each day as the price of the creditor's forbearance. *Wilson* v. *Harman* (2);

(1) 2 P. Wms. 502.

(2) [1755] 2 Ves. Sen. 672 at p. 673.

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Hay v. *Palmer* (1); *Pearly* v. *Smith* (2); *Ex parte Smyth* (3). And this conception of the contract to pay at a specified date interest on money lent—that the sum payable on the date fixed was an accumulation of sums which had accrued *de die in diem* (a day according to a familiar notion being treated for this purpose as an indivisible unit)—came to be accepted as corresponding with the true nature of such a contract even when the principal, being itself payable at a fixed date, would not be called in at the discretion of the creditor. In *In re Rogers Trusts* (4) Kindersley V. C. declined, after investigating the practice in the master's office, to give effect to an argument that the principle was confined to those cases where the creditor was entitled to recall his principal at pleasure.

And the form of words employed to express the idea that interest reserved as payable on a fixed date becomes due from day to day (because earned by forbearance of principal) has varied little since Lord Hardwicke's time. Lord Hardwicke himself used the phrases "accrues every day" in *Pearly* v. *Smith* (2) and "becomes due from day to day" in *Wilson* v. *Harman* (5); Mr. Swanston in his note to *Ex parte Smyth* (3) "accruing *de die in diem*" and "becomes due *de die in diem*"; and Kindersley V. C. at page 340 in *Re Rogers Trusts* (4), says

> the interest payable on the debentures though payable half yearly is not an entirety but an accumulation of each day's interest which accrues *de die in diem* and which though not presently payable is still due.

An accurate writer, Mr. Leake, speaking of interest upon debts payable at fixed periods says it is considered to "accrue due". Leake, Uses and Profits of Land, page 447.

(1) 2 P. Wms. 502.
(2) [1745] 3 Atk. 261.
(3) [1815] 1 Swan. 337 at p. 357.
(4) [1860] 1 Dr. & Sm. 338 at p. 341.
(5) 2 Ves. Sen. 672.

The same phraseology appears in the Apportionment Act of 1870, which provides that certain

> periodical payments in the nature of income * * * shall, like interest on money lent, be considered as accruing from day to day

although it is at the same time provided that the apportioned part of such payment shall only be payable or recoverable when "the entire portion * * * shall become payable," And in the judgments applying the Apportionment Act there are many illustrations of this use of the word "accrue". One or two examples will suffice.

In *In re Howell* (1) the court of Queen's Bench had to consider the question whether, a tenant having become bankrupt during the currency of a quarter, that part of the quarter's rent apportionable to the part of the quarter before the order of adjudication should be held to be rent "accrued due", within section 42, s.s. 1 of the Bankruptcy Act of 1883. Such apportionable part of the quarter's rent was of course not recoverable from the tenant until the expiry of the quarter; but it was held, nevertheless, that is to say, notwithstanding the fact that it was not payable until the end of the quarter, to have "accrued due" within the meaning of section 42, from day to day. In other words, the effect of the Apportionment Act was held to be that, rent accruing *de die in diem*, the part attributable to the time elapsed must be considered as "accrued due" for the purpose of applying a statute passed before the Apportionment Act itself.

Again in *In re Lucas* (2), the Court of Appeal had to consider the construction and effect of a will by which a testator had directed his executors to "forgive to" a certain tenant

(1) [1895] 1 Q.B. 844. (2) 54 L. T. 30.

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all rent or arrears of rent which may be due and owing from him to me at the time of my decease.

The court differed as to the construction of the phrase but there appears to have have been no difference of opinion upon the point that rent, although payable at a fixed date, becomes, by force of the language of the Act "considered as accruing from day to day", due from day to day, the amount so due being *debitum in praesenti solvendum in futuro;* as Fry L. J. says at page 32, section 2 of the Apportionment Act

> altered the Common Law of England, and whereas before the Act rent only, (unless of course it is otherwise specially reserved) became due when it became payable after the Act it became due from day to day

I will not multiply examples. Where, as Kindersley V.C. says, a lump sum is made payable on a specified date and where, having regard to the purposes of the payment or to the terms of the instrument, this sum must be considered to be made up of an accumulation of sums in respect of which the right to receive payment is completely constituted before the date fixed for payment, then it is quite within the settled usage of lawyers to describe each of such accumulated parts as a sum accrued or accrued due before the date of payment. Sums of money so divisible are to be distinguished from sums which, payable at a fixed date, are so payable as an entirety and not divisible at all. Such as, for example, rent before the Apportionment Act unless a contrary intention appeared from the manner in which it was reserved; and wages unless (as where the sum payable periodically is made up of moneys due for piece work 6 Q.B.D. 1) the terms or circumstances of the hiring express or imply another intention. These (rent and wages are selected by the respondents as typical illustrations

of their proposition that "a debt accrued only when due") are not apportionable because, as Littledale J. said in *Slack* v. *Sharpe* (1) (a case cited by Riddell J. and relied upon by the respondents here)

> although the time in respect of which the rent becomes due goes on accumulating the rent is an entire thing and becomes due all at once.

Let us consider then the application of the contractual clause in question to the sinking fund payments in respect of which the dispute arises. And first of the earlier series of debentures secured by the Trust Deed of the 2nd Feb., 1903.

The language of the trust deed which describes the obligation, and the conditions of it, to pay into a sinking fund or rather to pay to the trustee for the purposes of a sinking fund is far from precise. The company is to

> pay * * the sum of $1.00 for each electrical horse power sold by the company and paid for by the purchasers thereof during the preceding calendar year.

The expression "electrical horse power" denotes, of course, a rate, an engineer's unit for measuring the time rate of expenditure of electrical energy in doing mechanical work. Obviously this eliptical language must have been employed with reference to some words or some business practice known to the parties. Its real import would appear to be sufficiently ascertained from the subsequent course of business, followed by common consent, in which "electrical horse power" in this clause was treated by both parties as denoting an electrical horse power "year" an aggregate of 8760 or 8784 electrical horse power hours according to the year. The electrical horse power hour means, for all pertinent purposes, electrical energy supplied

(1) 8 A. & E. 366.

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for one hour and always capable on expenditure of performing mechanical work at the rate of one horse power; and as the practice of the parties shews, for the purpose of computing the sinking fund payments, it was of course immaterial whether horse power hours were supplied simultaneously or in succession, the method adopted having been to ascertain the aggregate number of horse power hours for a year from half hour readings, and then to divide that number by 8760 or 8784, as the case might be. The quotient would give the number of dollars payable on the 1st of July succeeding the end of the calendar year.

It was assumed on the argument and appears to have been assumed throughout the litigation that the amount of the sinking fund payment was determined by the number of horse power hours sold during the specified period, *i.e.*, the preceding calendar year. According to the true meaning of the deed (see also the form of the bond, in the record) it may very well be that this sum is a function of the number of horse power hours paid for during the year, not of the number sold, but the admissions as well as the course of litigation entitle us to proceed upon the assumption above mentioned; and indeed it is immaterial, in so far as regards the effect of the agreement of 1917, which construction be followed. According to this construction, just as soon in the month of January as, according to the readings of the company's meters, it appeared that 8760 or any multiple of 8760 horse power hours (or the equivalent in kilowatt hours) had been supplied a liability arose to pay to the trustee the sum of $1.00 or the corresponding multiple of that sum, for the purpose of the sinking fund and a like additional liability arose at every successive point of time when the aggregate number of horse power hours, so supplied,

reached 8760 or a multiple of 8760. The liability was then fully constituted but the obligation was not to pay at once, it was to pay in the future.

If on the true construction of the sinking fund clause in the trust deed the amount of the sinking fund payments depends upon the amount paid during the calendar year for sales whenever made, then an obligation to pay accrues the moment the price of a horse power year is paid to the company.

To these facts the application of the clause under discussion seems to present little difficulty. The sum of one dollar becomes due to the trustee for sinking fund as each "horse power year", in the sense above described, is sold or paid for according to the proper construction of the contract in the sense that there is an indefeasible obligation then and there constituted to pay on the 1st of July succeeding the termination of the current calendar year. The aggregate of these sums of $1.00 due in this sense during the current calendar year constitutes the totality of the payment which becomes exigible on the date named for payment. Therefore it would be strictly in accordance with the usage illustrated above to apply to these several sums of $1.00, the phrase "shall have accrued but shall not be due" on the several dates on which the duty to pay them arose.

I have dwelt upon this at some length because of some observations in the leading judgment in the court below which appear to indicate that the position of the appellants at this point has been misapprehended. Riddell J. says:

> It is common ground that there is no accrual under the mortgages and independently of the sale contract—in the absence of statutory provision, a debt only accrues when it is due—Patteson J. in *Slack* v. *Sharpe* (1).

(1) 8 A. & E. 366 at p. 373.

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The appellants maintained most explicitly before the trial judge as well as in this court, that under both trust deeds of the Power Company there was accrual in the manner above mentioned, and there was no admission that the principle of the case cited by Riddell J. (which applies only as explained above to periodical payments becoming due as entireties such as wages and rent when not otherwise reserved) had any sort of application to the sinking fund payments in question. Indeed Riddell J. himself says in a later passage of his judgment:

> It is argued that the payments must be considered as accruing by wording of the mortgages".

And the learned judge then proceeds to illustrate the appellants' contention by a useful analogy.

> I can see, (he says) no difference between such a provision—(speaking of the sinking fund clause) and a provision that a coal mining company should pay $1.00 for each ton of coal sold and paid for during the preceding calendar year.

Substitute "horse power year" for "ton of coal" and this sentence accurately paraphrases the clause in question from the appellants' point of view—with the consequence under the appellants' argument, that on receipt of payment of the price of one ton of coal a liability to pay the sum specified would at once be indefeasibly constituted, in other words, such a sum would accrue due though not yet payable.

It is suggested moreover by the learned judge that the sinking fund payments accruing during the seven months period ending on the 1st of August could not be accurately ascertained until after the expiry of the whole year, but this is not in accordance with the admitted facts as the following passage from the respondent's factum shews:—

79. On the other hand the appellants say that sinking fund payments had accrued on August 1st, 1917, in respect, and only in respect, of power sold and paid for between January 1st, 1917, and July 31st, 1917, inclusive. It is clear that on any day the power which had actually been generated and disposed of down to midnight of the preceding day could be easily and accurately ascertained. Indeed it could be so ascertained to within half an hour of ascertainment, the readings of the integrating meters being taken and recorded half hourly. On the appellants' contention, therefore, the provision for estimating was unnecessary and senseless. The exact payments could have been readily ascertained and made on August 1st, 1917.

Another view expressed in the court below may perhaps be noticed here. It is this. The sinking fund clause, it is said, creates an obligation to pay a sum of money for the sinking fund on a specified date and for the rest that clause only prescribes a method of ascertaining the amount which is to be paid; and counsel for the respondent urges that for all relevant purposes the effect would be just the same if the obligation was to pay the sum of $1.00 for every $10.00 of principal secured by the bonds. The answer to this seems to be that under the clause in controversy there is no liability to pay any sum for sinking fund purposes until electrical energy is sold according to the terms of the clause; then and then only the constitutive elements of the liability come into existence. But when that occurs the liability is created and is indefeasible—although it is a liability only to pay in the future. The facts which determine the extent of the liability, in other words, are those which determine its existence; and it is not an unnatural but a strictly accurate use of language to describe such a liability as a liability "accrued".

The respondent's chief contention expressed in a variety of forms has two branches. 1st, that the sinking fund payments under all three series of debentures are entire payments and consequently that in

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respect of such payments or any part of them there could not in any sense known to the law, be an accrual before the day on which they became exigible; and 2nd, that the words under consideration can have no operation unless some special meaning calculated to serve the purposes of the parties in framing this clause be ascribed to them, and they should therefore be read in a sense which makes the sinking fund payments under all three series apportionable. This sense, it is argued, is supplied by the analogy of interest which accrues *de die in diem* between the dates upon which it becomes periodically payable.

My reasons for rejecting this contention will perhaps sufficiently appear from what I have said. But to summarize briefly what has already been expressed—the office of a court of law called upon to construe a written document is to ascertain the intention of the parties from the meaning of the words used and when such language is fairly capable of more than one construction, to determine that construction from the context, the subject matter and the facts in reference to which it is used; but it is no part of the function of a court in construing such instruments to endeavour to ascertain the intention of the parties from the circumstances by ascribing to words the parties have selected a non-natural meaning—a signification which they will not fairly bear. *Great Western Ry. Co.* v. *Bristol* (1). On the theory of the respondent all the sinking fund payments to which the agreement applies are non-apportionable because they accrue as entireties. The argument assumes an agreement by the parties that these payments shall for the purposes of the clause in question, be considered to accrue *de die in diem*. No such agreement is expressed and I can discern

(1) 87 L. J. Ch. 414 at pp. 429 and 430.

no good ground for assuming it. The analogy appealed to with so much emphasis—the analogy of interest—does not support it. In truth the argument rejects the analogy of interest, for interest as above mentioned is apportionable precisely because it does not become payable as an entirety but is considered for the reasons mentioned an accumulation of segregable elements. Nor can it be urged that on the appellants' construction the clause is without application to the Transmission Company's bonds for the clause deals with interest as well as with sinking fund payments. This implied term that all sinking fund payments, though in truth payable as entireties, are for the purposes of the agreement to be treated as accruing *de die in diem*, cannot, I am convinced, be deduced from the language of the clause construed in light of context and object; it can only be arrived at—if at all—by the inadmissible process of attributing to the parties an intention they have not expressed and bringing the documents into conformity with the assumed intention by imparting to its words a colour which does not belong to them.

The points raised by the appeal case have, I think, been sufficiently discussed, but I think an observation is necessary upon the attempt of the respondent to give weight to his contentions by reference to the Transmission Company's agreement. By that agreement a sum of $30,000 is payable on the 1st of July in each year for sinking fund purposes. It appears that the respondent agreeably to his construction of the apportionment clause of the agreement of April, 1917, left with the Power Company the sum of $2,500, one-twelfth of the sum of $30,000 due July 1st, 1917. The argument is now pressed upon us with not a little fervour that the failure on the part of the Power

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Company to return this sum was an acceptance by conduct of the respondent's interpretation of the clause in dispute.

The Transmission Company's agreement was not before the trial judge. It was admitted in the Appelate Division on the application of the present respondent, on the ground no doubt that the agreement being one of the instruments contemplated by that clause should be before the court, and the propriety of referring to the agreement itself does not admit of doubt. But the agreement alone was admitted, and we have no evidence before us of any of the circumstances touching the retention of the sum mentioned or of any of the communications between the parties relating to the construction of the disputed clause and whether repayment was or was not offered does not appear. The matter is not touched upon in the pleadings.

The question therefore whether the conduct of the parties in relation to this sum of $2,500 amounts to a construction by conduct of this agreement is obviously not a question that can be raised in this court and speculation as to that conduct can, in the absence of evidence, have no effect unless it be to becloud the real issues to be decided on the appeal.

Still less is it permissible to assume that this court, in the absence of any issue of estoppel or the like, is bound to construe and apply the disputed clause upon the hypothesis that such construction and application are fixed and determined by something which happened between the parties of which it is not informed judicially. The respondent naturally recognized, when he decided upon his course, that a decision making all payments apportionable *de die in diem* would be more favourable to him than one based upon the principle for which the appellants now contend.

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What the respondent did in pursuance of his own interests is of no bearing upon the question before us; nor in the way in which these questions are presented is the conduct (so far as disclosed) of the appellants.

The respondent advances an argument founded upon the adjustment clause which he says has no office under the construction of the appellants. The argument ignores the fact that the adjustment clause applies to taxes and other matters not affected by the questions now agitated; and in relation to them I am unable to say on the material before us what practical operation or importance it may have.

As to the payments for sinking fund under the second trust deed of the Power Company I have reached the conclusion that the appellants must fail. It may be that the sinking fund clause creates a charge upon the net profits; but whether it creates such a charge or not there is no liability to pay unless there are net profits. I am not sure that the appellant's contention upon this point has not eluded me. In so far as I have succeeded in apprehending it, it appears to be that the existence of net profits is a divestitive condition. I cannot agree with that. The obligation is an obligation to pay out of net profits; that is the only obligation. I think the existence of net profits is one of the constitutive elements of liability.

In the result the judgment of Orde J. should be varied by reducing the amount awarded by one-fifth.

ANGLIN J. (dissenting)—The plaintiffs appeal from the judgment of an Appellate Divisional Court (1), reversing the judgment of Mr. Justice Orde (2) and dismissing their action. Their claim is to compel the defendant to

(1) 19 Ont.W.N. 273. (2) 19 Ont.W.N. 54.

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provide a sum of $93,359.95 (and $14,579.49 interest thereon) for which Mr. Justice Orde gave them judgment, to be paid to the Toronto General Trusts Corporation as the mortgagee-trustee for the holders of debenture bonds of the Ontario Power Company and to be applied by the trustee towards the redemption of such bonds. The sum awarded by the judgment of the trial court approximately represents $1.25 for each electrical horse power sold by the Power Company from the 1st of January to the 30th of June, 1917. The defendant left with the Power Company (for payment to the mortgagee-trustee on the 1st of July, 1918) the sum of $15,637.54, being an amount estimated to be equivalent to $1.25 for every electrical horse power sold by the Power Company between the 1st of July and the 1st of August, 1917, which he asserts is all that he was required so to provide under his contract with the plaintiffs.

The question for decision arises out of a provision in an agreement for the sale by the respondent Albright to the appellant, the Hydro-Electric Power Commission, of 90% of the shares of the stock of its co-appellant, the Ontario Power Company, and of so much of the remaining 10% of such shares as he should be able to acquire. By the provision in question (set out in full below) the vendor promised to leave with the Power Company *inter alia* a sum equal to so much of the sinking fund payments upon three specified mortgages as

> shall have accrued but shall not be due at the time for completion,

i.e., of the sale contract. The Ontario Power Company also owned the stock of the Ontario Transmission Company, a subsidiary corporation. The purpose of the sale from Albright to the Hydro-Electric Power

Commission was to vest in that body complete control of the Ontario Power Company, its assets and undertaking and of the Transmission Co., its assets and undertaking. It is common ground that the vendor in fact delivered to the purchaser appellant substantially all the shares of the Ontario Power Co.

The assets and undertaking of the Power Company were subject to two mortgages dated February, 1903, and June, 1906, respectively, made to a trustee to secure two debenture bond issues. The bonds outstanding in respect of these two mortgages on the 1st of August, 1917, when they were assumed by the purchaser, amounted respectively to $9,984,000 and $2,880,000. The assets and undertaking of the Transmission Company were likewise subject to a mortgage made to a trustee to secure bonds issued by it, dated August, 1905. This mortgage was also assumed by the purchaser and the amount oustanding in respect of the bonds secured by it was $1,805,000.

Interest on the bonds secured by the first mortgage of the Power Company was payable half-yearly on the 1st of February and the 1st of August. The Power Company by that mortgage also undertook to pay to the mortgagee-trustee on the 1st of July in each year—commencing on the 1st of July, 1909—a sum of money for the purpose of a fund, called a sinking fund, to be applied towards the redemption of the bonds secured by the mortgage. The sum so to be paid on the 1st of July, 1909, and that to be paid on each subsequent anniversary of that date during the currency of the mortage, which is to expire in 1942, was to be the equivalent of $1 for each electrical horse power sold by the company and paid for by the purchasers thereof during the preceding

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calendar year. The parties are agreed that "calendar year" means the year from the 1st of January to the 31st of December. The trustee was required to use the money so to be paid and any interest arising therefrom while in its hands, in purchasing in the open market at the lowest price for which they should be obtainable—but not exceeding par and a premium of 10% thereon and accrued interest—any of the bonds secured by the mortgage that could be so purchased. The parties are in entire accord as to the mode in which the sum to be paid annually on account of the sinking fund so called should be computed. It is accurately stated in the judgment of Mr. Justice Riddell, who spoke for the majority in the Appellate Divisional Court.

The second mortgage, which matures in 1921, contains a like provision for sinking fund payments except that the amount to be paid on the 1st of July in each year—commencing on the 1st of July, 1912—is to be a sum equal to 25 cents for each electrical horse power sold and paid for during the preceding calendar year. The obligation in this instance, however, is only to pay out of "net earnings" after providing for operating expenses, taxes, and interest and sinking fund payments in respect of the bonds secured by the first mortgage. Interest on the bonds secured by the second mortgage is payable half-yearly on the 1st of January and July.

Interest on the bonds secured by the Transmission Company's mortgage, which matures in 1945, is payable half-yearly on the 1st of November and the 1st of May. By a contemporaneous agreement the Transmission Co. undertook to pay to the mortgagee-trustee named in its mortgage as and for a sinking

fund for the redemption of its bonds the sum of $30,000 on the 1st of July in each year, commencing on the 1st of July, 1911. There is a provision that the moneys so to be paid shall be used in purchasing the bonds of the Transmission Company outstanding similar to that in the Power Company's mortgages.

The scheme of the three debenture bond mortgages appears to be identical. A lump sum is to be paid by the mortgagor towards a so-called sinking fund on the 1st day of July in each year, commencing in each instance on the 1st of July which occurs approximately six years after the issue of the debenture bonds. Each of these annual payments may, in a sense, be regarded as a payment in respect of the year which expires on the day before it falls due and in that sense as accruing during that year. The sum so payable under each of the two Power Company mortgages is to be, in the case of the first mortgage, as many dollars, and, in the case of the second mortgage, as many quarter dollars, as the company shall have sold electrical horse power during the preceding calendar year; but it is none the less a lump sum payable on a fixed date and having no other relation to, or connection with, the Power Company's earnings during such preceding calendar year. Computation on the basis of sales made during the year ending on the day before that fixed for payment, or on that of sales during the year ending 12, 18 or 24 months before that date, or on any other basis which would have suited the purposes of the parties, might quite as well have been stipulated for. The character of the sum to be paid and its relation to the earnings during the "computation period," if I may so term it, would in each case be precisely the same. In no case, except perhaps where the computation

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period should coincide with the year in respect of which the payment is to be made, could such payment be said to be accruing in any sense whatever during that period. In the case of the mortgage of the Transmission Company, which did not sell electrical power, a lump sum payment of a fixed amount is stipulated for in lieu of the lump sum the amount of which is to be arrived at by the computation provided for in each of the other two mortgages. This is the only difference between them; and I cannot regard it as material.

It is common ground that under none of these three mortgages was there any accrual in a legal sense of any part of the moneys payable towards the several sinking funds before the date on which they fell due. The entire liability for each of the three sums payable on the first of July in each year (after 1911) under the respective mortgages, and every part of it, accrued only on the day when such payment actually fell due.

But the sale agreement from the respondent Albright to the appellant, the Hydro Electric Commission, dated the 12th of April, 1917, contains a covenant by the vendor Albright, that at the time for completion (August 1st, 1917, *i.e.*, 60 days after the execution and delivery of the agreement was completed) there should be

> left in the hands of the Power Company * * * a sum estimated by the vendor to be equal to—
>
> (*a*). Interest and Sinking Fund payments on the bonds and debentures of the Power Company and the Transmission Company which shall have accrued but shall not be due at the time for completion, and
>
> (*b*). The proper proportion of all rentals and payments to the Commissioners of the Queen Victoria Niagara Falls Park, and of all unpaid rates, taxes and assessments for the year 1917, adjusted to the time for completion, and if such estimate shall, after completion, prove inaccurate, the excess or deficiency when determined shall be paid by the Vendor to the Power Company, or by the Power Company or the Purchaser to the vendor as the case may require.

All adjustments as to interest, rentals, taxes, etc., have been agreed upon. The parties are also at one as to the amount left by Albright with the Power Company in respect of the next sinking fund payment under the Transmission Company's mortgage. The last payment of $30,000 on that account was made by the Power Company, while still under the control of Albright, to the trustee-mortgagee on the 1st of July, 1917. The sum of $2,500, one-twelfth of the $30,000 which would become payable on the 1st of July, 1918, was left with the Power Company on that account and both parties are in accord that this was the sum which under the sale agreement the vendor covenanted should be left with the Power Company on account of that item as an amount "accrued but not due" at the time of completion of the sale.

As already stated it is common ground that nothing had legally accrued at that date in respect of the three sinking funds. Moreover, the parties are agreed that the term "accrued" was meant to have some conventional meaning; and as to the Transmission Company's mortgage, they both say that it was intended to designate that part of the next maturing payment of $30,000 which bears to it the same proportion as the one month elapsed since the date of the last payment bears to the 12 months which would elapse between that date and the date on which such next naturing payment would fall due. The respondent Albright contends that the word "accrued" bears precisely the same conventional meaning in regard to the sinking fund payments to be made under the two Power Company mortgages. The appellants, on the other hand, maintain that, as to these two payments, not one-twelfth but seven-twelfths of the next maturing payments had "accrued" on the 1st

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of August, 1917, notwithstanding that the amount due in respect of sinking fund payment under the two Power Company mortgages on the 1st of July, 1917, had been fully paid by that company to the mortgagee-trustee on that date.

Counsel for the appellants base their contention on the fact that the amount of each of the two payments made on the 1st of July, 1917, was equivalent to $1 in the case of the first mortgage and 25 cents in the case of the second mortgage for each electric horse power sold by them during the calendar year 1916 and that the corresponding sums to be paid by the purchaser (appellant) on the 1st of July, 1918, would be similarly computed on the sales of electrical horse power made and paid for between the 1st of January and the 31st of December, 1917. They maintain that the payments made on the 1st of July, 1917, were of the amounts which had accrued under the Power Company mortgages in respect of sinking funds up to the 31st of December, 1916, and not up to the date when they fell due and were paid. They add—at first blush plausibly enough—that, inasmuch as the vendor has received the earnings of the Power Company from the electrical horse power sold by it between the 1st of January and the 30th of June, 1917, he should provide the money requisite to meet the corresponding portions of the sinking fund payments to be made in July, 1918, which the agreement provides should be computed on the basis of the electrical horse power sold and paid for during the whole calendar year of 1917, and that such corresponding portions of the sinking fund payments due on the 1st of July, 1918 should be deemed to have "accrued" *de die in diem* up to the 31st of December, 1917, within the meaning of that term as conventionally used in the sale agree-

ment. No doubt that would be the case if it had been stipulated that the moneys to be paid on sinking fund account on the 1st of July, 1918, should be paid out of, or had in any way been made a charge upon, the proceeds of the sales of electrical horse power during the year 1917.

But, admittedly, the annual sinking fund instalments were not payable out of the earnings of the preceding calendar year and were in no sense a charge upon those earnings. Any view, however presented, that there was in any sense an accrual of each of such instalments during the whole calendar year preceding that in which it was made payable rests, unconsciously it may be, but nevertheless necessarily, upon the idea that the earnings of that calendar year were so charged. That idea involves a fallacy, subtle and seductive no doubt, but nevertheless a fallacy.

So far as they can be said to represent, or be in any way referable to, a period of elapsed time, the instalments on sinking fund accounts due on the 1st of July of any year were payments in respect of the 12 months which had then elapsed since the last previous instalments fell due. These payments may thus in a conventional sense be regarded as having accrued *de die in diem* during those 12 months. That, in my opinion, is the correct interpretation of the word "accrued" as used in regard to the sinking fund payments in clause (*a*) of the sale agreement above quoted. It gives to that word the same meaning when applied to each of the three mortgages in regard to which it is used, as in my opinion the parties almost certainly intended. It accords due recognition to the collocation of the words "interest and sinking fund payments"; sinking fund payments are treated as accruing, like interest, from gale day to gale day. Finally, it does

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not ignore the fact that it is of a proportionate part of the "payments" next to mature, alike on interest account and on sinking fund account, that the parties speak and apparently were contemplating the accrual.

But the fundamental error in the appellant's application of the word "accrued" is that, from whatever point of view it is considered, it necessarily involves the idea that the annual payments on account of sinking funds provided for in the two Power Company mortgages are either to be made out of the proceeds of the sales of power during the preceding calendar year or, in some way undefined and undefinable, constitute a charge on such proceeds, whereas in point of fact the number of electrical horse power sold during the preceding calendar year is introduced merely as the factor by which the number of dollars or quarter dollars that shall make up each annual instalment payable towards the respective sinking funds under the Power Company mortgages is to be determined.

Other formidable difficulties which the appellants encounter in the application of the word "accrued" for which they contend suggested at bar, I find it unnecessary to discuss.

I should perhaps allude, however, to the fact that under the second Power Company mortgage sinking fund instalments are payable only out of "net earnings" after the payment *inter alia* of the instalment of sinking fund under the first mortgage. The existence of such "net earnings" can be ascertained only on or after the date when the sinking fund payment fell due. It is therefore difficult to appreciate in the case of the bonds secured by the second mortgage how any sinking fund payment not already due can in any sense be said to have "accrued".

I am for the foregoing reasons of the opinion that the construction placed upon the provision of the sale agreement under consideration by the majority of the learned judges of the Appellate Divisional Court was correct and that this appeal therefore fails.

BRODEUR J.—We have to determine in this case the respondent Albright's liability concerning certain sinking fund payments under the agreement for sale by him of the 12th April, 1917 to the appellant, the Hydro Electric Commission.

By this agreement Albright was selling ninety per cent of the shares of a company called the Ontario Power Company. The contract dealt also with the assets and liabilities of the company and provided that these assets and liabilities were mostly transferred and assumed by the purchaser, the Hydro Electric, from the date of the completion of the contract, which was to be the first of August, 1917.

Albright claims that he was bound under the contract to make these sinking fund payments from the first of July to the first of August, which represented a sum of about $15,000. On the other hand, the Hydro Electric Commission contends that Albright should also provide for these sinking fund payments from the first of January, 1917, to the first of July, 1917, which would represent a sum of about $90,000.

The trial judge decided in favour of the Hydro Electric Commission but his judgment was reversed by the Appellate Division of the Supreme Court.

The case turns mostly upon the construction of the following clause of the agreement of sale.

> The vendor agrees with the Power Company and the Purchaser that in addition to the assets set out in said schedule "C" hereto there shall be left in the hands of the Power Company at the time for completion a sum estimated by the vendor to be equal to

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(a) Interest and sinking fund payments on the bonds and debentures of the Power Company and the Transmission Company mentioned in the said schedule D *which shall have accrued but shall not be due* at the time for completion.

Schedule C referred to in this clause gave a description of the assets of the Ontario Power Company and of the Transmission Company, the latter being a subsidiary company of the big corporation, the Ontario Power Company.

Schedule D mentioned in the above clause gave a list of the liabilities due by the Ontario Power Company and the said subsidiary company. Among these liabilities were bonds and debentures due by the Power Company to the extent of nearly $13,000,000, under two mortgages dated respectively the 2nd of February, 1903, and the 30th of June, 1906, between the Power Company and the Toronto General Trust Company.

By these mortgages, the Ontario Power Company agreed to pay to the Toronto General Trusts for the purpose of a sinking fund for the redemption of its bonds a certain sum of money payable on the first of July of each year

for each electrical horse power sold by the company and paid for by the purchasers thereof during the preceding calendar year.

In the second of these mortgages, it was provided that the sum stipulated for the sinking fund was to come out of the net earnings of the company after payment of certain obligations therein stipulated.

There was also amongst the liabilities mentioned in schedule D a sum of about $2,000,000 due by the Transmission Company for bonds it had issued. But the sinking fund provided for the redemption of its bonds was a fixed sum of money.

It is important to state for the purpose of giving us a correct view of the agreement for sale of the 12th of April, 1917, that the assets of the Ontario Power Company did not include any rentals or sums of money payable for power supplied which had been earned but would not be due on the first of August, 1917.

There was then, until the contract would be completed, an understanding that these assets earned but not paid should belong to the vendor. It is also contended with a great deal of force that the payments on the sinking fund should be treated in the same way viz: that the vendor should take care of these payments.

Being entitled by the agreement to receive the income earned but not paid before its completion the vendor must be supposed to take on his shoulders the responsibility for the sinking fund then accrued but not due. The time of payment which is stipulated on the first of July each year is in respect of money earned during the previous calendar year. At the beginning of each year the company binds itself to take out of its sales of horse power a certain sum of money which, on the first of July of the next year, will have to be paid to its creditors for the maintenance of the sinking fund. The accrual takes place from the first of January of each year. The sale of horse power did not provide a basis for calculating the payments. It is the condition of the liability; when the sale of a horse power is made and when the payment for it has taken place the liability arises and accrues.

The fact that a specific sum of money is to be paid for the sinking fund in connection with the last mortgage does not, in my opinion, alter the situation.

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I have come to the conclusion then that the accrual begins on the first of January, 1917 and not on the first of July.

The appeal should be allowed with costs of this court and of the court below and the judgment of the trial judges should be restored.

MIGNAULT J.—By agreement dated April 12th, 1917, the appellant purchased from the respondent 90,000 shares out of 100,000, the total share capital of the Ontario Power Company of Niagara Falls, and the remaining 10,000 shares to the extent that the holders thereof would put the respondent in position to make delivery, the price being 80% of the par value ($100.00) of the shares, so that if all the shares were transferred to the appellant the total price amounted to $8,000,000. The Ontario Power Company then owned the shares of a subsidiary company, the Ontario Transmission Company, Limited, which was also a party to the contract. It had entered into two mortgage agreements with the Toronto Trust Corporation, as trustee, to secure the repayment of two issues of its bonds.

By the first mortgage agreement, besides the payment of interest semi-annually on February 1st and August 1st, the Power Company promised to pay to the trustee on the 1st of July, 1909, and on the 1st of July in each year thereafter.

> for the purpose of a sinking fund for the redemption of the said bonds the sum of one dollar for each electrical horse power sold by the company and paid for by the purchasers thereof during the preceding calendar year.

By the second mortgage agreement the Power Company in addition to the interest on its bonds payable on January 1st and July 1st, obliged itself

to pay to the trustee out of its net earnings and after the payment of its operating expenses and taxes and the interest upon its first mortgage bonds and the constitution of the sinking fund in its first mortgage provided, on the 1st of July, 1912 and on the 1st of July in each year thereafter.

for the purpose of a sinking fund for the redemption of the said bentures the sum of twenty-five cents for each electrical horse power sold by the company and paid for by the purchasers thereof during the preceding calendar year.

The Transmission Company had also mortgaged its assets to secure a bond issue, and had agreed with the trustee to pay to the latter, as and for a sinking fund for the purchase of outstanding bonds, the sum of $30,000 on the 1st of July, 1911 and a like sum on the same date in succeeding years. The interest on its bonds was payable on the 1st of May and the 1st of November in each year.

To return to the sale agreement between these parties the third clause is of importance in view of the present controversy. Its effect, so far as it need be stated, is that the respondent agreed that he would do all things necessary to be done so that the respective assets of the Power Company and the Transmission Company should at the time for completion consist of those described in schedule "C" to the agreement, that their respective liabilities should at the time for completion be those described in schedule "D" and in default of so doing or in so far as he should not so do, the respondent would pay or settle all such liabilities. The respondent also agreed that in addition to the assets set out in schedule "C" there should be left in the hands of the Power Company at the time for completion a sum estimated by him to be equal to:

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(a) Interest and Sinking Fund payments on the bonds and debentures of the Power Company and the Transmission Company mentioned in the said Schedule "D" which shall have accrued but shall not be due at the time for completion, and

(b) The proper proportion of all rentals and payments to the Commissioners of the Queen Victoria Niagara Falls Park, and of all unpaid rates, taxes, assessments for the year 1917, adjusted to the time for completion, and if such estimate shall after completion prove inaccurate, the excess or deficiency when determined shall be paid by the vendor to the Power Company, or by the Power Company or the purchaser to the vendor as the case may require.

The clause went on to say:—

The assets of the Power Company at the time for completion are not intended to include any rentals, sums of moneys payable or to be become payable for power supplied or otherwise, under any lease or contract which shall have accrued or shall have been earned, but shall not be due or payable at the time for completion, and if they do include any such items the purchaser shall use every reasonable effort to collect such items, and if when collected shall pay, or procure to be paid, to the vendor, the amount thereof adjusted to the time for completion, and the purchaser shall also at the time for completion pay or procure to be paid to the vendor the value of all prepaid insurance, rentals, taxes, rates (including local improvement rates), assessments and payments for telephone services adjusted to the time for completion.

The parties agree that the time for completion was August 1st, 1917. The difference between them is as to the sum which the respondent should have left in the hands of the Power Company for sinking fund payments on the bonds and debentures of the Power Company. As to the bonds of the Transmission Company there is no difficulty; $30,000 was to be payable on the 1st of July, 1918 and $2,500, one-twelfth of that sum is admitted to be the proper amount. The respondent contended that one-twelfth of the estimated sinking fund payment due on the 1st of July, 1918, on the bonds of the Power Company was all that he had to provide for, while the appellant claimed that it was entitled to seven-twelfths of that sum or the amount representing the period between the 1st of January and the 1st of August

1917, calculated in the manner and according to the formula adopted by the parties. The learned trial judge took the latter view, the Appellate Division, Mulock C. J. Ex., dissenting, the former one.

Everything turns on the meaning of the words

> sinking fund payments * * which shall have accrued but shall not be due at the time for completion.

I have cited the clause in the mortgage agreements which provides for these sinking fund payments. It obliges the Power Company to pay on the 1st of July in each year

> for the purpose of a sinking fund for the redemption of the said bonds the sum of one dollar (in the case of the second issue of bonds, twenty-five cents) for each electrical horse power sold by the company and paid for by the purchasers thereof during the previous calendar year.

The respondent contends that these so-called sinking fund payments are prepayments of capital to be made on the first of July each year, and that the sum of one dollar or twenty-five cents, for each electrical horse-power, etc., is merely the measure of the amount to be paid. If this were the case, the word "accrued" would be meaningless, for periodical payments on capital cannot be said to accrue while they are not yet due.

The appellant claims that the sale and the receipt of the sale price of electrical horse-power is the condition of the obligation to make a sinking fund payment. That appears to result from the language of the mortgage agreement and if it can further be said that, on these sales of electrical horse-power being made and paid for, the sum of one dollar or twenty-five cents for each electrical horse power is to go to form the next sinking fund payment, there is, in that sense, something that can be said to accrue. It seems obvious,

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and the parties admit, that the word "accrue" was used by them in a conventional sense, so we have to look at clause three of the sale agreement to discover what this conventional sense really is.

This clause appears to me to be an adjustment clause. It must be remembered that at the date of the sale agreement the parties could not know precisely what would be the time for completion, which was the time for adjusting everything between them, and they provided for this adjustment at that uncertain date by a very detailed clause. The interest payments on the bonds, which fell due at different dates, are dealt with in the same manner as the sinking fund payments and the taxes, rates, asssessments, payments for telephone services, rentals, and the value of all prepaid insurance were to be paid by the purchaser to the vendor, adjusted to the time for completion. Similarly with respect to any rentals, sums of moneys payable or to become payable for power supplied or otherwise, under any lease or contract, which should have accrued or should have been earned, but should not be due or payable at the time for completion, and which the purchaser should collect, it promised to pay the same to the vendor adjusted to the time for completion. The vendor was also to leave in the hands of the Power Company the proper proportion of all rentals and payments to the Commissioners of the Queen Victoria Niagara Falls Park adjusted to the time for completion.

It is therefore clear that this clause is an adjustment clause and it would be singular if the sinking fund payments were not also to be adjusted to the time for completion. Indeed the respondent admits that they must be since he has paid a twelfth of the estimated

sinking fund payment to become due on the 1st of July, 1918, but his difficulty is that the parties clearly looked on these payments as accruing from day to day and from month to month, and from his point of view it is difficult to find any accrual.

The appellant's contention, to my mind, is more consistent with the clearly expressed intention of the parties to adjust everything to the date for completion, and to treat these sinking fund payments as if they accrued from day to day. For if the respondent is to keep the full amount received for each electrical horse-power sold and paid for from January 1st to August 1st, 1917, and the appellant is to pay to the trustee one dollar and twenty-five cents for each electrical horse-power so sold and paid for to the respondent (and it would be paid to him by the appellant under the clause concerning collections of amounts due for previous sales of power if the respondent had not already received it from the purchasers) the parties have not adjusted everything at the time for completion and the respondent would receive without obligation to pay and the appellant would pay without having received. I hesitate to place such a meaning on this clause unless I am forced to do so by its language.

In his factum, the respondent says:

> The obvious purpose of taking the Power Company's sales during the preceding calendar year as the basis for calculating or computing the sinking fund payment due on a stated day in the next year was simply that periodical repayments of principal should be in proportion to revenue previously received. The words quoted had to do with the ascertainment of the amount of each payment but with nothing else.

I would think that if periodical repayments of principal should be in proportion to revenue previously received they should, as between vendor and purchaser,

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be borne by the one by whom the revenue was received, otherwise the adjustment which is so minutely provided for as to everything else, fails in respect of these sinking fund payments.

And it must not be forgotten that the parties treat these payments as accruing before they become due. The word "accrue" can have some meaning, at least a conventional one, if applied to the dollar for each electrical horse-power sold and paid for, which goes to form the next sinking fund payment and in a sense is appropriated thereto, for the fund which is to form the next sinking fund payment grows thus from day to day, and whether it is put aside for that purpose or not is immaterial. We have therefore something which accrues in connection with these payments and that something appears to me to have been within the contemplation of these parties when they signed the sale agreement.

The respondent says that the payment is for the preceding calendar year, that on the 1st of August, 1917, anything due for the previous calendar year had been paid for a month previous. and that the language of all these agreements cannot be applied to something accruing from January 1st to August 1st, but merely and at the most to something which accrued during the previous year.

But here the vendor is to leave with the Power Company a sum estimated by him to be equal to sinking fund payments which shall have accrued but shall not be due at the time for completion. This is a provision made for the next payment on account of the sinking fund due the 1st of July, 1918, and then there would be something due for each electrical horse-power sold and paid for during the preceding calendar year. This sinking fund payment, due in eleven

months, can be equitably adjusted between the parties only by making the respondent pay for the sales made and paid for during the first seven months of 1917 according to the mode of calculation adopted by the parties, and if the clause has not really this meaning the parties have failed to express what I must consider was their intention. But I have no difficulty in placing this meaning on the adjustment clause.

The respondent argued that the payment and acceptance of $2,500.00 paid by him on account of the sinking fund payment due on the 1st of July, 1918, by the Transmission Company, shewed that the sinking fund payments on the bonds of the Power Company should be similarly dealt with. This payment, however, is not made by the Transmission Company for the preceding calendar year, nor is it based on sales or receipts, and the mortgage deed shows that it is made for the year computed from the 1st of July each year.

I have given my best consideration to this case and my conclusion is that the appeal should be allowed and the judgment of the trial judge restored with costs here and in the Appellate Division.

Appeal allowed with costs.

Solicitor for the appellant: *W. W. Pope.*

Solicitors for the respondent: *Blake, Lash, Anglin & Cassels.*

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*Mar. 14.
*Mar. 31.

C. I. DREIFUS.....APPELLANT.

AND

HARVEY E. ROYDS, ASSISTANT COMMISSIONER FOR THE CITY OF PORT ARTHUR.....RESPONDENT.

ON APPEAL FROM THE ONTARIO RAILWAY AND MUNICIPAL BOARD

Appeal—Jurisdiction—Assessment—Amount in Controversy—Court of last resort—Supreme Court Act—R.S.C. [1906] c. 139, s. 41—8-9 Geo. V. c. 7 s. 2—R.S.O. [1914] c. 195, s. 80 [6], Assessment Act.

On appeal in a case of assessment on land for 1921, the District Court Judge reduced the valuation on the land to an amount which would make the tax to be levied $800. On further appeal the Ry. and Mun. Board restored the valuation of the Court of Revision, making the tax $2,050. The owner of the land appealed to the Supreme Court of Canada asking to have the judgment of the District Court Judge restored.

Held that the amount in controversy on the appeal to the Supreme Court of Canada is not $2,050, but the difference between that and $802 the tax as fixed by the decision of the District Judge. Therefore, as such amount does not exceed $2,000 and no leave to appeal has been obtained the court has no jurisdiction, under the Act of 1920, to entertain the appeal.

The Ontario Assessment Act provides that "an appeal shall lie from the decision of the (Ry. and Mun.) Board * * to a Divisional Court upon all questions of law". Prior to the Act of 1920 an appeal to the Supreme Court of Canada could only come from the Court of last resort in the Province and on a question of law. On appeal from the Ry. and Mun. Board as to the assessment for 1920.

Held, that the board was not the court of last resort in the Province and the Supreme Court had no jurisdiction.

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*PRESENT: Sir Louis Davies CJ. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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APPEAL from a decision of the Ontario Railway and Municipal Board reversing the judgment of the District Court Judge in a matter of assessment of land in Port Arthur.

Two appeals are brought and consolidated for hearing. One is an appeal from the decision of the board on the assessment of 1920. This was before the court in 1920 and was sent back to the board for re-consideration the court holding that the actual value of the land assessed had not been determined as required by the Assessment Act. (1) The board maintained its former valuation. The other appeal was from a decision on the assessment of 1921 which increased the tax to be levied under the judgment of the District Court Judge by over $1,200. In each case the appellant seeks the restoration of the Judgment by the District Judge.

Chrysler K.C. for the appellant.

Geo. F. Henderson K.C. for the respondent.

THE CHIEF JUSTICE.—This is a consolidated appeal from the judgments or orders of the Ontario Railway and Municipal Board upon appeals to that Board under the provisions of the Assessment Act. c. 195, R.S.O. 1914.

The first order was on a reference back by this court on the hearing of a formal appeal to it, the reasons for which reference back are reported at 61 Can. S.C.R. 326.

The matter in question was the amount of the assessment for the year 1920 upon certain lands in the City of Port Arthur belonging to the present appellant.

(1) 61 Can. S. C. R. 326.

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The Chief Justice.

The second appeal is from the judgment or order of the board upon the assessed value of the same lands for the year 1921. As to this second appeal we are unanimously of opinion that the appeal must fail for want of jurisdiction in this court to hear it, under the amended Supreme Court Act of 1920, no leave to appeal having been obtained and the matter in controversy being only about $1,200.00.

The remaining question is as to the assessment for the year 1920 and the substantial contention at bar was that the board had disregarded the provision of the Assessment Act which enacts that land shall be assessed at its "actual value", and the directions of this court in that regard in remitting the case back to the board for further evidence and hearing. It was because this court was not satisfied on the first appeal that the board had fully complied with the direction of the statute as regards the finding of the actual value of the land, that we referred the case back to them for further evidence and consideration.

I have fully considered the evidence taken on the rehearing and reasons for the finding of the board given by the Chairman. I think the evidence taken before the board fully justifies the conclusion reached by it as to the actual value of the lands assessed.

I do not believe and cannot find any evidence whatever of any attempt by the board to evade the directions given by this court when on the previous appeal the case was remitted back to the board for further consideration and the taking of further evidence.

I am of the opinion that in a question of this kind as to the "actual value" of lands for purposes of assessment this court would not and should not interfere with the finding of fact as to such "actual value" if there was any evidence to sustain that finding.

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The board is constituted of men of experience on questions of this character. They have the great advantage of visiting and viewing the lands in question, and of seeing and hearing the witnesses who may be called to speak to its value. Unless, therefore, the board misdirected themselves on the proper principles which should govern them in determining this "actual value", or obviously reached their conclusions as to such value by adopting and following some wrong or improper principle, this court would not and should not interfere with their findings.

In the case before us, I find nothing of the kind to justify us in interfering with the findings of "actual value" of the lands in question in this appeal.

So far as I am concerned I not only fail to find that the board erred in adopting a wrong or improper principle in reaching the conclusion they did, but I go further and say that the evidence given before them, in my judgment, amply justified their conclusion.

It is in many cases no easy matter to determine the "actual value" of lands in many unsettled parts of Canada. Lands which a few years ago were in great demand and could easily be sold are now a drug on the market. In many cases they cannot be sold at all, and in such cases where there is practically no market or other equivalent tests of the actual value, it is plain that it is no easy matter to determine what the "actual value" of the land is. It is plain, land cannot be treated as valueless because there are no purchasers to be found for it when assessed for taxes, and equally plain to my mind that in such cases the probabilities of a reasonably early return of a "market" must be considered and weighed. Expert evidence on this point may be given and must be fairly weighed. This was done in the case before us after we had remitted it back.

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Under all the circumstances of this case and holding that we have no jurisdiction to hear the appeal from the assessment of 1921 and finding that the board did not proceed upon any wrong or improper principle in reaching its finding on the 1920 assessment, I would dismiss both appeals with costs throughout.

IDINGTON J.—These are assessment appeals against the assessment of property in Port Arthur in Ontario. No objection was taken by counsel in either case to our jurisdiction.

In the first case I had, after considering the evidence, come to the conclusion that the appeal should be allowed, but the majority of the court came to the conclusion that the case should be referred back to the Ontario Railway and Municipal Board to be re-heard as appears from the report of the case in 61 Can. S.C.R. 326.

That board meantime had got seized of another appeal against the assessment for the year following that of the first of said assessments.

The parties concerned proceeded with the said rehearing of the first case upon the understanding that the evidence so taken and judgments of the learned District Judge should be considered in the second case as if given therein.

The said board having proceeded accordingly came to the conclusion to render judgment in each case restoring their original judgment in the first case and allowing the appeal from the learned District Judge in the second case and restoring the assessment.

The curious result was an assessment of the same property for the first year in question of $60,000, and for the next year of $49,750.00, the assessor, the respondent, having apparently become convinced that he had erred, but the board holding it had not.

Thereupon these two appeals from said judgment of the board came before us as a consolidated appeal and argument thereupon was heard.

The curious result above stated led me to consider (what I, by reason of the view I had taken, had not before occasion to do) the power of the court to refer back such an appeal to an intermediate appellate court.

Not being able to find any precedent as authority for such a reference induced me to go farther and consider the second assessment and the right in either case to come here instead of going to the court of appeal for Ontario.

Incidentally to that investigation I found a reference by the Chief Justice of the Common Pleas Division in the course of disposing of a stated case in an assessment appeal heard by the Appellate Division, to an amendment in 1916 to the Assessment Act as it appeared in R.S.O. 1914. On referring thereto and calling the attention of my colleagues thereto it was decided to ask counsel to explain, if possible, how we could have jurisdiction to hear an assessment appeal in regard to a mere question of law when the parties concerned could appeal by virtue of said amendment which makes section 80, sub-section (6) which read as follows

(6) an appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said court upon application of any party and upon hearing the parties and the Board

by virtue of the amendment contained in the Assessment Act of 1916, section 6, sub-section (2), now read as follows:—

An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of The Municipal Board.

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By 8-9 Geo. V., c. 7, s. 2, section 41 of the Supreme Court Act is amended by adding thereto the following:—

Provided that the valuation of the property assessed shall not be varied by the Court unless it is satisfied that in fixing or affirming it such Court of last resort in the province has proceeded upon an erroneous principle; and, instead of itself fixing the amount of an assessment which in its opinion should be varied, the Court may remit the case to such court of last resort in the province, to fix the same in accordance with the principle which the Court declares to be applicable.

I am unable to distinguish the jurisdiction given above to a Divisional Court for Ontario to hear any appeal on a question of law, from that to which our court is restricted by this amendment.

The principle referred to in this amendment to the Supreme Court Act must, I think, be taken to be a principle of law and thus substantially the same kind of jurisdiction as was given to the Divisional Court for Ontario as a court of last resort in the province. Therefore until that court has passed upon the principle of law involved herein it seems to me we have no jurisdiction.

It seems to be rather unfortunate that counsel concerned in the case before the board in appealing here had not observed this change in the law and, on the other hand, equally unfortunate that counsel when the case was before us in the first instance did not call our attention to the amendment. I see no way out of the difficulty except to declare that we never had jurisdiction in either of these cases. The appellant should have gone to the Divisional Court for Ontario, and then possibly either party might have found his way to coming here.

There should be no costs to either party in all the proceedings that have been taken, in the way of appealing here or proceeding on the reference back.

DUFF J.—The appeals should be quashed.

ANGLIN J.—The owner appeals against the confirmation by the Ontario Railway & Municipal Board of assessment of lands in the City of Port Arthur for the years 1920 and 1921. The order of the board reversed the decision of the learned District Court Judge and restored the original assessments, which had been confirmed by the Court of Revision. Although consolidated by order of the registrar for convenience in the preparation of the case and for hearing, there are two distinct appeals, one for each year, which must be separately considered.

At the threshold of the 1921 appeal we encounter a question of jurisdiction. This appeal falls within the amendments to the Supreme Court Act made in 1920 and, special leave to appeal not having been obtained, our jurisdiction to hear it depends upon whether

> the amount or value of the matter in controversy in the appeal exceeds the sum of $2,000 (s. 39).

The total assessment of the appellant's property for the year 1921, as fixed by the Ontario Railway and Municipal Board, is $50,000; the rate of taxation for the year was 41 mills, as appears by the affidavit of Malcolm A. McKay, filed on the motion made to the registrar to affirm jurisdiction; the total taxes for the year 1921 were therefore $2,050. If the appellant sought to have his lands declared non-assessable or entirely valueless, $2,050 would be the amount in controversy in the appeal. But he does not ask this. On the contrary, he submits to the assessment as fixed by the learned District Court Judge, on appeal from the Court of Revision, at $100 per acre, making a total assessment of $20,000. The matter in controversy on the present appeal is

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therefore not the entire amount of the taxes for 1921, but the difference between $2,050 (taxes on an assessment of $50,000) and $802 (taxes on an assessment of $20,000) *i.e.*, $1,248. It follows that this appeal fails for want of jurisdiction.

The appeal against the assessment of 1920 falls under the former sec. 41 of the Supreme Court Act, R.S.C. 1906, c. 139. The assessment for that year being $60,000, no difficulty arises on the score of the amount involved. But the right of appeal conferred by former s. 41 is

> from the judgment of any Court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes.

By s. s. 6 of s. 80 of the Ontario Assessment Act (R.S.O. 1914, c. 195) as amended by s.s. 2 of s. 6 of the Assessment Amendment Act, 1916, c. 41, it is provided that

> (6) An Appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of the Municipal Board.

The appellant comes directly to this court without having appealed to the Appellate Divisional Court and his appeal is in respect of two alleged errors of law on the part of the board, viz., (*a*) misconstruction of s. 40 (1) and s. 69 (16) of the Assessment Act and (*b*) the absence of any evidence that the actual value of the lands in question exceeds the $100 per acre fixed by the learned District Court Judge.

Under these circumstances it seems reasonably clear that the Ontario Railway and Municipal Board cannot be said to have been "the court of last resort created under provincial legislation", within the meaning of former s. 41 of the Supreme Court Act. The

question of jurisdiction was not raised or discussed at bar either on the original argument of the present, or on the hearing of the former, appeal in this case (1) and it then escaped the attention of the court.

When the amendment to the Assessment Act made in 1916 came to our notice during the consideration of the present appeal the court directed that counsel should be heard on the question of jurisdiction which it raises. This hearing took place on the first day of the present term. As already stated, I am satisfied that we are without jurisdiction in regard to the assessment for 1920 as well as to that of 1921. But as I had already considered the appeal on the assessment of 1920 on its merits, I shall shortly state the reasons why, in my opinion, it could not succeed.

On examining the judgment of the board I find that it professedly disposed of the appeal to it in accordance with the decision of this court on the former appeal. I am not convinced that the tenor of that decision was not correctly appreciated by the board. Observations of the Chairman made in the course of the hearing indicate that it was.

In the judgment itself the board bases its finding on the oral evidence and appeals to the assessed value of adjacent lands under s. 69 (16) merely for "confirmation of its conclusion". I find nothing to warrant an assumption that the avowed adherence of the board to the principle of assessment defined by this court was merely colourable. Such a view of the board's action would be justifiable only on a record admitting of no doubt. I am therefore unable to hold that there was on this occasion a repetition of the misconstruction or misapplication of s. 40 (1) and s. 69 (16) of the

(1) 61 Can. S.C.R. 326.

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Assessment Act which we were of the opinion had influenced the board's former decision. I am not prepared to find that in reaching its conclusion upon the case now before us the board proceeded upon a mistaken view of the meaning and effect of the statutory provision that "land shall be assessed at its actual value" (s. 40 (1)). While, if weighing the evidence before the board, I should quite probably have reached the conclusion that it was insufficient to warrant disturbing the valuation made by the learned District Court Judge, it is not the function of this court to interfere in matters of assessment merely because in its opinion the valuation of the property has upon the weight of evidence been placed at too high a figure. We may vary the valuation made by the court of last resort in the province only if satisfied that in arriving at it that court "has proceeded upon an erroneous principle," (s. 41 Supreme Court Act, as amended by 8 & 9 Geo. V., c. 7).

An entire absence of evidence to sustain the valuation of the court *a quo* may warrant our intervention on the ground that in making it that court must have proceeded upon some erroneous principle. But in the case at bar I am not satisfied that there was not some evidence, given by Lionel C. S. Hallam, T. D. Roberts, J. A. Rapsey and W. F. Trenks, on which the board might base a valuation of $300 per acre. Personally I might not—probably would not—have accepted that evidence as sufficient to warrant setting aside the judgment of the learned District Court Judge. But without finding error in principle on the part of the board, which in my opinion has not been shewn, we are not entitled to review the valuation made by it.

The appeals fail and should be dismissed with costs as of a motion to quash.

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Brodeur J.

BRODEUR J.—I am of opinion that the appeal should fail for want of jurisdiction as to the assessment for 1921 for the reason stated by my brother Anglin. As far as the assessment for 1920 is concerned, I am of the view that the appeal should be dismissed on the ground that there was evidence to justify the Ontario Railway & Municipal Board in reaching the conclusion at which they have arrived, and that then we should not interfere with their decision because the members of the board were in a better position than we are to determine the actual values of the properties assessed.

A question has been raised as to whether we had jurisdiction as to this latter assessment,

This question of jurisdiction should be determined by the Supreme Court Act existing before the amendment of 1920. By the law then in force there is an appeal from the judgment of any court of last resort.

The provisions of the Ontario Assessment Act shew conclusively that the Ontario Railway & Municipal Board was not a court of final jurisdiction.

It is enacted in this Assessment Act that an appeal lies from the decision of the board to a divisional court upon all questions of law.

In view of these provisions, the decision of the Municipal Board is not a final judgment of the highest court of last resort (sec. 41 Supreme Court Act).

For these reasons the appellant fails and his appeal should be dismissed with costs.

MIGNAULT J.—There are two appeals here, the first from the order or judgment of the Ontario and Municipal Board fixing the assessment on the appellant's

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two properties in Port Arthur at $60,000.00 for the year 1920, and from the order of the board fixing the assessment for 1921 on the same properties at $49,750. Our jurisdiction over the 1920 appeal is governed by section 41 of the Supreme Court Act as in force before July 1st, 1920, and over the 1921 appeal by the new provisions enacted by chapter 32 of the statutes of 1920 (Can.).

At the hearing, doubts were expressed from the bench as to the right to appeal from the order respecting the 1921 assessment and further consideration has only confirmed these doubts. What is really in controversy in the appeal, is the difference between the amount of the taxes for 1921 at the valuation fixed by the Board and the amount of these taxes at the valuation contended for by the appellant, and this is less than $2,000.00.

There was no suggestion from counsel that there was any possible question as to the jurisdiction of this court to deal with the appeal from the order of the board concerning the 1920 assessment, which, as I have stated, is governed by section 41 of the Supreme Court Act before its amendment in 1920, for under that section the right of appeal exists when the judgment involves the assessment of property at a value of not less than $10,000.00. This court, without any doubt having been expressed as to its jurisdiction, dealt with the 1920 assessment in December of that year and referred back the matter to the Ontario Railway and Municipal Board for the reasons stated in its judgment. (1) And this appeal is from the order of the board on the reference back from this court.

(1) 61 Can. S.C.R. 326.

During the consideration of this case, however, a new difficulty was encountered as to our jurisdiction, a difficulty which none of the counsel had ever even hinted at. It is obvious that the court must look to counsel who come before it to draw its attention to any statutory provision bearing on a case which is being argued by them. Of course, there was no intention here to mislead the court—the professional standing of the learned counsel in the present case would render any such suggestion entirely out of the question—but all the same there is a material statutory provision in the Ontario Assessment Act which was never referred to, either now or during the hearing on the first appeal.

By section 41 of the Supreme Court Act, before the 1920 amendment, an appeal lay from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, but the valuation of the property assessed could not be varied by this court unless it was satisfied that such court of last resort in the province had proceeded upon an erroneous principle. The appellant here assumed, and the respondent did not dispute, that the Ontario Railway and Municipal Board was a court of last resort in municipal matters.

When, however, the Assessment Act and its amendments were examined, it appeared that under subsection 6 of section 80 of the Act an appeal from the board on any question of law was possible, by leave obtained, to a Divisional Court. There might have been a question whether the necessity of obtaining such leave prevented the board from being normally the court of last resort in the province on such matters.

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Mignault J.

But by chapter 41 of the statutes of 1916, section 6, subsection 2, (Ont.), the provision in subsection 6 requiring leave was struck out, so that now, under subsection 6 as amended, there is an absolute right of appeal on a question of law (and our appeal under section 41 of the Supreme Court Act is only on a question of law) from the order of the Ontario Railway and Municipal Board to a divisional court. It follows that the Board can no longer be said to be the court of last resort in the province empowered to adjudicate concerning the assessment of property for municipal purposes.

It was decided to hear the parties on this question of jurisdiction, and this was done on the first day of the present term. Nothing said by the learned counsel for the appellant has convinced me that we have any jurisdiction to hear the 1920 appeal. I would therefore quash it for want of jurisdiction.

Appeal quashed with costs.

Solicitor for the appellant: *Malcolm A. McKay.*

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

ELLA MAUD HICKS AND MARY ETTA ELEY..... APPELLANTS;

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*May 30.
*June 17.

AND

WILLIAM McCLURE AND GEORGE McCLURE..... RESPONDENTS.

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

Will—Devise to executors for sale—Disposal of proceeds—Sale by testator—Effect on devise.

A clause in a will directed the executors to sell a certain farm and divide the proceeds between the testator's two sons. The testator himself sold the farm and took a mortgage for part of the purchase money. This mortgage he held unimpaired at his death and it formed part of his estate. The executors applied by originating summons to the Supreme Court of Ontario for construction of this clause in the will.

Held, affirming the judgment of the Appellate Division (51 Ont. L.R. 278) that the trust declared by the will in respect to the proceeds of sale of the farm applied to the mortgage which passed to the testator's sons in the proportions he indicated.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the hearing on an originating summons for construction of a will.

The question raised on the appeal was whether the devise in the will of William McClure of the proceeds of sale of a farm by the executors to the

*PRESENT:—Sir Louis Davies CJ. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 51 Ont. L.R. 278 sub nom. *In re McClure.*

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respondents applied to the mortgage taken by the testator when he himself sold the farm or such mortgage fell into the residue of the estate. The courts below held that it passed to the respondents.

Proudfoot K.C. for the appellants. By the Ontario Wills Act a will speaks as if executed immediately before death. Applying that rule here there was nothing when the testator died for the devise of respondents to operate on. See *In re Dods* (1); In *re Clowes* (2).

The executors were directed to sell "my farm" which the testator made impossible. No "contary intention" to this direction can be found and the will must speak from the death. The "contrary intention" in sec. 26 of the Wills Act can only be looked for in cases of error by the testator where the intention is clear. See *In re Clifford* (3).

Nesbitt K.C. and *J. H. G. Wallace* for the respondents. The devise was of the proceeds from the sale of the farm and these proceeds have not lost their identity. The intention of the testator is clear and must govern. See *In re Carter* (4); *In re Bick* (5).

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin J. with which I fully concur, I would dismiss this appeal with costs.

IDINGTON J.—Having considered the cases cited by appellant, as well as those by the learned judges below, I agree with the reasons assigned by the latter in

(1) 1 Ont. L.R. 7.
(2) [1893] 1 Ch. 214.
(3) [1912] 1 Ch. 29.
(4) [1900] 1 Ch. 801.
(5) [1920] 1 Ch. 488.

support of the judgment appealed from. It seems to me that the cases of clear ademption relied upon in appellant's factum are beside the real question in issue.

That question is whether or not the testator, having bequeathed to the respondents the proceeds of the sale of his farm, directed by him to be effected by his executors, can be carried out by them, when he anticipated their selling by acting himself as seller, and took the mortgage now left in their hands as part of the purchase money so clearly designed by the terms of the will to become theirs.

I may add to those cited below and herein the decision in *Morrice* v. *Aylmer* (1), as in line with a mode of thought more liberal than some earlier decisions and worth looking at in such a case as this.

This appeal should be dismissed with costs and in any event the executors to have their costs out of the estate.

DUFF J.—This appeal presents a question of will construction which is one of not a little difficulty. The testator William McClure, by his will directed that the executors should sell his farm and that the proceeds should be divided in a certain way. By another clause he disposed of cash on hand or securities for money and "all other property and estate". Before his death he sold the farm which was the subject of the above mentioned trust and at his death part of the purchase money remained unpaid secured by a mortgage on the farm.

The question is whether the trust declared in respect of the farm applies to the mortgage. My conclusion is that the judgment of the Appellate Division should

(1) 10 Ch. App. 148; L.R. 7 H.L. 717.

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Duff J.

be maintained. The question may fairly, I think, be stated by an adaptation of the language of Farwell J. cited by Mr. Justice Hodgins from *In re Dowsett* (1). Has the testator manifested his intention that his gift is not of the particular property only but of the proceeds of the property so long as the proceeds retain a form by which they can be identified as such? I think such an intention is manifest by the terms of the will.

ANGLIN J.—The circumstance that the devise to the respondent is not of the farm in specie but of the proceeds of the sale of it directed to be made by the executor distinguishes this case from *In re Clowes* (2) where the devise was of land in specie, subsequently sold by the testator (who had, as in the case at bar, taken a mortgage on it to secure payment of part of the purchase money), sufficiently to afford opportunity for the application of s. 26 of the Wills Act and to bring this case within the principles of such decisions as *In re Clifford* (3); *In re Leeming* (4); *In re Carter* (5); and *In re Johnstone's Settlement* (6).

There seems to be enough in the devise here in question to indicate an intention that the funds representing the property dealt with should go to the beneficiary in whatever form they might be found at the testator's death. The "contrary intention" of s. 27 of the Wills Act therefore appears. *Morgan* v. *Thomas* (7) shews that in a case such as this a broad and even a lax construction of the terms of the will should prevail if thereby effect will more probably

(1) [1901] 1 Ch. 398.
(2) [1893] 1 Ch. 214.
(3) [1912] 1 Ch. 29, 35.
(4) [1912] 1 Ch. 828.
(5) [1900] 1 Ch. 801.
(6) 14 Ch. D. 162.
(7) 6 Ch. D. 176.

be given to the testator's intention. That case and *Manton* v. *Tabois* (1) establish that partial ademption owing to a portion of the property which is the subject of the devise being unavailable or to its identity having been lost will not prevent the devise taking effect as to so much of it as still forms part of the testator's available estate and can be fully identified.

Looking at the substance of the devise in question and giving effect to what appears to have been the probable intention of the testator, I am of the opinion that the mortgage in question passed to the respondents in the proportions indicated by the testator. Passages from the judgment delivered in the House of Lords in *Beddington* v. *Baumann* (2), quoted by Mr. Justice Hodgins, confirm this view. Adapting the language of Lord Davey the testator's will is

> expressed in such language and in such large terms as to carry not only the property as it then existed, but also this property which has arisen from the particular dealings with it.

BRODEUR J.—This is an appeal concerning the construction of a will. William McClure had by his will directed his executor to sell his farm and to divide the proceeds between his two sons. Before his death he sold the farm himself and part of the purchase price was secured by a mortgage thereon.

The question is whether the devise fails because the farm had already been sold.

If the farm itself had been devised to the legatees, the solution might be different; *Gale* v. *Gale* (3); *Farrar* v. *Winterton* (4); *Blake* v. *Blake* (5); *In re Clowes* (6); *In re Dods* (7).

(1) 30 Ch. D. 92.
(2) [1903] A.C. 13
(3) 21 Beav. 349.
(4) 5 Beav. 1.
(5) [1880] 15 Ch. D. 481.
(6) [1893] 1 Ch. 214.
(7) 1 Ont. L.R. 7.

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Brodeur J.

But the testator's executor was called upon to distribute the proceeds of the farm. There is nothing to shew that the testator did intend in selling his farm himself to prevent his beneficiaries under the will from having the proceeds of the mortgage handed over by the executor to his legatees. *In re Graham* (1).

The appeal should be dismissed. As there is some diversity of opinion as to the construction of such a will the costs of all parties should be paid out of the estate.

MIGNAULT J.—The question here is whether a bequest, whereby the testator directed his executors to sell his farm and divide the net proceeds among the respondents in the proportions therein stated, took effect the testator having himself sold the farm and taken a mortgage for the balance of the purchase price. The mortgage was still unpaid at the testator's death.

In my opinion, the bequest was of the proceeds of the farm and not of the farm itself, and it is not defeated because the testator anticipated the sale which he had ordered his executors to make.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *William A. Skeans.*

Solicitor for the respondents: *J. H. G. Wallace.*

(1) 8 Ont. W. N. 497.

WILLIAM J. MAJOR (PLAINTIFF) . . APPELLANT;

1922

*June 8.
*June 17.

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) . . . RESPONDENT.

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

Carriage of goods—Claim for loss—Illegal purpose—Contravention of Temperance Act—Action—Contract or tort.

M. bought liquor in Montreal for shipment to Windsor, Ont., intending to re-sell it there in contravention of the Temperance Acts. It was shipped over the C.P. Ry. and arrived at Windsor where part of it was stolen before delivery. M. brought action for the value of the portion not delivered.

Held, affirming the judgment of the Appellate Division (51 Ont. L.R. 370) that whether the action is one *ex contractu or ex delicto* it is based on a breach of the obligation to deliver the goods and the plaintiff must fail as he has to rely on his own illegal act. The carrier being innocent of the offence against the law may set up this illegality as a defence.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial in favour of the respondent.

The facts are sufficiently stated in the above headnote. The question for decision on the appeal is—Can a plaintiff who has induced an innocent defendant to enter into a contract, involving violation of a positive statute, recover damages from that defendant for failure to complete the contract, or, in tort, for anything arising out of the illegal transaction?

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

(1) 51 Ont. L.R. 370.

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Geo. F. Henderson, K.C. for the appellant. The plaintiff could legally import the liquor for sale outside the province. See Hals. Laws of England, vol. 4, page 8, as to common carriers.

The action is not based on contract. The carrier is liable at common law for loss of the goods. Hals. ib.

Where the alleged intention is only collateral to the contract it does not defeat a claim in tort. *Gordon* v. *Chief Commissioner Metropolitan Police* (1).

MacMurchy K.C. for the respondent. *Ex turpi causa oritur non actio.* See *Brown* v. *Moore* (2); 7 Hals. Laws of England, page 408, sec. 845.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin J. with which I fully concur, I would dismiss this appeal with costs.

IDINGTON J.—The appellant, through his agents in Montreal, induced the respondent to accept at Montreal a shipment of intoxicating liquor to be carried by it to Windsor in Ontario to be delivered through appellant at the latter place, by assuring it in the shipping bill as follows:—

> We hereby undertake and declare that this shipment is of a class and shipped under conditions permitted by law.

The learned trial judge finds that the said shipment of liquor was in fact intended by the appellant to be used by him in way of selling same in Ontario in violation of the statutes then in force prohibiting such re-sale, and hence also in violation of 6-7 George V., (1916) c. 19, sections 1 and 2, designed to aid then existing prohibition enactments in force in Ontario.

(1) [1910] 2 K.B. 1080. (2) 62 Can. S.C.R. 487 at p. 493.

Part of the goods so shipped were stolen in Windsor from the respondent's car wherein same had been shipped, and the appellant seeks to hold the respondent as a common carrier liable for such loss.

This pretension has been rejected both by the learned trial judge and the Appellate Division of the Supreme Court of Ontario.

Hence this appeal to us.

The relevant law is as was stated by Lord Mansfield in *Holman* v. *Johnson* (1) as follows:—

> The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant but because they will not lend their aid to such a plaintiff.

That remains good law to the present, seems most aptly to answer the claim herein of the appellant, and should not be frittered away by any nice distinctions.

This statement of the law is none the less applicable though not applied therein to defeat the claim made because the contract there in question was one made abroad and violated no English law; yet the principles so enunciated have been adopted and applied in a long line of cases since.

If the goods in question had been stolen in the Province of Quebec and there had been no such Dominion Act as relied upon, possibly the respondent might have been liable, but who can question the intention of the law applicable to sale, or intention to re-sell, in Ontario, and the Dominion Act being prohibitive of such traffic unless for the private consumption by the consignee.

(1) [1775] 1 Cowp. 341.

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Idington J.

I need not follow the history of the application of the law so declared by Lord Mansfield.

The appellant seeks to apply the exceptional cases cited in Broom's Legal Maxims, where only a penalty was attached to the act, and prohibition was not intended.

It is quite true that there are many cases which have arisen, under some Revenue Acts for example, when it was held that the purview of the Act not being prohibition, therefore the turpitude of which the court must take notice did not exist.

I am afraid that is asking us to go blind in this case. In like way conversely the case law relative to the results arising out of the Gaming Acts and other such Acts do not help much unless to confuse one and so mislead.

Again it is suggested that this action is founded on tort and not on contract.

I cannot so hold for it clearly is founded on the contractual relation between the appellant and respondent as a common carrier, though these relations are so often changed by statutory provisions.

I would dismiss the appeal with costs.

ANGLIN J.—In my opinion, however the plaintiff's case is put, upon the pleadings and facts in evidence his claim must be for breach by the defendant of its obligation to deliver certain of his goods to him at Windsor, Ontario. His sole cause of action consists of the duty so to deliver and its breach. To establish that duty he is obliged to shew the placing of his goods with the defendant for delivery as alleged. But the placing of the goods with the defendant for that purpose was, upon the evidence, a contravention

of the Dominion statute 6-7 Geo. V., c. 19, sec. 1 (*a*), inasmuch as it was a step in causing them to be sent or carried from one province of Canada into another province of Canada with the intention of there dealing with them in violation of the law of such latter province. The plaintiff is, therefore, in establishing his cause of action, obliged to invoke an illegal act in which he participated and consequently cannot maintain his action; *Simpson* v. *Bloss* (1); *Taylor* v. *Chester* (2); *Scott* v. *Brown. Doering, McNab & Co.* (3). The illegality is not in a collateral matter but in the very transaction out of which the alleged duty arose of the non-fulfilment of which the plaintiff complains.

The defendant being itself innocent in the matter, is not precluded from setting up as a defence the illegal intent of the plaintiff.

The statute 6-7 Geo. V., c. 19 (D.), was passed in aid of provincial Temperance Acts. Its penalizing clauses were enacted not merely for the purpose of revenue but to supplement and render more effective certain prohibitory provisions of such provincial enactments. They therefore impliedly prohibit and render illegal the acts they penalize. Broom's Legal Maxims, 8th ed., page 579.

I have no doubt that the judgment appealed from is right and should be affirmed.

BRODEUR J.—In 1916 the Province of Ontario passed a law by which no person could sell liquor without a licence. In the same year the Federal Parliament, for the evident purpose of reinforcing the

(1) [1816] 7 Taun. 246. (2) L.R. 4 Q.B. 309, 314.
(3) [1892] 2 Q.B. 724 at pp. 728, 734.

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temperance sentiment of the provinces, passed a law declaring that any person who sends, ships, etc. into any province from any other province any intoxicating liquor

knowing or intending that such intoxicating liquor will or shall be thereafter dealt with in violation of the law of the province into which such intoxicating liquor is sent, shipped * * * shall be liable * * * * * to a penalty.

In March, 1920, the appellant Major, who had been for years connected with the liquor trade in Ontario, bought in Montreal 100 cases of liquor from Law, Young & Co. and had them shipped by the Canadian Pacific Railway to Windsor, Ontario. The railway company would not undertake to carry these goods without having from the shipper a written guarantee that the liquor was

of a class and shipped under conditions permitted by law.

The goods arrived at their destination in Windsor but a part of the shipment was stolen in the yards of the railway company. There is no evidence that this robbery had been rendered possible by the negligence of the company in not properly guarding the yards or in not maintaining therein sufficient police protection. Major now sues the company to recover the value of the cases which have been stolen.

I should state also that in the month of May, 1920, Major was convicted under the Ontario Temperance Act for having sold in breach of the Act all the liquor he had received from that shipment and from other similar shipments. The irresistible inference from this conviction is that Major was still busily engaged in the liquor business but was now carrying out that business illegally without having the required licence.

The railway company pleaded in answer to Major's action that the liquor had been purchased by Major with the intent of violating the Ontario Temperance Act; that he was in bad faith when he represented through his agents that the shipment was made for legal purposes; that the contract to carry that liquor was illegal and that he could not recover under it.

The trial judge found that these goods had been bought by Major for illegal purposes. The latter tried to establish that the liquor had been imported in Ontario for his own personal use but the trial judge did not believe him.

It is evident that he was engaged in an illicit trade and that when he shipped these goods he knew and intended that such liquor was to be dealt with in violation of the law of Ontario.

This finding of the trial judge was concurred in by the Appellate Division and there is certainly no justification for us to interfere with this finding.

As far as he was concerned the contract of carriage which Major made with the Canadian Pacific Railway of that liquor was illegal.

Then could Major, who has induced an innocent defendant to enter into a contract involving a violation of law, recover damages from that defendant for failure to complete the contract?

As I have already said, no negligence is charged against the defendant railway company. I am of opinion that the plaintiff, having delivered these goods under an unlawful agreement, could not recover them back. *Taylor* v. *Chester* (1).

(1) L.R. 4 Q.B. 309 at p. 314.

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Brodeur J.

No action (says Halsbury Laws of England, vol. 7, page 408), can be brought for the purpose of enforcing an illegal contract whether directly or indirectly, or of recovering a share of the proceeds of an illegal transaction, by any parties to it. Where the object of a contract is illegal the whole transaction is tainted with illegality, and no right of action exists in respect of anything arising out of the transaction. In such a case the maxim *in pari delicto, potior est conditio defendentis* applies, and the test for determining whether an action lies is to see whether the plaintiff can make out his claim without relying on the illegal transaction to which he was a party.

Applying those principles as laid down in *Taylor* v. *Chester* (1) and in Halsbury to the facts of this case, I consider that the plaintiff Major made an illegal contract when he shipped his liquor to Windsor with the intent of violating the Ontario Temperance Act.

Mr. Henderson, in his able argument, stated that the action was in tort and that in such a case the principles above quoted would not apply. Whether his claim is for the recovery or delivery of the goods or whether it is for damages arising out of non-delivery, the plaintiff has to rely on the contract of carriage which he made with the company; and, as this contract is illegal, he could not recover whether his action is in tort or *ex contractu.* In such cases the courts cannot lend their assistance to an action which appears to arise *ex turpi causa,* or the transgressing the laws of this country. *Holman* v. *Johnson* (2).

For those reasons, I am of opinion that this appeal should be dismissed with costs.

MIGNAULT J.—Notwithstanding Mr. Henderson's very ingenious argument for the appellant, I cannot escape from the conclusion that to succeed he must rely on an illegal contract, although an innocent one in so far as the respondent is concerned.

(1) L.R. 4 Q.B. 309 at p. 314. (2) Cowp. 343.

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Mignault J.

Mr. Henderson argued that the shipment of liquor was not prohibited by the statute 6-7 Geo. V., ch. 19, but that the person shipping it, with the intention that it be thereafter dealt with in violation of the law of the province into which the liquor was sent, merely incurred a penalty. I cannot so read the statute; it is clearly prohibitive as the context shews. So the intention of the appellant, when he made the shipment, to deal with the liquor when it reached him in Windsor, Ont., in violation of the Ontario Temperance Act rendered the shipment an illegal one.

Mr. Henderson also argued that he could claim damages from the respondent for non-delivery of the liquor without relying at all upon an illegal contract of shipment, but on the ground that the defendant having come into possession of the appellant's property, and having by its negligence suffered it to be stolen, the appellant could proceed against the defendant in tort and not upon any contract of shipment. The refinement of this distinction shews the ingenuity of the learned counsel, but to my mind it is utterly impossible to get away from the contract. The appellant had the liquor shipped to him, and a portion of it was lost or stolen before it reached him. The liability clearly arises here out of the contract. The respondent, acting as a common carrier of goods, was in possession of this liquor by virtue of a contract of carriage. It was liable without proof of negligence, this liability being one at common law. It is true that an action of tort lies against a common carrier without proof of any contract (Halsbury, *vo.* Carriers, no. 13), but it is impossible to disregard the contract in a

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case like this one, where it was made in violation of the law. Even if the plaintiff could state a cause of action without referring to any contract—on the contrary, in his statement of claim he expressly alleges the contract of carriage—still if it appears from the evidence that there has really been an unlawful contract between the parties, the court would be bound of its own motion to take the objection that the contract is void. *Montefiore* v. *Menday Motor Components Co.* (1).

I think, therefore, that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Davis & Healy.

Solicitors for the respondent: *MacMurchy & Spence.*

(1) [1918] 2 K.B. 241.

THE ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA (PLAINTIFF)..... APPELLANT;

1922

*May 11, 12.
*Oct. 10.

AND

THE ATTORNEY-GENERAL OF THE DOMINION OF CANADA (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Constitutional law—Statutes—Construction—Importation of liquor by province for sale—"Taxation" on "property"—Customs duties—Exemption—B.N.A. Act, [1867] s. 125—(B.C.) 11 Geo. V. c. 30.

The government of the province of British Columbia in the exercise of its powers of control and sale of alcoholic liquors under the "Government Liquor Act", (11 Geo. V, (B.C.) c. 30) cannot import such liquors into the province for the purposes of sale without paying customs duties to the Dominion of Canada. Brodeur J. dissenting.

The levying of customs duties on the goods in question is not "taxation" on "property" belonging to a province within the purview of section 125 of the B.N.A. Act. Brodeur J. dissenting.

Judgment of the Exchequer Court (21 Ex. C.R. 281) affirmed, Brodeur J. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing appellant's action.

This action has been taken by the Crown in right of the province of British Columbia to have it declared that it could import liquors into Canada for purposes

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 21 Ex. C.R. 281.

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of sale pursuant to the provisions of the "Government Liquor Act" ([B.C.] 11 Geo. V. c. 30) without paying the customs duties imposed by the Crown in right of the Dominion of Canada upon the importation thereof.

Eug. Lafleur K.C. for the appellant: The word "taxation" in section 125 of the B.N.A. Act includes the imposition of customs duties. *Bank of Toronto* v. *Lambe* (1); *Cotton* v. *The King* (2).

The word "property" in section 125 includes moveable property, is not restricted to property within the province and is not limited to such property as may be incident to the administration of the provincial government.

The taxation in question is imposed upon the property by the terms of the taxing statutes.

Bayly K.C. for the Attorney-General for the province of Ontario, intervenant.

Newcombe K.C. and *Plaxton* for the respondent. The customs duties imposed in respect of the importation of liquors by the province do not violate either the letter or the spirit of section 125 of the B.N.A. Act.

These duties do not constitute "taxation" in the sense in which that term is used in section 125, but are merely in the nature of regulations of trade and commerce.

These duties, even supposing them to be in the nature of "taxation" do not constitute taxation on "property" within the meaning of section 125. *Attorney General of New South Wales* v. *Collector of Customs* (3).

(1) [1887] 12 App. Cas. 582. (2) [1914] A.C. 176 at pp. 192, 193.
(3) 5 Com. L.R. 818.

The case of liquor which has been imported by the province is not within the connotation of the word "property" in section 125.

The exemption from taxation provided by section 125 does not extend to goods which, though belonging to the province, are not intended to be used in the execution of the ordinary functions of government or for the purposes of the provincial government as these were understood at the time of the Union.

The word "taxation" in section 125 was not intended to comprehend customs duties, for the reason that the prohibition enacted by this section was intended to be a reciprocal prohibition and therefore does not extend as regards the Dominion to indirect taxation.

The word "property" must be held to be limited, in accordance with the *episdem generis* or *noscitur a sociis* rule of construction, to species of property of the same nature or description as "lands", that is to say, to things arising out of, or incident or appurtenant to lands.

IDINGTON J.—The government of the province of British Columbia having embarked in the business of dealing in intoxicating liquors and thereby found istelf under the necessity of importing "Johnnie Walker Black Label" whiskey, claims that it is exempt from the payment of the usual customs duties imposed by the Dominion Parliament upon such like importations, and rests its claim upon section 125 of the British North America Act, 1867, which reads as follows:—

> No lands or property belonging to Canada or any province shall be liable to taxation.

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Idington J.

This section falls under the caption "VIII.—Revenues; Debts; Assets; Taxation"; in that Act, and is the last but one of the twenty-five sections thereunder devoted to the said several subject matters—the last one dealing with a subject which does not concern us herein.

I am of the opinion that this exemption only relates to such lands and property as fall within the purview of some one or other of the sections preceding it under said caption and of those specifically set forth in the third and fourth schedule of the Act or by implication resting upon those or other provisions of the said B.N.A. Act and which may thereby reasonably be held to have been within the contemplation of the framers of the Act.

The Intercolonial Railway agreed by the terms of the said Act to be built by the Dominion Government would seem to me to be of such lastly suggested character.

The mere mention of the possibility of any province embarking upon such an enterprise as the province of British Columbia has done, and is now in question, I venture to think would have surprised any one in the far off day when the B.N.A. Act was enacted after much public discussion.

Hence it seems to me that the said section 125, above quoted, cannot reasonably be extended to cover any such case as now presented.

Indeed if any regard is had to the nature of the legislation in the immediate context where the section is found, and to the exclusive powers given by the items 2 and 3 of the 91st section of the Act, and the implication therein, the appellant's contention seems to me hardly arguable.

I do not propose dealing with the over refinements put forward in regard to the meaning of taxation.

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Idington J.

The consideration of this instrument of government presented to us to interpret, should be approached and construed in the wide comprehensive spirit in which it was framed and the means of destroying its efficacy should not be furnished by such a new departure as we are invited to take.

It is in that regard that the language of the late Mr. Justice Brewer in the case of *South Carolina* v. *United States* (1), quoted in respondent's factum, may help our range of vision herein; though of course, the decision of the courts of that country upon a constitution fundamentally different from the conception embodied in the B.N.A. Act in reserving for the Dominion what is not expressly given exclusively to the provinces, instead of the converse conception found in the said constitution, cannot help us very much.

I think this appeal should be dismissed with costs if asked.

DUFF J.—The second of the enumerated heads of sec. 91 "Regulation of Trade and Commerce" has been the subject of much controversy, but there has not been I think any difference of opinion upon the point that the amplest authority in relation to the subject of external trade is vested in the Dominion. By sec. 91 to the Dominion is committed exclusive authority over the "regulation of trade and commerce" over navigation and shipping, over the postal service and external communications as well as over aliens and naturalization; and by section 132 full authority is given to the Dominion in relation to the enforcement of treaty obligations. The statute itself, I think, gives abundant evidence that control over external trade by the central authority is an integral part of the confederation scheme.

(1) 199 U.S. R. 437.

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THE ATTORNEY GENERAL OF BRITISH COLUMBIA v. THE ATTORNEY GENERAL FOR CANADA.

Duff J.

The importance of the customs duties as an instrument for the regulation of external trade is too obvious to require comment. At the date of confederation there was probably only one country—The United Kingdom—in which such duties were resorted to for the exclusive purpose of raising a revenue and *prima facie* plenary authority in respect of them would seem to be an adjunct of exclusive authority to regulate foreign trade.

I have no difficulty in point of legal construction in holding that this authority is given by sec. 91 (2), that is to say that the authority to levy customs duties for trade purposes is embraced in the authority thereby conferred, "the regulation of trade and commerce". Mr. Newcombe in his valuable argument has collected a mass of evidence which conclusively establishes that it is strictly in accordance with legislative as well as judicial usage so to read the words of the second head of section 91. It is unnecessary to review that evidence. The language used for defining the authority of the Dominion on the subject of taxation—the "raising of money by any mode or system of taxation"— seems to distinguish between taxation for trade purposes and taxation for the purpose of raising money. Since the imposition of customs duties (as being indirect taxation) is excluded from the provincial jurisdiction, the words of the last mentioned heading suggest that such duties except where imposed primarily at all events for purposes of revenue are treated as falling within the "ambit" of the power given to the Dominion in relation to "Trade and Commerce".

The effect of the contention of the province is that by force of section 125 the control over foreign trade entrusted to the Dominion is subject to the limitation

that goods imported by a provincial government are not subject to customs duties. It requires little reflection to enable one to realize that this would be a restriction upon the Dominion authority of wide scope and of the greatest importance and it cannot be assumed, if the unrestricted right of free importation is given to the provinces, that it is a right which the provinces are not entitled (without incurring the reproach of abusing a constitutional power) to exercise to the fullest extent which the interests of the province may demand; and the proposition stated above as to the place which the constitutional scheme accords to the Dominion control of foreign trade must receive very serious qualification. Indeed the theory of Dominion primacy must on such a construction of section 125 postulate a theoretical application of the power of disallowance with a freedom which could hardly have been contemplated by the founders of a permanent federal system.

Of course, if the language of section 125 is quite unequivocal effect must be given to its plain meaning. But on the other hand the Act does, in my opinion (sec. 125 apart) contemplate so clearly the existence of this primacy of Dominion authority in the matter of external trade and control of customs as so clearly essential to the maintenance of this primacy that I must, I think, reject a construction of that section which would obviously render that control insecure, unless the language is too inflexible to enable me to do so.

It is indubitable that the word "taxation" in itself denotes a class of operations which includes the raising of moneys for public purposes by the imposition of customs duties. But that is not of much assistance.

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Duff J.

Our first duty in construing the section is, of course, to ascertain the ordinary and grammatical meaning of the words but it is with the ordinary and grammatical meaning of the words in the setting in which they are found and as applied to the subject matter that we are concerned. What the section is dealing with is not taxation in general but the liability of "property" to "taxation" and the word taxation when used in this association has, I think, *prima facie* a much less comprehensive import than that which would be ascribed to it standing by itself or in some other connections. Customs duties when levied for the purpose of raising a revenue are, speaking broadly and in the general view of them, taxes on consumable commodities, taxes on consumption; while the taxation of capital, of assets, of property is a very different matter. And I think the distinction affects the use of language to this extent at least that neither in popular speech nor in more deliberate discussion would the phrase taxation used in connection with capital or property, "taxation of property", for example, suggest the operation of levying customs duties. It is quite true that such a use of the phrase "taxation of property" if anybody chose to employ it in that sense might be justified because the levying of customs duties is "taxation" and customs duties are commonly spoken of as levied on goods (see e.g. sec. 123 B.N.A. Act) that is to say on property, and therefore such a use of the phrase would be capable of logical defence. But "taxation" when used in such a context has not, I think, *prima facie* so broad a significance.

In this view the words of sec. 125 are not apt words to express an intention to exempt the provincial governments from the operation of the customs laws, that is to say, such is not their necessary effect.

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Duff J.

My opinion therefore is, in view of the considerations mentioned above, that the more limited construction for which Mr. Newcombe contends must be ascribed to that section. But there is one other consideration which I think has some bearing upon the point in dispute which it may be worth while to mention. The group of sections in which sec. 125 appears, beginning that is to say with sec. 102, deals principally with the distribution of Crown property between the provinces and the Dominion. The Crown property is distributed between the two authorities in the sense that in part it is delivered over to the custody of the Dominion and in part to the custody of the provinces. But it is a distribution of property as assets; the control thus acquired by the provinces in respect of the assets assigned to them is not a control which excludes the operation of Dominion laws made in exercise of competent authority affecting the use of such property; provincial public fisheries *e.g.* are subject to regulations enacted by Parliament in the execution of its legislative authority in relation to fisheries. *In re Provincial Fisheries* (1). The provinces are to keep the property assigned to them and enjoy the fruits oft hat property free from any right of the Dominion to assume it except for the purposes of defence (sec. 117) and they have the further protection of section 125; a provision suggested, it may well be, by Marshall's famous dictum adapted from Webster's argument "a power to tax is a power to destroy"; but there is nothing in any of these clauses suggesting that the legislator is aiming at a limitation of Dominion authority in such matters as *e.g.* shipping and external trade.

The appeal should be dismissed with costs.

(1) [1898] A.C. 700.

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Anglin J.

ANGLIN J.—The case at bar is, in my opinion, not distinguishable in principle from that which came before the High Court of Australia in *Attorney General for N.S.W.* v. *Collector of Customs* (1). Section 114 of the Australian Constitution and s. 125 of the B.N.A. Act are substantially the same. The powers of the Commonwealth Parliament in regard to the regulation of trade and commerce and the raising of money by taxation are practically the same as those of the Parliament of Canada. In the Australian case customs duty was claimed upon the importation of steel rails by a state government for use upon a state railway; in the case at bar the importation by the provincial government of British Columbia is of a case of whiskey admittedly intended to be resold in the Government liquor stores of that province established under the authority of a provincial statute.

While, at first blush, we would seem to be confronted with a case of federal taxation of property belonging to a province in contravention of s. 125 of the B.N.A. Act, I am so thoroughly convinced that the exemption from customs duties claimed by the appellant was not intended to be given by that section that I am satisfied that some reasonably admissible construction which would exclude such exemption should be given to it.

The question at issue has been exhaustively considered and all aspects of it thoroughly discussed in the Australian case. Agreeing, as I do, with the result there reached, I shall merely indicate the ground on which, in my opinion, it should be held that the levying of customs duties on the goods in question is not taxation on property belonging to a province within the purview of s. 125 of the B.N.A. Act.

(1) N.S.W., 5 Com. L.R. 818.

Customs duties are, no doubt, in at least one aspect "taxation" within the meaning of that term as ordinarily used and, I think, as used in the B.N.A. Act, s. 91 (3). They are a mode or system of taxation for the raising of money and are a typical form of indirect tax. But they are, it seems to me, something more—they are tolls levied at the border as a condition of permission to import goods into the country being granted by the governmental authority clothed with jurisdiction either entirely to prohibit their entry, or to prescribe conditions on which such entry may be effected. In legislating for such prohibition or for permission to enter conditional upon payment of certain duties, Parliament is exercising its authority for "the regulation of trade and commerce" (s. 91 (2), as well as its right to provide for "the raising of money by any mode or system of taxation". In their aspect as tolls imposed in exercise of the power to regulate trade and commerce customs duties are not "taxation".

Although Australian customs duties, like those of Canada, are in terms imposed "on" or "upon" the goods imported, four of the eminent judges who sat in the High Court of Australia held that the subject of these tolls—the thing in respect to which they are levied—is rather the exercise of the right of importation—the movement of the goods over the border—their entry into the country—than the goods themselves in their character as property belonging to their owner. Another view is that they are a tax on the importer, whether owner or not of the goods, imposed in respect of the importation. In either veiw they do not constitute a tax on property belonging to the province in the sense in which that phrase is used in s. 125.

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There is also something to be said for the contention that, inasmuch as taxation can be levied only on goods subject to the jurisdiction of the authority which imposes them, "property" in s. 125 of the B.N.A. Act must mean property within Canada and does not include property about to be brought into the country which is, theoretically at least, held at the border until payment has been made of the customs duties.

Other reasons indicated in *Attorney General of N.S.W.* v. *Collector of Customs for N.S.W.* (1), for holding that the imposition of customs duties in respect of importations belonging to a provincial government is not taxation of property belonging to a province within the meaning of s. 125 were urged by Mr. Newcombe. I prefer, however, to rest my opinion upholding the judgment of the Exchequer Court on the grounds that customs duties are not "taxation" and that they are not imposed upon "property" within the meaning of those terms as used in s. 125 of the B.N.A. Act.

BRODEUR J. (dissenting).—The question in this case is whether the imposition by Dominion legislation of customs duties on goods imported by a province is constitutionally valid.

The Exchequer Court has pronounced such legislation *intra vires* and this is an appeal from the Exchequer Court's judgment.

The question is a new one as far as Canada is concerned but it has been raised in the United States and in Australia; and it was decided in those two countries that such legislation by the central authority did not violate the provisions of the constitution of the United States nor of the Commonwealth of Australia.

(1) N.S.W., 5 Com. L.R. 818.

The facts are very simple: The government of British Columbia purchased in Great Britain and imported a certain quantity of liquor for the purpose of re-sale under their "Government Liquor Act".

When the liquor arrived in Canada it was taken possession of by the Collector of Customs in the ordinary course of business. The provincial authorities then made a written demand on the Collector for delivery of the goods, but he refused to do so unless customs duties were paid.

The present action, which is a test case, was instituted to have a declaration that the Province was entitled to delivery or possession of that liquor free from the payment of any customs duty.

The Province relies on section 125 of the B.N.A. Act which is as follows:—

> No lands or property belonging to Canada or any province shall be liable to taxation.

The Dominion authorities claim that they are entitled to the possession of the goods until the customs duties are paid and that the Dominion laws authorizing them to claim these duties are not in violation of this section 125 of the B.N.A. Act.

There is no question in this case as to the validity of the power of British Columbia to pass their Government Liquor Act. It was the subject of controversy in the case of *Canadian Pacific Wine Co.* v. *Tuley* (1), and the Privy Council decided that such legislation was *intra vires*. We are then concerned only with the question as to whether liquor belonging to a province is free from customs duties.

(1) [1921] 2 A.C. 417.

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Brodeur J.

It is contended first on the part of the Dominion authorities that the customs duties do not constitute taxation but are merely in the nature of regulation of trade and commerce under the provisions of art. 91-2 of the B.N.A. Act. I may say that the imposition of customs duties might be in some respect considered as regulation of the trade of the country, and that the imposition of import duty may be resorted to to regulate commercial intercourse with foreign countries. Discriminating duties, prohibitory duties, protecting duties are so many commercial regulations. But I am strongly of the view that our customs duties are also imposed for the purpose of revenue in the exercise of the power of the federal authorities to raise money by taxation. Nobody will deny that the customs duties in the case of liquor are mainly imposed for revenue purposes. They then constitute the raising of money by taxation and should not be considered as merely in the nature of regulations of trade and commerce.

I may quote in support of my contention the declaration of *Attorney General of New South Wales* v. *Collector of Customs* (1), where the Australian High Court stated that the imposition of customs duties is a mode of regulating trade and commerce as well as an exercise of the taxing power.

The court below relied on a decision of the United States Supreme Court in a case of *South Carolina* v. *United States* (2), where it was stated that the exemption of state agencies from federal taxation should be limited to those which are of a strictly governmental character and does not extend to those which are used by the state in the carrying on of an ordinary private business.

(1) N.S.W. 5 Com. L.R. 818. (2) 199 U.S.R. 438.

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The legislation of the province of British Columbia is passed with the evident purpose of dealing with this very serious evil of intemperance. Several laws, federal and provincial, have been passed since Confederation for the purpose of remedying this evil. The licensing system was tried and found wanting. The local option was resorted to by provincial and federal legislation but did not bring about all the good results that were expected. During the great war attempts were made to enact total prohibition laws but the results in the opinion of a great many were not satisfactory. Then some provinces, amongst which was British Columbia, decided to put the sale of liquor under their direct control. In doing so nobody can deny that they exercised functions which are of a governmental character. I cannot then accept the view to the contrary expressed in that American case.

I may add that this American decision was not a unanimous one and that Mr. Justice White, who became later on Chief Justice, was dissenting with two of his colleagues, and his reasoning seems to me a very strong one.

It is contended also by the federal authorities that the duties claimed do not constitute taxation of "property" within the meaning of section 125 of the B.N.A. Act, and that the tax is levied in respect of the importation of goods and not upon the goods themselves; and they rely on the *Steel Rails Case* (1) decided by the Australian courts.

There is no doubt that what the Imperial Parliament had in mind to prohibit by that section 125 is taxation upon the beneficial ownership, possession or enjoyment of land or property. Then customs duties

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on liquor are certainly intended by Parliament to constitute taxation of property. Besides, the provisions of the Customs Act declare formally that the duties are "on or upon" imported goods; that these goods might be seized and sold for the payment of these duties. Consequently the beneficial ownership or enjoyment of these goods by the owner is affected, and I cannot agree with the respondent's proposition that customs duties do not constitute a tax.

The decision of the Australian courts in the *Steel Rails Case* (1) has been rendered under a constitution and under customs laws which differ to a certain extent from our own constitutions and our own customs law. There is however such a similitude in the principles of these constitutions and of these laws that we should not ignore the importance of this decision of the Australian court.

The authority of this Australian case is affected by the fact that the judges do not agree in their reasons. Two of them Justices Isaacs and Higgins made a distinction between the words *tax* and *taxation* and give to the word *taxation* a wider meaning than to the word *tax*. Their opinions support the view that when the word *taxation* is used it can cover customs duties.

The word *taxation* is the one used in our constitution. Moreover, section 125 of the B.N.A. Act is placed under the heading of the 8th paragraph which is titled "Revenues, debts, assets and taxation" and is in the group of sections having reference to taxation; and section 123, which deals with customs duties as being leviable on goods, belongs to the group of sections dealing with taxation.

(1) 5 Com. L.R. 818.

In Clements' Constitution of Canada, p. 643, section 125 is examined and it is stated that this section

> would operate no doubt to exempt from Customs duties goods purchased abroad by a provincial government, though there is no reported case on this point.

It has been contended also that the word "property" in section 125 of the B.N.A. Act does not include moveable property.

It seems that such a contention is erroneous. The word *property* is used there in the same sense as it is used in the section 91 (1) and 108 and the third schedule where the word *property* cannot clearly be restricted to lands or immoveable property.

For these reasons I am of the opinion that the government of British Columbia is entitled to a declaration that the goods in question were free of duty.

The appeal should be allowed.

MIGNAULT J.—The broad question involved in this appeal is whether the importation into Canada of goods belonging to the government of a province, and imported for purposes of trade, is subject to the usual custom duties imposed on similar goods by the Parliament of Canada.

By section 125 of the British North America Act, 1867, which applies to the province of British Columbia as well as to the other provinces of the Dominion, it is provided that

> no lands or property belonging to Canada or any province shall be liable to taxation.

And it is argued that custom duties are taxation and therefore no such duties can be imposed on any goods belonging to a province when imported into Canada. It is contended that the authority of

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Parliament to levy custom duties is conferred by subsection 3 of section 91 of the British North America Act, which grants the power to raise money by any mode or system of taxation, and that custom duties must therefore be considered as taxation, otherwise the authority to levy them would not belong to the Parliament of the Dominion.

No doubt duties of this description are often referred to as being indirect taxation, but the respondent argues that it is not necessary to go to subsection 3 of section 91 to find the authority for their imposition, but that they could equally be exacted under the power of Parliament to regulate trade and commerce conferred by subsection 2.

The ground on which, I think, the judgment appealed from can be sustained, is that the custom duties are not a tax imposed upon property as such but are levied on the importation of certain goods into Canada, or as a condition of their importation. The authority of Parliament to regulate importation for purposes of trade or otherwise cannot be doubted, and it follows that it can exact the payment of a duty or rate as a condition of the importation of goods into the Dominion. That the amount of the duty or rate may be based on the value of the goods, and it is not necessarily so based, appears to me immaterial. The property belonging to a province while within or without Canada is not subjected to any tax. What the province contends is that it can bring its property into Canada from other countries without paying the duties charged on the importation of similar goods when brought into Canada by other persons. I cannot agree with this contention and I think it cannot be based on the clause exempting from taxation the lands or property belonging to a province.

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Mignault J.

I would dismiss the appeal, but without costs, the controversy being between the Dominion and a province on a matter of public interest. No costs should be payable on the intervention of the attorney general of Ontario.

Appeal dismissed without costs.

Solicitor for the appellant: *A. V. Pineo.*

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

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*May 9, 10.
*Oct. 10.

CAMPBELL RIVER LUMBER COMPANY (DEFENDANT)..... APPELLANT;

AND

N. A. McKINNON AND A. McKILLOP (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Sale—Vendor and purchaser—Contract—Sale by vendor through third party to real purchaser—Increase of price—Difference to be paid by vendor to real purchaser—Concealment from third party—Fraud—Advance in cash by purchaser to vendor—Conditions of agreement not fulfilled—Claim for reimbursement—Indivisibility of transaction.

The respondents were owners of timber licences and timber lands, standing in the name of McKillop, which the appellant wished to purchase and for which the respondents asked $165,000. The appellant, being unable to make the cash payment required by the respondents, suggested that the transaction could be financed through one Rounds. It was finally agreed between the appellant McKillop that the respondents should sell to Rounds for $230,000 and that the appellant should receive in cash the difference of $65,000. The respondents were to be paid by Rounds $100,000 in cash, $90,000 in shares belonging to Rounds of the par value of $80,000 in a lumber company in Maine and $40,000 in five yearly instalments. The appellant was to buy the property from Rounds at the same price, $230,000. The appellant also agreed to purchase the shares from the respondents within four years at $85,000 with interest at 6% the respondents agreeing to pay the appellant in advance $65,000 in cash out of the $100,000 received from Rounds. The respondents consented to the increase in the price of sale and to conceal the fact from Rounds. The latter was also kept in ignorance of the payment of $65,000 by respondents to appellant and of the agreement by appellant to purchase the shares. These trans-

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault.

actions being all carried through, the respondents paid the appellant $65,000 in cash. At the end of four years, the respondents called upon the appellant to purchase the shares. The appellant repudiated the transaction as *ultra vires* and on that ground successfully defended an action for specific performance. The respondents then brought this action to recover the $65,000 advanced to the appellant, with interest.

Held, Idington J. dissenting, that the payment of the $65,000 cannot be separated from the rest of the transaction; and, such transaction being infected with fraud in which McKillop participated, the respondents cannot recover.

Judgment of the Court of Appeal ([1922] 2 W.W.R. 549, 556) reversed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) reversing the judgment of Gregory J. at the trial and maintaining the respondents' action.

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

The trial judge dismissed the respondents' actions; but on appeal, it was held, Macdonald C.J.A. dissenting, that the fact that the agreement was *ultra vires* of the company was not a defence to the action, since the $65,000 had been used by the company for its benefit in paying debts.

The respondents, by their action, also claimed interest on the $65,000. The Court of Appeal (1) held that the respondents were not entitled to the interest. A cross-appeal was taken to the Supreme Court of Canada by the respondents against this ruling.

Craig K.C. for the appellant.

Martin K.C. and *Lafleur K.C. for* the respondents.

(1) [1922] 2 W.W.R. 549, 556.

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Idington J.

IDINGTON J. (dissenting):—This is an appeal from the Court of Appeal for British Columbia which reversed the judgment of the learned trial judge dismissing the action and gave judgment for the respondents for sixty-five thousand dollars without interest, but with costs in both of said courts.

The case is rather remarkable in many ways and if I were to attempt to follow and write its full history in all its varied sinuosities I fear the true aspects of law and fact, upon which the appeal should turn, would be lost sight of.

The respondent McKillop being possessed of timbered lands in British Columbia, the appellant entered into negotiations with him for the purchase thereof. His price was finally put at $165,000 cash, or such a large part thereof in cash as to render it if carried out practically a cash transaction.

The appellant could not raise the necessary cash and in the last resort the unhappy thought struck someone connected with the management of appellant company that it might induce a relation of his named Rounds to help the appellant to finance the transaction if some shares held by him in another company were taken into consideration as apparently part payment of the price.

To make that scheme practically operative, and satisfy the respondent McKillop's firm demands as to price of sale by him, the officer of the appellant, who unfolded it, suggested calling the price two hundred and thirty thousand dollars instead of the $165,000 dollars price which the said respondent, McKillop, was determined to adhere to and be paid. This was acted upon, but it required the said McKillop's assent as the conveyance must come from him and,

after some hesitation, and doubts expressed by him to the parties acting for the appellant as to the propriety of such an expedient, he reluctantly assented.

It seemed from the way it was presented to him that he would be amply protected for the shares at par value of $80,000 would be, for the most part at least, covered by the increase of price. And so he should have been if such a devious scheme had been honestly observed by its inventor the appellant or its officers.

It had been promised McKillop by those acting for appellant that a mortgage would be given him by appellant on a valuable mill the company had recently erected, as well as other property to cover the balance that would be due him, after crediting the money he would receive, apart altogether from the shares Rounds was to assign him.

The first result was a transfer by him to the said Rounds expressed on its face to be for the said consideration of $230,000, of which $100,000 was to be in cash and $90,000 in said shares of the par value of $80,000 and $40,000 in five yearly instalments.

And then a re-transfer was made by Rounds to appellant on terms which do not seem identical but may work out the same result in price. The friend Rounds had got rid of his stock by the first step in the deal.

The adroit management which brought that result about was successful in so handling McKillop as to get by one excuse or another a large share of the cash part of the said price which he was to be paid by Rounds, to be advanced by him to the company, and then when it came to the execution of the promised mortgage which was to be the last step in the plan or programme, the further excuse was set up that a

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mortgage would so impair the appellant's credit at the bank that some other agreement equally assuring McKillop of the payment of the balance due him should be substituted for the promised mortgage.

He was induced by such blandishments to modify the promise of a mortgage into accepting the following agreement:

> This agreement made and entered into this twenty-fourth day of April, in the year of our Lord one thousand nine hundred and fourteen by and between:
>
> Albert McKillop of the city of Vancouver, in the province of British Columbia, lumber merchant, hereinafter called the party of the first part
>
> and
>
> Campbell River Lumber Company Limited, a company duly incorporated under the "Joint Stock Companies Act" of the province of British Clumbia, and with its head office at White Rock in the said province.
>
> Whereas the said Albert McKillop is the owner of 800 shares of the capital stock of the North American Lumber Co. a corporation duly incorporated under the laws of the State of Maine and with its head office at the city of Portland in the said state of Maine, of the par value of $100.00 per share, and the said Albert McKillop has agreed to sell the same to the party of the second part and the said party of the second part pursuant to a resolution of the Directors thereof has agreed to purchase the same,
>
> Now this indenture witnesseth that the said Albert McKillop for and in consideration of the sum of one dollar of lawful money of Canada to him paid this day by the party of the second part (the receipt whereof is hereby acknowledged) agrees to sell to the party of the second part the eight hundred shares of the capital stock of the said North American Lumber Company and the said party of the second part agrees to purchase the same and pay therefore the sum of eighty-five thousand ($85,000) dollars within four years from the date of this indenture with interest thereon from this date until paid at the rate of 6½% per annum, payable half yearly, all payments to be made to the Royal Bank of Canada, east end, to the credit of the said Albert McKillop, and upon completion of the said payments of $85,000.00 and interest as aforesaid the said Albert McKillop agrees to transfer the said stock to the said party of the second part.
>
> And it is further agreed between the parties hereto that the said party of the second part shall not sell, mortgage or dispose in any way of their lumber mill and premises at White Rock, B.C. until the said $85,000.00 and interest shall have been fully paid without the consent in writing of the said Albert McKillop thereto.

In testimony whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

ALBERT McKILLOP (Seal)
Campbell River Lumber Co. Ltd.

Signed, sealed and delivered in the presence of
"N. A. McKinnon,
H. W. Hunter, Pres.
F. G. Fox, V. Pres.

The appellant having got into financial difficulties after the respondent McKillop had transferred said agreement to the said respondent, McKinnon, and the former had gone as a volunteer to do service in the recent war, some litigation took place in his absence between the assignee of appellant and McKinnon whereby the last named sought a declaration against the estate, but that was dismissed, the court holding, it is said, that the bargain in said agreement was *ultra vires* the appellant.

That case does not seem to me to present the actual case which should have been made, as I view the transaction in light of the history which I have outlined, and hence is not though pleaded along with everything else imaginable as *res judicata*, actually such, so far as McKillop and said agreements are concerned, as to govern the decision herein.

Indeed it is hardly argued that it does, but is only faintly suggested.

What is set up by way of argument in appeal may be fairly treated as presenting two legal problems.

On the one hand it is said that there was no total failure of consideration and hence no action can lie to recover the consideration.

The other branch is that this agreement was but part of a whole transaction involving much else and the doctrine of total failure of consideration is not applicable.

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Idington J.

With great respect the view taken that on the latter ground the respondent must fail seems obviously to rest upon a failure to grasp the actual situation created by the parties, or rather by the appellant, which was the purchase by it of the respondent's, McKillop's, property at a price named and never departed from by him, and cannot be heard to set up, after contriving all the machinery its officers invented as means of financing and carrying out the bargain made with him for the purchase thereof, to defeat his recovery of the balance of the price agreed upon.

The subterfuge appellant resorted to and induced respondent McKillop to assent to, did not prove injurious to Rounds or we should likely have had another aspect presented, certainly not to the credit of the inventor thereof.

Hence nothing herein can turn upon its peculiarities in such a way as to defeat the respondents. Nothing in the scheme or the mode of its execution can change the actual bargain between the parties thereto now concerned herein.

All the documents executed were, so far as honestly intended, but a means of securing payment to the respondent McKillop of the balance of the purchase money which is yet due. The covenant by appellant in the said agreement to pay the sum of $85,000 is absolute in terms and still stands good and respondents entitled to recover thereon notwithstanding the obvious incorrect recitals.

But it is contended that cannot be because it would be *ultra vires* the appellant's corporate powers to take shares. So much the worse for it if it entered into a scheme involving the existence of such a power. That scheme was its own and it is now too late to set up such a pretence as means of cheating the respondent

McKillop of the balance of his price. Moreover I do not agree that it cannot obtain all the expected benefit of the shares even if it cannot vote as share-holder.

It was, I repeat, the clear intention of the parties to secure the balance of the purchase money and the solicitor who drew the agreement having suggested the question of *ultra vires* was answered by appellant's agent that the appellant had the power.

Hence such a mistake cannot be allowed to frustrate what was the actual purpose of the parties.

I agree with the contention of the appellant that this agreement was only part of the whole. The pretence of want of power in the appellant to carry out the ultimate intention of the parties reminds one of the analogous pretence set up in the case of *Brown* v. *Moore* (1), wherein the majority of this court held that such pretence should not avail and against the judgment so declared the pretending party sought leave to appeal to the Judicial Committee of the Privy Council, but was refused leave.

The foregoing was, together with my conclusion that the appeal herein should be dismissed with costs, and cross appeal allowed with costs, written last June shortly after argument. I was surprised to learn, some three months later, that the majority of the court had agreed to allow the appeal on the ground of the illegality of the conduct of appellant's officers in inducing Rounds to believe that the lowest price respondents would take was $230,000, instead of $165,000, and, which I am unable to understand, so tainted the later dealing now in question as to render it impossible for the respondents, or either of them, to recover.

(1) 62 Can. S. R. 487.

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Such a defence was not pleaded, nor, so far as I can see, argued, either at the trial or in the Court of Appeal; or before us, if my memory serves me.

The appellant's factum, which relates the facts in the way it contends they are, incidentally thereto refers to some of the history of the rise in purchase price but not in any way does it make the point now made by the majority of this court.

I, most respectfully, therefore, submit such a view should not now be entertained.

The erroneous allegation that all these agreements were in fact one, has been the source of much confusion.

It is not correct. It is correct that all three in a sense arise out of the same subject matter, but the actual consideration involved in each is not the same. And the taint that may have existed in the consideration of the agreement with Rounds, cannot extend to the future of any dealing with the fruits or resultant assets derived therefrom.

We must bear in mind that the learned trial judge expressly and decidedly accepted in its entirety the evidence of respondent McKillop and his story is that he assented to the part he took in the bargain with Rounds on the distinct understanding that he was not to have any stock given him as part of the price; that the sixty-five thousand dollars of the cash to be got from Rounds was to be handed over to the appellant upon a mortgage for that amount being given by it to McKillop upon the appellant's mill.

That was the basis upon which the parties worked pending the closing of the deal with Rounds which, as already stated, took place on the 31st of March, and results turned over by him on the 3rd of April to the appellant on terms agreed to between them and with which he had nothing to do and was no party to.

Three weeks or more later, on the 24th April, the appellant, by a separate and different transaction entirely, was induced to abandon his right to a mortgage, as promised on appellant's mill, and to give the $65,000 he held of the cash to appellant in consideration of the agreement sued on.

The appellant's officers and counsel sometimes seem to me to try to make out that the $65,000 was paid before the new agreements, respectively between the appellant and Rounds, and between appellant and respondent McKillop now in question, but fortunately respondent McKillop was able conclusively to prove by the production of the cheques making such payments of the said sum, that they were paid after the deal between appellant and Rounds had been closed on the 3rd of April; one for $15,000 on the 14th of April, apparently pending negotiations for the abandonment of the right to a mortgage; and the other for $39,939.00, after the agreement now in question was executed.

The balance apparently was accounted for by a transfer of a cheque given by them to Rounds and handed back by McKillop to the appellant.

In lieu of all these the abortive sale of the stock to the appellant was substituted, and that has failed on the ground of its being *ultra vires* and hence a complete failure of consideration.

How then can it be said this collateral or supplemental contract is tainted with any illegality of which Rounds alone could complain?

It was a quite independent contract with which he had nothing to do and could not have complained of in any way.

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He alone could have complained of the imposition practiced upon him, and he has neither done so nor been injured in any way, but, on the contrary, got a bonus out of his dealing.

In short, he has got (what he wanted) rid of his stock as he desired, at a price, I suspect, far beyond its value; and succeeded in helping the boys (as he expressed it) to finance the deal, which were his two objects.

So long as he acquiesed in the results no one else has a right to complain.

This is not a case of contravention of a statute in which resultant contracts in the promotion of an illegal purpose might be such as to render it the duty of the court to intervene, even if the parties concerned should refrain from pleading its violation.

As to the merits of the case as between the parties hereto, I imagine that if respondents had found the stock to be double the estimated value instead of only 25% thereof, and had attempted to hold on to it as their own, in disregard of their duties as trustees, and retain also the cash got, we would have heard some exclamations of surprise if told the law such as about to be declared.

I submit, most respectfully, that is *not* the law, and that the appeal should be dismissed with costs.

A cross-appeal is taken by respondents as to interest disallowed below. I cannot help thinking that the actual terms of the above agreement, as well as what led up to it, overcome the objection taken below, and that interest was specifically agreed upon. And hence I think that the cross-appeal should be allowed and interest added to the $65,000.00 at 6½%, in accordance with the terms of the agreement.

DUFF J.—In 1914 the plaintiff, McKillop, was the holder of certain timber licences in which his co-plaintiff McKinnon had some interest and which they wished to sell at the price of $165,000. Through Hunter and Fox, who may be considered as the owners of the capital stock of the appellant company, McKillop had negotiations with the company with a view to a sale. The company was not financially in a position to purchase on the terms upon which McKillop was willing to sell; but a relative of Hunter by marriage, Rounds, was approached by Hunter and found willing to assist Hunter and Fox by providing the necessary financial assistance to enable the company to acquire the property. With this in view Rounds consented, if the property on examination should be equal to expectations, to become (as he ultimately became) intermediary in an arrangement by which he should purchase from McKillop and in turn sell the property to the company for the same price but upon terms suitable to the company's position—substantially upon the condition that the purchase price should be paid out of the proceeds of the timber as sold.

Two features of the arrangement in which Rounds was willing to participate and which was substantially put into effect are of capital importance. Rounds was interested in a lumber concern in Maine, The North American Lumber Co., and held shares in it of the nominal value of $80,000 and it was a condition of Rounds' participation as well as an inducement that in the purchase from McKillop, these shares should be accepted approximately at their face value. The other feature was this. Hunter and Fox, pressed by the embarrassments of very limited working capital, conceived the idea that Rounds should pay $230,000

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for the property and that they should exact from McKillop a cash payment of $65,000 as their remuneration for bringing about the sale. McKillop eventually agreed to the proposal that the shares should be accepted as part payment of the purchase money to the extent of $85,000 on the understanding that he should be satisfactorily protected against the risk of loss by the shares proving to be worth less than that sum and he at the same time agreed to pay to the company out of the purchase money the commission excated by Hunter and Fox.

Rounds believed that McKillop's price was $230,000. This he was told by Hunter and Fox and their statement was confirmed explicitly by McKillop. He was in truth kept in ignorance both of the fact that a substantial part of the cash he handed to McKillop ($100,000) was in turn to be passed over to Hunter and Fox and of the fact that the shares which he supposed he was disposing of to McKillop were to be taken off McKillop's hands by the company. Both facts were from the business point of view of the most obvious materiality. The timber was Rounds' security; he was virtually advancing for the benefit of Hunter and Fox the sum of $230,000 in the belief that this was the price that was demanded for it, when in truth the owners were willing to sell and in fact were selling it for $165,000. The borrower (virtually from his point of view the transaction was an advance) was at the same time assuming a contingent obligation of $85,000 of which he was not informed.

It is impossible, I find, to acquit McKillop of complicity in the manœuvres of Hunter and Fox. He admits that he assured Rounds in express terms that his price was $230,000 while at the request of Hunter he carefully avoided any reference to the collat-

eral arrangements. Further he did this after being informed by Hunter that knowledge of the facts on Rounds' part would be disastrous to their plans. He says, indeed, that he protested, thinking their conduct was "not straight" but played his part in the plot under the belief that Rounds would suffer no detriment.

I do not in the least doubt that McKillop's assent to the sale was procured by the promise that he would be satisfactorily secured in relation to that part of the purchase money which was represented by the shares; and that he was to be indemnified fully in respect of any difference between the sum named ($85,000) and their actual selling value when he came to realize upon them; that is made very plain and indeed is overwhelmingly established by the admissions of Hunter and Fox.

Were it not that the respondents have disqualified themselves from maintaining this action by their co-operation in the machinations of Hunter and Fox there would, I think, be no difficulty whatever in sustaining the judgment in their favour. It is really not disputed that an undertaking was given to them in consideration of the sale and of the payment to the appellant company of its share of the proceeds that they should receive, after all deductions were made, the sum of $165,000 as their purchase price. Their acceptance of the shares was only a temporary measure; it was distinctly understood that they were to be relieved of the shares and the sum of $85,000 with interest substituted for them. This I say is not disputed; the agreement prepared by Mr. Carter took the form of a sale because for some reason which I cannot profess to understand he supposed the company to be incapable of binding itself in the manner the parties intended.

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The execution of that document is no obstacle in the way of the respondents; it has been conclusively held as between the parties to be inoperative. It was not an instrument executed by the company and consequently as a bilateral instrument it can have no effect whatever. Nor is the judgment in the action in which the respondents sought to enforce that instrument an obstacle. There is no estoppel because the cause of action arising under the actual oral agreement is not the cause of action asserted in the action in which judgment was given. That was an action brought upon the supposed written agreement. In that action evidence proving the oral agreement would not have been admissible. In form therefore the two causes of action are not the same nor are they the same in substance. The former action was an action upon an agreement held to be *ultra vires;* the oral undertaking deposed to was certainly not *ultra vires* and the proposition that the oral undertaking was within the powers of the company is in no way inconsistent with the allegation affirmed by the former judgment, namely, that the agreement embodied in the writing sued upon was beyond their powers.

But there is a fatal obstacle to the respondent's success in the action. Look at the whole transaction from any point of view and it is impossible to escape the hard fact that it all hinged upon getting Rounds to pay to McKillop and McKinnon $65,000 more than McKillop and McKinnon were to receive as the selling price of the property and getting him to do this under the belief that he was paying the vendors their price and nothing more than their price. In order to accomplish this there was the agreement which was actually executed that the parties to this litigation should co-operate in the deception of Rounds. The case

is within the principle that the courts will not enforce an agreement involving the perpetration of a fraud such, for example, as an agreement forming part of a scheme for promoting a company in which the object of the promoters is to defraud the shareholders. *Begbie* v. *Phosphate Sewage Co.* (1). An apt illustration of the principle is to be found in the decision of the Court of King's Bench in *Jackson* v. *Duchaire* (2). There the defendant had applied to his friend to advance certain moneys, the price of goods which he intended to buy of the plaintiff. The friend arranged with the plaintiff for the sale and paid the sum agreed upon. Secretly it was agreed between the plaintiff and the defendant that the defendant should pay an additional sum. This last agreement the court refused to give effect to as a fraud upon the third party whose intention, known to all parties, was to relieve the defendant from paying any part of the price.

The facts disclosed in the present appeal shew a state of circumstances in which all parties would naturally, on the assumption that they were acting honestly with one another, give and expect to recieve the fullest disclosure with regard to the character of the transaction. Rounds no doubt had a monetary interest to serve in the transaction as he desired to dispose of his shares; but one of his actuating motives unquestionably was the desire to assist his relative; and he would naturally expect, and this was quite understood by McKillop as well as by Hunter and Fox, to be dealt with in a manner befitting the circumstances and character of his intervention in the business. All parties fully realized that in the concealment of the facts concerning the collateral dealings in relation to the shares and to the purchase money

(1) L.R. 10 Q.B. 491 at p. 499 (2) 3 T.R. 551.

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Rounds was misled in a manner savouring of dishonesty though no doubt they all fully believed that in the end Rounds would lose nothing. It is impossible to escape the conclusion that the parties united to commit a fraud upon Rounds, a fraud which at Rounds' instance would have nullified the whole transaction. That being so, it follows that the company's undertaking with regard to the shares which was integral part of the entire transaction and was given in consideration in part at least of McKillop's undertaking to divide the price with the company is an unenforceable undertaking.

I have very carefully considered the question whether it is possible to separate this undertaking from the rest of the transaction but, as intimated above, I am forced to a negative conclusion. Had the agreement drawn by Mr. Carter been operative it is possible that the sale might have been enforced on the principle of the *Odessa Tramways Co.* v. *Mendel* (1); but as the respondents must rely upon the oral agreement it is essential to their case to prove the consideration for it which necessitates examining its relation to the transaction as a whole. It is at least gravely questionable whether the respondent can support the judgment on the ground that the consideration has wholly failed for the payment of the moneys they seek to recover; but it does not improve their position to put their claim in that form. In substance they are seeking to enforce the agreement that they were to receive no less than $165,000 as the net selling price of their property. See *Begbie* v. *Phosphate Sewage Co.* (2).

The appeal must be allowed.

(1) 8 Ch.D. 235. (2) L.R. 10 Q.B. 491.

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ANGLIN J.—I have had the advantage of reading the opinion of my brother Duff.

With some regret because in the deception practised on Rounds the directors of the defendant company, Hunter and Fox, were in my opinion distinctly more culpable than the plaintiff McKillop, I have come to the conclusion that the transaction out of which the plaintiffs' claim arises is so infected with fraud, in which McKillop participated, that this action cannot succeed. Whether that transaction should be regarded as evidenced exclusively by the instrument prepared by Mr. Carter and as involving the taking over of the shares in the North American Lumber Co. by the defendant company, or should be deemed open to proof in the somewhat different terms of the oral testimony, including an undertaking that the plaintiff McKillop would be indemnified against loss in respect of these shares if their value should prove to be less than the $85,000 at which he accepted them from Rounds on account of the purchase price of the timber, the contamination by fraud is the same. The payment of $65,000 by McKillop to the defendant company and its undertaking either to take over the North American Lumber Co. shares or to indemnify him against loss in respect thereof cannot be segregated from the purchase of McKillop's timber by Rounds at the price of $230,000. It was all one scheme—all one transaction—and the fraudulent taint affects every element of it.

Although McKillop, Hunter and Fox all believed that Rounds would ultimately sustain no loss—as proved to be the fact— he was none the less induced by the misrepresentation to which they were all privy, that McKillop's price for his timber amounted to $65,000 more than it actually was, to assume the risk

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that the moneys which the defendant company would realize out of the sale of that timber would be sufficient to enable it to repay his advances.

I incline to think that the defence that the failure of consideration alleged as its basis was partial only would also be fatal to the plaintiff's claim. I deem it better, however, to rest my judgment on the effect of the deceit practised on Rounds.

For these reasons I am, with respect, of the opinion that the judgment dismissing this action was well founded and should be restored.

BRODEUR J.—I am of the opinion that this appeal should be allowed and I concur with my brother Duff.

MIGNAULT J.—A brief statement of the facts in this case will naturally lead up to the conclusion I have adopted.

The respondents held certain timber rights of which they were anxious to dispose and their last price was $165,000 on which they required a substantial payment to be made in cash. They stated this price to one Harold W. Hunter and to one F. G. Fox, respectively president and vice-president of the appellant company, who were very desirous of purchasing these timber rights for the company, but the latter, being financially embarrassed, could not make the cash payment required and could only purchase the timber on a logging basis, which the respondents would not accept. Hunter appears to have been an adroit and certainly not over scrupulous schemer, and in effect told the respondents that he could get a relative of his to purchase the timber and re-sell it to the company on easy terms. But this relative was to pay $230,000 instead of $165,000, the respondent's price, and the

respondents were told by Hunter that as part of this price they would have to accept, as cash for $90,000, eight hundred shares of the North American Lumber Company (a Maine corporation) of the par value of $80,000. The respondents demurred at this, saying that they wanted money and not shares, but Hunter told them that the deal could not otherwise be carried through. And he added that his company would agree to purchase the shares from the respondents in four years for $85,000 (the difference, $5,000, Hunter was to apply to pay the commission of the agent who had brought the parties together) at six and one-half per cent interest, and would give a mortgage on its mills to secure the payment of the $85,000 and interest. Although the purchase price for the sale proposed by Hunter was to be $230,000, the respondents were not to receive more than their own price, $165,000; the difference, $65,000, they were to hand over to the appellant company. To carry out this transaction Hunter went to Kansas and returned with one Rounds, an uncle of his wife, but he cautioned the respondents against letting Rounds know that their price was only $165,000, whereas he was being made to pay $230,000, adding that if Rounds ever found it out both he and Fox would go to jail. The respondents weakly consented to this scheme, which was a palpable fraud on Rounds, relying on getting rid of the stock which Rounds insisted they should accept as part of the purchase price by selling it to the appellant company. And when Rounds stated that he understood that their price was $230,000, McKillop replied that it was the price that had been arranged.

By a first agreement dated March 31st, 1914, the respondents, acting by Albert McKillop, sold the timber rights to Rounds for $230,000 of which

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$100,000 was paid in cash or equivalent, $90,000 in the shares of the North American Lumber Company, and the balance $40,000 Rounds was to pay within five years.

By a second agreement of April 3rd, 1914, Rounds agreed to sell these timber rights to the appellant company for $180,000, which was to be paid within a term of years on a logging basis, and for $40,000 which was to be paid by the assumption of the payment of the like sum to the respondents for the balance of price due to them by Rounds. The latter was also to receive a bonus on the lumber cut by the appellant company.

I have said that Hunter had promised the respondents to give them a mortgage on the company's mills to secure the payment of the shares which the company was to take over from the respondents at the price of $85,000. Subsequently he represented to McKillop, with whom he dealt, that to grant a mortgage on the mills would injure the company's credit, and he proposed instead that the company should guarantee to the respondents the value of the shares, and McKillop allowed himself to be persuaded to accept this change in Hunter's proposal. With matters in this state, McKillop, Hunter and Fox went to a solicitor in Vancouver, Mr. Carter, to have an agreement drafted and signed. Mr. Carter inquired whether the appellant company had the power to purchase the shares of another company and was assured that this was all right. He, however, raised the objection that even if the company could purchase the shares, it might not have the power to guarantee their value, and McKillop thereupon consented to accept a straight agreement to purchase the shares, without any guarantee of their value, but with a stipulation that the company would not mortgage its property until the $85,000 was paid, and this third agreement whereby

the company undertook to purchase these shares within four years for $85,000, with interest at six and a half per cent, was signed by McKillop and by the company acting by Hunter and Fox on April 24th, 1914.

After this last agreement, McKillop, who had previously paid over a portion of the $65,000 to the company, completed the full payment, so that the respondents had received $100,000 in cash or equivalent, the obligation of Rounds to pay them $40,000 and the 800 shares of the North American Lumber Company, accepted for $90,000, and which the appellant company was to take over from them for $85,000, and they had paid to the appellant company $65,000. This left them in money $140,000, less $65,000, to wit $75,000, and in order to get their full price of $165,000, less the $5,000 commission, they relied on the promise of the appellant company to take over for $85,000 the shares they had received from Rounds.

But it turned out that the appellant company had not the power to make this promise or to purchase these shares, and this was determined in a previous suit between the parties. As a consequence, the appellant company has the $65,000 it had received from the respondents and it has the timber rights sold to it by Rounds whom it has now fully paid. The respondents have $75,000 in money and the shares which are testified to be now worth only 25 per cent of their face value, and they cannot force the appellant to take and pay for these shares.

Under these circumstances, the respondents seek in this action to recover from the appellant company the $65,000 paid to it, placing their case on the basis of a total failure of consideration for the agreement of the appellant company to purchase the shares. But it must be observed that the payment of the

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$65,000 was in no wise the consideration of the agreement to purchase the shares. McKillop admits in his testimony that there was but one transaction carried out by means of the three agreements I have mentioned. It may well be that McKillop would not have paid the $65,000 to the company had he not relied on its promise to take over the shares he had unwillingly accepted from Rounds and to pay $85,000 therefor. But I am forced to the conclusion that the real transaction between the parties was that the respondents would agree to make Rounds pay for the timber rights $65,000 more than their price and hand over this money to the company whose officers, Hunter and Fox, had practised this fraud on Rounds. And as to the shares, the respondents had accepted them from Rounds as representing $90,000 in money, and these shares were to be purchased by the appellant for $85,000. It is true that the respondents are now saddled with these shares, and cannot force the appellant to take them off their hands, but this is because they made an *ultra vires* contract with the company, for which they are surely to blame, for they should have obtained their solicitor's advice as to the appellant's right to purchase the shares, the more so as Mr. Carter put them a question which he would have no doubt solved for himself had not his clients assured him that there was no doubt as to the company's power to hold the shares of another company. It is impossible for me to think for a moment that there was a failure, total or otherwise, of consideration for the transaction between the parties, which was one transaction carried out by three agreements, and had not one of these agreements been void this controversy would probably not have arisen. And I must find that in truth and in fact a fraud was

practised upon an innocent purchaser who was induced to pay, over and above the real selling price of the respondents, this sum of $65,000, which McKillop handed over to the instigators and perpetrators of this fraud. I cannot come to the conclusion that because one of the agreements entered into to carry out this fraudulent design is now found to be *ultra vires*, the respondents can recover the illegal premium which they exacted from Rounds and paid to the company. And as I am clearly of opinion that they cannot place their case on the basis of a total failure of consideration, but that they allowed themselves to be drawn into a fraudulent transaction at the suggestion of Hunter and Fox, my conclusion is that this Court should not assist the respondents in their attempt to recover a sum which they should never have demanded from Rounds and which they paid over to the appellant company merely, as I must hold, in furtherance of the fraudulent scheme concocted by Hunter and Fox.

I would allow the appeal and restore the judgment dismissing the respondents' action, but in my opinion, and speaking for myself alone, in view of the fraudulent character of the transaction, there should be no costs either here or in the court below.

The cross appeal of the respondents against the refusal of the Court of Appeal to grant them interest must of course be dismissed, but I would grant no costs.

Appeal allowed with costs.

Cross-appeal dismissed with costs.

Solicitors for the appellant: *Mayers, Stockton & Smith.*

Solicitors for the respondents: *Martin & Murray.*

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*May 19.
*Oct. 10.

LA VILLE ST-MICHEL (DEFENDANT)..... APPELLANT;

AND

SHANNON REALTIES LIMITED (PLAINTIFF)..... RESPONDENT.

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

Municipal corporation—Valuation roll—Fictitious valuation—Action to set aside roll—Absolute nullity—Supervising control of Superior Court—Statutory means of relief—Jurisdiction of Circuit Court—Prescription—Incompetency—Arts. 48, 50, 54, 77, 978, 987, 1003, 1292 *C.C.P.—R.S.Q.* (1909) *arts.* 5256 *& seq.*, 5591, 5623 *& seq.*, 5696, 5705 *& seq.*, 5715 *& seq.*, 5730—*M.C. Arts.* 430, 431, 433—[1849] 12 *Vict.*, *c.* 38, *s.* 7—(*Q.*) 5 *Geo. V.*, *c.* 109, *s.* 28.

The valuation of the respondent's property by the municipality appellant was not fictitious nor grossly excessive. Anglin and Mignault JJ. dissenting.

If a valuation roll has been made within the powers of a municipal corporation and in the absence of fraud, the party assessed cannot invoke the supervising control given to the Superior Court (Art. 50 C.P.C.) in order to set aside the roll, when other relief is provided by way of appeal to the Circuit Court. Anglin and Mignault JJ. dissenting.

Per Anglin and Mignault JJ. (dissenting).—As the overvaluation constituted such an illegality that it must be considered as an absolute nullity *ab initio*, the Superior Court has jurisdiction to annul the roll under the authority of Art. 50 C.P.C.

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

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Per Davies C.J. and Brodeur J.—Moreover, the respondent's right to take a direct action before the Superior Court, if existing, would have been prescribed, as not having been exercised within three months from the date the roll had been in force. (Art. 5624 R.S.Q. (1909)). Anglin and Mignault JJ. *contra.*

Per Duff J.—Although article 5696 R.S.Q. (1909) expressly provides that taxable property shall be assessed "according to its real value," a departure from this statutory mandate does not constitute legal incompetency rendering the acts of the corporation *ultra vires* and *ab initio* null, as the statutory law provides a means for complaining against such a valuation and correcting it.

Judgment of the Court of King's Bench (Q.R. 32 K.B. 520) reversed, Anglin and Mignault JJ. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), affirming the judgment of the Superior Court, Maclennan J., and maintaining the respondent's action.

The appellant had instituted a suit, on the 18th of September, 1917, in the Superior Court, to recover from the respondent the taxes in arrear for the years 1913, 1914, 1915 and 1916, making, with interest thereon, the sum of $9,697.60. On the 20th of February, 1920, the respondent instituted the present action whereby it seeks to have the first action joined and that the assessment rolls and collection rolls for the years 1913, 1914, 1915, 1916, 1918 and 1919 be held illegal, irregular, null, *ultra vires*, quashed and annulled. At the trial, the case as to the rolls for the years 1913 and 1914 was abandoned, as the taxes for these years had been prescribed. For the year 1917 the respondent had taken an appeal to the Circuit Court against the valuation roll and had succeeded in obtaining a reduction of the valuation.

(1) REPORTER'S NOTE.—Special leave to appeal to the Privy Council was granted, December 8th, 1922.

(1) [1921] Q.R. 32 K.B. 520.

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L. E. Beaulieu K.C. for the appellant. The valuation of the respondent's property was not excessive.

Assuming that the property was over-valued, the respondent having neglected to avail itself, within the time prescribed, of the statutory remedy by way of appeal to the Circuit Court, was debarred from complaining by way of a direct action before the Superior Court under Art. 50 C.P.C. *Bain* v. *City of Montreal* (1); *Municipality of Macleod* v. *Campbell* (2).

Respondent's only available remedy was the setting aside of the collection rolls as regards its own property.

G. H. Montgomery K.C. and *A. Mailhiot K.C.* for the respondent. The finding of fact as to overvaluation is unanimous in the courts below.

The collection rolls are *ultra vires* and in violation of 5 Geo. V., c. 109, s. 28; and further as resting upon valuation rolls themselves *ultra vires* and made in violation of Art. 5696 R.S.Q. (1909).

THE CHIEF JUSTICE.—I am of the opinion that this appeal should be allowed with costs here and in the Court of King's Bench and the action dismissed with costs.

Had I been able, as one of my colleagues has, to reach the conclusion that the valuation of the plaintiff's lands in question for the years 1915, 1916, 1918 and 1919 were merely "fictitious valuations" and fraudulent exercises of the power to make assessments conferred on the assessors, I might have reached the conclusion that the Superior Court had the power, under Art. 50 C.P.C. to set them aside as void and illegal.

But I have not, on the record before me, been able to reach any such conclusion. On the contrary, I

(1) [1882] 8 Can. S.C.R. 252, at p. 264. (2) [1918] 57 Can. S.C.R. 517.

think such valuations were made honestly and without fraud in the light of the boom which existed with regard to lands within the municipality of St. Michel during the years mentioned, and before that boom had actually, as it is said, "burst."

A long experience in this court in dealing with the "real value" of lands in towns and municipalities where a boom in land prices had existed has taught me how difficult it is to reach a conclusion of what the "real value" is. Experts giving their evidence on the question differed widely and their various opinions were reflected frequently in the opinions of the several courts called upon to review the assessments made by those whose duty it was in the first instance to make them. These differences of opinion were very pronounced and very great and convinced me that it is difficult indeed during the existence of boom periods, and before the boom has "burst" to reach anything like a unanimous opinion.

In the case now before us I think it fair, on the facts, to conclude that notwithstanding an appeal was made successfully by the plaintiffs in one year, 1917, to reduce the valuation in that year; and as in each and all the years 1915, 1916, 1918 and 1919 no action at all was taken by the plaintiff's respondents to call the valuations for those years in question, they may well be held to have acquiesced in those valuations on the ground that it would or might assist them in selling their lots to prospective purchasers at a very high figure.

However that may be the facts are that in all those years, and until the present action was taken, no steps at all were taken by the plaintiff respondent to appeal from the valuations or to call in question the fairness or unfairness of these valuations.

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The law has provided a very simple method of their doing so, first, by an appeal to the municipal council and then from the determination of that body to the Circuit Court whose judgment was to be final and binding. As I have said, no such appeal was ever taken in the years I have mentioned.

Subject to what I have said in the foregoing reasons, I think the Superior Court had no power under art. 50 C.P.C. to entertain the plaintiff respondents' application to set aside the valuations.

I concur generally in the reasons and conclusions of Brodeur J.

IDINGTON J.—The respondent is the owner of a farm of nearly eighty acres which was subdivided, in 1913 or thereabouts, into lots each of about a tenth of an acre in size and possibly by reason of the subdivision having proved an unprofitable venture, for only some thirty lots were sold, the tenant who had long carried on the farm has been induced to continue farming there despite the subdivision.

The market value of the property seems to have increased so rapidly for some years that from having been bought in July 1911 for the price of $1,000 *per arpent,* it passed to the respondent in May, 1914, for the price of $2,200 *per arpent.*

The assessor or succession of assessors seem to have been induced thereby, and by the price list of the respondent, to raise the assessed value of the whole to the total sum of $528,104.00, in the years 1915, 1916, 1917 and 1918.

The respondent never, until 1917, took any of the regular and proper steps provided by statute for complaining against over assessment.

In 1917 it did take some steps provided, but what is not clear, for there is nothing relative thereto presented in the case before us, save a certificate of judgment in the Circuit Court, whereby it appears that the learned judge had reduced the assessment to $500.00 *per arpent.*

As the result of that it is argued that the said assessors should have adopted that very low figure for the rolls of 1918 and 1919.

A very obvious answer seems to be that, as to 1918, the roll probably was completed by the assessors before the 9th July, 1918, when that judgment was delivered.

I am unable to say why, under such circumstances, the respondent did not avail itself of the means provided by law for appealing to the court of revision for the roll was not homologated until the 11th September, 1918.

The assessment roll of the assessor for 1919 fixed the entire valuation of said property for that year at $347,578. The respondent does not seem to have taken any appeal against that assessment.

The appellant had instituted a suit on the 18th of September, 1917, in the Superior Court, to recover from respondent the taxes in arrear for the years 1913, 1914, 1915 and 1916, making, with interest thereon, the sum of $9,697.60.

On the 20th February, 1920, the respondent instituted this action whereby it seeks to have said action lastly referred to joined and that the assessment rolls and collection rolls for the years 1913, 1914, 1915, 1916, 1918 and 1919, be held illegal, irregular and null, *ultra vires*, and be quashed and annulled.

When the case came before Mr. Justice Maclennan for trial in the Superior Court, the case as to the rolls for the years 1913 and 1914, was abandoned, and

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after hearing the evidence adduced, he maintained the action and adjudged and declared that the valuation and collection rolls of the defendant, appellant, for the years 1915, 1916, 1918 and 1919 are, and each of them is and always has been illegal, irregular, null and *ultra vires* and are set aside and annulled.

Upon appeal therefrom the Court of King's Bench by a majority upheld the said judgment in its entirety, though Mr. Justice Guerin, one of that majority, seems to have had some doubts as to going further than dealing with the claim of partial exemption of the respondent, by reason of the lands in question being farm lands.

The said courts seem, as to the facts, to found said judgments upon the excessive valuation by the assessor and as to the law upon the power given by article 50 of the Code of Procedure.

As to the facts I cannot, after a perusal of the entire evidence, agree that there is therein anything to support such a drastic judgment which if upheld must lead to great confusion; indeed so great as probably to require legislation to carry on the affairs of the appellant as is intimated by the learned Chief Justice.

I, with respect, cannot agree that the article 50 of the Code of Civil Procedure, which reads as follows

> 50.—Excepting the Court of King's Bench, all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the province, are subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof in such manner and form as by law provided,

applies where there is a specific power given elsewhere, in the statutes relevant to the subject matter involved, supplying an adequate remedy, and indeed evidently intended to be the only remedy to rectify any wrong doing on the part of the assessor of a municipal cor-

poration in the way of under or over valuation. I cannot think that in such like cases resort to this article was ever intended, unless possibly in the cases of actual fraud or *ultra vires*.

And especially would that seem to be the case when, as here, the roll is declared binding when homologated, presumably after hearing any appeals tendered, as they were in some other cases, and the more so when that homologated roll in turn seems to be subject to an appeal to the Circuit Court.

I cannot help thinking that this specific code, as it were, eliminates any ground for the interference of the Superior Court under Art. 50, unless in the possible exceptions I have referred to, and by no means do I hold that these exceptions either in law or fact apply to such a case as presented herein.

There is no evidence herein to support any charge of fraud relative to the assessment of respondent's property, much less that the whole of these rolls as to every ratepayer were fraudulent. Indeed fraud is not seriously argued. Illegality may cover that or, in a sense, over or under assessment.

I will deal presently with the other of said possible exceptions confining myself to the only one that appears herein arguable on the facts.

I find the cases relied upon by the court below and counsel before us are as follows:—

The case of *La Corporation Archiépiscopale Catholique de St. Boniface* v. *The Town of Transcona* (1), was an ordinary appeal to us from the courts below in due course of executing the specific remedy given for just such cases as presented here,

(1) [1917] 56 Can. S.C.R. 56.

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If that course had been followed herein, possibly the essence of all involved might have come here if not duly and properly settled by the court of last resort in the province.

La Compagnie d'Approvisionnement d'Eau v. *La Ville de Montmagny* (1); *Rivard* v. *Corporation de Wickham* (2), are, so far as I can see, the only cases in which the court below has ever acted upon such ground as exists herein.

In the former case the course of events was rather provoking, for the party aggrieved pursued his specific remedies without desirable results, but that furnishes no foundation for the assertion of a jurisdiction which a court has not.

In the latter case the reasoning in the judgment of Pouliot J., who dismissed the application and rested upon a long line of authorities followed up to that time, has my assent as correct.

And when we come to the case of *Laberge* v. *La Cité de Montréal* (3), we find another basis of right asserted by the appellant, namely the general exemption. In joining in that judgment the late Mr. Justice Cross expressly excludes the case of a mere error in the amount of assessment, and rests his judgment upon the case therein presented of partial exemption created by a statutory provision for a term of years which seems to have arisen out of circumstances very similar to those which gave rise to the partial exemption in question herein.

These three cases being all so recent as five or six years before the respondent launched this case, and no prior decisions expressly in point having been cited, has induced me to try and trace, if possible, any previous exercise of the power asserted in them, but I have been unable to find any.

(1) [1915] Q.R. 24 K.B. 416. (2) [1915] Q.R. 25 K.B. 32.
(3) [1917] Q.R. 27 K.B. 1.

I find many cases asserting authority over municipal corporations in many ways, by virtue of said article 50 C.P.C., reaching back for fifty years or more, but nothing analogous to what is involved in that presented by this appeal.

The excessive valuation in question herein reminds me of a recent case before us in which judicial authorities passing upon valuation by assessors of a certain property in a city suffering from the same causes as appellant, were found to differ as much as four or five times in regard to the value to be placed upon a certain property.

One court thought one hundred dollars an acre excessive, and another thought four or five hundred dollars an acre was not.

I cannot, for my part, accept such excessive valuations even if they are the aftermath of a mad race in speculation.

But it comes with an ill grace, I submit, on the part of those who have done their part to develop the situation, to refrain from discharging the duty of trying to rectify the results apparent in the assessor's roll year after year and then seeking to overturn the whole basis of the financial structure upon which the affairs of the municipality rest.

I do not think, even if the supervising jurisdiction of the courts could be extended so far, it should be exercised under such circumstances as presented.

Unless in the cases of fraud or what falls properly within the *ultra vires* rule, no relief should, I submit, be given to suitors so acting, for in such cases a wise discretion may be properly exercised. However all that may be, I still adhere to the principles upon which we proceeded in the case of *Municipality of*

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Macleod v. *Campbell* (1), cited in argument herein. In that case I expressed my own view that to hold a mere excess of value an illegality such as to render a roll void is quite impracticable. Indeed it would surprise a great majority of rural municipalities to be told that taxes could not be collected because the assessor had assessed far below the actual value. Yet that is, in strict law, quite as illegal as assessing too high.

The doing so in either case does not give rise to any application of the doctrine of *ultra vires* unless in the case of him entitled to claim an exemption.

The duty of him claiming it is to bring the claim before the courts entrusted with the jurisdiction of settling the roll or correcting it.

But if he fail to do so I am of the opinion that he can resist the collection of taxes imposed in violation of his exemption and that he does not need such relief as sought herein for his protection.

The respondent has, I think, on the evidence before us, shewn it is entitled to be taxed on the basis of such exemption, and can insist thereon without being given any such relief as sought herein.

I was at first inclined to agree with Mr. Justice Rivard's suggestion in his well considered judgment, if I may be permitted to say so, with which I almost entirely agree, but on reflection I do not think the application of his solution of the problem is necessary herein, though the principle thereof must be observed in determining the amount the appellant is entitled to recover in the suit it has taken.

I would therefore allow this appeal and dismiss the respondent's action with costs throughout.

(1) 57 Can. S.C.R. 517.

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DUFF J.—The finding of the learned trial judge is in the following words:

> Considering that the valuation of the plaintiff's property on the basis of over $6,000 per arpent is and was a fictitious valuation far in excess of its actual or real value and the assessors of the defendant in so valuing plaintiff's property proceeded upon a wrong principle and ignored the real or actual value of said property and thereby exceeded the powers given to said assessors and to the said defendant by its charter and by-law.

I am not quite sure whether the learned judge means that for ulterior purposes the assessors and the municipal council had deliberately combined to assess the property in the municipality at a grossly excessive valuation.

If this is the proper construction of the finding then I think the evidence is inadequate to support it. There is nothing to shew that either the assessors or the council were actuated by any specific improper motive, such for example, as that suggested in the pleadings, namely, that the statutory limit of the municipal indebtedness should be illegally elevated. An inference that there was such wrongdoing would necessarily be an inference based upon the conclusion reached by the learned trial judge that the valuation was grossly excessive. I am not sure that in this sense the finding is concurred in by more than one of the learned judges of the Court of King's Bench; but assuming that in this sense there are concurrent findings of two courts I should still be forced to the conclusion from a perusal of the evidence and the reasons that there are no adequate grounds for such a conclusion. The question whether or not there has been such impropriety must always be a very delicate one. We have had in this court a very wide experience of the divergent views which people honestly entertain (valuators and the professional men of unques-

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tioned integrity charged with official responsibilities in the matter of valuation for taxation purposes) as to the proper method in particular circumstances of ascertaining "actual value;" and it must be obvious to anybody who gives the matter a moment's thought that the whole subject, both in theory and in practice, is beset with difficulties. The questions, is current price an exclusive test? is a great augmentation or diminution in the number of transactions a merely temporary aberration or the result of factors likely to be permanent? and others of a like nature are questions which may well give officials trying to do their duty the most anxious concern. Everybody knows how tenaciously at the close of a period of inflation people cling to their faith in a restoration of price levels after all legitimate grounds for such faith have disappeared.

The respondent's property was in a suburb of Montreal which began to receive the attention of speculators in land as early at least as 1911. Prices had risen with great rapidity and during the years in respect of which the questions agitated in this litigation arise, lands were assessed by the municipality at values based largely upon an estimate made in the years 1913 and 1914. The evidence is that the prices fetched from time to time by sales of small areas formed a starting point from which the valuations were made. It now seems to be quite clear that everybody (the respondent and other speculators and those who purchased lots from them, as well as the officers of the municipality) was over-sanguine and held absurdly extravagant ideas as to the value of the property. But while it may very well be that, as a result of the evidence now offered, the proper conclusion is that $500 an acre was the real value of the property assessed at the rate of $6,000 an acre, it

would be quite unfounded to suppose that anybody, the respondent or anybody else, had a suspicion that there was any such disparity between the real value and the assessed value. Indeed property which is now said to have been worth $500 an acre was admittedly sold in 1914 at the price of about $2,500 an acre.

A circumstance to which I think weight has not been sufficiently attached in the court below is the circumstance that these valuations which are now attacked were not during all these years impeached by the ratepayers affected by them in appeal to the Circuit Court as provided by the statute. The Court of King's Bench, it may be observed, has concurred with the trial judge in setting aside the rolls *in toto*. They have proceeded, so the respondents argue, upon the assumption that conscious and intentional overvaluation and violation of duty governed the municipal officers in respect of all the valuations in the municipality. No appeal has been taken against these valuations which are now attacked. No evidence was given of such appeals and I assume that the decisions of the Circuit Court are not impugned. It is not only a fair deduction, it is I think the only legitimate inference, that the views of the municipal officers as indicated by the valuation were not grossly inconsistent with the values which would have been ascribed to the properties affected by the general opinion of those most concerned, namely, the owners who by statute were made personally responsible for the payment of taxes. I do not suggest that it would be fair to infer that a particular assessment was always accepted as a perfectly just assessment but the inference is, I think, a plain one that there was no such disparity between the general opinion as to value and the assessment of the properties as in itself

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would justify the inference that the municipal officers were consciously departing from their duty and improperly fabricating an assessment roll with fictitious valuations for an ulterior improper purpose.

I repeat, that having read with care the evidence and the reasons given by the learned judges in the court below I see no escape from the conclusion that (if the respondents rightly construe the findings of fact) the consideration which in my opinion is the predominant consideration arising from the undisputed facts of this case is one to which sufficient weight has not been attached. It might be that a case of actual fraud would afford an answer to an action for the recovery of taxes. I desire to make it quite clear that I reserve entirely any question as to the right of the respondents if such a case of actual fraud had been established. I observe only that if such a question were raised it would be necessary to consider whether, by the law of the province of Quebec, a plaintiff who had declined to avail himself of the statutory remedy by way of appeal could lie by for years while all sorts of rights were being created on the faith of the assessment roll and then demand as of right that the roll should be set aside *in toto* without any sort of excuse or explanation of his quiescence. For the present I give no opinion upon the point, nor upon the question whether a finding of actual fraud such as that suggested might not afford an answer to a claim for the payment of taxes.

I am, however, unable to say that there is not evidence to support the conclusion of the learned trial judge that the assessors have not observed the principle laid down by the statute, and by that I mean this. I think there is evidence to justify the conclusion that the valuation was so excessive that if competent

valuers and a competent municipal council applied their minds to the question of the actual value of the property with anything like a correct appreciation of what is implied in "actual value" they would not have made an assessment in the figures actually arrived at. That is a result quite consistent with the assumption of an absence of bad faith. Such being the state of the facts it is convenient first to address oneself to the question whether you have here a case of legal incompetence. The "Cities and Towns Act," secs. 5256 to 5288 includes provisions dealing with the subject of the values and assessments. Secs. 5696, 5707 and 5708 deal with the authority of the assessor and of the council in relation to the valuation roll. To the assessors is committed the duty of assessing the taxable property of the municipality and to the municipality is committed the duty of hearing and deciding all complaints against valuations made by the assessors and to consider whether or not the roll should be maintained or altered, and authority to revise the same whether complained of or not. It is clearly within the authority of the assessors and the council to consider and to decide upon the valuation of property for the purposes of taxation and to record the result in the valuation roll. Now the Act by art. 5696 expressly provides that the taxable property shall be assessed "according to its real value." It is argued that where there is a departure from this statutory mandate there is a case of want of competence, that the acts of the assessor and the council are *ultra vires* and *ab initio* null. That is a conclusion to which I cannot agree. All through the law there runs a distinction between incompetent acts and acts which though competent are wrongful or it may be illegal. Where you have authority to do a certain class of acts coupled

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with a rule prescribing the manner in which the act is to be done or prohibiting the doing of it in a given way, you may always have the question whether the rule imports a limitation of authority; and whether it does or does not import a limitation of authority is a question to be decided on the construction of the instrument creating the authority viewed in light of the circumstances and the object and purpose for which the authority is given. Now it is quite clear that this statute does not treat as a nullity (it is almost too obvious for remark) a valuation which in fact is not based upon the actual value of the property. The statute does not treat it as a nullity because the statute provides a means for complaining against such a valuation and correcting it. First, there is the right to complain before the municipal council and then from the decision of the municipal council there is a right of appeal to the Circuit Court. If the valuation were a nullity there would be nothing upon which either appeal could operate. I think this applies whatever be the circumstances under which the irregular and wrongful valuation is made. Even if it were shewn that an assessor had overvalued property in consequence of corrupt influence I cannot doubt that it would still be open to the municipality to correct the valuation by resorting to the statutory appeal. It is not conclusive of course on the point of competency or no competency to say that such a valuation is not a nullity because an incompetent act may be only relatively null. For the present I am concerned only in making it clear that there is no case of nullity *ab initio*, and that, I think, is plain. I think it is also quite clear that there is no case of incompetency because it was the duty of the assessor in the first place to enter the valuation in the valuation

roll and in the second place it was the duty of the council to revise it; that is the very thing committed to them by statute. If in performing that duty the statutory rule were consciously disregarded that would be an illegality of a very grave kind. If there is incompetence or negligence such that in effect the statutory mandate is disregarded there may be illegality also, but in neither of these cases is there for that reason alone incompetency in the legal sense. I can entertain no doubt that giving due weight to the provisions for correcting wrong and improper valuations it is quite impossible to hold that in any of these cases there is either legal incompetency or nullity *ab initio*.

The point has been the subject of so much discussion that I think it worth while to refer to a single case to shew the view which heretofore has been taken upon this distinction between incompetency and illegality as these words are found embodied in Quebec legislation. In *Déchène* v. *City of Montréal* (1), the Privy Council had to consider a resolution of the corporation of Montreal under sec. 101 of the Montreal charter which authorized the corporation to make an annual appropriation of an amount necessary to meet the expenses of municipal administration during the current year. The self same clause which authorized the appropriation imposed a restriction that such appropriation should never exceed an amount to be ascertained in a manner prescribed by the section. The council of the corporation made an appropriation in excess of the maximum fixed by the section. Proceedings were taken to set aside the resolution and the corporation answered that the proceedings were prescribed in three months by force of a certain statutory

(1) [1894] A. C. 640.

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provision, sec. 12 of 42-43 Vict., c. 53, which gave to a municipal elector the right in his own name to procure a judicial annullment of municipal proceedings on the ground of illegality and imposed a prescription of three months where the proceeding was within the competence of the corporation. It was contended among other things that the resolution in question being incompetent the prescription did not apply. The promoters of the litigation insisted that the resolution was incompetent at least in so far as the amount of the appropriation exceeded the statutory maximum. By both the Quebec courts and the Judicial Committee it was held that the complaint was a complaint of illegality and not of incompetence. Lord Watson said at p. 644 of the report that the resolution

> was plainly within their competence, seeing that it exclusively relates to matters committed to the council by statute.

In the Court of Queen's Bench Mr. Justice Blanchet, delivering the judgment of the court (1), said:—

> L'appelant a prétendu de plus, que la prescription de trois mois ne s'applique pas au cas actual parcequ'en adoptant sa résolution l'intimé avait excédé sa jurisdiction. L'article suscité de la charte dit, en effet, que le droit de se plaindre sera prescrit par trois mois et que la résolution sera tenue pour valide pourvu qu'elle soit de la compétence de la corporation. Il ne faut pas confondre ici la question de pouvoir avec la question de compétence; le conseil avait évidemment le droit de fixer son budget, en y portant les sommes nécessaires pour les dépenses de l'année alors prochaine. Ce sujet était entièrement de sa compétence. De ce qu'il aurait inclus une somme qu'il n'avait pas le droit d'y mettre, il ne s'en suit pas que la resolution n'est plus de sa compétence. Il y a bien là une illégalité qui permettrait au tribunal d'intervenir et de retrancher ce qui est illégal de ce qui est légal, mais non pas de mettre de coté toute la résolution. Les illégalités ou les irrégularités commises à ce sujet peuvent être attaquées par les contribuables dans les trois mois fixés par le statut, à l'aide d'un mode spécial de procédure; mais ce délai passé, ces derniers sont absolument déchus de ce droit. La loi leur a donné un control sommaire et efficace sur les

(1) Q.R. 1 Q.B. 206 at pp. 214 and 215.

actes de leurs mandataires. Mais, comme il est de l'intéret public que les procédes des corporations soient, après un certain temps, tenus pour valides, la législature a voulu que ce délai une fois expiré, il en résulte une déchéance complète, quant au remède spécial qu'elle fournit, puisqu'elle déclare valide et obligatoire tout ce qui a été fait, dans les limites de la compétence du conseil, laissant aux intéressées le recours ordinaire, aux autres remèdes qui peuvent exister.

I come now to article 50 C.P.C. This article is one that confers jurisdiction, a jurisdiction which, by the terms of the article itself, is to be exercised subject to the special provisions of the law. It does not profess to give, and it would be an unwarrantable extension of its purport to read it as giving, an unrestricted and unqualified right to any subject of the realm to require the Superior Court to review the proceedings of public and private corporations; nor can it properly be read as giving to each elector or ratepayer in a municipality without regard to the qualifications and conditions laid down by the statutes dealing with municipal institutions the right to invoke such jurisdiction in relation to the proceedings of the municipality; and I think that where in relation to a given municipal proceeding or even a given class of municipal acts a special recourse is given to a specified class of persons as affording a remedy for error or illegality then the Superior Court, in exercising its jurisdiction under Art. 50, is governed by the conditions and the qualifications attached by law to that right of recourse. At all events I think it is quite clear that where a special remedy is given by statute if that remedy sufficiently appears, either from the express terms of the statute creating it or from the nature of the case, to be intended to be the exclusive remedy for those to whom it is given then the jurisdiction of the Superior Court is limited accordingly.

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It is not necessary, as I have already said, to consider what the remedy of the aggrieved owner may be in a case of actual fraud and I put that case aside. In all other cases whether the valuation be the result of error of judgment or of negligence or of reckless inattention or incompetence the statutory remedy is, in my judgment, the exclusive remedy unless it be, and that is the point to which I will come in a moment, that a right to impeach the assessment is given under Art. 5591 R.S.Q. I think this follows from a consideration of the nature and objects of the procedure itself. The object is to get a valuation of the taxable property of the community for the purpose of enabling the tax rate for special taxes as well for general municipal taxes to be struck as the school rate. Once the roll is complete, that is to say, once all appeals and complaints provided for by statute have been disposed of, the roll becomes the foundation upon which the levying and the collecting of taxes proceeds. It is also that basis which determines the limit placed by the law upon the municipal indebtedness. Now if it be open to any owner of property who has allowed the roll to be closed without taking advantage of the statutory procedure to complain of excessive valuation it is obvious that a very wide door to uncertainty and confusion is opened up. Cases of fraud being eliminated if an assessment is open to attack upon the ground that the assessor "has proceeded upon a wrong principle" it will in practice be a hopeless task to assign a limit to the class of cases which might be entertained by the courts. I think when the legislature provides for the making of a valuation roll and a special procedure for disposing of complaints and then makes the valuation roll the basis of taxation

it is implied that all questions of valuation as such are, as between the owner and the municipality, to be considered set at rest when the express statutory remedies made available have been exhausted.

I come now to Art. 5591. I am disposed to think than an overvaluation or an undervaluation made through sheer negligence in the sense of neglect on the part of the assessors and of the council to give any consideration to the question of actual value might not improperly be described as an instance of "illegality." I do not think, however, that in such a case of improper valuation the remedy given by Art. 5591 is available to an aggrieved owner because his remedy is explicitly provided for by the section of the "Cities and Towns Act" already referred to and the operation of 5591 for his benefit is excluded impliedly by those provisions.

If I am wrong in this however I concur with my brother Brodeur in thinking, as I have already said, that the complaint preferred is a complaint of illegality rather than incompetency and that in so far as the respondent prefers its complaint *qua* ratepayer that article applies. The conditions governing proceedings under that article would not, however, affect any right the aggrieved owner might otherwise have to resist a claim for taxes on the ground of fraud nor would non-compliance with such conditions be an answer to a proceeding by the Crown in the public interest on the same ground.

There remains the argument based upon the municipal charter, s. 28. This section deals with the subject of taxation rather than the subject of valuation. It can afford no basis for impeaching the assessment roll. Nor do I think it is a ground for

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impeaching the collector's roll except as an answer to a claim for taxes. The contention now raised will be open to the respondents in answer to such a claim.

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

ANGLIN J. (dissenting)—I have had the advantage of reading the carefully prepared opinions of my brothers Brodeur and Mignault. After full consideration of the record, factums and oral argument I am satisfied to accept my brother Mignault's conclusions that the valuations of properties on the impugned assessment rolls were purely fictitious and were made in utter disregard of real value.

The case presented is not one merely of excessive valuation, the result of mistake of judgment in endeavouring to exercise the powers conferred by the law. It is a case of flagrant and wilful abuse of those powers for an ulterior purpose. It is not a case of mere irregularity but one of absolute nullity *ab initio*, resulting from the attempt to do what the statute not only does not permit, but clearly forbids.

The evidence fully warrants this view which prevailed in the Superior Court and with a majority of the judges in the Court of King's Bench. On this aspect of the case I cannot usefully add to the opinions of my brother Mignault and of the learned Chief Justice of Quebec and Mr. Justice Martin in the Court of King's Bench.

I also accept the statement of my learned brother as to the scope and operation of Art. 50 C.C.P. Its purview and the limitations upon its application were stated by the Chief Justice of Quebec in the

passages quoted by my brother from his judgment in *La Tuque* v. *Desbiens* (1), and were briefly reiterated by Mr. Justice Greenshields in the recent case of *Neville* v. *School Trustees of New Glasgow* (2).

I agree that the remedies afforded by Arts. 5707 and 5715 and by Art. 5591 R.S.Q. are not, under the circumstances of the case, exhaustive, and that the right to invoke Art. 50 C.P.C. remains unaffected by the three months prescription which Art. 5634 R.S.Q. imposes. Where an assessment is void *ab initio*, the tribunals provided by Arts. 5707 and 5715 have no jurisdiction to deal with it. They can neither amend nor confirm it or give it validity. *Toronto Railway Co.* v. *City of Toronto* (3). No doubt it is in the public interest that ratepayers should ordinarily be restricted to the method prescribed by the "Cities and Towns Act" for obtaining redress in cases of over assessment or of irregularities. But this is not an ordinary case; it is a most extraordinary case of deliberate abuse of a statutory power amounting to a fraud upon such power. The supervising control conferred by Art. 50 C.P.C. on the Superior Court is designed to provide for such cases.

I do not overlook the restrictive words "in such manner and form as by law provided," which are appended to "the superintending and reforming power, order and control of the Superior Court" conferred by Art. 50 C.P.C. But those concluding words of the article do not import that resort to it cannot be had wherever a special means of redress of limited scope is afforded by the statute which confers the power the exercise of which the court is asked to supervise—at all events where, as here,

(1) Q.R. 30 K.B. 20. (2) Q.R. 33 K.B. 140, at p. 144.
(3) [1904] A.C. 809, at p. 815.

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it is established that the impugned act was beyond the competence of the corporation. *Déchène* v. *La Cité de Montréal* (1). No question of the sufficiency of the plaintiffs' interest under Art. 77 C.P.C., such as was dealt with in *Robertson* v. *City of Montreal* (2), arises in this case. I cannot assent to the suggestion that in every case of *ultra vires* action under Art. 50 C.P.C. must be at the instance of the Attorney General.

The only serious difficulty that I perceive arises from the plaintiffs' delay in seeking relief, which, it is urged, warrants an inference of acquiescence by them in the assessment of which they complain. But such an inference should not be drawn merely from failure to take advantage of the special means afforded by the "Cities and Towns Act" for obtaining relief against irregularities in the preparation of the rolls or in a case of mere overvaluation. If it should, Art. 50 C.P.C. could never be invoked in such cases.

Apart from the failure to proceed either under Arts. 5707 and 5715 or under Art. 5591 I do not find in the record anything to sustain the plea of acquiescence. While high assessments may have tended to improve the plaintiffs' prospects of selling their lots, there is no proof of such collusion on their part as might have amounted to a *fin de non recevoir*, or have precluded them from averring that the defendant had committed an abuse of its statutory power or a fraud upon it. An absolute nullity does not acquire life and vigour because it is not attacked. Enforcement of it may be successfully resisted when the attempt to enforce it is made. To allow mere delay without proof of collusion or acquiescence to defeat the plaintiffs' demand for action under Art. 50 C.P.C.,

(1) [1894] A.C. 640, at p. 642. (2) 52 Can. S.C.R. 30.

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which neither rests on equitable grounds nor involves the exercise of discretionary power, would be to introduce a prescription for which the law does not provide.

But, with respect for the contrary opinion of my learned brother Mignault, I prefer the view, which prevailed in the Court of King's Bench, that the relief to be granted the plaintiffs should not be restricted to avoidance of the assessments of their own properties. Their claim rests on nullity of the assessment roll resulting from the utter disregard of the requirement of the statute that property shall be assessed at its true value (Art. 5696), which the evidence, notably that given by the appellant's secretary-treasurer, Joseph A. Pesant, and by François C. Laberge, shows prevailed generally in the preparation of it by the municipal authorities. Excessive valuation in violation of Art. 5696 renders futile the provision limiting the annual rate of taxation to 2% (Art. 5730 R.S.Q.) *La Corporation Archiépiscopale Catholique Romaine de St. Boniface* v. *The Town of Transcona* (1).

If the excess in valuation had merely affected the plaintiffs' subdivision I should have had some difficulty in holding that the case did not fall exclusively within Arts. 5707 and 5715, or within Art. 5591 R.S.Q., and that it was not merely a case of mistaken overvaluation. It is because gross overvaluation is shewn by the defendant's plea and by the evidence to have been systematic that a case of flaunting restrictions on a statutory power such as results in absolute nullity has been clearly established. In such a case a plaintiff in my opinion is entitled to invoke the supervising control conferred by Art. 50 C.P.C. As put by Lamothe C.J. in *La Tuque* v. *Desbiens* (2), *"c'est l'action populaire."*

(1) 56 Can. S.C.R. 56 at p. 62.

(2) Q.R. 30 K.B. 20.

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The collection rolls, of course, fall with the assessment rolls. I also concur, however, in the view that as to the respondents the collection rolls are invalid because clearly in contravention of Art. 28 of the statute, 5 Geo. V., c. 109.

I would for these reasons dismiss the appeal with costs.

BRODEUR J.—Par son action instituée le 25 février 1920, l'intimée, la compagnie Shannon Realties, demande que les rôles d'évaluation et de perception pour les années 1915, 1916, 1918 et 1919 qui ont été homologués par le conseil municipal de la ville de St-Michel soient déclarés irréguliers, illégaux et *ultra vires*.

La ville de St-Michel plaide la légalité de ces rôles et elle allègue que la compagnie Shannon y a acquiescé et que cette action est instituée trop tard.

L'action de la compagnie Shannon a été maintenue par les tribunaux inférieurs, les honorables juges Allard et Rivard étant cependant dissidents en cour d'appel.

La ville de St-Michel est régie par la loi des cités et villes (Art. 5256 et suivants, S.R.P.Q. 1909). Elle est aussi régie par une charte spéciale où il est décrété que les terres en culture seront taxées sur la base d'un quart de la valeur portée au rôle d'évaluation.

Les évaluateurs de la municipalité ont pour les années en question préparé annuellement le rôle d'évaluation (art. 5696 S.R.P.Q.). Les avis requis ont été donnés, mais la demanderesse n'a pas jugé à propos de porter plainte et n'a pas non plus appelé à la cour de circuit qui avait juridiction, suivant les dispositions des articles 5715 et suivants des statuts refondus de la province de Québec, pour faire modifier l'évaluation qui frappait ses propriétés.

Elle a laissé écouler plusieurs années sans payer ses taxes; et maintenant, après avoir été poursuivie par la ville de St-Michel pour ses taxes, elle prend la présente poursuite pour faire annuler tous ces rôles d'évaluation et de perception, en disant que les estimateurs et le conseil municipal ont surévalué les propriétés de la municipalité et que les rôles de perception n'ont pas respecté cette disposition de sa charte qui exige que les terres en culture ne soient pas taxées pour un montant plus élevé qu'un quart de leur valeur.

La question qui se présente est de savoir si la compagnie demanderesse peut exercer maintenant ce droit d'action et s'il n'est pas prescrit.

Si nous consultons la loi des cités et villes, nous voyons que le législateur a indiqué avec soin la marche à suivre pour la confection des rôles d'évaluation et pour la sauvegarde des droits des intéressés. Les estimateurs sont tenus de faire au temps ordonné par le conseil le rôle d'évaluation des biens imposables (art. 5696 S.R.P.Q.). Après que le rôle est terminé, ils le déposent au bureau du conseil, avis public de ce dépôt est donné par le greffier dans les deux jours suivants, et les intéressés sont avertis que ce rôle restera ouvert à leur examen durant les trente jours qui suivent celui du dépôt (art. 5705 S.R.P.Q.). Alors si quelqu'un a à se plaindre du rôle, il peut en appeler au conseil durant ces trente jours (art. 5706 S.R.P.Q.), et le conseil, à sa première assemblée générale, entend ces plaintes et les décide (art. 5707). Cependant les plaignants peuvent se pourvoir en appelant devant la cour de circuit contre la décision du conseil. Et là, devant la cour de circuit, la procédure doit être faite avec la plus grande célérité (art. 5715-5716-5717-5720).

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Comme je l'ai déjà dit, la demanderesse-intimée se plaint que ses propriétés ont été évaluées à un prix trop élevé, et c'est le motif qui l'a incitée à instituer sa présente action en cour supérieure; et elle invoque à cette fin l'article 50 du Code de Procédure Civile, que les corporations sont soumises

au droit de surveillance et de réforme, aux ordres et au contrôle de la cour supérieure.

Ce pouvoir de la cour supérieure n'est pas absolu, car l'article 48 du code de procédure nous déclare que la cour supérieure

connaît en première instance de toute demande ou action qui n'est pas exclusivement de la juridiction de la cour de circuit.

L'article 54 du code de procédure qui parle de la juridiction de la cour de circuit, nous indique certaines causes où la cour de circuit

connaît en dernier ressort et privativement à la cour supérieure.

La juridiction de la cour supérieure n'est donc pas absolue; d'ailleurs l'article 50 C.P.C. énonce formellement que ce droit de surveillance et de contrôle sur les corporations et les tribunaux inférieurs doit s'exercer

en la manière et forme prescrite par la loi.

Dans la cinquième partie du code de procédure nous trouvons les procédures relatives aux corporations et aux fonctions publiques. L'article 978 donne au procureur-général le droit de poursuivre une corporation qui viole les actes qui la régissent. L'article 987 donne à toute personne intéressée le droit de porter plainte lorsqu'un individu exerce illégalement une charge publique.

Les tribunaux inférieurs qui excèdent leur juridiction sont soumis au bref de prohibition (art. 1003 C.P.C.). Le chapitre 65 nous donne les moyens de se pourvoir contre la procédure et les jugements des tribunaux inférieurs et dit les cas où le bref de *certiorari* peut être émis (art. 1292 et suivants, C.P.C.).

Voilà comment au code de procédure le législateur a déterminé la juridiction de la cour supérieure.

Nous avons cependant dans notre droit statutaire des dispositions formelles sur la juridiction des tribunaux. Ainsi, par exemple, la loi des cités et villes donne en matière d'évaluation municipale juridiction au conseil municipal et à la cour de circuit (art. 5706, 5709, 5715 S.R.P.Q.).

Cette juridiction est-elle exclusive et la cour de circuit a-t-elle le droit d'en connaître en dernier ressort et privativement à la cour supérieure?

Cette question de la juridiction respective de la cour supérieure et de la cour de circuit a fait le sujet de nombreuses discussions devant nos tribunaux, surtout au sujet des municipalités rurales qui, comme on le sait, sont régies par le code municipal.

La cour de circuit avait, sous les dispositions de l'article 100 du vieux code municipal, le droit de casser tout règlement ou toute résolution. Mais cet article ajoutait:

> Cet article n'est pas exclusif du droit de faire mettre de côté par la cour supérieure une résolution ou un procès-verbal d'un conseil municipal, pourvu que les frais encourus dans l'instance ne puissent pas dépasser les frais et déboursés qui auraient été payables si la cause eût commencé sous la Cour de Circuit.

Cette dernière disposition a donné lieu à une grande incertitude dans la jurisprudence.

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Mais tout de même il ne peut pas y avoir de doute que sous le code municipal la Cour Supérieure et la Cour de Revision ont juridiction sur les résolutions du conseil municipal.

On a dans la présente cause cité grand nombre de ces décisions qui ont été rendues sous le code municipal. Je crois qu'elles ne doivent pas être invoquées, pour l'excellente raison que notre loi des cités et villes n'a pas la même disposition que celle que nous trouvons dans l'article 100 du code municipal.

Dans la cause qui nous est soumise, la compagnie Shannon avait le droit, sous les dispositions de l'acte des cités et villes, de porter une plainte contre le rôle d'évaluation dans les délais déterminés par les statuts refondus. Elle pouvait également appeler de la décision du conseil à la cour de circuit. Elle n'a pas jugé à propos de le faire.

Cette juridiction qui est donnée par le statut à la cour de circuit me paraît être absolue et ne peut pas faire l'objet d'un litige devant la cour supérieure, sous les dispositions de l'article 50 du code de procédure civile. Il me paraît évident que la procédure qui est indiquée dans l'acte des cités et villes pour l'évaluation des propriétés et pour la contestation du rôle d'évaluation demande à être aussi sommaire que possible afin de ne pas paralyser le prélèvement des impôts et la marche régulière de l'administration municipale.

Il me paraît évident aussi que dans le cas actuel l'acte des cités et villes, en donnant à la cour de circuit la juridiction qu'elle lui a donnée quant à l'évaluation de la propriété, manifeste clairement l'intention du législateur d'enlever à la cour supérieure sa juridiction de droit commun pour la donner à la cour de circuit.

La demanderesse, la compagnie Shannon, se plaint que sa propriété est surévaluée. Elle aurait dû alors porter sa plainte devant le conseil municipal et ensuite en appeler à la cour de circuit. Or n'ayant pas fait cela, elle se trouve privée du droit de saisir la cour supérieure de son grief.

Il est de principe que la juridiction de la Cour Supérieure n'est pas enlevée par un statut, à moins d'un texte positif ou par des expressions qui manifestent clairement l'intention du législateur ou par la création d'un nouveau tribunal dont la juridiction serait incompatible avec la juridiction de droit commun.

J'en suis donc venu à la conclusion que la Cour Supérieure n'avait pas le pouvoir de rouvrir cette question d'évaluation de terrain qui était du ressort exclusif de la cour de circuit.

Mais la demanderesse plaide en outre que le rôle d'évaluation et le rôle de perception n'ont pas été faits suivant la loi et qu'alors elle a le droit de s'adresser à la cour supérieure pour les faire casser.

Il est incontestable que si les rôles sont illégaux la demanderesse aurait pu demander à ce qu'ils soient cassés et qu'elle aurait pu s'adresser à la cour supérieure à cette fin. L'article 5591 des statuts refondus dit:

> Les procès-verbaux, rôles, résolutions ou autres ordonnances du conseil peuvent être cassés par la cour supérieure du district dans lequel est situé en tout ou en partie la municipalité pour cause d'illégalité de la même manière, dans le même délai et avec les mêmes effets qu'un règlement du conseil et sont sujets à l'application des articles 5603 et 5633.

Les articles 5623 et suivants des statuts refondus de la province de Québec indiquent la manière dont on peut contester ces règlements, et l'article 5624 déclare positivement que le droit de faire cette demande se prescrit par trois mois.

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La demanderesse n'a pas jugé à propos de se plaindre dans ce délai que lui indiquait le législateur. Je suis même porté à croire qu'elle était satisfaite que son évaluation municipale fût portée à un prix aussi élevé que possible afin de lui permettre de vendre cette propriété plus cher. Mais maintenant que le "boom" qui existait dans le temps pour les immeubles a cessé, elle veut mettre de côté les rôles d'évaluation dont elle se servait probablement dans le temps pour trouver des acheteurs à un prix très élevé.

Cette question de prescription a fait l'objet d'une décision importante dans la cause de *Déchène* v. *La Cité de Montréal* (1). Le conseil privé, appelé dans cette cause à examiner la disposition de la charte de la cité de Montréal qui déclarait qu'un électeur municipal pouvait demander l'annulation d'une appropriation pour dépense d'argent dans les trois mois pour cause d'illégalité mais qu'après ce délai le droit était prescrit et l'appropriation était valide, a jugé

that on the expiration of the three months the elector's statutory right was at an end, and could not be extended by any procedure clause (see sec. 3 of the Civil Procedure Code) which presupposed an existing right of action and regulated its exercise.

Lord Watson, en rendant le jugement, dit de ces dispositions de la loi:

They confer upon each and every municipal elector the right, which he had not at common law, to challenge on the score of illegality, any corporate appropriation of money to meet the expenses of the current year, subject to the condition that the right shall prescribe, if not exercised within three months from the time when the appropriation comes into force. They also confer upon the corporation an absolute immunity from liability to have the legality of the appropriation questioned, at the instance of any person whatsoever, after the lapse of these three months.

(1) [1894] A.C. 640.

Voice que dans la cause actuelle la loi des corporations de villes déclare expressément que des rôles peuvent être contestés pour illégalité dans les trois mois qui suivent leur mise en force. La demanderesse a donc exercé tardivement son action qui aurait dû être renvoyée. Le droit de faire une chose et l'exercice de ce droit ne doivent pas être confondus. Lorsque la loi dit qu'un droit sera perdu faute de l'exercer dans le délai qu'elle fixe, elle établit une déchéance. Dalloz, Répertoire, *verbo* Délai, no. 63. Merlin, Répertoire, *verbo* Prescription, sect. 1ère, par. 1, no. 3.

Cette question de prescription a donné lieu à une jurisprudence assez incertaine. Ainsi en 1907 la cour de revision, composée des honorables juges Tellier, Hutchison et Lafontaine, a confirmé le jugement de l'honorable juge Curran dans la cause de *Emard* v. *Boulevard de St-Paul* (1), et a décidé que l'action en nullité ne peut être intentée trente jours après la mise en force d'une résolution d'un conseil municipal que par un contribuable ayant un intérêt direct et spécial.

En 1909, dans la cause de *Allard* v. *Ville de St-Pierre* (2), quatre juges de la cour supérieure se sont également divisés sur cette question, la majorité de la cour de revision étant d'opinion que tout contribuable peut demander par action directe la cassation d'un règlement municipal *ultra vires* nonobstant le recours spécial par voie de requête prévu dans l'acte.

Dans une cause de *Aubertin* v. *Ville de Maisonneuve* (1905) les juges se sont là aussi également divisés sur la question de savoir si l'action directe pouvait s'exercer par un contribuable.

(1) Q.R. 33 S.C. 155.

(2) 36 Q.R. S.C. 408.

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La cour d'appel a dans ces derniers temps décidé que la cour supérieure avait juridiction dans une action pour faire déclarer illégaux les rôles d'évaluation, même après les délais, et que cette action échappe à la prescription de trois mois édictée au sujet des requêtes en cassation pour cause d'illégalité.

La Compagnie d'approvisionnement d'eau v. *La ville de Montmagny* (1); *La ville de La Tuque* v. *Desbiens* (2); *Northern Lands Co.* v. *La ville de St-Michel* (3); *Laberge* v. *Cité de Montréal* (4).

Cette jurisprudence récente de la cour d'appel me paraît contraire à la décision qui a été rendue dans la cause de *Déchène* v. *Cité de Montréal* (5). Il est nécessaire, dans l'intérêt de l'administration municipale, que ceux qui ont à se plaindre des décisions des conseils municipaux le fassent dans les délais prescrits par la loi. Ils ne doivent pas attendre des années et des années avant de demander aux tribunaux d'intervenir.

Je considère que l'action intentée par la demanderesse dans la présente cause est tardive et que le jugement qui l'a maintenue doit être renversé avec dépens.

MIGNAULT J. (dissenting).—Peu de dispositions législatives sont invoquées plus souvent que l'article 50 du code de procédure civile, surtout en matières tombant sous l'empire soit du code municipal, soit de l'acte des corporations de ville.

Dans une décision récente (*La Ville de La Tuque* v. *Desbiens* (2)), l'honorable juge-en-chef Lamothe a fait une déclaration de principes qu'il est important de citer textuellement:

(1) [1915] Q.R. 24 K.B. 416.
(2) [1919] Q.R. 30 K.B. 20.
(3) [1919] Q.R. 28 K.B. 378.
(4) [1918] Q.R. 27 K.B. 1.
(5) [1894] A.C. 640.

Deux grands principes ont été affirmés dans des décisions antérieures; ce sont les deux phares qui doivent nous guider. Quand il s'agit d'une nullité absolue, on peut toujours recourir à l'article 50 C.P.C. Quand il s'agit d'illégalités provenant d'informalités, ou d'irrégularités, il faut recourir au mode spécial indiqué par la loi.

Plus loin, l'honorable juge-en-chef dit:

Les tribunaux ont souvent annulé des décisions municipales comportant une injustice criante à l'égard d'un ou de plusieurs contribuables; le fait qu'une décision apparaît arbitraire, oppressive et abusive, peut porter les tribunaux à la considérer comme nulle *ab initio*. La tendance de la jurisprudence a été de considérer un abus criant de pouvoir comme équivalent à un excès de pouvoir. Les mots *ultra vires* ont reçu par là une signification plus large.

L'article 50 C.P.C. est toujours le texte que l'on invoque lorsque l'on attaque de telles décisions.

Pour se prévaloir de l'article 50 C.P.C., faut-il qu'un demandeur démontre un intérêt spécial, différent de l'intérêt des autres contribuables? Si la décision attaquée est atteinte de nullités absolues, le demandeur n'a pas à alléguer ni à démontrer un intérêt spécial. C'est l'action populaire. Si cette décision est oppressive, injuste et abusive à l'égard de quelques contribuables, il faut que ce soit l'un de ces derniers qui se plaigne.

Tout ce que je dis ci-dessus a été sanctionné par maints arrêts. La jurisprudence établie par ces arrêts n'est plus contestable.

A ne considérer que la jurisprudence de la cour d'appel, je crois que la déclaration de principes de l'honorable juge-en-chef résume fidèlement cette jurisprudence.

Je ne mentionnerai que quelques causes; on en trouvera beaucoup d'autres dans une note à l'opinion de l'honorable juge Martin dans *Les Commissaires d'écoles de St-Félicien* v. *Hébert* (1). Voyez aussi; *Carpentier* v. *La Corporation de St-Pie* (2), où on a fait la distinction entre la nullité relative et la nullité absolue des actes municipaux.

(1) Q.R. 31 K.B. 458, at p. 461. (2) Q.R. 31 K.B. 335.

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Dans deux causes que l'intimée nous cite, *La Compagnie d'approvisionnement d'eau* v. *La ville de Montmagny* (1), et *Rivard* v. *La Corporation de Wickham-Ouest* (2), il a été jugé qu'un rôle d'évaluation municipal dans lequel les propriétés imposables sont dans leur ensemble évaluées au-dessous de leur valeur réelle, est illégal et nul; que le pourvoi dans ce cas est l'action en cassation et non l'appel à la cour de circuit; et que tout contribuable, à ce seul titre, a un intérêt suffisant pour intenter l'action.

Dans *Laberge* v. *La Cité de Montréal* (3), on a décidé que la cour supérieure a juridiction dans une action pour faire déclarer illégale l'évaluation municipale d'un immeuble par les estimateurs de la cité de Montréal, lorsque l'objet de l'action n'est pas seulement de faire diminuer le montant porté au rôle d'évaluation, mais aussi de faire déclarer que le principe de l'évaluation elle-même est erroné, comme dans le cas où les estimateurs municipaux ont mis de côté le droit que le propriétaire avait d'avoir son immeuble évalué comme terre en culture et l'ont évalué comme lots à bâtir.

Dans *Northern Lands Co.* v. *Ville St-Michel* (4), la cour d'appel a jugé que le recours donné par la loi des cités et villes contre un rôle d'évaluation n'est pas limitatif et que la cour supérieure a juridiction pour annuler un rôle d'évaluation lorsque dans son ensemble il est fait sur une base illégale.

Enfin, dans *La Corporation de St-Alexis des Monts* v. *McMurray* (5), on a écarté la prescription de trois mois (art. 433 C.M.) dans le cas d'une poursuite devant la cour supérieure pour faire annuler un réglement

(1) Q.R. 24 K.B. 416.
(2) Q.R. 25 K.B. 32.
(3) Q.R. 27 K.B. 1.
(4) Q.R. 28 K.B. 378
(5) Q.R. 29 K.B. 18

municipal intentée par une personne qui avait un intérêt spécial et direct à attaquer ce réglement, et on a posé le principe suivant que je cite du sommaire:—

> Although the courts should abstain from interfering with municipal matters, it is their duty to interfere with the exercise of powers conferred upon municipal councils where the latter acts are so unreasonable, unfair or oppressive as to constitute an abuse of those powers.

Volià assurément une jurisprudence solidement assise et elle ne faisait doute à personne lorsque je pratiquais comme avocat au barreau de Montréal.

Reste à savoir si elle est conforme à la loi.

L'article 5591 des statuts refondus de Québec (Acte des cités et villes) dit que les procès-verbaux, rôles, résolutions ou autres ordonnances du conseil peuvent être cassés par la cour supérieure, pour cause d'illégalité, de la même manière et dans le même délai et avec les mêmes effets qu'un règlement du conseil.

Et l'article 5623 porte que tout électeur municipal peut, par une requête présentée en son nom à la cour supérieure, ou à un juge de ce tribunal, demander et obtenir, pour cause d'illégalité, la cassation de tout règlement de conseil avec dépens contre la municipalité. Le droit de demander cette cassation se prescrit par trois mois à compter de l'entrée en vigueur du règlement (art. 5643).

Si nous comparons ces dispositions à celles du code municipal, nous trouvons que c'est à la cour de circuit du comté ou du district ou à la cour de magistrat de district qu'on demande, "pour cause d'illégalité," la cassation des règlements ou autres actes municipaux (art. 430). La poursuite pour obtenir la cassation est instituée par action ordinaire, et tout électeur ou tout intéressé est habile à l'intenter (art. 431). Le droit de poursuite se prescrit par trois mois à compter de la passation de l'acte ou de la procédure que l'on

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attaque pour illégalité (art. 433, al. 1), et le recours spécial donné par ces articles n'exclut pas l'action en nullité dans les cas où elle peut avoir lieu en vertu de l'article 50 du code de procédure civile, mais les frais de l'action en nullité ne peuvent, en aucun cas, être plus élevés que ceux d'une action de quatrième classe en cour supérieure (art. 433, al. 2).

La disposition du deuxième alinéa de l'article 433, qui vient de l'article 100 de l'ancien code municipal, ne se trouve pas à l'Acte des cités et villes, mais la cour supérieure, dans le cas des cités et villes comme des autres municipalités, a toujours accueilli l'action en nullité, en s'autorisant de l'article 50 C.P.C., sans égard à la prescription de trois mois, lorsqu'il s'agissait d'un acte municipal radicalement nul, ou adopté sans juridiction, ou constituant un abus de pouvoir ou une oppression. Et bien que l'Acte des cités et villes et le code municipal parlent de la cassation pour cause d'illégalité, on a entendu par là des vices qui n'entraînent qu'une nullité relative et partant susceptibles d'être couverts par l'inaction pendant le délai prescrit pour le recours en nullité.

Il me paraîtrait impossible de condamner cette jurisprudence sans méconnaître la portée générale et absolue de l'article 50, qui mentionne, entr'autres personnes sujettes au droit de surveillance et de contrôle de la cour supérieure, les corps politiques et corporations dans la province. Il est vrai que le droit de contrôle s'exerce, aux termes de cet article, "en la manière et forme que prescrit la loi," mais cela ne veut pas dire, dans le cas des corps municipaux, qu'il n'y a d'autre recours que la requête en cassation. Ce pouvoir de contrôle, je le crois, vise cependant les cas non prévus ou non suffisamment couverts par les dispositions spéciales que j'ai citées, mais s'il y a

nullité absolue, s'il y a défaut ou excès de juridiction, s'il y a abus de pouvoir ou oppression, la cour supérieure sera dans les limites de sa juridiction en accueillant l'action en nullité, et lui dénier ce droit équivaudrait à biffer du code de procédure civile l'article 50 qui, avant ce code, et il remonte au 12 Victoria, ch. 38, art. 7 (1849), était toujours regardé comme une règle fondamentale de la juridiction de la cour supérieure.

Je puis ajouter que dans la cause de *Déchène* v. *La cité de Montréal* (1), bien qu'on n'eût pas cité l'article 2329 S.R.Q. (1888), maintenant l'article 50 du code de procédure civile, le conseil privé a reconnu que les dispositions de la charte de Montréal permettant à un électeur municipal d'attaquer, dans les trois mois, pour cause d'illégalité, un vote d'argent

do not interfere with any right existing by law to impeach the appropriation, after the expiry of the three months, upon the ground that it was beyond the competence of the corporation.

Je n'ai pas perdu de vue la décision de cette cour dans *Robertson* v. *City of Montréal* (2). Il s'agissait là d'une demande en nullité d'une résolution adoptée par le conseil municipal de Montréal et qui autorisait la passation d'un contrat avec une compagnie d'autobus lui conférant le privilège exclusif de faire circuler ses autobus dans certaines rues de la cité. Cette résolution était attaquée par un contribuable qui prétendait avoir le droit d'intenter l'action par le fait qu'on lui avait transporté quelques actions dans la compagnie des tramways pour lui permettre de l'instituer, mais qui, au cours de l'instance, avait renoncé à se prévaloir de sa qualité d'actionnaire de cette compagnie. Il fut jugé, confirmant en cela la décision des cours provinciales, qu'en l'absence de preuve d'un intérêt spécial lésé par la résolution attaquée, Robertson ne pouvait intenter l'action.

(1) [1894] A.C. 640.
(2) 52 Can. S.C.R. 30.

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Dans cette cause, l'opinion a été exprimée qu'un remède efficace dans un tel cas serait une poursuite prise par le procureur général en vertu de l'article 978 du code de procédure civile. Je ne crois pas que cette décision suffise pour mettre de côté la jurisprudence que j'ai citée. Et en supposant que l'article 978 C.P.C. autoriserait le procureur général à poursuivre une corporation qui agirait contrairement à sa charte ou qui abuserait de ses pouvoirs corporatifs—et cet article n'a jamais, que je sache, été invoqué dans la pratique pour obtenir l'intervention de la cour supérieure dans les cas que prévoit l'article 50—rien ne me paraît empêcher une personne dûment intéressée de demander elle-même à la cour supérieure d'exercer le pouvoir de surveillance et de contrôle qui lui appartient aux termes de l'article 50. Et certainement la décision dans *Robertson* v. *City of Montreal* (1) ne condamne pas la jurisprudence solidement établie de la province de Québec que j'ai rapportée plus haut.

J'ai cru que cet exposé de principes serait utile pour mieux juger l'espèce qui nous est soumise. La demanderesse intimée, s'autorisant de son titre de propriétaire d'immeubles dans la cité de St-Michel, a saisi la cour supérieure, en 1920, d'une action se plaignant de l'évaluation, dans le rôle d'évaluation municipal, de ses immeubles pour les années 1913, 1914, 1915, 1916, 1918 et 1919, et elle a allégué de plus que cette évaluation avait été faite contrairement à l'article 28 de la loi 5 Geo. V., ch. 109, les propriétés de l'intimée étant des terres en culture ou affermées ou servant au pâturage des animaux; que dans le but de se créer un pouvoir d'emprunt que la loi lui déniait et de tromper les porteurs de ses obligations comme ses

(1) 52 Can. S.C.R. 30.

autres créanciers, l'appelante avait porté l'évaluation générale des propriétés dans la municipalité au multiple de leur valeur réelle, contrairement à l'article 5696 S.R.Q., à tel point que les tribunaux avaient réduit les évaluations faites à $6,000.00 et $3,000.00 l'arpent à $500.00, et que la confection des rôles suivant cette méthode était un abus et un excès de pouvoir de la part de l'appelante. L'intimée a conclu à l'annulation des rôles d'évaluation et de perception.

L'évaluation des immeubles de la municipalité dans le but de faire le rôle d'évaluation rentre dans les attributions de la corporation municipale et doit se faire d'après la valeur réelle (art. 5696 et suiv.). Le conseil municipal revise le rôle d'évaluation et entend les plaintes des intéressés (art. 5707), et de sa décision il y a appel à la cour de circuit du comté ou du district ou à la cour de magistrat de district (art. 5715).

L'intimée a pris un semblable appel contre l'évaluation de ses propriétés en 1917 et a réussi à faire réduire cette évaluation à $500.00 l'arpent, mais la valeur mentionnée au rôle, dans les années suivantes, n'en a pas moins été portée à un chiffre excédant de beaucoup ce montant. Il convient d'ajouter que l'intimée s'est désistée de son attaque contre les rôles d'évaluation et de perception de 1913 et 1914, pour la raison, nous a-t-on dit, que les taxes de ces années étaient prescrites.

La cour supérieure en est venue à la conclusion que l'évaluation des propriétés de l'intimée était une évaluation fictive (fictitious valuation); que les estimateurs avaient évalué ces propriétés "upon a wrong principle", méconnaissant leur valeur réelle, et avaient ainsi excédé leurs pouvoirs; et que les rôles d'évaluation de 1915, 1916, 1918 et 1919 avaient été faits en excès et par abus des pouvoirs de l'appelante, et étaient *ultra vires*, illégaux, nuls et non avenus.

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Ce jugement a été confirmé par la cour du Banc du Roi, les honorables juges Allard et Rivard étant dissidents quant à l'annulation des rôles d'évaluation, mais étant d'avis que le rôle de perception devait être cassé à l'égard de l'intimée pour cause de violation de la règle de l'article 28 de la loi 5 Geo. V., ch. 109.

S'il est vrai que l'évaluation de l'immeuble de l'intimée est fictive, je n'aurais aucune hésitation à dire que la cour supérieure pouvait l'annuler. Pour déterminer ce fait capital, j'ai lu bien attentivement toute la preuve. Se basant sur la subdivision de cet immeuble en lots de ville, bien que sa destination agricole n'eût pas été changée, les estimateurs de l'appelante, avec l'approbation du conseil qui a homologué le rôle, ont évalué des lots de 25 pieds de front par 95 pieds de profondeur à des prix variant de $365.00 à $600.00, ce qui fait pour toute la propriété une évaluation d'environ $6,685.00 l'arpent. A part de cela, les estimateurs ont évalué les rues montrées sur le plan de subdivision à 10 cents du pied et les ruelles à 5 cents du pied. L'évaluation pour 1919 est un peu moindre, soit $347,578.00 pour toute la propriété, alors que dans les années précédentes elle était évaluée à $528,104 pour 1918, $523,529.00 pour 1917, $526,085.00 pour 1916 et $528,011.00 pour 1915. Cette propriété, lorsque la spéculation immobilière était à sa plus forte hausse, avait été achetée, avec une partie vendue depuis quelques années aux commissaires d'écoles, au prix de $207,-500.00. Il est prouvé que depuis plusieurs années on ne trouve pas d'acheteurs pour les lots de subdivision; à part la partie vendue aux commissaires d'écoles, il n'y a eu que six lots, sur neuf cents environ, qui aient été vendus à des acquéreurs qui paient le prix d'acquisition. Les rues et ruelles montrées sur le

plan étaient, depuis deux ou trois ans avant l'action, cultivées comme le restant de la terre, car le tout, à l'exception de ce qui a été vendu, est loué au fermier, un nommé Scott, qui l'occupe et le cultive depuis une trentaine d'années, pour un loyer annuel de $225.00. Dans ces circonstances, évaluer une terre en culture, bien qu'elle ait été sub-divisée au temps de la hausse spéculative et purement fictive, à plus de $6,000.00 l'arpent, ce n'est pas faire une évaluation réelle comme le veut l'article 5696 S.R.Q., c'est faire une évaluation purement fictive et qui n'a aucun rapport quelconque avec la valeur réelle. La cour de circuit a réduit l'évaluation de 1917 à $500.00 l'arpent, et l'année suivante, en 1918, les estimateurs et le conseil reviennent à l'évaluation fantastique de plus de $6,000.00 l'arpent. Je ne crois pas qu'il soit possible de trouver dans la jurisprudence un abus de pouvoir et une oppression aussi flagrante.

Si dans les circonstances la cour supérieure ne peut exercer le pouvoir de surveillance et de contrôle que lui donne l'article 50 du code de procédure civile, il vaudrait autant, je l'ai dit, biffer cet article du code. On objecte que l'intimée aurait pu faire en 1915, 1916, 1918 et 1919 ce qu'elle a fait en 1917, en appeler à la cour de circuit. La preuve constate qu'il y a eu des négociations entre les parties pour tâcher d'en arriver à une entente, mais ces négociations ont échoué. Il n'y a certainement pas eu d'acquiescement de l'intimée. Et le recours de l'appel à la cour de circuit suppose qu'il y a eu une évaluation sérieuse, où on allègue qu'il y a eu erreur de jugement des estimateurs. Mais si on s'est moqué de la loi, si, au lieu d'évaluer sérieusement l'immeuble de l'intimée, les estimateurs lui ont attribué une valeur purement fantastique et arbitraire, s'ils ont abusé de leurs

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pouvoirs, je ne puis, pour ma part, laisser subsister cet abus de pouvoir et cette évaluation fictive pour la raison qu'il n'y a pas eu d'appel à la cour de circuit. Dans de telles circonstances, c'est à la cour supérieure qu'il appartient de protéger les citoyens contre l'oppression et l'arbitraire. Comme je l'ai dit, la jurisprudence de la province de Québec depuis de nombreuses années reconnaît cette juridiction à la cour supérieure, et je crois très respectueusement que cette jurisprudence doit être acceptée par cette cour.

D'ailleurs il y a eu violation de l'article 28 de la loi 5 Geo. V., ch. 109, dont la premier alinéa se lit comme suit:

> Toute terre en culture ou affermée ou servant de pâturage pour les animaux, de même que toute terre non défrichée ou terre à bois dans les limites de la municipalité, est taxée pour un terme de dix années à un montant proportionnel au quart de sa valeur réelle telle qu'inscrite au rôle d'évaluation, à la condition que tel montant proportionnel n'excède pas cent cinquante piastres par arpent y compris les bâtisses dessus construites.

L'immeuble en question est indubitablement une terre en culture ou servant au pâturage pour les animaux, et on ne pouvait taxer les intimés pour une valeur de plus de $150.00 l'arpent.

On dit que cela n'entraînerait la nullité que du rôle de perception. Pour les raisons que j'ai données, je crois que le rôle d'évaluation lui-même doit être mis de côté.

Cependant je n'annulerais ce rôle qu'en tant que l'intimée est concernée. Celle-ci a pris son action à titre de propriétaire d'immeubles dans la municipalité et son intérêt se borne à faire réduire l'évaluation de sa propriété. Elle ne me paraît pas exercer l'action populaire, malgré ses conclusions qui dépassent son intérêt, et les autres propriétaires de la municipalité,

dont quelques-uns ont pris des appels à la cour de circuit, ne sont pas en cause et ne se plaignent pas des rôles d'évaluation. Nous n'avons pas devant nous les rôles d'évaluation de l'appelante, mais seulement des extraits qui concernent l'intimée, et les éléments de preuve quant aux autres évaluations ne me paraissent pas suffisants pour annuler tout le rôle. Je modifierais donc le jugement de la cour supérieure et je n'annulerais que l'évaluation des propriétés de l'intimée; et il s'ensuit que les rôles de perception qui imposent des taxes à l'intimée basées sur cette évaluation doivent également être annulés à l'égard de l'intimée. Ce changement est assez important pour donner à l'appelante la moitié de ses frais en cette cour et dans la cour du Banc du Roi. L'intimée a droit à tous ses frais dans la cour supérieure.

Appeal allowed with costs.

Solicitors for the appellant: *Beaulieu, Gouin, Marin & Mercier.*

Solicitors for the respondent: *Brown, Montgomery & McMichael.*

1917
March 21.
May 1.

IN THE MATTER OF A SPECIFIC TRADE-MARK CONSISTING OF THE WORD "HORLICK'S."

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Trade-Mark—Surname—Food Products.

A surname, and especially an uncommon surname, may be registered as a trade mark when it has long been used to designate the quality of goods sold and to distinguish the same from other goods.

APPEAL from the judgment of the Exchequer Court of Canada deciding that the word "Horlicks" could not be registered as a trade-mark to be used to designate goods sold by Horlick.

The appeal was heard *ex parte*, the Commissioner of Patents not appearing.

Harold Fisher and *Smart* for the appellants.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Exchequer Court on a petition by Horlick's Malted Milk Co. to register the surname "Horlick's" as a trade-mark to be used in connection with the sale of food products (ss. 5, 11 and 42 of the Act).

The application was disposed of in the Exchequer Court apparently on the assumption that the facts alleged in its support disclosed merely a case of passing off and that the goods had acquired a reputation on the market by reason of the superiority of their manufacture and nothing more.

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

(REPORTER'S NOTE.—This case was not reported at the proper time as the judges' notes were mislaid).

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The grounds on which the minister refused the application do not appear, but his right to refuse to register is limited by section 11 of the Act. Having carefully considered the different subsections of section 11 I assume that the minister exercised the powers conferred by subsection (e) of that section to the effect that the trade-mark for which registration was sought did not contain the essentials of a trade-mark properly speaking. I am not quite clear as to what that language means but in any event both before and after the statute the office of a trade-mark was and is to point out the origin or ownership of the article to which it is affixed. In the words of the English Act, 1905, section 9, a trade-mark is something adopted to distinguish the goods of the proprietor of the trade-mark from those of other persons. Our statute, section 5, enacts that all names adopted by a person in trade for the purpose of distinguishing an article manufactured and offered for sale by him shall for the purposes of the Act be considered as a trade-mark.

The evidence as I understand it, and I have read the affidavits with some attention, does not refer, as the judge below assumed, to the quality of the goods, but they establish that the word "Horlick's" has been used as a sign or symbol to indicate the origin or ownership of the goods to which it has been attached and, in the words of section 5, to distinguish the article manufactured and offered for sale. In these circumstances I fail to see how the application to register should be refused on the plain language of the sections of the Act. I do not think that *Teofani & Co.* v. *Teofani* (1), is applicable on the facts of this case. But in *Teofani's Case* (1), it was held "that a surname is not necessarily

(1) [1913] 2 Ch. 545.

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incapable of being a registrable trade-mark." It may be registered for instance where it is as in this instance an uncommon name and its use has been so extensive that in fact it has become distinctive. Here the affidavits shew that the trade-mark has been in actual use and that such user has been sufficient to render it distinctive; food products in packages bearing as a conspicuous identifying feature the word "Horlick" have been sold in the United States and in Great Britain and the Colonies for over forty years, the approximate number of packages sold each year amount to 7,500,000 and the annual cost of advertising has been almost $500,000.

This case is distinguishable on the facts from the case of *In re R. J. Lea's Trade-Mark* (1), and our statute differs from the British Act; but the *Lea Case* (1) is very instructive.

I am of the opinion that the appeal should be allowed and the prayer of the petition granted.

DAVIES J.—I concur in the result.

IDINGTON J.—I think this appeal should be allowed. The use of names seems expressly provided for by section 5 of the Trade-mark and Designs Act, as one of the devices which may be adopted for use by any person in his trade, business, occupation or calling for the purpose of distinguishing any manufacture, etc.

Indeed it may by long use have become the most distinctive mark that the product of a man's manufacture can be recognized by.

(1) 29 Times L.R. 334.

The material before us indicates at least a *prima facie* right on the part of the petitioner to have this name registered as its trade-mark.

The Minister may find some objection upon facts brought to his knowledge in any way which would entitle him, and might indeed render it his duty, under section 11 of the Act, to reject the application. We can only speak from what is before us.

The reference to English decisions is certainly not very helpful. There is such a wide difference between the frame and express language of the English Act and ours, that decisions under the former are often more apt to mislead than help or to put us on our guard.

In that Act in its latter form the use of names seems expressly to require the authority of the Board of Trade.

Under either Act, of course, the use of a name may so tend to mislead that the history of its use as well as possibility of it being a very common name in the country where the trade-mark is to be used must be looked at to avoid misleading.

The Weekly Notes and Law Times come to hand since this appeal was heard, contain notes of the decision of Mr. Justice Neville in *Re William Crawford & Sons* (1), where he held the application for registration should not proceed by reason of the name being a common one. He relied on the remarks of Lord Cozens Hardy M.R. in the *Teofani Case* (2).

All implied therein is very far from holding that the use of a name must be prohibited.

DUFF J.—I concur in the result.

(1) [1917] 1 Ch. 550; 116 L.T. 440. (2) [1913] 2 Ch. 545.

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ANGLIN J.—We have not had the advantage of hearing counsel in support of the order made by the learned judge of the Exchequer Court refusing the petition of the applicants for registration of a "specific trade-mark." After giving to the consideration of the appeal the utmost possible care I am, with great respect, of the opinion that it should be allowed. The learned judge apparently misconceived the purport of the evidence adduced. Its object was and its effect is not to establish that the products of the applicants "have acquired a reputation on the market by reason of their excellence" or "by reason of the superiority of their manufacture," but to prove that the use in connection with the advertising, packing and sale of them of the word "Horlick's" has been so extensive, so conspicuous and of such duration and persistence that the word has become distinctive of those products. Having regard to the fact that the name itself is somewhat peculiar and uncommon and to the extent and nature of the user shewn, the objections usually made to the registration of the surname have not their customary force. The effect produced by the user made by the applicants of the word "Horlicks" is that it has become associated with them. It has became a name "adapted to distinguish the goods as the goods of one particular maker." The facts in evidence appear to bring this case within the recent decisions in the cases of "Cadbury" and "Muratti" (1) which seem to me more closely in point than the two authorities cited by the learned judge. Reference may also be made to the *Teofani Case* (2). "The so-called trade-mark contains the essentials of a trade-mark properly speaking." (R.S.C. ch. 71, sec. 11 (e); *Richards* v. *Butcher* (3).

(1) 32 Cut. P.C. pp. 9 and 77. (2) [1913] 2 Ch. 545, 567.
(3) [1891] 2 Ch. 522, 536.

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I am of the opinion that upon a case such as that made in the record before us the English courts under the somewhat narrower terms of their statute would direct that an application for registration should proceed. Having regard to the broader provisions of our Act—that

all * names * * * adopted for use by any person in his trade (or) business * * for the purpose of distinguishing any manufacture, product or article * * manufactured, produced, compounded, packed, or offered for sale by him, applied in any manner whatever either to such manufacture, product or article or to any package * * box, or other vessel or receptacle of any description whatever containing the same, shall for the purposes of this Act be considered and known as trade-marks.

I think we should really be doing a serious injustice to the applicants, not compensated by any advantages to the public, if we were not to allow the registration which they seek to be effected. *In re Daimler* (1).

Appeal allowed.

Solicitors for the appellant: *Murphy, Fisher & Sherwood.*

A trade-mark registered in Canada consists of an anchor in connection with the initials or full name of "John de Kuyper & Sons" to designate liquor sold by that firm. In the United States "Bostons" indicates goods sold by the Boston Rubber Shoe Co., and "Bucyrus" steel made in a town of that name.

Reporter.

(1) 33 Cut. P.C. 337.

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MUNICIPAL CORPORATION—*Cont'd.*

Maisonneuve (Q.) 3 Geo. V., c. 58) to construct a highway outside its limits on the territories of the municipalities, appellants. In accordance with the provisions of the statute the town of Maisonneuve enacted a by-law, by which, after an estimate of the cost of the works had been given, liability was imposed on the appellant municipalities for the payment in cash of the cost of the highway within their limits "as soon as the by-law shall have received the sanction of the Lieutenant-Governor in Council." On the 3rd of November, 1914, an order in council was passed approving the by-law but declaring that the payment to the town of Maisonneuve should be made by means of debentures, payable in forty years, bearing interest at a rate not exceeding 6 per cent per annum, which the town of Maisonneuve was bound to accept at par, provided the cost should not exceed 5 per cent of the estimate. In the same month, the appellant municipalities passed by-laws for the issue of debentures bearing date 1st of December, 1914, with interest coupons payable semi-annually. These by-laws also enacted that the councils of the municipalities might transfer the debentures and coupons to the City of Maisonneuve, "upon a certificate of (the appellants') engineer and according to the progress made, in the territory of (each municipality) of such proposed" highway. These by-laws were ratified by the legislature (5 Geo. V., c. 10, s. 34 and c. 108, s. 23). A contract for the construction of the highway was entered into between the town of Maisonneuve and the respondent company, by which the latter agreed to accept, in payment of the contract price for work done in their territory the debentures issued by the appellant municipalities. When these municipalities proposed to make their payment to the town of Maisonneuve, they passed a resolution in conformity with powers given by the order-in-council for the deposit of the debentures in a bank and giving directions to the bank that the contractor should be paid only upon the certificate of their engineer according to the progress of the work. They also instructed the bank to detach from the debentures such coupons as should have at the time of the delivery of the debentures entirely or partially matured. The respondent company

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received from the town of Maisonneuve debentures in payment of the work done on the territories of the appellant municipalities. The respondent company, by its action, claims the amount of the interest coupons accrued between the date of the issue of the debentures and the time when it became entitled to receive delivery of them on engineer's progress certificates.—*Held*, Idington and Duff JJ. dissenting, that the respondent company was entitled to recover the amount of their interest coupons. LA VILLE DE MONTREAL NORD *v.* QUINLAN & ROBERTSON LTD..... **283**

2 —— *Valuation roll — Fictitious valuation—Action to set aside roll—Absolute nullity—Supervising control of Superior Court—Statutory means of relief—Jurisdiction of Circuit Court—Prescription—Incompetency—Arts.* 48, 50, 54, 77, 978, 987, 1003, 1292 *C.C.P.—R.S.Q.* [1909] *arts.* 5256 *& seq.* 5591, 5623 *& seq.*, 5696, 5705 *& seq.*, 5715 *& seq.*, 5730—*M.C. Arts.* 430, 431, 433—[1849] 12 *Vict., c.* 38, *s.* 7—(*Q.*) 5 *Geo. V., c.* 109, *s.* 28.] The valuation of the respondent's property by the municipality appellant was not fictitious nor grossly excessive. Anglin and Mignault JJ. dissenting.—If a valuation roll has been made within the powers of a municipal corporation and in the absence of fraud, the party assessed cannot invoke the supervising control given to the Superior Court (Art. 50 C.P.C.) in order to set aside the roll, when other relief is provided by way of appeal to the Circuit Court. Anglin and Mignault JJ. dissenting.—*Per* Anglin and Mignault JJ. (dissenting).—As the overvaluation constituted such an illegality that it must be considered as an absolute nullity *ab initio*, the Superior Court has jurisdiction to annul the roll under the authority of Art. 50 C.P.C.—*Per* Davies C. J. and Brodeur J. The respondent's right to take a direct action before the Superior Court, if existing, would have been prescribed, as not having been exercised within three months from the date the roll had been in force. (Art. 5624 R.S.Q. (1909)). Anglin and Mignault JJ. *contra.*—*Per* Duff J. Although article 5696 R.S.Q. (1909) expressly provides that taxable property shall be assessed "according to its real value," a departure from this statutory mandate does not constitute legal incompetency