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SUPREME COURT

OF

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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 Right Hon. Charles Joseph Doherty K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Hugh Guthrie K.C.

ERRATA ET ADDENDA.

In volume 60

In the Table of the Names of the cases reported, add under the letter F.

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and under the letter W.

Wabash Railway Co. v. Follick 375

Page 20, in the ninth line replace the word "represented" by the word "presented".

Page 21, in the twenty-eighth line, replace the word "National" by the word "national".

Page 105, in the sub-titles and page 675 under "Principal and agent", replace "716" by 1716.

Page 326, in the second line of caption, replace 1955 by 195, and in the first line of head-note, replace 41 (1) by 40 (1).

From page 223 to page 236, strike the words: "In *re* Public UtilitiesAct" from the margin.

Page 523, in the sub-titles and page 674 under "Negligence" (3), replace "281" by "291".

Page 553, in the sub-titles and page 676 under "Sale" (3), read Act, 1644 C.N. instead of 1644 C.C.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

CHARLES ISMAN (PLAINTIFF)..........APPELLANT;

1920

*May 6.
*June 21.

AND

JOHN SINNOTT (DEFENDANT)..........RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Mortgage—Mortgagee holding first and third mortgages—Foreclosure of first mortgage and sale of land—Recovery under covenant on third mortgage—Collateral security not discharged.

The appellant, having purchased a property from the respondent, transferred to him, as security for the balance of the purchase price, a first and a third mortgage due by one Yandt upon another property; and, as collateral security, he also gave a mortgage on the property bought, payable at dates corresponding with the respective due dates of the above two morgtages. In course of time, the respondent obtained foreclosure under the first mortgage and sold the land. The appellant then claimed a discharge of the collateral mortgage.

Held that, notwithstanding the foreclosure of the first mortgage and the sale of the foreclosed property, the respondent could still recover under the appellant's covenant for payment contained in the third mortgage and the appellant was not entitled to the discharge of the collateral mortgage until the payment of the third mortgage.

Judgment of the Court of Appeal (12 Sask. L.R. 445; [1919] 3 W.W.R. 719) varied.

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

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v.
SINNOTT.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) reversing the judgment of the trial judge (2) and dismissing the appellant's action.

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

Aug. Lemieux K.C. and *V. R. Smith* for the appellant.

C. H. Locke for the respondent.

THE CHIEF JUSTICE.—I concur with my brother Anglin.

IDINGTON J.—The appellant bought, on the 16th April, 1914, property in Kamsack, Saskatchewan, for $60,000, which consideration was made up largely of other properties taken in part exchange—with which we are not concerned.

$8,150 of the consideration was made up of the balance due on two mortgages, a first for $7,000 and a third for $2,150, made by one Yandt on other property.

But to secure the due payment thereof to the extent of $8,150, the appellant was to give a mortgage on the property he was buying from respondent, payable according to or corresponding with the respective due dates of said two mortgages.

Said mortgages were duly assigned to respondent and the promised collateral mortgage of 8,150 was duly given. In course of time Yandt made default and respondent took proceedings upon the first of said mortgages for sale and purchase. Said proceedings ended in a final order of foreclosure which vested

(1) 12 Sask. L.R. 445; [1919] 3 W.W.R. 719.

(2) 12 Sask. L.R. 115; [1919] 2 W.W.R. 61.

the property in respondent and had as an incidental, necessary result, according to the system of land titles in force, the barring of the charge upon the land which had been created by the third mortgage.

The respondent thereafter sold the property thus vested in him for less than the amount which was found to be due under and by virtue of the said first mortgage.

All these proceedings were brought under the notice of appellant and he was expressly given the opportunity of redeeming said mortgage on payment of the sum due and which his collateral mortgage to respondent stood as a guarantee for, but he did nothing either towards making such payment or objecting to the said sale of the property.

Later on he conceived the happy thought that he was released entirely by virtue of said purchase and sale from all liability in respect of either mortgage and instituted this suit to have it declared that the said first and third mortgages had been fully paid and satisfied, and that the said collateral mortgage he had given to secure the due payment was duly paid and satisfied, and for an order directing the respondent to discharge the latter.

The appellant succeeded at the trial by reason of the learned trial judge (1) holding erroneously, as I respectfully submit, that the later sale of the foreclosed property by respondent discharged the mortgagor's covenant.

The Court of Appeal (2) set that judgment aside and dismissed the action.

(1) 12 Sask. L.R. 115; [1919] 2 W.W.R. 61.

(2) 12 Sask. L.R. 445; [1919] 3 W.W.R 719.

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I so fully agree with the main reasoning of the learned judges in that court upon which they reach that result, that I need not repeat the same here, or trouble explaining minor differences I entertain as to one or two expressions therein that in no way affect the result reached.

The historical development of the equitable doctrines upon which our judgment in the *Mutual Life Assurance Co.* v. *Douglas* (1) case was founded, in no way justifies such contentions as relied upon by appellant herein.

And whatever possible difficulties might have arisen upon a like case in England where the doctrine of tacking prevails, or even in Ontario or where by reason of the procedure in the Master's office requiring, and often getting, proof made of subsequent encumbrances there is no room for doubt or difficulty under the system prevailing in Saskatchewan as explained by appellant's counsel and assented to by respondents.

In other words under the old system of pursuing the remedy of foreclosure the respondent might have been induced to offer proof not only of the amount due under his first mortgage but also that under his subsequent mortgage and thereby given arguable ground for the contention that he was claiming foreclosure of both mortgages and when he got his final order of foreclosure stood bound by the usual rule relative thereto.

It is, however, to be observed that the mortgage under the "Land Titles Act" is only a charge on the land and does not vest, as in England and Ontario, any title in the land and that each is independent of the other and dependent upon the terms of said Act.

(1) 57 Can. S.C.R. 243.

I have examined all the cases cited in the appellant's factum on this branch of the argument, in the hope of finding something analogous to that thus presented, to have been dealt with by the courts either in England or Ontario calling for the application of the principles relied upon, but only to meet with disappointments.

The case of *Walker* v. *Jones* (1), presents a series of complicated facts which in the ultimate result might have developed such a case as presented herein, or somewhat resembling the same.

But all that was involved therein to be decided was the validity of an interim injunction.

The court was particularly careful to avoid determining anything involved, or likely to be, in the possible ultimate result.

The case of *Dyson* v. *Morris* (2), is, so far as it goes, helpful to respondent rather than appellant.

The case of *Rudge* v. *Richens* (3), effectually disposes of the contention sometimes set up that a party cannot sell part of his security under a power of sale and proceed for the balance, and is also as helpful in principle to respondent as appellant.

All the other cases relied upon in this connection are each in the last analysis but the application of the elementary principle that after foreclosure the mortgagor followed upon his covenant or something analogous thereto is entitled to say to the mortgagee, give me back my property and here is your money and default that claim he is no longer liable.

The appellant seeks to apply that to a case of two different mortgages never consolidated or used jointly in the foreclosure proceedings and having no con-

(1) L.R. 1 P.C. 50. (2) I Hare 413.
(3) L.R. 8 C.P. 358.

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nection either with each other or with securing the same debt but in the ultimate result as a necessity of getting a final order conformable with the "Lands Titles Act," wipes out the charge made by the third mortgage.

If the argument is good for anything then on the issue of that order and its registration and without waiting for a sale by the mortgagee, the mortgagor is discharged from liability on his covenant in the later mortgage.

That is not the true application of the old well-known principle relied upon, but an extension of it by a metaphysical process of reasoning for which there is no precedent.

There are precedents cited by the respondent which shew how little foundation there is for extending the principle in that way.

See, especially, the case of *Worthington* v. *Abbott* (1).

The statute in Alberta which was in question in the *Douglas Case* (2) preserved, by the use of the word "foreclosure," much of the law incidental thereto, when used in the way it is therein.

And in the mortgage therein in question the parties specifically contracted for observance of Ontario law so far as possible.

At the close of the argument herein I had the impression that possibly the appellant was entitled to relief to the extent of such effect as might be given to the ordinary application of the principles of foreclosure in respect of that part of the indebtedness covered by the first mortgage.

(1) [1910] 1 Ch. 588. (2) 57 Can. S.C.R. 243.

An examination of the pleadings and facts including the nature of the transactions upon which the collateral mortgage was founded, renders that impossible.

No such case is made by the appellant's pleading.

And without presuming to express any definite opinion I would suggest that the equitable doctrine that "he who seeks equity in a court of equity must do equity," might be found a rather formidable obstacle in appellant's way for even such measure of relief.

I think the appeal should be dismissed with costs.

DUFF J.—I concur with Anglin J.

ANGLIN J.—I was at first inclined to the view that, inasmuch as the defendant had by his own acts in foreclosing the first mortgage and subsequently selling the Redvers Hotel property put it out of his power, on payment of the third mortgage, to reconvey that property to the mortgagor, subject to the first and second mortgages, he had relinquished his right to recover on the mortgagor's covenant in the third mortgage and that that mortgage as well as the first should therefore be deemed satisfied and paid for the purpose of entitling the mortgagor to the discharge of the collateral mortgage on the Kamsack Hotel, which he claims. But on further consideration I think that position cannot be maintained.

As Mr. Locke pointed out in his admirable argument after the foreclosure of the first mortgage all that the mortgagor could claim on payment of the amount of the third mortgage would have been a release of his covenant in that mortgage. By the foreclosure brought about by the mortgagor's own default any equitable interest of the respondent as third mortgagee as well as the mortgagor's own

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interest in the land had been foreclosed. There was nothing left to a reconveyance of which the mortgagor would be entitled on payment of the amount of the third mortgage. But that foreclosure did not extinguish the mortgagor's liability on his covenant in the third mortgage any more than it did his liability on his covenant in the first mortgage. It was the subsequent sale that prevented the mortgagee from reconveying the mortgaged property to the mortgagor on payment of the amount due on the first mortgage and thus precluded recovery on the covenant in that mortgage. If it did not actually extinguish the debt, that was practically the result. But it was not the sale that prevented the mortgagor from obtaining anything which, but for it, he might have required the mortgagee to transfer to him on payment of the third mortgage. Any right he had to a reconveyance had already been effectually barred by the foreclosure of the first mortgage.

The theory on which an action by the mortgagee on the covenant is restrained after foreclosure and sale under the mortgage in which the covenant is contained proceeds is therefore not applicable. That theory I had occasion to consider fully in the recent case of *Sayre* v. *The Securities Trust Co.* (1). The distinction between the effect of foreclosure of the first mortgage followed by sale on the mortgagor's liability on his covenant in that mortgage and its effect on his liability on the covenant in the third mortgage is no doubt subtle yet I think it is substantial. The mortgagor's position under the third mortgage was of course affected by the foreclosure. But it was not the foreclosure which had the practical effect of

(1) 61 Can. S.C.R. 109.

extinguishing his liability on the covenant under the first mortgage. It was the subsequent sale; and that, as already pointed out, had no effect whatever on the mortgagor's rights or position under the third mortgage.

Moreover, the proviso for redemption of the Kamsack Hotel is that the mortgagor is to be entitled to a discharge of it on payment of the two mortgages on the Redvers Hotel to which it is collateral. Whatever may be said as to the debt under the first mortgage by reason of the plaintiff having taken the property in satisfaction thereof, there is no ground for maintaining that the third mortgage has been paid.

However, I incline to the view that, having foreclosed the first mortgage on the Redvers Hotel and sold that property thereunder, the mortgagee took it in satisfaction of the entire debt due on that mortgage, that the amount thereof must therefore be deemed to have been fully paid and satisfied and that the mortgagor is entitled on the accounting with the mortgagee to credit for that amount and not merely for what was realized by the mortgagee on the sale. On the third mortgage covenant, however, the mortgagee is still entitled to recover the sum actually due and owing in respect of the debt by it secured and on payment of that amount the plaintiff will be entitled to a discharge of the Kamsack Hotel property from the collateral second mortgage upon it.

In lieu of a judgment dismissing the plaintiff's action, therefore, judgment should in my opinion be entered declaring that, on payment to the defendant of the amount due under the third mortgage on the Redvers Hotel property, the mortgage held by him on the Kamsack Hotel property will be satisfied and the plaintiff will be entitled to a discharge of it.

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BRODEUR J.—I would agree with the Court of Appeal (1) that the foreclosure proceedings on a first mortgage would not prevent the mortgagee, if he is the creditor of a third mortgage, from claiming on the covenant on this third mortgage if even he has bought the property on those foreclosure proceedings and has since disposed of it.

But at the same time there is no doubt that if the appellant could not succeed with regard to the third mortgage his indebtedness has disappeared as far as the first mortgage is concerned and he should succeed to the extent of the latter. This point, however, does not seem to have been strongly pressed in the courts below, though it has been mentioned.

The action should not be dismissed *in toto* but a judgment should be entered declaring that on payment of the third mortgage the plaintiff will be entitled to a discharge of the mortgage held by the defendant on the Redvers Hotel property.

There should be no costs on this appeal.

MIGNAULT J.—By the agreement of sale of certain hotel premises between the respondent (vendor) and the appellant (purchaser), what was termed a collateral mortgage on the hotel property was given by the appellant to the respondent, it being stipulated that this mortgage should be discharged when a first and third mortgage on another hotel property for $7,000 and $2,150 respectively, due to the appellant by one Yandt, and transferred by him to the respondent in part payment of the price, should be fully paid by Yandt.

(1) 12 Sask. L.R. 445; [1919] 3 W.W.R. 719.

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Yandt not having paid either mortgage, the respondent took foreclosure proceedings against him on the first mortgage after having vainly tried to bring the property to sale under a power of sale, and obtained a final order of foreclosure, subsequent to which he sold the property for $4,000.

The appellant now claims that he is entitled to a discharge of the collateral mortgage under the above mentioned stipulation of the agreement of sale.

The first objection to the appellant's contention is that Yandt has not fully paid the first and third mortgages due by him to the appellant and by the latter transferred to the respondent, and therefore the appellant is not entitled to a discharge of the collateral mortgage.

The second objection is that granting that the respondent could not sue Yandt on the covenant in the first mortgage without offering to reconvey him the mortgaged property, which he is not in position to do, his inability to reconvey does not stand in his way should he sue on the personal covenant contained in the third mortgage, for Yandt having lost his whole equitable right in the property by the final order of foreclosure on the first mortgage, cannot demand reconveyance as a condition of an action on the covenant in the third mortgage.

I therefore think the appeal fails, and for the reasons fully stated by my brother Anglin I agree in his disposal of the matter.

Appeal dismissed with costs.

Solicitors for the appellant: *McPhee, Smith & O'Regan.*

Solicitors for the respondent: *Patrick, Doherty, Killam & Walton.*

1920
*May 26.
June 21.

THE MONTREAL TRAMWAYS COMPANY (DEFENDANT)........ APPELLANT;

AND

NAPOLÉON GIRARD (PLAINTIFF). RESPONDENT.

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

Workmen's Compensation Act—Tramways Company—Free transportation—Injury to employee—Liability—R.S.Q. (1909) *arts.* 7321 *& seq.*

The respondent, an employee of the company appellant, when injured, was returning from his work to his home in a tramcar on which he was entitled to be carried free under certain provision in the company's regulations.

Held that the respondent had a right to compensation under the Quebec Workmen's Compensation Act, as the injury was occasioned "by reason of or in the course of (his) work" within the meaning of article 7321 R.S.Q. (1909.)

Judgment of the Court of Review (Q.R. 57 S.C. 394) affirmed.

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

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

Arthur Vallée K.C. for the appellant.

L. A. Rivet K.C. for the respondent.

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

(1) Q.R. 57 S.C. 394.

IDINGTON J.—There is (at this stage) only one fairly arguable point open for appellant to take by this appeal, and that is whether or not the phrase "accidents happening in the course of their work" used in the first section of the Quebec Workmen's Compensation Act, is to be construed as the equivalent of the phrase "happening in the course of their employment" in other Acts of a like kind, as, for example, in the English "Workmen's Compensation Act."

If so, then there is ample authority for holding that, under the circumstances in question, including the implied engagement of appellant to transport men in their employment to and from their respective places of abode free of charge on the occasion of going to or quitting work, the respondent, by reason of the accident in question, is entitled to recover.

I cannot say that I have any very decided opinion on the question but in such an event I cannot properly reverse the unanimous judgments of the courts below. I therefore conclude that this appeal should be dismissed with costs.

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

ANGLIN J.—This action is brought under the "Workmen's Compensation Act" of Quebec (R.S.Q. 1909, Arts. 7321 et seq. and amendments) and the plaintiff holds a judgment for $2,280, affirmed by the Court of Review, against which the defendant appeals.

These grounds of appeal are advanced:

(1) that the plaintiff's disability is not due to the fall from which he avers it has resulted;

(2) that the compensation awarded is excessive; and

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(3) that the injury was not suffered in the course of his work.

There is abundant evidence to sustain the finding in the plaintiff's favour on the first ground and no case has been made for interference with the amount of the compensation awarded.

The third ground of appeal presents the only debatable question, viz., whether the injury in respect of which the plaintiff claims compensation was occasioned "by reason of *or* in the course of (his) work"—"par le fait du travail, *ou* à l'occasion du travail"—within the meaning of Art. 7321 of the R.S.Q. 1909.

When injured the plaintiff was returning from his work to his home in a tramcar of the defendant company on which he was entitled to be carried free, under the following provision in the company's booklet of "Instructions to Conductors and Motormen."

(Instructions aux conducteurs et garde-moteurs).

La Cie des Tramways de Montréal. No 36.—Transport des employés.—Les conducteurs, garde-moteurs, aiguilleurs et autres employés de la compagnie revêtus de l'uniforme et portant leur insigne bien en vue, pourront voyager gratuitement pour se rendre à leur travail ou en revenir sur tous les tramways de la compagnie. Ces employés devront voyager à l'intérieur du tramway quand il y aura place, mais ne devront pas occuper les sièges quand les voyageurs seront debout, ni engager de conversation avec les employés du tramway.

Although it was not expressly made a term of the formal contract between the defendant company and its employees that the latter should be carried free between their homes and the company's sheds in going to and returning from their work, the evidence leaves little room for doubt that this privilege was recognized as an established custom of the defendants and that the right to enjoy it really formed part of the consideration for which the employees gave their services.

I extract the following paragraph from the judgment of the Superior Court:—

Considérant en droit, attendu que suivant la coutume suivie et les règlements mêmes de la compagnie défenderesse qu'elle remet à ses employés, il est permis à tout employé à la conduite de ses tramways de monter gratuitement sur tout tramway pour se rendre à son travail ou en revenir; que cette disposition est à l'avantage de la défenderesse en lui assurant une plus parfaite exactitude de la part de ses employés en lui procurant des employés frais, en leur exemptant la fatigue qu'il résulterait de se rendre à pied pour leur travail aux hangars de la compagnie ou en revenir, et que cette disposition est aussi à l'avantage des employés en leur fournissant une espèce de surplus de salaire en outre du prix en argent qu'ils reçoivent; qu'il semble donc que l'aller et retour dans les voitures de la compagnie défenderesse pour effectuer le travail requis du demandeur fait partie du louage de services entre lui et la défenderesse, que dans ces circonstances l'accident survenu au demandeur est arrivé à l'occasion du travail et qu'ainsi il y a lieu d'appliquer les dispositions de la loi du travail.

The evidence supports the conclusions of fact in this passage.

The use of the conjunction "or" in the Quebec statute in lieu of the conjunction "and" in the English "Workmen's Compensation Act" ("arising out of *and* in the course of the employment") will not have escaped attention. The use of the disjunctive in the French statute of 1898, from which the Quebec law is taken, was deliberate and purposeful (Cabouat, Accidents du Travail, Vol. 1, p. 186), and although a commentator in Rec. des Assurances, 1918, at p. 38, says

pour qu'il y ait accident du travail, il faut que celui-ci se soit produit au cours du travail, et soit en rapport direct de cause à effet avec lui,

the jurisprudence seems clearly to establish that

il n'est pas nécessaire que (l'accident) survienne par le fait même du travail de la victime; il suffit qu'il se produise à l'occasion de ce travail: (D.1900.2.181)—que l'accident se rattache par un lien plus ou moins étroit à l'exercice de la profession de la victime.

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Otherwise the effect of the two statutes in regard to the matter under consideration appears to me to be the same. I regard "by reason of" as the equivalent of "out of," and "in the course of their work" as identical in effect with "in the course of the employment" and I am prepared to accept as applicable to both statutes the view expressed by Buckley L.J., in *Fitzgerald* v. *Clark & Son* (1), that

> the words "out of" point * * to the origin or cause of the accident; the words "in the course of" to the time, place and circumstances under which the accident takes place.

It follows, I think, that while some cases which are within the Quebec Act may not be covered by the English Act, since it requires that both conditions must be fulfilled, any case within the English Act must necessarily fall within the Quebec statute, which will *ex facie* be satisfied if the accident either arises by reason of, or arises in the course of, the work or employment.

While in view of such decisions as *Davies* v. *Rhymney Iron Co.* (2); *Walters* v. *Staveley Coal & Iron Co.* (3); *Nolan* v. *Porter & Sons* (4); *Edwards* v. *Wingham Agricultural Implement Co.* (5); *Philbin* v. *Hayes* (6); and *Gilbert* v. *Owners of Steam Trawler Nizam* (7), the question whether upon a state of facts similar to those of the case at bar an injured employee would be held to fall under the provisions of the English Act may be regarded as debatable, authoritative statements as to the scope of the statute in recent cases such as *Armstrong-Whitworth & Co.* v. *Redford* (8);

(1) I B.W.C.C., 197 at p. 201.
(2) [1900] 16 T.L.R. 329.
(3) [1911] 105 L.T. 119.
(4) [1909] 2 B.W.C.C. 106.
(5) [1913] 3 K.B. 596.
(6) [1918] 87 L.J., K.C. 779.
(7) [1910] 2 K.B. 555.
(8) [1920] 36 T.L.R. 451.

Stewart v. *Longhurst* (1); *Marsh* v. *Pope & Pearson, Ltd.* (2); *Wales* v. *Lambton & Hetton Collieries* (3); *Thom* v. *Sinclair* (4); *Walton* v. *Tredegar Iron & Coal Co.* (5); and *Mole* v. *Wadworth* (6); and in such earlier cases as *Gane* v. *Norton Hill Colliery Co.* (7); *Cremins* v. *Guest, Keen & Nettlefolds, Ltd.* (8); *Blovelt* v. *Sawyer* (9); *Holmes* v. *Great Nor. Rly. Co.* (10); *Hoskins* v. *Lancaster* (11); and *Moore* v. *Manchester Liners Ltd.* (12); and the reasoning in *Whittall* v. *Stavely Iron & Coal Co.* (13), rather incline me to think that under circumstances such as those of the present case an employee of an English company, injured as the present plaintiff was, would be held to be within the purview of the English statute. As put by Warrington L.J. in the case last cited:

> The real question that the Court has to ask itself is: Was it an express or implied term of the contract of service that the workman should do, or should be entitled to do, that which he is doing at the time when the accident happened?

And as Bankes L.J. said in the same case:

> It is necessary to inquire when deciding whether the accident arose in the course of the employment, whether the accident took place upon a way which the workman was using as of right, because then it would be a term either expressed or implied of his engagement that he was to be at liberty so to use it.

It seems to me that, upon the findings of the trial judge, which the evidence warranted, the case at bar falls within the principle of the decisions in *Cremins* v.

(1) [1917] A.C. 249.
(2) [1917] 86 L.J.K.B. 1349.
(3) [1917] 86 L.J.K.B. 1346.
(4) [1917] A.C. 127.
(5) 6 B.W.C.C. 592.
(6) 6 B.W.C C. 129.
(7) [1909] 2 K.B. 539.
(8) [1908] 1 K.B. 469.
(9) [1904] 1 K.B. 271.
(10) [1900] 2 K.B. 409.
(11) 3 B.W.C.C. 476.
(12) 2 B.W.C.C. 87.
(13) [1917] 86 L.J. 985.

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Guest, Keen & Nettlefords (1), where the workman was held entitled to recover upon a finding that it was an implied term of his contract of service that the train upon which he was being carried should be provided by the employer and that employees should have the right to travel to and fro upon it without charge with the result that the employment was taken to begin when they entered the train in the morning and to cease when they left it in the evening, and in the similar case of *Walton* v. *Tredegar Iron & Coal Co.* (2), in which there was a like result notwithstanding a special indemnity contract with the employers, rather than within the decision in *Davies* v. *The Rhymney Iron & Coal Co.* (3), where the contrary view was taken although the workman had availed himself of facilities given by his employer to go home, the court there regarding the service rendered by the employers as purely gratuitous. The decision in *Coldrick* v. *Partridge, Jones & Co.* (4), is also in point.

Lord Cozens-Hardy, M.R., laid it down in *Read* v. *Baker* (5), that

> the facts being admitted or not disputed, it becomes a question of law whether or not an accident arises "out of the" employment.

On the other hand Lord Buckmaster said in *Stewart* v. *Langhurst* (6):

> In my opinion, however, the learned County Court Judge has fallen into error in his endeavour to obtain from outside cases a fixed standard of measurement by which to test the meaning of the words in the statute "in the course of" and "arising out of" the employment. Some of the reported cases * * * appear to me to have made the same mistake and to have attempted to define a fixed boundary dividing the cases that are within the statute from those that are without. This it is almost impossible to achieve. No authority can with certainty do more than decide whether a particular case upon particular facts is or is not within the meaning of the phrase.

(1) [1908] 1 K.B. 469.
(2) 6 B.W.C.C. 592.
(3) 16 Times L.R. 329.
(4) [1910] A.C. 77.
(5) [1916] 1 K.B. 927, at p. 929.
(6) [1917] A.C. 249, at pp. 258-9.

The facts in the very late case of *Armstrong, Whitworth & Co.* v. *Redford* (1), bear a curiously close resemblance to those in the recent French case of *Masson* v. *L'Urbaine Seine* (2). In both cases the employer provided a canteen for the exclusive but optional use of its employees. In each the canteen had no direct connection with the factory premises and access to it was by a separate entrance and a stairway. In each the employee was injured by falling on the stairs when returning from the mid-day meal to resume work. In the English case the employer was held liable by the House of Lords (Lords Sumner, Parmoor and Wrenbury), on the ground that the employee might be regarded as "in the course of the employment" while descending the stair-case to the actual spot where the work lay. Viscount Finlay and Lord Dunedin dissented. In the French case the Tribunal Civil de la Seine (4ème ch.) dismissed the action on the ground that the accident had occurred during an interruption of the employment and was "sans relation avec le travail."

Giving to the decided cases the consideration and weight to which I consider them to be entitled it seems to me that the plaintiff may fairly be regarded as having been, when injured, doing something which an implied term of his engagement "entitled him to do"—that he was on the tramcar solely by virtue of his contract of his service—that he was making use of the means provided by his employer to convey him to his home—that he was doing something ancillary or incidental to the work for which he was employed

(1) 36 Times L.R. 451. (2) Rec. des Assurances, 1918 p. 37.

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(*Davidson* v. *McRobb*) (1), and that the accident which befell him may therefore fairly be said to have "arisen out of and in the course of his employment."

But we are not without French authority directly bearing on the subject which, for the reasons stated in the recent judgment delivered in this court in *St. Lawrence Bridge Co.* v. *Lewis* (2), is entitled possibly to even greater weight. The idea that injury sustained by a workman while being taken to and from his place of work in a conveyance provided by his employer as a term of the contract of hiring should be regarded as part of the risk involved in his employment has received judicial approval in France both before and since the enactment of the law of 1898, D. 1886, 2.123; Gaz. du Palais, 1886.2.66; Loubat, No. 464, Sachet, Nos. 322-4. Under the law of 1898 and subsequent legislation, in this respect similar, there have been several applications of this doctrine. Thus in *Lafaye* v. *Chemins de fer de l'Est* (3), the company was held liable for injury sustained by a workman while proceeding, after his work had been finished, to take his place in a train provided by the company to carry him gratuitously to his home in fulfilment of a term of his engagement. Again in a case before the Cour d'Appel de Grenoble, reported in the Gaz. des Tribunaux, 1904.2.204, and in D. 1905.2.83, the holding was that

> L'accident dont un ouvrier est victime au cours d'un voyage de retour du lieu du travail à son domicile, aux frais du patron, doit être considéré comme survenu à l'occasion du travail, auquel il se rattache, par une relation incontestable de cause à effet.

(1) [1918] A.C. 304.
(2) 60 Can. S.C.R. 565.
(3) 1 Gaz. du Palais, 1901.1.310: D. 1901.2.277.

The return journey was regarded as part of the period of employment for which the workman's wages were paid. In a recent case in the Cour de Cassation, D. 1917.1.23 (32ème espèce), a workman en route to his work injured while unnecessarily crossing some railway tracks in proceeding by a short-cut, which he had, with the knowledge and tacit consent of his employers, been accustomed to use, was held entitled to recover, the court finding that

> l'accident s'est produit à une heure où la reprise du travail nécessitait la présence de l'ouvrier en cet endroit.

and that

> le lieu de l'accident devait être considéré comme une dépendance du lieu du travail.

But in 1910 the Cour de Cassation (Ch. des Req.) decided the case of *Veuve Dauvert* v. *Comp. de Tramways de Cherbourg* (1), which seems to me to be indistinguishable from the case at bar. Dauvert, an employee of the company, was killed by falling from a platform of a tramcar on which he was being taken from the car-sheds to his home. By a general rule of the company employees coming to and leaving their place of employment (the company's car-sheds) were permitted to ride gratuitously in the tramcars between their homes and the car-sheds. The trial court had taken the view that this rule had been passed with a view to ensuring regularity in service and that it secured moreover an advantage for the employees which constituted a veritable addition to their salaries and which thus presented indisputable characteristics of a stipulation in the contract of employment. The Cour de Cassation found no error in the conclusion of the court that the accident which had caused the

(1) Gaz. des Trib. 1910 (Vol. 2) 1, 143.

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death of Dauvert occurred "à l'occasion du travail," and his widow's recovery was upheld. I think we may safely follow the precedent which the last cited case establishes and in the case at bar uphold the judgment of the Court of Review confirming that of the Superior Court in favour of the plaintiff.

The appeal should be dismissed with costs.

BRODEUR J.—C'est une poursuite sous la loi des accidents du travail de la Province de Québec. Le demandeur intimé était à l'emploi de la compagnie appelante comme wattman ou garde-moteur. Il avait fini son travail et avait remisé sa voiture vers deux heures du matin; il était monté sur un autre tramway de la compagnie défenderesse pour retourner chez lui, et en se levant pour descendre, il tomba lourdement sur le parquet glacé et glissant du tramway. Cette chute lui occasionna des douleurs dans la région de l'abdomen. Il revint tout de même reprendre son travail le lendemain après s'être appliqué des bandages. Mais les douleurs devenant plus difficiles à supporter, il alla consulter son médecin qui, après examen, constata qu'il souffrait de hernies. L'une d'elles paraissait être guérie lors de l'enquête; mais l'autre subsistait encore et lui causait une incapacité partielle et permanente.

La principale question qui se présente est de savoir si l'employé d'une compagnie de tramways qui est victime d'un accident lorsqu'il est transporté gratuitement en revenant de son travail peut invoquer la loi des accidents du travail.

La preuve constate que les employés de la compagnie appelante reçoivent, en entrant à son service, un livret intitulé "Instructions aux conducteurs et

garde-moteurs" et l'article 36 de ces règlements comporte que les employés de la compagnie revêtus de leur uniforme pourront voyager sur tous les tramways de la compagnie pour se rendre à leur travail ou en revenir.

L'appelante prétend que cette disposition des règlements ne constitue qu'une simple faveur qui ne saurait constituer aucune obligation.

Je considère que ce passage gratuit que la compagnie donne à ses employés est à l'avantage non-seulement de son préposé mais aussi d'elle-même. Cela lui assure, comme le dit si bien l'honorable juge Lafontaine, une plus parfaite exactitude de la part de ses employés qui peuvent alors se mettre au travail frais et dispos, vu qu'ils s'exemptent de la fatigue de se rendre à pied à l'endroit où ils devront prendre leur tramway. D'un autre côté, cela constitue un supplément qui fait partie de la rémunération que la compagnie est tenue de payer. Et elle violerait certainement ses obligations si elle refusait à son employé de le transporter pour aller à son travail ou en revenir.

On voit par ces règlements que ces employés qui prennent ainsi passage sur un tramway sont soumis, sous certains rapports, aux ordres du conducteur de ce tramway et ne peuvent jouir de ce privilège que dans certaines conditions.

La responsabilité qui résulte de la loi des accidents du travail a pour fondement l'état de dépendance où se trouve placé à l'égard du patron l'ouvrier qui est victime d'un accident. Cette responsabilité est subordonnée à la condition qu'il existe un contrat de louage. L'ouvrier qui irait chercher son salaire après son travail terminé aurait bien droit à une indemnité

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s'il lui arrivait alors un accident. Il devrait en être de même du garde-moteur qui monte dans une voiture de la compagnie pour y jouir d'un passage gratuit qui fait partie de son salaire.

La loi des accidents du travail (art. 7321 S.R.Q.) ne couvre pas seulement l'accident survenu par le fait du travail mais aussi à l'occasion du travail, c'est-à-dire celui qui sans avoir pour cause directe le travail de la victime a été déterminé par un acte connexe au travail et plus ou moins utile à son accomplissement. (Cabouat, vol. 1er, n° 150; Aubry & Rau, vol. 5, par. 372 bis, pp. 477-480; Dalloz, 1900-2-181.)

Comme on le sait, la loi française est rédigée dans les mêmes termes que celle de Québec. Le fait est que notre législation de 1909 est la copie presque textuelle de la législation française de 1898. Or il a été décidé en France par la Cour de Cassation, dans une cause de *La Compagnie des Tramways de Cherbourg* v. *Veuve Dauvert* (1), que l'employé qui en vertu d'un règlement général d'une compagnie de tramways qui permet aux employés venant prendre ou quittant leur service de circuler gratuitement dans les tramways entre leur domicile et le dépôt, peut invoquer la loi des accidents du travail s'il est victime d'une chute de la plateforme du tramway qui le ramenait de son dépôt à son domicile. *Revue judiciaire des accidents du travail* vol. 11, année 1910. *Gazette des Tribunaux*, 1910-1-143. La Cour de Cassation nous enseigne que dans ce cas-là l'accident est survenu à l'occasion du travail.

Une décision au même effet se trouve dans la même revue pour l'année 1913, à la page 143.

(1) Gaz. des Trib. [1910] (vol. 2), 143.

Il me semble bien évident alors que le demandeur dans la présente cause a le droit de réclamer sous la loi des accidents du travail.

L'appelante prétend que la maladie dont il souffre ne provient pas de l'accident. C'est là une question de fait. La preuve démontre que l'employé, après l'accident, a ressenti des douleurs qui, après examen par son médecin, justifiaient ce dernier de dire que l'accident avait causé la hernie qui a réduit sa capacité de travail. Je ne me croirais pas justifiable de modifier la décision des deux cours inférieures sur cette question de faits.

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

MIGNAULT J.—D'après les constatations de fait du premier juge, l'appelante, tant par les règlements qu'elle remet à ses employés que par la coutume suivie, permet à ses employés de monter gratuitement sur ses tramways pour se rendre à leur travail ou pour en revenir, ce qui est un avantage pour l'appelante en lui assurant une plus grande exactitude de travail et des employés plus frais et dispos, et pour les ouvriers en leur fournissant une sorte de supplément de salaire.

Dans l'espèce, Girard revenait de son travail dans une des voitures de l'appelante lorsqu'il fit une chute qui, encore par les constatations de fait du premier juge, causa une incapacité partielle et permanente de travail, lui donnant, dans l'opinion de la cour supérieure et de la cour de revision, droit d'action d'après la loi des accidents de travail de Québec.

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L'accident en question est-il survenu "par le fait du travail ou à l'occasion du travail" (art. 7321, S.R.Q., 1909) de l'intimé? Les deux cours ont répondu dans l'affirmative et l'appelante nous demande maintenant d'infirmer les jugements rendus contre elle.

J'ai eu l'avantage de lire l'opinion très travaillée de mon honorable collègue, M. le juge Anglin. Il démontre que les tribunaux anglais et français admettent dans ce cas la responsabilité du maître sous la loi, tant anglaise que française, concernant les accidents du travail. Mon honorable collègue, M. le juge Brodeur, est de la même opinion, mais se base sur la jurisprudence française uniquement, et, du reste, puisque la loi des accidents du travail de Québec est copiée, du moins pour ce que je viens d'en citer, sur la loi française, on trouve, dans la jurisprudence française, un guide très utile pour son interprétation.

Toutefois j'avoue que je n'ai pu me défendre de quelques doutes, car le but du législateur est de protéger l'ouvrier contre les accidents dont son travail est la cause ou du moins l'occasion directe, et ici, malgré que le privilège que l'appelante accorde à ses employés de voyager gratuitement dans ses voitures pour se rendre à leur travail ou en revenir soit dans l'intérêt des ouvriers et de la compagnie, on peut se demander en quoi un accident arrivé au cours du transport gratuit a pour cause ou occasion directe le travail de l'ouvrier. Cependant, la jurisprudence admet le recours en ce cas et l'espèce jugée par l'arrêt de la Cour de cassation du 9 juin 1910, que cite mon collègue, M. le juge Anglin, et qui est rapporté dans la Gazette des Tribunaux, 1910, 2ème semestre, première partie, p. 143, est à peu près identique à

l'espèce qui nous occupe, car les constatations de fait du premier juge nous permettent de dire que c'était une condition au moins implicite du contrat de louage d'ouvrage que l'intimé pourrait voyager gratuitement dans les voitures de l'appelante en se rendant à son travail ou en revenant chez lui, sa journée finie. Cette décision peut donc justifier le jugement dont l'appelante se plaint.

Il sera intéressant de citer ici les observations de l'arrêtiste qui rapporte la décision de la cour de cassation à laquelle je viens de faire allusion:

En principe, un ouvrier n'est pas protégé par la loi de 1898 sur les accidents du travail lorsqu'il est victime d'un accident pendant qu'il se rend de son domicile à son travail ou réciproquement, c'est-à-dire avant que la journée de travail soit commencée ou après qu'elle est terminée. C. de Douai, 25 novembre 1902 (Gaz. des Tribunaux, 18 janvier 1903); C. de cassation, 25 février 1902 (Rec. Gaz. des Tribunaux, 1902, 2ème sem., 1.6; Dalloz, 1902.1.273); 3 mars 1903 (Rec. Gaz. des Tribunaux, 1903, 2ème sem., 1.61; Dal., 1903.1.273).

Il en est autrement, et l'ouvrier bénéficie des dispositions de la loi de 1898, lorsque, par suite de la nature du travail ou de l'éloignement du chantier, le patron a pris à sa charge le transport des ouvriers. En pareil cas, l'accident survenu à un ouvrier, au cours du transport, constitue un accident du travail. C. de Caen, 25 juin 1901 (Rec. Gaz. des Tribunaux, 1901, 2ème sem., 2.421); C. de Grenoble, 27 mai 1904 (Rec. Gaz. des Tribunaux, 1904, 2ème sem., 2.204; Dal., 1905.2.83).

Cette même exception subsiste-t-elle lorsque, ne s'agissant plus d'un transport à la charge du patron, celui-ci a simplement accordé à ses ouvriers la faculté d'un transport gratuit?

C'était la question que posait le pourvoi dans l'espèce ci-dessus. La Chambre des requêtes l'a résolue affirmativement. Au point de vue juridique, cette solution est peut-être admissible, étant donnés les précédents de la jurisprudence sur la question, quand l'ouvrier se rendant au travail est blessé au cours d'un transport fait pour le compte du patron.

Au point de vue pratique, on peut se demander si l'arrêt que vient de rendre la Chambre des requêtes ne confirme pas l'opinion de ceux qui pensent que lorsque la protection dépasse une certaine mesure, elle aboutit à des résultats inverses des effets bienfaisants que l'on en attendait. Il ne serait pas étonnant, en effet, que, comme

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conséquence de cet arrêt, la compagnie de tramways demanderesse au pourvoi eût retiré à ses employés la faculté du parcours gratuit, ne voulant pas, sans doute, que cette autorisation fût pour elle une source de charges. Accident survenu au cours du transport gratuit, accident du travail? Soit. Plus de transport gratuit.

Je suis absolument de cet avis.

L'appel devra donc être renvoyé avec dépens.

Appeal dismissed with costs.

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

Solicitor for the respondent: *L. A. Rivet.*

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*May 28.
*June 21.

AND

LA COMPAGNIE DU PARC ST. CHARLES (PLAINTIFF)........... RESPONDENT.

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

Arbitration and award—Previous action—Agreement to arbitration—Larger claim fyled—Ultra petita.

The respondent, alleging that the appellants had encroached upon beach lot No. 586 of St. Roch Nord, took an action for $96,000.00, the value of 384,000 square feet. Before any contestation, both parties agreed to submit to one arbitrator the question whether such encroachment on lot No. 586 had taken place and, in the affirmative, the amount of compensation. The respondent then fyled with the arbitrator, under protest by the appellant, a larger claim for $162,040.50, representing 681,162 square feet of land comprised in lot No. 586. The arbitrator rendered his decision allowing $51,539.58, the value of 572,662 square feet.

Held that the arbitrator's sentence was not *ultra petita.*

Judgment of the Court of King's Bench (Q.R. 29 K.B. 302) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, (1) affirming the judgment of the trial judge, Dorion J. and maintaining the respondent's action with costs.

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

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

(1) Q.R. 29 K.B. 302.

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Lafleur K.C. and *Rivard K.C.* for the appellant.

Gelly K.C. and *Dion K.C.* for the respondent.

IDINGTON J.—The neat question raised herein is whether or not the arbitrator exceeded the terms of the submission.

Having regard to all the surrounding facts and circumstances, by which, if there is any ambiguity, we must be guided in the interpretation thereof, I do not think there is any room for argument.

He was duly appointed to determine how much area the appellant had invaded of the property belonging to respondent, and then to find the value thereof.

It was not the action alone and the limits of its then ambit that was intended to dominate the terms of the submission, though that was rather inaptly referred to in the resolution leading up to the submission, and liable, in default that, to be expanded in its operation by an amendment.

It was doubtless the possibilities of extension or diminution of the size of the area encroached upon that led to a more comprehensive definition in the deed of submission. The terms of the latter must govern.

I, therefore, am of opinion that this appeal should be dismissed with costs.

DUFF J.—On the whole, I am of the opinion that the question passed upon was one within the competence of the arbitrator.

ANGLIN J.—I concur with my brother, Mr. Justice Mignault.

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BRODEUR J.—La Commission du Havre de Québec a fait du creusage à l'embouchure de la rivière St-Charles afin d'améliorer et d'agrandir le port de cette ville. La compagnie intimée a prétendu que ces travaux se faisaient sur un lot de grève dont elle était la propriétaire en vertu d'une concession seigneuriale faite à ses auteurs dans les premiers temps de la domination francaise. Ce lot de grève était recouvert d'eau à haute marée. L'intimée a alors pris une action pour réclamer $96,000 en alléguant que la Commission du Havre s'était ainsi emparée de 384,000 pieds de son terrain. Les parties ont décidé de soumettre à l'arbitrage la question du droit de propriété, ainsi que la compensation qui devrait être payée pour tout le terrain dont la Commission se serait emparée.

Alors la compagnie Le Parc St-Charles a produit devant l'arbitre une réclamation non pas seulement pour 384,000 pieds mais pour presque le double de cette quantité.

Par la sentence arbitrale l'appelante a été condamnée à payer au delà de $50,000.

Par sa présente action l'intimée demande l'homologation de cette sentence arbitrale. La Commission du Hâvre s'oppose à cette homologation et prétend que l'arbitre a procédé *ultra petita,* qu'il n'avait pas le droit d'adjuger sur la valeur de près de 600,000 pieds de terrain quand l'action soumise à l'arbitrage ne portait que sur environ 400,000 pieds.

Voilà tout le litige qui nous est soumis .Nous n'avons rien à faire avec la valeur proprement dite de ce lot de grève.

Le montant réclamé et accordé me paraît exagéré. Car une réclamation semblable nous avait été soumise dans la cause de *Bélanger* v. *The King* et nous n'avons

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pas voulu confirmer le jugement de la cour d'Echiquier, tellement élevé nous paraissait le montant accordé. Mais dans la présente cause nous n'avons rien à faire avec le montant de l'indemnité. Ceci a été laissé à la seule discrétion de l'arbitre que les parties ont nommé.

Nous avons simplement à décider si l'acte d'arbitrage réfère simplement à la quantité de terrain mentionnée dans l'action originaire, soit environ 400,000 pieds, ou bien s'il peut couvrir les 600,000 pieds près mentionnés dans la sentence arbitrale.

L'acte d'arbitrage, dans le préambule, parle d'abord de l'action de $96,000, ensuite de l'impossibilité pour les parties de s'entendre pour éviter les frais d'un litige judiciaire; et alors elles conviennent de nommer un arbitre pour déterminer en dernier ressort les points suivants:

(a) Quels sont les titres de la dite compagnie aux terrains et lot de grève connu et désigné aux plan et livre de renvoi officiel du cadastre de St-Roch de Québec Nord, sous le numéro 586 dont il est question dans la dite cause.

(b) Déterminer l'étendue et les extrêmes limites de là dite propriété et du lot de grève n° 586 de St-Roch Nord sur le côté qui fait face à la rivière St-Charles et au fleuve St-Laurent;

(c) Etablir si les Commissaires ont empiété sur la propriété et le lot de grève n° 586 du cadastre de St-Roch Nord, s'ils ont de plus pris possession d'aucune partie du dit lot par leurs travaux de draguage pratiqués dans l'estuaire de la rivière St-Charles;

(d) S'il est établi à la satisfaction du dit arbitre que les dits empiètements de la dite prise de possession ont eu lieu, établir le montant de la compensation que la dite Compagnie est en droit de réclamer et de recevoir des dits Commissaires.

Un arbitre n'a compétence que pour connaître des contestations qui lui sont soumises par l'acte d'arbitrage. La jurisprudence s'est en général montrée très tolérante dans l'application de la règle qui exige la désignation de l'objet du litige; et de l'ensemble de ses décisions il résulte que le litige peut être désigné

d'une manière générale. On a dans le cas actuel désigné les points litigieux, mais on n'a pas cru devoir les limiter à ceux mentionnés dans l'action qui a provoqué l'arbitrage, mais on a donné à l'arbitre le pouvoir de déterminer les limites du lot de grève, l'étendue de l'empiètement commis par la Commission du Havre, et enfin l'indemnité que la compagnie est en droit de réclamer pour cet empiètement.

Cet acte d'arbitrage ouvrait la porte à une réclamation plus élevée que celle qui était originairement faite. Et c'est ce qui a été fait.

Je considère que l'arbitre a procédé dans les limites de ses pouvoirs.

L'appel doit être renvoyé avec dépens.

MIGNAULT J.—Les appelants se plaignent d'un jugement de la Cour du Banc du Roi, siégeant en appel, confirmant à l'unanimité un jugement de la cour supérieure à Québec, prononcé par l'honorable juge Dorion, lequel jugement homologuait une sentence arbitrale rendue contre les appelants par l'honorable M. H. C. Pelletier, juge en retraite de la cour supérieure, nommé arbitre unique par les parties.

La compagnie intimée, en juillet, 1917, avait intenté contre les appelants une action en recouvrement de la somme de $96,000 pour la valeur de terrains dont les appelants s'étaient emparés en faisant des travaux de creusage dans la rivière St-Charles dans le port de Québec. Sa déclaration, très courte, se lisait comme suit:

1. La demanderesse est propriétaire pour l'avoir acquis de ses deniers et en vertu de bons et valables titres du lot No 586 du cadastre officiel de la paroisse de St-Roch Nord, dans la Cité de Québec, avec toute la grève qui en dépend.

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2. La demanderesse est aussi propriétaire du dit lot et de la dite grève, en ayant prescrit la propriété légalement par sa possession et celle de ses auteurs à titre de propriétaire pendant audelà de trente ans conformément aux articles 2242 et 2251 du Code Civil de la Province de Québec.

3. Les défendeurs depuis plusieurs années, et spécialement depuis l'année 1912, ont fait des travaux de creusages dans la rivière St-Charles dans le port de Québec, et spécialement en front de la susdite propriété de la demanderesse:

4. Les défendeurs en exécutant ces dits travaux ont empiété sur la propriété de la demanderesse, s'en sont emparés, ont creusé sur icelle et enlevé tout le terrain constituant une partie considérable de la dite grève, savoir, sur une superficie de 384,000 pieds carrés, convertissant ce dit terrain à leur usage.

5. La valeur du terrain ainsi enlevé et qu'ils ont converti à leur usage est de $96,000.00 à raison de 25 cents du pied carré.

6. Les défendeurs ont ainsi empiété et pris possession du terrain de la demanderesse illégalement, sans droit aucun et sans avoir procédé à aucune expropriation et malgré les protestations réitérées de la demanderesse.

7. Les défendeurs sont toujours restés depuis en possession du dit terrain.

8. La demanderesse a requis les défendeurs de payer la dite somme de $96,000.00, mais les défendeurs ont toujours refusé de payer.

Pourquoi la demanderesse demande jugement contre les défendeurs pour la dite somme de quatre-vingt-seize mille piastres ($96,000.00) avec intérêt et dépens.

Avant toute contestation de cette action, les parties sont convenues de soumettre leur différend à l'arbitrage. A cet effet les appelants ont adopté la résolution suivante le 10 août, 1917:

Resolved: That the action taken by La Compagnie Le Parc St-Charles Limitée, against the Quebec Harbour Commissioners, claiming from them the sum of $96,000.00 for alleged encroachment upon, and taking possession of that part of their property No. 586 of the official cadaster of St-Roch Nord, under No. 2354 of the Superior Court of Quebec, be submitted to one arbitrator, whose decision shall be final and binding upon both parties, as a final judgment of the Superior Court, without the right of appeal therefrom, said arbitrator to enquire into, and give a decision on the following points:

(a) The titles of the company plaintiff to the land and beach lot No. 586 of St-Roch Nord in question in this case.

(b) To determine the extent and extreme limits of said property and beach lot No. 586 of St-Roch Nord on the side of said lot, facing the River St. Charles and the River St. Lawrence.

(c) Have the Commissioners encroached upon said property and beach lot No. 586 of St-Roch Nord, and have they taken possession of any part thereof by dredging operations performed in the estuary of the River St. Charles.

(d) In the affirmative, what is the value of the property so taken, and what compensation is the company plaintiff entitled to receive therefrom.

(e) That the cost of said arbitration be borne equally by both parties.

Resolved: That Honourable H. C. Pelletier, retired judge of the Superior Court, be appointed as arbitrator in this case.

Le 14 août, l'intimée accepta cette proposition d'arbitrage et nomma comme son arbitre M. Antoine Gobeil, avocat de Québec, mais subséquemment les parties décidèrent de s'en rapporter à la décision de l'honorable M. H. C. Pelletier comme seul arbitre.

La convention d'arbitrage fut passée, le 6 septembre, devant Mtre J. A. Charlebois, notaire de Québec, et elle précisait la question à décider dans les termes suivants:

(a) Quels sont les titres de la dite compagnie aux terrains et lot de grève connu et désigné aux plan et livre de renvoi officiel du cadastre de St-Roch de Québec Nord, sous le numéro 586 dont il est question dans la dite cause?

(b) Déterminer l'étendue et les extrêmes limites de la dite propriété et du lot de grève No. 586 de St-Roch Nord sur le côté qui fait face à la rivière St-Charles et au fleuve St-Laurent.

(c) Établir si les Commissaires ont empiété sur la propriété et le lot de grève no. 586 du cadastre de St-Roch Nord, s'ils ont de plus pris possession d'aucune partie du dit lot par leurs travaux de draguage pratiqués dans l'estuaire de la rivière St-Charles.

(c) S'il est établi à la satisfaction du dit arbitre que les dits empiètements et la dite prise de possession ont eu lieu, établir le montant de la compensation que la dite compagnie est en droit de réclamer et de recevoir des dits Commissaires.

Cette convention stipulait que les appelants ne seraient tenus de payer le montant accordé par l'arbitre que lorsqu'ils l'auraient reçu du gouvernement fédéral, mais qu'en attendant ils payeraient les intérêts au

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taux de six pour cent par an sur cette somme. Il faut aussi ajouter que la convention déclarait que les parties avaient décidé de soumettre toutes les questions soulevées dans l'action au jugement d'un arbitre unique et amiable compositeur.

Pendant la procédure de l'arbitrage, l'intimée, se basant sur des mesures des terrains empiétés faites par M. Giroux, arpenteur, produisit une réclamation pour 681,162.1 pieds carrés, estimés à 25 cents du pied, formant une somme de $162,040.50. Les appelants s'objectèrent à cette réclamation pour la raison qu'elle changerait la nature de la première demande de l'intimée qui était de $96,000.00 au lieu de $162,-040.50.

Le 19 janvier, 1918, l'arbitre rendit sa décision devant le notaire Charlebois déclarant que les appelants s'étaient emparés de 572,662 pieds carrés de terrain appartenant à l'intimée qu'il a évalués à 9 cents du pied, formant un montant total de $51,539.58.

L'intimée demande maintenant l'homologation de cette sentence arbitrale et réclame des appelants la somme de $3,092.37 pour un an d'intérêts sur $51,539.58, le gouvernement fédéral n'ayant pas encore fourni aux appelants les deniers requis pour payer cette dernière somme.

Les appelants prétendent:—

1° Qu'ils n'avaient pas le pouvoir de soumettre à l'arbitrage la question soulevée par la première action de l'intimée.

2° Que l'arbitre avait adjugé *ultra petita* en accordant une compensation à l'intimée pour 572,662 pieds de terrain, alors que, par l'action soumise à l'arbitrage, elle ne demandait à être indemnisée que pour un empiètement de 384,000 pieds.

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A la discussion devant cette cour les avocats des appelants n'ont pas insisté sur le premier moyen, et il ne sera question que du second, c'est-à-dire l'assertion que la sentence arbitrale est *ultra petita*.

Malgré la savante argumentation de MM. Lafleur et Rivard pour les appelants, je ne puis me convaincre que leur grief contre la sentence arbitrale soit bien fondé.

J'admettrais immédiatement que la sentence serait absolument nulle si le savant arbitre avait adjugé sur quelque chose qui ne lui était pas soumis par la convention d'arbitrage, et on ne pourrait donner effet à sa sentence jusqu'à concurrence de l'empiètement sur lequel il était chargé de se prononcer. Tel n'est pas le cas cependant.

La prétention des appelants est que l'action qui a donné lieu à l'arbitrage se plaignait d'un empiètement de 384,000 pieds seulement, et quels que soient les termes de la convention d'arbitrage, ils doivent être restreints à ce qui était en question dans cette action, et ils invoquent à cet effet leur résolution que j'ai citée plus haut.

Il est clair que l'action de l'intimée aurait pu être amendée jusqu'à jugement final, mais les appelants nient la possibilité d'un amendement après la convention d'arbitrage, disant qu'une seule des parties ne peut, sans l'assentiment de l'autre, changer l'acte de compromis. Il est bien évident que l'acte de compromis ne peut être modifié que de consentement mutuel, mais, dans mon opinion, il n'y a eu, dans l'espèce, aucune modification.

Et d'abord, j'interprète l'action de l'intimée, qui a été réglée par la convention d'arbitrage, comme se plaignant d'un empiètement sur le lot cadastral n°

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586 et comme demandant, à raison de cet empiètement, une indemnité de $96,000.00. Il est vrai que la déclaration dit que l'empiètement comprend une superficie de 384,000 pieds carrés, et que c'est en évaluant ce terrain à 25 cts du pied qu'elle en arrive à déterminer le chiffre de $96,000.00. Cependant la superficie mentionnée n'est pas indiquée comme étant un terrain distinct, c'est une partie non limitativement déterminée du lot n° 586, et la mention de la superficie de 384,000 pieds ne peut avoir un plus grand effet, dans l'espèce, que celui de la description du terrain dont les appelants se sont emparés. Etant donné que l'intimée se plaint d'un empiètement sur un lot déterminé par son numéro cadastral et demande à en être indemnisée, si, pendant le procès, on constatait que l'empiètement dépassait 384,000 pieds, je crois—mais en cela je ne fais qu'exprimer mon opinion personnelle—que le tribunal aurait pu, même sans amendement, indemniser l'intimée pour tout l'empiètement, à la condition de ne point dépasser le chiffre de $96,000.00. En d'autres termes la partie essentielle de l'action c'est l'allégation de l'empiètement au préjudice du lot 586 et la demande de l'indemnité de $96,000.00, et s'il y a description inexacte de la partie de ce lot comprise dans l'empiètement, j'appliquerais la règle *falsa demonstratio non nocet*. Au demeurant, nul doute que le tribunal, dans un tel état de choses, aurait pu, *ex abundanti cautela*, permettre d'amender la déclaration pour la faire coïncider avec les faits prouvés, mais dans mon opinion l'amendement n'aurait pas été indispensable dans l'espèce si l'indemnité totale accordée ne dépassait pas $96,000.00.

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Mais le motif sur lequel la cour se base pour renvoyer l'appel, c'est que, dans l'acte de compromis, les parties ont expressément soumis à l'arbitrage la décision de l'indemnité à être accordée à l'intimée pour l'empiètement quel qu'il fût que les appelants avaient commis au préjudice du lot n° 586, et qu'en vertu des termes mêmes de cet acte de compromis l'étendue de l'empiètement n'était pas restreint aux 384,000 pieds carrés mentionnés dans l'action qui a été réglée par la convention d'arbitrage. En tant que besoin en était, on peut considérer la déclaration dans cette action comme ayant été amendée par l'acte de compromis.

L'appel doit donc être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitor for the appellants: *Adjutor Rivard.*

Solicitors for the respondent: *Gelly & Dion.*

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*May 28, 31.
June 21.

JOSEPH BOILY,
AMEDÉE FORTIN,
JOSEPH TREMBLAY, (PLAINTIFFS) APPELLANTS.

AND

LA CORPORATION DE ST-HENRI DE TAILLON (DEFENDANT)...... RESPONDENT.

THREE APPEALS

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

Municipal corporation—By-law—Special meeting—Notice—Absence of councillor—Minutes of the meeting—Closing of road between two municipalities—Consent of the county council—Articles 505. 1233 *C.C.—Articles* 14, 115, 116, 118, 332, 334, 340, 344, 345, 355, 359, 467, 473, 474, 475, 519 *M.C.—R.S.Q.* (1909), *articles* 2064, 2065.

The notice for a special meeting of a municipal council having been given to all the councillors by a non-registered letter sent to them by mail, instead of the notice being served on each councillor individually as required by the municipal code, the minutes of the meeting could not and did not mention that such notice had been served on one of the councillors who was absent (Art. 116 M.C.). At the trial it was proved, (which evidence was objected to by the appellants) by this councillor's own admission, that he had in fact received notice in due time.

Held, Anglin J. dissenting, that the proceedings of the council at the meeting were irregular and null. *Hudon* v. *Roy dit Desjardins* (Q.R. 19 K.B. 68) overruled.

Per Anglin J. (dissenting).—Any irregularity that there may have been in the giving of notice of the meeting was cured by article 14 M.C.

A colonization road, which passed through the municipality respondent and a neighbouring municipality, had been opened by the provincial authorities long before the existence of both municipalities. The municipality respondent changed, within its limits, the course of this road without changing the place where it connected with the neighbouring municipality, and passed a by-law closing the other road.

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

Per Anglin and Mignault JJ.—It was not necessary for the municipal council to obtain, previously, the consent of the county council. (Art. 519 M.C.). Duff and Brodeur JJ. *contra*.

Judgment of the Court of King's Bench (Q.R. 29 K.B. 146) reversed, Anglin J. dissenting.

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APPEAL from a judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing a judgment of the Superior Court, District of Roberval and dismissing the appellant's action with costs.

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

Belcourt K.C. and *Bergeron* for the appellants.

Aug. Lemieux K.C. and *Lapointe K.C.* for the respondents.

IDINGTON J.—These three appeals were heard together as they involve the same question. For the reasons assigned by my brother Brodeur (with which I agree) relative to the failure of the council of respondent to act in compliance with the statutory provision (other than alleged need of county council's consent) which should have governed it in taking steps to pass such a by-law as in question, I think this appeal should be allowed with costs throughout.

DUFF J.—I concur with Brodeur J.

ANGLIN J. (dissenting).—I respectfully concur in the unanimous opinion of the learned Judges of the Court of King's Bench, which I understand is shared by my brother Mignault, that this case does not fall within Art. 519 of the Municipal Code.

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I likewise concur in their view that notice of the presentation of the by-law in question was sufficiently given unless the legality of the council meeting of the 27th of October has been successfully attacked. In my opinion it has not.

Any irregularity that there may have been in the giving of notice of that meeting to councillor Gilbert, who did not attend it, was, I think, cured by Art. 14 of the Municipal Code, since it is proved by Gilbert's own admission that he had in fact received notice in due time and the omission to serve it in the prescribed method and to state in the minutes of the meeting that notice had been given in conformity with the requirements of the Municipal Code therefore did not entail any substantial wrong or injustice. I accept the opinion of the learned judges of the Court of King's Bench as to the admissibility of this evidence.

With profound respect for the contrary opinion of my learned brothers Brodeur and Mignault, in which I understand my brothers Idington and Duff are disposed to concur, I also agree with the views of the majority of the learned judges of that Court that this irregularity does not fall under the last paragraph of Art. 116 of the Municipal Code. I can find no justification for construing the explicit words

> if it appear that the notice of meeting has not been served on all the absent members ("s'il appert que l'avis de convocation n'a pas été signifié à tous les membres absents,")

as if they read "if it does not appear that the notice of meeting has been served on all the absent members." and that, with respect, is what is done in maintaining this appeal. If it appears affirmatively that notice of the special meeting has not been given to every absent councillor, the council is, no doubt, obliged to adjourn at once, and, if it does not, nullity of any

proceedings taken follows. But if this be not shewn—if, although the usual proof of notice be lacking, the council is otherwise satisfied that every absent member was in fact notified—while its proceedings may be irregular they are not declared null by Art. 116 M.C. They are, no doubt, taken at the risk of nullity if the fact should prove to be that any absent councillor had not been notified. But, if he was in fact notified and that can be established, a case is made, in my opinion, for the application of Art. 14 M.C. which ordains that

no objection founded upon form, or upon the omission of any formality, even imperative, in any act or proceeding relating to municipal matters, can be allowed to prevail in any action, suit or proceeding respecting such matter, unless substantial injustice would be done by rejecting such objection or unless the formality omitted be such that its omission, according to the provisions of this code, would render null the proceedings or other municipal acts requiring such formality.

The omission to serve the notice of the special meeting in the method prescribed by Art. 340 M.C., and the omission of the entry in the minutes prescribed by the second paragraph of Art. 116 M.C., were in my opinion not informalities which, according to the provisions of the Municipal Code, rendered the proceedings of the council null. The only provision relied upon as entailing nullity is the concluding paragraph of Art. 116 M.C. The proceedings would have been null under that paragraph had it appeared that notice of the meeting had in fact not been received by the absent Gilbert. But that did not appear—could not have appeared—since the fact was otherwise. I think it is too narrow a construction of the last paragraph of Art. 116 M.C., to hold that it entails nullity merely because service of notice of the meeting on an absentee has been effected informally, where he has actually received notice in writing.

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For these reasons, I am with respect of opinion that the appeal should be dismissed.

BRODEUR J.—Ces trois causes ont été réunies parce qu'elles soulèvent des questions identiques. Ce sont des actions confessoires par lesquelles les demandeurs réclament de la corporation défenderesse la reconstruction d'une clôture entre leurs fermes et les routes y adjoignant. (Articles 505 C.C., 473, 474, 475 C.M.)

La défenderesse plaide que ces routes ont été fermées par règlement municipal du 5 novembre 1917, et que la corporation pouvait enlever les clôtures qu'elle y entretenait (art. 467 C.M.).

Les demandeurs ont répondu à cette défense que le règlement est nul parce qu'il n'a pas été précédé d'un avis de motion régulier (art. 359 C.M.), cet avis de motion ayant été donné à une séance spéciale illégalement tenue le 27 octobre 1917 (art. 116 C.M.).

La cour supérieure a maintenu ces actions en décidant: 1° que l'avis de motion exigé par l'article 359 du code municipal n'avait pas été donné, et 2° que le règlement ayant trait à la fermeture d'un chemin qui sert de sortie d'une municipalité à l'autre (art. 519 C.M.) ne devenait en vigueur qu'après avoir été approuvé par le conseil de comté.

La cour d'appel (1) a renversé ce jugement et a renvoyé les actions.

Les faits qui ont donné lieu au litige sont les suivants:

Le gouvernement provincial a commencé à construire, il y a trente-cinq ans environ, un chemin de colonisation dans la région du Lac St-Jean qui relie la rivière Saguenay à la rivière Péribonka et qui passe

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à travers six cantons. Ce chemin s'appelle le Chemin Archambault. (Rapports du Commissaire de l'Agriculture et des Travaux Publics de Québec, 1887, p. 47. Rapports du Commissaire de l'Agriculture et de la Colonisation de Québec, 1890, p. 170; 1893, p. 136-160; 1894, p. 381; 1896; p. 252). A certains endroits il suit la frontière des lots d'un rang et en d'autres il conduit d'un rang à un autre. A l'entrée dans la municipalité intimée, St-Henri de Taillon, il suit le front des terres du deuxième rang. Il monte ensuite entre les lots 21 et 22, 26 et 27, 30 et 31 des rangs trois, quatre et cinq jusqu'à ce qu'il atteigne, à la frontière du sixième rang, la municipalité voisine, St-Henri de Taillon Ouest. Les demandeurs sont propriétaires de fermes qui longent ce chemin dans le deuxième et le troisième rang. C'est la partie du chemin que la corporation intimée veut fermer.

La corporation de St-Henri de Taillon a récemment ouvert une route plus à l'est, entre les lots 14 et 15, sur les rangs deux, trois et quatre; et cette nouvelle route, qui part du chemin Archambault à la frontière du deuxième rang, près de l'église, rejoint ce même chemin en utilisant le chemin de front du cinquième rang. Je désignerai la route que l'on veut fermer sous le nom de route Boily-Fortin et la nouvelle route comme route de l'est.

En vertu de la loi (2064 S.R.P.Q.), une municipalité est tenue d'entretenir les chemins de colonisation qui traversent son territoire de la même manière qu'elle entretient les chemins qu'elle ouvre elle-même. Elle ne peut fermer ces chemins de colonisation sans le consentement du ministère (art. 2065 S.R.P.Q.).

Le conseil municipal de St-Henri de Taillon paraît avoir, le 9 juillet 1917, adopté une résolution demandant au ministère de la colonisation de fermer les

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route Boily-Fortin qui fait partie du chemin Archambault, disant qu'une nouvelle route (route de l'est) a été ouverte. Cette permission leur fut accordée le 30 août 1917.

Cette fermeture projetée a évidemment mécontenté plusieurs contribuables, car une assemblée du conseil a lieu le 15 octobre 1917; et, après avoir pris le vote des contribuables présents, il est décidé sur une proposition secondée par Adélard Gilbert que la route Boily-Fortin resterait ouverte.

Les partisans de la fermeture ne se tinrent pas pour battus, car le secrétaire-trésorier, ayant reçu des requêtes de leur part, convoqua pour le 27 octobre 1917 une séance spéciale du conseil. Au lieu de signifier régulièrement les avis, conformément aux articles 115 et 340 du code municipal, en en laissant une copie à chacun des conseillers en personne ou à leur domicile ou place d'affaires, il les déposa au bureau de poste.

Au jour fixé par l'assemblée, Gilbert, celui-là même qui avait le 15 octobre secondé la proposition de laisser la route Boily-Fortin ouverte, était absent. Le procès-verbal de la séance ne mentionne pas qu'avant de procéder aux affaires, le conseil ait constaté que l'avis de convocation avait été dûment signifié à ce membre (art. 116 C.M.); on n'a pas clos l'assemblée ainsi que le requiert l'article 116 C.M. sous peine de nullité; au contraire, les autres conseillers ont procédé et ont adopté deux propositions, la première révoquant les procédures du 15 octobre, et la seconde autorisant le secrétaire à donner des avis publics convoquant les contribuables à une assemblée et déclarant qu'à cette assemblée le conseil procédera, après examen des requêtes, à la passation d'un règlement ordonnant la

fermeture des routes Boily-Fortin. L'avis public fut donné pour le 5 novembre 1917; et ce jour-là le conseil a adopté unanimement (Gilbert étant présent) un règlement ordonnant la fermeture de ces routes.

Plus tard, le 24 novembre, le conseil adopta une autre résolution autorisant le maire à engager des hommes

> pour enlever la broche des routes entre 21 et 22, rang deux, et entre 26 et 27, rangs trois et quatre; les hommes nommés pour cet ouvrage devront, avec la permission des propriétaires, fermer les routes à chaque bout avec une clôture.

Les personnes envoyées pour s'entendre avec les propriétaires voisins enlevèrent les clôtures sans leur consentement.

Comme on le voit, il y a eu de la part du conseil, beaucoup d'hésitation et de contradiction dans ses actes. En août, résolution pour fermer la route d'abord. Le 15 octobre, on décide de laisser le chemin ouvert. Le 27 octobre, on révoque la résolution du 15 octobre. Le 5 novembre, un règlement est adopté pour fermer la route; et enfin le 24 novembre, on engage des hommes pour enlever les clôtures, mais on leur recommande de ne fermer la route qu'avec *le consentement des propriétaires.*

La première question qui se présente est de savoir si cette assemblée du 27 octobre est légale.

Le nouveau code municipal s'est évidemment inspiré de l'idée qu'il faut être plus rigoureux qu'on ne l'a été dans le passé au sujet de ces assemblées spéciales et des avis qu'il faut donner. Nous n'avons qu'à lire à ce sujet le rapport des codificateurs en date du 20 novembre 1912 (p. VIII) sur les sessions du conseil.

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Ainsi, dans l'ancien code, l'avis qu'il fallait donner aux conseillers pour une session spéciale n'était pas nécessairement par écrit (arts. 126 et 215 ancien code municipal) mais l'article 115 C.M. exige impérieusement que cet avis spécial doit être maintenant par écrit. Le législateur a voulu évidemment écarter la jurisprudence de la cour d'appel dans la cause de *Hudon* v. *Roy dit Desjardins* (1), où on avait décidé que si une session du conseil est ajournée faute de quorum à un jour subséquent, l'avis requis sous l'article 139 de l'ancien code, alors en force, pouvait être donné verbalement. Aujourd'hui, au contraire, dans un cas semblable, l'article 118 du nouveau code exige que ce soit par écrit.

Un règlement pouvait être adopté sans donner d'avis de motion; maintenant l'article 359 du code municipal exige un avis de motion.

Comment l'avis pour les assemblées spéciales doit-il être donné aux conseillers?

Cet avis spécial doit être donné par écrit, comme je l'ai déjà dit (art. 115 C.M.). L'article 332 C.M. nous indique ce que cet avis doit contenir. Des copies dûment attestées doivent en être faites pour en remettre une à la personne à être notifiée (art. 332 C.M.). L'article 340 C.M. nous dit que la signification d'un tel avis spécial se fait en laissant une copie de l'avis à celui à qui il est adressé en personne, soit à son domicile, soit à sa place d'affaires. L'article 344 C.M. nous indique les heures auxquelles un avis spécial peut être signifié; et l'article 345 C.M. nous déclare que si les portes du domicile ou de la place d'affaires sont fermées alors la copie de l'avis doit être affichée sur l'une de ces portes.

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Quand la personne a fait la signification, elle doit en donner un certificat signé et attesté soit sous son serment d'office ou sous serment spécial, donner son nom, sa résidence, la description de la manière dont l'avis a été signifié et le jour, le lieu et l'heure de la signification (art. 355 C.M.). Ce certificat doit accompagner l'original de l'avis et être déposé dans les archives de la corporation (art. 334 C.M.).

Dans le cas actuel, nous trouvons dans les archives de la corporation le certificat suivant:

> Je, soussigné, J. L. Larouche, certifie sous serment d'office que j'ai signifié l'avis spécial par écrit aux conseillers sus-nommés en laissant une copie à chacun d'eux au bureau de poste entre et heure de l' -midi le 22ème jour du mois d'octobre 1917.
>
> (Signé) J. L. Larouche.

Il est bien évident que la signification de l'avis spécial n'a pas été faite suivant les dispositions de la loi, qui exigent de celui qui la fait de se transporter au domicile ou à la place d'affaires du conseiller, à moins qu'il ne lui remette cet avis ailleurs à lui-même en personne (arts. 340, 344 C.M.).

Pouvait-on faire la preuve testimoniale du fait que tout de même l'avis avait été délivré au conseiller Gilbert qui était absent à l'assemblée du 27 octobre?

Je dis que non. Il y a eu objection à cette preuve et cette objection aurait dû être maintenue. Le code municipal exigeant que ces certificats de signification d'avis soient par écrit, les tribunaux ne sauraient accepter d'autre preuve que celle résultant de l'écrit lui-même. L'article 1233 du code civil nous indique les cas où la preuve testimoniale peut être admise. Le fait qui nous occupe ne peut pas être considéré comme l'un de ces cas; et l'article 1233 C.C. ajoute:

> Dans tous les autres cas, la preuve doit se faire au moyen d'écrits ou par le serment de la partie adverse.

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Que devait faire le conseil à sa séance du 27 octobre? L'article 116 C.M. nous l'indique:

> Le conseil municipal, avant de procéder aux affaires à cette session doit constater et mentionner dans le procès-verbal de la séance, que l'avis de convocation a été signifié tel que requis par les dispositions du présent code aux membres du conseil qui ne sont pas présents à l'ouverture. S'il appert que l'avis de convocation n'a pas été signifié à tous les membres absents, la session doit être close à l'instant sous peine de nullité de toute procédure adoptée.

Dans la cause actuelle, le conseiller Gilbert était absent. Alors le conseil aurait dû, avant de procéder, insérer dans son procès-verbal si l'avis de convocation lui avait été signifié. Il ne l'a pas fait. Et ce pour une bonne raison, c'est que le certificat de signification qui était déposé aux archives de la corporation ne démontrait pas que l'avis lui eût été remis. Ce certificat établissait bien que l'avis avait été déposé au bureau de poste; mais rien n'établissait qu'il lui était parvenu. Alors la session aurait dû être close; et ne l'ayant pas été, les procédures qui y ont été faites sont frappées de nullité. Par conséquent, la convocation des intéressés qui a été décidée à cette assemblée est nulle, ainsi que l'avis de motion qui a été donné qu'un règlement serait adopté pour la fermeture du chemin en question à la prochaine séance du conseil. Mais il est évident que ces délais ne faisaient pas l'affaire des partisans de la fermeture; ils ont insisté pour procéder, croyant leurs chances meilleures maintenant qu'en attendant un peu plus tard.

On a invoqué l'article 14 du code municipal, qui dit que l'omission de formalités même impératives ne saurait constituer une objection sérieuse, à moins qu'une injustice réelle ne dût en résulter. Mais l'article 14 C.M. ajoute:

> à moins que les formalités omises ne soient de celles dont l'omission rend nuls, d'après les dispositions du présent code, les procédures ou autres actes municipaux qui doivent en être accompagnés.

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Or l'article 116 C.M. déclare formellement que

s'il appert que l'avis de convocation n'a pas été signifié à tous les membres absents, la session doit être close à l'instant, *sous peine de nullité* de toute procédure adoptée.

La défenderesse ne peut donc pas invoquer au soutien de ses irrégularités l'article 16 du code municipal. L'avis de motion de l'adoption d'un règlement qui a été donné à cette séance-là n'est donc pas légal; et alors elle s'est trouvée, à la séance du 5 novembre, à adopter un règlement pour la fermeture du chemin sans un avis préalable. L'article 359 C.M. déclare que tout règlement, sous peine de nullité, doit être précédé d'un avis de motion donné séance tenante et il ne peut être adopté qu'à une séance subséquente. L'avis de motion en question a donc été donné à une séance qui n'a pas été régulièrement tenue et il rend, par conséquent, nulle l'adoption du règlement fait à la séance subséquente.

La défenderesse a invoqué un jugement qui a été rendu par la cour d'appel dans une cause de *Hudon* v. *Roy dit Desjardins* (1), où l'on trouve le jugé suivant:

When a regular session of a municipal council is adjourned, for want of a quorum, to a subsequent day, the notice of the adjournment to the absent councillors, required under art. 139 M.C., may be given verbally, and, although service of such notice must be established at the resumed session, a mention in the minutes that this was done is not essential to the validity of the proceedings. Hence, a resolution passed at such a resumed session, although the minutes contain no reference to the notice given after adjournment to the absent councillors, if no substantial injustice is shown to result therefrom, will not, in view of art. 16 M.C., be declared null and void.

Cette cause a été jugée en 1909 par une majorité de quatre juges contre un. Le juge Cimon, qui a été dissident, était bien au courant de nos lois municipales, vu qu'il était juge dans un district rural et qu'il y avait exercé sa profession toute sa vie. Ce

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jugement de la cour d'appel renversait celui de la cour de revision qui était composée du juge Langelier, alors juge-en-chef suppléant, Sir Louis Jetté, qui est devenu plus tard juge-en-chef de la cour d'appel, et du juge Carroll, qui est aujourd'hui juge de la cour d'appel.

Comme on le voit, les opinions étaient sérieusement partagées dans cette cause de *Hudon* v. *Roy dit Desjardins* (1). De plus, cette cause n'a pas été jugée sur la validité d'une assemblée convoquée par avis spécial, mais sur la validité d'une assemblée ajournée, c'est-à-dire sous l'article 139 du code municipal qui était rédigé dans des termes différents de notre article 116 du code municipal actuel.

Ainsi l'avis spécial n'avait pas besoin d'être par écrit, mais pouvait être donné verbalement. Le certificat de signification de cet avis pouvait se faire alors verbalement devant le conseil et l'article 139 de l'ancien code n'exigeait pas que la session fût close à l'instant

> s'il appert que l'avis de convocation n'a pas été signifié à tous les membres absents

sous peine de nullité; mais on disait simplement que le défaut de signification rend nulle toute procédure adoptée à cette séance du conseil. Notre article 116 du code actuel est couché dans des termes plus précis et plus formels et, par conséquent, je crois que l'on peut difficilement invoquer cette décision de *Hudon* v. *Roy dit Desjardins* (1). D'après la nouvelle rédaction des articles sur la matière, les formalités doivent être accomplies d'une manière plus certaine; l'avis ne doit pas être simplement verbal mais doit être par écrit. Tout cela, il me semble, démontre que le jugement dans la cause de *Hudon* v. *Roy dit Desjardins* (1) ne peut pas être invoqué dans la cause actuelle.

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On a invoqué également la cause de *Mathieu* v. *Corporation de St François* (2), jugée en 1918 et où il aurait été décidé qu'une résolution d'un conseil municipal enjoignant au secrétaire-trésorier de donner avis public qu'à la session générale subséquente du conseil un règlement sera adopté pour une fin indiquée, équivaut à l'avis de motion préalable requis par l'article 359 du code municipal.

Il s'agissait dans cette cause d'un règlement qui avait été adopté non pas précisément sous l'autorité du code municipal mais sous l'Acte des Bonnes Routes, 3 Geo. V, c. 21. On avait adopté un règlement et on avait donné un avis de ce règlement à une assemblée préalable; mais la cour a décidé qu'un règlement n'était pas nécessaire et que l'on pouvait procéder simplement par résolution; et le regretté juge-en-chef, Sir Horace Archambault, après avoir exprimé l'opinion que j'ai citée plus haut dans le jugé, dit:

> D'ailleurs, la loi des bons chemins n'oblige pas le conseil de procéder par règlement. Il l'autorise à procéder par résolution, et il n'est pas nécessaire qu'une résolution soit précédée d'un avis de motion. Si le document dont il s'agit n'est pas valide comme règlement, il l'est certainement comme résolution.

Comme on le voit, il n'y a pas de décision formelle sur le point que l'avis qui aurait été donné à l'assemblée du 27 octobre pouvait valoir comme avis public exigé par l'article 359 du code municipal.

Maintenant pouvait-on fermer les routes Boily-Fortin?

Ces routes forment partie d'un chemin de colonisation connu sous le nom de chemin Archambault qui a été construit il y a plusieurs années par le gouvernement provincial, avant la fondation de la muni-

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cipalité défenderesse et des municipalités environnantes. Quand des municipalités sont établies et qu'il y a des chemins de colonisation, ces chemins tombent sous la juridiction et le contrôle de la municipalité et sont considérés comme des chemins locaux et non pas comme des chemins de comté. Un chemin local peut être sous le contrôle d'une municipalité, mais quand il s'agit de le fermer, il faut voir si ce chemin sert de sortie à une autre municipalité. Dans ce cas-là, quoique le chemin soit un chemin local, il ne peut pas être fermé à moins que ce ne soit avec le consentement du conseil de comté. (Art. 519 C.M.).

Les parties du chemin Archambault qui se trouvaient dans la municipalité de St-Henri de Taillon sont bien tombées sous le contrôle de cette municipalité, mais pouvait-elle en fermer une partie sans le consentement du conseil de comté? S'il s'agissait de chemins ordinaires, d'une route qui aurait été établie par une municipalité et qui ne toucherait pas directement à la municipalité voisine, je comprendrais que le conseil local pourrait fermer cette route sans référer au conseil de comté. Mais quand il s'agit d'un chemin de colonisation qui a été ouvert pour toute une région, ce chemin ne peut pas être détourné sans le consentement du conseil de comté.

Nous avons la preuve dans le cas actuel que ce chemin pouvait être utilisé par les contribuables de la municipalité voisine, St-Henri de Taillon Ouest, pour aller à un quai qui a été construit par le gouvernement fédéral sur le Lac St-Jean, à un endroit appelé Rivière-à-la-Pipe. 60-61 V. c. 2, 1897, p. 33. Et voici que par la fermeture de cette route, ces contribuables vont être obligés de s'allonger pour atteindre le quai qui a été construit pour l'accommodation de

tous les colons de la région. Le conseil de comté aurait dû, dans les circonstances, être saisi de la question pour savoir si on devait donner suite à cette fermeture ou non.

Je crois donc que la corporation intimée a eu tort de fermer ce chemin et d'enlever cette clôture avant d'avoir obtenu cette autorisation du conseil de comté.

Pour ces raisons, je suis d'avis que l'appel doit être maintenu avec dépens de cette cour et de la cour d'appel et que les jugements de la cour supérieure doivent être rétablis.

MIGNAULT J.—Ces trois causes soulèvent les mêmes questions et ont été plaidées ensemble. Il y avait une quatrième cause, *William Tremblay* v. *La Corporation de St-Henri de Taillon*, où on avait également appelé du jugement de la Cour du Banc du Roi siégeant en appel. Cette dernière cause différait des trois autres en ce que le demandeur (appelant devant nous) demandait l'annulation du règlement et des autres procédures de la corporation défenderesse (intimée devant nous) invoquées par cette dernière dans sa défense aux trois actions, celles de Joseph Boily, Amédée Fortin et Joseph Tremblay. Une question quant au droit d'appel ayant été soulevée dans cette quatrième cause, cette cour a ordonné comme suit:

> March 8. Motion to quash stands reserved until after hearing in the other three cases against the above corporation, Boily, Fortin and J. Tremblay. No further expense to be incurred meanwhile in this case.

L'audition a donc eu lieu dans les trois causes seulement.

Les actions des trois demandeurs appelants se plaignaient de l'enlèvement d'une clôture séparant leurs propriétés d'une route ouverte à la circulation du public, l'entretien de cette clôture étant pour moitié à la charge de la défenderesse intimée; et

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alléguant que leurs propriétés jouissaient d'une servitude consistant dans l'obligation de clôturer créée par la loi contre l'intimée, les appelants concluaient à ce qu'il fût enjoint à l'intimée de faire, entretenir et maintenir une clôture suffisante pour séparer leurs terrains de la dite route sur la moitié de son parcours à l'endroit où se trouvait la clôture enlevée.

L'intimée contesta ces actions alléguant que, par un règlement adopté le 5 novembre, 1917, la route que les appelants déclaraient ouverte au public avait été dûment fermée; que ce règlement avait été précédé des avis requis par la loi et avait été dûment promulgué et était en vigueur; que ce règlement avait été fait conformément à la loi et que l'intimée avait autorité pour fermer cette route; que la clôture appartenait à l'intimée et avait été enlevée dans les délais voulus par la loi.

La réponse des appelants allégua que le règlement du 5 novembre 1917 était radicalement nul, parce qu'il n'avait pas été précédé de l'avis de motion requis par la loi; que les avis publics étaient également nuls, parce qu'ils avaient été donnés sans autorisation régulière, la résolution ordonnant la publication de ces avis ayant été passée, le 27 octobre 1917, à une séance spéciale du conseil irrégulièrement convoquée et tenue de façon à entraîner la nullité de toutes procédures qui y ont été adoptées; que le 15 octobre, 1917, le conseil de l'intimée avait décidé que les dites routes resteraient ouvertes, et que c'était pour tromper les appelants et d'autres intéressés qu'une séance spéciale fut convoquée le 27 octobre, laquelle fut tenue irrégulièrement et illégalement comme susdit, et les avis intentionnellement donnés de façon à ce que ceux qui étaient favorables au maintien des dites routes n'en eussent pas connaissance.

Il est visible, par l'analyse que je viens de faire de la procédure, que le principal moyen soulevé devant cette cour et les cours de première instance et d'appel, savoir que les routes en question communiquaient d'une municipalité à l'autre et ne pouvaient être fermées par le conseil de l'intimée sans l'approbation du conseil de comté, n'a pas été mentionné dans la réponse des demandeurs. Il est possible que la quatrième action (*William Tremblay* v. *La Corporation de St-Henri de Taillon*), soulevait cette question, point sur lequel je ne me prononce pas, mais je cherche en vain une allégation de ce moyen de nullité dans la réponse des appelants. Cependant, comme cette question a été discutée devant nous et devant les autres cours, je vais en traiter tout comme si elle avait été régulièrement soulevée. J'ajoute que si je croyais ce grief fondé, j'ordonnerais tout amendement nécessaire pour lui donner effet.

Premier grief. Le règlement en question ferme une route qui sert de communication d'une municipalité à une autre et, par conséquent, il ne pouvait entrer en vigueur qu'après avoir été approuvé par le conseil de comté, ce qui n'a pas été fait dans l'espèce.

Il s'agit de l'article 519 de code municipal, deuxième alinéa, ajouté en 1872 à l'ancien code municipal par la loi 36 Vict., ch. 21, sect. 21, qui dit:

> Néanmoins, tout règlement ou procès-verbal fait pour fermer un chemin qui sert de sortie, descente ou montée à une municipalité locale voisine, ou pour détourner ce chemin à l'endroit de telle sortie, descente ou montée, n'a de vigueur qu'après avoir été approuvé par une résolution de la corporation de comté, adoptée par la majorité des membres qui composent son conseil.

J'interprète cet article comme s'appliquant, non pas à un chemin par lequel on peut parvenir à un autre chemin qui sert de sortie, descente ou montée à une municipalité locale voisine, mais comme empê-

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chant, sans l'approbation du conseil de comté, la fermeture du chemin même qui sert de sortie, descente ou montée à une municipalité locale voisine, ou le détournement du chemin à l'endroit de telle sortie, descente ou montée. Je me sers du langage même de l'article 519 C.M., langage assez défectueux au point de vue grammatical, mais la pensée du législateur est rendue très claire par le texte anglais de l'article, qui parle d'un règlement ou procès-verbal décrétant

> the closing of a road leading into or from any neighbouring local municipality, or for diverting such road at a point where it leads into or from such municipality.

Ce que la loi défend, à moins que l'approbation du conseil de comté n'ait été obtenue, c'est de priver les intéressés d'accès à une municipalité locale voisine par les chemins ou routes qui y conduisent, et cela me paraît démontré par les mots

> ou pour détourner ce chemin *à l'endroit de telle sortie, descente ou montée,*

de sorte que nous devons examiner si, dans l'espèce, les appelants sont privés de cet accès. Si le chemin qu'ils devront parcourir pour atteindre une municipalité locale voisine est rendu plus long, sans qu'ils soient privés de cet accès, l'article ne s'applique pas.

Les appelants se plaignent de la fermeture d'un chemin ou route conduisant à la municipalité locale voisine, savoir à Honfleur ou Péribonka. Or il suffit de lire le témoignage de l'appelant Boily (et les parties ont admis que les autres appelants diraient la même chose) pour se convaincre que les appelants, par la fermeture de deux bouts de route longeant leurs terrains, ne sont pas privés d'accès à cette municipalité, bien que le chemin qu'ils ont à parcourir soit plus long. J'en cite un court passage:

Q. Si vous voulez aller aujourd'hui à Honfleur, vous avez un chemin pour y aller?—R. Il y a un chemin.

Q. Plus long?—R. Plus long.

Q. Vous avez un chemin pour aller à la municipalité voisine, la fermeture de cette route-là ne vous a pas empêché d'avoir un chemin existant dans votre municipalité?—R. Cette route-là était construite quand je me suis bâti le long de la route.

Q. Cela vous fait plus long?—R. Oui, monsieur.

Q. Vous avez encore un chemin complet pour aller à Péribonka et l'autre bord? R. Oui, monsieur.

Q. Seulement que cela vous rallonge?—R. Cela nous rallonge.

Je suis donc d'opinion que ce premier grief est mal fondé. Je puis ajouter que l'intimée, avant de fermer ces bouts de route, avait obtenu l'autorisation du Département de la Colonisation, des Mines et des Pêcheries de Québec, autorisation qui était nécessaire car des deniers publics avaient été dépensés à la construction du chemin.

Deuxième grief. Il s'agit de l'assemblée du conseil de l'intimée, le 27 octobre, 1917, à laquelle on a ordonné qu'avis public fût donné du règlement adopté par le conseil le 5 novembre. L'honorable juge de première instance est arrivé à la conclusion qu'aucun avis de motion de ce règlement au désir de l'article 359 C.M. n'avait été donné; il ne discute pas autrement la question de la légalité de cette assemblée. Or la cour d'appel était d'opinion que l'avis public ordonné à cette réunion pouvait valoir comme avis de motion, suivant en cela sa décision antérieure dans la cause de *Mathieu* v. *Corporation de la paroisse de St-François* (1). En cela, si la session du 27 octobre a été régulièrement convoquée et tenue, je partage l'opinion de la cour d'appel.

Cependant voici la principale difficulté quant à l'avis de motion qu'on prétend avoir été donné. L'un des conseillers, le nommé Adélard Gilbert, n'assistait

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pas à la réunion du 27 octobre, qui était une session spéciale du conseil convoquée par le maire. Les avis aux conseillers de cette session avaient été donnés par le secrétaire-trésorier par des lettres non recommandées, et il y a de lui au dossier un certificat, daté du 23 octobre, de l'envoi de l'avis par ces lettres. L'honorable juge Pelletier dit que ce certificat était sur la table du conseil à son assemblée du 27 octobre. Je n'ai pu vérifier cette affirmation au dossier; j'y trouve, au contraire, dans la déposition de secrétaire-trésorier, Larouche, l'admission que ce certificat n'a pas été produit au conseil au début de la séance, et il n'est pas mentionné au procès-verbal.

La cour d'appel s'est basée sur sa décision dans la cause de *Hudon* v. *Roy dit Desjardins* (1), pour écarter l'objection. On y avait jugé, sous l'empire de l'ancien code municipal, que lorsqu'une session régulière d'un conseil municipal avait été ajournée à une date subséquente, faute de quorum, l'avis pouvait être donné verbalement aux conseillers absents, et que bien que la signification d'un tel avis doive être prouvée à la session ajournée, la mention de cette formalité dans le procès-verbal n'est pas requise à peine de nullité des procédures. Dans cette cause-là, la cour d'appel infirma le jugement de la cour de revision, et le principal argument qui l'a déterminée était basé sur l'article 16 de l'ancien code, maintenant l'article 14 du nouveau.

Dans la présente cause, la cour d'appel était unanime, mais l'honorable juge Martin aurait été d'opinion que l'assemblée du 27 octobre était illégale, s'il ne se fût cru lié par *Hudon* v. *Roy dit Desjardins* (1). Il ne croyait pas non plus devoir mettre de côté une jurisprudence établie depuis dix ans.

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C'est cette dernière raison seule qui me fait hésiter en cette cause. Il est vrai que le nouveau code a amendé l'ancien en exigeant, dans l'article 115 C.M., que l'avis soit donné par écrit, mais sans la décision de *Hudon* v. *Roy dit Desjardins* (1), on aurait pu considérer l'avis requis par les anciens articles 126 et 127 C.M. comme devant être donnés par écrit, car l'article 127 C.M. parlait de sa signification. Mais l'effet de l'amendement est de rendre la loi encore plus rigoureuse, et nul doute maintenant que, malgré *Hudon* v. *Roy dit Desjardins* (1), l'avis d'une session spéciale du conseil doit être donné par écrit. Si l'affirmation du secrétaire-trésorier qu'il n'a pas produit au conseil au début de la séance son procès-verbal de signification est exacte, et elle n'est ni contredite ni expliquée, la légalité de la session ne peut se défendre même en vertu de *Hudon* v. *Roy dit Desjardins* (1), car on y a admis la nécessité de prouver cette signification à l'assemblée du conseil.

Je partage entièrement l'avis du juge Martin quand il dit:

> It appears to me that the three paragraphs of Article 116 M.C. must be read together and together form one article. Notice of a special meeting must be in writing (M.C. 115) and served by leaving a copy of the notice with the person to whom it is addressed in person or at his domicile or place of business (M.C. 340), and it was the duty of the council before proceeding to the business of the special meeting, to set forth in the minutes of the sitting that notice of meeting had been given to any member not present, in conformity with the requirements of the Municipal Code, and the concluding paragraph of Article 116 to the effect that, if it appears that notice of meeting has not been served on all the absent members, the sitting must be immediately closed under penalty of the nullity of all its proceedings, in my opinion refers to the preceding paragraph indicating the manner in which the evidence of the regularity and sufficiency of the notice is to be set down and established.

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A moins de prendre sur nous de mettre la loi entièrement de côté, nous devons donner effet à la disposition impérative de l'article 116 C.M., lequel comporte nullité, que

s'il appert que l'avis de convocation n'a pas été signifié à tous les membres absents, la session doit être close à l'instant, sous peine de nullité de toute procédure y adoptée.

La cour d'appel dit que cette disposition ne s'applique pas à moins qu'il n'apparaisse que les membres absents n'ont pas reçu signification de l'avis. Ainsi si rien n'appert du tout il résulterait que le conseil peut continuer sa séance. Pour ma part, je n'interprète pas ainsi l'article 116 C.M.; et je crois qu'il faut lire le troisième alinéa de cet article avec le deuxième, car ils ne forment réellement qu'une seule disposition. Le deuxième alinéa exige la mention dans le procès-verbal que l'avis de convocation a été signifié aux membres du conseil qui ne sont pas présents à l'ouverture de la séance, et s'il appert (évidemment par cette mention au procès-verbal) que l'avis de convocation n'a pas été signifié à tous les membres absents, la session doit être close à l'instant. N'est-il pas évident que le législateur exige la preuve que l'avis de convocation a été signifié aux conseillers absents? Et afin que ma pensée ne reste pas douteuse, je dirai que dans mon opinion le conseil doit constater, avant de procéder, si l'avis a été signifié aux conseillers absents, et si la signification de cet avis n'appert pas, il doit immédiatement clôre la session.

Il est vrai que Gilbert dit qu'il a bien reçu l'avis plus de deux jours avant la session. Mais on s'est objecté à cette preuve, et d'ailleurs le conseil n'avait rien devant lui pour démontrer que l'avis avait été

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reçu par Gilbert, et il aurait dû suspendre sa séance tant que cette preuve n'aurait pas été faite, et la clôre en l'absence de preuve suffisante que l'avis avait été signifié au conseiller absent.

Si donc on regarda comme un avis de motion la résolution adoptée le 27 octobre, cet avis n'a pas été donné "séance tenante," c'est-à-dire pendant une séance légalement tenue du conseil, au désir de l'article 359 C.M., qui est de droit nouveau.

Convient-il maintenant de mettre de côté une jurisprudence établie depuis plus de dix ans conformément à la décision de la cour d'appel dans *Hudon* v. *Roy dit Desjardins*? (1). J'ai dit qu'on ne peut même se réfugier derrière cette décision dans l'espèce, car il appert, par la déposition du secrétaire-trésorier, qu'il n'a pas mis devant le conseil le certificat produit par lui et qui d'ailleurs n'aurait pas prouvé que Gilbert avait reçu l'avis envoyé par la poste. Mais le nouveau code écarte ce précédent qui se contentait d'un avis verbal, et, dans ces circonstances, et vu qu'il s'agit d'interpréter un nouveau code municipal entré en vigueur depuis peu, je crois qu'il vaut mieux que nous exprimions notre opinion sur le mérite de la question. Mon opinion donc est qu'on doit se conformer aux exigences des articles 115 et 116 C.M., et, par conséquent, je suis d'avis que la session du 27 octobre a été irrégulièrement convoquée et tenue.

Ceci amène l'application de l'article 359 C.M., et il faut tenir que l'avis de motion du règlement du 5 novembre, exigé à peine de nullité par l'article 359 C.M., n'a pas été donné, et le règlement lui-même est nul.

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L'appel dans les trois causes devrait être maintenu avec les frais d'un seul appel dans cette cour et dans la cour d'appel et le jugement de la cour supérieure rétabli. J'accorderais cependant aux appelants tous leurs déboursés dans les trois causes.

Appeal allowed with costs.

Solicitors for the appellants: *Bergeron & Brassard.*

Solicitors for the respondent: *Lapointe, Langlois & Sylvestre.*

JOSEPH LEGAULT (PLAINTIFF)....APPELLANT;

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ALFRED DESÈVE (DEFENDANT)....RESPONDENT.

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

Mortgage—Transfer of property—"A la charge de l'hypothèque"—Personal obligation—Articles 1019, 1508, 2016, 2056, 2065, C.C.

The mere taking of a transfer of property subject to a hypothec,—"à la charge de l'hypothèque"—does not, under the civil law of Quebec, *per se*, entail any personal obligation on the part of the transferee to pay the debt for which the hypothec is security.

Judgment of the Court of King's Bench (Q.R. 29 K.B. 375) affirmed.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec (1), reversing the judgment of the Superior Court and dismissing the appellant'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.

Louis Boyer K.C. and *Alphonse Décary K.C.* for the appellant.

Aimé Geoffrion K.C. and *Oscar Dorais K.C.* for the respondent.

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

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IDINGTON J.—I agree with the judgment of my brother Mignault and hence that this appeal should be dismissed with costs.

DUFF J.—I concur with Mignault J.

ANGLIN J.—I concur in the judgment dismissing this appeal. The mere taking of a transfer of property subject to a hypothec does not under the civil law of Quebec *per se* entail any personal obligation on the part of the transferee to pay the debt for which the hypothec is security. There is no implication that the transferee undertakes to indemnify the vendor against his personal liability such as the English equity system imports in the case of a purchaser subject to a mortgage. In Quebec the assumption of personal liability by the transferee must be clear and unequivocal in order that it may be judicially enforced. Ordinarily the words "à la charge de l'hypothèque" do not import it, but are regarded as merely intended to preclude any claim in warranty by the transferee against the transferor should the holder of the hypothec subsequently enforce it against the property. I do not find in the fact that these words are unnecessarily repeated in the provision for taking over the property in satisfaction in the event of default contained in the instrument executed to evidence the loan made by Desève to Lecavalier and Chassé (which had already referred to the existing hypothec of $15,000 as a charge on the land) or in their repetition in the instrument executed by the curator of Lecavalier's estate in compliance with Desève's demand for a transfer "à titre de dation en paiement" sufficiently clear and explicit evidence of an intention that Desève should on taking over the

property in satisfaction of his claim assume personal liability for the debt as security for which the $15,000 hypothec was held. The phrase "à la charge de l'hypothèque" is at best equivocal. My brother Mignault, whose opinion I have had the advantage of reading, has discussed at some length the authorities bearing on its purview and effect. For the reasons I have indicated I agree in his conclusion that assumption of personal liability by the respondent has not been satisfactorily made out and that the appeal therefore fails.

BRODEUR J.—Je suis d'opinion de renvoyer l'appel pour les raisons données par mon collègue, M. le juge Mignault.

Les parties à la dation en paiement et au prêt originaire pouvaient certainement stipuler que l'acquéreur ne serait pas tenu personnellement au paiement de l'hypothèque antérieure. Les contrats disent bien que la propriété sera prise à la charge de l'hypothèque, c'est-à-dire, comme dit l'article 2016 du code civil, à la charge d'un droit réel qui l'affectait. Et alors l'acquéreur, dans ces conditions, pouvait être tenu de déguerpir si le créancier de la dette hypothécaire voulait procéder contre la propriété, mais le tiers détenteur ne pouvait être tenu de payer la dette que s'il s'y était personnellement obligé.

Dans le cas actuel, l'obligation de payer que l'on rencontre d'ordinaire dans les actes notariés (Marchand, Formulaire du notariat, vol. 2, p. 553; Lainey, Formulaire d'actes usuels, p. 552) ne s'y trouve pas. Le plus qu'on puisse dire, c'est qu'il y a doute; et alors le contrat doit s'interpréter en faveur de celui qui a contracté l'obligation (art. 1019 C.C.).

L'appel doit être renvoyé avec dépens.

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MIGNAULT J.—Cette cause—où la seule question à décider est la portée qu'il convient de donner à une clause par laquelle l'intimée se faisait transporter, en dation de paiement, un immeuble, qui lui était hypothéqué pour une somme de $6,200.00, à la charge d'une première hypothèque de $15,000.00 en faveur de l'appelant—a donné lieu à des débats qui ont duré une journée entière. Dans cette discussion sur l'interprétation de ces cinq mots "à la charge de l'hypothèque", les avocats des parties ont fait preuve de beaucoup de talent et nous ont cité plusieurs vieux auteurs, en commençant par Loiseau, Ferrière et Duplessis et en finissant par Pothier. De plus, alors que dans la cause que nous avons à juger quatre juges se sont prononcés en faveur de l'intimé et deux juges contre lui, on nous a produit trois jugements rendus respectivement par les honorables juges Demers, Duclos et Martineau, où il s'agissait de la même clause ou d'une clause identique, et chacun de ces jugements est favorable aux prétentions émises par l'appelant. L'intimé est partie dans les causes décidées par les juges Duclos et Martineau et on nous informe qu'il a appelé des jugements rendus contre lui. Des montants considérables sont en jeu et notre décision règlera le sort non-seulement de la présente cause, mais aussi des deux autres causes que je viens de mentionner. Pour cette raison, cette question d'interprétation a une importance capitale pour les parties et je n'ai voulu la résoudre qu'après l'avoir étudiée à fond.

L'exposé des faits essentiels peut se faire brièvement. Par acte du 16 avril, 1914, passé devant Chauret, notaire, l'appelant avait prêté $15,000.00 à Lecavalier et Chassé sur première hyopthèque portant sur l'immeuble connu et désigné comme partie de la subdivision 3 de la subdivision 19 du lot 12 du cadastre

du village incorporé de la Côte St-Louis, maintenant partie de la cité de Montréal.

Le 4 mai 1914, devant Rivest, notaire, l'intimé prêta $6,200.00 à Lecavalier et Chassé, avec deuxième hypothèque sur le même immeuble. L'acte stipulait que pour plus de garantie, et afin d'éviter les frais et délais d'une vente par le shérif, au cas où les emprunteurs feraient défaut de rembourser la somme prêtée, ou de payer les intérêts sur cette somme ou sur la première hypothèque, ou les taxes ou primes d'assurances, l'intimé aurait droit de garder la propriété hypothéquée et en deviendrait propriétaire absolu à titre de dation en paiement du montant à lui dû en capital, intérêts et accessoires, à la charge de l'hypothèque de $15,000.00 ci-après mentionnée seulement (l'hypothèque de l'appelant).

L'intimé, qui avait stipulé toutes les garanties possibles pour protéger sa créance, ne s'est probablement pas douté que cette clause de dation en paiement, exigée comme garantie additionnelle, renfermait le germe d'un gros procès, même de plusieurs procès, comme je viens de le dire. Toujours est-il que Chassé ayant transporté ses droits à Lecavalier, et ce dernier ayant fait cession de ses biens à la demande de ses créanciers, l'intimé a exigé la passation en sa faveur d'un acte de dation en paiement.

Cet acte fut reçu devant Rivest, notaire, le 28 mai 1915, et le curateur de Lecavalier, St. Amour, céda à l'intimé, avec l'autorisation judiciaire, et à titre de dation en paiement, l'immeuble en question avec un autre immeuble sur lequel l'intimé avait également une seconde hypothèque. Il y fut déclaré que la cession des deux immeubles était faite en considération de la somme de $1,800.00 et en paiement complet des créances hypothécaires de l'intimé, et de plus

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à la charge de l'hypothèque de $15,000.00 affectant l'emplacement en premier lieu décrit (l'hypothèque de l'appelant) et de l'hypothèque de $25,000.00 affectant l'emplacement en second lieu décrit

(une hypothèque en faveur d'une Dame Alice Daoust, épouse d'un nommé Viau).

Plus tard, le 3 décembre, 1915, devant Labrèche, notaire, l'intimé vendit l'immeuble présentement en question à Mr J. A. H. Hébert. Il fut déclaré à l'acte que la vente était faite pour le prix de $12,500.00 payés comptant par bonnes et valables considérations, et en plus

à la charge de l'hypothèque de $15,000.00 grevant le dit immeuble en faveur de M. Joseph Legault.

En 1917, l'appelant poursuivit Hébert personnellement en recouvrement de sa créance hypothécaire, et obtint, après contestation, un jugement contre lui de l'honorable juge Demers. Il fit alors émaner un bref d'exécution contre Hébert, et ce bref ayant été noté sur une exécution antérieure, l'immeuble hypothéqué fut vendu par le shérif. Le prix de vente n'ayant pas suffi pour payer la créance de l'appelant, celui-ci réclame maintenant la différence, soit $5,711.60 de l'intimé, alléguant que l'intimé s'est rendu personnellement responsable du paiement de sa créance.

En cour supérieure, l'honorable juge Greenshields donna raison à l'appelant, mais ce jugement fut infirmé par la cour d'appel, l'honorable juge Pelletier différant. De là le présent appel.

Il est élémentaire de dire que le débiteur hypothécaire demeurant propriétaire de l'immeuble hypothéqué peut en disposer librement. S'il le vend, la vente n'affecte pas les droits du créancier hypothécaire, qui peut poursuivre l'acquéreur pour le forcer à délaisser l'immeuble, si mieux il n'aime payer la

créance du demandeur. Cette vente non plus n'engage la responsabilité personnelle de l'acquéreur envers le créancier que si l'acquéreur s'est obligé à payer la créance hypothécaire. Il peut s'y obliger par une convention avec le vendeur sans l'intervention du créancier hypothécaire. Il y a alors délégation ou indication de paiement, délégation dite imparfaite parce qu'elle n'a pas été acceptée par le créancier. Cependant, tant que cette délégation n'a pas été révoquée par le vendeur, le créancier peut l'accepter, ce qui créera un lien de droit entre lui et l'acquéreur, et il est de jurisprudence que le seul fait de poursuivre l'acquéreur en vertu de la délégation de paiement en comporte acceptation suffisante.

Reste à savoir s'il y a eu délégation de paiement dans l'espèce, car si cette délégation existe, l'appelant l'a acceptée par son action contre l'intimé.

J'ai cité la clause dont il s'agit et qui se trouve d'abord dans l'acte de prêt du 4 mai 1914, et ensuite dans l'acte de dation en paiement du 28 mai 1915. L'intimé, dans le premier acte, a stipulé, en cas de défaut de paiement, le droit de garder l'immeuble, dont il deviendrait propriétaire à titre de dation en paiement, et ce à la charge de l'hypothèque de $15,000.00 de l'appelant seulement. Et, dans le deuxième acte, cet immeuble et un autre immeuble lui ont été transportés en considération de $1,800.00 et de plus à la charge de l'hypothèque de $15,000.00 de l'appelant et de l'hypothèque de $25,000.00 de Mme Viau.

Les honorables juges qui formaient la majorité de la cour d'appel ont décidé que par cette clause l'intimé a accepté la charge de l'hypothèque seulement et n'a pas contracté une obligation personnelle de payer la dette dont cette hypothèque était l'accessoire. Or

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nul doute que l'obligation personnelle de payer la dette est essentielle, car sans elle il n'y a pas de délégation de paiement que le créancier puisse accepter. Et j'ajouterai qu'il faut que l'existence de cette obligation personnelle ne soit pas douteuse, car on n'est jamais présumé vouloir s'obliger; en d'autres termes, celui qui prétend qu'on s'est obligé envers lui est obligé d'en apporter la preuve, et cette preuve doit pleinement satisfaire la conscience du juge. Il doit en être ainsi surtout dans une cause comme celle-ci où l'intimé est un parfait étranger pour l'appelant et où ce dernier, qui n'a pas exigé dans son contrat de prêt que les acquéreurs subséquents de la propriété s'obligeassent personnellement envers lui, veut profiter maintenant d'une clause insérée dans un deuxième contrat de prêt et dans un contrat de dation en paiement auxquels il n'était pas partie pour se faire donner un nouveau débiteur. Assurément l'appelant *certat de lucro captendo*, et dans le doute la clause qu'il invoque doit être interprétée contre lui.

Donc l'intimé a-t-il contracté une obligation personnelle de payer la créance hypothécaire de l'appelant en achetant à la charge de son hypothèque?

J'ai lu bien attentivement l'opinion de l'honorable juge Martineau dans la cause de *Pilon* v. *Desève*, un des jugements dont l'appelant nous a fourni copie. On y cite de nombreuses autorités tirées de l'ancien droit, savoir, l'article 102 de la Coutume de Paris, l'article 102 de la Coutume de Meaux, l'article 409 de la Coutume d'Orléans, Ferrière, Grande Coutume, tôme 2, p. 67, Bacquet, Droit de Justice, ch. 21, no. 195, Henrys, tôme 2, livre 3, question 51, DeLalande sur l'article 409 de la Coutume d'Orléans, pp. 243 et suiv., et Duplessis, p. 607.

Dans toutes ces autorités il est question de rentes foncières ou constituées assurées par hypothèque sur un immeuble, et on déniait le droit de déguerpissement à celui qui, en achetant un immeuble, s'était chargé de la rente, et à qui on demandait le paiement des arrérages échus de son temps. A cela je puis ajouter une autorité plus moderne, bien qu'elle ne soit pas de fraîche date, où on a décidé que lorsqu'il est exprimé dans un acte de vente qu'on vend un immeuble avec ses droits et charges, l'acquéreur est obligé personnellement à payer les rentes auxquelles cet immeuble est hypothéqué. Liège, 1er juin 1814, Dalloz, *Privilèges et Hypothèques*, n° 1855, 3°.

Toutes ces autorités n'envisagent que la question des rentes, et on conçoit que lorsqu'on vend un immeuble tenu au paiement de prestations périodiques, comme les arrérages de rentes, les taxes, les rentes seigneuriales, celui qui achète à la charge de la rente soit obligé personnellement à payer les arrérages échus de son temps. Mais l'appelant ne nous a cité aucune autorité où cette doctrine ait été appliquée à une créance due par le vendeur et garantie par une hypothèque sur l'immeuble vendu, et je n'en ai trouvé moi-même aucune, sauf le passage de Loiseau que je citerai tout à l'heure et qui n'est pas favorable aux prétentions de l'appelant.

D'après les règles générales qui régissent la matière, il n'est nullement nécessaire, pour protéger le créancier hypothécaire, de stipuler dans la vente de l'immeuble hypothéqué que cette vente est faite à la charge de l'hypothèque, car le créancier a le droit de suivre l'immeuble en quelques mains qu'il passe et de le faire vendre en justice et de se faire payer, suivant le rang de sa créance, sur les deniers provenant de cette vente (art. 2056 C.C.). Il s'ensuit que la vente se fait toujours à la charge de l'hypothèque.

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Quelle est alors l'utilité de la clause expresse que la vente est faite à la charge de l'hypothèque? Cette utilité ne peut exister que pour le vendeur, soit pour que l'acheteur paie la dette hypothécaire et libère ainsi le vendeur de tout recours personnel contre lui pour cette dette, soit pour empêcher que l'acheteur ne le recherche en garantie à raison de l'éviction qu'il souffre de la part du créancier hypothécaire.

Dans le premier cas, le vendeur impose une obligation que je pourrais appeler *active* à l'acheteur, il l'astreint à payer la dette hypothécaire, et il faut que la clause par laquelle cette obligation est stipulée ne soit pas équivoque et ne laisse aucun doute sur l'intention du vendeur d'imposer et de l'acheteur d'accepter cette obligation.

Dans le second cas l'obligation de l'acheteur est *passive*. Il devra subir l'hypothèque; et s'il est évincé à raison de cette hypothèque, il n'a pas de recours en garantie contre son vendeur.

Mais on dira: pour exclure la garantie il suffit de déclarer la charge dans l'acte de vente (art. 1508 C.C.). Or dans l'acte de prêt de Desève à Lecavalier et Chassé on a déclaré expressément l'existence de l'hypothèque de l'appelant et dans une autre clause on dit que la vente est faite à la charge de cette hypothèque. Le but de cette dernière clause n'a donc pu être d'empêcher le recours en garantie, car la déclaration ou dénonciation de l'hypothèque suffisait à cette fin. La seule utilité de la clause par conséquent est d'imposer à Desève l'obligation de payer l'hypothèque de l'appelant à l'acquit de Lecavalier et Chassé.

Cet argument aurait beaucoup de force si les actes notariés n'étaient d'ordinaire remplis de clauses inutiles et de répétitions, et l'acte en question n'est pas exempt de ce reproche, comme la clause de rem-

boursement en bonnes espèces de monnaies ayant cours le fait voir. D'ailleurs la clause en question est équivoque et peut très bien signifier que l'intimé prendra l'immeuble avec la charge de la première hypothèque qui le grève, sans qu'il puisse demander à Lecavalier et Chassé de l'en indemniser. De plus, on dit dans l'acte: à la charge de l'hypothèque de $15,000.00 ci-après mentionnée, et plus loin on mentionne cette hypothèque, de sorte que les deux clauses se complètent et ne font réellement qu'une seule stipulation. On aurait pu éviter toute équivoque en disant: à la charge *de payer* l'hypothèque de $15,000.00 ci-après mentionnée, et alors il aurait été certain que Lecavalier et Chassé voulaient faire une délégation de paiement, et non pas seulement se protéger contre un recours éventuel en garantie de la part de Desève. C'est une clause de ce genre que vise Loiseau, dans son traité du Déguerpissement, (édition de 1701), livre III, ch. VIII, p. 73, où il dit:

> Aussi la discussion n'a lieu en faveur du tiers détenteur, qui a acquis l'héritage à la charge expresse de payer la rente ou la dette à une fois payer; car celui-là est tenu personnellement envers le créancier, et même sans cession d'actions du vendeur, comme nous le pratiquons en France, ainsi qu'il sera traité au livre suivant: aussi ne serait-il pas raisonnable qu'il pût demander que celui qui a recours contre lui fût discuté auparavant lui. Autre chose serait en celui qui lors de l'achat aurait bien eu connaissance de la rente, mais ne serait nullement chargé de la payer; et même de celui qui aurait acquis l'héritage à la charge, non de la rente, mais seulement de l'hypothèque pour raison de la rente; car celui-là n'en est point tenu personnellement, ni envers le créancier, ni envers le débiteur, pour l'en acquitter, mais ce n'est qu'un avertissement et certioration de l'hypothèque qui était sur l'héritage pour s'exempter du stellionat; de manière qu'avant que s'adresser à lui, il faut discuter le débiteur qui lui a vendu l'héritage.

Les honorables juges de la cour d'appel interprètent le mot "hypothèque" comme signifiant le droit accessoire que constitue l'hypothèque, ce qui la distingue de la créance dont elle n'est que la garantie. Cet

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argument aurait une plus grande force à mes yeux si, dans le contrat de prêt, les parties n'avaient pas employé le mot "hypothèque" pour désigner la créance hypothécaire. Ainsi l'acte impose aux emprunteurs l'obligation de produire au prêteur les reçus démontrant le paiement des versements de capital et intérêts "sur les hypothèques ci-après mentionnées," et s'ils font défaut de payer à échéance les versements "sur les hypothèques antérieures affectant la dite propriété," et si le prêteur paie lui-même "les intérêts sur les hypothèques antérieures," il peut en exiger le remboursement immédiat avec intérêt de dix pour cent. Et il y a d'autres expressions du même genre qui affaiblissent l'argument qui a prévalu devant la cour d'appel. D'ailleurs je ne crois pas cet argument essentiel, et même si la clause en question veut dire que l'intimé prend l'immeuble à la charge de la créance hypothécaire de l'appelant, il ne s'ensuit pas qu'il soit obligé à payer cette créance. Il a consenti à subir l'éviction qui en résulterait, voilà tout, et il me répugnerait de donner à une clause aussi équivoque une portée qui dépasse, j'en suis convaincu, toutes les prévisions des parties.

De part et d'autre on invoque l'article 2065 du code civil qui dit:

> Le tiers détenteur assigné sur action hypothécaire et qui n'est ni chargé de l'hypothèque, ni tenu personnellement au paiement de la dette, peut opposer, s'il y a lieu, outre les moyens qui peuvent éteindre l'hypothèque, les exceptions énoncées dans les cinq paragraphes qui suivent.

Mais ce texte est sans portée sur la responsabilité du tiers détenteur qui s'est chargé de l'hypothèque ou qui est tenu personnellement au paiement de la dette. Il envisage le cas de l'assignation du tiers détenteur sur action hypothécaire, partant sur une action qui

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lui donne la faculté de délaisser pour ne pas payer, et tout ce que l'article refuse à ce tiers détenteur ce sont les cinq exceptions mentionnées par le code, ainsi que la défense basée sur des moyens qui peuvent éteindre l'hypothèque. Il n'en sera pas moins condamné hypothécairement seulement, suivant les conclusions de l'action prise contre lui. La question de savoir s'il aurait pu être poursuivi personnellement reste ouverte, et pour admettre l'affirmative il faudrait trouver dans l'acte d'acquisition une obligation personnelle de l'acquéreur de payer la dette hypothécaire, ce que je ne puis trouver dans l'espèce.

Je suis donc d'opinion de renvoyer l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Décary & Décary.*

Solicitors for the respondent: *Dorais & Dorais.*

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*May 27.
*June 21.

THE MARCONI WIRELESS TELEGRAPH COMPANY OF CANADA (PLAINTIFF)......................APPELLANT;

AND

THE CANADIAN CAR AND FOUNDRY COMPANY (DEFENDANTS)..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent—Installation of invention—Foreign vessel—Infringement—"Patent Act," R.S.C. (1906), *c.* 69, *ss.* 30 *and* 53.

The respondent, having a contract from the French Republic to construct twelve vessels at Fort William for use during the late war, agreed, by a supplementary contract, when the vessels were 95% completed, to install on each of the ships a wireless apparatus which the respondent claims to be an infringement of its patent. These apparatus were bought by the French Republic in New York and shipped to itself at Fort William. The respondent did nothing else than allow its men, under the direction of a naval officer of the French Republic, to install these apparatus on the vessels.

Held, Anglin J. dissenting, that the respondent did not "construct or put in practice" the invention of the appellant within the meaning of section 30 of the "Patent Act,"

Per Mignault J.—The terms of section 53 of the "Patent Act," cover not only the case of a foreign ship visiting a Canadian port, but also the case of a foreign ship built in Canada. Anglin J. *contra*.

Judgment of the Exchequer Court (19 Ex. C. R. 311) affirmed, Anglin J. dissenting, and Duff J. taking no part in the judgment owing to absence.

APPEAL from the judgment of the Exchequer Court of Canada (1), dismissing an action for damages by infringement of the plaintiff's patent.

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

(1) 19 Ex. C.R. 311.

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.

Eug. Lafleur K.C. and *Colville Sinclair* for the appellant.

Arnold Wainwright K.C. for the respondent.

IDINGTON J.—The appellant claims that because respondent having a contract from the French Republic during the late war to construct a dozen vessels at Fort William for use in that war, by a supplementary contract thereto, agreed to provide in each of said structures a space so framed and fitted as to receive a device or machine serviceable for wireless telegraphy, and permitted, and possibly assisted in removing them from the warehouse in which each of such devices or machinery was deposited, to each of the said vessels and placing it therein, there was such a breach of the "Patent Act" under and by virtue of which the assignors of the appellant had obtained a patent for such device that appellant is entitled to recover damages herein.

The "Patent Act," by section 30, provides as follows:—

30. Every person who, without the consent in writing of the patentee makes, constructs or puts in practice any invention for which a patent has been obtained under this Act or any previous Act, or who procures such invention from any person not authorized by the patentee or his legal representatives to make or use it, and who uses it, shall be liable to the patentee or his representatives in an action for damages for so doing, and the judgment shall be enforced, and the damages and costs that are adjudged shall be recoverable, in like manner as in other cases in the court in which the action is brought.

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The respondent according to the evidence adduced herein certainly did not "make or construct" the devices or machines in question herein for they had been bought in New York, already made, and shipped by the French Republic to Fort William and all the respondent had to do with them was suffering its men under the direction of an officer of the French Republic to place them as he directed in the compartment built in each vessel, designed to receive some unspecified sort of wireless device.

The vessels were each so far finished that only five per cent. of the work to be done, under the original contract, remained to be executed when this placing of each of the said devices or machines took place.

It is argued that inasmuch as the title to the property in and of the vessels remained in the respondent, therefore the title in and to each of these devices in question supplied by the French Republic became vested in the respondent.

I cannot accept such a proposition as tenable under all the facts and circumstances in evidence.

A perusal of the entire evidence here leaves me rather unenlightened as to the exact nature of the device or machine, but I infer that it was something portable and a piece of property belonging to the French Republic independently of the property in the vessel.

The respondent's relation to the article in question which I have designated a "device or machine" was analogous to that of the custom's agent in question in the case of *Nobel's Explosives Co.* v. *Jones. Scott & Co.* (1), whom the Court of Appeal refused to hold liable for damages.

(1) 17 Ch. D. 721.

I am, therefore, not able to hold that the respondent in any way "put in practice" the invention in question.

It is not necessary, therefore, for me to pass any opinion upon the effect of section 53 of the "Patent Act."

As I suspected during the argument the cases cited in support of appellant's contentions rest for the most part upon the right to an injunction which it is frankly admitted could not now be granted.

None of those cases cited maintain any such pretentions as set up herein.

They might support a claim to an injunction had that been applied for during the course of construction.

But this case is reduced, notwithstanding what is set up in the affidavit upon which leave to appeal was granted herein, to a bare right of claim for damages arising from an alleged tort.

And to found that I find no evidence and hence I conclude this appeal should be dismissed with costs.

DUFF J. took no part in the judgment owing to absence.

ANGLIN J. (dissenting).—The novelty and utility of the plaintiff's patent, No. 74799, was *prima facie* established, if not by its production, (*Electric Fire Proofing Co.* v. *Electric Fire Proofing Co. of Canada* (1); Fisher & Smart on Patents, p. 215; Fletcher Moulton on Letters Patent, p. 188, note (c), by the evidence of the witnesses Cann and Morse. The record contains nothing that rebuts the *primâ facie* case thus made in this respect.

(1) Q.R. 31 S.C. 34.

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Infringement is, I think, sufficiently established, as to the apparatus installed on the SS. *Navarrine* by the uncontradicted testimony of the witness Cann. By the 4th paragraph of its statement of defence the defendant admitted having installed wireless apparatus on 12 small war vessels being constructed by it for the French navy at Fort William, Ontario. The evidence sufficiently shews that the "Navarrine" was one of these vessels and there is no suggestion anywhere in the record that the apparatus installed on her differed in any respect from that placed on the other eleven ships. Indeed, Mr. Canfield, the defendant's superintendent, expressly stated that all the ships had the same installation although he admitted on cross-examination that he had not made personal investigation to ascertain that fact. He added that the vessels were all delivered by the defendant at Fort William. Mr. Atwood, assistant to the president of the defendant company, never heard of any difference in the apparatus installed on the several vessels and Mr. Lloyd McCoy, the General Master Mechanic who looked after the installation for the defendant, called as a witness on its behalf, is not asked whether there was any such difference. The apparatus was all obtained by the French Government from Emil J. Simon at New York and shipped to its representative at Fort William. I think it *primâ facie* appears therefore that the apparatus on the twelve vessels was identical.

The only substantial defences are (a) that, if there were such user by the defendant of the apparatus purchased from Simon as would otherwise be an infringement of the plaintiffs' patent, it was upon foreign vessels and therefore fell within the protection of s. 53 of the "Patent Act," R.S.C., c. 69;

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(b) that there was in fact no such use made of the apparatus by the defendant as would constitute a violation of the exclusive right of the plaintiffs under s. 21 of the "Patent Act;"

(c) that the plaintiffs are at most entitled to nominal damages, any infringement by the defendant having been innocent.

(a) Sec. 53 of the "Patent Act" was meant to cover the case of a foreign ship visiting a Canadian port and having on board some article the use of which in Canada would amount to an infringement of a Canadian patent, such as was the subject of litigation in *Caldwell* v. *Vanvlissengen* (1). The section was not meant to, and does not, cover the installation in Canada on a visiting foreign ship, and *a fortiori* not on a ship built here for foreign owners, of a device the use of which is otherwise in violation of the exclusive right conferred by s. 21. The case of *Vavasseur* v. *Krupp* (2), cited by the learned Assistant Judge of the Exchequer Court is clearly distinguishable. The French Republic is not a party to this action and no relief is sought against it nor is interference with its property asked. Moreover, under the terms of the agreement between the defendant company and the French Government the property in the vessels had not passed to the latter but was still vested in the former when it did the work of installing the Simon apparatus. They were therefore not foreign ships at that time.

(b) There was, in my opinion, user by the defendant of the infringing apparatus in violation of the plaintiffs' rights under s. 21. The installation was, and was intended as, a step towards the effective use of it and, in the absence of any evidence warranting such an

(1) 9 Hare 415. (2) 9 Ch. D. 351.

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inference, it cannot be assumed that there was to be no user of the wireless equipment until after the vessels should have left Canadian territorial waters. If such an intention would, if proven, have afforded a defence, the burden of establishing it satisfactorily was on the defendant. The French Government could not authorize the use in Canada of such apparatus. While it is not itself subject to answer in the courts of Canada for its acts or those of its agents, its Canadian contractors enjoy no such immunity. They are properly sued (*Denley* v. *Blore* (1), cited in Frost on Patents, vol. 1, p. 395 and Edmonds on Patents, p. 364) and are answerable for whatever damages were occasioned to the plaintiffs by the infringement of their rights which they aided, or helped to bring about. The principle of such cases as *British Motor Syndicate* v. *Taylor & Son* (2), and *Upmann* v. *Elkan* (3), applies.

(c) Innocence of intention is immaterial in considering the question of infringement; *Stead* v. *Anderson* (4). In the absence of a Canadian statutory provision corresponding to s. 33 of the "Patents and Designs Act," 1907, (Imp.) 7 Ed. VII., c. 29, the fact that the defendant was an innocent infringer does not entitle it to relief from liability for the damages sustained by the plaintiffs—(*Nobels Explosive Co.* v. *Jones, Scott & Co.* (5); *Boyd* v. *Tootal Co.* (6)—the measure of which is the loss actually suffered by them as a direct and natural consequence of its acts, *Boyd* v. *Tootal Co.* (6). This is not the case of an innocent defendant submitting and offering restitution as in *Nunn* v. D'*Albuquerque* (7). The defendant here contests the plaintiffs' right. *Proctor* v. *Bayley* (8).

(1) 38 London Jour. 224.
(2) [1900] 1 Ch. 577.
(3) 7 Ch. App. 130, at p. 132.
(4) 16 L.J. C.P. 250.
(5) 8 App. Cas. 5, at pp. 11-12.
(6) 11 Cut. P.C. 175, at p. 181.
(7) 34 Beav. 595.
(8) 42 Ch. D., 390, at pp. 393-420.

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The appeal should be allowed and judgment entered declaring that there has been an infringement by the defendant company of the plaintiff's patent No. 74799 and referring this action to the Registrar of the Exchequer Court to inquire into and ascertain the amount of the plaintiffs' damages. The plaintiffs are entitled to their costs both of the action and of the appeal.

BRODEUR J.—The mere fact that the respondent furnished certain labour and material in connection with the installation of wireless apparatus on mine sweepers which it was building for the French Government would not render it liable in damages. These wireless apparatus never were the property of the respondent, but belonged to the French authorities, had been bought by the latter in New York and had been shipped in to Canada at Fort William, where the ships were being built. There is no evidence that these apparatus were used or put in practice by the respondent before they delivered those ships. Terrell, 5th ed. p. 312. As far as the respondent company is concerned, there was no infringement of the patent claimed by the appellant.

The appeal should be dismissed with costs.

MIGNAULT J.—On one ground I think this appeal should be dismissed, that furnished by sec. 53 of the "Patent Act" (R.S.C., ch. 69) which says:—

No patent shall extend to prevent the use of any invention in any foreign ship or vessel, if such invention is not so used for the manufacture of any goods to be vended within or exported from Canada.

This section, which has been in our statutes since at least 1872 (35 Vict., ch. 26, sect. 47), was apparently suggested by a provision of the English Act, now

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section 48 of 7 Edward VII., ch. 29, but is in somewhat wider terms. It is contended that it was meant to cover the case, not of a foreign ship built in Canada, for a foreign ship can undoubtedly be built here, but of a foreign ship visiting a Canadian port and having on board an article patented in Canada, and the use of which here would amount to an infringement of a Canadian patent. This, no doubt, may be the usual case, but there is no such limitation in section 53, which, in general terms, permits the use of any invention in any foreign ship or vessel, the only restriction being that the invention is not to be used for the manufacture of any goods to be vended within or exported from Canada.

It is further argued that the English Act was amended after the decision of Vice Chancellor Turner in *Caldwell* v. *Vanvlissengen* (1), which was the case of a visiting ship. The appellant also refers us to the Hansard Debates when the English Act was amended, as shewing the intention of Parliament in adopting this amendment. I am quite clear that we cannot look at these debates (Beal, Cardinal rules of Legal Interpretation, 2nd. ed., p. 288). And even granting that this amendment was made in view of the decision in *Caldwell* v. *Vanvlissengen* (1), this should not, in my opinion, make us hesitate to give effect to the clear and unambiguous language of our statute.

The only "use" here relied on was the installation by the respondent of the wireless device. If the vessels in question were foreign vessels, no patent could extend to prevent the use of any invention therein, and when these vessels were on the way to the sea, it does not seem to me that the use by the foreign crew of this device could have been enjoined.

(1) 9 Hare 415.

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The learned trial judge found that these vessels were foreign vessels. It is true that the respondent had a lien thereon, which lien went so far as to stipulate that property in the ships would not pass to the French Government until the price was fully paid, and it had been paid when the *Navarine* was inspected in the Montreal harbour. I think however that this clause was inserted in the contract for the protection of the respondent, and of course could have been waived by it. The vessels were constructed for the French Government as a part of its navy. The wireless apparatus was purchased by that Government in New York and was consigned to it at Fort William. All the respondent did was to instal it, being paid merely the actual cost of installation. Under these circumstances, I do not think the respondent should be treated as an infringer of the appellant's patent.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant:

Greenshields, Greenshields, Langeudoc & Parkins.

Solicitors for the respondent:

Davidson, Wainwright, Alexander & Elder.

1920

*June 8, 9.
*June 21.

JOHN MAGDALL..................APPELLANT;

AND

HIS MAJESTY THE KING........RESPONDENT.

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

Criminal law—Seduction under promise of marriage—Previous illicit connection—Previous chastity of complainant—Findings of the jury—Arts. 210, 212, 1002, 1140 *Cr. C.*

The appellant was convicted for having, under promise of marriage, seduced and had illicit connection with an unmarried female of previously chaste character under the age of 21 years. The girl complainant, at the trial, admitted that she had had illicit connection with the appellant on one previous occasion under mutual promise of marriage.

Held, Duff and Brodeur JJ. dissenting, that the fact of the previous seduction did not preclude the jury from finding the complainant to be "of previously chaste character" within the meaning of article 212 Cr. C., the question whether or not the facts and surrounding circumstances could justify such a conclusion being one to be determined by the jury alone.

Judgment of the Appellate Division (15 Alta. L.R. 313; [1920] 2 W.W.R. 251) affirmed, Duff and Brodeur JJ. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), dismissing, on equal division of the court, the appeal by the appellant from the refusal of Simmons J., at the trial with a jury, to reserve a case for the opinion of the Appellate Division.

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

(1) 15 Alta. L.R. 313; [1920] 2 W.W.R. 251.

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

W. F. O'Connor K.C. for the appellant.

W. L. Scott for the respondent.

THE CHIEF JUSTICE.—This was an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta which, on an equal division of opinion, refused to quash a conviction against the appellant prisoner under section 212 of the Criminal Code for having, under promise of marriage, seduced and had illicit connection on or about the 27th day of March, 1919, with one Mary Kovack, an unmarried female under the age of 21 years.

Two questions only were raised and argued at bar: one, whether the evidence of Mary Kovack, the female in question, was corroborated or not; and the other, whether she was at the time of the alleged offence of previously chaste character.

After hearing Mr. O'Connor, counsel for the appellant, on the question of corroboration, we were unanimously of the opinion that there was sufficient evidence of corroboration, and Mr. Scott was not called on to reply on that point.

The second question raised a much more delicate and difficult point: Was the jury justified in not finding the complainant Mary Kovack, at the time of the illicit connection of the 27th March between her and the prisoner, a girl of previously unchaste character?

The material facts necessary to reach a conclusion on that point are fully set in the learned judge's reasons given in the Appellate Division (1). The

(1) 15 Alta. L.R. 313; [1920] 2 W.W.R. 251.

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parties were, at the time of the commission of the offence on the 27th March, and for some length of time before that, engaged to be married to each other. They were both of them foreigners whose parents had emigrated to Canada. At a date about the latter end of December previously or the beginning of January, and at a time when the marriage engagement existed, there had been on one occasion illicit connection between the prisoner and Mary Kovack, but at the time this prosecution commenced, more than twelve months having elapsed, that offence was barred by the statutory limitation of time.

The prosecution, therefore, was necessarily confined to the second offence of the 27th March, 1919, a date when the engagement for marriage still continued, and the question immediately arose whether on the admission by the complainant of the first offence having taken place in the latter end of December or the beginning of January previously she could be found by the jury to have been of "previously chaste character" on the 27th March when the second offence was committed.

Some evidence was given in prisoner's behalf by some young men to the effect that the girl complainant was not chaste, but the jury disbelieved that evidence, and the sole question, therefore, remains whether the single lapse of virtue by her with the prisoner on or about the last of December when the parties were under a mutual promise of marriage prevented the jury finding her to be of "chaste character" when the offence of March 27th was committed.

I am not able to accept the argument that such a single fall from grace of a woman, engaged to a man to whose solicitations she yields, either because of a weaker will than his or that combined with affection

and a hope of their prospective marriage under his promise, necessarily stamps that woman as one of an unchaste character for all future time. That surely cannot be so. There must come a time when repentance and pureness of living can rehabilitate her as a chaste character within the meaning of the statute.

Whether or not the facts and surrounding circumstances justify such a conclusion can only be determined by a jury.

In this case, the jury had the advantage of seeing the complainant in the witness box and hearing from her all the material facts necessary to enable them to reach a conclusion as to her family relationship, nationality, occupation, conditions and habits of life, marriage engagement with the promise and other material facts, and to determine from her manner, demeanour and evidence when examined and cross-examined, whether she should be believed in whole or in part.

The prisoner acting upon his rights remained mute.

The result was that they found her not to be of an unchaste character when the offence of 27th March was committed, and, unless I am compelled to find that one previous fall from virtue with the same man to whom on both occasions she was engaged to be married prohibits a jury from finding the same woman afterwards to be of a chaste character within the meaning of the Code, then I must accept the jury's finding. There is no arbitrary lapse of time which I can suggest as necessary before a jury can so find. It must be a case for determination on the facts and circumstances of each case. But assuming the jury to have been properly charged and directed upon the question, I think it would require a very extreme case to justifv a court of appeal in setting aside their finding.

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In substance, then I conclude that if under such circumstances as we have in this case before us, a woman falls to the solicitations of a man to whom she is engaged to be married, she does not, from that single fact, necessarily become such an unchaste character within the meaning of those words in the section of the Code before us as prevents a jury finding her, three months afterwards, not to be unchaste in character. It must be in the very nature of things a fact for the jury, under all the proved facts and being properly directed, to find.

There is no statutory limit of time which must elapse in order that she may rehabilitate herself. There is no arbitrary time which the court may set up which must so elapse. I cannot set up my judgment, not having seen or heard the witnesses but simply from reading the record, against the findings under proper direction of the jury who did see and hear them.

I would, therefore, dismiss the appeal.

IDINGTON J.—The questions raised by the dissenting judgment so far as relevant to the requirement by the statute of corroboration "in some material particular" were practically disposed of on the argument.

For my part I am of the opinion that in such a case the previous relations of the parties concerned may well form the subject of inquiry and evidence adduced on such a basis become of the most cogent character for the purposes of corroboration.

When that is applied herein there seems to be no reason for doubting the evidence of the girl.

But its very application and the mode of thought by which it becomes effective, tend to raise much doubt and difficulty in regard to the other question of the girl having at the time in question been of previously "chaste character."

The dissenting opinion of Mr. Justice Stuart with which Mr. Justice Ives concurred, is the basis of any jurisdiction we may have to hear this appeal, and on this latter ground I have some difficulty in finding a clear and decided dissent.

The burden of his argument deals with the question of want of corroboration and all incidental thereto. He holds the evidence of what took place in December was inadmissable when presented, as it was, by the Crown.

The burden of proof relative to the want of previous chastity by the complainant is expressly cast, by section 210 of the Code, upon the accused.

If it was, however, admitted in evidence, then I think he had a right to rely upon it, for what it was worth, as fully as if adduced specifically on his own behalf.

Yet Mr. Justice Stuart contents himself with relying upon the non-admissibility of it relative to the question of corroboration.

The question of her previous chastity is presented by objections Nos. 3 and 4 of appellant's counsel at the trial, as follows:

3. His Lordship should have withdrawn the case from the jury on the ground that there was evidence of previous unchastity.

4. Assuming in the complainant's favour all the facts that the jury could upon evidence reasonably find in her favour, that is, assuming that the accused in undertaking the burden of proving the unchastity which section 210 casts upon him proved against the complainant the least that the jury could upon the evidence reasonably find against her, were those facts such as to constitute the complainant a girl of previously unchaste character?

Mr. Justice Stuart in his final disposition of this part of the appeal disposes of it as follows:—

As to question 3, my view is that, under the existing authorities and precedents especially in the American States whence the law has come, the case should have been withdrawn from the jury and I would answer it in the affirmative. But in view of my much firmer opinion on questions 2 and 5 I do not think it necessary to discuss the matter more fully. This also makes an answer to question 4 unnecessary.

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Idington J.

These points though submitted as separate really in substance deal with one and the same issue in law. The learned judge appears to answer one hesitatingly and declines to answer the other.

Is that such a dissent as to entitle us to speak? I have grave doubts as to its being so. We should have a clear and explicit dissent to rest our jurisdiction upon.

The majority of the court think it is, and answer accordingly.

As I understand the proposed answer it is to be that the question was one for the jury.

And, as the learned trial judge left it to the jury in a way that cannot be complained of, unless that he should have withdrawn the case from the jury entirely, and the majority of this court hold he could not do so, I may say that I much doubt if that is a satisfactory view of the law applicable to the very peculiar facts in question herein.

Many decisions have been given that tend to uphold such a ruling, but I doubt if any of them have gone quite so far as to justify the so holding in this peculiar case.

I do not hold any such decided opinion as to warrant my dissent.

I see no good purpose to be served by enlarging upon the matter.

Indeed to meet the possibility of such a case as of this class again arising, enabling the offender to set up his own wrong as a means of defence, I submit the law might well be so amended as to prevent the possibility of such a curious means of defence.

DUFF J (dissenting).—This appeal should, in my opinion, be allowed on the short ground that evidence of previous conduct could only be admissible as tending to shew a reciprocal state of feeling between the two

persons concerned making it not only probable that the prisoner would desire to have intercourse with the prosecutrix but a disposition on her part also to yield to him. It could not be admitted for the purpose of shewing merely that the accused was a person who was likely to try to commit the offence with which he was charged; and it could only be admitted as evidence of a reciprocal guilty inclination existing at the time the offence was alleged to have been committed. The result must be either that the prosecution alleging the woman was chaste on the occasion of the occurrence out of which the complaint arises could not be allowed to say that the evidence was admissible or that the evidence having been admitted upon assumptions inconsistent with "chastity" on any reasonable interpretation of the words used in the statute, a verdict against the accused involving a finding of chastity could not legally be based upon such evidence. To hold otherwise would be playing fast and loose with justice.

ANGLIN J.—It was intimated on the argument that the court was of opinion that there was sufficient corroboration of the complainant's story to satisfy the statute (sec. 1002 of the Criminal Code). *The King* v. *Shellaker* (1), is direct authority for the admissibility of some of this corroborative testimony and *The King* v. *Ball* (2), indicates its value and effect.

On the other question I am of opinion that from the facts deposed to by the complainant—that she had received many visits from the appellant and that they had spent many hours together between Christmas, 1916, and the 27th of March, 1917, when the act of illicit connection on which the present case rests occurred, and that there had been no illicit

(1) [1914] 1 K.B. 414. (2) [1911] A.C. 47.

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intercourse between them in that interval—if believed by them, the jury might not unreasonably draw the inference that the complainant, although seduced by the appellant under promise of marriage about Christmas, 1916, had so far recovered herself on the 27th of March, 1917, as to have become at that time once more a woman "of previously chaste character" within the meaning of sec. 212 of the Criminal Code. If, as is practically conceded, that section does not require that the woman should be *virgo intacta*—if, as I think, the doctrine of rehabilitation is admissible under it, I am unable to accede to the contention that the trial judge should, or could properly, have withdrawn this case from the jury. It was for them to determine what credit should be given to the complainant's evidence, and what inference should be drawn as to the chastity of her character—for that was the issue—on the 27th of March, three months after the one previous act of unchastity which she admitted.

I would dismiss the appeal.

BRODEUR J. (dissenting).—There was a question raised in this appeal as to whether the evidence of the complainant had been corroborated. It is not necessary on a charge of criminal seduction under promise of marriage that the corroboration should be as to every fact, it is sufficient if it confirms the belief that the prosecutrix is speaking the truth. Art. 1002 Criminal Code; *The King* v. *Daun* (1).

There are facts disclosed by other witnesses than the complainant which show conclusively that there was criminal intercourse between the complainant

(1) 11 Can. Crim. Cas. 244.

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and the accused and that this intercourse took place at the time the promise of marriage was made. I have no doubt that there was sufficient corroboration.

But the main question is whether the complainant was of a "previously chaste character," as required by section 212 of the Criminal Code.

The girl was seduced for the first time, according to her own story, by the appellant on Christmas Day, 1918. But she failed to lay any charge for this offence during the year which followed its commission and there was limitation of time for commencing a prosecution on this offence of Christmas 1918 (Sec. 1140 s.s. e-5). Then she made a charge against the appellant that she was seduced a second time by him in March, 1919. During her evidence at the trial she had to admit that she had surrendered her chastity three months before March, 1919.

Her own statement and admission as to having lost her chastity a few months before the relations of March, 1919, made it imperative on the trial judge to withdraw the case from the jury, because one of the essential ingredients of the crime which is charged did not exist, according to the statement of the complainant herself. She was no more a chaste woman in March, 1919. Of course, the burden of proof of previous unchastity was upon the accused (art. 210 C.C.); but the evidence of the girl herself rendered it unnecessary for the accused to bring any witnesses to prove her unchastity.

It is contended, however, that a woman who has been guilty of unchaste conduct may subsequently become chaste in legal contemplation and be seduced a second time. But no evidence was brought to

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show that this girl regained her chastity in the few months which elapsed between December, 1918, and March, 1919. The jury could not, with the evidence they had before them, declare that this girl was, in March, 1919, of a "previously chaste character." Their verdict should be set aside and the prisoner should have been acquitted.

The appeal should be allowed with costs.

MIGNAULT J.—The only question on which this court found it advisable to hear counsel for the respondent was whether there was evidence on which the jury could find that the complainant, notwithstanding the fact of her seduction by the appellant under promise of marriage about the beginning of January, 1919, was an unmarried female "of previously chaste character" when she was seduced by the appellant on the 27th March of the same year. The evidence was that although the complainant met the appellant very frequently from January to the 27th March, she did not, after the first seduction, have any illicit connection with him until the latter date. From this evidence the jury could infer that notwithstanding her fall in January, she had rehabilitated herself and was on the 27th March an unmarried female "of previously chaste character." It is not for us to say that we would have so considered her, but the question is whether the previous seduction of the complainant precluded the jury on the evidence from finding that she had rehabilitated herself, or, in the words of the statute, that she was then an

unmarried female of previously chaste character under twenty-one years of age.

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This was eminently a fact for the jury's determination, and I cannot say that there was no evidence to go to the jury on which they could find this fact.

The appeal should be dismissed with costs.

Appeal dismissed.

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

Solicitors for the respondent: *McDonald, Martin & MacKenzie.*

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*May 10.
*June 21.

THE STRAND THEATRE COMPANY (DEFENDANT) .... APPELLANT;

AND

CAHILL AND COMPANY (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Nuisance—Theatrical performance—Crowd on street—Obstruction of neighboring premises—Injunction.

A theatre Co. may be restrained by injunction from so arranging its performances that persons waiting for admission assemble in such numbers that they obstruct the access to neighbouring business premises and seriously inconvenience the proprietors.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment at the trial in favour of the appellant.

The question to be decided on the appeal is indicated in the above head-note.

F. H. Bell K.C. for the appellant.

A. W. Jones for the respondent.

IDINGTON J.—The respondent, complaining of a nuisance created by the appellants inducing such an assemblage of persons on the sidewalk in front of its theatre and extending to the entrance of the respondent's adjoining grocery, applied for an injunction, and that application was by consent conducted without formal pleadings.

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

(1) 53 N.S. Rep. 514.

After a trial lasting two days Mr. Justice Drysdale dismissed the application and, on appeal, the Supreme Court of Nova Scotia reversed said judgment of dismissal and made instead thereof the following order:—

> And it is further ordered that the defendant, Strand Theatre Company, Limited, its managers, servants and agents be and they are hereby restrained from unlawfully obstructing the free access to and egress from the premises of the plaintiff, Cahill & Company, at the southeast corner of the intersection of Sackville and Argyle streets in the city of Halifax by the collection of crowds of people or otherwise.

From that, by leave of said court, the said defendant appeals to this court.

There appears herein some evidence which, within the doctrine relied upon in the case of *Lyons* v. *Gulliver* (1), might have justified a judgment for damages if that form of relief had been sought or an injunction restraining the repetition of the offences disclosed in the evidence I refer to.

The above quoted order being confined to the restraining feature "unlawfully obstructing the free access to and egress from the premises of the plaintiff," &c., can result in nothing more than the trial of a specific complaint founded upon facts disclosing such an unlawful obstruction hereafter, and the payment of the costs as awarded.

In other words there seems to me nothing in fact or law involved in this appeal but a mere question of costs.

The uniform jurisprudence of this court has rightly been to refuse to interfere with a mere question of costs.

What then is left for us to consider? If there occur any future like offences they must be decided upon the facts according to the relevant law applicable thereto.

(1) [1914] 1 Ch. 631.

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STRAND THEATRE COMPANY v. CAHILL AND COMPANY.

Idington J.

I am sorry to hear counsel suggest that the proof in such cases must depend solely upon that furnished by affidavits in support or denial of the allegations of any such offence, and that there can be no cross-examination.

Such a feature in the administration of justice I suspect must, if so, be confined to Nova Scotia, for elsewhere rules of practice generally provide for cross-examination of parties making affidavits.

That, of course, is not always so satisfactory as the cross-examination in an open trial, but if its operation does not exist in Nova Scotia I imagine some means can be devised by the courts there for overcoming such an unsatisfactory condition of affairs.

I think that must be entrusted to the local courts.

If there had been pleadings, or the court had seen fit to permit of amendment to substitute them for the procedure adopted so as to allow a judgment for damages by way of remedying the undoubted wrong that has occasionally been suffered, coupled with costs of suit, it would, to my mind, have more appropriately met the necessities of the case than such an injunction as framed.

On the other hand I cannot say that there was no evidence of a cause of action and, as a result, hold the appellant at liberty to pursue a like course of conduct as it undoubtedly did.

Lawlessness is not to be encouraged by giving a license to repeat such offences as were committed.

A little vigorous effort on the part of the local authorities, if invoked by appellant, should produce the result desired.

I think the appeal should be dismissed with costs.

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Duff J.

DUFF J.—The form of the order may be open to objection, *Parker* v. *First Ave. Hotel Co.* (1), but the point was not clearly taken and the Court has full control on its own order. I think the appellant has not made out a case for interference.

ANGLIN J.—After considering all the evidence I find myself unable to say that the careful appreciation of it in Mr. Justice Mellish's judgment is not correct. It discloses, in my opinion, an unjustifiable interference (for which the defendants are clearly responsible) with the plaintiffs' undoubted right to the full enjoyment of their property. The defendants must find some means of putting a stop to the obstruction complained of, even if to do so should necessitate the incurring of additional expense or some curtailment of the profitable use to which they are now putting their own property. *Lyons v. Gulliver* (2). *Sic utere tuo ut alienum non laedas* is an elementary principle in point. The evidence shews that the unlawful obstruction continued between the date of the writ and that of the trial.

Had objection been clearly taken to the form of the order of injunction I am not entirely satisfied that it should not have been modified. An injunction against

unlawfully obstructing free access to and egress from the plaintiffs' premises by the collection of crowds of people or otherwise

is open to the objection that it merely expresses, and in terms no more precise, a general obligation which the law imposes. It leaves undecided and open for discussion on a motion to punish for breach of it what is prohibited. *Cother* v. *Midland Ry. Co.* (3); *Attorney General* v. *Staffordshire Co. Coun.* (4); *Parker* v. *First Avenue Hotel Co.* (1).

(1) 24 Ch. D. 282, at page 286.
(2) [1914] 1 Ch. 631.
(3) 2 Ph. 469, at pages 471-2.
(4) [1905] 1 Ch. 336, at page 342.

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On the other hand, however, it may be that the view of the Supreme Court of Nova Scotia was that adequate protection could not be afforded to the plaintiffs by an order couched in less comprehensive terms. *Elliott* v. *North Eastern Ry. Co.* (1). *Vere* v. *Minter* (2). Moreover the defendants' contention has been that no injunction whatever should have been granted rather than that an order more definite and precise should have been made.

On the whole the appellants have, in my opinion, failed to make out a case for interference with the order against which they appeal.

BRODEUR J.—It has been suggested that the control of crowds in a highway was a matter for police regulation and that the owner of a theatre was not responsible because persons collected before the hour at which it opened, formed a queue on the sidewalk and obstructed the access to the adjacent premises. But the Court of Appeal in England decided this question adversely to that suggestion and declared that if the natural and probable result of what a person is doing will be the collection of a crowd which will obstruct the highway, then the obstruction is an actionable nuisance and this person could be restrained. *Lyons Sons* v. *Gulliver* (3).

It does not seem that a theatre queue under all circumstances and in all conditions is an actionable nuisance. There must be some unreasonable use or obstruction of the highway so as to prevent the access to and egress from the neighbouring premises and that obstruction must be calculated to deter customers, to some extent, from resorting to those adjacent premises.

(1) 10 H.L. Cas. 334, at pages 358-9. (2) L.J. 1914, Vol. 49 p. 129.
(3) [1914] 1 Ch. 631.

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Brodeur J.

Each case, however, should be governed by its own facts and an injunction should be issued only in circumstances which would amount to a nuisance.

The owner of the theater in the present case is alive to these exigencies of the law and claims that he had been doing everything in his power to minimize inconvenience to the plaintiff, his neighbour, and is willing to incur all necessary expenses arising out of a larger police force to control the crowd.

The evidence, however, shews that the plaintiffs' premises have been unduly obstructed and customers desiring to enter his premises unduly interfered with. The evidence given by the police authorities is generally favourable to the owner of the theatre; but there were facts and circumstances established by evidence, which was not contradicted, which shewed undue interference. I am inclined to think that the police protection was not sufficient; and as the appellant has assumed the onus of seeking and even paying for that police protection, he has then incurred liability. On the whole I agree with the judgment *a quo*.

The appeal should be dismissed with costs.

MIGNAULT J.—The law governing a case of this description has been authoritively stated by the English Court of Appeal in *Lyons, Sons & Co.* v. *Gulliver* (1), also the case of queues formed by the patrons of a theatre waiting for admission, and obstructing the entrance to a neighbouring business establishment. The English case, however, differs from the present one in that, in the former, damages only, and not an injunction, were granted, in view of the under-

(1) [1914] 1 Ch. 631.

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taking given by the defendants to open their doors an hour before the performance, and it further differs in that the trial judge there found on the facts in favour of the plaintiffs, whereas here Mr. Justice Drysdale the trial judge said:—

> I find these queues have been formed and kept, that is reasonably kept, on the outer side of the sidewalk with ample space for people to pass up and down the sidewalk between the queues and the buildings, for a long period before action. I find that plaintiff's shop has not been obstructed or customers desiring to enter interfered with; in short, so far as the entrance to plaintiff's shop is concerned, the plaintiff company has no reasonable cause of complaint. Plaintiff Cahill in describing conditions is somewhat in conflict with the testimony of the police. His statements are, however, I think, exaggerated and this perhaps owing more to his state of feelings than an intention to exaggerate, as conditions that now exist and for a long time previous have existed. I accept the testimony of the police. These men are truthful and I believe them and I do not think the Defendant Company had been so using its property as to interfere with plaintiff's business but reasonably and in a way as of right they might.

This finding is my only difficulty, for my reading of the evidence would lead me to agree with Mr. Justice Mellish, and were the conditions described in the evidence to continue, I cannot doubt that the respondents would be greatly prejudiced thereby. I think, however, that the way the appellant carries on its business inevitably leads to the gathering of crowds in front of the theatre and of the neighbouring properties. It gives one performance in the afternoon and two in the evening. The greater crowds gather for the second evening performance, and the doors of the theatre are closed about 8.20 p.m., when the lobby is usually filled, and the practice being not to let the second audience in before the first has left the theatre by the side exits, the doors are opened only about 8.40 or 8.50 p.m., so that, during from twenty to thirty minutes at least, a crowd naturally gathers. At first this crowd obstructed the street, but the city

police formed them into queues on the sidewalk, on one side those who already had tickets, and on the other those who had not secured them. That the queue thus formed in front of the respondent's premises obstructed the entrance thereto cannot be doubted on any reading of the evidence. It is true that the appellant carries on a legitimate business, but that is no excuse for the annoyance caused to the respondents and the interference with the free and unobstructed access to their place of business. The appellant, if it chooses to give two performances each evening, and to let one audience out before it admits the other, must not so use its right as to interfere with the equal rights of the respondents to carry on their business without any interference; *sic utere tuo ut alienum non laedas.*

The form of injunction granted by the court below is not free from objection, for it states that the appellant must not unlawfully obstruct the free access to and egress from the premises of the respondents, and thus in effect orders the appellant not to violate the law, but the appellant's case is really that no injunction at all should have been granted. It is indeed very questionable whether such an injunction is in any way prejudical to the appellant, for the latter certainly cannot claim the right to unlawfully obstruct the respondent's premise; and if any one has an interest in having the injunction made more precise it is rather the respondents, for in any case where it is claimed that the injunction has been disobeyed the issue will be, as it was in this case, whether the appellant has unlawfully obstructed the free access to and egress from the respondents' premises.

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STRAND THEATRE COMPANY v. CAHILL AND COMPANY.

Mignault J.

On the whole, I do not feel disposed to interfere with the judgment of the Supreme Court *en banc* and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. H. Bell.*

Solicitor for the respondent: *W. L. Hall.*

A. JUDSON SAYRE AND WILLIAM M. GILFOY (DEFENDANTS) ...... APPELLANTS;

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*Feb. 11, 12.
*June 21.

AND

THE SECURITY TRUST COMPANY AND OTHERS (PLAINTIFFS) .... RESPONDENTS.

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

Mortgage—Order allowing purchase by mortgagee—Execution for balance of claim—Foreclosure—"The Land Titles Act," (Alta.) S. (1919) c. 37, s. 62 b.

An order by which a mortgagee becomes the owner of the mortgaged land as purchaser at a named price with leave to issue execution for the balance of his claim, is not an order for foreclosure operating as satisfaction of the debt under section 62 b. of "The Land Titles Act" as amended by chapter 37 of the Alberta Statutes, 1919.

Per Sir Louis Davies C.J. and Idington and Brodeur JJ. (affirming the judgment of the Appellate Division).—Though the order should have been set aside and a proceeding *de novo* directed, the decision of the Appellate Division that, notwithstanding the terms of the order, the mortgagee may still pursue his remedy for the balance of his claim should not be disturbed, the question involved being one of practice and procedure.

Per Duff Anglin and Mignault JJ. (reversing said judgment) —The order should be set aside as the doctrines of equity in regard to mortgages preclude the making of an order which purports *uno flatu* to vest the mortgaged property in the mortgagee as purchaser free from all equity of redemption and to enforce the personal liability of the mortgagor for some part of the mortgage debt. A mortgagee cannot have both the mortgaged property and the mortgage money.

Per Duff and Anglin JJ.—The sale sanctioned by the order was not a sale of the land within the meaning of s.s. 2 of s. 62 of "The Land Titles Act" and the mortgagee is therefore prohibited by that section from issuing execution under his judgment on the covenant.—The sale contemplated by the statute is a sale to a stranger, not to the mortgagee.

Judgment of the Appellate Division (15 Alta. L.R. 17; [1919] 3 W.W. R. 634) affirmed on equal division of the court.

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

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SAYRE v. SECURITY TRUST COMPANY.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of Stuart J. at the trial (2) and dismissing an appeal by the appellants from an order of the master in chambers at Calgary.

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.

A. H. Clarke K.C. for the appellants.

H. P. O. Savary K.C. for the respondents.

THE CHIEF JUSTICE.—For the reasons given by Chief Justice Harvey, of the Appellate Division of Alberta, in delivering the judgment of that court now in appeal in this action, and also for the reasons stated by my brother Idington, I am of the opinion that this appeal should be dismissed.

Personally I should have preferred that the master's order in question herein should have been set aside altogether and a proceeding *de novo* directed. But, as I think the ends of justice can be fully worked out between the parties under the order as construed by the Appellate Division and the disposition they have made of the action, with which construction and disposition I am quite satisfied, I will not press this view, more especially as it relates largely to a matter of procedure and practice.

As to the limitation of time of two weeks, stated in the Chief Justice's reasons, within which the defendants might file a demand for an offer of the land for

(1) 15 Alta. L.R. 17; [1919] 3 W.W.R. 634.

(2) [1919] 2 W.W.R. 863.

sale by tender, that limitation must, of course, be construed as running from the day of the judgment of this court and, I think, under the circumstances, might well be extended to four weeks.

As this court is equally divided in opinion as to allowing or dismissing the appeal, there will be no costs here.

IDINGTON J.—The master's order in question herein cannot, in my opinion, be treated as an order of foreclosure.

It is, by its terms, though very inaptly using the word "foreclosure", clearly intended to be a vesting order carrying out the sale to the mortgagee, in like manner as if to a stranger, and permitting thereupon the mortgagee to proceed upon the covenant to realize the balance due after confirmation of said sale.

Who has ever seen a foreclosure decree so framed? I venture to think that no one can produce such a precedent in a foreclosure proceeding.

The mortgagee has always had the right in such proceedings to abandon his foreclosure and proceed upon the covenant if ready and able to return to the mortgagor his property upon payment of the amount due.

Hence the legislation of the Alberta legislature of 1919, section 4 of chapter 37, must, by the express language using the word "foreclosure" be confined to the plain ordinary meaning that is well understood by those conversant with it as a legal term.

I am sorry if any one has been misled by reference to a dictionary instead of the masters of the English law on whom I relied, and cited in the case of *Mutual Life Assurance Company* v. *Douglas* (1).

(1) 57 Can. S.C.R. 243.

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Idington J.

The amending statute I cite clearly obliterates that option of a mortgagee after a final order of foreclosure and possibly effects a needed reform in our law.

But the legislature does not touch, or pretend to touch, the undoubted power of the court, according to long standing jurisprudence, well expressed by that eminent judge, Lord Hatherly, in the case of *Tennant* v. *Trenchard* (1), to sanction a sale to a trustee which a mortgagee is in conducting a sale under a mortgage. Hence the exercise of that power in question herein, cannot properly be held to have been interfered with by the enactment above referred to. Such a sale as made in the due exercise of such power cannot mean a foreclosure.

The things covered by the term "foreclosure" extending over the whole, and a sale possibly only of a part, are entirely different.

If the legislature intended to destroy the power of a court to sell to the mortgagee for part of the debt the land mortgagee, it should have said so.

I am not concerned in that regard as to what is done.

There may be good reasons for its doing so. Indeed conceivably good reasons therefor might exist in one country and yet doing so be imprudent in another.

I am unable, for the foregoing reasons, to maintain a reversal of the judgment appealed from.

I should have preferred, partly in accord with Mr. Justice McCarthy's opinion, to have seen the whole order set aside and a proceeding *de novo* directed, within the undoubted rights of the court, to sell to a mortgagee. But for us to interfere therewith would savour too much of dictating in mere matters of procedure.

I think the appeal should be dismissed with costs.

(1) 4 Ch. App., 537 at 547.

DUFF J.—I concur with Mr. Justice Anglin.

ANGLIN J.—The question presented by this appeal is whether, in proceedings instituted to enforce a mortgage of property in that province, the law of Alberta enables its courts to order the sale of the mortgaged land to the mortgagee as absolute and irredeemable purchaser for a price less than the amount of his claim and at the same time that he be at liberty to issue an execution against the mortgagor for the amount by which the mortgage debt exceeds such purchase price. Such an order was made by the master in chambers in this action on the 28th of May, 1919.

The circumstances out of which the question above stated arises are fully stated in the judgment of Mr. Justice Stuart (1), holding, on appeal from the master, that such an order cannot be made; that the master's order was a foreclosure within s. 62b of the "Land Titles Act" (enacted by c. 37 of the statutes of 1919); that the mortgage debt was thereby extinguished; and that the provision of the order permitting the issue of execution must therefore be set aside and vacated—with the result that the mortgagee would retain the property but his mortgage debt would be wholly extinguished. This judgment was reversed in the Appellate Division (Harvey C.J. and Simmons J.—McCarthy J. dissenting) (2), and the master's order was restored, but with a provision for the taking of tenders for the purchase of the property and confirming the sale to the mortgagee if no higher tender than the price at which he was allowed to purchase under the master's order should be received and

(1) [1919] 2 W.W.R. 863.

(2) 15 Alta. L.R. 17; [1919] 3 W.W.R. 634.

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directing that, if a higher tender should be received and accepted and payment made in accordance therewith, the mortgagee should transfer the land to the person making such tender and should give credit for the amount thereof on his mortgage claim.

We are informed by Mr. Justice Stuart that the practice followed by the master has grown up and "been in vogue for some time" as the result of an amendment to s. 62 of "The Land Titles Act," made in 1916 (c. 3, s. 15 (4)), adding thereto the following as s.s. 2:—

(2) Where any action or proceeding has before the date of the passing of this subsection been taken or shall thereafter be taken in any court either under the provisions of this section or to enforce the observance of the covenants, agreements, stipulations or conditions contained in any agreement for the sale of any land, and personal judgment has been or shall be obtained therein, no execution shall issue thereon until sale of the land mortgaged or encumbered or agreed to be sold has been had or foreclosure ordered and levy shall then be made only for the amount of the judgment or mortgage debt remaining unsatisfied with costs.

It is not surprising that such a statutory provision should have led to some anomalies in practice. Just what is meant by

the amount of the judgment or mortgage debt remaining unsatisfied

after foreclosure has been ordered it is a little difficult for the legal mind to appreciate. Sec. 62 was repealed in 1919 (c. 37, s. 1) and the following substituted:—

62. Proceedings for recovery of money secured by a mortgage or encumbrance, or to enforce any provision thereof, or sale, redemption or foreclosure proceedings with respect to mortgaged or encumbered land may be taken in any court of competent jurisdiction in accordance with the existing practice and procedure thereof.

(2) No execution to enforce a judgment upon the personal covenant contained in a mortgage encumbrance or agreement of sale on or of land or on any security therefor shall issue or be proceeded with until sale of land, and levy shall then only be made for the amount of the said moneys remaining unpaid after the due application of the purchase moneys received at the said sale. * * *

The following section was also added (by sec. 4) as s. 62b:—

62b. The effect of an order for foreclosure of a mortgage or encumbrance heretofore or hereafter made by any court or judge or by any registrar shall be to vest the title of the land affected thereby in the mortgagee or encumbrancee free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under him subsequently to the mortgage or encumbrance, and shall from and after the date of the passing of this section operate as full satisfaction of the debt secured by such mortgage or encumbrance.

Such mortgagee or encumbrancee shall be deemed a transferee of the land and become the owner thereof and be entitled to receive a certificate of title for the same,

obviously, as Harvey C. J. points out, to meet the decision of this court in *Mutual Life Assur. Co.* v. *Douglas* (1).

These amendments became effective on the 17th of May, 1919, eleven days before the order of the master in chambers, which is attacked, was made.

It is of the essence of a completed foreclosure that the mortgagee cannot thereafter proceed to enforce the mortgagor's personal liability for the mortgage debt without opening the foreclosure, but that, so long as he is in a position to reconvey the mortgaged property on payment of his claim he may so proceed, thereby, however, automatically opening the foreclosure and affording the mortgagee an opportunity to redeem as of right; and courts of equity have maintained jurisdiction to grant the mortgagor a corresponding right, where special circumstances warrant such a course, on terms which would protect the mortgagee. "Foreclosure" under the Alberta "Land Titles Act" was subject to these incidents prior to 1919. *Mutual Life Assur. Co.* v. *Douglas* (1). Under

(1) 57 Can. S.C.R. 243.

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the amendment of that year, however, they are done away with and "foreclosure" in Alberta now completely extinguishes the mortgage debt and all rights of the mortgagor in the pledge. The order of the master in chambers in this case, on the contrary, purports in express terms to keep alive and enforce recovery of the greater part of the mortgage debt and at the same time to vest the mortgaged property in the mortgagee as absolute owner in satisfaction not of his entire claim but of less than one-third of it. I agree with the learned Chief Justice of Alberta and Mr. Justice Simmons that such an order was not, and was not intended to operate as, a "foreclosure" as that term must now be understood in Alberta and that it therefore did not operate to extinguish the personal liability of the mortgagor. Neither was it meant to have effect as a foreclosure as understood in English equity jurisprudence. Moreover, if the provision of the order directing a sale to the mortgagee as an irredeemable purchaser at $6,500, and that directing the issue of execution for the balance of the mortgage debt are so incompatible one with the other that both cannot stand, the proper course to rectify the error committed in making such an order is, with respect, not to strike out one of its provisions and allow the other to stand. Inasmuch as the order approving of the sale to the mortgagee at the price fixed was sought and accepted only on the footing that it should contain the additional provision for the recovery of the balance of the mortgage debt and the master never intended to make an order in any other terms or on any other condition—never intended that the mortgagee's claim should be extinguished except as to the $6,500 for which he had offered to take the land in satisfaction—the order should be

vacated as a whole unless it can be sustained as a whole. The mortgagor cannot insist on that part of it standing which suits his purposes minus the accompanying provision without which it was neither sought nor granted and would not have been taken. *Grand Trunk Pacific Rly.* v. *Fort William Property Owners* (1). If not entitled to maintain the order as it stands the respondent asks that it should be set aside in *toto* and to that relief it is entitled.

But is the order as made sustainable? There are no doubt authorities for the proposition that the court will under special circumstances sanction the mortgagee becoming the purchaser of the mortgaged premises at a court sale. In addition to *Tennant* v. *Trenchard* (2), and *Hutton* v. *Justin* (3), cited by the respondent, reference may be had to *The Wilsons* (4), and *Ex parte Marsh* (5), cited in Fisher on Mortgages (Can. ed. 1910) par No. 2020. When the mortgagee is allowed to bid the conduct of the sale is usually transferred to some other interested party. *Domville* v. *Berrington* (6). *Gowland* v. *Garbutt* (7), cited by Mr. Clark, is also an instance where this was done. But in Ireland a contrary course has sometimes been taken and the mortgagee allowed to bid, though retaining the conduct of the sale, where the property was clearly insufficient to pay the debt. *Steele* v. *Devonport* (8); *Spaight* v. *Patterson* (9). These cases may be readily understood when it is borne in mind that foreclosure is the primary remedy which the law gives to the mortgagee, the right to a sale being statutory and the conduct of the sale discretionary.

(1) 43 Can. S. C. R. 412; [1912] A.C., 224, at p. 229.
(2) 4 Ch. App. 537, at p. 547.
(3) 2 Ont. L.R., 713.
(4) 1 W. Rob., 172.
(5) 1 Mad., 148.
(6) 2 Y. & C., 723.
(7) 13 Gr., 578, at p. 580.
(8) [1848] 11 Ir. Eq. 339.
(9) [1846] 9 Ir. Eq. 149.

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Hewitt v. *Nanson* (1). Where a sale is ordered and the mortgagor is not financially good for any possible deficiency it is only reasonable to permit the mortgagee to protect himself as far as possible by giving him leave to bid at the sale, and, if necessary, to become a purchaser. But no case is reported, so far as I have been able to discover, where a mortgagee has been allowed to acquire an absolute title to the land as a purchaser and thereafter to maintain an action on the personal covenant of his mortgagor for the amount by which his mortgage claim exceeded the price at which he purchased. A passage in the judgment of Moss J. A., in *Hutton* v. *Justin* (2), may, however, be referred to.

While the mortgagor's covenant for payment of the mortgage debt may be absolute at law, in equity the right to enforce it is subject to the condition that the mortgagee shall not be disabled through any act of his own (Ashburner on Mortgages (2 ed.) 683) not authorized by the mortgagor from restoring the estate. *Palmer* v. *Hendrie* (3); *Kinnaird* v. *Trollope* (4). A mortgagee asserting absolute ownership of the mortgaged property cannot sue on the mortgagor's covenant. In equity, speaking generally, the rights of payment and redemption are reciprocal.

Even where the mortgagee claims to have acquired, in his character as such, absolute ownership of the property under a title paramount, he cannot enforce the mortgagor's covenant except on the terms that he should submit to redemption. An excellent illustration of this proposition is afforded by *Parkinson* v.

(1) 28 L.J. Ch. 49.
(2) 2 Ont.L.R. 713, at p. 716.
(3) 27 Beav. 349, at p. 351.
(4) 39 Ch.D. 636, at pp. 641-2.

Higgins (1), where it was held on demurrer that a mortgagee, who had purchased at a court sale, which would have conferred on a stranger so purchasing a paramount and absolute title,

> could not sue for the mortgage money while asserting his right to the property mortgaged wholly independent of any title derived from the mortgagor and without any right to redeem,

and *Parkinson* v. *Higgins* (2), where the same mortgagee on pleading by way of equitable replication that he had acquired title to the property solely to protect his interests and that he had offered and was always willing to submit to redemption on payment of the mortgage moneys and the sum he had been obliged to expend to save the property from sale to a stranger, who would acquire paramount title, was held entitled to maintain his action on the mortgagor's covenant.

In my opinion the doctrines of equity in regard to mortgages preclude the making of an order which purports *uno flatu* to vest the mortgaged property in the mortgagee as purchaser free from all equity of redemption and to enforce the personal liability of the mortgagor for some part of the mortgage debt. A mortgagee cannot have both the mortgaged property and the mortgage money.

I find nothing in the Alberta statutory law which warrants ascribing to the legislature the intention of making such a substantial further inroad upon the system of mortgage law which has grown up under the fostering care of the chancery courts, as the order of the master in chambers implies. Moreover, that order seems to involve an evasion of s.s. 2 of s. 62 and probably also of s. 62 (b) of the Land Titles Act.

(1) 37 U.C. Q.B. 308. (2) 40 U.C.Q.B. 274.

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For relief from whatever hardship is entailed by the undoubted deprivation of their contractual rights effected by the former subsection mortgagees must look to the legislature, not to the courts.

The appeal in my opinion should also succeed on the ground that there has not been "a sale" of the land within the meaning of s.s. 2 of s. 62 of the "Land Titles Act" and that the mortgagee is therefore prohibited by that subsection from issuing execution under his judgment on the covenant. Sale in English law generally imports an exchange of some article of property for money. *J. & P. Coats Ltd.* v. *Inland Revenue Commissioners* (1); Benjamin on Sale, 5 ed., pp. 2, 3. Here the transaction is not of that character. It is an exchange or barter of the mortgaged property for the release or extinguishment by the mortgagee. of a portion of the debt owed him by the mortgagor That in my opinion is not a sale within the meaning of that word as used in s.s. 2 of s. 62. It is there used in its general meaning in English law. Moreover, I am satisfied that the sale contemplated by the statute is a sale to a stranger not to the mortgagee.

For these reasons I would allow this appeal and set aside the order of the master in chambers. The land titles register must be rectified so as to restore the title to the position in which it stood before the master's order was made, and the certificate of title issued to the respondent mortgagee must be delivered up to the registrar and cancelled.

The respondents were obliged to appeal from the order of Mr. Justice Stuart which cut off all remedy on the mortgagor's covenant. They may well therefore be entitled to add all their costs down to and exclusive of the judgment of the Appellate Division to the

(1) [1897] 1 Q.B. 778, at p. 783.

mortgage debt. But I think the appellant, in view of the respondent's denial of his right to redeem (*Kinnaird* v. *Trollope*) (1); *Hall* v. *Heward* (2), is entitled to his costs of the appeal to this court which he was obliged to bring in order to have the order of the master in chambers, upheld by the Appellate Division, set aside. These latter costs should be set off against and deducted from the mortgage debt.

BRODEUR J.—The question involved in this appeal is largely a question of practice and procedure in a mortgage action. Mr. Justice Stuart, whose judgment the appellants seek to restore, declares himself that the practice which was followed by the master has been in vogue for some time in order to work out in some form the results which should follow upon the moratorium act of 1916 and that practice seemed to have been approved tacitly, if not formally, by judicial authority. Some questions of principle might incidentally be raised for the solution of this question of procedure or practice.

Although we have an appellate jurisdiction, this court does not exercise it in matters relating to the practice and procedure of the courts below, except under special circumstances.

There is nothing which has been disclosed in this case which would justify us, in my mind, in interfering with the judgment appealed from. I am satisfied that under the order as framed by the Appellate Division the rights of the mortgagor will be duly safeguarded.

The appeal should be dismissed with costs.

(1) 42 Ch.D. 610, at p. 619. (2) 32 Ch.D. 430.

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MIGNAULT J.—The facts of this case are fully explained in the judgments of the courts below, and need not be repeated here. The question chiefly discussed in these judgments was whether the master's order was such an order for foreclosure as would, under the amendment to "The Land Titles Act," assented to on the 17th April, 1919, and which became operative a month later (Alberta Statutes, 1919, ch. 37, sect. 4), deprive the respondent of its right to recover the balance of its claim, after deducting the sum for which the mortgaged property was sold to the respondent.

The material portion of the master's order, granted by him after hearing all the parties, and after proof by affidavit that the value of the mortgaged property did not exceed $6,500, is as follows:

It is ordered that the sale of the lands and premises mentioned in the Statements of Claim in the above actions to the plaintiffs for the price or sum of $6.500.00 be and the same is hereby approved and confirmed:

It is further ordered that the payment into court by the plaintiffs of the said sum of $6,500.00, the purchase price of the said lands, be and the same is hereby dispensed with:

It is further ordered that the above named defendants, and each of them, and all those claiming by, through or under the said defendants or either of them, do hereby stand absolutely and irrevocably barred and foreclosed of and from all right, title or equity of redemption in and to the said mortgaged lands in the pleadings mentioned, and hereinafter more particularly set forth:

And it is further ordered that the said lands and premises, being: Lots Twenty-four (24) and Twenty-five (25) in Block Fifty-six (56) according to a plan of part of the City of Calgary of record in the Land Titles Office for the South Alberta Land Registration District as Plan "A," Calgary, be vested in the plaintiffs The Security Trust Company, Limited, of the City of Calgary, in the Province of Alberta, and William Murray Connacher, of the City of Calgary, aforesaid, for an estate in fee simple, subject to the reservations contained in the existing Certificate of Title, and that the Registrar of Land Titles for the South Alberta Land Registration District do upon production of this order or a certified copy hereof cancel the existing Certificate of Title and issue a new Certificate of Title in the name of the said The Security Trust Company, Limited, and William Murray Connacher, free and clear of all encumbrances subsequent to and inclusive of the plaintiff's mortgage sued on herein;

And it appearing and having been proved from said affidavits filed that there is due and owing to the plaintiffs on account of the mortgage which forms the subject matter of the above actions the sum of $20,-564.31, which amount exceeds the sum of $6,500, the amount for which the said lands have been purchased by the plaintiff, by the sum of $14,064.31.

It is further ordered that the plaintiffs have leave and liberty is hereby given to the plaintiffs to issue execution against the defendants for the said sum of $14,064.31, being the balance of their claim, and that judgment be entered accordingly for the said sum of $14,064.31 with interest and costs.

The amendment of 1919 referred to in the judgments below is in the following terms:

62. Proceedings for recovery of money secured by a mortgage or encumbrance, or to enforce any provision thereof, or sale, redemption or foreclosure proceedings with respect to mortgaged or encumbered land may be taken in any court of competent jurisdiction in accordance with the existing practice and procedure thereof.

(2) No execution to enforce a judgment upon the personal covenant contained in a mortgage, encumbrance or agreement of sale on or of land or on any security therefor shall issue or be proceeded with until sale of land, and levy shall then only be made for the amount of the said moneys remaining unpaid after the due application of the purchase moneys received at the said sale.

* * * * * * * *

62b. The effect of an order for foreclosure of a mortgage or encumbrance heretofore or hereafter made by any court or judge or by any registrar shall be to vest the title of the land affected thereby in the mortgagee or encumbrancee free from all right and equity of redemption on the part of the owner, mortgagor or encumbrancer or any person claiming through or under him subsequently to the mortgage or encumbrance, and shall from and after the date of the passing of this section operate as full satisfaction of the debt secured by such mortgage or encumbrance. Such mortgagee or encumbrancee shall be deemed a transferee of the land and become the owner thereof and be entitled to receive a certificate of title for the same.

I cannot look on the master's order in this case as being purely and simply "an order for foreclosure." It is much more than that. It provides for the sale of the mortgaged property to the respondent for $6,500.00, dispenses the respondent from paying the purchase price into court, for its mortgage debt exceeded $20,000.00, forecloses the appellant of all right, title or equity of redemption in and to the

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mortgaged lands, and gives leave to the respondent to issue execution against the appellant for the balance of its claim. The learned trial judge ordered that the part of the master's order permitting execution to issue be struck out and replaced by an order preventing execution. He thus applied section 62b to the order, as if this order had been an order for foreclosure pure and simple, with the effect that the respondent, which never intended to take the property in satisfaction of its claim, is now held to have done so.

With all possible deference, I cannot think that the learned trial judge should have disregarded, nay more, have struck out the provisions of the master's order which prevented it from being an order for foreclosure pure and simple, to which section 62b would apply.

The learned Chief Justice of Alberta shews what the purpose of the amendment was. The Legislature was moved to adopt it by reason of the decision of this court in *Mutual Life Assurance Co.* v. *Douglas* (1) The Appellate Division of Alberta had held that a mortgagee who took a final order of foreclosure, lost his rights on the covenant and that the debt was extinguished. This court, on the contrary, decided that the mortgagee could sue on the covenant, notwithstanding the foreclosure, provided he was in position to reconvey the mortgaged property. The learned Chief Justice of Alberta says:

> It seems abundantly clear that it was intended to declare the law for this Province to be henceforth what the Provincial Court had held it to be, and what the Supreme Court of Canada declared it was not.

I certainly cannot say that the learned Chief Justice has wrongly stated the intention of the 1919 amendment. But, on the construction of the amendment itself, my opinion is that it would, to say the least,

(1) 57 Can. S.C.R. 243.

be a misdescription to call the master's order, with its provisions for a sale to the respondent and for the latter's right to issue execution for the balance of its claim, a final order for foreclosure within the meaning of section 62b, notwithstanding that the appellant is in fact declared foreclosed of all right, title or equity of redemption. Subject to what I will say, as to the point raised by my brother Anglin, the effect of a sale of the mortgaged property under subsection 2 of section 62 would be to deprive the mortgagor of all right in the property, and he would still be liable for the moneys remaining unpaid after due application of the purchase price. Here the property was declared to be sold to the appellant and leave was granted him to issue execution for the balance of his claim, and looking at the whole order, I am of opinion that it is not the order for foreclosure contemplated by the amendment.

I now come to the point raised by my brother Anglin, that the mortgagee, even under the special legislation of Alberta, cannot be authorized to purchase the property, and, while retaining it, to issue execution against the mortgagor for the balance of the mortgage debt, after deducting the price for which he has purchased the mortgaged property. For that reason, my learned brother concludes that the master's order should be entirely set aside as containing contradictory and irreconcilable provisions.

After due consideration I think the point well taken, for it is an undoubted rule of equity that the mortgagee cannot have both the mortgaged property and the mortgage debt., While no doubt the mortgagee, in a proper case and with sufficient safeguards, may be allowed to bid at a court sale of the mortgaged property (Halsbury's Laws of England, vo. Mortgage,

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No. 458, note (e); Fisher, Law of Mortgages, 6th Canadian Edition, No. 2020), I can find no authority for the proposition that after buying in the property himself, he can, while retaining it, sue for the balance of the mortgage debt. There is authority to the contrary, in the judgment of Hagarty, C.J., in *Parkinson* v. *Higgins* (1), cited by my brother Anglin, where the learned Chief Justice says:

> On the whole my conclusion is that the mortgagee cannot sue for his mortgage money, while in the same breath he asserts that the estate is wholly his own, and that he holds it by title paramount, and wholly independent of any title derived from the mortgagor.

The new legislation of Alberta does not, reasonably construed, contradict this statement of the law. On the contrary, section 62b shews that the mortgagee cannot sue on the covenant when he has obtained an order for foreclosure against the mortgagor, and this provision would be easily evaded if the mortgagee who has bought the property even with the leave of the court could retain it and sue for the balance of the mortgage debt. In the absence of any authority I would not now say that he can do so.

I would allow the appeal and set aside the master's order, with costs as stated in the opinion of my brother Anglin.

Appeal dismissed without costs.

Solicitors for the appellant Sayre: *McLean, Patterson & Broad.*

Solicitors for the appellant Gilfoy: *Taylor, Moffatt, Allison & Whetham.*

Solicitors for the respondents: *Savary, Fenerty & Chadwick.*

(1) 37 U.C.Q.B. 308, at p. 318.

THE MINISTER OF FINANCE OF BRITISH COLUMBIA (DEFENDANT)... } APPELLANT;

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*May 4.
*June 21.

AND

THE ROYAL TRUST COMPANY (PETITIONER)...................... } RESPONDENT.

IN RE SUCCESSION DUTY ACT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Succession duty—Deceased domiciled without the province—Property within and without the province—Method of taxation on property within—"Succession Duty Act," R.S. B.C. (1911), *c.* 217, *s.* 7, *as amended by* (*B.C.*) *1915*, *c.* 58, *s.* 4.

Where a person domiciled out of the province of British Columbia dies leaving property both in and out of the province, the provincial authorities have the right, for the purpose of computing succession duty according to section 7 of the "Succession Duty Act," to take into account all the property.

Judgment of the Court of Appeal ([1919] 3 W.W.R. 76) reversed, Anglin and Mignault JJ. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Hunter C. J. (2), and maintaining the respondents' petition.

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

(1) [1919] 3 W.W.R. 76. (2) [1919] 1 W.W.R. 1101.

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

J. A. Ritchie, for the appellant.

Charles Wilson K.C., for the respondent.

IDINGTON J.—The late Sir William Van Horne was domiciled in Quebec when he made his last will and testament and died on the 11th of September, 1915, possessed of an estate of the aggregate value of $6,371,-374.31, of which $300,000 worth was situated in the Province of British Columbia. The questions raised herein relative to the amount of the succession duties collectable upon or out of that part of the estate so situated, must be determined by the true interpretation and construction of the "Succession Duties Act," as amended, of said province, if and so far as *intra vires* the legislature thereof.

The judgment of the Court of Appeal for British Columbia (1) holds that the scale applied by the appellant in estimating the duties payable in question would be *ultra vires* the power of the said legislature to enact, and hence the "Succession Duty Act" so construed would be *ultra vires*.

It should tend to clarity of thought upon the subject to bear in mind that the right of any one to claim any part of the estate of a deceased rests entirely upon the legislative enactments, in force where the property so left, may chance to have provided.

(1) [1919] 3 W.W.R. 76.

The succession duties, so called, requiring a part of the estate situated in any province at the time of death to be handed over to the Minister of Finance or other authority declared by the legislature entitled to demand and receive same, is clearly within the power of the legislature to enact.

The scale by which such duties are to be measured and the conditions upon and by which it is to be applied also fall within the said power.

There is no attempt made by the enactment here in question to tax, directly or indirectly, any part of the estate lying beyond the province.

All that is attempted, is to apply a scale of assessment to that now in question presumed to be fitting the case of a wealthy man's estate.

Similar distinctions are, rightly or wrongly, made in an infinite variety of ways in that kind of legislation in the cases of those domiciled within a province.

Two of the most prevalent of those distinctions are the cases of the men of wealth, as distinguished from their poorer neighbours, or of men with a family, or next of kin, as distinguished from those who have none.

No one has ever, so far as I know, tried to maintain that such distinctive conditions are beyond the power of the legislature having absolute authority over property and civil rights, to impose as a term of the necessary recognition by local authority, in order to entitle any one to claim the succession of any part of the property of a deceased person.

For aught I can see, as matter of law, the like distinction might be so made in favour of or against the sex or colour of him or her who has died, or him or her who is to become entitled to receive by virtue of legislative authority what has been left, if the legislature saw fit to do so.

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Idington J.

It seems to me necessary, from experience of the mode of thought with which enactments such as that in question are sometimes approached, in trying to interpret and construe them, that a full realization of the foregoing elementary principles is necessary.

The amended statute now in question if viewed in light of such conceptions is to my mind very clear and simple.

I agree it might have been expressed in some way that would have rendered the construction put upon it below impossible.

Yet if we pay heed to the interpretation of the definitions of the phrases "aggregate value" and "net value" when used in the enactment, how, I submit with great respect, can the clauses wherein they occur be construed otherwise than as embracing both property within and without the province?

The phrases are defined respectively as follows:—

> "Aggregate value" means the value of the property before the debts, incumbrances, or other allowances authorized by this Act are deducted therefrom, and shall include property situate without the province as well as property situate within the province.
>
> "Net value" means the value of the property, both within and without the province, after the debts, incumbrances, or other allowances or exemptions authorized by this Act are deducted therefrom.

What right have we to read them in any sense which will discard this statutory meaning? And what right have we to read into the enactments in which they appear another meaning than that would give?

And when we look at the whole purview of the statute is it not clear that there is no pretence of intention to tax anything situated beyond the province but merely to apply by means of the ascertainment thereof a scale of tax applicable to that within the province according to certain conditions?

These conditions I think were properly appreciated by the appellant and duly applied by the rules of proportion he has adopted.

And, curiously enough, as illustrative of how the prepossessions and self-interest of men will tend to mislead them, we have the respondent quite content to adopt the rule of proportion so invoked when it is applied to the deduction of the testator's debts of which none existed in the province.

And that is accepted by the court as quite right.

It would have been quite competent, but for the testamentary disposition, for the respondent to have paid all the debts out of British Columbia assets.

The necessary relevant authorities are cited in the dissenting judgments below and need not be repeated here.

I think the appeal should be allowed with costs.

DUFF J.—The decision of this appeal turns upon the proper construction of section 7 of the "Succession Duty Act" as amended by the legislation of 1915. The section so amended provides that where the net value of the property of the deceased exceeds $25,000 and passes through a certain course of succession mentioned in the statute, then

all property situated within the province * * * shall be subject to duty as follows.

Then follows three sub-paragraphs, A, B, & C, of which paragraph C only has relevancy to the present appeal. That paragraph is in these words:

(c) Where the net value exceeds $200,000, at the rate of $1.50 for every $100 of the first $100,000, $2.50 for every $100 of the second $100,000, and five dollars for every $100 above the $200,000.

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Duff J.

Net value as defined in the interpretation section means a net value ascertained by taking into account the value of all property both within and without the province. It seems reasonably clear that the scheme contemplated by the legislature as brought into force by paragraph (c), is that for the purpose of ascertaining the rate in the case of estates falling within that paragraph, the net value of the estate is to be divided into three parts, the first being the sum of one hundred thousand dollars, the second also being the sum of one hundred thousand dollars, the third being the difference between the sum of two hundred thousand dollars and the sum representing aggregate net value; the net value in every case as already mentioned being ascertained by reference to the whole of the property both within and without the province. This division having been made, the rate prescribed by paragraph (c) is the rate of one dollar and fifty cents notionally applied to the whole of the first one hundred thousand dollars of the net value; the sum of two dollars and fifty cents for every one hundred dollars on the second one hundred thousand dollars notionally applied to the whole of that sum, and five dollars for every one hundred dollars above the two hundred thousand dollars notionally applied to the whole estate both within and without the province. In this manner the rate of taxation is ascertained. The property taxed, however, is only the property situated within the province, and in the case of each of the parts only that part of the first one hundred thousand, the second one hundred thousand or the excess over two hundred thousand, as the case may be, which is so situate is subject to taxation according to the several rates prescribed by sub-section (c), for the parts mentioned. This appears to be a simple

and perfectly intelligible scheme applicable alike to estates partly situated within and partly situated without the province, and to estates wholly situated within the province, and the intention of the legislature seems to be expressed with reasonable clearness. The alternative interpretation proposed by Mr. Wilson in his able argument, I think, cannot be maintained on any construction of "net value" in sub-section (c), which is not inconsistent with the definition of that phrase given in the interpretation section.

ANGLIN J. (dissenting).—Although it would appear that in the opinion of the majority of the learned judges who have dealt with this case its determination should turn on whether s. 7 of the British Columbia "Succession Duty Act" (R.S.B.C., c. 217), as amended by s. 4 of c. 58 of the statutes of 1915, is or is not *intra vires* of the Provincial Legislature, I am, with profound respect, unable to discern in it any arguable question of constitutional validity. The subject matter of the taxation being admittedly within the province, I fail to appreciate how it can transcend its legislative jurisdiction to prescribe that the rate of the tax which it is to bear shall depend upon the amount of the decedent's entire estate, whether situate wholly within, or partly without and partly within, the province, or how it could be said if the rate of taxation on the domestic assets were made to increase with the amount of the "net value" of an entire estate comprising foreign assets, that the greater tax consequently levied on the domestic assets in that case would involve an indirect tax on the foreign assets. I agree with Mr. Justice Martin that

> it is not a matter of indirect taxation at all but simply the fixing of a basis of domestic assessment in varying circumstances, domestic and foreign.

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Anglin J.

The respondent's petition does not claim freedom from succession duties. It does not challenge the constitutionality of s. 7 of the statute. It asks merely a declaration that the amount of the duty payable under it in respect of the $290,463.25, net value of the estate of the late Sir William Van Horne, K.C.M.G., situate in British Columbia, is $8,523.16 and not $14,242.10 as claimed by the province. Both parties are agreed that the amount of the taxable property in British Columbia is the "net value" of the decedent's assets in the province and that this "net value" is to be ascertained by deducting from the gross or aggregate value of such assets a part of the debts of the decedent which bears to his whole indebtedness the same proportion as the aggregate value of his British Columbia assets bears to that of his entire estate. Whether this practice is correct or is sanctioned by the statute is therefore a question not presented for our consideration.

The difference between the parties arises from a divergence of views as to the mode of computation directed by s. 7, the material parts of which, as amended, read as follows:—

> When the net value of the property of the deceased exceeds twenty-five thousand dollars, and passes under a will, intestacy, or otherwise, either in whole or in part, to or for the use of the father, mother, husband, wife, child, daughter-in-law, or son-in-law of the deceased, all property situate within the Province, or so much thereof as so passes (as the case may be) shall be subject to duty as follows:—
>
> (a) not applicable.
>
> (b) not applicable.
>
> (c) Where the net value exceeds two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, two dollars and fifty cents for every hundred dollars of the second one hundred thousand dollars, and five dollars for every one hundred dollars above the two hundred thousand dollars.

Counsel representing the Minister of Finance contends that it is not on the entire "first one hundred thousand dollars" worth of property situate in British Columbia that duty at the rate of $1\frac{1}{2}\%$ is to be levied, but on the proportion thereof which would be subject to that rate if the entire estate had been situate within the province—and in like manner as to the "second one hundred thousand dollars'" worth of assets situate in British Columbia. He would read the words "every one hundred dollars of the first one hundred thousand dollars" and "every one hundred dollars of the second one hundred thousand dollars" as meaning in each case, "that portion of every one hundred dollars which bears to it the same proportion as the amount of the net value of the estate within British Columbia bears to the net value of the whole estate wherever situate." The respondent executor, on the other hand, maintains that this construction involves interpolating an idea which is not only not expressed in the statute but is excluded by its terms. One hundred dollars, he says, means that sum and not some part or proportion of it varying as the relative amount of foreign assets comprised in the estate is greater or less.

With Mr. Justice Galliher I view this as the real, if not the sole, question for decision; and with that learned judge I would determine it in the respondent's favour. While unable to read the words "net value" in clause (c) as the learned Chief Justice of the Court of Appeal does (i.e., as having a meaning different from that which the same words bear in the first line of s. 7—viz., the meaning given to it by the definition found in s. 2), I agree with what I understand to be that learned judge's view and also that of Mr. Justice Galliher, that it is the entire first one hundred thousand

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dollars' worth of "all property (of the decedent) situate within the province" that is declared by clause (c) of s. 7 to be liable to a duty of $1\frac{1}{2}\%$ and the entire second one hundred thousand dollars' worth of the same property that is declared to be liable to a duty of $2\frac{1}{2}\%$, and that the 5% rate of duty applies only to the excess over the two hundred thousand dollars worth of assets situate within the province. The statute, in my opinion, plainly says so.

Omitting the introductory forty-six words of s. 7, which serve to define the cases that fall within the operation of the section as a whole, and also the introductory words of clause (c) "where the net value exceeds two hundred thousand dollars," which in like manner serve to define the cases that fall within the purview of that particular clause, the operative part of the section, as applicable to the case before us, reads as follows:—

> All property situate within the province * * * shall be subject to duty as follows:—
>
> At the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, two dollars and fifty cents for every one hundred dollars of the second one hundred thousand dollars, and five dollars for every one hundred dollars above the two hundred thousand dollars.

That this provision was intended to apply to estates consisting of property wholly within the province as well as to those comprising property partly within and partly without the province is conceded. While in the former case the appellant takes the statute just as it is and says that it fully expresses the intention of the legislature, in the latter, he would apply clause (c) as if it read as follows, the words in brackets being interpolated, except the concluding words, which are substituted:

(c) Where the net value exceeds two hundred thousand dollars, (and part of the estate consists of property not within the province) at the rate of one dollar and fifty cents for (a part of) every one hundred dollars of the first one hundred thousand dollars, (which bears to the sum of one hundred dollars the same proportion as the net value of the estate within British Columbia bears to the net value of the entire estate of the decedent) two dollars and fifty cents for (a like part of) every hundred dollars of the second one hundred thousand dollars, and five dollars for every one hundred dollars (worth of the rest of the estate within the province).

In the case at bar the appellant would apply the 1½% rate to $4,683.84, the 2½% rate to $4,683.84 and the 5% rate, not as the statute says to "every one hundred dollars above the two hundred thousand dollars," but to "every one hundred dollars above $9,366.48."

Not only does clause (c) of s. 7 appear to say in such plain language that the lower rates of 1½% and 2½% are the rates of duty to be taken in respect of the first one hundred thousand dollars' worth and the second one hundred thousand dollars' worth of property situate within the province respectively that no excuse is afforded for any departure from Lord Wensleydale's well-known "golden rule of construction," but as part of a taxing Act it does not admit of an equitable construction in favour of the Crown in order to carry out some presumed intention of the legislature in the direction of equality which has not been expressed. *Lumsden* v. *Commissioners of Inland Revenue* (1). The subject of taxation must come within the letter of the law. We cannot justify reading into this taxing statute any words such as counsel for the Minister argues the legislature must have meant it to contain to increase the burden of the tax, whether on a plea of equalization or any other. It may be that if the Act be read literally, as I think it must be, the taxation on the $300,000 of British Columbia assets

(1) [1914] A.C. 877, at p. 897.

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owned by the decedent will be less than it would have been had all the rest of his estate of $6,371,374.75 been likewise situate within the province. But, if that be a result which the legislature did not intend, it is reached merely because it has expressed an intention to that effect and has failed to express any other intention. The remedy is in its hands and must be sought from it and not from the courts. *Attorney General* v. *Milne* (1).

I would dismiss the appeal with costs.

BRODEUR J.—The question in this case is whether the British Columbia Government should levy a succession duty, on Sir Wm. Van Horne's Estate, of $14,242.10, as claimed by the appellant, or of only $8,523.16, as contended by the respondent and as decided by the courts below.

The whole difficulty is as to the construction of section 7 of the "Succession Duty Act" of British Columbia and as to the way of computing the rate of duty. There was a suggestion by one of the judges below that the Province had no right to take into account the extra-provincial assets to determine the net value of the estate. But this constitutional aspect was not, and with reason, accepted by the other judges. It seems to me that a province acts within its power in enacting that the property of a deceased person situate outside the province should be considered in arriving at the aggregate value. *Re Renfrew* (2). There is no attempt in the present statute to tax property outside the province; but it simply declares that the property situate within the province will bear a heavier duty when the whole estate is larger.

(1) [1914] A.C. 765, at pp. 771, 774, 780-1. (2) 29 O.R. 565.

The provincial authorities in determining the rate of duty in this case have taken into account all the property of the deceased both within and without the province and have subjected the proportionate part of such property within the Province to the duty which would have been payable if the whole estate had been within the province. This mode of calculation is not only a fair and equitable one, but is the one authorized by the statute.

The respondent contends that the rate of succession duty should be determined with reference only to the net value of the property of the deceased within the Province.

Section 2 of the "Succession Duty Act" enacts that the net value mentioned in section 7 means the value of the property both within and without the Province.

It is common ground that the liabilities of the estate should be charged proportionately on the property in the province and it seems to me that the same rule should be observed as to the payment of the rates of succession duty.

The appeal should be allowed with costs throughout and the claim as made by the British Columbia Minister of Finance be declared valid.

MIGNAULT J. (dissenting).—As I view this case, it involves merely the construction of the British Columbia "Succession Duty Act," chapter 217 of the Revised Statutes of 1911, as amended by section 4 of chapter 58 of the statutes of 1915. No constitutional problems arise and the right of the British Columbia legislature to levy a succession duty of any amount on property within the province passing by the death of a person domiciled within or without the province, has not been disputed.

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The late Sir William Van Horne left an estate of the aggregate value of $6,371,374.73, with liabilities of $169,989.56, so that the net value of the estate was $6,201,385.17. Out of the aggregate value, 2,000 shares in the British Columbia Sugar Refinery, Limited, were in British Columbia and their agreed value was $300,000. The appellant demanded $14,242.10, as succession duty, and the respondent, managing executor of the estate, petitioned the court to have it declared that the claim of the appellant proceeded upon an erroneous basis, and that the sum payable for succession duty was $8,523.16, and no more.

By the statute "aggregate value" means

> the aggregate value of the property before the debts, incumbrances, or other allowances authorized by this Act are deducted therefrom, and shall include property situate without the Province as well as property situate within the Province,

while "net value" is defined as

> the value of the property, both within and without the Province, after the debts, incumbrances, or other allowances or exemptions authorized by this Act are deducted therefrom.

Section 7 of the statute is as follows:

> When the net value of the property of the deceased exceeds twenty-five thousand dollars, and passes under a will, intestacy, or otherwise, either in whole or in part, to or for the use of the father, mother, husband, wife, child, daughter-in-law, or son-in-law of the deceased, all property situate within the Province, or so much thereof as so passes (as the case may be) shall be subject to duty as follows:
>
> (a) Where the net value exceeds twenty-five thousand dollars, but does not exceed one hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars;
>
> (b) Where the net value exceeds one hundred thousand dollars but does not exceed two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first hundred thousand dollars and two dollars and fifty cents for every one hundred dollars above the one hundred thousand dollars;
>
> (c) Where the net value exceeds two hundred thousand dollars, at the rate of one dollar and fifty cents for every one hundred dollars of the first one hundred thousand dollars, two dollars and fifty cents for every hundred dollars of the second one hundred thousand dollars, and five dollars for every one hundred dollars above the two hundred thousand dollars.

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I am of opinion, on the construction of this section, that the property subject to succession duty is "all property situate within the province," and inasmuch as the property in British Columbia of this estate exceeded in value $200,000. the succession duty must be calculated according to paragraph (c) of section 7.

The property in British Columbia belonging to the estate amounted, I have said, to $300,000. It appears to have been common ground between the parties that from this $300,000 should be deducted the sum of $9,536.75, being a share of the total liabilities of the same proportion as the sum of $300,000 when compared with the aggregate value of the whole estate, thus leaving a net value in British Columbia of $290,-463.25. It is on the basis of this reduction of the assets in British Columbia that both parties have proceeded, and I express no opinion whether the reduction should have been made.

The appellant's mode of calculation, which I copy, correcting some misprints in figures, from the respondent's factum, no objection having been taken to the accuracy of the statement by the appellant's counsel, is as follows:

> Total amount of estate, less debts, $6,207,385.07; agreed value of property in B.C. after deducting proportion of debts, $290,463.25. The appellant then divided $6,207,385.07, the whole estate, by $290,-463.25, the agreed net value of the British Columbia property, the quotient being 21.3496. Then to ascertain the duty payable he divides the first $100,000 by 21.3496, which is $4,683.84, and 1½% on this sum is $70.24.
>
> The same process for the next $100,000 at 2½% produces $117.09.
>
> Then the appellant deducts twice $4,683.84, i.e., $9,367.68, from the value of the property in British Columbia after deducting the proportion of the debts, viz.: $290,463.25, leaving $281,095.57, and upon this sum charges 5%, i.e., $14,054.77; the result being: first $100,000 at 1½%, $70.24; second $100,000 at 2½%, $117.09; the remainder, viz., $281,095.57, at 5%, $14,054.77. Total, $14,242.10.

The appellant strongly relies on the statutory definitions of "aggregate value," and "net value" given

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above, and contends that when paragraph (*c*) of section 7 speaks of the "net value" exceeding $200,000, the "net value" referred to is the net value of the property both within and without the province. Even supposing this construction to be sound, the rule of paragraph (*c*) must nevertheless be followed, and the rate of taxation is 1½% on the first hundred thousand dollars, 2½% on the second hundred thousand dollars, and 5 per cent above the two hundred thousand dollars. The intention of the legislature is clearly shown by the amendment made in 1915 to section 7, which section, before this amendment, in the case of a succession of more than $200,000.00, required the payment of $5.00 on every $100.00 of the net value of the estate. The effect of the amendment was to charge, even in the case of a net value of more than $200,000.00, 1½ per cent. on the first $100,000.00, 2½ per cent. on the next $100,000.00 and 5 per cent. on the excess over $200,000.00. Moreover, as stated, the subject of this taxation is "all property situate within the province" (see also subsection (*a*) of section 5) and unless the legislature be held to have intended to impose a tax on property outside the province, which it could not do, the property only which was situate within the province is taxed according to the scale indicated.

Calculating therefore in conformity with this scale the succession duty on the sum of $290,463.25, agreed upon as the net value of the assets in British Columbia, the amount due is $8,523.16, as found by the two courts below.

I am therefore of opinion that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Wm. D. Carter.*

Solicitors for the respondent: *Wilson & Whealler.*

THE AMERICAN NATIONAL RED......APPELLANT;
CROSS (DEFENDANT).................

1920
June 4.
Oct. 12.

AND

GEDDES BROTHERS (PLAINTIFFS) RESPONDENTS.

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

Contract—Sale of goods—Abandonment by vendor—Acceptance—Notice—Subsequent acts of vendor.

G., by contract in writing, agreed to sell goods to the American Red Cross but before any were delivered wrote the latter that he would be unable to carry out his contract. The Red Cross then made an entry on its books that the contract was cancelled.

Held, reversing the judgment of the Appellate Division (47 Ont. L.R. 163) Mignault J. dissenting, that though the Red Cross did not give notice to G. that the abandonment was accepted the contract was terminated as the subsequent acts of G., and especially his failure to deliver the goods at the times specified showed that he treated it as at an end and believed that the other party had elected to accept.

Per Anglin J.—The conduct of G., viewed in the light of his letters and the terms of the contract, amounted to an intimation of abandonment and gave the Red Cross an option to rescind which was sufficiently exercised when delivery was tendered.

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 plaintiffs.

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

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

(1) 47 Ont. L.R. 163.

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Tilley K.C. for appellant.

D. L. McCarthy K.C. for respondents.

THE CHIEF JUSTICE.—This action is one brought to recover damages for non-acceptance by the defendants, appellants, of a quantity of woollen sweater yarn tendered by the plaintiffs under a contract, called throughout order 1788, for the sale by the plaintiffs to the defendants of 20,000 pounds of such yarn.

There is no dispute between the parties as to the facts and the single question argued at bar and to be disposed of on this appeal is whether an unequivocal and absolute written renunciation by the plaintiffs of their contract for the delivery of the yarn contained in a letter of the 2nd October, 1918, had been adopted by the defendants.

On the receipt of plaintiff's letter of renunciation the defendants' manager, Mr. Reed, gave instructions that the contract was to be marked "cancelled" on the defendants' records, and it was so marked, but no letter was written to plaintiffs notifying them that their renunciation of the contract had been accepted. The defendants had forwarded written instructions to the plaintiffs as to the shipping of the yarn dated the same day as the plaintiffs had sent their renunciation letter. The letter covering the shipping instructions sent by the defendants, and that embodying the renunciation by the latter of the contract crossed each other.

The plaintiffs, however, when they received these shipping instructions knew they must have been forwarded before the receipt by the defendants of the plaintiffs' letter of renunciation of the contract.

After the 5th of October, when these crossing letters were received by the respective parties, one sending shipping orders, and the other renouncing the contract, there were no further communications between them respecting this yarn now in dispute, being order No. 1788, until December 10, 1918, when portions of the yarn were offered for delivery to the defendants, and were refused. But it does not seem to me that this subsequent offer materially affected the legal position of the parties.

The contention on the part of the appellants was that the plaintiffs' letter of the 2nd October, 1918, being an unequivocal and absolute refusal to carry out contract 1788, was received and adopted by the defendants, who at once cancelled the order in their records. They further contended that the plaintiffs' failure afterwards to deliver the 4,000 pounds of spot yarn, immediately on receipt of shipping instructions, and the first monthly instalment of 2,000 pounds within a month after receipt of shipping instructions, was evidence that they were aware the defendants had accepted their repudiation.

The question then, it seems to me, in every such case must be whether under the proved facts adoption of one party to a contract of its repudiation by the other party may be inferred from the proved facts, or whether an actual notice of acceptance or adoption must be given by the party receiving notice of the repudiation to the party repudiating.

It seems to me from reading the authorities that such an actual notice of acceptance or adoption is not necessary but that adoption may be reasonably inferred from all the circumstances as proved.

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The Chief Justice.

It would, of course, have been better business on the part of the defendants to have acknowledged and accepted plaintiffs' letter of renunciation, but that they as a fact did accept it is proved by the evidence of their having cancelled the order in their records. Then, what view did plaintiffs entertain on the crucial point of their repudiation having been accepted? Undoubtedly they fully understood and believed it had been, as the evidence of Gordon Geddes clearly shows. He says at page 10:—

> Q.—Now did you receive any reply to your letter of October 2nd?
> A.—No.
> Q.—Then what did you do?
> A.—Well, I waited about three weeks, as near as I can recall, and was firmly convinced—I waited what I thought was a reasonable time—and felt Mr. Reed was taking our letter as final, and the order would be cancelled.

It is true, he afterwards changed his mind, for reasons best known to himself, without giving defendants any notice, or inquiring from them whether they were satisfied with his renunciation of the contract or not.

However, we have here the explicit evidence of the letter of renunciation; its receipt by the defendant; the cancelling of the order in its books, and the firm conviction sworn to by the renouncing party that the contract was at an end. No notice of any kind was sent by the plaintiffs of their desire or intention to withdraw their renunciation while, as a matter of fact, they failed to deliver or offer delivery of two instalments of yarn which the contract specifically called for, namely 5,000 pounds as soon as reasonably possible after the 5th October, and 2,000 pounds which should have been forwarded about the 5th of November. In my judgment, the fair inference which should be drawn from all these proved facts is that the contract had been put an end to by consent and assent of both parties.

I can see little difference between writing an adoption of the renunciation on the letter containing it, or directing the cancellation of the contract renounced in the records of the party receiving the renunciation. In either case, it is some evidence of adoption of the renunciation, and a letter to the renouncing party, though a prudent and businesslike course, is not an essential necessary to complete the adoption in cases where facts proved allow of a fair inference of acceptance of renunciation being drawn.

The law in cases of this kind is laid down by Lord Esher in giving judgment in the case of *Johnstone* v. *Milling* (1), at page 467, as follows:—

Accordingly the defendant has recourse to the doctrine laid down in several cases cited, the best known of which is perhaps the case of *Hochster* v. *De la Tour* (2). In those cases the doctrine relied on has been expressed in various terms more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or. in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned declares his intention then and there to rescind the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end for the purpose of the action for wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue. Such appears to me to be the only doctrine recognized by the law with regard to anticipatory breach of contract.

(1) 16 Q.B.D. 460. (2) 2 E. & B. 678.

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The Chief Justice.

I accept this extract as correctly stating the law on the subject which I think applicable to this present appeal. I find that the reasonable and necessary inference from the proved facts is that the plaintiffs' letter of repudiation of 2nd October, never withdrawn or qualified by them, had been adopted and acted upon by the defendants and the contract put an end to by mutual assent. See also *Frost* v. *Knight* (1).

I would, therefore, allow the appeal and dismiss the action with costs throughout.

IDINGTON J.—Mr. Gordon Geddes, a member of the respondent firm, tells that they were carrying on, in Sarnia, Ontario, a retail dry goods and woollen business as well as jobbing when he, in the early part of August, 1918, went to Washington to solicit orders from the appellant "for wool, knitting yarn."

He met, on that occasion, Mr. Reed, an associate director of the Bureau of Purchases for the appellant, and they agreed on terms for two orders to be sent respondent.

One order was to be for sock yarn, which is now, save incidentally in its results as shedding light on the course of the business, out of the question raised herein.

The other was to be yarn for knitting sweaters. That was, pursuant to the agreement reached orally, forwarded on the 14th August, 1918, to respondent. It was numbered and will be referred to herein as number 1788.

To induce the giving of it, Mr. Gordon Geddes had represented that respondents had on hand, ready for shipment, 4,000 pounds of the desired quality.

(1) L.R. 7 Ex. 111.

The order No. 1788, so forwarded by appellant specified 20,000 pounds at a price of $1.80, delivery 4,000 pounds at once, and 2,000 pounds a month. Shipping instructions to be given later—and to ship, freight collect, f.o.b. Sarnia.

Presumably this was received in due course by mail a couple of days later.

The first response was dated 24th August, 1918, and so far as related to order No. 1788 was as follows:—

Re your Order No. W1788 for 20,000 lbs. knitting yarn.

We regret to say there is some doubt about our ability to fill this order.

The 4,000 lbs. spot yarn was sold and delivered to the American Red Cross at this same price prior to receipt of your order, and the mill from whom we bought this yarn claims they are unable to deliver the balance.

We will make every effort to secure this delivery, and will force the issue at once, and if we receive all or any part of it, will deliver it as per your order.

On 26th September, 1918, the appellant wrote as follows:

Sarnia, Canada,
Sept. 26, 1918.

Messrs. Geddes Bros.,
Sarnia, Canada.

Gentlemen:—

We write you in reference to order numbers W 1787, calling for 35,000 pounds of worsted yarn, and order W 1788, calling for 20,000 pounds of woollen yarn.

We received your letter of August 26th, and do not understand your letter, and we will expect this yarn delivered as contracted with us./

I would ask you to wire at once how much of this yarn can be shipped immediately, and when contract can be completed as we are issuing shipping instructions now on all the yarn we have purchased and wish to know just when we can count on delivery.

Be sure to wire on receipt of this letter, and oblige,

Respectfully yours,
Edward T. Reed,
Associate Director,
Bureau of Purchases.

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And on 2nd October, as follows:—

Washington, D.C.,
Oct. 2nd, 1918.

Geddes Bros.,
Sarnia, Canada.

Gentlemen:—

Referring to your letter of September, 25th, we will say that complete shipping instructions are being sent you for order No. Washington 1787 and 1788, and we will be glad if prompt shipments can be made on both these orders.

Respectfully yours,
Edward T. Reed,
Associate Director,
Bureau of Purchases.

That was accompanied by the following shipping instructions relative to No. 1788:—

To Geddes Brothers,
Sarnia, Canada.

Please ship the following to addresses specified below. Ship via Freight Collect.

20,000 lbs., Code No. 1033B, Yarn.

Distribution:

6,200 lbs. Atlantic Division, American Red Cross, 20 E. 15th Street, New York City.

7,000 lbs. Lake Division, American Red Cross, 724 Prospect Ave., Cleveland, Ohio.

6,800 lbs Northern Division, American Red Cross, 10th and Nicollett Ave., Minneapolis, Minn.

Alternate shipments to the Different Divisions.

Approved: Edward T. Reed,
For Director, Bureau of Purchases.

I can find no letter of 25th September, 1918, in the case, or explanation relative thereto.

The letter of 2nd October, 1918, crossed in the mail the following from respondents:—

Sarnia, Canada,
Oct. 2nd, 1908.

Mr. Edward T. Reed,
c/o American Red Cross, Bureau of Purchases,
National Headquarters, Washington, D.C.

Dear Sir:

Replying to your favour of the 26th inst., we wired you to-day as per your request, and enclose confirmation herewith. Regarding your order, No. 1787, for 35,000 pounds of worsted yarn, we expect to be able to deliver this complete, and as we stated to you in our telegram, have approximately 6,000 pounds ready for immediate delivery, which we are holding until we receive shipping instructions from you.

Regarding your order No. 1788, for 20,000 pounds of woollen yarn at $1.80, it will be impossible for us to deliver this as the mills are not able to make it, they state, on account of having government orders which require their whole attention.

At the time this order was taken, i.e., August 14th, Mr. Geddes pointed out to you that there was a possibility that it might not be possible for us to fill these orders complete, and we believe the circumstances were outlined to you at that time. We wrote you on August 26th, explaining just what we would be able to do in reference to these orders and as we received no reply, we presumed you understood the situation.

We greatly regret, naturally, that we are not able to fill this order, but it is something over which we have no control, and we trust that under the circumstances you will consider this entirely satisfactory.

Yours very truly,
Geddes Bros.

No such telegram is in the case, nor is there any telegram from respondents as requested by appellant's letter of 26th September, 1918.

The appellant, on receipt of the letter, marked in their books that the order No. 1788 was cancelled; but, evidently, in absence of such telegram as requested and through pressure of work, omitted to write or wire such cancellation had been made.

Nothing more, however, was heard, in regard thereto, by appellant, until the 10th day of December, 1918, when they received from Bates & Bates notification of a shipment by them from Montreal account respondents.

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The correct inference of cancellation agreed to had, however, been properly drawn as appears from the evidence of said Gordon Geddes who testifies as follows:—

Q. Then what did you do? A. Well, I waited three weeks, as near as I can recall, and was firmly convinced—I waited what I thought was a reasonable time—and felt Mr. Reed was taking our letter as final, and the order would be cancelled. After I waited a certain length of time I began to get worried about it, and having the last two exhibits in my mind, I felt perfectly satisfied that Mr. Reed would force us to deliver that yarn. I got busy and canvassed the jobbing trade, and places we did not usually expect to get yarn in that quantity. I covered London, Toronto, and finally got to Montreal.

Q. With what result? A. I found some small quantity at Duncan Bell's, at a high price, and I thoroughly covered all the jobbing houses there and located another small quantity through McIntyre, Son & Company, also at a high price.

He drew the correct inference but failed to telegraph the fact though he had been, as appears above, urged to do so by the letter of appellant of 26th September, above quoted, which the respondents must have received four or five days before wiring as desired.

I am unable to reconcile with any sense of fair dealing such conduct on his part.

Instead of doing as they should have done they changed their minds. I suspect by reason of their omission to fairly consider the whole correspondence and act accordingly, that the true reason for change of mind was not any worry about what Mr. Reed would do, but a change of market more favourable to them, six weeks later.

It hardly lies in the mouth of one so failing himself to act and answer promptly to complain of another he so treated doing the same. Had they done so on receipt of the letter of 26th September, in all probability we never would have had the confusion presented by the crossing letters of the 2nd October or, I venture to think, this lawsuit.

Yet the basis of the argument in the way of excusing the respondents' conduct in first repudiating their contract, making, pursuant to such repudiation, default from month to month and then suddenly turning round and tendering goods in pretended fulfilment of it, is that the appellant had failed to answer a letter.

Moreover the argument overlooks the fact that respondents had, by their letter of 24th August, 1918, which I quoted above, assured the appellant that they would make every effort to secure this delivery and would force the issue at once, etc., etc. What effort then made to carry out the said promise does not appear.

It certainly does not appear a very solid basis upon which to rest such an argument when they kept appellant waiting a whole month to hear the result of such assurances as said letter contained.

And when they got the letter of 26th September from appellant referring thereto insisting upon due fulfilment of their contract, instead of pleading for forbearance they tell appellant that this one is absolutely impossible of fulfilment.

If that is not an absolute repudiation of it, what would be? Must we have violent and ill-natured words used to render repudiation effective?

Indeed it is fairly arguable on the evidence that the respondents never had become bound and this letter was a distinct refusal to become so and hence nothing more to be said. They doubtless hoped for generous treatment, and got it by the actual cancellation.

The other contract got from appellant, at same time, and by virtue of the same soliciting effort, and which in a close sense, as to giving of orders for shipment, and all else ran concurrently with that now in question, has been fulfilled or adjusted in a commonsense fashion.

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They were grouped together in the correspondence up to the point when the respondents said they found that one now in question impossible of fulfilment, and then much correspondence continued relative only to the other. It evidently was assumed by both parties that that alleged contract had ended.

The respondents must have been much more dense than I take them to be if they did not infer and clearly understand under all the foregoing circumstances that their abandonment or repudiation of the other order now in question had been assented to by appellant.

There were half a dozen shipments under 1787, and all implied therein relative to that contract recognized it as on foot; and most of these before the appellant had ever heard of anything to suggest that the respondents pretended that they were assuming appellant recognized the order now in question as being on foot and in force.

How could respondents imagine that appellant during all that time and under such circumstances was distinguishing thus its treatment of one contract and ignoring its twin, unless by reason of assent to the respondent's renunciation.

On November 6th appellant wrote respondents asking how fast shipments will be made on Order No. 1787, but made no reference to any claim under order No. 1788, now in question.

Seeing this was but a few days after Mr. Geddes had, as he professes, begun to get worried lest he might be called upon to fill the Order No. 1788, it seems very remarkable he did not cease worrying or ask how it came about that appellant seemed only concerned as to order No. 1787.

Indeed he carefully abstained, after the 2nd October, 1918, from ever referring to the matter of order No. 1788 in any communications he had with appellant.

Instead of worrying about being possibly liable to be called on for delivery thereunder, a careful study of all the evidence leads me to interpret his conduct early in November as the result of a treacherous intention to take advantage, if he could safely, of the omission, on the appellant's part, to formally assent by letter to the repudiation of respondents.

The numerous cases cited by the respective authors and editors of Benjamin on Sales, and Blackburn on Sales, relative to contracts for delivery by instalments, fail to disclose anything like a parallel to the features of this case. And those cited in argument fail to fit these peculiar features.

We have, however, as the result of much discussion, the opinions of many eminent judges on the question of what may constitute such a renunciation as to relieve the other party to the contract.

I accept that expressed by Lord Coleridge in the case of *Freeth* v. *Burr* (1), at page 213, as follows:—

> In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free.

(1) L.R. 9 C.P. 208

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Apply this to the terms of the respondents' letter declaring it absolutely impossible to fulfil the contract as interpreted by both himself and Mr. Reed, and the fact that the latter did accept and cancel the contract and the conduct of respondents in accord with that assumption, and I think we have a safe guide which leads to the conclusion that respondents are not entitled to recover.

The appellant could not on the facts disclosed have recovered anything for any breach of contract.

On these grounds alone the appellant is entitled to succeed herein.

But, beyond all that and the relevant law I cite as to one aspect of the case, there is to my mind clear and convincing evidence to be inferred from the steps taken by and the conduct of both parties, that there was a well understood mutual rescission of any contract that by any possible conception of the facts may have existed.

Moreover there seems no ground whatsoever upon which to rest the judgment recognizing a right to insist on delivery of the goods after the times specified in the contract.

If the times fixed thereby are to be observed, then the time for delivery as to the first 4,000 pounds was on the 14th August, subject always, of course, to the shipping order and by the time that had been given in the letter of 2nd October, the time had then elapsed for immediate shipment of at least 6,000 pounds, and for another 2,000 pounds before respondents had thought of buying a single pound to ship.

I am unable to understand how in any view of the facts the respondents could claim any rights as to these early instalments, whatever might be said as to the later instalments on another view of the facts than I hold.

And as to these later instalments if the contract could be held on foot, that would seem to have been ended and reduced to a question of damages by the frank declaration of appellant that it could take no further deliveries and must submit to compensation in cases where the contract still in force.

An armistice having been declared on the 11th November, 1918, the appellant made an appeal to all those who had sold it goods to cancel their contracts and adjust on an equitable basis.

That to the respondents, dated 27th November, 1918, reads as follows:—

Washington, D.C.,
November 27th, 1918.

Geddes Brothers,
Sarnia, Ontario, Canada.
In Re: Order Washington 1787.

Gentlemen:—

On November 20th the War Council of the American Red Cross sent you the following telegram:—

"In view of the signing of the armistice the needs of the Red Cross for merchandise have been very much reduced. We would appreciate it therefore if you would be willing to cancel on an equitable basis such part of our contract with you as has not already been shipped. Will you be good enough to advise us if you will assist us in this matter?
War Council, American Red Cross."

We have have not as yet heard from you in reference to this telegram and we hope very much that you will be able, on an equitable basis, to do something in the way of cancellation of unshipped part of order.

I will be in Washington the first four days of next week, and will appreciate, very much, if you could take the matter up with me then.

Respectfully yours,

Edward T. Reed,
Associate Director. Bureau of Purchases.

And to that respondents replied as follows:—

Sarnia, Canada,
Dec. 2, 1918.

Mr. Edward T. Reed, Associate Director,
Bureau of Purchases, American Red Cross,
Washington, D.C.

Dear Sir:

We have your letter of November 27th, and beg to state that we did not receive telegram from the War Council of the American Red Cross. Your letter is the first intimation that you desire to cancel the balance of your order.

We suggest that you outline to us the basis on which you desire us to accept said cancellation, and we will do anything possible to meet you.

Yours very truly,
Geddes Bros., per Gordon G. Geddes.

And then appellant made a special appeal to respondents by the letter of 5th December, 1918, as follows:—

December 5, 1918.

Geddes Brothers,
Sarnia, Ontario, Canada.
In Re: Order Washington No. 1787.

Gentlemen:—

We are in receipt of your letter of December 2nd and have wired you as per enclosed "confirmation telegram." We would like to have you accept cancellation for the unshipped portion of this order, as you know, owing to the present conditions the needs of the Red Cross have been very greatly lessened and we are not in position to use the supplies of yarn we have on hand and bought. This yarn was not bought for business purposes, and we are not in position to, and should not, throw a lot of yarn on the market, and we have asked firms to accept cancellation.

We have been very much pleased with the manner in which practically all of the firms, having orders from us, have accepted cancellation, and we certainly hope that you can do the same. We believe you appreciate, fully, the situation and the facts that the Red Cross is not organized, and should not be organized to dispose of merchandise, and we hope that you can accept cancellation of the unfilled portion of this order and relieve us of this amount of yarn.

In reference to this cancellation you will remember that we placed an order with you—No. 1788, for 20,000 pounds of yarn and had entered into this contract in good faith with you, and you cancelled this order—and without making any trouble in regard to it, we accepted this cancellation on your part although we had grounds for demanding the delivery of this yarn, and we hope that you will go over this matter carefully and consider it from every side.

I will appreciate it if you could advise me by wire, promptly, as to what you will do in the matter.

Respectfully yours,
Associate Director,
Bureau of Purchases.

That of the 27th November, and this, of course, was an appeal in respect of order No. 1787, and so recognized by the respondents' reply to the former. They made no allusion to order No. 1788, and no reply to this later one.

Meantime respondents were assiduously working away through Bates & Bates, to get ready to tender goods under order 1788.

The goods had not yet been shipped or delivered f.o.b. as nominated in the bond. And they never were so. The contract provided for the delivery at Sarnia, f.o.b., and that term never was departed from, but unfortunately escaped the observation of the court below or I imagine we never would have been troubled with this appeal.

I, therefore, fail to see how respondents are entitled to recover by virtue of a tender at a place other than that specified in the contract, and never named or dreamed of.

I think the appeal should be allowed with costs throughout, and the action dismissed with costs.

DUFF J.—I am unable to agree with the conclusion at which the Appellate Division arrived. I do not find it necessary to pass any opinion upon the point whether the seller, having made default in delivery of part of the goods, the subject of a sale in which delivery

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is to be made by instalments, and such default in itself either constitutes sufficient evidence of an intention of the party to abandon the contract, or is accompanied by a declaration on his part to that effect, it is necessary that the buyer must notify his intention to concur in the abandonment of the contract before tender by the seller of delivery of an instalment deliverable at a later date.

There are two grounds upon which, in my opinion, the respondent's action fails.

First: The basis upon which the parties entered upon their agreement was, I think, the fact, which the appellants believed upon the representation of the respondents, that they had 4,000 pounds of yarn ready for immediate delivery; and the delivery of that quantity of yarn forthwith upon the receipt of shipping instructions was, I think, an essential term of the contract breach of which invested the appellants with the right to treat the contract as no longer binding upon them, and I see nothing whatever in the course of events as divulged by the evidence which could be successfully relied upon by the respondents as depriving the appellants of their right to declare their election after the tender of delivery by the respondents.

Secondly: It is abundantly shown that the respondents quite plainly declared their intention not to fulfil the terms of the contract, and that they interpreted the conduct of the appellants as expressing an intention on their part to concur in that abandonment. I think that was a perfectly reasonable interpretation to put upon the appellants' conduct when viewed by the respondents as a whole including the pressing communications of the 26th September, and the 2nd of October, followed by the silence which succeeded the despatch of the respondents' letter of the latter

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date. That was a perfectly reasonable interpretation and was the interpretation upon which the respondents continued to act until circumstances arose which seemed to offer them more favourable prospects in another direction. It is equally clear that the appellants intended to acquiesce in the abandonment of the contract by the respondents. We have here, then, a declared intention to abandon on part of the seller and a concurrence in fact on the other side accompanied by conduct which was treated by the seller as evidencing such concurrence.

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

ANGLIN J.—The facts out of which this litigation has arisen are fully stated in the judgments delivered by Mr. Justice Rose and in the Appellate Division (1). After much consideration and not a little hesitation—the latter due largely to the respect in which I hold the opinion of the learned trial judge unanimously affirmed by the Divisional Court—I have reached the conclusion that this appeal must be allowed and the action dismissed.

Although the defendants have pleaded that the acceptance of their order by the plaintiffs was conditional—and this would seem to have been the position taken by the plaintiffs in their letters of the 24th of August and the 2nd of October—the evidence puts it beyond reasonable doubt that the sending of the order itself was an unconditional written acceptance or confirmation of acceptance by the defendants of an oral proposal made by the plaintiffs, which had probably been orally accepted by the defendants when made, and that there was in fact a firm contract in the terms of that order.

(1) 47 Ont. L.R. 163.

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Parol evidence adduced to show that the definite terms of delivery clearly specified were not intended to bind the plaintiffs, but that they were entitled to deliver the wool contracted for as speedily as it could be procured, was, I think, inadmissible. The real question on this branch of the case is whether the contract was rescinded—whether the conduct of the parties was such that the proper inference from it is mutual rescission, or whether the plaintiffs so acted as to justify the defendants in declining to carry out the contract when they did.

There is no reason for not fully accepting the view, which I gather prevailed in the trial court and on appeal, that both the plaintiffs and the defendants acted throughout in entire good faith. That of the defendants is not impugned and the fact that the plaintiffs made purchases at the beginning of November, before there was any material decline in prices, to enable them to carry out their contract would seem sufficient to establish that they were also acting *bonâ fide*. The defendants believed the contract was put an end to by the plaintiffs' letter of the 2nd of October; the plaintiffs early in November believed that it was still on foot and that they might be held to performance.

But it must be at least equally clear that both parties were sadly lacking in ordinary business diligence. A letter written by either of them to the other within a reasonable time after the receipt of the letters of the 2nd of October, 1918, which crossed, such as ordinary prudence would seem to have required from each, would have prevented the situation now existing from which serious loss must inevitably fall on one or the other.

If the case should be viewed purely as one of anticipatory breach effected by the plaintiffs' letter of the 2nd of October intimating that they could not supply the yarn for which they had contracted, I should have agreed that the defendants could not succeed because of their failure to communicate by word or act their election to accept this declaration as a renunciation of the contract and to treat the attitude of the plaintiffs as having put an end to it. *Scarfe* v. *Jardine* (1), at pages 360, 361; *Johnstone* v. *Milling* (2), at pages 469, 471; Ewart on Waiver Distributed, pp. 89 and 95. The first intimation of acceptance is found in defendant's letter of the 5th of December. Long before that letter was written the plaintiffs had changed their position in the belief that they were still bound by their contract.

But, in my opinion, the subsequent conduct of the parties is in this case of paramount importance and, as put by Lord Coleridge C.J., in *Freeth* v. *Burr* (3), at page 213, "the real question for consideration" is whether, having regard to the terms of the contract and viewed in the light of the plaintiffs' letters of the 24th of August and the 2nd of October, their subsequent inaction and silence

> do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract * * * (do not) evince an intention no longer to be bound by the contract.

After referring to this passage from Lord Coleridge's judgment with approval in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (4), the Earl of Selborne L.C., adds, at pp. 439 and 440:

(1) 7 App. Cas. 345.
(2) 16 Q.B.D. 460.
(3) L.R. 9 C.P. 208.
(4) 9 App. Cas. 434.

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It appears to me according to the authorities and according to sound reason and principle that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion.

The same extract from the judgment of Lord Coleridge was again accepted as stating "the true test" by Lord Collins in *General Bill Posting Company* v. *Atkinson* (1), at page 122.

Now what was the conduct of the parties material to the question at issue? Having intimated by their letter of the 2nd of October that they would be unable to fulfil their contract, the plaintiffs made default in delivering 4,000 pounds of yarn which, according to its terms, should have been shipped as soon as reasonably possible after the 5th of October, when shipping instructions reached them, and they again made default in shipping the first monthly instalment of 2,000 pounds which should have been put in transit about the 5th of November. No explanation was made by them of these failures to carry out the contract and no complaint or demand for delivery came from the defendants. Indeed both parties acted as if the contract had ceased to exist—as if the defendants were acquiescing in the plaintiffs' request to be relieved from it and in their treating it as abandoned.

Meantime deliveries were being made by the plaintiffs upon, and correspondence took place in regard to, another order for yarn (No. 1787) placed with them by the defendants at the same time as the order now in question (No. 1788). This state of affairs continued down to the 10th of December. No doubt the plaintiffs made successful efforts to obtain the yarn during the month of November. But because uncom-

(1) [1909] A.C. 118.

municated to and unknown by the defendants, except as indicative of their honesty of purpose and as establishing a change of position which precluded subsequent acceptance of their letter of the 2nd of October as an anticipatory breach, those purchases are quite as irrelevant to the issue to be determined as is the defendants' entry in their own books of the cancellation of contract No. 1788 on receipt of the plaintiffs' letter of the 2nd of October. Although in a letter written on the 5th of December in regard to contract No. 1787, the defendants state that the plaintiffs had cancelled contract No. 1788 and that they (the defendants) had accepted that cancellation without making any trouble about it, it was not until the 10th of December that the defendants were apprised of any departure by the plaintiffs from the attitude of inability to fulfil the latter contract intimated in their letter of the 2nd of October and of their intention to carry it out.

While the defendants cannot be heard to aver that the contract now in question was terminated by their uncommunicated acceptance of the plaintiffs' declaration of inability to carry it out and acquiescence in its thus being put an end to, the plaintiffs' subsequent failure to deliver the instalments due in October and November, although possibly not such non-performance as would *per se* justify rescission by the defendants, viewed in the light of their letter of the 2nd of October in my opinion

> amounted to an intimation of an intention to abandon and altogether to refuse performance * * * evinced an intention no longer to be bound by the contract,

and this, as Lord Selborne puts it, gave the defendants the option

> to relieve themselves from a further performance of the contract.

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See also *Millar's Karri* v. *Weddel* (1), at page 129, per Bigham J.; *Cornwall* v. *Hensen* (2), at page 303, per Collins L. J.; *Bloomer* v. *Bernstein* (3). That option they promptly exercised by rejecting on its arrival the first yarn shipped to them by the plaintiffs' agents and by writing their letters of the 10th of December, on receipt of the first invoice, to the plaintiffs and their agents, Messrs. Bates & Bates, respectively.

The principle of the decision in *Morgan* v. *Bain* (4), I think, applies and governs. That was the converse case of tender of price and demand for performance by a purchaser who, after he had notified his insolvency to the vendor, had allowed the dates specified for delivery of two instalments to pass without protest, and without any offer to pay the price on delivery or any demand for explanation. On receipt of his subsequent demand of delivery the vendor promptly repudiated any obligation on the ground that the contract had been put an end to. The notice of insolvency did not terminate the contract but gave to the subsequent failure to deliver and to the absence of protest from the purchasers and of tender of price by them a significance as evidence of abandonment which they would not otherwise have had.

So here the plaintiff's letter of the 2nd of October, while ineffectual to put an end to the contract because acceptance of it was not communicated and although it should be regarded, as the plaintiffs now contend, not as an intimation of abandonment or refusal to perform but merely as a request to be relieved from the obligations of the contract, gave to the subsequent non-delivery by them and to the defendants' silence in regard thereto a significance as indicative of a deter-

(1) 100 L.T. 128
(2) [1900] 2 Ch. 298.
(3) L.R. 9 C.P. 588.
(4) L.R. 10 C.P. 15.

mination to renounce the contract that they might otherwise have lacked. From the non-delivery under the circumstances the defendants had a right to conclude that the plaintiffs had abandoned their contract and, if they did so conclude, to abandon it themselves. Their announcement that they regarded the contract as at an end by their letters written as soon as they had the first intimation of the plaintiffs' intention to treat it as still subsisting and to carry it out was, I think, a sufficient exercise of the option which the plaintiffs' conduct had given them to decline performance, notwithstanding that those letters were written on the erroneous assumption that the acceptance of the plaintiff's withdrawal from the contract on the 2nd of October, entered in their books, though unnotified, had already terminated it.

Treating the notice of insolvency in the *Morgan Case* (1), as practically of the same legal value as the unaccepted notice of inability to perform in the case at bar (*Tolhurst* v. *Associated Portland Cement Manufacturers* (2), at page 671) the material circumstances of the two cases are scarcely distinguishable. In both there was non-delivery of two instalments, silence in regard to the defaults and equally prompt repudiation when the party who had given the notice subsequently sought to treat the contract as still subsisting and enforceable. If not (as I incline to think it may be) a case of termination by mutual abandonment, as put by Keating J., in *Morgan's Case* (1)—the view of that case also taken by Jessel M.R., in *In re Phoenix Bessemer Steel Co.* (3), at page 114—we have here a case of conduct of the vendors warranting an inference of intention to renounce, and an exercise by the purchasers of the

(1) L.R. 10 C.P. 15. (2) [1902] 2 K.B. 660.
(3) 4 Ch. D. 108.

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option to withdraw thus afforded them, which seems to have been the ground of decision of Lord Coleridge in *Morgan* v. *Bain* (1).

Moreover, in order to succeed in this action, the plaintiffs must prove delivery or tender of delivery in accordance with the terms of the contract. Under those terms delivery of six or at the most eight thousand pounds of yarn had fallen due at the beginning of December. The amount shipped was 10,332 pounds. The contract provided that delivery should be made in monthly instalments of 2,000 pounds each, commencing a month after the first "spot" delivery of 4,000 pounds. Such stipulations in mercantile contracts are not negligible. *Bowes* v. *Shand* (2), at pages 465-6, per Cairns L.C. While not disposed to attach much importance to the fact that the shipment was made from Montreal instead of from Sarnia, since any difference in freight rates would be readily adjustable, I question the sufficiency of the tender of over 10,000 pounds actually made by the plaintiffs early in December to support the averment of performance essential to their claim. *Hoare* v. *Rennie* (3).

It would rather shock one's sense of what is just and fair between man and man if, upon the state of facts presented in this case, the purchasers should be legally bound to accept and pay for the goods in question, notwithstanding the vendor's early intimation of their inability to carry out their contract, their subsequent undoubted default in delivery of at least two instalments (nearly one-third of the whole) and the complete change in circumstances brought about by the armistice. The conclusion that they are not so bound is therefore all the more satisfactory.

(1) L.R. 10 C.P. 15. (2) 2 App. Cas. 455.
(3) 5 H. & N. 19.

I do not find in the circumstances enough to warrant a departure from the ordinary practice that costs throughout should follow the event.

MIGNAULT J. (dissenting).—This case possesses some features which render it rather a hard one for the appellant, but that is certainly no reason why perfectly settled legal principles should not be applied regardless of the hardship entailed thereby, and for the existence of which the appellant is not without blame. Nevertheless these features have received my very serious consideration, for the question, as it is now presented to this court, is, in final analysis, whether the conduct of the respondents has been such as to deprive them of recourse under the contract which they admittedly made with the appellant for the sale to the latter of 20,000 pounds of Oxford woollen yarn under order No. 1788.

Admitting the existence of a valid contract, the letter of the respondents of October 2nd, 1918, was either a request to be freed from their contractual obligations, a request which was not granted, or an anticipatory breach of their contract.

Taking it to be an anticipatory breach of contract, it gave the appellant the option either to insist on the performance of the contract or to take the repudiation of the respondents as a definite breach and treat the contract as rescinded. For obviously one contracting party cannot of his own will and without the assent of the other rescind a valid contract. Obviously also this option required due notice to the respondents of the choice made by the appelant.

As far as the appellant is concerned there was, after the anticipatory breach, no valid exercise of this option. The appellant did not answer the respond-

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ents' letter of October 2nd, but made an entry of cancellation of order No. 1788 in its books, which, not being notified to the respondents, could not operate as an exercise of its option or as a rescission of the contract.

So far there can be no difficulty. But it is now argued that the subsequent conduct of the respondents and their failure, after receiving the shipping instructions of the appellant, also dated the 2nd of October, 1918, to make shipments according to the terms of the order, 4,000 pounds at once and 2,000 pounds per month, and their silence until December when the shipments in question were made and notice thereof given to the appellant, amounted to an abandonment of the contract disentitling the respondents to ship the yarn in December and claim payment from the appellant.

A careful examination of the record has convinced me that this issue of abandonment—as distinguished from the question whether the anticipatory breach of the respondents and their failure to make deliveries in time had relieved the appellant from liability under the contract—was not submitted to the courts below. In the appellant's plea the ground taken is: 1. That the respondents had repudiated the contract and that thereafter the appellant treated the same as terminated, and purchased other yarn to take the place of the yarn which it had intended to purchase from the respondents, no proof of the latter statement having been made; 2. That the respondents made default in delivering the yarn within the time specified in the appellant's order and shipping instructions and consequently there was no effective tender of delivery by the respondents under the alleged contract. These two grounds were also taken in the appellant's appeal to the Appellate Division as follows:—

3. If there was a concluded contract between the parties the plaintiffs' letter to the defendants of 14th August, 1918, was a repudiation thereof and such repudiation continued until after the expiration of the time for delivery under the terms of such contract.

4. If there was a concluded contract between the parties and no effective repudiation thereof the plaintiffs did not make deliveries within the times specified in such contract.

In view of the issue thus presented to the courts below, we have not the benefit of an express finding of the learned trial judge on the question whether there had been an abandonment of the contract by the respondents acquiesced in by the appellant, as distinguished from a rescission by reason of the anticipatory breach of the respondents and the acceptance thereof by the appellant. The issues really presented were decided by both courts below, and in my opinion rightly decided, adversely to the appellant, and it was held: 1, that the anticipatory breach of the contract gave to the appellant an option to treat the same as rescinded, but that the appellant never had signified to the respondents its intention that the contract should be treated as rescinded; 2, that (I take this in somewhat abbreviated form from the judgment of Mr. Justice Hodgins in the Appellate Division) time not having been made of the essence of the contract, the failure to deliver before December was an actual breach, which, if it went to the root of the contract, would merely entitle the appellant, if it saw fit, to treat the non-performance as a repudiation of the whole contract and to sue for damages.

I cannot help thinking that the question whether the contract was by reason of the conduct of the parties abandoned by them, is entirely distinct from the two questions to which I have referred and which were really in issue. At all events, it is clear that the abandonment must have been concurred in by both

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parties, for both must agree to an abandonment as well as to a rescission, and an act of abandonment by one of them alone without acceptance or acquiescence by the other cannot effect the continued existence of the contract.

I may add that the question of abandonment is essentially a question of fact, being an inference to be drawn from all the circumstances of each case, and decisions in particular cases, where it has been held that the circumstances warranted the presumption of abandonment, are of little assistance, unless the circumstances are the same, a coincidence which is hardly to be expected.

I may now refer to the case of *Morgan* v. *Bain* (1), probably the nearest in point, which is cited in the appellant's factum. There a purchaser of pig-iron to be delivered in specified portions at fixed dates, became insolvent subsequently to the contract and notified the vendor of his insolvency. A petition was filed by the purchaser in the Bankruptcy Court whereupon a person was appointed to collect sums due and carry on the business. A meeting of creditors was held at which a composition at 5s. in the pound was agreed to. No mention was made of the contract in the statement of his affairs submitted by the purchaser, and no deliveries under the contract were made by the vendor at the determined dates. The price of iron having risen the purchaser, who had obtained fresh capital by forming a new partnership, demanded delivery tendering cash payment, but the vendor refused to deliver. It was held under these circumstances, on a special case stating the facts, that the purchaser had abandoned the contract, and that the vendor, by not making deliveries which had become due, assented to its rescission.

(1) L.R. 10 C.P. 15.

After full consideration I think that the *Morgan Case* (1) cannot assist us here, the circumstances being different. The respondents had, it is true, declared on the 2nd of October, that they could not carry out the contract, but, on the same date, the appellant had written insisting on its performance. As matters then stood, under the authority of cases such as *Frost* v. *Knight* (1), and *Johnstone* v. *Milling* (2), the appellant not having exercised its option to treat the contract as rescinded, on the contrary insisting on its performance, the respondents could subsequently carry it out notwithstanding their previous declaration that they would not do so. The only remaining material point is whether the respondents' subsequent failure to deliver before December and the absence of protest by the appellant, give rise to the presumption of abandonment of the contract by all the parties thereto. I think no such presumption arises here. The anticipatory breach of the respondents was caused by their failure to obtain yarn. Subsequently, fearing that notwithstanding their letter of October 2nd they would be held to make deliveries—and the unretracted letters of the appellant dated September 26th and October 2nd, gave them every reason to believe this—they made fresh inquiries for yarn and, in the beginning of November, secured it in Montreal at a price but little below the contract price, and the appellants' letter of December 5th was the first intimation to them that the appellant accepted cancellation of the order. There is no suggestion whatever that the respondents acted otherwise than in perfect good faith, and while it would have been more prudent no doubt to answer the appellant's letter of October 2nd, and thus clear up the matter,—and the appellant

(1) L.R. 7 Ex. 111. (2) 16 Q.B.D. 460.

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AMERICAN NATIONAL RED CROSS v. GEDDES BROTHERS.

Mignault J.

itself was wanting in ordinary business caution in not answering the respondents' letter of the same date—still I must find that the appellant's insistence on the performance of the contract fully justified the subsequent conduct of the respondent and that no presumption of abandonment by reason of delay in delivery can arise.

On the whole, I fully agree with the judgments of the courts below and my opinion is that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Tilley, Johnston, Thomson & Parmenter.*

Solicitors for the respondents: *Hanna, LeSueur & McKinley.*

JACOB KALICK..................APPELLANT;

1920
*Oct. 12.
*Nov. 2.

AND

HIS MAJESTY THE KING........RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Criminal law—Bribery—Violation of provincial Act—"Administration of justice"—Cr. C. ss. 2, 157, 164—*(C)* 31 *Vict. c.* 71, *s.* 3—*"The Saskatchewan Temperance Act," Sask., S.* (1917) *c.* 23.

A bribe given in order to induce a police officer not to proceed against the party giving it for violation of "The Saskatchewan Temperance Act" is given with intent to interfere with the "administration of justice" under section 157 of the Criminal Code. Idington J. *contra.*

Per Idington J. (dissenting)—Section 157 of the Criminal Code can only herein be held relevant to a peace officer or public officer as defined in the interpretation clause of the said code; and appellant was not acting within such definition but merely performing a duty of inspecting books under the "Saskatchewan Temperance Act", and reporting, which could have been discharged by any one. The offence in question was one against section 39 of the said "Temperance Act", and hence impliedly excluded by section 154 of the said code from falling within section 157 thereof.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment of the trial court, with a jury, in the judicial district of Swift Current, in Saskatchewan.

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

(1) (1920) 3 W.W.R. 99.

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KALICK
v.
THE KING.

The accused appellant was indicted as follows: "For that he, . . . with intent to interfere corruptly with the due administration of justice, did corruptly give to one . . . police officer a bribe . . . in order to induce (him) not to proceed against the said (accused) for violation of the Saskatchewan Temperance Act." The accused was found guilty by the jury but he prayed for a case to be reserved for the Court of Appeal.

The question submitted in the reserved case stated by the trial judge and the circumstances of the case, are fully stated in the above head-note and in the judgments now reported.

F. H. Chrysler K.C. for the appellant.

Harold Fisher for the respondent.

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

IDINGTON J. (dissenting).—The appellant was indicted in the King's Bench Judicial District of Swift Current, in Saskatchewan, as follows:

........For that he, the said Jacob Kalick, on the 20th of December, A.D. 1919, with intent to interfere corruptly with the due administration of justice did corruptly give to one Abraham Weder, a Police Officer, a bribe to wit—the sum of one thousand dollars ($1,000) in order to induce the said Abraham Weder not to proceed against the said Jacob Kalick for violation of the Saskatchewan Temperance Act.

On this he was found guilty by the jury and thereupon the learned trial judge reserved for the Court of Appeal the following question:—

Was a bribe given in order to induce a Police Officer not to proceed against the accused for violation of the Saskatchewan Temperance Act, given with intent to interfere with the administration of justice under section 157 of the Criminal Code? The evidence and charge to the jury is hereto annexed.

The majority of the Saskatchewan Court of Appeal answered in the affirmative.

The dissenting opinion of Mr. Justice Newlands which gives us, by virtue of section 1024 of the Criminal Code, the jurisdiction to hear an appeal therefrom, held that the offence disclosed by the evidence did not fall within said section 157 of the Criminal Code inasmuch as it was not specifically defined by the said Code as a crime, and was specifically provided for by the 39th section of the Saskatchewan "Temperance Act" under and by virtue whereof the officer in question was acting when alleged to have been bribed.

The section 39 of said Act reads as follows:—

39. 1. No police officer, policeman or constable shall, directly or indirectly, receive, take or have any money for reporting or not reporting any matter or thing connected with the administration of this Act, or for performing or omitting to perform his duty in that behalf, except the remuneration and allowances assigned him in virtue of his office by the Government of the Province.

2. Any police officer, policeman or constable receiving, or any person offering money contrary to the provisions of this section shall be guilty of an offence and liable to a penalty of $100 and in default of immediate payment, to imprisonment for three months.

He held that, inasmuch as Parliament has the exclusive jurisdiction of declaring what is, or may constitute a crime, and had only declared offences against provincial legislation to be crimes when and so far as falling within section 164 of the Criminal Code, which he held could not be so operative or effective as the circumstances in question herein required in order to maintain said conviction. That section reads as follows:—

164. Everyone is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any Legislature in Canada by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

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KALICK
v.
THE KING.
Idington J.

That, which is simply a re-enactment of the Criminal Code of 1892, seems, not only an express declaration of what (when merely resting upon disobedience of an Act of Parliament or of a legislature) is to constitute an indictable offence, but also to limit or restrict the indictable quality of the offence to something which is not within the reservation expressed by the term

unless some penalty or other mode of punishment is expressly provided by law.

That enactment of the Criminal Code of 1892 was in substitution of 31 Vict. ch. 71, sec. 3, which was the earliest enactment of the Dominion Parliament giving the added strength of its enactment by virtue of the exclusive jurisdiction it had over criminal law, to help the enforcement of provincial legislation.

As I have always understood, the policy pursued in this regard has been to help the provincial legislation but to carefully abstain from trenching upon the provincial legislative powers, or wishes of the provincial legislators, as expressed by themselves relative to the sanctions to be imposed by provincial legislation.

Such being the case when we find any provincial legislative enactment containing an express sanction to secure its enforcement, its terms ought to be respected and be the limit in that regard.

It seems idle to take as our guide the vulgar idea of what may constitute a crime, when we have a much better guide in the history of the legislation emanating from Parliament as above outlined.

Then turning to the details of what has to be considered in light thereof, we have, in section 2 of the Criminal Code, the definition and interpretation of the words "Peace Officer" and "Public Officer" which are used in the said section 157, now in question.

Why should we go beyond these for the purposes of this case?

There certainly is nothing in the Saskatchewan "Temperance Act" that seems to justify any departure from these respective definitions, nor in the code to render it imperative to expand either definition in relation to the particular officer in question herein.

What were his duties? What office did he fill, under the Saskatchewan "Temperance Act" which would render it fitting he should be looked upon as either a peace officer or a public officer within the meaning of section 157 of the Criminal Code, now in question?

He may have been in fact a peace officer, or worn the uniform of such, but the actual duty in question which he had to discharge was under the liquor department created under said Act to inspect the books which appellant, as a druggist, was bound by said law to keep as a vendor of liquor, and compare the incoming supply of liquors with the outgoings served from said supply, and the prescriptions authorizing sales, and report the result of such inspection and audit to his superior officer.

Any man or woman sent by the liquor department to discharge such simple duty could have made just as good a report. It was not in any legal sense necessary to have sent a constable, or peace officer, or public officer, as defined by the code, to perform such a duty.

And sending one apparently so decorated surely did not help to bring him within the meaning of section 157.

The evidence of Weder, the officer in question, tells the story as follows:—

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KALICK v. THE KING.

Idington J.

Q. What was the first conversation you had with him?

A. When I came into the drug store I asked for the record and Mr. Kalick gave them to me and I went back into the dispensary to do the work there.

I sat down at the little table in the dispensary, Mr. Kalick came in and says "listen here, I will give you $100.00 and you leave the books alone."

I said I would not do that. I then went to work and started to check up the books and just before I was through Kalick came up again and asked me how I was getting along.

I replied that I was of the opinion that he had to account for some shortage. He said, "I will give you $500 and you leave the books alone," or rather, "Fix up the books so that they will be all right."

I said I did not know whether he would be short or not yet, that I was not through.

After I was through checking up the books I found a shortage of liquor and I asked Mr. Kalick if he could account for the shortage and he did not say anything to that.

So then he offered me $1,000 to call the matter square, that is the way he put it.

This illuminates the story relative to the nature of the duties that were being discharged and the offence of the appellant.

Unless we are to hold that the administration of the Saskatchewan "Temperance Act" and "the administration of justice" are synonymous terms, I fail to see how we can bring this offence, which the foregoing quotation and the remainder of the story unfold, assuming the strict interpretation of it as against the appellant, within the meaning of the indictment assumed to be founded upon section 157 in question.

I have no doubt upon the facts interpreted as contended for against the appellant, and in the absence of legislation relevant thereto, that he might have been held to have offended at common law as suggested in the court below, or against section 39 of the Saskatchewan "Temperance Act,"

I cannot see, even if the conviction herein stands, how the appellant could plead that, if prosecuted at common law or under said section 39 of said Act, in bar of such prosecution.

That seems to me not only the fair test, but the one which the law imperatively requires to maintain this conviction as founded on section 157.

In short I agree with Mr. Justice Newlands that the offence now in question disclosed by the evidence was, if interpreted against the appellant, clearly one against the above quoted section 39, s.s. 2, and hence impliedly excluded by section 164 of the Criminal Code from falling within section 157, now in question.

Moreover, assuming there might, in the absence of special or specific legislation bearing on the question, have been found something offensive against the common law, it is not that we have to deal with but section 157. And I submit we must read that and section 164 together, and apply the law that fits the crime.

I, therefore, am of the opinion that the appeal should be allowed.

DUFF J.—The stated case is in these words:—

On Feb. 5th, 1920, at Swift Current, the accused was found guilty by a jury on the charge: "For that he, the said J. Kalick, on the 20th day of December, 1919, with intent to interfere corruptly with the due administration of justice, did corruptly give to one Abraham Weder, a police officer, a bribe, to wit: the sum of one thousand dollars ($1,000.00) in order to induce the said Abraham Weder not to proceed against the said J. Kalick, for the violation of the Saskatchewan Temperance Act."

The question submitted for the opinion of the Court is:

Was a bribe given in order to induce a Police Officer not to proceed against the accused for violation of the Saskatchewan Temperance Act, given with intent to interfere with the administration of justice under section 157 of the Criminal Code?

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v.
THE KING.
Duff J.

It seems clear that giving a bribe to prevent prosecution for an offence is *prima facie* an interference with the administration of justice. Mr. Chrysler argues that it is not within those words in the context in which they appear in section 157 on two grounds:

1. That the offence is specifically dealt with in those parts of the same section as well as in section 164 of the code and that the normal scope of the phrase must receive some restriction in consequence. I cannot perceive the application of sec. 164 and as to the other parts of section 157 they do not touch the case of accepting or giving a bribe for affording protection against a prosecution for an offence and that the facts proved established a case of giving a bribe for such a purpose is assumed in the question submitted.

2. He argues that the application of the section is limited to offenders or persons supposed to be or suspected of being or fearing that they are offending against the criminal law strictly so called, that is to say, against the criminal law as falling within the exclusive jurisdiction of the Parliament of Canada. While the word "crime" in the Criminal Code generally speaking applies only to crimes strictly so called and probably has that restricted meaning in this section, I think there is nothing requiring us to limit the meaning of the words administration of justice in the way suggested.

The appeal should be dismissed.

ANGLIN J.—The reserved case assumes that the defendant endeavoured to stifle a prosecution for a violation of the Saskatchewan "Temperance Act" by bribing a police officer, Was the bribe

> given with intent to interfere with the administration of justice under section 157 of the Criminal Code

is the question propounded. In my opinion it was.

It is quite immaterial whether the police officer actually intended or contemplated instituting a prosecution. It suffices that the appellant gave the bribe with intent to head off such a proceeding. The due administration of justice is interfered with quite as much by improperly preventing the institution of a prosecution as by corruptly burking one already begun.

Two contentions were pressed by Mr. Chrysler— (a) that interference with a prosecution for a contravention of a provincial penal statute is not within the purview of section 157 of the code; and (b) that if any offence against that section was committed it was that of bribing a police officer

to protect (the appellant) from detection or punishment

and not that of

interfering corruptly with the due administration of justice.

(a) The obvious purpose of section 157 is to declare criminal and to render indictable the corruption or attempted corruption of officers engaged in the prosecution, detection or punishment of offenders. "Offenders" is a very wide term (*Moore* v. *Illinois*) (1), and the use of it affords a strong indication that the application of section 157 should not be restricted, as counsel for the appellant argued, to cases in which the bribe is offered or given to prevent the prosecution, detection or punishment of a person who is, or apprehends that he may be, charged with a crime indictable under the criminal code or at common law. The contravention of a valid provincial penal statute is an offence and a person who commits it is an offender.

(b) I am unable to agree with the contention that, if what the appellant did amounted to bribing a Peace

(1) 55 U.S.R. 13, at p. 19.

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Anglin J.

Officer with intent "to protect (himself) from detection or punishment etc." within the concluding phrases of clause (a) of section 157, it cannot warrant his conviction for the crime of bribing a peace officer with intent to interfere corruptly with the due administration of justice provided for in the earlier and more comprehensive phrases of the same clause. That the act charged against the appellant was done with intent to interfere corruptly with the due administration of justice in the ordinary acceptation of that phrase is conceded. The mere fact that it might also warrant a conviction under the more restricted terms of the concluding phrase of clause (a) is not, in my opinion, a sufficient reason for cutting down the plain meaning of the earlier phrase. Other instances of similar overlapping occur in the Criminal Code.

Moreover, in order to bring the case within the concluding phrase of clause (a) a finding that the appellant had committed, or had intended to commit, a contravention of the Saskatchewan "Temperance Act" would be essential. No such finding has been made. No such issue was presented to the jury. No such charge was laid. Whether the appellant had in fact committed, or had intended to commit, an offence against the Saskatchewan "Temperance Act" was quite irrelevant and immaterial to the charge as laid. It was only essential that, being apprehensive of prosecution for such an offence, the appellant should have bribed the police officer with intent to prevent the realization of that possibility. Upon the case presented he could not have been convicted under the concluding phrase of clause (a); but upon the facts assumed in the reserved case he was, in my opinion, rightly convicted under the earlier clause.

It is quite unnecessary to consider whether the breach of a provincial penal statute which provides its own penalty is a "crime" within the meaning of that word as used at the end of clause (a) of section 157. Expressing no opinion upon that question, I allude to it merely to observe, with great deference, that cases such as *In re McNutt* (1), referred to by the learned Chief Justice of Saskatchewan, and the later and decisive case of *Mitchell* v. *Tracey* (2), which deal with the meaning and scope of the words "arising out of a criminal charge" in section 39 (c) of the Supreme Court Act, would appear to me to afford little or no assistance in determining it.

The appeal fails.

BRODEUR J.—This is a criminal appeal. The appellant was convicted before a duly constituted tribunal with having corruptly interfered with the administration of justice in giving to a police officer a bribe of $1,000 in order to induce this police officer not to proceed against him for violation of the Saskatchewan "Temperance Act."

The charge had been laid under section 157 of the Criminal Code which makes it an indictable offence for any person to give to a police officer employed for the prosecution, detection or punishment of offenders any money with intent

1° to interfere with the administration of justice; or

2° to procure the commission of any crime; or

3° to protect from detection or punishment any person having committed or intending to commit a crime.

The reserved case which is now before us is submitted in the following words:

(1) 47 Can. S.C.R. 257. (2) 58 Can. S.C.R. 640.

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THE KING.
Brodeur J.

Was a bribe given in order to induce a police officer not to proceed against the accused for violation of the Saskatchewan "Temperance Act" given with intent to interfere with the administration of justice under section 157 of the Criminal Code?

It is contended by the accused that he was prosecuted for having corruptly interfered with the administration of justice, that the giving of money to protect from detection any one committing a crime before any proceedings have been instituted for the punishment of that crime is not interfering with the administration of justice and that it is another offence dealt with otherwise.

The Court of Appeal for Saskatchewan answered the reserved case in the affirmative, Mr. Justice Newlands dissenting.

The police officer who received the bribe had been instructed by his superior officers to check the liquor sales made by the appellant and to see whether the latter had unlawfully sold any liquor contrary to the dispositions of the Saskatchewan "Temperance Act," and to find out whether information should not be laid against the appellant.

The work which the police officer was carrying out was authorized by the law and was absolutely necessary to put the wheels of justice in motion.

I am of opinion that the "administration of justice" mentioned in section 157 of the Criminal Code should not be restricted to what takes place after an information had been laid; but it includes the taking of necessary steps to have a person who has committed an offence brought before the proper tribunal, and punished for his offence. It is a very wide term covering the detection, prosecution and punishment of offenders.

The appeal should be dismissed with costs.

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KALICK
v.
THE KING.
Mignault J.

MIGNAULT J.—On the ground that the charge against the appellant, and on which a verdict of guilty was returned by the jury, comes within the terms of article 157 of the Criminal Code, the jury having found the appellant guilty of having, on the 20th day of December, 1919, with intent to interfere corruptly with the administration of justice, corruptly given a bribe to a police officer to induce him not to proceed against the appellant for violation of the Saskatchewan "Temperance Act," I am of opinion that the question submitted should be answered in the affirmative. To give a bribe to a police officer with this intent is a corrupt interference with the administration of justice within the terms of Article 157. It is, in my opinion, immaterial whether proceedings were then pending or merely likely to be taken, and I do not think that the fact that these proceedings were to be instituted under the Saskatchewan "Temperance Act" takes the case out of the operation of this section of the Criminal Code.

The appeal therefore fails and should be dismissed.

Appeal dismissed.

1920
Nov. 17.
Nov. 23.

ADELARD DIOTTE (PLAINTIFF)....APPELLANT;

AND

GODFROI BERNIER (DEFENDANT)..RESPONDENT.

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

Crown's Land Act—Crown's agent—Receipt—Title to land—R.S.Q. (1909) *arts.* 1559, 1562.

The appellant, by a petitory action, asked to be declared owner of certain land subject to the Crown's Lands Act and invoked as his title the following receipt delivered to him by the Crown's Lands Agent: "Crown Lands Agency. $1.00.—Dec. 29th, 1910.— Received from Adelard Diotte the sum of one dollar as fee for registration (description of land). Wm. Clarke, agent."

Held, that the terms of such a receipt do not fall within the provisions of articles 1559 and 1562 R.S.Q., as the money was not paid on account of the purchase price.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, reversing the judgment of the Superior Court, sitting in review, at Montreal (1), and restoring the judgment of the trial court, Weir J., which dismissed the appellant's action.

The appellant took an action *au pétitoire,* asking to be declared owner of a certain lot of land subject to the Crown's Lands Act. Letters patent on that lot have never been issued. The appellant invoked as his title the receipt contained in the head-note;

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

(1) Q.R. 55 S.C. 467.

and he also produced the following letter, bearing no date, which he had received from the Crown Lands Agent. "Your 1 acre is all right as your Quit Claim deed has been sent to Quebec and have made a note of it in my books. Yours truly, Wm. Clarke, agent." The respondent's plea is that such a receipt did not constitute any title to the land in favour of the appellant; and that he was himself the owner of the land, having bought it from one Pilon to whom the Crown had given a location ticket.

T. P. Foran K.C. for the appellant.

T. B. Major for the respondent.

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

DUFF J.—I concur with Mr. Justice Brodeur.

ANGLIN J.—I concur with Mr. Justice Brodeur.

BRODEUR J.—Le demandeur-appelant poursuit au pétitoire et demande à être déclaré propriétaire du lot de terre No. 10c. 5ème rang du canton de Aldfield.

Ce terrain est régi par l'Acte des Terres de la Couronne. Il n'y a jamais eu de lettres patentes d'émises. L'appelant invoque pour titre un reçu de l'agent des Terres de la Couronne qui se lit comme suit:

No. 223. Crown Lands Agency.
$1.00. Dec. 29th, 1910.

Received from Adélard Diotte the sum of One dollar as fee for registration 11-B, in 4th R., 48 acre and a pt. 10-C, 1 acre lot in 5 range of township of Aldfield, P.Q.

Wm. Clarke,
Agent.

Sale No.

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BERNIER.
Brodeur J.

Il invoque également la lettre suivante, qui ne porte pas de date, qu'il aurait reçue de l'agent:

> Your 1 acre is all right as your Quit Claim deed has been sent to Quebec and have made a note of it in my books.
>
> Yours truly,
> Wm. Clarke,
> Agent.

Le défendeur-intimé plaide que ce reçu de l'agent ne constitue pas un titre de propriété, et que ce terrain lui appartient, vu qu'il est aux droits de Joseph Pilon à qui la Couronne l'a concédé par billet de location.

La seule question dans cette cause est de savoir si le reçu invoqué par le demandeur constitue un titre valable à la possession d'un terrain de la Couronne.

L'article 1559 des Statuts Refondus de la Province de Quebec dit que le Ministre des Terres peut émettre sous ses seing et sceau des permis d'occupation en faveur d'une personne qui désire s'établir sur une terre publique: et ces permis donnent au concessionnaire le droit de poursuivre pour tout empiètement qu'un tiers ferait sur cette terre.

L'article 1562 des mêmes statuts dit que les agents des terres de la Couronne peuvent également faire des concessions de terrains. En voici le texte:

> Les permis d'occupation, certificats de vente ou reçus de deniers payés sur la vente des terres publiques et les billets de location, émis et signés par un agent des terres de la Couronne, en faveur d'une personne qui a acheté des terres publiques, ont le même effet à l'égard de cette personne et de ses ayants cause, leur confèrent les même droits, pouvoirs et privilèges sur les terres pour lesquelles ils ont été émis, et les assujettissent aux mêmes conditions, que si cette personne avait obtenu du ministre un instrument sous forme de permis d'occupation conforme à l'article 1559 S.R.

Le demandeur-appelant prétend que le reçu qui lui a été donné par l'agent des terres est un reçu émis sous cet article, c'est-à-dire un reçu "de deniers payés sur la vente des terres publiques."

Malheureusement pour sa prétention, ce reçu ne paraît pas lui avoir été donné pour une somme d'argent qu'il aurait payée sur la vente du terrain en litige, mais lui a été donné "as fee for registration."

L'officier qui lui a donné ce reçu est décédé. Il aurait pu sans doute nous en expliquer la portée. Son successeur, qui a été entendu, n'a pas pu nous éclairer beaucoup sur la situation. Cette somme d'un dollar qui a été versée entre les mains de l'agent est bien entrée dans le livre de caisse de l'agence et on retrouve bien dans un livret de reçus le talon du reçu en question: mais il n'y a rien qui nous indique si cet argent avait été donné pour le prix d'achat.

Au livre des ventes nous ne trouvons rien pour indiquer que cette propriété avait été achetée par le demandeur. Nous trouvons, au contraire, qu'elle avait été vendue à Joseph Pilon.

Le demandeur a tenté de prouver qu'il avait un titre du fils ou de l'ayant-cause de ce Joseph Pilon, mais on ne lui a pas permis de faire cette preuve.

Dans ces circonstances, je présume que ce *quit claim* dont il est question dans la lettre de l'agent est un transport que Diotte aurait eu du fils de Pilon et qu'il l'aurait envoyé à l'agent des terres pour le faire enregistrer ainsi que l'acte des Terres de la Couronne l'exige (art. 1563 S.R.P.Q.). Alors ce reçu n'aurait donc pas été donné pour argent payé en acompte de l'achat d'une terre publique mais pour l'enregistrement, ainsi qu'il y est formellement déclaré d'ailleurs, du transport ("quit claim") du fils de Pilon.

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DIONNE
v.
BERNIER.

Brodeur J.

Le demandeur n'a pas prouvé sa demande.

Le renvoi de son action pétitoire ne devra pas affecter les droits qu'il a pour les améliorations qu'il a faites sur la propriété.

L'appel doit être renvoyé avec dépens.

MIGNAULT J.—I concur with Mr. Justice Brodeur.

Appeal dismissed with costs.

Solicitors for the appellant: *Devlin & Ste. Marie.*

Solicitors for the respondent: *Fortier & Major.*

JOHN KIDSTON (PLAINTIFF)............APPELLANT;

1920
*Oct. 21, 22, 25.
*Nov. 23.

AND

STIRLING AND PITCAIRN, LTD. (DEFENDANT)....................................RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Construction—Essential term—Special meaning—Parol evidence —Company —Shares—Premium —Payment —Appropriation.

Both parties to a contract in writing agreed that one of its terms was not used in the ordinary sense and parol evidence to explain its special meaning was received.

Held, Brodeur J. *contra*, that, such term being essential and the evidence showing that the parties were not *ad idem* as to it, there was no contract. Idington J. was of opinion that there was a contract but the damages should be assessed by a reference and not as the Court of Appeal directed.

Per Brodeur J. (dissenting).—A contract is binding upon the parties notwithstanding their different interpretations of its terms; and it is for the court to determine which of these interpretations must be upheld according to the surrounding circumstances which can be proved by oral evidence.

The appellant having subscribed for fifty shares of the company respondent, they were allotted to him at $120 per share being at a premium of $20 per share. The appellant sent his cheque for $1,500.

Held, Brodeur and Mignault J.J. dissenting, that the $1,500 should be apportioned *pro rata* between the premium and the par value of the shares.

Judgment of the Court of Appeal ([1920] 3 W.W.R. 365) reversed, Brodeur, J. dissenting.

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

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KIDSTON v. STIRLING AND PITCAIRN, LTD.

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

The appellant is a producer of fruits. The respondent company is a co-operative corporation composed of shareholders engaged in the cultivation of fruits and it looked after the marketing and the sale of the fruits of the orchards of which the shareholders of the company were the owners. The parties made a contract by which the appellant undertook to sell and the respondent to buy during seven years the appellant's crop of fruit, "the purchase price to be the market price of such fruit in each year." Both parties are agreed that the term "market price" was not used in the ordinary sense, to wit: the actual price at which a commodity is commonly sold at the place of the contract, as in this case there was no such market; but both parties were not *ad idem* as to the exact meaning of this term. The appellant also applied for fifty shares of the company respondent, which were allotted to him at $120 a share, meaning a premium of $20 on the par value. He sent his cheque for $1,500. The question is whether this sum must be first applied in full payment of the premium and the balance in part payment of the par value of the shares; or whether the said sum must be apportioned *pro rata* between the premium and the par value of the shares.

Eug. Lafleur K.C. and *W. H. D. Ladner* for the appellant.

J. J. Taylor K.C. for the respondent.

(1) [1920] 3 W.W.R. 365.

IDINGTON J.—I am of the opinion that this appeal should be allowed in respect of three of the specific matters in question.

In the first place I cannot find anything in the interpretation and construction of the several respective contracts made between appellant on his own behalf and on behalf of the two others he represented, which should maintain the application of the particular sliding scale put forward in the evidence as the only one fitted for determining the rights of the parties.

It was neither expressly nor impliedly incorporated in any of the said contracts or in the terms upon which the appellant was admitted as a shareholder or director of the respondent.

It was not put forward in the negotiations as a final determination for the term of the ensuing seven years these contracts were to run, but simply as an illustration of the mode in which the respondent had for a year or two then past, been trying to adjust the yearly settlement of its accounts with those selling their products to it.

It was not applied for such purpose in regard to the first year's entire products sold the respondent under the contracts now in question.

Indeed it is doubtful if it was applied as to any material part of such products.

In order to help the court in the interpretation of an ambiguously worded contract, extrinsic evidence may be given of the surrounding circumstances under which it was entered into.

The identity of the object which the parties had in view as well as the identity of the subject matter with which they were dealing may be better understood when read in light of such surrounding circumstances.

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For example take one of the contracts before us which reads as follows:—

Agreement made (in duplicate) this twenty-ninth day of May, A.D. 1914, between John Kidston (hereinafter called the vendor) of the one part, and Stirling & Pitcairn, Limited, a body corporate duly incorporated under the statutes of British Columbia, and having its head office at Kelowna, in the province of British Columbia, (hereinafter called the purchasers), of the other part, whereby it is agreed as follows:—The vendor will sell and the purchasers will buy the crop of fruit now growing or to be grown on the trees of the orchard of the vendor as at present planted, situate near Vernon, in the Coldstream municipality, for a period of seven (7) years from the first of May, 1914.

The purchase price shall be the market price of such fruit in each year.

The vendor shall pick and gather the said fruit in due course, and when sufficiently mature for the purpose of gathering and taking the same, shall deliver the same to the purchasers' warehouse, reserving such fruit as may be required for the use of the ranch.

Signed, sealed and delivered.

John Kidston (Vendor),
Stirling & Pitcairn, Ltd.,
(Purchasers).

In the presence of E. C. Kidston.

Others in question are in same form.

The "purchase price" as thus defined when using the words "the market price of such fruit in each year" is capable of several distinctly different meanings.

Was it to be the market price in the nearest market town on the day of delivery for each respective kind and quantity and quality as delivered and to be paid in cash on delivery?

Or was it to be determined by means of arriving at some average price for the fruit season for each kind and grade in quality of each kind?

And was that to be according to what the application of fair dealing and reasonableness applied to the course of business in each year would disclose?

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Idington J.

In the latter alternative, or something akin thereto, a knowledge of the surrounding circumstances would materially assist in understanding what the parties were about.

That once discovered would in its turn doubtless admit of the application of proper methods to demonstrate what would be fair and reasonable methods of determining what had been the market price for any given year.

What is fair and reasonable often can be applied in law to help out what the parties have inadvertently failed to make as expressly clear as a court might desire.

It is even conceivable that a sliding scale of some kind may, when the accounts come to be taken, be found a valuable auxiliary to work out the result to be determined.

But it never would be permissible to act upon the theory that the sliding scale mentioned above had become incorporated in the foregoing contract or the others in same form.

Had it been demonstrated that the said sliding scale had been, to the knowledge of all the parties, actually applied, without objection, as a factor in determining the price for the year (in July of which the contract was executed though dated in May) it might have been possible (acting upon many decisions which rest upon what the parties did immediately after the execution of the contract and in pursuit thereof) as a means of determining what they had in fact intended by the language used to imperatively uphold the continuation of such use.

It is not pretended that the said sliding scale is commonly used in carrying on such business as in question herein.

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In short I can find no ground upon which to rest the provision in the formal judgment of the Court of Appeal for the application of the said sliding scale, and would allow the appeal.

There is much to be said in favour of the course of dealing which both parties agreed in and adopted immediately after execution of the contract as demonstrating that both adopted the view that what was in fact intended to be the market price was to be the result of respondent's marketing elsewhere than in British Columbia and that to be determined by deduction of expenses and a fair commission. I think that is likely to be best determined by a referee proceeding on the basis of what was fair and reasonable.

In the next place I think that the learned trial judge was right in allowing the plaintiff, now appellant, the sum of $562.50, balance due for dividend on his stock.

The contention that the first payment of $1,500 account fifty shares of stock must be first applied in payment of the premium, seems to me quite unfounded whether we look at the nature of the purchase or the letter of appellant appropriating the money and receipt of the secretary of respondent expressly putting it as $30.00 per share.

It is quite true that the late Mr. Pooley's record of his way of looking at the payment was in accord with what the respondent contends, but that is by no means clear in what he submitted to the appellant.

The judgment of the learned trial judge ought to be restored. The appeal ought to be allowed in this case with costs throughout to the appellant.

The respondent brought an action against the appellant for specific performance of said contract.

I am unable to find any ground in evidence herein upon which such jurisdiction can be exercised if regard is had to the principles which have settled the limitations of the exercise of such jurisdiction.

The adequate and usual remedy of recovery for damages for breach of contract was open to the plaintiff in that connection.

The many complications involved in the performance of the contract and to be pursued in the remedy given by means of specific performance, were such as to bar a resort to that remedy.

The ambiguous nature of the contract of which so many varying views have been taken render specific performance inappropriate.

I need not continue my list of serious objections to the exercise of such a mode or relief, but may be permitted to refer to the authorities cited on pages 26 *et seq.* of Fry on Specific Performance, 4th ed. relative to my first objection; to pages 38 *et seq.* of the same work relative to my second and to pages 294 *et seq.* of same work, as well as foregoing, in relation to the third objection I take.

The interim injunction which was granted was only ancilliary to the specific performance which was sought, and that should have ended with the proper dismissal of the action by the learned trial judge.

Another injunction of a similar nature was granted in the Court of Appeal pending the hearing of appeal thereto.

That, of course, falls, or should fall, in my opinion, with the failure to establish a right to specific performance, which, I repeat, is the remedy specifically sought in and by the said action.

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Idington J.

If the relief by injunction is to be held as sought independently of the right for specific performance, then I can find no authority that would entitle respondent to such mode of relief in such a case as presented.

The authorities on that head are collected in Kerr on Injunctions, chapter 10, wherein, or in reports of later cases, I can find none to uphold such a contention.

The respondent relies upon the decision in the case of *Metropolitan Electric Supply Co.* v. *Ginder* (1), which I respectfully submit does not, in its essential features, dependent upon a statutory obligation and a covenant, of which the practical effect was to maintain the right of the company to carry out that obligation, maintain the right to an injunction herein.

It does not of my mind present very much resemblance to the features of this case. Yet of all of those cited, on behalf of respondent, it, in principle, comes nearer than any other cited on its behalf, to touching the operation of the principles involved.

The decision of Sir George Jessel in the case of *Fothergill* v. *Rowland* (2) is almost exactly in point in this, and is adverse to the respondent herein.

In conclusion I think the action for specific performance was rightly dismissed by the learned trial judge, and that dismissal should be restored with costs throughout.

The respective counsel for the parties hereto are agreed that there is no local statutory provision under which the damages for breach of the undertaking given on the obtaining of the said injunctions can be dealt with herein.

(1) [1901] 2 Ch. 799.

(2) [1873] L.R. 17 Eq. 132.

They are also agreed that respondent obtained the delivery of the crops of fruit for the balance of the seven year period, whether or not as result of an injunction, which I hold should not have been granted, is not clear.

The appellant's action, according to my opinion, must be maintained, but whether it covers anything beyond the time up to when begun, and thus the later results to be decided thereafter, I refrain from dealing with.

There is thus ample room for a fine crop of litigation.

I would allow the appeal and meantime dismiss the action for specific performance, with costs throughout, and I would direct a reference similar to that which the learned trial judge directed, but guarding against his expression that there was no contract.

I think there was a contract which may be well illuminated by the conduct of the parties relative thereto, whilst excluding the sliding scale in question, and applying the doctrine of what is fair and reasonable which helps so much under our law in the administration of justice.

DUFF J.—My conclusion is that the trial judge was right in his finding that the parties had never arrived at a contract in terms.

On the other hand, fruit, the property of the appellant, was received and disposed of by the respondents in circumstances which exclude the hypothesis that they were not to pay for it, and it follows, of course, that the appellant is entitled to recover from the respondents a reasonable price. My conclusion is that the trial judge's judgment directing a reference to ascertain the value of the fruit understood in this

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Duff J.

sense should stand. I adhere however to the view expressed in the argument that the dealings of the parties afford up to a certain point a satisfactory guide for the ascertaining of what is reasonable in the circumstances and I think the order of reference ought to contain a direction to the referee on this point. The direction should be that the price is to be ascertained by taking the average price realized by the respondents for fruit sold by them of each kind and grade furnished by the plaintiff and from that should be deducted first, expenses incurred in handling the fruit received from the plaintiff, and, secondly a sum representing a reasonable profit. As to the question of the appropriation of the moneys paid by the appellant on his shares, I concur with the reasoning of Mr. Justice Idington.

If follows of course that the respondents' counterclaim for specific performance should be dismissed.

ANGLIN J.—I am, with respect, of the opinion that the learned trial judge reached the proper conclusion upon all the evidence in this case. It discloses a great many incidents which taken together make it reasonably certain that the minds of the parties never met as to the meaning of, or the method of computing, the "market price" to be paid the plaintiff. They are agreed that this term is not used in the ordinary sense—that it meant the average yearly price received by the defendants on each grade and variety of fruit sold by them less certain deductions for expenses and profits. But upon the basis of computation of these deductions they were never agreed. Moreover there is a difference between them as to whether sales for export should be included in ascertaining the average prices. If this latter were the only matter in dispute however, I should

have had little hesitation in determining it in the plaintiff's favour. *Stuart* v. *Kennedy* (1), cited by the appellant from Benjamin on Sales, 5 ed., p. 103, seems closely in point.

I also agree with the learned trial judge that the payments made by the plaintiff on account of his subscription for fifty shares of stock in the defendant company should be apportioned *pro rata* between the premium of 20% at which he subscribed and the par value of the shares. That I think is the true meaning of the contract on which the shares were taken, and, with respect, I am unable to understand the application of the doctrine of imputation of payments to the single debt which the plaintiff incurred.

The conclusion that the parties were not *ad idem* as to a vital term of the contract necessarily involves the failure of the action of *Sterling & Pitcairn, Limited,* v. *Kidston.*

I would allow the appeal of the plaintiff Kidston with costs in this court and the Court of Appeal and would restore the judgment of the learned trial judge in each action, and would dismiss the cross-appeal also with costs.

On the reference, however, directed by the learned trial judge the value of the fruits delivered by the plaintiff (by which I take it a reasonable price for them is meant) should, under the special circumstances of this case, be ascertained by deducting from the average price realized by the defendants in each year for all fruit sold by them of each kind and grade furnished by the plaintiff the expenses incurred by the defendant in handling the plaintiff's fruit and a reasonable sum for profits on the sale thereof. The evidence warrants the conclusion that a fair price will be best arrived at by this method.

(1) [1885] 23 Sc. L.R. 149.

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Brodeur J.

BRODEUR J. (dissenting).—The main question on this appeal is whether or not the contract is a binding one. The trial judge found that the parties were not *ad diem* and that the contract never existed. The Court of Appeal decided there was a valid contract.

The respondent company is a co-operative corporation composed of shareholders engaged in the cultivation of fruits. It looked after the marketing and the sale of the fruits of what is called in the case affiliated orchards, viz., orchards of which the shareholders of the company were the owners. The shares were allotted according to the cultivated area of each orchard.

In 1914, Kidston, who is a producer of fruits, wanted to become a shareholder of the respondent company and to have his fruits marketed and sold by it, and he applied for 50 shares which were allotted to him at $120 a share, meaning a premium of $20 over the par value. In the correspondence and the negotiations which then took place, Kidston was advised that the affiliated orchards sold their fruit to the respondent company for a price to be calculated upon the net returns after deducting for expenses and profits according to what was called the "sliding scale." This sliding scale was communicated to Kidston and he then signed a contract providing for the sale of his crop to the respondent company for a period of seven years at a price which was to be "the market price of such fruit in each year."

He delivered his fruits and he received during those years the same price as was paid to the affiliated orchards, but he claims that he should have received a larger sum and he takes an action in *reddition de compte*.

He had paid $1,500, at first on his fifty shares of which a sum of $1,000 was apportioned by the respondent company for the premium of $20 a share and on which sum of $1,000 he did not receive any dividend. He claims that this $1,500 should have been apportioned equally on the par value of the shares and on the premium and then he should have received larger dividends.

Kidston, after having instituted his action in 1917, continued however to deliver his fruits to the respondent company until 1919, when, having refused to go on with his contract, the respondent company took an injunction to prevent him from selling to other persons. The injunction was dismissed by the trial judge who decided that the contract was not binding, but the injunction was restored by the Court of Appeal.

The case then turns almost entirely on the construction of these words "market price" in the contract.

In its ordinary sense the market price means the actual price at which a commodity is commonly sold at the place of the contract.

In this case, there is no market at the place where the contract was made. These fruits have to be shipped away to the United States or to some cities of the Canadian provinces; and Kidston in his particulars and in his evidence admits that these words had a special meaning in this contract and would not cover the market price of the locality.

They mean, according to his opinion, the average price realized by the respondent company for each grade and variety of fruit, less the expenses and a reasonable commission on the sale.

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In view of this admission by the appellant and in view of the statements made by the respondent company in its pleadings and at the trial, I cannot reconcile myself to the idea that there is no binding contract between the parties. If two persons entered into a contract and understood it in a different sense, it is binding upon them. Stevens' Mercantile Law, p. 102. There is no difference of opinion as to the determining of the average price of each variety of fruit. There is no serious difficulty either as to the expenses connected with the sale of the goods.

As to the profits, the respondent company claims that the sliding scale should be used to determine these profits. The appellant opposes this idea.

For my part, I would think that the sliding scale should be considered as part of the contract. It was communicated to the appellant before he signed his contract and was referred to time and again by both parties during their course of dealings. That scale was used with regard to all the co-operative associates.

But if the sliding scale should not be considered as part of the contract, it would form at least a basis on which a reasonable profit could be ascertained.

As to the appropriation of the money made by the appellant on his shares, I consider that out of the amount paid at first the necessary sum for the premium should be deducted and that the appropriation made in that respect by the respondent is well founded.

With regard to the injunction or specific performance, I concur with the views expressed by the learned Chief Justice of the Court of Appeal.

On the whole, I am of the opinion that the appeal should be dismissed with costs.

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Mignault J.

MIGNAULT J.—The more I have studied the voluminous record in this case, the more I have become convinced that the parties were wide apart from the very beginning as to a vital term of their contract, to wit, the price to be paid the appellant for his fruit. They drew up and signed, in May, 1914, a contract which on its face appears clear and unambiguous. The appellant (vendor), by this contract, undertakes to sell and the respondent (purchaser) to buy during seven years the appellant's crop of fruit, the purchase price to be the market price of such fruit in each year, and the vendor to gather and pick the fruit and when sufficiently mature to deliver the same to the purchaser's warehouse.

Such a contract, I have said, is on its face clear and unambiguous. The court could easily define the expression "market price" which of course would vary from year to year, possibly from month to month, according to the condition of the fruit market, and the appellant would obtain from the respondent the selling price prevailing at the time and place of the sale for fruit of the same kind and quality as that sold to the respondent. With a contract so worded there would of course be no question of expense incurred by the respondent or of any profit realized by it on the resale of the fruit.

Both of the parties, however, agree that the obvious meaning of the language of their contract is not that which they had in mind when they made it. The contract was not an ordinary contract of sale, but it involved a kind of agency of the respondent for the appellant in the sense that the price to be considered, the parties admit, is the price not of the sale by the appellant but of the resale by the respondent, and that certain expenses and charges as well as a reasonable commission must be allowed the latter.

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Having thus both agreed that the contract does not mean what its language clearly imports, the parties follow widely divergent courses when they attempt to define the "market price" which is to rule, and from the very start they appear to have been hopelessly apart as to the price which was to be paid for the fruit. The appellant defined "market price" in his particulars as the average price realized by the respondent from all sales made by it in each year of each grade and variety respectively, less the expenses properly incurred in handling the same and a reasonable commission on the sale of the fruit. The explanation of the respondent covers nearly a page in the appeal book, and involves considering its policy with what were termed the affiliated orchards, and then, at the end of the selling season, taking the average selling price of a carload lot of each particular variety of fruit, deducting from this a profit on each box in accordance with a scale called the sliding scale adopted by the respondent in its dealings with the affiliated orchards, in addition to which a further sum for packing, overhead and handling charges by package, as per the "sliding scale," would also be deducted. The net result would give the net amount per pound payable to the appellant and would be the market price as the respondent understood it.

With the parties so far apart from the very start, it is not surprising that after four years of dealings there is a very considerable difference between what the appellant contends should have been paid and what he actually received from the respondent. The appellant's action involves an accounting so as to establish the amount of this difference, and as his discussions with the respondent brought about no result, he finally refused to make further deliveries

and notified the respondent that he would sell his fruit elsewhere. The respondent then took an action for specific performance with an injunction to prevent the appellant from selling his fruit to any other purchaser.

I must confess that I endeavoured at first to find out which of the versions of the parties was the correct one, and it is noticeable that the respondent before us showed an inclination to accept the appellant's definition of market price, while contending that the "sliding scale" should be applied in determining the deductions for expenses and the profit to be charged. The appellant however, strenuously argues, and I think rightly, that the "sliding scale" formed no part of the contract. That the conduct of the respondent in fixing the amounts to be deducted for expenses and the commission to be paid it was arbitrary there can be no doubt, and its board of directors, of whom appellant was, during the first years, a member, but a constantly dissenting one, attempted to define the meaning of "market price" and finally proposed that a new contract be made stating that the price payable should be fixed by the directors in each year. Under these circumstances it appears to me impossible to place on this vital term of the contract a meaning which can in any way be considered as ever having had that *consensus ad idem* of the parties which is essential for the existence of a valid contract.

I find myself therefore in agreement with the opinion of the learned trial judge that there was no valid contract. I may add that there is no room for construction here because the natural and legal meaning of the term "market price" was not intended by the parties and they never agreed as to the special meaning which it should bear.

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The question of the payments made by the appellant on the shares purchased by him in the capital stock of the respondent company is a rather difficult one to solve. The appellant's application for shares stated that these shares, of a nominal value of $100 each, were issued at a premium of $20 per share, and the appellant, applying for fifty shares, sent his cheque for $1,500, being a deposit of $30 per share and promised to pay $22.50 per share on May 1st, 1915, and a like amount on the 1st of May of the years 1916, 1917 and 1918. He made besides the deposit of $30 per share, the first payment of $22.50 per share due on May 1st, 1915. The respondent acknowledged receipt of the application and of the deposit of $1,500, stated in the formal receipt sent to the appellant to be a deposit of $30 per share on an application for fifty ordinary shares of $100 each issued at 20% premium, but in its books the respondent credited $1,000 to the premium account and $500 to the capital account, so that, of the first payment of $30 per share, $20 went to the premium and $10 to the share itself. The result was that inasmuch as dividends are paid by the respondent on the paid up portion of its capital, the respondent received a lesser dividend than if the payment had been credited ratably on the premium and on the shares, which the appellant contends, but without citing any case supporting his contention, should have been done.

I do not think that authorities as to appropriation of payments can help us here, for there was only one debt, i.e., for fifty $100 shares sold for $120 each. If there had been two debts, one for the premium and the other for the share itself as distinguished from the premium, I would think that there has been no appropriation by the appellant, who paid first

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$30 and subsequently $22.50 generally on each of the shares subscribed by him, but that there was an appropriation by the respondent which credited $1,000 to premium and $500 to the 50 shares, and this appropriation was subsequently notified to the appellant when he asked for explanation as to the amount of the dividend cheque sent to him. So that it seems to me that when the learned trial judge allowed the payments made by the appellant to be ratably applied to the premium and to the share itself, thus treating the premium and the share as if they were two separate debts, he could not, under the authorities, ignore the appropriation made by respondent and notified to appellant. In this view of the matter the case of *Cory Bros. & Co.* v. *Owners of "The Mecca,"* (1), cited by the respondent would be in point and would sustain the judgment of the Court of Appeal.

But here I find one debt only, that of $120 for each share of a nominal value of $100. As I have said, the appellant paid generally, at first $30 and subsequently $22.50 on each share purchased by him and the receipt given him for the first payment of $30 is also general. The notes of the appellant's conversation with the respondent's manager Pooley, when a subscription of forty shares was contemplated, show that a total liability of $4,800 was mentioned, on which 25% of the total price was to be paid on allotment, and the balance in four equal annual instalments. When the appellant made the first payment of $30 per share subscribed for at $120, he still owed $90 on each share, for the price to him of the shares was $120 each. The dividends of course were paid on the par value,

(1) [1897] A.C. 286, at p. 293.

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but unless the premium and the par value be distinguished so as to form two separate debts—and then the rules governing appropriation of payments would apply—the appellant still owes $67.50 on his shares and can certainly not claim dividends on the balance due by him on shares, which he purchased at $120. If the premium and the par value be differentiated, it does not seem unnatural that the premium, which is the profit of the company for the privilege of purchasing its shares and not a part of its capital, should be paid first.

I therefore on this point, and for these reasons, agree with the Court of Appeal.

There remains the action for specific performance with the injunction taken by the respondent against the appellant. In my view that there was no valid contract, it is clear that this action was rightly dismissed and the injunction dissolved by the learned trial judge.

I would therefore allow the appeal of the appellant with costs here and in the Court of Appeal except as to the claim of the appellant for additional dividends and the costs properly ascribable to this claim. The respondent's cross-appeal which presupposes a binding contract between the parties should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Cochrane, Ladner & Reinhard.*

Solicitors for the respondent: *Cowan & Gurd.*

NORTHERN ALBERTA NATURAL GAS DEVELOPMENT CO....... } APPELLANT;

1920
Nov. 3.
Dec. 17.

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA....... } RESPONDENT.

IN RE THE PUBLIC UTILITIES ACT.

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

Municipal corporation—Contract—Gas company—Maximum rate—"Existing rate"—"Public Utility"—"Public Utilities Act," (Alta.) s. (1915) c. 6, s. 20 (b) and s. 23 (c).

The maximum rate stipulated in a contract between a gas company and a municipal corporation, while the company has not yet by by-law or otherwise fixed any rates which it proposes to charge, is not an "existing rate" as used in section 23 (c) of the "Public Utilities Act" of Alberta; and the Board of Public Utility Commissioners has no jurisdiction to modify it.

Per Sir Louis Davies C.J. and Anglin J.—A gas company, which has a number of wells drilled and ready for operation but has not yet constructed pipe lines to carry their output, nor begun to render service to the public, is a "public utility," within the purview of the "Public Utilities Act." Idington J. *contra*.

Judgment of the Appellate Division (15 Alta. L. R. 416) affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), allowing an appeal by the Attorney-General of the Province of Alberta from a decision of the Board of Public Utility Commissioners.

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

(1) 15 Alta. L. R. 416

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NORTHERN ALBERTA NATURAL GAS DEVELOPMENT COMPANY v. ATTORNEY-GENERAL FOR ALBERTA. IN RE PUBLIC UTILITIES ACT

The Board had adjudged that it possessed jurisdiction under the "Public Utilities Act" of Alberta to make an order increasing the prices for the sale by the appellant of gas to consumers in the city of Edmonton beyond the maximum rates fixed by an agreement between the city and the company appellant whereby the company was granted its franchise by the city and which agreement was confirmed by chapter 29 of the Statutes of Alberta, 1916.

A. H. Clarke K.C. and *H. R. Milner* for the appellant.

Eug. Lafleur K.C. and *I. B. Howatt* for the respondent.

THE CHIEF JUSTICE.—After consideration I have reached the conclusion that this appeal must be dismissed.

I concur with the reasons for such dismissal stated by my brother Anglin.

IDINGTON J.—To maintain this appeal we must hold that a municipal corporation having, with the assent of the electors, known as burgesses, made a contract, of such an unusual and *ultra vires* character, with a company of adventurers, to make it legal required legislative ratification thereof, and then that the Legislature by enacting such merely ratifying legislation, impliedly enabled the Board of Public Utilities Commissioners to go a step further than had been given by either contract so ratified, or the legislation creating this Board; and hence, without the consent of said burgesses to a variation of the contract, by adding to the maximum price named in such a contract for the services to be rendered, although it might never come to be operative.

The company in question never got beyond the stage of expending some money in way of exploitation or construction, and never operated, nor was ready to operate, anything, yet claims that it is a public utility within the meaning of the definition thereof in the "Public Utilities Act," which reads as follows:—

(b) The expression "public utility" means and includes every corporation other than municipal corporations (unless such municipal corporation voluntarily comes under this Act in the manner hereinafter provided), and every firm, person or association of persons, the business and operations whereof are subject to the legislative authority of this province, their lessees, trustees, liquidators, or receivers appointed by any court that now or hereafter own, operate, manage or control any system, works, plant or equipment for the conveyance of telegraph or telephone messages or for the conveyance of travellers or goods over a railway, street railway, or tramway, or for the production, transmission, delivery or furnishing of water, gas, heat, light or power, either directly or indirectly, to or for the public; also the Alberta Government telephones, now managed and operated by the Department of Railways and Telephones.

The company in question pretends that it intends to supply gas. How such a company, merely exploiting the territory from which it expects to supply gas, can claim that it

owns, operates, manages or controls, any system,

within the meaning of said description, I am unable to understand.

And much less am I able to understand how a board merely given a possible jurisdiction to assent to the entry of such a company into a particular field to operate in, and then, when in operation, regulate its rates, can imagine that it has not only the powers duly assigned it, but also the power to override the legislative limitations of powers of contract, which a municipality has had imposed upon it by its charter, and extend those limited powers further than the legislative creator had seen fit to grant by special

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legislation, and in doing so to exceed not only the contractual power or the expression thereof, and the specific legislation, but also something far beyond the powers assigned the Board itself.

It seems to me as plain as the English language can make it, in the use thereof by a draftsman trying to express a Canadian legislator's meaning, that the Board can only deal with existent public utilities, and have nothing to do with the birth, growth, and finishing of same ready to be owned and used.

And, despite the resistance of the Attorney General for the province and the unanimous opinion of the Supreme Court thereof specifically designated by the legislation creating the said Board as the only authority which is to determine the limits of the jurisdiction of the Board, the company comes here asking us to overrule such determination, notwithstanding said court has pointed out many other insuperable objections in the way of the Board exercising such autocratic powers as the company desires it to exercise.

The company of course, is entitled to say that it got leave from this court to come here, but that is no more conclusive as to our jurisdiction than any leave, given by a single judge, for example, under the Winding-Up Act, or another court inadvertently giving leave to appeal in a case over which we never have been given jurisdiction.

Although appearing of record in this case as a party to the order granting leave, I wholly dissented therefrom for reasons assigned in writing.

I hold that we are not here to pass upon mere administrative acts of any branch of government, unless expressly assigned that duty by Parliament, as, for example, in regard to appeals from the Board of Railway Commissioners for Canada.

I have, however, in deference to what is assumed to be the contrary opinion of the majority of the court, set forth above what seem to me amply sufficient reasons for dismissing the appeal as well as that of want of jurisdiction.

I think the appeal should be dismissed with costs.

DUFF J.—I agree with the conclusion of the Appellate Division. The judgment of the Board in which the question of jurisdiction is fully discussed sets forth as follows:—

> Any jurisdiction the Board may possess so far as increasing rates is concerned is derived from s.s. c. of section 23 of the "Public Utilities Act." That section provides that the Board may after hearing fix "just and reasonable" rates * * * whenever the Board shall determine any existing individual rate * * * to be unjust or unreasonable, insufficient or unjustly discriminatory or preferential.

The order of the Board, having regard to the circumstances, which it is unnecessary to recapitulate, in effect is simply an order authorizing the company to exact charges exceeding the limit fixed by the agreement between the company and the municipal corporation of Edmonton and by the statute confirming the agreement. The company is providing no services, it is in no position to provide any services; consequently it is not in fact exacting any rate and it has not by any corporate act fixed the rates it is to charge. The order is therefore an order changing the limits fixed by the agreement between the company and the municipality ratified as already mentioned by statute in respect of tolls and it is nothing else.

The question is: Does the provision quoted sanction such an exercise of authority by the Board?

If such be the purpose of the provision the language is not apt; it is a provision for substituting just and reasonable rates for rates which have been held by

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the Board on investigation to be unreasonable or insufficient. The provision does not appear to contemplate orders which merely expand or restrict the limits fixed by a statutory contract in respect of tolls and charges. Whether in exercising authority under the section the Board may disregard the limits fixed by such contracts is another question. The language in my opinion is not sufficiently precise to support an order which merely changes such limits.

ANGLIN J.—The appellant company has not yet established a service. While it has a number of wells drilled and ready for operation it has not constructed pipe lines to carry their output. By its agreement with the city of Edmonton, whereby it obtained its franchise, certain maximum rates of charge for its services are established. That agreement has been validated and confirmed by statute. The company, however, has not, by by-law or otherwise, fixed any rates which it proposes to charge.

Alleging that the maximum rates specified in the agreement with the city are quite inadequate, the company applied to the Board of Public Utilities Commissioners to fix increased rates for its future services. The Board heard and granted this application, notwithstanding the intervention of the Attorney General contesting its jurisdiction. On an appeal taken under the provisions of the statute the Board's order was vacated by the Appellate Division as made without jurisdiction, and from that decision the present appeal has been brought by leave of this Court.

Three objections are taken to the jurisdiction of the Board:—

(a) that because it has not begun to render service to the public the appellant company is not yet a

"public utility" within the purview of the "Public Utilities Act"; (b) that the Board's jurisdiction is confined to increasing, reducing or approving of existing rates, and a maximum rate is not an "existing rate"; and (c)that, except for the reduction of excessive rates, provided for by s. 20 (b) of the statute, the Board has no power to interfere with rates fixed by the terms of a contract between a public utility and a municipality.

The status of the appellant company to apply to the Board and to assert the present appeal depend alike upon its existence as a public utility. Objection (a) should therefore be dealt with whatever view may be taken of objections (b) and (c). I am, with respect, of the opinion that it should not prevail. If it is sound a company ready to operate cannot obtain the sanction or approval of the Board to the rates it proposes to charge before actually commencing to do business, but must wait until it is in actual operation and actually charging such rates before it can legally apply for such sanction or approval. That this was the intention of the legislature seems highly improbable. The appellant company, in my opinion, "owns, * * or controls * * works, plant or equipment * * for the production or furnishing of gas * * to or for the public" and is therefore within the definition of "public utility" found in clause (b) of s. 2. Nothing in that clause imposes actual operation or even complete readiness to operate as a condition precedent to such a company as the appellant attaining the status of a "public utility." On the contrary the tenor of the Act, taken as a whole, appears to contemplate that in the stage of development which the appellant's works, plant and equipment have reached that status should be accorded to it.

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But objection (b) seems to me to be fatal to the jurisdiction of the Board whose powers are purely statutory. Sec. 20 (b) clearly does not apply. Nobody suggests that the maximum rates authorized by the agreement with the municipality of Edmonton are excessive. Sec. 23 (c) is the only other provision which purports to confer direct jurisdiction over rates. But the operation of that section is by its terms confined to cases where "the Board shall determine any existing rate * * to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential." It may be that it is not necessary to have a rate in actual use and in course of collection to render this clause of the statute applicable. But there must at least be a fixed rate which the company has determined, by by-law or in some other proper method, to impose and charge whenever it shall render the service for which such rate is prescribed. A rate merely stipulated as the maximum which the company may exact, but which has not yet been charged or authorized by the company and may never be so charged or authorized is not an "existing rate." I am therefore of the opinion that the case before us does not fall within s. 23 (c).

The only other suggestion offered in support of the appellant's position which seems to call for observation is that the Board has jurisdiction under s. 37 to deal with and prescribe the rates to be charged by a public utility as a condition of giving approval to a "privilege or franchise" granted to it by the municipality. But, in view of the explicit provisions of the statute empowering the Board to deal with rates and delimiting its jurisdiction in that connection, s. 37 in my opinion, cannot be invoked for that purpose. The principle of the decision in *Fort William*

Grand Trunk Pacific Railway Co. v. *Property Owners* (1) seems to be in point. The conditions authorized to be imposed by s. 37 are

conditions as to construction, equipment, maintenance, service or operation.

"Operation" is the only word in this group which could possibly cover the fixing of rates. I had occasion to consider its meaning and scope in the recent case of *Ottawa Electric Railway* v. *Township of Nepean* (2). As used in the statute now before us, in my opinion, it does not include the fixing or regulation of rates or charges.

Mr. Clarke pressed for an expression of opinion upon objection (c) whatever view should be taken with regard to objections (a) and (b). But, having regard to my conclusion that objection (b) is well taken and is fatal to the company's application, I think objection (c) should not now be passed upon. It is not only unnecessary to deal with it but any expression of opinion upon it might well be regarded as purely academic.

Moreover, we were informed by counsel that an appeal is actually pending under a similar statute in the appellate court of another province in which this very question is presented for decision, in the case of a public utility in actual operation and charging fixed rates or tolls. We should not embarrass the presentation or determination of that appeal by any expression of opinion here which could be regarded as unnecessary or premature.

Because the appellant's application does not fall within s. 23 (c) owing to their being no "existing rates" the Board in my opinion was without jurisdiction to entertain it and to make the order reversed by the Appellate Division. Solely on this ground I would affirm the judgment *a quo* and dismiss the appeal with costs.

(1) [1912] A.C. 224. (2) 60 Can. S.C.R. 216, at p. 244.

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MIGNAULT J.—On the ground that the so-called rate which the appellant seeks authority from the Board of Public Utilities Commissioners of Alberta to increase is not an "existing rate" within the meaning of section 23, s.s. (c) of the "Public Utilities Act" (Alberta), my opinion is that this appeal fails and should be dismissed. The appellant's franchise agreement with the city of Edmonton fixes no rate, but establishes a maximum price for gas which the appellant cannot exceed. Under this agreement and within this maximum the appellant must by by-law determine the price to be paid by the consumers of gas, and then only will there be an existing rate. It has not yet done so for it has not yet laid down the pipe lines through which the gas will be supplied. There is therefore no existing rate, but merely a maximum agreed upon by the appellant and the city, and it is this contractual maximum which the appellant seeks to have increased. In my opinion, the condition required for the exercise of the Board's jurisdiction is wanting. Looking at the whole situation and the changed conditions since the agreement was made, it would seem that resort should be had to the Legislature rather than to the Board whose powers clearly do not extend to a case like this one.

Appeal dismissed with costs.

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

Solicitor for the Attorney General of Alberta: *Irving B. Howatt.*

Solicitor for the city of Edmonton: *J. C. F. Bown.*

EDMONTON, DUNVEGAN AND BRITISH COLUMBIA RAILWAY CO., (DEFENDANT)............... APPELLANT;

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*Nov. 3, 4.
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IN RE PUBLIC UTILITIES ACT.

AND

J. W. MULCAHY., (PLAINTIFF)...... RESPONDENT.

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

Master and servant—Railways—Injury to servant—Knowledge of dangers—Volenti non fit injuria—Liability of master.

The respondent, employed by the appellant railway company as road-master, had been specially instructed to repair a certain section of the road-bed which was in a dangerous condition owing to bad rails. The respondent frequently applied for new rails which the appellant company did not supply. While, in the course of his employment, the respondent was travelling over that section in a hand-car, an accident occurred through the car leaving the tracks and he was injured.

Held, Sir Louis Davies C. J. dissenting, that the appellant company was liable, the defence of *volenti non in injuria* not being applicable under the circumstances.

Judgment of the Appellate Division (15 Alta. L.R. 464) affirmed, Sir Louis Davies C. J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Hyndman J. (2) 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.

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

(1) 15 Alta. L.R. 464; [1920] 2 W. W.R. 583. (2) [1919] 3 W.W.R. 750.

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IN RE PUBLIC UTILITIES ACT.

C. P. Wilson K.C. for the appellant.

Eug. Lafleur K.C. for the respondent.

THE CHIEF JUSTICE (dissenting): At the conclusion of the argument at bar I was of the opinion that Mr. Wilson had made out a good case for this appeal. As, however, my colleagues seemed to have a different impression, I found it necessary to read with care all the pertinent evidence in the case referred to by counsel on either side, as also the judgment of the trial judge, Mr. Justice Hyndman, and that of the Appellate Division reversing it.

As a result, I am clearly of the opinion that, alike on the applicability of the maxim *volenti non fit injuria* and of the law of contributory negligence, the defendants are not liable and that the appeal should be allowed with costs and the judgment of the trial judge restored.

If there ever was a case, in my opinion, to which the doctrine of the maxim was applicable and should be applied, it is this case.

The actual work and duty of the plaintiff, for which he was employed, was to put in repair the very roadbed, the dangerous condition of which, it is contended by the plaintiff Mulcahy, caused the accident in question. He undertook the employment and continued in it with full knowledge of the very bad and unsafe condition of the roadbed. His knowledge of its condition was probably better than that of any other man. He applied, after going to work at the repairs in August, for new rails, and before, and in the beginning of September, was informed that the company would supply new rails for a portion of the road but could not do so for that part of it where the accident occurred, namely, between McLennan and

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Grande Prairie. On receiving this definite information, he, on the 6th September., 1917, wrote to his foreman the following letter.

Spirit River, Sept. 6, 1917.

Mr. Frank Donis,
Ex. Gang Foreman.

Dear Sir:

When you are working your gang from Manir Tank Mile 341 to Smoky 297 getting worst places out of track you will notice you will find some very bad rails. I have made requisitions for rails to Mr. Sutherland and he claims that he cannot give me any rails between McLennan and Grande Prairie so when you find a very bad one go to the nearest siding and take out rails from side track and put in main line and put your bad rail in side track that you take from main line leave a man to protect side track until you return with bent rail to replace good rail taken out. I understand this is a very expensive way to do but it is the only way we can get some of the very worst rails out which will cause bad derailments if left in track when repaired I know it will break up your gang so you cannot make a good showen but I understand all of this and will proct (protect?) you if anything is sayed about your work not showen up be shure and tamp up under new rail in low places good.

Yours truly,

J.W. Mulcahy,
R.M.

No evidence could more clearly establish plaintiff appellant's full knowledge of the road's condition and of the inability of the company to supply new rails on that portion of the road where the accident occurred. The instructions he gave his foreman in this letter as to how he should remove and replace very bad rails, taken in conjunction with the other letters in evidence, shew his complete knowledge of all the facts, namely, the bad condition of the road on this particular section, the inability of the company to supply new rails for that comparatively untravelled section as all the rails they could procure were required for the section of the road where there was the greatest

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traffic for freight and passengers, and the means he directed the foreman should take to supply the new rails required as substitutes for any "very bad ones."

This letter is, to my mind, also a complete answer to the suggestion that the company had aggravated the dangers to which plaintiff was exposed by neglecting to supply him with new rails. It shews his full knowledge of the company's inability to supply new rails between McLennan and Grande Prairie where the accident occurred as all the new rails they could procure were required for the more travelled sections of the road. With all this actual knowledge, the plaintiff continued in his position as roadmaster, repairing the road for which he had been specially employed. I can only, without quoting more from the evidence, repeat my strong opinion that the doctrine of *volenti non fit injuria* should be applied.

Then, as to the contributory negligence of the plaintiff, I am also of the clear opinion that it has been proved up to the hilt. He was in control of the car, called a speeder, at the time of the accident and sat in the front seat along with a workman named Carbonneau. Frank Donis, who was running the car under his instructions sat behind him, and the evidence shews clearly it was plaintiff Mulcahy's custom and duty to signal to him the rate of speed. As usual, the witnesses differ somewhat as to the rate, but Mulcahy's own evidence is that, at the time of the accident, the speeder was running at between 10 and 15 miles an hour.

Accepting plaintiff Mulcahy's own evidence of the state and condition of the roadbed and rails over which they were running, this rate of speed, I think, was not short of reckless imprudence and negligence. It no doubt thereby contributed to throw the car off the rails and cause the accident which occurred.

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If, however, the evidence of the other witnesses, Donis and Sutherland and Carbonneau, is accepted, that the roadbed, at the place in question, was not at all in the very bad condition that Mulcahy describes, but, as one of them Sutherland said:

> about the best piece of track up there, the land dry and the ditching very good, there was no chance for water to remain around the track and keep it soft or give it a chance to become rough,

then the proper conclusion to be drawn is that which I think the trial judge, accepting their evidence, drew that the car ran off or jumped the track, not from the bad condition of the roadbed or rails, but from some unexplained cause.

My conclusion, therefore, is clear that the appeal should be allowed with costs and the judgment of the trial judge restored.

IDINGTON J.—The learned trial judge rested his judgment herein upon the application of the doctrine expressed in the maxim *volenti non fit injuria.*

Assuming, for argument's sake, such a defence would have been applicable if the accident had happened the next day after the respondent had entered upon his new employment, relying upon the reasonable expectation of his being supported in his effort to improve the dangerous condition then existent and to be rectified, I cannot see how it can be made applicable to the circumstances created by the gross neglect of appellant to supply the rails which the respondent so repeatedly urged upon its managers to be used in rendering the very spot in question safe.

The Appellate Division, in my opinion, was quite right in reversing, for the reasons assigned by it, the judgment of the learned trial judge on that ground,

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unless there was pressed upon it, and shewn to be well founded, the ground of contributory negligence on the part of respondent which is now urged upon us.

Although a casual expression by the learned trial judge is quoted by counsel for appellant as indicating that, in the said judge's opinion, the defence of contributory negligence was established, I cannot read it as an express finding upon the conflicting evidence that appears or think that, if he so intended to find, he would have so passed over what he found on the facts and let the matter rest there, and then turned to elaborate the ground upon which he does rest his judgment.

And the absence of any reference thereto in the able and fully considered opinion of the court below, seems to indicate that no such defence had been pressed on that court.

The evidence on the point, I repeat, is most conflicting. And in one view presented is reduced to a narrow point, which does not seem by any means to render it safe for us to act upon, under the foregoing circumstances.

Indeed it amounts to no more than a possible suspicion that when the speeder car approached the point in question it might have been wiser for respondent to have indicated, to the man operating, a reduction in the rate of speed.

I do not think, in face of the foregoing history of the alleged defence, and the conflict of evidence, as well as the fact that the motorman knew the road as well as respondent, that we would be justified in allowing the appeal on that ground, and, therefore, I think the appeal should be dismissed with costs.

DUFF J.—This appeal involves a controversy touching the application of the maxim *volenti non fit injuria.* Long ago Bowen, L. J., called attention in a well known judgment to this—that the maxim is *volenti non fit injuria* not *scienti non fit injuria.* I make this observation because I should like it to be quite plain that some sentences in the judgment of the learned trial judge seemingly not quite consistent with this should not be accepted as an accurate exposition of the rule.

I do not find it necessary to discuss the question whether if we had been confronted with a case in which the essential elements were the request by the company to Mulcahy to undertake the work he did undertake in the circumstances known both to him and to his superiors, the learned judge's finding of fact that the conduct of the parties properly interpreted evinced an intention that Mulcahy should bear the risk of the dangerous condition of that part of the railway where his duties were to lie could properly be set aside by the Appellate Division. I shall proceed upon the hypothesis that Mulcahy did undertake the risk but his agreement to undertake the risk must, as the Appellate Division have held, be qualified by the condition necessarily implied that the company would do what they reasonably could to assist him in minimizing the risk. That must, I say, be taken to have been one of the terms upon which the risk was assumed and I think an essential term. It follows that the failure on the part of the company to fulfil this term disables them from relying upon Mulcahy's undertaking unless at all events they can establish that by their default Mulcahy was not prejudiced. The Appellate Division have taken the view apparently that this was not shewn. Mr. Wilson has not satisfied me that that view is erroneous.

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Anglin J.

ANGLIN J.—The judgment of the Appellate Division is challenged by counsel for the defendant company on two grounds. It is urged (*a*) that the plaintiff voluntarily incurred the risk of the defective condition of the railway which has been found to have been the cause of his injury; (*b*) that excessive speed of the car, or "speeder," on which he was travelling was the true cause of the accident and that he was so far responsible for it that he should either be deemed the author of his own wrong or at least guilty of contributory negligence.

As to the first defence, depending upon the applicability of the maxim *volenti non fit injuria,* I agree with the opinion delivered by Mr. Justice Ives in the Appellate Division concurred in by the learned Chief Justice of Alberta and Mr. Justice Beck. The plaintiff did not agree to relieve the company from liability for accidents that might happen from an unnecessary prolongation of the risk arising from irremediably defective rails owing to its failure to comply with his reasonable and reiterated request that he should be sent a supply of good rails to replace them. No such implication is warranted either from his assumption or his retention of the post of roadmaster of the section.

That the speeder was running at an excessive speed at the time of the injury was not found by the learned trial judge, who dismissed the action because he was "by no means satisfied" that the speeder did not

jump the rails, * * * without any explainable cause.

But, assuming in the defendant's favour that the speed was too great, the evidence is not convincing either that the driver should be regarded as the plaintiff's *alter ego* so as to make him responsible for negli-

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gent driving or that the plaintiff had such an opportunity of observing and controlling the speed immediately before the moment of the accident that a case of contributory negligence on his part is clearly made out. Notwithstanding the able argument presented by Mr. Wilson I am not satisfied that there is error in the judgment *a quo*.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Parlee, Freeman, Mackay & Howson.*

Solicitors for the respondent: *Woods, Sherry, Collisson & Field.*

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*Nov. 18, 19.
*Dec. 17.

IN RE
PUBLIC UTILITIES ACT.

THE MONTREAL LOCOMOTIVE WORKS, LIMITED (DEFENDANT) } APPELLANT;

AND

GEORGE McDONNAUGH (PLAINTIFF).......................... } RESPONDENT.

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

Negligence—Accident—Damages—Jury's findings—Inconsistency—New trial.

The respondent was injured by placing his hand on a defective electric motor in motion. He alleges that he was obliged to do so to ascertain if the motor was overheated; but the appellant contends that he acted contrary to instructions. The principal findings of the jury were:

"4.—Was the accident caused by the common fault of the plaintiff and the defendant; and if so, state in what the fault of each one consisted?

"Yes.—The defendant is to blame for having had a defective machine in operation, knowing that it was defective.

"The plaintiff is to blame for having exceeded what he was told to do, by getting up and putting his hand on the motor while in motion and taking unnecessary risks.—Unanimous."

The verdict of the jury, awarding $3,000 to the respondent, was affirmed by the Court of King's Bench.

Held, Idington J. dissenting, that a new trial should be ordered, as the jury's findings are obscure and inconsistent.

Judgment of the Court of King's Bench reversed, Idington J. dissenting and Mignault J. concurring *sub modo*.

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

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

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THE MONTREAL LOCOMOTIVE WORKS, LIMITED, v. MCDONNAUGH. IN RE PUBLIC UTILITIES ACT.

The respondent was injured, while in the employ of the company appellant, by placing his hand on an electric motor which was defective. The respondent alleged that he did so in order to ascertain if the motor was overheated, which act was necessary in order to keep the motor in operation by oiling it if needed. The appellant company pleaded that the respondent's duty, according to instructions given, consisted only in replacing the fuses when they burned out. The jury, after finding that the accident was not due to the sole fault of either the appellant or the respondent, answered to question 4 as reported in the head-note. The appellant's ground of appeal is that there is no relation of cause and effect between the defective condition of the machine and the injuries which the respondent sustained. The respondent contends that the verdict is not clearly wrong and therefore must stand.

A. Chase-Casgrain K.C. for the appellant.

Ernest Pélissier K.C. for the respondent.

IDINGTON J. (dissenting)—There is much in the form of the verdict of the jury which is open to criticism.

But reading it as a whole there is one thing clear and that is that the contention of the appellant never was intended by the jury as its verdict.

I prefer giving it, as the evidence justifies and the learned trial judge and the unanimous holding of the Court of King's Bench did, a rational meaning.

To do so this appeal should be dismissed with costs.

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Duff J.

DUFF J.—I concur in the view of the court below that there was evidence to support the verdict for the plaintiff if the jury had found such a verdict after a complete and proper direction by the trial judge.

But the questions for the jury were eminently debatable ones and it is a case in which a judgment for the plaintiff ought not to be sustained unless two conditions are satisfied: 1° that the trial judge by his charge brought home to the comprehension of the jury the nature of the questions upon which they had to pass and 2° that there should be no substantial doubt as to the meaning of the jury's finding. Neither of these two conditions is satisfied. I think it is gravely questionable that the jury understood the questions they were asked to answer; and further, after a good deal of consideration, I am quite unable to satisfy myself as to the meaning of their answers. There should be a new trial and all costs, including the costs of this court, should abide the event of the new trial.

ANGLIN J.—Greatly as I regret the necessity for the adoption of that course I see no way to avoid ordering a new trial of this action. The meaning of the jury's findings is at best obscure. Putting upon them the most benevolent interpretation of which they are susceptible they seem to be hopelessly inconsistent.

The fault attributed to the defendants is the operation of a machine known to be defective. But, admittedly, the defect in the machine did not itself expose the plaintiff to any risk. Unless we are to attribute to them an utter disregard of the requirement that to be actionable fault must be a proximate cause of the injury—*dans locum injuriae*—the jury must be

taken to have meant that the operation of the defective machine entailed duties on the plaintiff in the discharge of which he was exposed to unnecessary and unwarranted risk of injury. Yet they found as fault on his part that in performing the act which was the immediate cause of his being injured he exceeded what he was told to do and took unnecessary risks.

It is suggested for the plaintiff that by this latter finding the jury merely meant that, although it was part of his duty to see that the defective bearing did not become overheated and therefore to ascertain its condition from time to time by feeling the casing covering it, he was not sufficiently cautious in doing so. But the verdict scarcely admits of that interpretation and attributing the intention to the jury of making such a finding is almost pure conjecture. If taken literally the finding ascribes to the plaintiff fault of such a character that the conclusion is almost inevitable that it was the sole cause of the accident. But the jury negatived that view and expressly found that there was fault on the part of the defendants which contributed to causing the injury. A somewhat meagre charge, particularly as to the necessity for direct causal connection between any fault to be found and the injury sustained, may to some extent account for the difficulties which the findings present. At all events it seems to me that they are insuperable and that justice to both parties requires that a new trial should be had. Costs of the abortive trial should abide the event. The costs of the appeals to the Court of King's Bench and to this Court should be costs in the cause to the appellant payable to it in any event of the action.

BRODEUR J.—I concur in the result.

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THE MONTREAL LOCOMOTIVE WORKS, LIMITED, v. MCDONNAUGH. IN RE PUBLIC UTILITIES ACT.

Mignault J.

MIGNAULT J.—In this case the majority of the court is of opinion that the appeal should be allowed and a new trial ordered. I would have been ready to express my views on the merits of the respondent's action and to state whether it should be maintained or dismissed. I realize however that such an expression of opinion might possibly influence or embarrass the new trial now ordered. So, while I would have preferred to dispose immediately of the action on its merits, I will not dissent from the judgment ordering a new trial.

Appeal allowed with costs.

Solicitors for the appellant: *Casgrain, McDougall, Stairs & Casgrain.*

Solicitor for the respondent: *J. E. C. Bumbray.*

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*Nov. 15.
*Dec. 17.

A.H.D.W. BREAKEY AND OTHERS (PLAINTIFFS) . . . . APPELLANTS;

AND

THE CORPORATION OF THE TOWNSHIP OF METGERMETTE NORTH (DEFENDANT) . . . . RESPONDENT.

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

Municipal corporation—Right to cut timber—Immoveable property—owner—Valuation Roll—Arts. 378, 381, 382 C.C.—Arts. 16, S.S. 20 and 27, 649, 651, 684, 688 *M.C. (Que.) 2 Geo. V., c. 45.*

Although article 381 C.C., as amended by 2 Geo. V., c. 45, declares that "the right to cut timber" is "immovable."

Held per Duff, Anglin and Mignault JJ.—The possessor of that mere right cannot be placed on the valuation roll for the purpose of municipal taxation under the Municipal Code.

Per Duff J.—The possessor of that right is not an "owner" within the meaning of paragraph 20 of article 16 M.C.

Per Brodeur J.—The possessor of that right, if he is at the same time the owner of the standing timber, can be placed on the valuation roll. Anglin J. *sembile.*

Per Anglin, Brodeur and Mignault JJ.—Such a right is not "immovable property" within the meaning of that term as defined by paragraph 27 of article 16 M.C. and as used in article 651 M.C.

Per Idington J. dissenting.—The definition of the word "immovable" by the legislature ought to be observed in the interpretation of article 651 of the new municipal code which was enacted subsequently to the amendment of article 381 C.C.

Judgment of the Court of King's Bench (Q.R. 29 K.B. 309) reversed, Idington J. dissenting.

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

REPORTER'S NOTE: In this case a motion to quash for want of jurisdiction was dismissed with costs; the judgment is reported in 60 Can. S.C.R. 302.

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BREAKEY v. THE TOWNSHIP OF METGERMETTE NORTH.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of the trial judge, Flynn J. and dismissing the appellant'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.

Louis St. Laurent K.C. for the appellant.

Ernest Roy K.C. for the respondent.

IDINGTON J. (dissenting). This appeal raises the point of whether or not the possession of a right to cut standing timber for a term of thirty years can be placed on the valuation roll which is the first step taken under the Municipal Code of Quebec in the way of imposing taxes to be borne by the owner of any land or part thereof.

The taxes in the rural municipalities of Quebec are borne by the owner of the land, or parts thereof.

The right to cut standing timber was at one time, as we held in the case of the *Laurentide Paper Co.* v. *Baptist* (2), a mere personal right.

No matter whether the right was in perpetuity or merely for a term of years such, by reason of the peculiar angle at which learned lawyers sometimes will look at things and arrive, by what to them seems to be a sound process of reasoning, at conclusions that determine the quality of the ownership of anything, was the ultimate result reached.

When that case was decided, and for a very long time before, the view taken in that case, and in which I agreed, no doubt was settled law in Quebec.

(1) [1919] Q.R. 29 K.B. 309.

(2) [1908] 41 Can. S.C.R. 105.

It might be that the timber growing on the land was the only thing of value thereon or therein or that could be produced thereby; and that the unsophisticated might be unable to appreciate the difference between the conclusive right to enter and cut same as and when from time to time the possessor of such right might see fit and by means of the law protect such right absolutely; and the absolute legal ownership thereof as part of the entire property in the land. Perhaps even the sophisticated were at times puzzled to maintain the nature of the subtle distinction between the right to cut and carry away, and the absolute ownership of a dismembered part of the entirety, even though the former, at least, had not acquired a universally recognized legal designation or definition of it.

I suspect it was by reason of the results reached in said case, that shortly after the declaration thereof the common sense of the legislature of the province saw fit to try and make the legal conception of juristic right, so far as legislative power could do so, conform with the common sense conception of ownership of land, or part therein or thereof or thereout, and accordingly enacted 2 Geo. V., cap. 45, amending Art. 381 of the Civil Code, as follows:—

1. Article 381 of the Civil Code is amended by inserting, after the word "habitation" in the second line, the words: "the right to cut timber perpetually or for a limited time."

Article 381, thus amended, now reads as follows:—

381. Rights of emphyteusis, of usufruct of immovable things, of use and habitation, the right to cut timber perpetually or for a limited time, servitudes, and rights of action which tend to obtain possession of an immovable, are immovable by reason of the objects to which they are attached.

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Idington J.

The fundamental law of the province as formerly interpreted having been thus expressly amended, I respectfully submit that this new addition to the list of rights formerly held to be immovable, though less than the entire ownership thereof, and a new definition of what is to be comprehended within the term "immovable" ought to be observed throughout by the courts; and at all events in dealing with any subject matter falling within the term "immovable" used in any legislative enactment passed by the Quebec Legislature after said amendment, that word "immovable" should be interpreted in light thereof and construed accordingly, unless there appear in such enactment a clear intention that another meaning is to be attributed to the word "immovable."

The new Municipal Code was enacted some five years thereafter and must, I submit, be read in light thereof.

Article 651 thereof reads as follows:—

> All land or immovable property situated in a local municipality, except that mentioned in article 693 is taxable property.

Surely that is expressly within the definition of "immovable" in the Civil Code as amended.

Article 693 contains a lot of exemptions of which this now in question is not one.

I am quite aware that much in the language of the new Municipal Code remained, as it was in that which it substituted, apparently capable of subserving either the purpose of Art. 381 of the Civil Code, as it stood before the amendment, or as it stood when amended.

It is, however, in Article 651, just quoted, that the key note of the whole is to be found so far as assessment or valuation roll is concerned, and I submit that said article dominates all else in that regard.

It is the amended article of the code which must also always be applied to the later enactments and deeds or agreements. And if the *Laurentide Paper Co. Case* (1), or one like thereunto, should again hereafter arise, it is the amended article that should, so far as relevant, be applied.

We ought not to encourage the following of a metaphysical train of thought born of other days, to defeat such a plain enactment, clearly intended to set aside for all purposes that which had resulted from the adoption by the courts of that mode of reasoning.

The Legislature, moved evidently by a new mode of reasoning in relation to every-day affairs of the people concerned, had been led to determine that the antiquated mode, so far as the right to cut timber extended, should cease in regard to the meaning of the word "immovable."

The comprehensive conception and purpose of such an excellent fundamental law as the Civil Code should not be lightly set aside.

I think, therefore, the appeal fails.

There is another aspect presented by the hearing of this case.

There is, as I read the law, no title to land (in the sense in which these words are used in section 46 (b) of the Supreme Court Act defining our jurisdiction) involved herein upon which our jurisdiction can rest. At all events if the right in question is a mere personal one, there can be no title to land in question, and hence we should dismiss the appeal for want of jurisdiction.

(1) 41 Can. S.C.R. 105.

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Idington J.

And if, by any process of reasoning, there can be found a title to land in question, then, and only then, we have jurisdiction and, by adopting that ruling, the appellants are assessable and properly placed on the valuation roll.

The appeal, is in my opinion, should be dismissed with costs.

DUFF J.—By article 688 M.C. municipal taxes imposed on land may be collected from the

occupant or other possessor of such land as well as the owner thereof or from any subsequent purchaser of such land.

By section 16, s.s. 20, owner is defined as meaning

everyone having the ownership or usufruct of taxable property or possessing or occupying the same as owner or proprietor or occupying Crown lands under a location ticket.

Section 16 provides that the expression so defined shall have the

meaning, signification and application

so assigned to it

unless the context * * * declares or indicates the contrary.

It is, in my judgment, not permissible to give to the word "owner" or "proprietor" in sec. 688 a more extended meaning than that derived from the above quoted definition. Nothing in the context or in the subject matter indicates an intention to employ the word in a more comprehensive sense. These considerations in my opinion dispose of the appeal. Article 381 C.C. as amended undoubtedly provided that the appellant's *droit de coupe de bois* is an immovable but it does not follow that this right is a usufruct or that it is proprietorship within the meaning of these provisions of the Municipal Code. It is not

sufficient, I think, to bring a possible subject of taxation within the sweep of these provisions to have a statutory enactment declaring that possible subject to be an immovable.

ANGLIN J.—Since "the right to cut timber permanently or for a limited time" has been declared by Art. 381 of the Civil Code, as amended by 2 Geo. V., c. 45, to be

immovable by reason of the object to which it is attached

I should have been disposed to regard it as "immovable property" within Art. 651 of the Municipal Code and, as such, "property taxable" in the name of the owner or holder of such right, were it not for the definition of "immovable property" in paragraph 27 of Art. 16 of the latter code. That definition is as follows:

The words "land" or "immovable" or "immovable property" mean all lands or parcels of land (toute terre ou partie de terre) in a municipality owned or occupied by one person, or by several persons jointly, and include the buildings and improvements thereon.

It is argued that this definition is merely indicative and not restrictive. But the introductory paragraph in Art. 16, in my opinion, answers that contention. It reads as follows:—

Art. 16. The following expressions, terms and words whenever they occur in this code or in any municipal by-law or any municipal order have the meaning, significance and application respectively assigned to them in this article unless the context of the provision declares or indicates the contrary.

The "application" of the term "immovable property" is thereby confined to

all lands or parcels of land (toute terre ou partie de terre).

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Now, standing timber is no doubt part of the land on which it stands. But the mere right to cut that timber is not. This distinction (I speak with the utmost respect) is, in my opinion, disregarded in the judgment of the majority of the learned judges of the Court of King's Bench. It seems to have been assumed, as put by Mr. Justice Martin, that under the right to cut them

> property in the trees is vested in the buyer before severance of the trees from the soil.

Ownership of the trees passes, in my opinion, only when they are cut and converted into movables. The incorporeal right theretofore vested in the holder of this *droit de coupe* is not parcel (partie) of the land and therefore not "immovable property" within the meaning of that term as used in Art. 651 of the Municipal Code, although it undoubtedly is so for other purposes. I would allow the appeal with costs here and in the Court of King's Bench and would restore the judgment of the learned trial judge.

J. BRODEUR.—Il s'agit d'une action instituée par les appelants pour faire annuler sur un rôle d'évaluation des entrées qui les auraient désignés comme propriétaires de coupes de bois sur certains lots de terre. Les terrains en question portent deux évaluations, l'une pour la foncialité ou le fonds, qui est mise au nom du propriétaire, et l'autre pour la coupe du bois, qui est mise au nom des appelants.

La corporation défenderesse dans sa défense maintient la validité de son rôle et allègue qu'elle a le pouvoir de taxer les appelants pour leurs droits de coupe.

Pour éviter les frais d'enquête, les parties ont admis que les demandeurs sont contribuables dans la municipalité, qu'un rôle d'évaluation a été fait et que les demandeurs y ont été entrés comme propriétaires de la coupe de bois. Ces admissions sont suivies d'une demande d'adjudication dans les termes suivants:

> La seule question à décider est de savoir si un propriétaire d'un droit de coupe de bois pour trente ans de ce jour peut être porté au rôle d'évaluation sans être propriétaire du fonds sur le terrain privé.

Cette question est évidemment soumise suivant les dispositions des articles 509 et suivants du Code de Procédure Civile.

La Cour Supérieure a répondu négativement à cette question et a maintenu l'action des appelants, mais ce jugement a été renversé par la Cour du Banc du Roi (1) qui a décidé que le propriétaire d'un droit de coupe de bois est propriétaire d'un immeuble et comme tel est sujet à être taxé par les autorités municipales, même quand il n'est pas propriétaire du fonds.

Nous avons alors à examiner si ce jugement de la Cour du Banc du Roi est bien fondé.

Les rôles d'évaluation sont faits sous les dispositions des articles 649 et suivants du Code Municipal. Ils servent de base aux taxes municipales (art. 684). Ils doivent contenir, en autant de colonnes distinctes:

> . . . 2° la désignation et la superficie de tout immeuble de la municipalité, ainsi que de toute partie d'immeuble . . . 3° la valeur réelle de tout immeuble et de toute partie d'immeuble imposable; . . . 6° les noms et prénoms des propriétaires de tout immeuble et de toute partie d'immeuble, s'ils sont connus.

Dans le cas actuel, le rôle d'évaluation de l'intimée a désigné certains lots de terre comme étant la propriété de différentes personnes en tant que le fonds est

(1) Q.R. 29 K.B. 309.

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concerné et les appelants ont été portés comme propriétaires de la coupe de bois sur ces mêmes lots. Il y a une évaluation distincte pour le fonds et pour la coupe de bois. Quand les taxes seront prélevées, les appelants seront appelés à contribuer pour leurs coupes de bois.

La corporation intimée avait-elle le droit d'inscrire les appelants sur le rôle d'évaluation comme propriétaires des coupes de bois.[2]

Si les appelants étaient propriétaires du bois debout lui-même, je n'hésiterais pas à dire que oui. En d'autres termes, si nous étions en présence d'un droit de superficie, le conseil municipal aurait le droit de porter au rôle d'évaluation le propriétaire du fonds et le propriétaire du droit de superficie; car alors il s'agirait d'un lot de terre possédé et occupé partie par le propriétaire du fonds et partie par le propriétaire superficiaire; et chacun de ces propriétaires pourrait être taxé pour la partie qu'il occupe. (Art. 16 al. 27, C.M.)

Planiol, vol. 1er, 4e éd., n°. 2572, dit:

> La superficie formant, comme le fonds lui-même, une propriété immobilière (Besançon, 12 déc. 1864: D. 65-2-1, et là note) est par suite susceptible d'hypothèque.

Proudhon, *Traité des droits d'usage et du droit de superficie*, 2ème édition, p. 604:

> La superficie est un immeuble particulier qui, quoique reposant sur le sol d'autrui, a cependant son existence propre et indépendante de tout autre héritage . . . Et en cela il est d'une nature toute différente de celle du droit d'usage qui, comme servitude réelle, ne peut avoir une existence solitaire, même civile, séparée du fonds auquel elle est due.

Baudry-Lacantinerie, vol. 5, 2ème éd., n°. 341, dit:

[2] Le superficiaire n'a pas un simple droit d'usufruit mais bien un droit de propriété.

L'article 378 du code civil nous dit que les arbres sont immeubles tant qu'ils tiennent au sol par les racines. Alors s'ils appartiennent à une personne différente de celle qui a le fonds, ils sont susceptibles d'être grevés d'hypothèques, d'usufruit et de servitude, nous enseignent les auteurs suivants: Rolland de Villargues, vo. Superficie; Aubry & Rau, vol. 2, p. 440; Demolombe, vol. 9, n°. 483; Fuzier Herman, vo. Superficie: Planiol, 2ème éd., vol. 1er, no. 1182.

Le droit de superficie n'est pas nommément désigné dans le code civil mais il n'en existe pas moins, ainsi qu'il a été décidé dans la cause de *Cournoyer* v. *Cournoyer* (1).

Mais nous ne sommes pas en présence d'un droit de superficie.

En 1908, dans une cause de *Laurentide Paper Co.* v. *Baptist* (2), cette cour a décidé que le droit de coupe constitue seulement un droit mobilier sur le bois quand il est coupé, et que l'enregistrement de ce droit ne pourrait donner au propriéaire de la coupe une préférence contre l'acheteur subséquent de la propriété sur laquelle ce droit de coupe peut s'exercer.

Ce jugement a évidemment incité la législature à faire l'amendement que nous retrouvons dans les statuts de 1912 quand on a amendé l'article 381 du code civil.

L'article 381 se lisait comme suit:

> Sont immeubles par l'objet auquel ils s'attachent, l'emphythéose, l'usufruit des choses immobilières, l'usage et l'habitation, les servitudes, les droits ou actions qui tendent à obtenir la possession d'un immeuble.

Et en 1912, on a ajouté avant le mot "servitude" les mots suivants:

> le droit de coupe de bois perpétuel ou pour un temps limité.

(1) [1911] 18 R. de J. 194. (2) 41 Can. S.C.R. 105.

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Si on avait à décider la présente cause sous les dispositions du code civil, j'aurais à dire que le droit de coupe de bois est un immeuble. Malheureusement pour l'intimée, la définition faite du mot immeuble dans le code civil n'a pas été portée au code municipal; et alors il faut avoir recours au code municipal pour décider la question qui nous est soumise. Or le code municipal, par sa définition du mot *immeuble,* art. 16 al. 27, n'a pas compris le droit de coupe de bois. Tous les droits immobiliers dont parle le code civil ne sont pas susceptibles d'être taxés, mais il n'y a que les propriétés ou les parties de propriétés qui peuvent être imposées.

Il y a bien des immeubles désignés comme tels au code civil qui ne sont pas considérés comme immeubles au code municipal. Ainsi les servitudes, les droits concernant la possession d'un immeuble, le capital des rentes constituées, les deniers provenant du rachat de rentes constituées appartenant à des mineurs, les sommes données par les ascendants à leurs enfants en considération de leur mariage pour être employées en achats d'héritages, sont des immeubles suivant le code civil (arts. 381 & 382) mais personne ne prétendrait que ces immeubles pourraient être portés au rôle d'évaluation et seraient des immeubles sous l'autorité de la définition portée à l'article 16, alinéa 27, du code municipal.

Il est possible que le législateur eût l'intention en 1912 de constituer la coupe de bois comme susceptible d'être taxée, mais il ne l'a pas dit.

Il est possible que les Breakey soient propriétaires d'un droit de superficie et par conséquent d'une partie de l'immeuble. Alors on aurait dû l'alléguer et le prouver: mais l'admission comporte seulement qu'ils sont les propriétaires non pas du bois lui-même mais du droit de coupe.

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J'aurais d'abord été enclin à renvoyer le dossier en cour supérieure pour faire la preuve certaine de la nature de leurs droits sur le bois, mais réflexion faite, j'en suis venu à la conclusion qu'il valait mieux disposer de la cause telle que les parties l'avaient présentée devant nous avec leurs admissions. D'ailleurs, si les demandeurs sont réellement propriétaires des arbres et si, en d'autres termes, leur droit est un droit de superficie, rien n'empêche de soumettre ce point aux tribunaux. Je considère qu'on ne pourrait pas alors invoquer chose jugée, car ce n'est pas ce qui nous est soumis par le présent appel.

Je viens donc à la conclusion que nous devrions répondre négativement à la question qui nous a été posée par les parties.

Le jugement *a quo* doit être renversé avec dépens.

MIGNAULT J.—Les appelants, qui ont acquis des droits de coupe de bois considérables dans la municipalité de Metgermette-Nord, se plaignent qu'on les ait entrés au rôle d'évaluation comme sujets aux taxes municipales à raison de leurs droits de coupe de bois, et la question formulée par les parties, et qui doit déterminer le sort de cette cause, est de savoir si un propriétaire d'un droit de coupe de bois pour trente ans peut être porté au rôle d'évaluation sans être propriétaire du fonds. La cour supérieure a répondu négativement à cette question, mais la cour du Banc du Roi, les honorables juges Carroll et Pelletier différant (1), a infirmé ce jugement, décidant que le droit de coupe de bois est assujetti aux taxes municipales imposées en vertu du code municipal sur les immeubles.

(1) Q.R. 29 K.B. 309.

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Il est hors de doute, depuis l'amendement apporté à l'article 381 du code civil, que le droit de coupe de bois, perpétuel ou pour un temps limité, se trouve dans la classe des immeubles par l'objet auquel ils s'attachent. Mais cette disposition du code civil ne résout pas la question qui nous est soumise. Il s'agit, au contraire, de savoir si ce droit immobilier est sujet à la taxe sur les immeubles sous l'opération du code municipal. L'article 651, premier alinéa, de ce dernier code dit bien que

sont des biens imposables tous les terrains, immeubles ou biens-fonds situés dans une municipalité locale, sauf ceux mentionnés dans l'article 693.

Cependant il faut se reporter à la définition du paragraphe 27 de l'article 16 pour déterminer la signification, pour les fins du code municipal et de l'article 651, des mots 'terrains, immeubles ou biens-fonds', et ce paragraphe dit:

Les mots "biens-fonds" ou "terrains" ou "immeubles" désignent toute terre ou toute partie de terre possédée ou occupée, dans une municipalité, par une seule personne ou plusieurs personnes conjointes et comprennent les bâtisses et les améliorations qui s'y trouvent.

Il résulte de cela que ce que le code municipal considère comme "biens imposables" ce sont les *choses* et non les *droits*. Le droit, en un sens, est une abstraction. C'est son objet qui le rend mobilier ou immobilier. Avant l'amendement de l'article 381 C. C., on considérait le droit de coupe de bois comme un droit mobilier, car son objet était le bois que le concessionnaire avait le droit d'aller couper et enlever: *Laurentide Paper Company* v. *Baptist* (1). Le code civil maintenant le range parmi les droits qui sont immeubles par l'objet auquel ils se rattachent. Mais cela n'entraîne pas la conséquence que ce soit une

(1) 41 Can. S.C.R. 105.

terre ou partie de terre. C'est tout simplement un droit, immobilier bien entendu, mais un droit qu'on ne saurait confondre avec une terre ou partie de terre. Le savant avocat de l'intimée, en réponse à une question que je lui ai posée lors de l'audition, a dit qu'il entendait par "partie de terre" une partie physique de cette terre. Le texte anglais du paragraphe 27, qui parle de "parcels of land", démontre bien qu'il en est ainsi. On pourra appliquer les mots "partie de terre" au cas, entre autres, où une terre se trouve dans deux ou plusieurs municipalités et alors chaque municipalité taxera la partie de cette terre qui se trouve dans ses limites. Mais cela me paraîtrait être un abus de langage que de dire qu'un droit de coupe de bois est une partie de la terre où ce droit s'exerce, et il ne suffit pas que ce droit soit immeuble, il faut encore démontrer que c'est un immeuble dans le sens que le code municipal, art. 16, parag. 27, donne à ce mot.

S'il suffisait de citer l'article 381 du code civil pour donner raison à l'intimée, il faudrait logiquement dire que le droit de servitude est imposable, car ce droit est également immeuble par l'objet auquel il se rattache. Or on ne soutiendrait pas sérieusement cette proposition.

On dit que la concession d'un droit de coupe de bois sur une terre diminue la valeur de cette terre, que le propriétaire de la terre aurait le droit de faire évaluer sa terre sans le bois qui s'y trouve, et qu'alors ce bois qui fait partie de la terre serait exempt de taxes si on ne pouvait atteindre le concessionnaire du droit de coupe. Cet argument, qui me semble être surtout un argument pour la législature, ne me convainc pas. Il aurait autant de force dans le cas d'une terre grevée d'une servitude, car cette servitude

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diminue plus ou moins, suivant sa nature plus ou moins onéreuse, la valeur de la terre sur laquelle elle s'exerce. Mais il ne s'agit pas ici de la vente du bois qui se trouve sur une terre, ni de la vente du droit de superficie, mais de la vente d'un droit de coupe de bois, et comme nous sommes en présence d'une définition adoptée par le législateur, il faut se demander si cette définition comprend le droit de coupe de bois. Mon opinion est qu'elle ne le comprend pas.

Je crois donc que la question soumise par les parties doit recevoir une réponse négative. Avec toute déférence possible pour les honorables juges de la cour du Banc du Roi qui ont exprimé l'opinion contraire, je suis d'avis que l'appel devrait être maintenu avec les dépens de cette cour et de la cour du Banc du Roi et le jugement de la cour supérieure rétabli.

Appeal allowed with costs.

Solicitors for the appellants: *Galipeault, St-Laurent, Gagné, Métayer & Devlin.*

Solicitors for the respondent: *Roy, Langlais, Lavergne, Langlais, Godbout & Tremblay.*

BASIL ANTONIOU AND OTHERS (DEFENDANTS) .... APPELLANTS;

1920
*Nov. 2, 3.
*Dec. 17.

AND

UNION BANK OF CANADA (PLAINTIFF) .... RESPONDENT.

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

Bills and notes—Acceptance—Holder in due course—Damages against drawer—Set off—"And exchange"—Definite liability.

The appellants agreed to buy certain goods from A., who assigned, for an indebtedness, to the respondent bank his interest in the contract. A. later on shipped the goods, attached bills of lading to the drafts and delivered them to the bank, which credited A. with the proceeds of the drafts and forwarded them with the bills of lading to its branch where appellants accepted them and received the bills of lading. The bank brought action on the drafts but the appellants, having a claim for damages suffered by them by reason of A.'s breach of contract, set it off against the bank's claim.

Held, Duff J. dissenting, that the acceptance of the drafts by the appellants, with full knowledge of A.'s breach of contract, implies an acknowledgement of unconditional liability towards the respondent bank, which had no notice of the breach.

The appellants raised for the first time in this appeal the objection that the words "and exchange," written on the bills without indicating the rate of exchange, prevented them from being for a sum certain under the "Bills of Exchange Act," section 28.

Per Sir Louis Davies C.J., Anglin and Mignault JJ.—This objection should not be entertained now, as, if it had been raised on the pleadings or at the trial, evidence might have been adduced to show, by custom of trade or otherwise, that these words import a definite and precise liability.

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

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Per Sir Louis Davies C.J. and Anglin J.—If these words have any application at all in the case of these inland bills, they cannot be taken to deprive the instruments before us of their character as bills of exchange because of any indefiniteness or uncertainty in the amount for which the acceptors became liable.

Judgment of the Appellate Division (15 Alta. L.R. 482) affirmed, Duff J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Simmons J. at the trial and maintaining the respondent's, plaintiff's action.

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

J. B. Barron for the appellant.

A. H. Clarke K.C. for the respondent.

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

IDINGTON J.—The respondent recovered judgment at the trial upon certain bills of exchange drawn by one Arnett, upon appellants, which were accepted by them.

The appellants had entered into a written contract with said Arnett, a manufacturer at Souris, Manitoba, for the manufacture by him of certain goods which were to be shipped for them to Calgary and ultimately used by them for their place of business in Calgary.

The bills of exchange in question were drawn by said Arnett at Souris and discounted with respondent at its Souris agency.

(1) [1920] 15 Alta. L.R. 482; [1920] 2 W.W.R. 746.

These bills of exchange were respectively accompanied by shipping bills, or bills of lading, with instructions written at head of each draft "hold for arrival of goods."

And not until and evidently in consideration of the delivery of such bills of lading was the acceptance written by appellants of the bills of exchange now in question.

Out of such an ordinary course of dealing we have presented in this appeal some remarkable contentions founded on the proposition that because the manufacturer, Arnett, had assigned (beyond question I assume as collateral security for advances made or to be made by respondent) the said contract to the respondent by the following memorandum:—

For value received I hereby assign all my rights, title and interest in the attached contract between myself and the King George Ice Cream Parlors dated February 10, 1919, and all the moneys payable thereunder and in the property therein mentioned, to the Union Bank of Canada.

Dated April 19th, 1919.

T. L. Arnett

therefore any bills of exchange drawn by Arnett and discounted with respondent, though only accepted by appellants under circumstances as above related, were possibly worthless in the hands of the respondent and, at all events, were subject to be set off by any claim for damages suffered by appellants by reason of Arnett's breach of said contract.

I submit such a proposition only needs to be stated to shew how very unfounded is this appeal. To my mind it is not arguable.

The respondent is suing upon a bill of exchange given for good and valuable consideration, accepted by appellants, as already stated in consideration of its delivery to them of the documents enabling them to get posses-

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sion of the goods. And there is no pretence of knowledge on the part of the respondent of any breach or notice by appellants to it, when so accepting these drafts, of breach or claim for damages in consequence thereof.

Even if there had been it could not have put the appellants in any better position as against the respondent. I only mention it as one of the peculiarities of the case set up.

The contracts of appellants with respondent evidenced by these several acceptances are entirely collateral to the original contract and shew no privity of contract between the respondent and appellants founded on the said original contract.

And, if possible, there is still less upon which to rest any equitable claim of set off, or anything to entitle the appellants to have respondent restrained from enforcing the clear undoubted claim it has in respect of each of said acceptances.

The respondent was the undoubted holder, in due course, of each of these bills of exchange, and entitled to recover from the appellants by reason of their respective acceptances thereof in consideration of the delivery of the bills of lading, or shipping bills, as more usually called in speaking of shipments by railway.

And the question raised as to the certainty of the amount of each bill by reason of the use of the words "and exchange" which for a few minutes seemed to me the only serious point taken in the argument, seems to be answered in several ways.

In the first place the amount of such inland rate for cost of collection is well settled by daily practice forming part of our common knowledge and that specifically referred to in the Banking Act to be a clearly fixed sum.

In the next place the memo. written on the bill should be used in light of such common knowledge and it leaves no doubt in my mind of the exact sum covered by the use of these words.

And again the original contract of appellants with Arnett expressly provides that appellants were to pay by accepting drafts

to bear eight per cent per annum and bank charge for collection

which latter phrase has a well known definite meaning.

There is also the suggestion, made by Mr. Clarke, of counsel for respondent, that the instrument, with the evidence connected therewith, was at all events evidence of a contract between the respondent and the appellants of the meaning of which there can be no doubt.

And I may repeat that it was as such a collateral contract in no way dependent upon, or reduceable in effect by reason of the result of breaches by Arnett of the original contract.

Another point was faintly made by counsel for appellants that the only signature to the acceptance was that of Antoniou, which seems amply met by the following statement made on examination for discovery:—

Q. Were you authorized by your firm to accept these drafts and the contract, you have signed all of them I see, I do not see any other members of your firm on them?

Mr. Barron: You can take that as an admission from us that he was authorized and was acting on behalf of the King George Ice Cream Parlors and for his partners and whatever signing he did do, is the same as the signature of all the partners of the firm. I have told Mr. Carson I would admit that all the time. That will save you considerable time in getting an answer out of the witness.

I think the appeal should be dismissed with costs throughout.

DUFF J. (dissenting).—As between the respondent and the appellant the effect of the assignment of the 19th April, 1919, no doubt depends upon the Consolidated Ordinances, Ch. 21, sec. 10, s.s. 14 ("The Judicature Ordinance") but the rights of the bank and Arnett *inter se* are governed by the Manitoba statute in force at the date of the assignment, the effect of which appears to be that the bank acquired a legal title to Arnett's rights under his contract with the appellant. Apart from this statute the bank became, even without notice, the owner, at least in equity, of Arnett's rights.

At the date of the bills of exchange sued upon, June 10th, 1919, Arnett was largely indebted to the bank, considerably, that is to say, in excess of the aggregate of the three bills. The evidence makes it quite clear that the bills of lading were to be accompanied by drafts and I think the proper inference from the facts is that the parties recognized the legal position, namely, that the bank held the assignment and any rights accruing to Arnett under his contract with the appellant as security for his indebtedness and that the right given by the contract to require acceptance of drafts by the appellant was a right which Arnett was to exercise for the bank. This right, as between Arnett and the bank was, as already indicated, the bank's, the drafts were drawn for the immediate benefit of the bank, the discounting of the bills was, in substance, only a recognition of the bank's right and the bank's title, in other words, in substance the bank was the drawer of the bills. In these circumstances, with great respect, I cannot accept the view that the bank was a holder in due course. It follows, moreover, that the bank was merely in exercise of its rights under the contract and assignment. The acceptance which indeed was not strictly a voluntary.

acceptance, can be no answer to the appellant's claim to set up in reduction a right to reparation in damages arising from Arnett's failure to observe the terms of the contract. Such a claim is not a mere personal claim or defence but a claim arising out of the very transaction upon which in the view above expressed the bank's right to recover is based.

Nor am I able to understand how the appellant's right is affected by the fact that judgment has been recovered against Arnett. The doctrine of *res judicata* is founded in justice and convenience and has no application here; the right as against Arnett arises under the contract; the right of set-off against the claim of the bank rests upon the ground that the bank is not entitled to recover moneys which in the circumstances it would be unjust to call upon appellant to pay.

ANGLIN J.—By accepting the bills of exchange sued upon, the appellants contracted directly and unconditionally with the respondent bank to pay to it the amounts thereof. An acknowledgement of absolute liability therefor was implied. The consideration for these contracts was the surrender of the bills of lading held by the bank. This alteration of the bank's position, quite apart from any right it may have as the "holder in due course" of negotiable paper, I think, precludes the defence of set-off of the appellants' claim for damages against Arnett, the drawer of the bills. Moreover, for the establishment of their right of recovery on their claim for damages the appellants must invoke the judgment pronounced, but not yet entered, in their action against Arnett. They cannot successfully prefer this inchoate judgment as establishing their right to damages and at the same time deny its effect as a merger of the cause of action on which

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it was pronounced merely because it had not been formally entered. If effective to establish their right to damages it must also operate to merge the claim for those damages which it is sought to set off in this action. That the judgment against Arnett can be set off against the plaintiff's claim is not contended.

The other grounds of appeal lack substance and even if well founded as answers to a claim dependent on the bank's status as a holder of the bills in due course being established, they would be ineffectual to defeat its claim based on its position as the holder of independent contractual rights on which the defendants are directly liable to it.

Pressing the defence that the acceptances by Basil Antoniou did not bind the firm of which he was a principal and his co-partners seems to me scarcely consistent with good faith in view of the following admission of counsel for the defendants on the examination of one of his clients for discovery.

> You can take that as an admission from us that he (Antoniou) was authorized and was acting on behalf of the King George Ice Cream Parlors and for his partners and whatever signing he did do is the same as the signature to all the partners of all the firm. I have told Mr. Carson I would admit that all the time.

The objection based upon the insertion of the words "and exchange" in the bills is taken for the first time in this court. In my opinion it should not be entertained, as, if it had been raised on the pleadings or at the trial, evidence might have been adduced to shew that these words import a definite and precise liability. If they have any application at all in the case of these inland bills, I think they cannot be taken to deprive the instruments before us of their character as bills of exchange because of any indefiniteness or uncertainty in the amount for which the acceptors became liable.

The appeal fails and should be dismissed with costs.

MIGNAULT J.—It is unfortunate for the appellants that before accepting the bills sued on, they did not consider the objections they now urge as reasons why they should not be held on their acceptances. The breach of contract they complain of had then occurred, and they nevertheless accepted the bills. They now say that as the drafts were attached to the bills of lading, they could not get the goods without accepting the drafts, but then, to get possession of the goods, they rendered themselves personally liable to the bank for payment, unless they can shew that the latter is in no better position than Arnett. The fact is, however, that the bank had made advances to Arnett in view of his contract with the appellants and had credited the five drafts drawn by him on the appellants against his overdraft so that there remained a credit in Arnett's favour of $360.00. The bank was therefore a holder in due course of the bills, and the appellants by accepting them, with full knowledge of Arnett's breach of contract, accepted an unconditional liability towards the bank and should not now be listened to when they attempt to offset Arnett's liability for breach of contract against the bank's claim against them on their acceptance of the bills. The fact that for greater security the bank took an assignment of Arnett's rights under his contract with the appellants is no reason for depriving it of its claim based on the appellants' acceptance.

But Mr. Barron now says, for the first time, that although the bills were accepted by Antoniou duly authorized by the other appellants, this is not in law an acceptance for the other appellants.

At the examination on discovery of Antoniou Mr. Barron made the following admission:—

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Q. Were you authorized by your firm to accept these drafts and the contract, you have signed all of them I see, I do not see any other members of your firm on them?

Mr. Barron. You can take that as an admission from us that he was authorized and was acting on behalf of the King George Ice Cream Parlors and for his partners and whatever signing he did do, is the same as the signature of all the partners of the firm. I have told Mr. Carson I would admit that all the time. That will save you considerable time in getting an answer out of the witness.

In view of this admission, which no doubt lulled the respondent into complete security on the question of Antoniou's authority to accept, I think Mr. Barron should not be listened to when he now attempts to escape from the effect of his admission, which I can only construe as fully recognizing that Antoniou's acceptance was the acceptance of the appellants.

Mr. Barron made another objection at the argument for the first time, and that is that the words "and exchange" in these bills without indicating the rate of exchange, prevented them from being for a sum certain, under the Bills of Exchange Act, sect. 28, parag. (d) of s.s. 1.

Had this objection been made at the trial, it might have been shewn that these words have, by custom of trade or otherwise, a definite meaning well understood by the parties. It seems scarcely consistent with the rules of fair dealing in judicial proceedings to consider now such a technical objection, and I do not propose to do so.

On the whole I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Barron, Barron & Helman.*

Solicitors for the respondent: *Clarke, Carson, MacLeod & Co.*

ALEXANDRE MINGUY..........APPELLANT;

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*Dec. 1,
*Dec. 17.

AND

HIS MAJESTY THE KING........RESPONDENT.

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

Criminal law—Speedy trial—Election—Jury trial—Requirement by the Attorney-General—Sections 446 (*a*), 690, 825, 826, 827, 828, 830, 833, 873, 1018, 1024 *Cr. C.*—(*D.*) 32-33 *Vict.*, *c.* 29, *s.* 28—(*D.*) 8-9 *Ed. VII*, *c.* 9, *s.* 2.

The appellant was accused of an offence, punishable by imprisonment for a period exceeding five years and for which he had the right of election to be tried by a judge or a jury. He first elected to be tried by a jury and, after the preliminary hearing, he was committed for trial. Whilst still in custody of the sheriff, he wrote to the latter that he was electing for a speedy trial and the sheriff notified the judge of the sessions of this election. He was then brought before a district magistrate and there elected for a speedy trial. Later on, the Attorney-General signed a declaration that the indictment has been on his order "brought before the grand jury." It was so brought, a true bill was found and the appellant tried before a jury and found guilty.

Held, Idington J. dissenting, that the conviction of the appellant by a jury was legal.

Per Sir Louis Davies C.J. and Duff J.—The requirement signed by the Attorney-General was in compliance with section 825 Cr. C., as amended by 8-9 Ed. VII, c. 9. s. 2.—Idington J. *contra* and Anglin J. *semble*.

Per Anglin, Brodeur and Mignault JJ.—The election for a speedy trial made by the appellant before a district magistrate was not valid, as it should have been made before the residing judge of the sessions of the Peace, according to section 827 Cr. C.

Per Idington J. (dissenting).—The election by the appellant for a speedy trial, contained in his letter to the sheriff, was valid, as being made in conformity with s.s. 2 of s. 828 Cr. C., and any subsequent irregularity could not affect the appellant's rights.

Judgment of the Court of King's Bench affirmed, Idington J. dissenting.

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

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APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the trial judge, Desy J., with a jury and dismissing the motion made by the appellant for a stated case.

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.

Fernand Choquette for the appellant.

Lucien Cannon K.C. for the respondent.

THE CHIEF JUSTICE.—At the close of the argument on this appeal, I was of the opinion that the only arguable point requiring consideration was to the effect that the Attorney-General had not complied with the amendment to section 825 of the Criminal Code, 8-9 Ed. VII., Ch. 9, which enacted that

> where an offence charged is punishable with imprisonment for a period exceeding five years, the Attorney-General may require that the charge be tried by a jury, etc.

It was admitted that the offence charged in the indictment came within this section.

After examining the indictment filed with the record, it seems to me quite clear that there is nothing in this objection.

The indictment appears first to have been signed by the crown prosecutors on behalf of the Attorney-General under section 873, but in addition to this the Attorney-General personally signed a requirement on the back of the indictment that "it should be brought before the grand jury." It was so brought, a true bill was found and the prisoner tried before a jury and found guilty.

It seems to me therefore that the amending section of 825 has been fully complied with.

I would dismiss the appeal.

IDINGTON J. (dissenting).—The appellant was brought before the magistrate of the District of Quebec upon the accusation of an offence which entitled him to a right of election to be tried by a judge or jury, and he elected the latter, on the 28th April, 1920. Thereupon he was duly committed for trial accordingly.

On the 5th of May, following, whilst still in custody of the sheriff, he availed himself of the privilege given by subsection 2 of section 828 of the Criminal Code, which provides as follows:—

> 2. Any prisoner who has elected to be tried by a jury may, notwithstanding such election, at any time before such trial has commenced, and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and judge or prosecuting officer to proceed as directed by section eight hundred and twenty-six.

The sheriff duly notified the judge of the sessions of this election.

Some question is now raised, for the first time, as to whether the judge to whom the notice was delivered in fact was a judge of the sessions.

That, to my mind, is quite immaterial. When once the accused has duly made his election in the manner prescribed by the statute, he has duly established his right to be tried by a judge, unless by virtue of some other provision in the statutes that right has been overruled, or taken away.

There is no pretence herein that any such overruling of his election as was possible, under subsection 3 of the said section, was seriously considered and

determined against him. No such contention has been set up. And if any mistake arose in the delivery of the sheriff's notice, when properly addressed as the record before us shews or in the proceedings thereon the prisoner must not suffer for that.

What is relied upon with more assurance is that contained in the Criminal Code Amendment Act, 1909, which, amongst other changes, amended section 825 as it theretofore stood by adding subsection 5, which reads as follows:—

5. Where an offence charged is punishable with imprisonment for a period exceeding five years, the Attorney-General may require that the charge be tried by a jury, and may so require notwithstanding that the person charged has consented to be tried by the judge under this part, and thereupon the judge shall have no jurisdiction to try or sentence the accused under this part.

Under this sub-section undoubtedly the Attorney-General for the province can overrule the appellant's election.

The sole question with me herein is one of fact. Did the Attorney-General deliberately decide, in light of the foregoing facts, that the appellant should be deprived of his *prima facie* right of election to trial by a judge instead of by a jury?

Curiously enough the opinion judgment of Mr. Justice Martin seems expressly to admit that the indictment upon which the appellant was convicted by the jury was

on the 9th of June * * * preferred against the accused before the Grand Jury of the District then in session, upon the order of the Attorney-General of the Province, under the provisions of Article 873 of the Criminal Code.

And Mr. Justice Pelletier in like manner attributes such action as the Attorney-General took to have been done pursuant to same article 873 of the Criminal Code.

That article reads as follows:—

873. The Attorney-General or any one by his direction or any one with the written consent of a judge of any court of criminal jurisdiction or of the Attorney-General, may prefer a bill of indictment for any offence before the grand jury of any court specified in such consent.

2. Any person may prefer any bill of indictment before any court of criminal jurisdiction by order of such court.

3. It shall not be necessary to state such consent or order in the indictment and an objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge.

4. Except as in this part previously provided no bill of indictment shall be preferred in any province of Canada.

If what was done by the Attorney-General in way of the preferment by the indictment in question is attributable to the operation of said section, then, what was done by such preferment certainly does not fall within the meaning of the amendment of section 825, by adding subsection 5 above.

Up to the time of this express amendment the Attorney-General could not, nor could any one on his behalf, take away the right of election given the accused, though the learned judge or prosecuting officer before him, had long had the power, under section 828, subsection 3, of refusing to allow the exercise of the right of re-election in special cases whenever they deemed it would not be in the interests of justice.

The occasion for this, by some mischance I am unable to understand, possibly never arose. A possibly accidental absence of the judge qualified to act is one surmise if, as suggested in argument, he who did act was not, but then that could not deprive accused of the election he made by his letter to the sheriff and forwarded by the sheriff's letter to the right judge.

Be all that as it may, if the accused was not brought up before the right judge, as the statute requires, that was the fault of the prosecuting counsel,

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else we should not have the judicial assent indorsed on the sheriff's letter, and that did not take away this right of the accused, and due regard should have been had to the fact, on the motion to quash the indictment. Any irregularity on the part of the local authorities in the matter could not, as appears by *Reg.* v. *Burke* (1), affect the appellant's rights.

With great respect, neither of these learned judges in appeal seems to me accurately to have distinguished that which may rest upon section 873 from that which must rest upon section 825, subsection 5, added by the amendment of 1909. I agree with them that section 873 was all that parties acting had in mind. The former is intended to govern the right to go before a grand jury to prefer an indictment, which right at common law was possessed by all the King's subjects but, by later legislation, was cut down to what the Attorney-General might permit, or the learned judge presiding might, on application to him, permit or order.

That modern way of restricting and regulating proceedings before a grand jury was first introduced, so far as I can find, into Canada by the Act respecting Criminal Procedure of 1869, 32-33 Vict., Ch. 29, sec. 28, confined to something like half a dozen offences.

Needless to trace how this at one time known as relating to vexatious indictments was developed until the restriction became complete and was subjected to the requirements of said section 873, just quoted.

It is, however, imperatively necessary to bear in mind herein the origin and purpose of that section and its requirements as distinguishable from the origin and purpose of the later enactment of 1909, upon which the decision of this appeal should turn.

(1) [1893] 24 O. R. 64.

The mode in which the numerous attorneys general of different provinces carried out the earlier enactment might vary in minor details and, especially in the method of expression adopted for causing those concerned to know and understand that required assent, no doubt differed.

That would, speaking generally, be a matter of minor consequence.

It is a very different object that is to be attained by the action of the Attorney-General upon the new section 825, subsection 5, quoted above, which involves the taking away of a right of election given to an accused person and implies the exercise of a kind of judicial power or authority which the Attorney-General is, I submit, expected by the amendment to specially direct his mind to in each case coming up for action. The power is expressly one given to him alone and cannot be transferred to another.

I am unable to see on this record any clear exercise of any such power. What does appear therein seems to me more aptly attributable to the provisions of section 873 as, by two of the learned judges below, seems to have been inferred.

What possible reason could exist for the exercise of such a power relative to what seems, at first blush, a very ordinary sort of offence?

And again, if the Attorney General really intended to take away the right from an accused of trial before a judge, I should have expected I respectfully submit, to find it expressed by apt language which would have left no room for argument, and that which we are referred to does not express anything but what is consistent only with a direction under section 873.

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Moreover how could there have been left in the mind of any one concerned in the motion to quash the indictment, before accused was forced to plead thereto, any doubt or difficulty, for if in fact the fiat indorsed was in truth intended to mean what is contended for, surely in the City of Quebec, above all places, that could easily have been set at rest by an affidavit or otherwise.

Those accused of crimes may, in the majority of cases, be at bottom in some minds entitled to very little consideration.

But we must guard their rights as sacredly as possible, and remember that society is not well served by the conviction of any man unless by due process of law strictly adhered to.

I think the appeal should be allowed, for the reasons I have assigned, and that the right to have a case stated should have been given him and, by reason not only of default thereof but under and by virtue of the powers assigned in such event by sections 1018 and 1024, respectively, to the Court of King's Bench and this Court, the conviction should be quashed, or, if the majority of the court so conclude, referred back to the learned trial judge to state such case as he should have stated.

See *The King* v. *Hébert* (1), and *Reg.* v. *Hogarth* (2), as well as *Reg.* v. *Burke* (3), already cited.

DUFF J.—I concur with the Chief Justice.

ANGLIN J.—Only one of the objections to the validity of his conviction taken on behalf of the defendant calls for consideration. It is that based on

(1) [1905] 10 Can. C.C. 288. (2) [1893] 24 O. R. 60.
(3) 24 O. R. 64.

the alleged absence from the record of anything which establishes the exercise by the Attorney-General of the power conferred on him by s.s. 5 of s. 825 of the Criminal Code (8–9 Ed. VII, c. 9, s. 2) to require that a person charged with an offence punishable by imprisonment for a period exceeding five years shall be tried by a jury notwithstanding that he has consented to speedy trial by a judge. The jurisdiction of the Court of King's Bench in proceeding with the trial of this case is thus challenged. If there was a valid election by the accused for a speedy trial, the jurisdiction of that court was thereby superseded (ss. 825, 827 and 833, Cr. C.; *Reg* v. *Burke* (1); *Rex* v. *Bissonnette* (2), per Lamothe C.J.) and could be re-established only by the Attorney-General personally exercising the special power conferred on him by s.s. 5 of s. 825. Being a condition of jurisdiction the fact that the authority had been exercised should appear on the face of the proceedings. The ordinary presumption in favour of the jurisdiction of a superior court scarcely covers such a case.

The law does not prescribe any particular method in which the Attorney-General is to act. Neither is notice to any person or body required. Nor is it necessary that the Attorney-General should make his requisition in open court. I am satisfied that the indorsement over his signature on the indictment of his authorization for its presentment, provided it is couched in terms which unmistakably imply action under s.s. 5 of s. 825, will suffice.

But s. 873 Cr. C. likewise provides for the preferring of indictments by or on behalf of the Attorney-General before a grand jury. The power which that section confers, however, should not be exercised where the

(1) 24 O. R. 64. (2) [1919] 31 Can. C.C. 388, at p. 389.

accused has already elected for speedy trial, and he may so elect after an indictment has been preferred under it. *Giroux* v. *the King* (1). This latter step was not taken in the present case, counsel for the prisoner relying on what he assumed to have been a valid election for speedy trial already made in the Court of Sessions of the Peace, and the case appears to have proceeded in the Court of Appeal on the footing that such an election had been duly made.

Counsel for the Attorney-General very frankly stated, in answer to a direct question put by me, that if the indictment now before us had been preferred under the authority of s. 873 it would have been in its present form and might have carried precisely the indorsement found upon it, namely:

> Le présent acte d'accusation "indictment" est porté devant le grand jury par ordre du soussigné procureur général de la Province de Québec.
>
> 9 juin 1920.
>
> (Signé) L. A. Taschereau,
> Proc. Général de la prov. de Quebec.

In other words, so far as the proceedings shew, the action taken by the Attorney-General in regard to the presentation of this indictment is referable quite as readily to s. 873 as to s.s. 5 of s. 825. It is therefore impossible to say that it imports a requisition under the latter provision. Under these circumstances, if there had been a valid election for speedy trial, in my opinion it would be extremely doubtful, to say the least, whether the conviction could stand and whether the motion to quash the indictment made on behalf of the accused before plea should not have prevailed.

(1) [1917] 56 Can. S.C.R. 63.

But I find it unnecessary to determine this question since, in addition to relying on the indorsement on the indictment as sufficient evidence of the exercise of the power conferred by s.s. 5 of s. 825, counsel representing the Attorney-General now insists, as it is quite within his right to do (a respondent may support the judgment *a quo* on any ground), that there was no valid election for a speedy trial because the attempt of the accused to make such an election did not take place before the judge of the Sessions of the Peace as contemplated by s. 827 Cr. C. Election before the prosecuting officer (s.s. 2) is not suggested.

The District Magistrate, Corriveau, before whom the record shews the accused was brought to make his election, was without jurisdiction to receive it because there was at that time a Judge of the Sessions of the Peace for the District of Quebec (s. 823 ii) as appears in the record and is admitted by counsel for the appellant.

I cannot accede to the suggestion that the notice to the sheriff, not required in this case (s. 826), but provided for in other cases by ss. 825 (6), 828 (2), and 830 (2) itself constitutes an election. Where it is made part of the procedure, that notice is a preliminary step leading to the accused being given an opportunity to make his election by being brought before the proper officer for that purpose. But the statute makes it very clear that the election itself must take place before the judge or the prosecuting officer ss. 825 (7), 826 and 827.

There was therefore no election by the accused for a speedy trial sufficient to bring either ss. 3 and 4 of s. 827 or s. 833 into operation. It follows that, the

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jurisdiction of the Court of King's Bench never having been superseded, its re-establishment by action of the Attorney-General under s. 825 (5) was not necessary. The indictment can be supported under s. 873.

I regard this rather as a case of first election within s. 826 (7), than as a case of re-election within s. 828. Section 830 (2) would be applicable, however, if the accused upon withdrawing his original election for a summary trial had elected to be tried by a jury and the warrant of committal for trial had so stated. That warrant is not in the record, and the election which preceded it is stated in the proceedings to have been merely to proceed by preliminary investigation in lieu of summary trial.

There was evidence on which a jury could find the defendant guilty of the charge laid against him. Taken as a whole as it must be, the charge is not open to the objections raised. The sentence imposed, while apparently severe, was within the jurisdiction of the court. It is not within our province to review its propriety.

The defendant may have a real grievance in that he was not given the opportunity to which he was entitled of making an election for a speedy trial before a competent judicial officer. But I know of no redress for that grievance which it is open to us to accord him in this appeal.

BRODEUR J.—Il s'agit d'un appel sous les dispositions de l'article 1024 du code criminel.

La question qui nous est soumise est de savoir si la Cour du Banc du Roi avait juridiction pour juger l'appelant.

Ce dernier allègue qu'ayant été accusé sous l'article 446a du code criminel, il a opté pour un procès expéditif et que plus tard, malgré son option, il a été amené par acte d'accusation devant la Cour du Banc du Roi, où il a été jugé et condamné à quinze ans de pénitencier.

La Couronne pretend que l'appelant n'a jamais fait d'option valable et que, même s'il en a fait une, le Procureur-Général avait le droit de le poursuivre par acte d'accusation devant la Cour du Banc du Roi sous les dispositions de l'article 825, s. 5 du code criminel. A cela l'accusé répond que le Procureur-Général ne paraît pas avoir régulièrement fait la demande dont parle l'article 825, s. 5.

Y a-t-il eu option d'un procès expéditif par l'accusé? Les pièces que nous avons devant nous ne sont pas très claires sur ce point. Il est bien évident cependant que l'accusé désirait avoir un procès expéditif sous les dispositions de la partie 18ème du code criminel. En effet, après que le magistrat de district qui avait fait l'enquête préliminaire, eut, le 5 mai 1920, jugé la preuve suffisante pour lui faire subir un procès (art. 690) et l'eût envoyé en prison pour y être détenu en attendant son procès, les avocats de ce dernier ont notifié le shérif, qui avait la garde de l'accusé, qu'il optait pour un procès expéditif et qu'il fut amené devant

la Cour des Sessions dans le plus court délai possible afin qu'il puisse faire sa déclaration à cet effet.

Le shérif, le 6 mai, informe par lettre le Juge des Sessions, suivant les dispositions de l'article 826 du code criminel, que Minguy déclare faire option pour "un procès expéditif". Cette lettre du shérif est versée au dossier et nous y voyons sur le dos de la lettre l'entrée suivante:

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(Signé) T. & G. G.P.

Le mois n'est pas mentionné, mais les parties reconnaissent que c'est le mois de mai et que les initiales T. et G. sont celles de Talbot et Gendron, Greffiers de la Paix.

Nous voyons ensuite sur le dos de la même lettre l'entrée suivante:

Québec, 7 mai 1920.

Présent: M. le Juge Corriveau, M.D.D.

Le prévenu étant présent, la décision sur son option pour procès expéditif est ajournée au 10 mai 1920.

Gus. Chouinard,
D.G.P.

Les initiales M.D.D. signifient Magistrat de district et celles D.G.P. signifient Député Greffier de la Paix.

Ces deux entrées que nous retrouvons sur la lettre du shérif me paraissent peu explicites et correctes.

D'abord le 5 mai il n'a pas pu y avoir d'option pour procès expéditif, car à cette date l'accusé n'avait pas encore été amené devant le Juge des Sessions. La lettre du shérif adressée au Juge des Sessions n'a été envoyée que le 6 mai et ce n'est que le 7 que le prévenu comparaît devant un juge, qui n'est pas, cependant, le Juge des Sessions mais un Magistrat de district, celui-là même qui avait condamné l'accusé à subir son procès.

Il est admis par les deux parties qu'il y a un juge des sessions à Québec.

En vertu du code criminel (Partie XVIII), les options pour procès expéditifs doivent avoir lieu (art. 827) devant le juge qui est défini par l'article 823 comme étant le Juge des Sessions. Le magistrat de district, suivant ce dernier article, n'a juridiction que dans le cas où il n'y a pas de juge des sessions.

Le magistrat de district, M. Corriveau, n'avait donc pas juridiction dans le district de Québec où il y avait un juge des sessions. Par conséquent, le prévenu n'a donc pu faire d'option valable pour un procès expéditif.

D'ailleurs a-t-il fait une option qui enlevait à la Cour du Banc du Roi toute juridiction?

L'entrée qui est sur la lettre du shérif, en date du 7 mai, démontre qu'il n'y a pas eu d'adjudication sur l'option du prévenu pour procès expéditif. L'entrée n'exprime probablement pas correctement ce qui a eu lieu. A raison de ce qui est survenu subséquemment, je serais porté à croire que ce jour-là, le 7 mai, la Couronne a fait une demande ou bien a manifesté l'intention d'avoir un procès par jury, et que la question est restée en suspens de savoir si l'accusé serait jugé à la Cour des Sessions ou à la Cour Criminelle.

Avant l'amendement de 1909 (8 et 9 Ed. 7, ch. 9, s. 2), le privilège de l'accusé de choisir un procès expéditif était absolu; et du moment que son consentement pour un procès expéditif était inscrit au dossier, son procès devait avoir lieu conformément aux dispositions de la partie XVIII du code criminel (art. 825, s.s. 2, 3 et 4 code criminel, S.R.C. 1906) c'est-à-dire devant le Juge des Sessions de la Paix.

Les amendements de 1909 ont ajouté plusieurs autres sous-sections à l'article 825, et notamment une à l'effet que le Procureur-Général peut faire une demande que le procès ait lieu devant un jury.

Il me semble que cette demande, si elle ne peut pas être refusée, ainsi que le prétend l'intimé, doit être au moins consignée au dossier de la cause afin d'évoquer la cause devant la Cour du Banc du Roi ou bien d'enlever au Juge des Sessions toute juridiction.

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Dans la cause actuelle, je suis d'opinion que l'accusé a bien désiré opter pour un procès expéditif: mais son consentement n'a pas été fait devant le juge compétent. Alors le Procureur-Général pouvait, sous l'article 873 du code criminel, porter un acte d'accusation devant le Grand Jury.

L'appelant se plaint aussi de l'illégalité des instructions du juge au jury, mais il n'y a rien dans ces instructions qui violent aucun principe de droit. Quant aux faits nouveaux qu'il prétend avoir découvert depuis le procès et quant à la sévérité de la sentence, ce sont des questions qui ne sauraient justifier notre intervention.

L'appel doit être renvoyé.

MIGNAULT J.—Il y a deux questions à examiner sur cet appel, car les autres griefs d'appel, dans mon opinion, sont mal fondés; 1° L'appelant a-t-il réellement opté pour un procès expéditif; 2° S'il y a eu telle option, l'acte d'accusation (*indictment*) sur lequel le procès a eu lieu démontre-t-il que le procureur-général de la province de Québec exerçait le pouvoir que lui confère le paragraphe 5 de l'article 825 du code criminel, ou bien celui de l'article 873 du même code, qui permet au procureur-général ou à ses représentants de soumettre un acte d'accusation au grand jury? Le pouvoir exercé sous l'article 825, al. 5, est d'une portée plus considérable que celui que confère l'article 873, car il rend sans effet l'option pour un procès expéditif. Mais lorsque telle option n'a pas été valablement faite, il va sans dire que l'acte d'accusation présenté par le procureur-général sous l'opération de l'article 873, confère pleine juridiction à la cour qui juge le procès. Du reste, dans l'espèce, le magistrat

de district avait fait l'enquête préliminaire et avait déclaré qu'il y avait lieu de faire subir un procès au prévenu, de sorte que l'acte d'accusation aurait pu être soumis au grand jury sans l'ordre du procureur-général.

Maintenant y a-t-il eu option du prévenu pour un procès expéditif? Si j'arrive à la conclusion que la réponse doit être dans la négative, je n'aurai pas besoin d'exprimer d'opinion sur la deuxième question.

Il est hors de doute que l'appelant désirait avoir un procès expéditif, mais le désir ne suffit pas, il faut que l'option elle-même soit faite devant une personne autorisée à la recevoir. A cet égard, les parties admettent qu'il y a à Québec un juge des Sessions de la Paix, l'honorable M. Choquette. Il y a aussi un magistrat de district, M. Philéas Corriveau.

Après son arrestation, l'appelant fut amené devant le juge des Sessions de la Paix, où il fit option pour un procès sommaire. Il lui fut cependant permis plus tard de se désister de cette option, et de procéder par enquête préliminaire. Cette enquête, si le magistrat trouvait matière à procès, pouvait, suivant son choix, le conduire soit à un procès expéditif devant le juge des Sessions de la Paix, soit à un procès devant la cour du Banc du Roi siégeant au criminel. Pour le premier, le procès expéditif, il fallait une option du prévenu: pour le second, le procès devant la cour du Banc du Roi, aucune option n'était requise.

Le 5 mai 1920, le magistrat de district déclara, je l'ai dit, qu'il y avait matière à procès. Le même jour les procureurs de l'appelant écrivirent au shérif de Québec le notifiant que leur client désirait opter pour un procès expéditif et le prièrent, en conséquence, d'amener l'accusé devant la cour des sessions dans le

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plus court délai possible afin qu'il pût faire sa déclaration à cet effet. Sur réception de cette lettre, le shérif, le 6 mai, écrivit au juge des Sessions de la Paix, l'informant que l'accusé

déclare maintenant faire option pour un procès expéditif.

D'après le code criminel, article 826, paragraphe 1er,

Tout shérif doit, dans les vingt-quatre heures après qu'un prévenu ainsi que ci-haut est préventivement incarcéré en attendant son procès, informer le juge par écrit que ce prévenu est ainsi incarcéré, relatant son nom et la nature de l'accusation portée contre lui, sur quoi le juge fait comparaître le prévenu devant lui sous le plus court délai possible.

Remarquons que par l'expression "juge," la loi entend, dans le cas du district de Québec, le juge des sessions (art. 823 code crim.). Lorsque le prévenu est amené devant le juge, celui-ci, après avoir pris communication des dépositions à la suite desquelles le prévenu a été incarcéré:

(a) fait connaître au prisonnier de quelle infraction il est accusé et lui en décrit la nature; et (b) lui explique qu'il peut, à son choix, subir son procès immédiatement devant un juge sans l'intervention d'un jury, ou rester en prison ou sous caution, selon que la cour en décide, pour subir son procès de la manière ordinaire devant la cour qui a juridiction criminelle. (Art. 827 code criminel.)

Si, lors de cette comparution devant le juge, le prévenu consent à subir son procès devant lui, sans l'intervention d'un jury, le procès qu'on appelle expéditif se fait devant le juge.

D'après l'article 828, paragraphe 2,

tout prisonnier qui a opté pour le procès devant un jury, peut nonobstant l'option ainsi faite, en tout temps avant le commencement du procès, et soit qu'une accusation ait été ou non portée contre lui, notifier, au shérif, qu'il désire revenir sur sa décision; sur quoi le shérif et le juge ou le fonctionnaire poursuivant doivent suivre la procédure prescrite par l'article huit cent vingt-six.

Cette notification au shérif se fait dans le cas où un prévenu, qui a opté pour le procès devant un jury, désire revenir sur sa décision, et alors le shérif et le juge doivent suivre la procédure prescrite par l'article 826 dont j'ai cité le premier alinéa. Dans l'espèce, l'appelant n'avait pas opté en faveur d'un procès devant un jury, mais avait choisi une enquête préliminaire, laquelle, je l'ai dit, pouvait conduire soit au procès expéditif devant le juge des sessions, soit au procès ordinaire devant un jury.

Le deuxième alinéa de l'article 828 suppose qu'il y a eu choix d'un procès devant un jury, choix que le prévenu désire rétracter. Il y a une disposition au même effet, et pour le même cas de rétractation d'option, aux alinéas 2 et 3 de l'article 830. Il y a également une disposition semblable à l'article 825, paragraphe 6, pour les accusés sous caution, mais il n'y est pas question de rétractation d'option, mais du choix d'un procès expéditif.

Apparemment on a procédé ici comme si l'appelant avait choisi un procès par jury et voulait revenir sur ce choix, car c'est dans ce cas qu'on s'adresse au shérif lorsque le prévenu est incarcéré. Dans l'espèce, le shérif a informé par écrit le juge des sessions que l'appelant désirait maintenant faire option pour un procès expéditif.

Sur réception de cette lettre, le juge des sessions aurait dû faire comparaître le prévenu devant lui, et lui faire les déclarations exigées par l'article 827, et c'était alors le moment de faire l'option d'un procès expéditif. Au lieu de cela, le 7 mai, on a fait comparaître l'appelant devant le magistrat de district, M. Corriveau, et une inscription au dos de la lettre du shérif—il semble au moins qu'on aurait dû faire une

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entrée au registre—indique que, le prévenu étant présent, la décision pour son option pour procès expéditif est ajournée au 10 mai. En regard, on a écrit:

> Le *Roi* vs. *Alexandre Minguy,* option pour procès expéditif. Prod. le 5, 1920,

avec les initiales des greffiers de la paix au bas.

Est-ce pour la raison que M. Fernand Choquette, avocat de l'appelant, nous a indiquée, de sa parenté avec l'honorable M. Choquette, juge des sessions, dont il est le fils, que M. Corriveau, le magistrat de district, a siégé le 7 mai? Les dispositions du code de procédure civile qui auraient empêché M. Fernand Choquette de comparaître devant son père en matière civile ne s'appliquent évidemment pas à un procès devant une juridiction criminelle, et alors que j'apprécie hautement le sentiment de délicatesse qu'invoque le savant avocat de l'appelant, qui a très habilement plaidé cette cause, il est évident qu'on devait ici suivre la procédure qu'indique le code criminel. Or malheureusement c'est devant le juge des sessions que devait se faire l'option d'un procès expéditif, en réponse aux déclarations que celui-ci devait faire au prévenu au désir de l'article 827; et comme il s'agit d'une matière de juridiction de droit commun, et que la procédure par voie de procès expéditif est de nature exceptionnelle, et exige le consentement du prévenu devant le juge des sessions, je ne puis arriver à la conclusion que la Cour du Banc du Roi, siégeant au criminel, qui est la juridiction de droit commun, a été dessaisie de la cause par ce qui s'est passé devant le magistrat de district.

Les honorables juges de la cour d'appel paraissent avoir pris pour acquis qu'il y avait eu choix d'un procès expéditif. Le fait qu'ils n'ont pas discuté

la question dont je viens de parler, me dispose à croire qu'elle a pu n'avoir pas été soulevée devant eux. Mais évidemment cette question est préjudicielle, car s'il n'y a pas eu choix régulier d'un procès expéditif, il n'importe nullement que le procureur-général n'ait pas déclaré expressément qu'il exigeait le procès devant un jury malgré l'option pour un procès expéditif. Je n'ai donc pas à exprimer d'opinion sur la question que les honorables juges de la cour d'appel ont longuement discutée.

Les autres moyens invoqués par l'appelant, je l'ai dit, sont dans mon opinion mal fondés. L'appel doit donc être renvoyé.

Appeal dismissed.

Solicitor for the appellant: *Fernand Choquette.*

Solicitors for the respondent: *Marchand & Cannon.*

1920
*Nov. 12.
*Dec. 17.

DAME M. S. MUNROE AND W. J. O'CONNELL (DEFENDANTS)...... APPELLANTS;

AND

CHARLES LEFEVRE (PLAINTIFF). RESPONDENT.

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

Sale—Judicial Sale—Taxes due—Fraud—Nullity—Municipal law—Practice and procedure—Irregularities—Arts. 689 *and sef.*, 1043 1045, 1591, 1701, 1709, 1710, 1851, 1967, 1983, 2017, 2161 (*i*) *C.C.—Art.* 748 *C.C.P.—Arts.* 373, 718, 723, 734, 735, 946, 955 962, 998 *to* 1015 *M.C.*

In 1846, one O. became owner of a certain lot of land comprising two cadastral lots. In 1867, he bequeathed it to seven legatees who were thus joint undivided proprietors, one of whom was his daughter, D., owner of one-eighth of the property. In 1879, being indebted to the respondent, D. signed a deed of obligation in his favour and, as collateral security, D. transferred to the respondent all her rights in the above property. In 1899, the respondent obtained judgment for the amount then due which was never registered nor executed. The whole property was then assessed for taxing purposes under the name of "Estate O." without any objection on the part of the respondent who never concerned himself about the property. In 1902, the appellants, two of the legatees, purchased about the two-thirds of the shares of their co-legatees, with the exception of those of D. and others which they tried but failed to acquire. Up to two years previous to 1906, the municipal taxes had been paid, without the evidence showing positively by whom. In 1907, the taxes not having been paid for more than two years, the property was sold by the municipality and adjudicated to the appellants who were the only bidders. Two years later, they became absolute owners by virtue of a deed of sale from the municipality. In 1912, the respondent took an action to set aside the adjudication and the deed of sale, alleging fraud on the part of the appellants and also irregularities in the proceedings of the sale.

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

Held, Sir Louis Davies C. J. and Brodeur J. dissenting, that the appellants, as co-owners of the property, were not in law bound to pay the taxes or to give to the respondent notice of the sale and that there was no fraud on their part in making use of the means of a sale for taxes in order to dissolve the undivided ownership.

Per Idington, Duff, Anglin and Mignault JJ.—The first offer, even if the only one, made in a sale for taxes, is an "enchère" within the meaning of Art. 1001 M.C.

Per Idington, Duff, Anglin and Mignault JJ.—The party owing municipal taxes is not deprived of the right to bid and be declared purchaser of the property sold by the municipality for the payment of those taxes.

Per Idington, Duff, Anglin and Mignault JJ.—The property having been entered on the valuation roll under the name of "Estate O." without any objection by the respondent the sale ought to be considered as made *super domino*.

Per Idington, Duff, Anglin and Mignault JJ.—The seizure and the sale of the goods and chattels of the party owing municipal taxes is not a preliminary condition to the sale of the immovable property, the provision of Art. 962 M.C. being permissive and not imperative.

Per Anglin and Mignault JJ.—The respondent was not the "owner" of the eighth undivided part transferred to him by D.

Per Brodeur J. (dissenting).—The evidence is sufficient to create the presumption that the appellants were in possession, if not of the whole property, at least of the seven-eighths part of it, and they were bound in the circumstances of this case to pay all the taxes due on it or to give notice to the respondent of the sale of the property for taxes due.

Judgment of the Court of King's Bench reversed, Sir Louis Davies C.J. and Brodeur J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court, Belleau J. (1) 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.

F. Roy K.C. for appellant.

Aug. Lemieux K.C. and *Paul Robitaille* for respondent.

(1) [1920] Q.R. 57 S. C. 314.

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THE CHIEF JUSTICE (dissenting).—I am of opinion that this appeal should be dismissed and the judgment of the Court of King's Bench, affirming that of the Superior Court (1), confirmed. I agree generally with the reasons stated by my brother Brodeur J., but I prefer to base my opinion upon the ground that the non-payment of the taxes on the lands in question and for which they were sold and bought in by the defendants constitute, under the facts in this case, a deliberate fraud on the part of the defendants as against the plaintiff.

These defendants were the owners of the lands in question but subject to a security for the payment of $500 loaned by the plaintiff to one Diana O'Connell, a sister of James O'Connell and a legatee for one-eighth of the latter's interest in the lands in question.

The plaintiff was a non-resident in the municipality but the security held by him for the $500 loan was well known to defendants, as clearly appears from the evidence.

The defendants were and had been for years in the possession of these lands and had received whatever revenues they yielded, paying the taxes thereon regularly until the year 1906. They attempted to purchase the plaintiff's claim in an undivided one-eighth interest, but the negotiations to that end were not successful. I think the facts proved leave only one fair inference to be drawn, namely, that, after such failure, they determined not to pay the accruing taxes and not to notify the plaintiff of their intended default, and in this way to have the lands sold and purchase them in at the sale and so destroy and defeat plaintiff's title under his security. By their previous action for years in receiving the revenues and paying the taxes on the lands they had lulled the plaintiff into a false security.

(1) Q.R. 57 S. C. 314.

Having paid all municipal taxes up to the year 1906 and having failed in their efforts to purchase plaintiff's undivided interest, their secret determination not to pay the accruing taxes and to have the land sold under the statute for their non-payment and bought in by themselves without any notice whatever to the plaintiff and so destroy his security and his interest in the land, amounted, in my opinion, in view of the facts, to a deliberate fraud upon the plaintiff which the law will not sanction or approve.

The learned Chief Justice Lamothe, of the Court of King's Bench, who dissented from the judgment of that court, held that, while the dealings and omissions of the defendants in regard to their non-payment of the taxes in order to have the lands sold

were approaching bad faith, they did not actually constitute fraud

As I have already stated, in my opinion, this conduct and deliberate neglect on defendants' part without giving plaintiff the slightest notice of their intentions, not only approached bad faith but, under the circumstances of this case, actually constituted fraud.

IDINGTON J.—There is nothing in the evidence in this case to establish any legal obligation on the part of the appellants to continue to pay taxes, even if we assume, which is not proven, that they, or some of them, had, for some years, paid taxes for the benefit of respondent and themselves.

Nor is there anything in statute law, or otherwise, prohibiting a part owner from buying at a tax sale lands in which he has merely an interest. The reliance placed by Mr. Justice Martin upon Art. 748 C.C.P., which he links up with Art. 1591 C.C., with deference,

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does not seem to me to be warranted. Indeed it seems a straining of the language used, and overlooks the basis for the rule contained in said Art. 748 C.C.P.

It no doubt originated in the fact that the parties to such sales as contemplated thereby had often much to do with the conduct of the sale; whereas the tax sale originated in quite another way and is something with the conduct of which the owner or debtor has nothing to do.

I am unable to appreciate, at the value respondent does, the subtle argument that there must be more than one bidder.

If adopted herein I fear we would be endangering many titles resting upon tax sales.

There is, if my memory serves me rightly, an Ontario decision setting aside tax sales when the group attending same agreed, improperly, to refrain from bidding against each other, thereby defeating the purpose of the Act there in question.

All we have here is that the respondent seems to have expected his co-owners in part to have gone on paying the taxes without any contribution from him.

Without more than appears in the evidence it does not become one suffering from his own neglect of duty to complain.

The assessment being made *en bloc* to the estate of somebody, did not seem to me quite regular until I turned to the statute and was surprised to find that it expressly provided for such mode of assessment in such like cases, yet not expressly covering *en bloc* assessments of distinctly separate parcels.

At all events no one speaking judicially seems to have considered it worthy of serious mention, and all assume such an assessment legally possible.

If the assessment in that form was valid when the roll completed, how can the appellant purchasers who had not a common interest with respondent throughout the entire block sold, but only in one item of part thereof (Lot 266) be spoken of as joint owners or co-owners?

And how can they be held to have been impliedly, with him, joint debtors to the municipality?

And how can any such assumed legal relationship, under such circumstances, be of any consequence in the disposition of this case?

And how can the debt due the municipality be of any consequence under such circumstances in determining the right of any one or more of such parties to bid and buy the whole block as offered?

They had no joint interest in the whole property so sold. They were neither joint owners nor joint debtors.

I see no ground upon which the respondent can in law say they (the appellants) were, as purchasers, simply relieving him from paying the taxes upon that part in which he had an interest.

With these observations I fully agree in the main with the judgments of the Chief Justice and Mr. Justice Greenshields.

I would therefore, allow the appeal with costs throughout.

DUFF J.—I find myself fully in accord with the views expressed in the judgment of the learned Chief Justice and Mr. Justice Greenshields.

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

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Anglin J.

ANGLIN J.—I concur in the conclusions reached by my brother Mignault, whose opinion I have had the advantage of reading, and generally in the reasons on which they are founded.

BRODEUR J. (dissenting).—Il s'agit de la validité de la vente d'un immeuble pour taxes municipales. Cette vente est attaquée par Lefèvre parce qu'elle serait entachée de fraude et parce qu'elle aurait été conduite illégalement. Les défendeurs-appelants sont les acquéreurs de cet immeuble.

La Cour Supérieure (1) a maintenu l'action pour les deux motifs qui avaient été invoqués, soit la fraude et l'illégalité.

La Cour du Banc du Roi a confirmé le dispositif de ce jugement sans en adopter tous les considérants.

Les illégalités invoquées étaient nombreuses et elles ont donné lieu à une grande divergence d'opinion parmi les juges de la Cour du Banc du Roi. L'opinion de la majorité est énoncée dans les termes suivants du jugement de cette cour:

Considering that the two lots of land numbers two hundred and sixty-six (266) and three hundred and sixty (360) of the cadastre of the parish of Ste-Foy were assessed together in the name of the Estate John O'Connell, whom the appellants represent, and the latter were liable towards the said municipal corporations for the payment of all the municipal taxes due for Lot No. 360 and seven eighths of those on Lot 266, and which the appellants made default to pay.

Considering that, although the proceeding of the sixth of March, 1907, took the form of a tax sale, it was in reality only a payment by the appellants to the said municipal corporation of a debt they and the respondent Lefèvre owed that corporation the said tax sale did not under the circumstances disclosed and established in this case vest the appellants with a title to respondent's Lefèvre one undivided eighth interest in said lot 266.

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This Court, without adopting all the *considérants* of the judgment appealed from, to wit, the judgment of the Superior Court for the district of Quebec herein rendered on the third day of October, one thousand nine hundred and nineteen, doth confirm the said judgment as to its dispositif.

En d'autres termes, la Cour du Banc du Roi a déclaré que la vente a été simulée et n'a jamais existé valablement et que le prétendu prix d'achat versé par les appelants ne constituait, après tout, que le paiement de la taxe municipale auquel les défendeurs, comme seuls propriétaires ou propriétaires conjoints de l'immeuble vendu, étaient tenus.

La Cour Supérieure dans ses considérants avait déclaré que les défendeurs-appelants avaient eu la possession de cet immeuble et en avaient payé les taxes municipales. La majorité de la Cour du Banc du Roi est venue à la même conclusion, savoir que les défendeurs étaient en possession de cet immeuble et qu'ils en avaient payé les taxes.

L'honorable juge-en-chef Lamothe, qui était dissident en faveur des appelants, déclare lui aussi:

Les appelants possédaient les immeubles et ils en retiraient les revenus—s'il y avait des revenus, ce qui n'apparaît pas.

L'honorable juge Greenshields, qui était aussi dissident, ne nous dit pas formellement qu'ils n'étaient pas en possession, mais il rapporte des faits qui ne sont pas prouvés. Voici, en effet, ce qu'il dit:

Previous to the death of the testator, James O'Connell, the property in question had been entered for taxing purposes in the books of the local corporation of Ste-Foye under the name of John O'Connell. After his death none of the legatees made any application to have his or her or their names entered upon these books, and none were entered, and the property appeared as belonging to the estate of James O'Connell, and the two lots, 266 and 360, were continuously and without interruption valued by the municipality for taxing purposes *en bloc* and were assessed as belonging to the estate James O'Connell.

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Il n'y a pas un seul mot de preuve dans la cause sur la manière dont les propriétés étaient évaluées avant la mort du testateur James O'Connell. Par conséquent, on ne peut pas dire si le rôle d'évaluation portait alors le nom de John O'Connell plutôt que celui de James O'Connell. Je crois que l'honorable juge a mal interprété la preuve qui a été faite à ce sujet.

Le seul témoignage que nous avons sur ce point est celui du sécrétaire de la corporation municipale de Ste-Foy, M. Robitaille. Or cet officier ne parle nullement des rôles d'évaluation qui existaient à la mort de James O'Connell en 1870. Son témoignage ne porte que sur les rôles de 1896 à 1907.

Les appelants, malgré l'opinion quasi unanime des cours inférieures sur cette question de possession disent que cette preuve de possession n'existe pas dans le dossier, et que les dispositifs des deux jugements des cours inférieures, étant basés sur cela, ils devaient être mis de côté.

D'ordinaire nous ne renversons pas les jugements sur des questions de faits quand les cours inférieures en sont venues à la même conclusion. Mais comme je vois que quelques-uns de mes collègues sont d'opinion qu'il n'y a pas de preuve pour justifier cette opinion des cours inférieures, je me vois dans la nécessité d'analyser la preuve et les faits de la cause.

Il est vrai que la preuve directe de ces faits n'est pas aussi claire qu'elle aurait dû ou pu l'être; mais cela est dû à la mauvaise foi apparente de la défenderesse dans son témoignage. Le demandeur l'a examinée comme témoin et elle s'est contentée de dire qu'elle ne connaissait rien et que le tout avait été fait par son fils, l'autre défendeur, qui est décédé avant l'audition des témoins. Elle refuse même de dire si elle a fait certains contrats, lorsque ces contrats portent sa signature.

Je suis d'opinion que la preuve est suffisante pour créer une présomption que les défendeurs étaient en possession et qu'ils payaient les taxes.

Voici les circonstances révélées par la preuve:

En 1870, James O'Connell mourait laissant un testament par lequel il divisait ses biens entre ses enfants et ses petits-enfants par parts inégales.

Parmi ses biens se trouvaient les lots 266 ct 360 du cadastre de Ste-Foye.

L'une des filles de James O'Connell, qui s'appelait Diana et qui avait hérité d'un huitième des biens, a, le 9 avril 1879, transporté au demandeur Lefèvre ses droits successifs et notamment un huitième du lot n° 266 en garantie d'un prêt que Lefèvre lui avait fait.

Elle partit ensuite pour aller demeurer aux Etats-Unis, ainsi que la plupart des légataires et héritiers de James O'Connell, à l'exception de John O'Connell, le mari de la défenderesse, et le défendeur William John O'Connell et son frère et ses soeurs.

Ces derniers sont restés en possession de la propriété.

Nous n'avons pas les rôles d'évaluation de 1879 à 1896, mais au rôle qui a été fait en 1896, Madame Veuve John O'Connell, la défenderesse, y est entrée comme propriétaire et un nommé Giroux comme locataire.

Au rôle fait en 1899 le nom de Giroux n'apparaît plus comme locataire et le nom du propriétaire est transcrit comme suit: "Succession Dame Veuve John O'Connell."

Entrée bien singulière si l'on considère que Madame Veuve O'Connell était encore vivante. Mais cette entrée peut s'expliquer par le fait que les enfants de John O'Connell, notamment le défendeur William-John alias James O'Connell et Mary Maria O'Connell

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avaient des parts indivises dans ces immeubles et alors on a, tout de même improprement, décrit les propriétaires comme étant "Succession Dame Veuve John O'Connell."

Maintenant il ne faut pas confondre le testateur, James O'Connell, avec John O'Connell, son fils, le mari de la défenderesse. Cette désignation "Succession Dame Veuve John O'Connell" qu'on relève dans le rôle d'évaluation de 1899 s'applique évidemment au fils John et non à son père, le testateur, qui s'appelait James, car si on avait voulu par là désigner le terrain comme appartenant à la succession James O'Connell on n'aurait pas d'abord dans le rôle d'évaluation de 1896 porté la propriété au nom de "Dame Veuve John O'Connell" et ensuite dans le rôle de 1899 au nom de "Succession Dame Veuve John O'Connell."

Dans cette même année 1899, la défenderesse a tenté d'acheter les droits de Diana O'Connell dans cette propriété et le demandeur lui-même a reçu des avocats des appelants une lettre lui demandant s'il serait prêt à vendre ses droits. Il n'a pas été donné suite à ces offres.

Les défendeurs étaient plus heureux avec la plupart des autres co-héritiers qui leur vendaient leurs parts indivises par acte fait le 8 mars 1902. Les parts indivises qui y sont cédées y sont erronément décrites mais cela ne saurait affecter le présent litige.

Je note tout de même dans cet acte que "Mrs. Mary Stuart Munro, widow of the late John O'Connell," c'est-à-dire la défenderesse, était alors co-propriétaire avec les héritiers de James O'Connell. Comment était-elle devenue propriétaire? On ne le sait pas. Mais tout de même il fait bon de signaler ce fait comme partie des présomptions qui tendent à établir sa possession et son administration des immeubles en question.

En 1902, la propriété est encore portée au rôle d'évaluation fait cette année-là sous le nom de "Succession Veuve John O'Connell" et il en est de même sur celui de 1905.

C'est sur cette succession que la propriété a été vendue par le conseil de comté, pour taxes, le 6 mars 1907.

Après cet exposé de faits il me semble qu'il ne peut pas être prétendu que les défendeurs n'étaient pas en possession de la propriété. Comme propriétaires indivis ils étaient soumis au paiement des taxes qui grevaient la propriété. Ces taxes frappaient non-seulement toute la propriété mais chaque part indivise de la propriété (art. 1983, 2017 C.C., 946 C.M.). Si les défendeurs n'avaient pas de titre pour toute la propriété, ils étaient pour le moins propriétaires indivis pour la plus grande partie, probablement $\frac{7}{8}$, quand la propriété a été taxée et ensuite vendue pour défaut de paiement des taxes. Alors la portion indivise dont les défendeurs étaient propriétaires était affectée au paiement des taxes municipales.

Dans les cours inférieures on a pris comme acquis le fait que les taxes ont été payées par les défendeurs jusque vers 1902. Ils étaient en possession de la propriété soit personnellement, ainsi que le constate le rôle de 1896, soit comme représentants et héritiers de John O'Connell. Ils ont dû retirer les revenus de la propriété et à même ces revenus ont dû payer les taxes municipales, puisque leur co-propriétaire, le demandeur, n'en a jamais payé lui-même. Il serait inconcevable de croire que la corporation municipale aurait passé vingt ans sans percevoir les cotisations qui frappaient cette propriété. Ils géraient au moins la propriété qui appartenait à autrui pour partie.

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Que leur administration fût celle du *negotiorum gestor* sous les articles 1043 et suivants du code civil ou de mandataires par mandat tacite sous les articles 1701 et suivants du code, les défendeurs étaient tenus d'apporter à la gestion de la part indivise du demandeur les soins d'un bon père de famille. Ils devaient donc payer les taxes qui frappaient cette part indivise, vu qu'ils en retiraient les revenus, ou du moins avertir le demandeur de les payer afin que ce dernier pût protéger ses droits sur la propriété. Non; les défendeurs cessent de payer les taxes, gardent le silence et ensuite laissent vendre cette propriété qui valait plusieurs milliers de dollars pour environ cent dollars.

Je n'hésite pas à caractériser cette conduite de frauduleuse.

Bédarride, vol. 2, p. 3, nous dit que la fraude

est l'art perfide de braver les lois avec l'apparence de la soumission, de violer les traités en paraissant les exécuter, et de tromper par l'extérieur des actes et des faits sinon ceux qu'on dépouille du moins les tribunaux dont ils pourraient invoquer la puissance.

Les défendeurs laissent le demandeur dans une fausse sécurité. Pendant des années et des années ils administrent son huitième indivis dans la propriété, essaient de l'acheter, mais ne pouvant pas réussir ils ont recours au défaut du paiement des taxes municipales. Ils ne remplissent pas leurs propres obligations et ne l'avertissent pas que leur gérance est terminée. Ils n'agissent certainement pas en bon père de famille (art. 1709, 1710 & 1045 C.C.).

Il est incontestable que le demandeur souffre un préjudice et que le fait dont ce préjudice résulte est un fait illégal ou illégitime (Bédarride, no. 643). Les défendeurs ne sauraient donc profiter de cette vente municipale qu'ils invoquent pour garder la propriété du demandeur.

Comme dit Baudry-Lacantinerie, vol. 20, 2ème édition, n° 536, en parlant de l'administration de la chose commune:

> Si l'objet indivis est entre les mains de l'un des communistes, il est vis-à-vis de ses co-propriétaires tenu d'en prendre soin. Il est donc responsable des fautes qu'il commet dans sa gestion.

Domat, au livre II, titre 5, discute les engagements réciproques de ceux qui ont quelque chose de commun sans convention. Ainsi, parlant d'une chose qui se trouve commune, comme une succession entre co-héritiers, il ajoute, p. 253, vol. 3, édition de 1822:

> Ainsi celui qui a la chose commune entre ses mains doit en prendre soin.

Il ne doit donc pas la laisser vendre pour défaut de payer les impôts fonciers qui peuvent la frapper, au moins sans avertir son co-propriétaire.

Si les défendeurs voulaient faire cesser l'indivision et se rendre acquéreurs de la part détenue par le demandeur, ils devaient alors provoquer le partage et prendre une poursuite en partage sous les dispositions des articles 689 et suivants du code civil. Mais cela aurait été une voie trop droite pour les défendeurs. Ils ont préféré avoir recours à la procédure d'une vente simulée pour défaut de payer les taxes municipales et acquérir à vil prix une propriété de valeur.

Je crois donc que la vente doit être mise de côté et que l'action du demandeur doit être maintenue.

L'appel des défendeurs doit être renvoyé avec dépens.

MIGNAULT J.—L'intimé attaque une vente pour taxes municipales et dirige son action contre les appelants qui se sont rendus acquéreurs à cette vente.

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Il a réussi devant le premier juge (1) et également devant la cour d'appel, le juge-en-chef et le juge Greenshields ayant toutefois fait enregistrer leur dissentiment. Les appelants nous demandent maintenant d'infirmer ces deux jugements et de renvoyer l'action de l'intimé.

La propriété dont il s'agit ici venait de la succession de feu James O'Connell, et la fille de ce dernier, Diana O'Connell, épouse de Donald McDonald, paraît avoir succédé à un huitième de cette succession, qui comprenait deux immeubles, les nos 266 et 360 du cadastre de la paroisse de Sainte-Foy, dans le voisinage immédiat de la cité de Québec. Le 9 avril, 1879, Diana O'Connell, alors veuve, qui devait $520.00 à l'intimé, consentit en sa faveur un acte d'obligation promettant lui payer cette somme avec intérêt à 10% dans deux ans. Par cet acte, pour assurer le paiement de ce montant, elle céda et transporta à l'intimé ses droits successifs dans la succession de son père, et plus spécialement un huitième indivis du lot no 266. En 1899, l'intimé obtint contre Diana O'Connell un jugement sur cet acte d'obligation pour une somme de $780.00, mais il n'appert pas que ce jugement ait été suivi d'éxécution. En 1902, l'appelante Mary Stuart Munroe et son fils William John O'Connell, ce dernier défendeur dans cette action et maintenant décédé, ont acheté les parts indivises de plusieurs des colégataires de la succession O'Connell, mais la part de Diana O'Connell n'a pas été acquise. En 1907, les lots 266 et 360 ont été vendus par la corporation du comté de Québec pour taxes municipales dues à la corporation de Sainte-Foy, et Mary Stuart Munroe et son fils William John O'Connell s'en sont rendus adjudicataires pour le montant des

(1) Q.R. 57 S. C. 314.

taxes et des frais. Deux ans plus tard, un acte de vente a été consenti en faveur des adjudicataires, aucun retrait n'ayant été effectué. C'est cette vente que l'intimé attaque.

Je ne puis m'empêcher de dire au début que l'étude du dossier, tel que les parties l'ont fait, a été loin de me satisfaire. Le dossier imprimé ou "case" est mal fait et mal coordonné, certains exhibits se trouvant placés après le jugement de la Cour d'Appel et les autres avant, et il est évident que la lecture des épreuves a été faite par une personne incompétente. A tous égards, ce "case" ne répond pas aux exigences des règles de pratique de cette cour. De plus, la preuve faite de part et d'autre laisse beaucoup à désirer, et l'intimé est maintenant réduit à invoquer des présomptions ou des inductions pour remplacer la preuve positive qu'il aurait dû produire à l'enquête.

Mais voyons les moyens de nullité de l'intimé.

Je dois dire d'abord qu'à mon avis l'intimé n'est nullement propriétaire d'une part indivise du lot nº 266, et cela malgré que l'avocat des appelants, dans sa plaidoirie devant nous, ait exprimé l'opinion qu'il l'était. L'acte d'avril 1879 est un acte d'antichrèse auquel s'appliquent l'article 1967 du code civil ainsi que les règles du gage, et la propriété de la part indivise donnée en gage est restée à Diana O'Connell. Une espèce absolument identique est celle *Eglauch* v. *Labadie* (1), jugée par feu Sir François Langelier. On peut même se demander si l'antichrèse d'une part indivise produit un effet quelconque avant le partage, question sur laquelle je ne me prononce pas, car, comme je l'ai dit, l'avocat des appelants a admis le droit de propriété de l'intimé même après que je lui eusse signalé l'article 1967, et je me

(1) [1900] Q.R. 21 S.C. 481.

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dispense de discuter une question qui ne se pose pas en vue de l'attitude prise par les appelants.

Le premier moyen de nullité est la fraude. L'honorable juge de première instance a décidé que les défendeurs, depuis un grand nombre d'années, avaient été en possession du lot nº 266, dont ils avaient retiré tous les revenus et acquitté toutes les charges, à part celles pour le paiement desquelles les immeubles nºs 266 et 360 ont été vendus; qu'après des tentatives pour acquérir les intérêts du demandeur ils avaient laissé un certain montant de taxes municipales impayé, évidemment dans le but de laisser vendre cet immeuble et de s'en porter acquéreurs, alors qu'ils étaient eux-mêmes tenus au paiement des taxes comme possesseurs et qu'ils pouvaient arrêter la vente en payant le montant dû comme ils l'ont fait lors de l'adjudication.

Après un examen attentif du dossier, je ne trouve la preuve que d'un seul fait parmi ceux mentionnés par l'honorable juge, la tentative d'acheter les intérêts de l'intimé. Il n'y a rien qui fasse voir que les appelants (je parle de Mde. O'Connell et de son fils maintenant décédé et représenté sur reprise d'instance par sa veuve) étaient en possession du lot nº 266, ni qu'ils en aient retiré les revenus ou acquitté les charges. En supposant que l'intimé était, comme il l'allègue, leur copropriétaire, rien n'obligeait les appelants à payer sa part de taxes. Et quant à la possession, la seule chose qui paraisse, c'est qu'un locataire, le nommé Abraham Giroux, était en possession des lots nºs 266 et 360. Or on n'a pas interrogé Giroux, qui a pu très bien payer les taxes. On a questionné Mde. O'Connell, vieille femme d'environ quatre-vingts ans, mais on n'a rien prouvé par elle, car son fils vaquait à toutes ses affaires et ce fils est mort depuis le 13 janvier 1913.

Il n'y a non plus au dossier aucune preuve directe que les appelants aient laissé les taxes impayées dans le but de faire vendre l'immeuble et de le racheter ensuite. Raisonnant *ex post facto* on peut peut-être dire que les appelants, qui n'ont pas payé les taxes pendant une couple d'années—et on n'a pas prouvé qu'ils les payaient auparavant, c'est une présomption qu'on a voulu tirer du fait que l'intimé ne les a pas payées, mais il n'est pas impossible que Giroux l'ait fait—ont voulu laisser vendre l'immeuble et s'en porter ensuite adjudicataires. En supposant que les appelants aient eu cette intention, il n'en résulte pas nécessairement qu'ils aient voulu frauder l'intimé. Ils étaient propriétaires d'à peu près les deux-tiers indivis des immeubles 266 et 360, l'autre tiers indivis appartenant aux autres héritiers O'Connell. Ils ne devaient pas, dans ces circonstances, la totalité des taxes, et rien ne les obligeait à payer la part de leurs copropriétaires. En supposant qu'ils aient payé toutes les taxes pendant plusieurs années, ils n'étaient certainement pas tenus de continuer indéfiniment de payer pour leurs copropriétaires, et pour l'intimé, s'il était vraiment copropriétaire, surtout quand on ne démontre pas qu'ils recevaient les revenus ou loyers de ces propriétés. Il y avait pour les appelants deux moyens de sortir de cette situation, l'action en partage ou la vente des immeubles pour les taxes, et je suis d'avis qu'on ne peut accuser les appelants de conspiration frauduleuse parce qu'ils ont choisi le second moyen, beaucoup moins coûteux que le premier.

On dit que les appelants auraient dû prévenir l'intimé de cette vente. Le sécrétaire-trésorier du conseil de comté a annoncé la vente, tel que l'exigeait le code municipal, et à moins de dire qu'il y avait, pour les appelants, obligation légale de donner un

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avis particulier à l'intimé, ce qu'on ne peut prétendre, on ne peut les taxer de fraude parce qu'ils n'ont pas donné cet avis. On a voulu soutenir qu'il y avait eu ici gestion d'affaires pour l'intimé. Rien ne justifie cette assertion, car on n'a pas prouvé qu'il y ait même eu une gestion quelconque. La vérité, c'est qu'il y a eu incurie incroyable de la part de l'intimé qui demeurait à Québec et qui n'est pas allé une fois, dans une quarantaine d'années, visiter cette propriété dont il prétend avoir été copropriétaire, et ne s'est jamais occupé de savoir si les taxes étaient payées. Dans ces circonstances, on ne doit pas écouter l'intimé quand il reproche aux appelants de n'avoir pas payé les taxes pour lui, et qu'il les accuse de conspiration frauduleuse parce qu'ils ont cessé, dit-il, de payer ces taxes, qu'ils ont laissé vendre la propriété et l'ont ensuite rachetée sans l'en avoir prévenu.

Il y a ici, on me permettra de le dire, une confusion d'idées, assez inévitable il est vrai, car on procède de supposition en supposition. On suppose d'abord, et à tort suivant moi, que l'intimé était copropriétaire avec les appelants; le jugement qu'il a obtenu, en 1899, contre Diana O'Connell dans une action purement personnelle, démontre qu'il se considérait créancier et non copropriétaire. Se basant ensuite sur cette prétendue copropriété, on suppose, sans aucune preuve, que les appelants étaient en possession du lot n° 266 et qu'ils en tiraient les revenus. Cela même ne suffit pas, car il faut encore supposer, toujours sans preuve, que ces revenus étaient suffisants pour payer les taxes. Ensuite on dit que le copropriétaire en possession est obligé de prendre soin de la chose commune et qu'il est responsable des fautes qu'il commet dans sa gestion (Baudry-Lacantinerie, *Société*, 3è édition, n° 536). Cela je le concède, mais il ne

s'ensuit pas qu'il soit obligé envers ses copropriétaires d'acquitter les charges et impôts dont la chose est grevée, surtout pour la part incombant à ses copropriétaires. Au contraire, les auteurs enseignent qu'il n'y a, en l'absence d'une convention expresse, aucun lien personnel entre les copropriétaires, aucun mandat tacite entre eux comme entre associés aux termes de l'article 1851 du code civil (Baudry-Lacantinerie, *Société*, no. 539: Fuzier-Herman, vo. *Indivision*, nos 137 et suiv.). S'il n'y a ni lien personnel, ni mandat tacite, il est clair que le copropriétaire en possession ne représente pas ses copropriétaires et qu'il n'est tenu à leur égard d'aucun devoir actif, mais seulement du devoir négatif de ne pas abuser de sa possession et de ne pas s'opposer à ce que ses copropriétaires jouissent avec lui de la chose commune (Fuzier-Herman, *eodem verbo*, nos 73 et 74.) Et quant aux dettes ou charges qui grèvent la chose, chaque copropriétaire est tenu d'en supporter sa part (Fuzier-Herman, nos 97 et 98), et par conséquent l'un d'eux n'est pas obligé de payer pour les autres. Tout ceci est élémentaire et il est également élémentaire de dire qu'il n'y a pas de responsabilité sans obligation, et pas de faute à moins qu'il n'y ait manquement à un devoir. Et si les appelants n'étaient pas tenus de payer les taxes pour l'intimé, s'ils n'étaient pas obligés de lui donner un avis particulier d'une vente annoncée publiquement, et on ne cite aucune autorité exigeant cet avis, il s'ensuit qu'ils ne sont pas en faute à son égard, que la fraude n'existe pas pour la raison qu'aucun droit de l'intimé n'a été violé, et que s'il souffre un préjudice il le souffre par sa propre incurie.

Je conclus donc que l'accusation de fraude n'est pas établie, et il ne faut pas oublier que l'intimé, étant demandeur, avait la charge de cette preuve.

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Venons-en maintenant aux formalités de la vente, qui sont celles que prescrivait l'ancien code municipal. Les articles que je citerai sont les articles de ce code. L'intimé attaque cette vente pour cinq raisons.

1. Il n'y a pas eu d'enchères, ni d'ajournement de la vente, et cette vente a été faite en bloc.

Ce moyen a été trouvé bien fondé par la cour supérieure, qui se base sur des définitions données du mot "enchère" par certains répertoires, et sur l'article 1003 C.M. qui veut que la vente soit ajournée si, au moment de la vente, aucune enchère n'est offerte. Ici les appelants avaient offert de payer le montant des taxes et des frais. Aux termes de l'article 1001

quiconque offre alors (au temps fixé pour la vente) de payer le montant des deniers à prélever pour la moindre partie de ce terrain, en devient l'acquéreur, et cette partie du terrain doit lui être adjugée sur le champ par le secrétaire-trésorier, qui vend celle qui convient le mieux à l'intérêt du débiteur.

Il est évident donc que s'il y a eu telle offre, on ne peut dire qu'il n'y a pas eu d'enchère, et l'article 1003 ne s'applique pas. Dans ces circonstances, la vente ne devait pas être ajournée.

On insiste et on dit que la vente des nos 266 et 360 s'est faite en bloc, c'est-à-dire que les deux numéros ont été vendus ensemble et pour un seul prix.

La preuve constate que ces deux lots étaient entrés et évalués ensemble au rôle d'évaluation. Ils paraissent avoir été loués tous les deux au nommé Giroux. Cela étant, j'adopte la réponse à cette objection que donne l'honorable juge-en-chef Lamothe en ces termes:

Il n'y a, dans ce fait, aucune irrégularité fatale. Deux lots de terrain, ayant des numéros de cadastre différents, peuvent être évalués et taxés ensemble s'ils appartiennent à un même propriétaire, s'ils forment une seule exploitation, etc. Ils peuvent être vendus en bloc dans les mêmes cas. Lors de la confection du rôle d'évaluation, on

peut objecter à la réunion de ces deux lots: si aucune objection n'est faite, le rôle d'évaluation ainsi que le rôle de taxation, ne sont pas, par là, frappés de nullité. La saisie se fait conformément au rôle municipal; elle ne peut se faire autrement.

2. La vente a été faite aux débiteurs. L'intimé dit "aux saisis." Il est évident qu'il n'y avait pas de "saisis" ici, car il n'y a eu aucune saisie, et, quand la vente a lieu aux termes des art. 998 et suiv. du code municipal, elle se fait sans qu'il y ait saisie des immeubles assujettis aux taxes.

Il est vrai qu'aux termes de l'article 748 du code de procédure, la partie saisie, si elle est personnellement tenue de la dette, ne peut se porter adjudicataire, mais je suis d'avis que la validité des ventes pour taxes municipales doit être jugée d'après les dispositions du code municipal seulement. Or ce code ne contient pas de dispositions semblables à l'article 748 C.P.C.

Du reste, tout le monde sait qu'il arrive très souvent qu'une personne responsable du paiement des taxes municipales ou d'une partie de ces taxes achète à la vente municipale, son but étant quelquefois de se faire donner un nouveau titre qui, au bout de deux ans sans retrait, la fera considérer comme propriétaire irrévocable (art. 1007 C.M.), et aura l'effet de purger l'immeuble des hypothèques (art. 1013 C.M.). Si maintenant nous déclarions qu'une personne responsable des taxes ne peut acheter à la vente municipale, nous reconnaîtrions implicitement l'invalidité d'une quantité considérable de titres qui reposent sur un achat semblable. Je suis d'opinion que ces titres sont valables, et je ne veux d'autre autorité que celle de la loi, car l'art. 1001, que j'ai déjà cité, se sert de l'expression "quiconque" qui évidemment comprend, parmi les personnes qui peuvent enchérir, le débiteur des taxes.

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On dit qu'alors cette personne achète d'elle-même. Cela n'est pas exact: elle achète de la corporation du comté au nom de qui l'acte de vente est consenti (art. 1009 C.M.). Peu importe qu'elle paie sa dette en même temps que le prix de vente: la faute, si faute il y a, est celle de la loi qui ne veut pas que le prix d'adjudication dépasse le montant des deniers à prélever y compris les frais. Pour cette raison, on ne peut se plaindre que la vente se soit faite à vil prix, car le prix de vente ne peut excéder le chiffre des taxes et des frais encourus. Voy. l'art. 1001 C.M.

L'intimé cite des autorités anglaises et américaines sur cette question. Je crois qu'il suffit de nous en tenir aux articles du code qui sont suffisamment explicites pour nous guider en cette matière.

3. Il n'y a pas eu de discussion préalable des meubles des appelants, les débiteurs.

Je réponds que la saisie et la vente des meubles du débiteur, facultatives aux termes de l'article 962 C.M., n'est pas une condition préalable de la vente des immeubles pour les taxes qui les grèvent en vertu des art. 998 et suivants du code municipal.

4. Les appelants, débiteurs des taxes, en payant le prix d'adjudication, se trouvent avoir payé leur propre dette, et ne peuvent ainsi changer le titre qu'ils avaient aux lots nos 266 et 360.

J'ai répondu à cette objection en discutant le deuxième moyen de nullité de l'intimé.

5. La vente a été faite *super non domino et non possidente* et est partant nulle.

La preuve constate qu'en 1896 les numéros 266 et 360 étaient entrés au rôle d'évaluation au nom de Dame Veuve John O'Connell. En 1899 l'entrée est "Succession Dame Veuve John O'Connell." En 1902

c'est "Succession Veuve John O'Connell." En 1905 on met "Succession John O'Connell." En 1908, après l'adjudication mais avant l'acte de vente, on lit: "Dame Mary S. O'Connell et Mr. W. G. O'Connell."

Avant de discuter cette objection il vaut mieux rendre compte des dispositions principales du code municipal se rapportant tant au rôle d'évaluation qu'à la vente des terrains pour taxes.

Le code municipal, art. 718, exige qu'on entre au rôle d'évaluation, les noms, prénoms et qualité des propriétaires de biens imposables quand ils sont connus. Aux termes de l'article 723 si le propriétaire d'un terrain est inconnu, les estimateurs mettent le mot "inconnu" dans la colonne des noms des propriétaires, en regard de la désignation de ce terrain. Le rôle d'évaluation est examiné par le conseil, et toute personne peut se plaindre des entrées y faites, et le conseil peut corriger les noms des personnes qui y sont inscrites (art. 734, 735). Ce rôle sert de base au rôle de perception qui indique, entre autres mentions, les noms et état de chaque propriétaire contribuable inscrit au rôle d'évaluation, ou le mot "inconnu" si le propriétaire est inconnu (art. 955.)

Maintenant, quant à la vente d'immeubles pour taxes, le secrétaire-trésorier du conseil local, sur l'ordre du conseil, doit, avant le 20 décembre de chaque année, transmettre au bureau du conseil de comté une liste des personnes endettées pour des taxes municipales ou scolaires, avec la désignation des terrains imposés et le montant des taxes qui les affectent (art. 373). Ces renseignements reçus, le secrétaire-trésorier du conseil de comté doit préparer, avant le 8 janvier de chaque année, une liste donnant

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la désignation de tous les terrains situés dans la municipalité du comté à raison desquels il est dû des taxes municipales ou scolaires, avec les noms des propriétaires tels qu'indiqués au rôle d'évaluation, et en regard des terrains le montant des taxes qui les affectent. Cette liste est accompagnée d'un avis public annonçant que ces terrains seront vendus à l'enchère publique au lieu où le conseil de comté tient ses sessions, le premier mercredi de mars suivant à dix heures du matin, à défaut de paiement des taxes et des frais encourus (art. 998). La liste et l'avis doivent être publiés en la manière ordinaire et, de plus, deux fois dans la Gazette Officielle et dans un ou plusieurs "papiers-nouvelles," dans le cours du mois de janvier (art. 999). Au temps fixé pour la vente, le secrétaire-trésorier du conseil de comté vend ces terrains après avoir fait connaître le montant à prélever sur chacun d'eux, y compris la part de frais encourus pour la vente (art. 1000). Puis l'article 1001 indique la manière de faire cette vente; je le cite encore textuellement à cause de son importance dans cette cause:

> Quiconque offre alors de payer le montant des deniers à prélever, y compris les frais, pour la moindre partie de ce terrain, en devient l'acquéreur, et cette partie du terrain doit lui être adjugée sur le champ par le secrétaire-trésorier, qui vend celle qui convient le mieux à l'intérêt du débiteur.

Sur paiement, par l'adjudicataire, du montant de son acquisition, le secrétaire-trésorier constate les particularités de la vente dans un certificat fait en double sous sa signature, et en remet un duplicata à l'adjudicataire. Le deuxième alinéa de l'article 1004 dont je viens de transcrire le premier alinéa, ajoute:

> L'adjudicataire est dès lors saisi de la propriété du terrain adjugé et peut en prendre possession, sujet au retrait qui peut en être fait dans les deux années suivantes, et aux rentes foncières constituées.

Citons aussi l'article 1007:

> Si, dans les deux années qui suivent le jour de l'adjudication, le terrain adjugé n'a pas été racheté ou retrait d'après les dispositions du chapitre suivant, l'adjudicataire en demeure propriétaire irrévocable.

L'adjudicataire a droit alors à un acte de vente du terrain, qui lui est consenti par la corporation du comté. Ajoutons que la vente transfère à l'adjudicataire tous les droits du propriétaire primitif et, sauf certaines exceptions, purge tous les privilèges et hypothèques dont le terrain peut être grevé (art. 1013). Enfin l'action pour faire annuler une vente de terrain faite en vertu de ces dispositions, ou le droit d'en invoquer l'illégalité, se prescrivent par deux ans à compter de la date de l'adjudication (art. 1015).

Quand la vente en question a été faite les immeubles étaient entrés au rôle d'évaluation au nom de la succession John O'Connell. Ces biens venaient de la succession James O'Connell, de sorte qu'il y avait erreur de prénom. Cette erreur cependant ne pouvait tromper personne, l'intimé moins que tout autre, et ce qui me paraît décisif c'est que personne, ni l'intimé, ni aucun autre intéressé, n'a demandé la correction du rôle d'évaluation. L'intimé—s'il était vraiment copropriétaire, et je ne puis lui reconnaître cette qualité—aurait pu faire insérer son nom au rôle d'évaluation. Il n'en a eu aucun souci préférant sans doute faire payer les taxes municipales par d'autres. Je suis donc d'opinion que l'intimé est mal fondé à dire, à cause de l'entrée des terrains au nom de la succession John O'Connell, que la vente s'est faite *super non domino*.

Les formalités exigées par le code municipal pour la vente des terrains pour taxes municipales paraissent avoir été suivies. Les annonces ont été faites dans la Gazette Officielle ainsi qu'à la porte de l'église de la

paroisse de Sainte-Foy. Je ne trouve pas au dossier la preuve de l'annonce dans un "papier-nouvelles" au désir de l'art. 999, mais l'intimé ne s'est pas plaint devant nous qu'elle n'ait pas été faite, et la présomption est qu'elle a dû être publiée: *omnia præsumuntur rite et solemniter facta donec probetur in contrarium.* Du reste, l'article 1015 empêcherait l'intimé de s'en plaindre maintenant. Je trouve que le secrétaire-trésorier s'est littéralement conformé à l'article 1001 en faisant l'adjudication. Il explique son mode de procéder en ces termes:

> Q. Vous rappelez-vous de la façon dont la vente a été conduite? Est-ce qu'elle a été conduite comme vous dites là? Comment avez-vous demandé?
>
> R. Je mets la propriété, d'abord, à l'enchère et je demande qui offre de payer le montant des taxes et des frais pour la propriété. Le premier prêt me dit; Je la prends pour le montant des taxes et des frais. Je demande s'il y a d'autres enchérisseurs. S'il y en a qui me disent; Il n'y en a pas, je l'adjuge. C'est de même que ça s'est fait là.
>
> Q. Comment demandez-vous l'enchère?
>
> R. C'est-à-dire, supposons qu'il y en a deux pour acheter. Une première fois, il dit; Je la prends pour le montant des taxes et des frais. Un autre, par derrière vous, peut dire; Je la prends pour les trois quarts, ou le huitième, pour le même montant.
>
> Q. C'est de même qu'elle a été mise à l'enchère?
>
> R. Sans doute, c'est de même.

On ne peut mieux se conformer aux exigences du code municipal. Le secrétaire-trésorier n'a pas le droit de recevoir plus que le montant des taxes et des frais. Les surenchères se font, si je puis m'exprimer ainsi, en moins prenant, c'est-à-dire, la somme offerte restant invariable, le surenchérisseur prend moins de terrain pour le même montant que le premier enchérisseur, et ainsi de suite. S'il n'y a qu'un seul enchérisseur, il prend le terrain ou la partie qu'il indique dans son enchère pour le montant des taxes et des frais encourus. Que les tiers puissent en souffrir, c'est possible, mais ils peuvent surenchérir de la manière

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que j'ai indiquée, et s'ils sont créanciers hypothécaires ils ont droit de recevoir un avis du registrateur s'ils ont pris la précaution de faire inscrire leur nom dans le livre d'adresses de ce dernier (art. 2161 (i) code civil). En tout cas, la seule question qui doive nous occuper ici, ce ne sont pas les inconvénients qui peuvent résulter de la loi, mais uniquement celle de savoir si on s'est conformé à la loi. Je ne puis répondre à cette question autrement que dans l'affirmative. J'ajoute que si l'intimé souffre un préjudice, il ne peut s'en prendre qu'à son incroyable incurie. *Vigilantibus non dormientibus scripta est lex.*

Les objections de l'intimé me paraissent donc toutes mal fondées et, par conséquent, l'appel doit être accordé et l'action de l'intimé renvoyée avec dépens de toutes les cours, moins toutefois, pour les raisons données plus haut, les frais d'impression du "case."

Appeal allowed with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon, Parent & Casgrain.*

Solicitors for the respondent: *Robitaille & Fafard.*

1920
*Nov. 11.
*Dec. 17.

ALEXANDER C. McKENZIE (PLAINTIFF)..................... APPELLANT;

AND

HATTIE WALSH (DEFENDANT)...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of land — Memo. in writing — Statute of Frauds — Additional terms.

Pursuant to an agreement to purchase her property the vendor signed the following document: "Received from A. C. McKenzie the sum of two hundred dollars on the purchase of house No. 33 Spring Garden Road. Purchase price ten thousand five hundred dollars. Balance on delivery of deed." In an action by the purchaser for specific performance.

Held, that this document contained all the essential terms of a contract for the sale of land and complied with the conditions of sec. 7 of the Statute of Frauds. R.S.N.S. [1900] ch. 141.

It was contended that the time for completion of the purchase was a term of the contract and should have appeared in the written memorandum.

Held, that the finding of the trial judge that the time for completion was agreed on after the document was signed should be accepted and it was, therefore, not a term of the original contract but an arrangement for carrying it out.

Per Duff J.—This defence was not pleaded nor submitted to the jury and, as a question of fact, could not be raised after verdict since it was not disclosed so as to challenge the attention of the plaintiff.

It was also alleged that the property sold was mortgaged and the purchase was only of the equity of redemption which the memorandum did not disclose.

Held, that the purchase was of the whole property and not of the equity of redemption only and that the contract contained in the memorandum could be worked out as if it provided for the mortgage.

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

APPEAL from a decision of the Supreme Court of Nova Scotia, (1) reversing the judgment at the trial in favour of the plaintiff and dismissing the action.

The material facts and the questions raised on this appeal are sufficiently stated in the above head-note.

Jenks K.C. for the appellant.

Power K.C. for the respondent.

THE CHIEF JUSTICE.—I must confess I was not, at the close of the argument, without some doubts as to the sufficiency of the written receipt or memorandum relied upon in this case as satisfying the Statute of Frauds. After consideration, however, and reading of the authorities cited by counsel on both sides, I have reached the conclusion that the memorandum or receipt is sufficient. That it must contain all the essential terms of the contract and must show that the parties have agreed to those terms is conceded by both sides. That it does do so, I conclude. The essential terms are the parties, the property and the price.

The memo. or receipt in this case reads as follows:

Halifax, N.S.
February 5, 1919.

Received from A. C. McKenzie the sum of two hundred dollars on the purchase of house, No. 33 Spring Garden Road. Purchase price ten thousand five hundred dollars. Balance on delivery of deed.

(Signed) Hattie Walsh.

It seems to me that these three essential terms of the contract—parties, property and price—are all included.

It appears that after the memo. was signed the parties met and arranged for a time of completion, viz., the 15th of April, and possession, the 1st of May.

(1) 54 N.S. Rep. 26.

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I have read most carefully the judgments delivered in the court below and concur with the opinion of Chief Justice Harris that the written memorandum or receipt discloses a contract in writing sufficient to satisfy the Statute of Frauds and that the arrangements subsequently made for a time of completion and possession were in the nature of appointments merely to carry out the contract and not varying its terms.

I concur with the learned Chief Justice's judgment and for the reasons given by him would allow this appeal and restore the judgment of the trial judge with costs throughout.

IDINGTON J.—The appellant as plaintiff sued respondent for specific performance of an agreement entered into by her for the sale to him of a house and premises in Halifax.

The appellant paid, after several meetings at which negotiations had taken place, two hundred dollars, and got from the respondent the following receipt:—

Halifax, N.S.,
February 5, 1919.

Received from A. C. McKenzie the sum of two hundred dollars on the purchase of house No. 33, Spring Garden Road. Purchase price ten thousand five hundred dollars. Balance on delivery of deed.

(Signed) Hattie Walsh.

She evidently, a month or so afterwards, had made up her mind not to sell.

The appellant brought this action on the 2nd of May, 1919, and, by his statement of claim, delivered later, set forth therein a copy of this agreement as basis of his claim.

It is now contended by respondent, after being beaten in several other contentions she set up, that this is not a sufficient memorandum in writing to comply with the Statute of Frauds.

Prima facie it certainly seems to be so by containing all the essential elements of a bargain and sale of land.

It is given expressly, for the cash payment, on the purchase of a house, definitely described, of which the purchase price is to be $10,500 and the balance on delivery of deed.

Surely that covers all that is necessary to satisfy the Statute of Frauds unless there is something rendering the transaction entered upon much more complicated than usual, which does not appear herein.

The respondent in defence pleaded that the actual agreement was only an optional one dependent upon whether or not the respondent would be able to obtain possession of another property which she had leased, and further that the respondent signed the above quoted memorandum upon the representation by appellant that it was a mere receipt for two hundred dollars.

Upon this issue the parties went to trial and the result, upon most conflicting evidence, was a verdict of the jury answering questions submitted entirely negativing the contentions thus set up.

No other questions seem to have been suggested by the respondent.

In an ordinary trial as to the validity of the receipt as a contract setting out the terms, this should have ended the whole matter in dispute.

The resourceful counsel for respondent was only able to suggest at the close of the learned trial judge's charge the following, answered as appears by the learned judge as follows:—

Mr. Ralston: Will you explain that the arrangement is everything that took place between them that night?

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His Lordship: The arrangement is the agreement between the parties; the written agreement is conclusive in McKenzie's favour, if he is telling the truth, but the woman says that agreement was not the whole agreement, that the whole agreement contained that condition, and that is the difference between the parties.

Then one would have expected the matter to end by the verdict of the jury, for counsel did not object to the charge further, or except thereto in any other way.

What transpired between the learned judge and counsel later, does not appear in the case before us, but one may infer from the judgment of the learned judge that some further contentions, however irregular, had been set up by counsel, for there is a judgment of the learned trial judge in which he deals with a contention first that the time for completion of the contract had not been contained in the memorandum of the contract, and secondly that the mode of dealing with the problem of an existing mortgage had not been dealt with in the memorandum.

He disposes of the former by finding as a fact that the time for completion had been determined by the parties after the signing of the memorandum.

It was quite competent for the parties proceeding upon the validity of the memorandum to have done so, and default that, for the court to have determined what was a reasonable length of time, on the assumption that the contract was sufficient within the Statute of Frauds.

The finding of the learned trial judge may fall within either and must bind all concerned.

The other question of the existence of a mortgage is an every day incident dealt with by the courts in suits for specific performance and is amply covered by the decision of this court in *Williston* v. *Lawson* (1), at page 679, as expressed by Strong J. in the language quoted.

(1) 19 Can. S. C.R. 673.

I doubt if there ever sat in any Canadian Court a judge more learned in the relevant law to be observed as a guide, or better qualified to express an opinion on such a point of equity jurisprudence upon which the right to specific performance rests.

It would seem to me that the matter should have rested there. But the respondent was persistent and appealed, taking, in her notice of appeal, the following grounds, the nature of which I give in abbreviated form:—

1st, that the findings were against the weight of evidence; 2nd, such as reasonable men should not have made; 3rd, because they were against the probabilities; 4th, that the learned judge wrongly instructed the jury; and 5th, because the learned judge's direction as to the effect of the conflict was to present an issue of one or other party committing perjury and hence a withdrawal of the case from the jury.

Not a word therein points to the question of the requirements of the Statute of Frauds having been fulfilled or not.

I cannot find in the case any leave to amend this notice or take any other ground.

The first observation I think this calls for is that all argument addressed to us relative to the non-compliance with the Statute of Frauds never seems to have occurred to counsel at the trial beyond what was properly submitted to the jury and thus disposed of; and seems to have been abandoned as a hopeless contention when giving notice of appeal but, by reason of something which does not appear, suggested in appeal, is again mooted.

The result thereof is an opinion judgment of the learned Chief Justice completely answering any such contention; another of Mr. Justice Longley that

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finds fault with the learned trial judge's charge, and expresses the opinion that there should be a new trial, and then, though finding difficulty in assenting to the proposition of Mr. Justice Ritchie that the document was not of a character to fulfil the conditions of the Statute of Frauds, finally assents thereto and to the dismissal of the action.

I recite all this as illuminating how little confidence either bench or bar had in the contention now made the sole basis of answer to this appeal here.

I respectfully submit that once the issues raised before the jury had been by them disposed of adversely to the respondent, there was nothing more, reasonably to be hoped for, as resting upon the Statute of Frauds.

I repeat that the memorandum was not solely a receipt for money, but *prima facie* evidence of a complete contract within the Statute of Frauds, and when such substantial issues as presented to the jury were disposed of by them, nothing more should have been given effect to, and that the mere matters of method or form of carrying out the contract need not have been further considered as being required by the Statute of Frauds.

Hence I think the appeal should be allowed with costs throughout and the judgment of the learned trial judge restored.

Duff J.—I concur on the whole with the judgment of the Chief Justice of Nova Scotia, and there is only one point which I would like to put in a slightly different way.

The majority of the full court took the view that the 4th section of the Statute of Frauds had not been complied with inasmuch as it was a term of the agreement that the balance of the purchase money was to

be paid on the 15th of April and the deed then delivered and that this term does not appear in the memorandum produced by the plaintiff. I assume, without expressing any opinion on it, that the document produced is not in itself of such a character as to preclude oral evidence shewing that it did not embody all the material terms of the contract and consequently that it was open to the defendant to plead and prove by oral evidence that a stipulation to the effect mentioned was a term of the agreement.

The statement of defence raises no such issue. The 9th paragraph, it is true, alleges that the memorandum produced by the appellant did not contain all the terms of the agreement actually entered into between the parties but the language of the plea ("does not contain all the terms of the said conditional agreement or option") unmistakably relates to the agreement alleged by the defendant in paragraph 7 which, while professing to set out fully the terms of the agreement, mentions no stipulation touching the date of the delivery of the deed or payment of the purchase money. The state of the pleadings is not without importance as indicating the issue to which the evidence was directed; although of course the pleadings in themselves are by no means conclusive as to that. An examination of the proceedings at the trial, however, leaves no doubt on one's mind that the evidence was not directed to the issue whether or not such a stipulation formed part of the agreement between the parties. Such an issue would of course be an issue of fact and primarily therefore a question for the jury. In that issue the onus would be on the defendant because the plaintiff had alleged a contract in the terms of the memorandum set out and if the defendant denying an agreement in such terms alleged

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in the alternative that if there was an agreement in such terms there was a further term not disclosed by the memorandum that would be matter of defence and of the onus of that defence he must acquit himself. Only once during the trial was the point adverted to. In cross-examination, the plaintiff was asked whether the arrangement that the balance of the purchase money was to be paid on the date mentioned was made on the day on which the memorandum was signed or later. The plaintiff was unable to answer although he did say that this was a part of the arrangement between him and the defendant. No question was submitted to the jury upon the point, no suggestion was made by defendant's counsel that the jury should be asked to pass upon it. On motion for judgment the trial judge was asked to dismiss the action on the ground that no date for completion was mentioned in the memorandum but he rejected the contention taking the view that the arrangement in respect of the date of completion was made after the day on which the memorandum was signed and that in any event this arrangement was not part of the contract but in the nature of an appointment for the purpose of carrying out the contract.

It was not, in my opinion, open to the defendant after the verdict to raise this question as a question of fact. I express no opinion as to whether the practice of the Nova Scotia courts would permit such a question to be decided by the judge as a question of fact. No such question of fact could be raised after verdict because the point not having been taken on the pleadings, it was the defendant's duty, if intended to rely upon it, to disclose it in such a way as to challenge the plaintiff's attention to it and it is very clear that this was not done. ?

I may add, however, that dealing with it as a question of fact, reading the memorandum with the evidence given by the plaintiff, my finding would be that the defendant had failed to prove that such a term was part of the contract. It follows, of course, from this that the defendants could not, raising the point as a point of law, succeed.

The appeal should be allowed and the judgment of Mr. Justice Drysdale restored.

ANGLIN J.—This case has, in my opinion, been so satisfactorily dealt with by the learned Chief Justice of Nova Scotia that I shall content myself with expressing respectful concurrence in the opinion which he delivered. I would merely add a reference to the well-known language of Halsbury L.C. in *Nevill v. Fine Art and General Ins. Co.* (1), at page 76, on the hopelessness of asking for a new trial for mere non-direction where no exception has been taken to the charge at the trial.

MIGNAULT J.—This is an action taken by the appellant for the specific performance of an agreement for the sale by the respondent to the appellant of the former's house in Halifax. On the 5th February, 1919, the appellant called on the respondent and proposed to purchase her house. The appellant testifies as to his conversation with the respondent as follows:—

Q. Tell us what the conversation was? A. I just asked her if the house was for sale; she told me it was; then I asked her the price; she told me what the price was, $10,500.00, and after a little talking back and forth I told her I would give her her price.

Q. That is $10,500.00? A. Yes.

(1) [1897] A.C. 68.

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Q. What happened then? A. At the same time she told me she was offered $10,000.00, or had been offered $10,000.00 and that she was asking $10,500.00.

Q. You agreed to give her $10,500.00? A. Yes; then I went out and told her I would be back in half an hour; I went out and came back with the receipt and the money.

Q. You came back; you brought back this receipt I show you and this cheque? A. Yes, and that cheque.

Q. What took place then? A. I read the receipt and passed it over to Mrs. Walsh and apparently she read it; she had it anyway and she apparently read it before she signed it.

Q. She signed it in your presence? A. Yes.

Q. And you gave her this cheque? A. Yes.

Q. You got the cheque back from your bank vouchered cashed? A. Yes.

Q. And what further was said about the property at that time? A. There was nothing particular said at that time.

The receipt referred to is very material because the issue now between the parties is whether it was a sufficient memorandum in writing to satisfy the Statute of Frauds. It reads as follows.

Halifax, Feb. 5th, 1919.

Received from A. C. McKenzie the sum of two hundred dollars on the purchase of house No. 33, Spring Gar. Rd., purchase price ten thousand five hundred dollars.

Balance on delivery of deed.

(Sgd.) Hattie Walsh.

Two objections are now made to the sufficiency of this receipt.

1. It was agreed between the parties, according to the appellant's story, that the balance of the purchase price would be paid on the 15th of April, and that possession would be given the appellant on May 1st, and this term was a material term of the agreement and was not mentioned in the memorandum.

2. There was a mortgage on the house of $5,000 and the appellant states that the respondent said that this mortgage could stay on, and no mention of this is made in the memorandum.

I may say that the learned trial judge (Drysdale J.) tried this case with a jury, and the issue raised at the trial by the respondent was that it was a condition of the arrangement that the appellant was not to have the house unless the respondent could get her tenants out of another house belonging to her by April 1st. The learned trial judge put questions to the jury covering this issue, and the answers were against the pretensions of the respondent. Judgment was given in favour of the appellant, but the respondent succeeded in her appeal to the Supreme Court of Nova Scotia *en banc.*

My opinion is clearly that the learned trial judge's charge was a fair one, and if the evidence of the respondent's daughters was not sufficiently set out by the learned trial judge, his attention should have been called to the matter by the respondent's counsel after the charge. This was not done, and I do not think the objection should now be entertained. I may add that no new trial was granted by the court below, but the appellant's action was dismissed on the objections taken to the memorandum under the Statute of Frauds, the learned Chief Justice of Nova Scotia dissenting.

Coming now to the objections founded on the Statute of Frauds, the only one on which I feel any difficulty is the first one, and this difficulty is on the point whether the agreement alleged by the appellant as to the payment of the balance of the purchase price and the delivery of possession took place at the interview of February 5th, or was a subsequent parol agreement. If the former, I would think it was a material term of the agreement, and should have been mentioned in the memorandum. If it was a subsequent parol agreement, I think the memorandum is sufficient.

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As can be seen, the memorandum describes the house to be sold and mentions the price, $10,500.00, on which $200.00 was then paid, and says:—

> Balance on delivery of deed.

The appellant in his statement of claim says that, by a subsequent parol agreement, it was agreed that payment of the balance and delivery of the deeds should be made by the 15th of April, and that respondent should occupy the house free of rent until May 1st.

In the evidence given by the appellant as part of his case, he says that this agreement would be in March some time, either February or March. When called in rebuttal, he first says it was made the next time he was in the respondent's house, but adds further on that it may have been made either when the receipt was signed or later.

This, as it stands, is somewhat indefinite, but the learned trial judge found as follows:—

> It seems the parties met after the date of memo and arranged for a time of completion, viz., the 15th of April and possession the 1st of May, but I think such arrangements were in the nature merely of appointments to carry out the contract and not an effort to vary the terms, which could not, I think, be verbally done.

I think this agreement, if subsequent to the memorandum, was of the nature stated by the learned trial judge, but the material point is that the learned judge finds as a fact that the arrangement was subsequent to the memorandum. I think this finding of fact should be accepted.

The consequence is that this memorandum contains the material terms of the agreement of February 5th, and is sufficient to support the appellant's action.

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On the question of the sufficiency of the memorandum, the judgment of the learned Chief Justice of Nova Scotia who dissented in the court below, is so complete that I rely on his reasoning and do not find it necessary to repeat it here. I also accept as entirely sufficient the judgment of the learned Chief Justice on the second objection of the respondent as to the mortgage on the property.

In my opinion the appeal should be allowed and the judgment of the learned trial judge restored with costs here and in the court below.

Appeal allowed with costs.

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

Solicitor for the respondent: *John T. Power.*

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*Nov. 24.
*Dec. 17.

C. J. DREIFUS....................APPELLANT;

AND

HARVEY E. ROYDS...............RESPONDENT.

ON APPEAL FROM THE ONTARIO RAILWAY AND MUNICIPAL BOARD.

Assessment and taxes—Land—Actual value—Assessment on adjacent lands—Principle—Ontario Assessment Act, R.S.O. [1914] *c.* 1955 40 (1) *and s.* 69 (16).

By sec. 41 (1) of the Ontario Assessment Act "land shall be assessed at its actual value" and by sec. 69 (16) "the court may, in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed."

Held, that in assessing land under these provisions the governing principle is to ascertain its actual value.

Held, further, Brodeur J. dissenting, that in this case the assessment was made chiefly, if not entirely, on consideration of the value at which adjacent lands were assessed and the actual value was disregarded. The case was, therefore, sent back to the tribunal appealed from to have the land assessed on the proper principle.

APPEAL from the ruling of the Ontario Railway and Municipal Board which set aside the assessment on appellant's land made by the County Court Judge and restored the higher valuation of the Court of Revision.

The questions raised on the appeal are sufficiently indicated in the above head-note.

Chrysler K.C. for the appellant.

G. F. Henderson K.C. for the respondent.

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

THE CHIEF JUSTICE.—This is an appeal by the owner of two parcels of land in the City of Port Arthur from a judgment of the Ontario Railway and Municipal Board reversing a judgment of the District Judge for Thunder Bay, which in turn had altered the judgment of the Court of Revision confirming an assessment of the lands in question.

The assessment of the two parcels of land had been fixed by the Court of Revision at $32,000 and $28,000 respectively, being at the rate of $300 per acre; the District Judge reduced these assessments respectively to $10,700 and $9,300, being at the rate of $100 per acre. The Ontario Railway and Municipal Board restored the assessment fixed by the Court of Revision, namely, $60,000, for the two parcels of land.

Unless it was clearly apparent that the Board from whose judgment this appeal was taken had erred in its conclusions either by adopting some wrong principle or in ignoring some right one, I would not be disposed even if I had the power, to interfere with its judgment.

They are men of great experience in dealing with matters of the kind in question here and, as the hearing took place in Port Arthur where the lands are situate, I assume they would have an opportunity of inspecting them and those in the immediate vicinity and, in this way, would be better qualified than we possibly could be to determine the actual value of the lands in dispute and the weight to be given to the evidence as to the assessment of these adjoining lands in deciding the actual value of those in question here.

It is contended, however, that the Board erred in that they disregarded the provision of the Assessment Act, requiring the lands to be assessed at their actual value and in allowing undue weight to the evidence respecting the assessment of the lands of the same kind as those in question in the immediate vicinity.

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The learned chairman of the Board, during the hearing of the appeal, expressed himself strongly, more than once, to the effect that the Board's duty was to find the actual value of the lands in question, and I find it difficult to reach the conclusion that he erred in giving undue weight to the assessments upon lands of the same kind in the immediate vicinity of those in question. He seemed fully to appreciate the finding of that "actual value" as the dominant and controlling factor in determining the amount at which they should be assessed.

But the evidence given before the board was most meagre and unsatisfactory as to this "actual value" and the Assessment Act expressly provides that, in arriving at such actual value, consideration might be given to the assessed value of lands of the same kind in the immediate vicinity of those in question.

Whether undue weight was given to this evidence of the assessed value of other lands of the same kind as those in question in the immediate vicinity is very difficult to decide.

In view of the large amount involved and the very meagre and unsatisfactory character of the evidence of actual value given, some of my colleagues think that justice requires there should be a rehearing of the case by the board and fuller and better evidence given of the "actual value" of the lands which the Act requires. Under the circumstances, I am not disposed to dissent from such a disposition of the appeal.

I think we are all agreed that the actual value of the lands and that only can be assessed. That is the dominant and controlling factor which must determine the assessment, and it would seem as if the assessor failed to appreciate that fact and did not bring before

the board the evidence necessary to enable it to find such actual value but relied too much upon the subordinate fact of the assessed value of adjoining lands.

Under all the circumstances I would agree to the reference back to the board with instructions to take further evidence of the actual value of the lands in question, due regard being had to the assessment values, unappealed from, of the lands of a similar kind in the immediate vicinity of those in question, in order to arrive at the actual value of those in question

It must not be assumed however, by this reference. back to the board to fix the assessment upon the "actual value" of the land, that the statutory direction in arriving at that actual value to consider the assessed values of similar lands in the immediate vicinity of those under consideration, is to be ignored. On the contrary, these values must have due consideration and weight, but they were evidently not intended by the legislature to be the sole or even the controlling factor in determining the actual value of the lands being assessed, but simply as one item of evidence in reaching that actual value which had to be considered.

IDINGTON J.—The appellant is a non-resident owner of two parcels of land situated in Port Arthur, one of one hundred and seven acres and the other of ninety-three acres, separated only by a highway running between them, and thus together forming a rectangular block of two hundred acres.

The respondent is the Assessment Commissioner of Port Arthur who had these parcels placed on the said city's assessment roll at an assessed value of three hundred dollars an acre.

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The said owner appealed from said assessment to the Court of Revision for the municipality, which dismissed his appeal.

He then duly appealed to the learned judge of the District Court of the Provisional District of Thunder Bay, who, after hearing evidence (which for some reason or want of reason is not before us) allowed the appeal and reduced the assessment to one hundred dollars an acre.

It does appear from notes of his finding that appellant had called two witnesses well acquainted with the lands in question for many years, and well qualified to speak on the subject of real estate values in the part of Port Arthur in question, who put the value of the whole possible farm land, undrained, at $75 to $100 an acre. One of these men speaking from personal experience, indicates it would cost more to drain and clear and make productive than it would be worth.

The learned judge says Mr. Royds did not call any witnesses.

And then the learned judge closed his remarks thus:—

> In my opinion, the value put by Mr. Schwigler and Mr. Tomkin is altogether too high, and I cannot see where any owner can put these swamps and muskegs to any use that would justify such a value. But on their evidence I fix the assessment at $100 per acre and it is reduced accordingly.

From that judgment the respondent herein appealed to the Ontario Railway and Municipal Board, which reversed same and restored the assessment made by said respondent.

The record of the proceedings before us indicates that counsel appeared respectively for the appellant then, now respondent herein, and for the respondent then, now the appellant herein. Yet the proceedings

were opened by Mr. Royds in person without being sworn, so far as appears, though in regard to any others called as witnesses the record indicates that each man so called was sworn.

He began thus:—

As shewn on the blue print submitted, the parcels marked in red ink, 1, 2, 3, 4, 5 and 6, form assessment subdivision 22, and parcels numbered in red pencil 7, 8, 9, 10, 11, form assessment subdivision 32. We do not intend in this particular appeal to burden this Court with witnesses regarding the valuation. We do not wish to take up that matter at present, because as you know since the war these things differ considerably, and we are going to appeal to you as a matter of equity in the assessment of this property.

The Chairman: The reduction as made by the judge stands unless we are satisfied that its actual value is more than the value fixed by him.

Passing that perfectly correct ruling of the chairman, without heeding it, Mr. Royds launched out into something unusual on the part of a witness, and which is somewhat difficult to understand, but incidentally discloses, if it means anything, that he had in mind to compare adjoining or adjacent blocks of land (which had been subdivided and partly built on) extending over a wide stretch of such neighbouring territory with these uncleared, unbroken, unimproved non-subdivisions now in question.

He apparently conceived the idea of selecting such improved subdivisions into small lots (assessable to different owners) and making a total estimate of the whole of such assessments, and then, computing the entire acreage of each of such tracts so selected, divided the total assessment of each by its acreage so ascertained, and thus arrived at an assessment per acre exceeding the assessment of the land now in question herein, thus satisfying his own mind that he had made an equitable assessment.

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The only vacant unsubdivided block considered at all lay nearer the centre of the city and hence furnished no basis for a fair comparison based on acreage.

He was asked, before he got started very far, as follows:—

To the Vice-Chairman:

Q. Is this property marsh lands? A. No. It is straight back nearly directly west from the post office. There is one lot on each side of the Dawson Road. The assessment against parcels 1 to 6 at the time it was purchased by the owner were approximately $10,000; that was in 1895.

To the Chairman:

Q. That is the aggregate assessment? A. Yes, in 1895, and the aggregate assessment of that subdivision 22 at the present time is $536,275.

To Mr. McKay:

Q. What do you mean by subdivision 22? A. The land west of High Street to the city boundary, subdivision 2 of Ward 2. That is the assessment for the whole subdivision. It was assessed for $10,100 in 1895. Parcels 7 to 11 were assessed approximately at $7,000 in 1895, and the assessment in 1919 was $331,810. I have taken the whole block of land so as to make the assessment appear more equitable, and I have taken the total assessment against these lands.

To the Chairman:

Q. It is actually assessment by subdivision lots? A. Yes, but I have apportioned it out in the whole acreage, including streets, lots and everything.

One and another asked questions but the results may be just as inaccurate as when he denied the fact of those lands being marsh lands.

I doubt if he really intended to swear as it reads, for if anything is clearly proven in the case, these lands in question are largely marsh lands.

Possibly his mind was running on his preconceived notion of the other tracts he was speaking of a minute later. If so then there was no fair comparison possible between the subdivisions he referred to and the unsubdivided lands in question and, for the purposes of this appeal, that is all that need concern us.

He seems aggrieved that appellant has not improved and subdivided his lands, although, from all that appears, subdivision within the city's bounds seems to have run, as elsewhere, far beyond the bounds of prudence.

The only other evidence, if this and such like irrelevant talk can be called evidence, given on behalf of appellant before the board appealed from herein, was a single witness who was called to prove that in 1911 or 1912 he tried to buy the land in question from the appellant and he refused to consider any offer as he had determined to keep his land for some relative, although the said witness tried it on by steps up to $20,000 or $30,000 and even $50,000. The latter figures evidently I suspect, were a joke.

That witness on cross-examination testified as follows:—

> Q. You anticipated making a large profit? A. We wanted a sudivision and we wanted to divide it up. It was close to the town, and the extension of the railway out that way would make it a marketable property, if we spent a little money on it.
>
> Q. What did you reasonably expect to make over your figure of $50,000? A. I could not tell you that now. This was a long time ago.
>
> Q. Would you give that for it now? A. No.
>
> Q. At what price did you anticipate putting the individual lots on the market? A. We had not made up our minds; we would figure that out. We would fix a price according to what it would cost, but Mr. Dreifus would not commit himself to any price and we had to give him up. We corresponded with him for about two years. He would not answer a letter for a long time after we had written him.

The respondent would not venture to swear that the land in its present state and in the state of the market when the assessment was made, was worth, in the market, what he had assessed it at, or to name a price.

His appeal ought, I respectfully submit, instantly to have been dismissed for want of evidence, but it was not.

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The now appellant, therefore, was driven to calling three witnesses who demonstrated by facts that the judgment of the learned district judge could not have been disturbed by raising the assessment above what he had fixed.

The ruling which followed, and is now appealed against, would maintain any assessment, no matter if double or treble the actual value, so long as it could be argued that some other property, assessed in like manner illegally and improperly beyond its value on same assessment roll and hence must be upheld.

That is not the meaning of the words

and the Court may, in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed,

interjected in 1892 into the section from which the section 69, sub-section 16, relied upon, has come.

In the Assessment Act the predominating clause is that in which, as the chairman of the board repeatedly suggested in the course of the proceedings, the actual value is made the rule to be observed.

To reject this appeal would revolutionize the whole jurisprudence established by many decisions during the twenty-eight years since the embarrassing subsidiary paragraph relied upon was quietly introduced so long ago as 1892, and enable municipalities to defeat through compliant assessors the very fundamental principle of the Assessment Act.

Instead of the respondent bearing the onus of proof in such an appeal as before the Board, it was the duty of the appellant assessor to have established by evidence that the actual value of the land in question had been that set down on the roll. If the practice had been adopted of reporting the evidence given

before the learned judge from whose judgment the appeal was taken, so that the Board could read it, that might not be necessary. Assuming, however, as appears herein, that it formed no part of the record before the board, then clearly the appellant on a re-hearing must bear the burden I indicate; in same manner as an appellant to the Court of Revision must bear the burden of proving the assessor in error.

Then, if that *prima facie* is so established, the onus of proof may be shifted to the respondent.

It does sometimes so happen that the conflict of evidence renders it difficult to determine. The actual difference of opinion so made to appear may be slight and in such a case I conceive the change of 1892 was designed to permit the appellant court to refer to the roll as an element to help to a solution of such a problem as thus presented.

It was never conceived that it should be taken as the sole guide, but only as a factor in the last resort to avoid, by the allowance or disallowance of the appeal, unjust consequences of disturbing a roll clearly founded on the strictest effort to give full force and effect to the imperative requirement of the Act that land, unless in the excepted cases, had been set down at its actual value.

A roll that its maker does not pretend to have been so made out is not available for any such purpose.

It certainly is remarkable that in a city of the size of Port Arthur not a single person could be brought to say the assessment was right on the basis of actual value.

The pretence that there are no sales rather tends to shew there is no value. Of course we ought to know that such is not the case.

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It may well be that the actual value is low, indeed very low, and, if you will, unexpectedly so, but whatever it is, according to the judgment of witnesses competent to speak, their evidence must be the guide.

The absurdity of bringing forward evidence of a refusal to sell, or worse still, of such a refusal in 1911 and 1912 when everyone knows that estimated values then and eight or nine years later are not identical, tends to show, on respondent's part, a rather perverse way of looking at things, which, I submit, should not be encouraged.

The appeal should be allowed with costs herein and before the board appealed from, and the judgment of the learned district judge be restored.

DUFF J.—Section 40 s.s. 1 should be read with sec. 69, s.s. 16 of the Assessment Act. Reading the two provisions together I can entertain no doubt that the rule given by them as the rule governing the Court of Revision in hearing and determining an assessment appeal is that the assessment is to be determined by the actual value of the land and that for the purpose of arriving at the actual value of the land the court may refer to the assessment of land in the vicinity "similar" in character and consider the value of such land as manifested by the assessment. It is not necessary to attempt for the purposes of this appeal any definition of the phrase "actual value" as employed in this statute. It is very clear to me that the board has proceeded upon the theory that the enactment of sec. 40, s.s. 1 is modified by that of s.s. 16 of sec. 69 and that the actual value for the purpose of assessment may be something other than the actual value in fact, the determination of which is governed by the

practice of the assessor as applied to similar lands in the vicinity. This I think is an erroneous view. The governing enactment is that of section 40, s.s. 1, and the rule laid down by s.s. 16 of sec. 69, is a subsidiary rule which has been enunciated with the object of facilitating the application of the governing rule. The assessment of other lands may be referred to for the purpose of ascertaining the actual value, that is to say as affording some evidence of the actual value but only for that purpose.

The appeal should be allowed and the matter referred back to the board to enable them to determine the assessment in accordance with this principle.

ANGLIN J.—The following concluding paragraph from the opinion of its chairman contains the basis of the decision of the Ontario Railway and Municipal Board allowing an appeal in this case from the learned District Court Judge.

> The chief reliance of the appellant is the provisions of section 69, subsection (16) of "The Assessment Act" which so far as material reads "the Court may, in determining the value at which any land shall be assessed have reference to the value at which similar land in the vicinity is assessed."
>
> Under the authorization of this provision, the appellant showed that parcel 4, the unsubdivided block above referred to, is assessed to a resident of Port Arthur at $400 an acre; parcel 6, the subdivided parcel above referred to, is assessed in the aggregate at $425 per acre; parcel 7, a subdivided parcel lying west of parcel 8 and further than it from the centre of the city is assessed in the aggregate at $400 per acre. No satisfactory proof was given that the character and quality of the land embraced in parcels 5 and 8 were materially different from the land in parcels 4, 6 and 7.
>
> From this evidence the Board has reached the conclusion that there is not such a disparity in the value of parcels 5 and 8 as compared with parcels 4, 6 and 7, as to warrant the reduction made by the learned district judge, and in the opinion of the board the assessment as confirmed by the Court of Revision should be restored.

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The principle involved in this passage is in my opinion clearly erroneous. If it does not entirely ignore the paramount provision of s.s. 1 of s. 40, of the Assessment Act—that "land shall be assessed at is actual value" it at least treats as dominant a subordinate clause of s. 69 (16) which permits the Court of Revision

> in determining the value at which any land shall be assessed (to) have reference to the value at which similar land in the vicinity is assessed.

Moreover this latter provision rests on the assumption that the assessment shall have been made on the basis directed by the Act, i.e., that land shall be assessed at its actual value. The evidence of the assessor Royds shows that the roll in this instance was not so prepared—that his idea in making his valuations was that there should be such relative uniformity of assessment that the burden of taxation "should be borne in an equitable manner"—that a person situated as is the appellant

> should be at least willing to contribute his equitable share with the people who gave his land the value it has.

Royds' evidence as a whole demonstrates that in preparing the assessment roll his purpose was not to assess land at its actual value, but rather to assure what he deems equality of assessment, regardless of actual value. The assessments on similar lands in the vicinity of those of the appellant, therefore, do not in this case afford the criterion of value which the legislature doubtless had in view when it provided that reference might be had to them by the Court charged with

> determining the value at which any land shall be assessed.

With great respect, the board appears to have restored the original assessment of $300 an acre, which the District Court Judge had reduced to $100, solely because

> there is not such a disparity in the value of parcels 5 and 8 (the subject of the assessment under appeal) as compared with parcels 4, 6 and 7 (similar land in the vicinity) as to warrant the reduction made by the learned District Judge.

The Board would seem to have taken the assessment of these neighbouring lands, assumed in the absence of evidence to the contrary to be of the same character, as conclusive of the valuation that should be put upon the lands of the appellant for the purpose of the assessment roll. Actual value, of which there was some evidence, seems to have been wholly disregarded. The decisions of this Court—*La Corporation Archiépiscopale C. R. de St. Boniface* v. *Transcona* (1), and *Rogers Realty Co.* v. *Swift Current* (2), seem to me to be in point.

I would allow the appeal with costs and set aside the order of the board. Although at first disposed to restore the order of the learned District Court Judge, which there is evidence to support, I think on the whole the better course is to exercise the power conferred by s.s. 2 of s. 41 of the Supreme Court Act, as enacted by 8 & 9 Geo. V., ch. 7, and remit this case to the Ontario Railway and Municipal Board in order that it may fix the assessment of the actual value of the land as prescribed by s.s. 1 of s. 40 of the Assessment Act.

(1) 56 Can. S.C.R. 56. (2) 57 Can. S.C.R. 534.

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BRODEUR J. (dissenting).—I am not satisfied that the Ontario Municipal Board have based their decision on some erroneous construction of the law.

The law requires (R.S.O. 1914, ch. 195, s. 40, Assessment Act) that land should "be assessed at its actual value."

The land in question covers a somewhat large area in the midst of the city of Port Arthur and has belonged for a great number of years to the appellant who apparently keeps it for a relative to whom he proposes to leave it in the future.

It is not subdivided into town lots.

Some years ago the appellant had the opportunity of selling this land for $50,000 and he would not consider favourably such an offer. The land is assessed at about that sum.

The evidence is conflicting. Some witnesses say the property is not worth more than $100 an acre. On the other hand, it is in evidence that it is worth far more than that. The members of the board held their sittings in the locality and saw the land and could make as good an estimation as these witnesses. They came to the conclusion that the property should be assessed at $300 an acre. They base their judgment on a case of *In re Lake Simcoe Hotel Co. and Barrie* (1), or at least they refer us to the decision in that case.

In that case of *Lake Simcoe*, it is stated that value alone is to be considered in making assessments and it is added also that the proper guide is to be found in sect. 69 (16) of the Assessment Act, providing that the Court may in determining the value at which any land shall be assessed have reference to the value at which similar land in the vicinity is assessed.

(1) 11 Ont. W.N. 16.

In the present case, the land not being on the market, we have no sale price to guide us. It does not give any revenue, and we cannot then have reference to the returns to determine the value. The board considered the assessment at which the lands in the vicinity were assessed. Different groups of lots of land were formed for making the comparison and it was found that these adjoining properties were assessed at four and five hundred dollars an acre.

It seems to me that the appellant, in these circumstances, cannot complain of the decision of the board which assessed its land at three hundred dollars an acre.

If I could read in the decision of the board that they had disregarded the actual value of the land and had based their valuation only on the neighbouring property I would decide in favour of the appellant. But as they failed to find out by sales, by the income or by other means the actual value of the property, and as the evidence of value given by witnesses was "little more than guesses," they found in the value of adjoining properties a guide which the law itself declares could be considered.

The appeal should be dismissed with costs.

MIGNAULT J.—The only ground on which this Court has jurisdiction to vary the valuation of property assessed, is that the court appealed from has proceeded upon an erroneous principle (sec. 41, Supreme Court Act). So on this appeal from the Ontario Railway and Municipal Board, which is the court of last resort in the province of Ontario on matters of assessment, it must be shown that the board, in allowing the appeal of the present respondent from the judgment of the district judge, has proceeded upon an erroneous principle.

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There is no doubt that the respondent urged an erroneous principle before the board when he contended that because of municipal requirements the city of Port Arthur had to have a certain amount of revenue and that therefore equity of assessment (whatever that may mean) would be the fair way. But the Board does not appear to have proceeded on any such ground, so it is unnecessary to consider it.

However the board clearly bases its judgment upon subsection 16 of section 69 of the Assessment Act, which says:—

> In other cases, the court, after hearing the complainant, and the assessor, or assessors, and any evidence adduced, and, if deemed desirable, the person complained against, shall determine the matter, and confirm or amend the roll accordingly. And the Court may in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed. And in all cases which come before the Court it may increase the assessment or change it by assessing the right person, the clerk giving the latter or his agent four days notice of such assessment, within which time he must appeal to the Court if he objects thereto.

The governing provision in the Assessment Act is section 40, subsection 1, which is as follows:

> Subject to the provisions of this section, land shall be assessed at its actual value.

Section 40, which lays down an imperative rule, is among the provisions of the Act concerning the valuation of lands, while section 69 is in the part of the statute which deals with the Court of Revision. Subsection 16 is clearly permissive only, and allows the Court, before which an appeal against the assessment is taken, to have reference, in determining the value at which any land shall be assessed, to the value at which similar land in the vicinity is assessed.

Thus the imperative rule is that land shall be assessed at its actual value, and that rule is binding on the Court. But in determining the actual value of the land, the Court may have reference to the value at which similar land in the vicinity is assessed.

Careful reading of the reasons for judgment of the learned chairman of the board, has convinced me that undue prominence was given by the board to subsection 16 of section 69, while the imperative rule of subsection 1 of section 40 was apparently lost sight of. Evidence of the actual value of the land was given before the board, but this evidence was dismissed with the remark that

> in view of the fact that there is no movement in properties of this kind at present, or indeed since before the war, such estimates of value can be little more than guesses.

Other facts were also relied on by the learned chairman, such as the assessment of the two parcels in question in 1915 at $104,500 without protest, and the further fact that when asked whether he would take $50,000 for the property some eight or nine years ago, the appellant stated that he did not wish to sell and was holding the lands for a relative. It is noticeable that Meikle, who testified as to this conversation with the appellant, says, in answer to a question put to him by the respondent's counsel, that he would not give that price for the property now. And the silence of the appellant in 1915 is certainly not conclusive against him when he protests the assessment in 1919, although it is possibly a circumstance to be weighed.

I have therefore come to the conclusion that instead of considering what was the actual value of the land, the board based its judgment, to the exclusion of

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evidence of actual value, on subsection 16 of section 69, which merely permits the Court, in determining the actual value, to have reference to the value at which similar land in the vicinity is assessed. Giving to this provision the prominence which the Board gives it, practically nullifies the imperative rule of section 40, subsection 1, and makes it really the dominant rule, instead of being, what it is, a guide to the Court in determining the actual value. The result is that evidence of actual value was disregarded, and the assessment of similar land in the vicinity was considered as the controlling element in the passing on the appeal from the district judge, whose judgment was based on evidence of actual value.

I agree that the case should be referred back to the board in order that it may determine what the assessment of these lands should be according to their actual value as required by the Assessment Act. To that end the appeal should be allowed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Malcolm A. McKay.*

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

HENRY ABELL (PLAINTIFF)........APPELLANT;

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*Nov. 26.
*Dec. 17.

AND

THE CORPORATION OF THE COUNTY OF YORK (DEFENDANT) RESPONDENT.

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

Highway—Dedication—Reservation of easement—Title to soil—Ontario Municipal Act, 1913, s. 433—3 *Edw. VII, c.* 19, *s.* 601 *(Ont.)*

Prior to 1913 the soil and freehold of roads and highways in Ontario were vested in the Crown and the roads and highways themselves in the respective municipalities subject to any rights in the soil reserved by the person who laid out such road or highway." Sec. 433 of the Municipal Act, 1913, repealed these provisions and vested the soil and freehold of roads and highways in the municipalities without any reservation of right. Prior to 1913 land had been dedicated for a highway with the right reserved to maintain a raceway across it.

Held, Davies C. J. dissenting, that sec. 433 did not take away the right so reserved; to effect that purpose clear and unambiguous language is necessary and a mere inference from the repeal of the provisions protecting the rights reserved is not sufficient; and that the purpose of sec. 433 was to do away with the confusion arising from the joint proprietorship over roads and highways to which effect can be given without causing the injustice of taking private property without compensation.

Judgment of the Appellate Division (45 Ont. L.R. 79) reversed and that of the trial judge (39 Ont. L.R. 382) restored.

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.

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

(1) 45 Ont. L.R. 79; 46 D.L.R. 513. (2) 39 Ont. R. 382.

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A single question of law was raised on this appeal, namely, whether or not sec. 433 of the Municipal Act, 1913, by repealing a provision which protected private rights in a highway existing when it was acquired by the municipality, had the effect of depriving the owner of such rights. The trial judge held that it had not such effect and the Appellate Division that it had.

H. J. Scott, K.C. for the appellant.

Lennox for the respondent.

THE CHIEF JUSTICE:—The contest in this case is as to the right of the now appellant to maintain a raceway in connection with his mill property under the surface of a highway called Pine Street in the village of Woodbridge.

The question in dispute depends upon the proper construction of the 433rd section of the Municipal Act, 1913. That section reads as follows:

433. Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act.

The law applicable down to the enactment of this section was 3 Edw. VII, ch. 19, section 601, as follows:

601. Every public road, street, bridge, or other highway, in a city, township, town or village—except any concession or other road therein, which has been taken and held possession of by any person in lieu of a street, road or highway laid out by him without compensation therefor—shall be vested in the municipality subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway.

It is not contended that there was any express reservation of appellant's rights within the meaning of those words in section 433.

Agreeing as I fully do with the reasoning of Sir William Meredith, Chief Justice of Ontario, who delivered the judgment of the Appeal Court, concurred in by Maclaren, Magee and Hodgins JJ., I would dismiss this appeal with costs.

The legislature has since altered section 433 and its proper construction is not now of public importance, and as I have nothing material to add to the Chief Justice's reasons for judgment, I content myself with a simple concurrence therein.

IDINGTON J.—The question raised herein is whether or not the appellant's easement of carrying a mill raceway across a highway constituted solely by the dedication of the predecessors in title through whom appellant claims, who obviously had reserved such easement, has been taken away by section 433 of the Municipal Act of 1913, which reads as follows:—

> 433. Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act.

I should be very unwilling to assume that the legislature ever intended to exercise its undoubted but extreme power of taking any man's property and transferring it to another without due compensation. I cannot think that it intended deliberately to do so as is contended for herein. Such legislation, if ever attempted, must be construed in the most restricted sense.

Much stress is laid upon what is claimed to be the clear meaning of the language used.

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The introductory words "unless otherwise expressly provided" are read by those urging this view as if it were absolutely necessary to have the express provisions framed in the form of a deed or other instrument of that sort.

It seemed at the close of the argument as if respondents were willing to concede that, for example, a statutory right of a railway crossing or running along the highway might be such an express provision. But why so? Surely that sort of provision is often beyond the legislative jurisdiction of the provincial legislature as much as any private grant.

It is not an express provision within the power of the legislature, much less within the literal meaning of the words in question in the connection in which they are used, which would seem possibly to imply something expressly provided by the legislature.

Passing this more or less arguable proposition I am decidedly of the opinion that unless the narrow limits suggested thereby or something akin thereto is to be adhered to, the words "otherwise expressly provided" are quite comprehensive enough to cover a claim such as the reservation of this easement claimed by appellant, and all other rights established by law as that is; just as effectually as those created by other statutes for purposes of railways crossing or running along the highway or the use of parts of the soil by watermains of water supply companies, and such like.

All such like rights would be obliterated by maintaining the interpretation of the Appellate Division of the Supreme Court of Ontario of the said section, unless resting upon the provision of some Dominion legislation.

I agree so fully with the reasoning of Mr. Justice Middleton in his dissenting opinion that I need not enlarge.

I do not think that the amending Act of 1919 in any way helps or hinders either side in such a case as this pending at the time it was passed. Counsel for the respondent after taking his point having had time to consider the objections thereto, with commendable frankness, admitted so on resuming his argument.

I think the appeal must be allowed with costs throughout and the learned trial judge's judgment restored but not to go into effect for six months in which, meantime, if so advised, respondent can remedy the wrong or expropriate appellant's property in the said easement.

DUFF J.—This appeal turns on a dry question of law, namely, the application of section 433 of the Ontario Municipal Act of 1913. The section is in the following words:—

433. Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act.

This section replaced sections 599 and 601 of the Municipal Act of 1903, the text of which was in these words:—

599. Unless otherwise provided for, the soil and freehold of every highway or road altered, amended or laid out according to law, and every road allowance reserved under original survey along the bank of any stream or the shore of any lake or other water, shall be vested in His Majesty, His Heirs and Successors.

601. Every public road, street, bridge or other highway, in a city township, town or village—except any concession or other road therein, which has been taken and held possession of by any person in lieu of a street, road or highway laid out by him without compensation therefor—shall be vested in the municipality subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway.

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It has been held by the majority of the Appellate Division that the effect of the legislation of 1913 is to abrogate rights existing at the time the legislation was passed secured by the provision of sec. 601 that the interest vested in the municipality shall be

> subject to any right in the soil reserved by the persons who laid out such road, street, bridge or highway.

Sections 599 and 601 of the Act of 1903 have had a place in the Ontario municipal legislation for many years and have been the subject of a good deal of discussion and the general effect of the decisions appears to be correctly stated by Mr. Biggar in his Municipal Manual at p. 818, namely, that as regards highways created by dedication "the soil and freehold" were vested in the municipality subject as in that section 601 provided. In this general view of sec. 601 the Act of 1913 effected, as regards such highways, no change in the law presently relevant, unless, as has been held by the Appellate Division, by repealing section 601 it did as regards such highways abrogate the rights secured by the language above quoted. I am unable myself to agree with this conclusion and I think that section 14 s.s. (c) of the Interpretation Act points to the principle which ought to be applied if indeed its language does not expressly cover the case. That section is in these words:—

> 14. Where an act is repealed or whenever any regulation is revoked, such repeal or revocation shall not, save as in this section otherwise provided,
>
> * * * * * * * * * *
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment, regulation or thing so repealed or revoked.

In the case at least of highways established by dedication after the passing of section 601 or its parent enactment, one is not, I am inclined to think, exceeding the bounds of reasonable construction in holding that the right of the dedicand was a right "acquired under the Act" and therefore protected by this clause. But whether that be or be not strictly so the Act of 1913 ought, I think, to be read in light of the canon of construction laid down in *Canadian Pacific Ry. Co.* v. *Parke* (1), applying the language of Lord Blackburn in *Metropolitan Asylum District* v. *Hill* (2):—

> It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears.

The words "soil and freehold" are not words of such aptness and precision as one might have expected to find if the intention had been to transfer the full and unincumbered proprietorship *a coelo usque ad centrum;* and indeed obviously the *dominium* of the municipality is subject so long as the highway remains a highway to the public right of passage exercisable by all His Majesty's subjects.

In the result the construction contended for would disable the municipality from acquiring only a stratum of land sufficient for highway purposes in a case in which the acquisition of the soil *ad centrum* (in the case e.g. of a highway laid out over a mining property) might entail a great deal of unnecessary expense and inconvenience. The better view appears to be that the subject matter with which the legislature is dealing is the title held at the time of the passing of the Act by the Crown or by some public authority subject to the public right of user as a highway. If that is the

(1) [1899] A.C. 535. (2) [1881] 6 App. Cas. 193, at p. 208.

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subject matter to which the enactment is directed and I think that conclusion is justified by the character of the existing legislation, then the principle of construction applies that general words should not be extended so as to involve collateral effects upon the rights of individuals which the legislature must be presumed not to have contemplated. *Railton* v. *Wood* (1).

ANGLIN J.—The findings of the learned trial judge are now fully accepted with the result that the right of the appellant to maintain the raceways in question across Pine street, a public highway, prior to the enactment of the Municipal Act of 1913 (3 & 4, Geo. V, ch. 43) is conceded. The sole question on this appeal is whether that legislation destroyed or took away such right without compensation. Such a confiscatory effect will not be given to a statute unless it be inevitable. Maxwell on Statutes, 6 ed., 501. The intention to accomplish that result must be expressed in clear and unambiguous language, 27 Hals., Laws of England, No. 283. Here it has been inferred chiefly because of the omission in section 433 of the Municipal Act of 1913, which replaced sections 599 and 601 of the Municipal Act of 1903 (3 Ed. VII, c. 19), of the words

subject to any rights in the soil reserved by the person who laid out such road, street, bridge or highway.

It is obvious, as is pointed out by Justice Middleton, that there must be some restricton on the broad meaning which it is sought to attribute to the language of section 433. Certain rights which form part of the soil and freehold of highways were not thereby vested in the municipalities. I agree

(1) [1890] 15 App. Cas. 363, at p. 367.

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with that learned judge that it is reasonably clear that the purpose of the change made by the Act of 1913 was to do away with some uncertainty and confusion that arose from the former legislation which, while providing that highways should be vested in the municipalities (s. 601), at the same time declared (s. 599) that the soil and freehold thereof were vested in the Crown. Apparently to overcome this difficulty the legislation of 1913 vested the soil and freehold in the municipalities, thus transferring to them the proprietary rights theretofore held by the Crown. The attainment of the purpose of the amendment does not require interference with easements, such as that held by the plaintiff, and reasonable effect, and I think the full effect intended by the legislature, can be given to the language of section 433 without involving their confiscation.

Moreover I doubt whether the language

the soil and freehold of every highway shall be vested—

is apt or appropriate to carry a mere easement enjoyed over the highway, since an easement is only a right in the owner of a dominant tenement to require the owner of servient land "to suffer or not to do" something on such land and neither forms part of the ownership thereof nor involves a right to any part of its soil or produce. Gale on Easements, 9 ed. 91.

In reaching the conclusion that the appeal should be allowed and the judgment of the learned trial judge (1), restored, I have entirely put out of consideration the amendment of 1919 (9 Geo. V. c. 46, s. 20) brought to our attention by Mr. Lennox. (See *Boulevard Heights* v. *Veilleux*) (2). If, notwithstand-

(1) 39 Ont. L.R. 382. (2) 52 Can. S.C.R. 185.

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ing ss. 18 and 19 of the Interpretation Act, any inference may properly be drawn from this enactment it would seem to afford an indication that the view of the effect of the legislation of 1913 above stated probably accords with what the legislature intended. Of course s. 19 precludes any inference that the statute of 1913 before the amendment of 1919 had the effect for which the respondent contends or that such amendment was necessary to give it the effect for which the appellant contends. The amendment was obviously passed to meet the decision of the Appellate Division in this case and may well have been introduced merely *ex majori cautela*.

The appellant is entitled to his costs here and in the Appellate Division.

BRODEUR J.—It is common ground that the street under which were the raceways in question had been dedicated as a public highway by the predecessor in title of the plaintiff-appellant and that the dedication was subject to his right as owner of certain mills to enjoy the raceways across the street.

The public highways were before 1913 partly vested in His Majesty and partly vested in the municipalities (1903, ch. 19, ss. 599 and 601).

The vesting in the municipality was made subject to any rights in the soil reserved by the person who laid out the road (section 601).

In the year 1913, it was enacted that all the roads would be vested in the corporation. It is true that the old sections 599 and 601 of the Municipal Act were repealed and that no formal provision was enacted as to the reservations that the former owners

of the road possessed under the old law. But it seems to me that the object of the statute of 1913 was simply to bring a change as to the vesting of the highways from His Majesty into the municipal corporations.

The repeal had not the effect of affecting any right, privilege or easement that the appellant possessed concerning those raceways (s. 14 R.S.O. ch. 1). The appellant still possesses the right which he reserved to himself when his predecessor made his dedication to use these raceways and continue the industrial development which he could make with his mills.

I entirely concur in the views expressed in the Appellate Division by Mr. Justice Middleton.

The appeal should be allowed with costs of this court and the order of the trial judge restored with a proviso however that it shall not become operative for a period of six months, to enable the municipality in the meantime, if it so desires, to expropriate the right or easement in question.

MIGNAULT J.—I concur with Mr. Justice Anglin.

Appeal allowed with costs.

Solicitors for the appellant: *Aylesworth, Wright, Moss & Thompson.*

Solicitors for the respondent: *Lennox & Lennox.*

1920
*Nov. 5.
*Nov. 23.

ABRAHAM LAVIN (DEFENDANT)....APPELLANT;

AND

MORRES GEFFEN (PLAINTIFF).....RESPONDENT.

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

Partnership—Sale of interest by one partner to the other—Oral agreement—Evidence—Statute of Frauds—"The Partnership Ordinance" N.W.T. Ord. (1905) *c.* 94, *s.* 24.

Held, Duff J. dissenting, that, though the assets of a partnership include an interest in land, an oral agreement by one partner to buy out the other partner's interest in the partnership is enforceable and the Statute of Frauds is inapplicable in such a case, unless it be shown that there appears a "contrary intention" to the rule enacted by s. 24 of "The Partnership Ordinance" that "land" which has "become partnership property * * * shall * * "be treated as between the partners * * * as personal or "movable and not real estate."

Judgment of the Appellate Division (15 Alta. L.R. 556) affirmed, Duff J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge and maintaining the respondent's action.

The appellant and the respondent were carrying on business in partnership as farmers, ranchers and general dealers in cattle. The respondent alleged that the appellant orally agreed to buy out the respon-

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

(1) [1920] 15 Alta. L.R. 556; [1920] 1 W.W.R. 666.

dent's interest in the partnership on certain terms and sued for the price agreed. The appellant denied this, pleaded the Statute of Frauds and counterclaimed for an order dissolving the partnership and for an accounting. Upon the case coming on for a first trial, without the terms of the partnership agreement or of the lease being put in evidence, the respondent admitted that among the assets of the partnership was a leasehold interest in some real estate. The trial judge then dismissed the respondent's action, following *Gray* v. *Smith* (1). On appeal to the Appellate Division, this judgment was reversed and a new trial ordered (2). On the second trial, both the partnership agreement and the lease were produced and the respondent's action was then maintained.

A. McL. Sinclair K.C. for the appellant.

J. B. Barron for the respondent.

THE CHIEF JUSTICE.—The reasons stated by Mr. Justice Stuart in delivering the judgment of the Appellate Division in this case are quite satisfactory to me. I agree with them and would dismiss this appeal with costs.

IDINGTON J.—The parties hereto by articles of partnership agreed to become partners in the business of mixed farming and cattle buyers.

The respondent had, two days before, obtained a lease of four hundred acres of land in Alberta for the term of five years.

(1) [1889] 43 Ch. D. 208; 59 L.J. Ch. 145; 62 L.T. 335.

(2) [1919] 15 Alta. L.R. 59; [1919] 3 W.W.R. 498, 584.

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By said articles of partnership it was

> agreed and distinctly understood

that the said lease should

> be the property of and belong to the partnership

and the respondent agreed

> to hold the said lease for the sole use and benefit and in trust for the said partnership

and that he would execute such documents as required to insure the benefit for the partnership which was to become bound by the provisions and covenants contained in said lease and save respondent harmless.

A month later these parties were negotiating for a dissolution of said partnership and as the result thereof orally agreed that the appellant should buy out all the respondent's interests therein, including the interest he had so acquired in said lease.

The learned trial judge decided in favour of the respondent seeking to enforce the terms of said oral agreement.

The appellant, amongst other things he contended for, set up the provision of the Statute of Frauds, and another statute requiring the contract to be in writing.

Section 4 of the Statute of Frauds is the only one that seems to raise any difficulty.

The question raised thereunder is whether or not the contract in question was one for

> the sale of lands tenements or hereditaments or any interest in or concerning them.

The authorities are collected in Leake on Contracts, 4th ed., pages 164 et seq., so far as bearing upon the necessity for an assignment of a lease for a term of years being reduced to writing. Of these the cases

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Buttemere v. *Hayes* (1), and *Smart* v. *Harding* (2), followed as they have been by many others, seem to establish the proposition that a contract for the transfer of a lease for a term of years or even a less interest in the possession of land, requires to be in writing.

The question raised herein is whether or not that is applicable to a bargain involving the transfer of the whole of the assets of a partnership when made between two partners.

The Partnership Ordinance in Alberta C.O. 1915, ch. 94 by section 24 thereof, enacts as follows:—

> Section 24:—Where land or any interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the parties (including the representatives of the deceased partner) as personal or movable and not real estate.

It is submitted by counsel for appellant that this refers to the law as administered in the courts of equity for many years prior to the passing of the Ordinance.

Assuming that to be the case, had either of the parties any more, after the execution of the articles of partnership, than an equitable interest in the lease to dispose of?

And is that on going a step further anything more than the interest either had in the ultimate result of what value there would be left for either after winding up? And I can conceive of a possible case of a joint adventure in the acquisition of real estate or any interest therein which might, in the last analysis, leave nothing but that real estate to be bargained about, and where there might be room for the application of the *obiter dicta* in the case of *Gray* v. *Smith* (3).

(1) [1839] 5 M. & W. 456. (2) [1855] 15 C.B. 652.
(3) 43 Ch. D. 208.

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But under such articles of partnership as above referred to, I am unable to see any escape from the authorities cited by the court below, and many others, reducing the interest sold to a mere chose in action, and hence that the appeal should fail.

I do not think it necessary in the view I take to consider the motion to quash further than to say that it is what the court expresses by its formal judgment, and not the opinions leading up thereto, that must govern, and the record shews that all the court decided was for a new trial.

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

DUFF J. (dissenting).—I am not satisfied that the Appellate Division considered that the judgment on the previous appeal had determined the point of the applicability of the Statute of Frauds. An opinion to that effect was expressed but the actual determination of the question in its relation to the rights of the parties in the action seems to have been left for the judgment on the new trial. For that reason I think the point is open on the present appeal.

On the merits of the point, as the majority of the court take a different view there is perhaps not much object in entering upon a detailed discussion. The fallacy, if I may say so with great respect, which appears to have prevailed with the majority of the judges in this litigation is that the provision of "The Partnership Act" declaring the interest of a partner in partnership land to be (as between partners) personalty—a provision declaratory of the law as it existed at the time the Act was passed—concludes the point; in other words, that because for certain purposes the

partner's interest is personalty it follows necessarily that it is something to which the fourth section of the Statute of Frauds can have no application.

The point of course is: Is such an interest an interest in land within the meaning of the fourth section? The judgments of Lord Cairns in *Brook* v. *Badley* (1), and of the Lords Justices James and Cotton in *Ashworth* v. *Munn* (2), appear to me to furnish the reasoning governing the determination of the point.

Lord Cairns' expression in the first mentioned case,

a person who has a direct and a distinct interest in the land,

is—if anything—more clearly applicable to the case of a partner than to the case with which he was dealing; and all the judges who took part in the judgment in *Ashworth* v. *Munn* (2) in the Court of Appeal treated the judgment of Lord Cairns as governing the case of a partner. Lord Justice Cotton said, speaking of a partner's interest, at p. 374:

It is, in my opinion, independently of any decision, an interest in land;

and at pp. 376-7 he says it is quite impossible, in his opinion, to distinguish for the relevant purpose the case of partnership property from that of the interest of a person in land which is to be sold and the proceeds of which are to be divided among beneficiaries of whom he is one. The interest in every such case, of course, is, before any sale takes place, by reason of the doctrine of notional conversion, in contemplation of law personalty; but it is very clearly, I think, (as all the eminent judges held) none the less an interest in land. In *Gray* v. *Smith* (3), Lord Justice Cotton expressed the opinion that an agreement for

(1) [1868] 3 Ch. App. 672. (2) [1880] 15 Ch. D. 363 at p. 369.
(3) 43 Ch. D. 208.

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the dissolution of a partnership and a transfer of one partner's share in the assets (including leaseholds) is an agreement within the fourth section concurring in this with Kekewich J.; and nobody after reading the judgment of the Lords Justices in *Ashworth* v. *Munn* (1) could be surprised at this expression of opinion.

ANGLIN J.—The judgment of the Appellate Division delivered by Mr. Justice Stuart disposed of the question at issue in this Court so satisfactorily that I feel I cannot usefully add to it.

MIGNAULT J.—For the reasons given by Mr. Justice Stuart in the Appellate Division, I would dismiss this appeal.

Appeal dismissed with costs.

Solicitor for the appellant: *B. Ginsberg.*

Solicitors for the respondent: *Barron, Barron & Helman.*

(1) 15 Ch. D. 363 at p. 369.

D. W. OGILVIE & COMPANY..... (PLAINTIFFS)........................ } APPELLANTS;

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AND

A. C. DAVIE AND OTHERS....... (DEFENDANTS)................... } RESPONDENTS.

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

Contract—Illegality—Public order—Questions raised only at argument—New trial—Arts. 989, 990 *C.C.—Sect.* 158 *(f.) Cr. C.*

Per Duff, Anglin, Brodeur and Mignault JJ.—Where a contract sued upon has been held void for illegality on a ground not pleaded and not referred to at the trial until after the close of the evidence, and the circumstances relied upon to establish such illegality may be susceptible of explanation, a new trial should be directed to afford the plaintiff an opportunity to adduce evidence to meet the defence of illegality. *Connolly* v. *Consumers Cordage Co.* (89 L.T.R. 347) followed.

Per Anglin and Mignault JJ.—In the case of a sale to the Government a contract by the vendor to pay an agent, engaged by him to procure the highest possible price, all that such agent could obtain over a figure fixed by the vendor as the minimum net price he would accept is not *per se* illegal as contrary to public order.

Per Idington J. (dissenting).—Upon the evidence, the option agreement alleged by the appellants had expired and had never been renewed.

Judgment of the Court of King's Bench reversed, Idington J. dissenting.

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

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

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The appellants claim from the respondents the sum of $12,567.85 being for commission and profits due to them by virtue of a certain agreement, this sum being the difference between the amount for which the appellants had the right to purchase the respondent's property and the amount paid by the government under expropriation proceedings. The respondents fyled pleas that the action was premature, that the commission and profits had already been paid to appellants' agent, and others in relation to the respective items of the claim. At the close of the trial, the respondents' counsel, in argument, alleged that, upon the evidence, when they agreed to pay the appellants for was an exercise of improper influence with the government of Canada or some ministers of the Crown or some of its officials in order to effeet the sale of their property. The trial judge and the Court of King's Bench dismissed the appellant's action, resting their judgment solely on that ground of illegality.

Eug. Lafleur K.C. and *J. W. Cook K.C.* for the appellants.

Louis St. Laurent K.C. and *Gravel K.C.* for the respondents.

IDINGTON J. (dissenting).—The respondents, as owners in part and as executors or trustees in part, were entitled to compensation for land in Levis expropriated by the Crown for purposes of the Intercolonial Railway on the 12th August, 1912. It is by no means clear whether it was as the result of ignorance of the fact that the land had been so expropriated or as a

means of determining the compensation due the respondents, that they retained appellants on the 1st October, 1912, for some purpose and to effectuate same gave, on said date, the following option:—

D. W. Ogilvie, Esq.,
11 St. Sacrament St., Montreal, P.Q.

Dear Sir:

We hereby give you an option to purchase the following described property, such option to be good for four (4) months from present date.

That certain property known as the G. T. Davie & Sons property, situated in the town of Levis, P.Q., the said property being bounded on the north-west by the river St. Lawrence; on the south-east by the public road known as the Commercial Road; the whole as per plan prepared by A. E. Bourget, P.L.S., of date March 28th, 1912. The whole as it now exists with wharves, buildings, etc., erected thereon.

The property to be accepted subject to existing leases and servitudes.

Rents, taxes, insurance, etc., to be adjusted to date of passing of deeds.

The property to be free and clear of any and all encumbrances.

Purchase price to be as per our letter of this date, payable on passing of deeds, which must be passed within thirty (30) days from the date of acceptance of option.

In the event of this option being taken up and the purchase price paid, we agree to pay D. W. Ogilvie & Company, incorporated, a commission of five per cent (5%) on the purchase price.

Yours very truly,
George T. Davie & Son.

The appellant responded thereto by the following:—

11 St. Sacrament St.
Montreal, Oct. 1, 1912.

Messrs. G. T. Davie & Sons,
Levis, P.Q.

Dear Sirs:

In reference to the option given me this day to purchase that certain property owned by you situated in the town of Levis, P.Q., the whole as per plan prepared by A. E. Bourget, P.L.S. of date March 28th, 1912.

It is hereby understood that this option is given for the purpose of my acting as your agent for the sale of the property at the best obtainable figure and on completion of the sale I am to receive a commission of five per cent on the purchase price.

Yours very truly,
(Sgd.) Douglas W. Ogilvie.

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The letter of respondents of 1st October, 1912, enclosing the option, had referred to the part the Government required as worth, at least, $2.00 per foot, evidently thereby including injurious affection of so taking, and referred to some other land as possibly required for same purpose as worth $1.00 a foot.

That option evidently expired by effluxion of time without any results, or extension, or renewal, and all therein, and connected therewith, seems only useful as illuminating to a certain, or rather uncertain, extent, what follows.

The next stage in the relations between the parties hereto appears, by the following letter of appellant of 7th May, 1913, and reply of respondent of 14th May, 1913, which read as follows:—

Montreal, May 7, 1913.

Messrs. George T. Davie & Sons,
Levis, P.Q.

Dear Sirs:—

The Intercolonial Railway of Canada have sent us a blue print of your property situated in Lauzon Ward, Levis, shewing the land they purpose to expropriate lying between the present Intercolonial Railway and the King's highway; the strip of land having a superficial area, according to the plan as prepared by A. E. Bourget, of 36,900 sq. ft. E.M.

In order to take up this matter with the Intercolonial Railway, will you kindly write us giving us the best cash price you will accept for the 36,900 sq. ft. of land. On receipt of your letter we will communicate with the proper officials and endeavour to make a sale of the property direct to the Intercolonial Railway without expropriation proceedings.

Trusting you will give this matter your early attention, as it is advisable to settle with the railway before expropriation proceedings are started.

Yours very truly,

(Sgd.) D. W. Ogilvie & Co., Inc.
Per D. W. Ogilvie.

(REPLY).

Levis, May 14th, 1913.

Messrs. D. W. Ogilvie & Co.,
11 St. Sacrament St., Montreal, Que.

Dear Sirs:—

In answer to your letter of May 7th, we beg to say that we are asking one dollar and twenty-five cents ($1.25) per foot of our property which has been expropriated by the Intercolonial Railway.

Yours very truly,
Geo. T. Davie & Son.
Per J. O. A. V.

That seems to have resulted in some little movement on the part of the appellant, for it is able, on the 13th Oct., 1913, to write as follows:—

Montreal, October 13th, 1913.

F. P. Gutelius, Esq.,
General Manager,
Intercolonial Rly. of Canada,
Moncton, N.B.

Re Geo. T. Davie & Son's property, Levis, P.Q.

Dear Sir:—

We beg to acknowledge receipt of your favour of the 9th instant and note contents.

As per our letter of May 16th, 1913, addressed to Mr. F. T. Brady, we are prepared to sell the G. T. Davie & Sons' property in Lauzon Ward, Levis, P.Q., containing 36,900 sq. ft., for the sum of $64,575.00, or $1.75 per sq. ft. This price will cover all damages.

We would point out that the question of "Damage" is a serious one, as Mrs. Davie has to vacate the Davie residence, lying to the south of the land in question; and the office of G. T. Davie & Sons, and the Quebec Salvage Company, has to be vacated owing to the noise, inconvenience, etc., caused by the Intercolonial Railway taking over the strip of land in question.

In addition to this, the question of carriage between the Davie property situated to the south and to the north of the strip of land in question has become a difficult one owing to the several tracks they have to cross, and to the fact that the ground on this strip has been excavated and it makes it difficult to take a heavy load from one property to the other.

Mr. Geo. D. Davie is in Montreal to-day and the contents of this communication has been put before him, and he has expressed his opinion of being anxious to come to an early amicable settlement with the Railway Company.

Yours very truly,
(S.) D.W. Ogilvie & Co. Inc.
(S.) D.W. Ogilvie.

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Something, not clear what, revived the energy of appellant, for we have respondent's letter:

Montreal, Jan. 30th, 1914.

Messrs. D. W. Ogilvie & Co. Inc.

Dear Sirs:—

Re Levis property.

I hereby confirm the verbal extension given you some time ago of your option for the purchase of the property of the undersigned at Levis, at the modified price of a dollar and seventy-five cents per foot for the portion required by the Government, viz., the portion lying between the highway and the Intercolonial Railway, and containing approximately thirty-six thousand nine hundred square feet, or one dollar and twenty-five cents per foot, if you take the whole of the property; the above option being hereby extended until, say, the first of April, next.

Yours truly,

(S.) George T. Davie & Sons.
Per G. D. D.

Montreal, March 31st, 1914.

The above option is hereby renewed on the same terms and condition for sixty (60) days from the present date.

(S.) George T. Davie & Sons.
(S.) per G.D.D.

and reply from appellant's manager, as follows:—

March, 26th, 1914.

George D. Davie, Esq.,
Levis, P.Q.

Dear Mr. Davie:

In reference to the strip of land containing about 36,900 sq. ft. which the Intercolonial Railway desire to purchase.

Following your verbal instructions, I have again got directly in touch with the officials of the Intercolonial Railway regarding the sale of this property, and have to-day been informed that as Mr. Gutelius is likely to be kept at Ottawa for some days on important business nothing at present can be done.

The official in question, however, informed me that the railway were anxious to come to an amicable settlement for the purchase of this property.

Under the circumstances, in order that there be no misunderstanding, will you be good enough to renew the option of date January 30th, 1914, which expires on April 1st, 1914, for say, sixty (60) days.

This will give an opportunity to meet Mr. Gutelius in Montreal or Moncton during the next couple of weeks and get this property sold at private sale without any of our Quebec friends interfering in same.

With kindest regards,
Yours very truly,
Douglas W. Ogilvie.

Nothing having been accomplished meantime, and the sixty days' extension if given (as may be inferred from the letters of 22nd April and 28th April, 1914) having expired, I again remark that all the foregoing must pass for nothing as contractual basis to be relied upon by appellant, save as illuminating the relations between the parties.

The letters I refer to of April, 1914, are as follows:—

Montreal, April 22nd, 1914.

Geo. D. Davie, Esq.,
Levis, Que.

Dear Sir:—

I understand Mr. Barnard spoke to you in reference to the property of George T. Davie & Sons which I.C.R. wish to acquire.

I can get you one dollar and seventy-five cents ($1.75) per sq. ft. for this piece of land from the railway, but I am also of the opinion that if we hold out, this sum can be increased.

As our option on this property is good until June 1st, I would be obliged if you would give the matter consideration.

I might suggest that the property be sold to myself or some other responsible individual on a small cash payment at $1.75 per sq. ft.; and that any profit over and above $1.75 per sq. ft. secured from the I.C.R. be divided amongst those interested. This matter we would have to adjust when we next meet.

Trusting you will take the matter up with your brothers and see what can be done.

Yours very truly,

(Sgd.) Douglas W. Ogilvie.

Levis, Que., 28th April, 1914.

D. W. Ogilvie, Esq.,
11 St. Sacrament St., Montreal.

Dear Sir:—

Your favour of the 22nd instant re the property expropriated at Levis by the I.C.R. was duly read and as requested I have talked the matter over with my brother.

He is agreeable that we dispose of this property either to yourself or some other responsible party that you would name at $1.75 per sq. ft. on consideration of a cash payment to be made on same, leaving you to dispose of it to the Government and any difference over the $1.75 to be divided as you see fit.

Yours truly,

George D. Davie.

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On the 2nd of June, 1914, when that last option extension ended, respondents, apparently tired of the needless and vexatious delay, promptly began to act on their own behalf and wrote directly to the manager of the Intercolonial as follows:—

Montreal, June 2nd, 1914.

F. P. Gutelius, Esq.,
Manager, Intercolonial Rly., Moncton, N.B.

Dear Sir:—

Since Sept., 1912, we have been corresponding with various officials of the Intercolonial Railway in reference to a strip of land at Levis, P.Q., which the railway company has taken possession of and which belonged to Geo. T. Davie & Sons, Levis, P.Q.

The property in question has been acquired by the Davie Shipbuilding and Repairing Co., Limited, and at a meeting of the directors held at Montreal, this morning, we were instructed, without prejudice to the proprietors' rights and subject to immediate acceptance, and that the deed of sale be signed not later than July 1st, 1914, to make the following proposition:

We will sell you the property containing a superficies of 36,900 sq. ft. E.M. as per survey prepared by A. E. Bourget, P.L.S., for the sum of sixty-nine thousand, five hundred and seventy-five dollars ($69,575.00) cash, on passing of deed. The purchase price to include damages to the adjoining property as belonging to the Davie Company.

The Davie Shipbuilding and Repairing Co., Limited, is anxious to come to an amicable settlement regarding the purchase of this land, and we trust you will give the matter your immediate consideration.

His reply is not in the case.

Surely that must have cut away all hope on the part of appellant ever reaping anything by fair means of any profit beyond the basis of $1.75 per foot for whatever land taken by the Crown for the purposes in question.

In response to letters meantime the appellant's manager wrote as follows:—

11 St. Sacrament St.,
Montreal, Sept. 15th, 1914.

Messrs. George T. Davie & Sons,

Levis, P.Q.

With reference to your letter of the 8th instant, asking what the position is of your claim against the Government for land taken for the I.C.R. cattle sheds at Levis.

I beg to say that the settlement of this matter is progressing, I consider on the whole, very satisfactorily.

We have arranged with the Government to apply for a petition of right to sue the Government for the value of the land, but have been asked not to press this matter, as they expect to make a settlement.

In Ottawa last week we were asked to write Mr. Gutelius telling him that if the matter was not settled before the 20th instant, we would apply for the Petition of Right and that the same would be granted.

Of course you know it is very difficult to get the Government to move in any matter outside of war matters just at present; but they are well disposed, and I really think we will be able to settle this matter without suit within a very short time.

Of course when the settlement is effected, it will bear interest from the date of the taking of possession by the railway company of the Davie property.

Trusting this explanation is satisfactory, and assuring you that we are doing everything possible in order to obtain a quick settlement in this matter.

Yours very truly,

Douglas W. Ogilvie.

Levis, Que., 17th Mar., 1915.

Nothing more appears in the case bearing directly on the measure of appellant's retainer until March 17th, 1915, when respondents write as follows:—

Messrs. D. W. Ogilvie & Co., Inc.,

11 St. Sacrament St., Montreal.

Dear Sirs:—

In connection with our property at Levis, which the Intercolonial Railway Co. has taken possession of for a siding and which property has been in your hands for sale to the Government, Mr. Barnard states that the Government will be willing to settle for the property on terms that would give us one dollar and seventy-five cents ($1.75)

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per foot for the property, with interest at 4% from date of sale to be passed as soon as the deeds are got in shape. The purchase price to be payable as soon as the Government is in funds and not later than two years from date.

This would be satisfactory to us and we hereby authorize you to close the matter on such terms.

Yours faithfully,
Geo. T. Davie & Sons.

It is to be observed that this did not expressly renew or pretend to extend the terms of previous letters giving an option and it is to me incredible that in face of the respective letters of appellant of 13th October, 1913, and of respondents of 2nd of June, 1914, to Mr. Gutelius, plainly declaring their terms, that there should exist any hope of profit to be got by fair means.

I, therefore, see no basis upon which appellant can rest any claim for compensation on such a basis, or any other basis than the 5% on price of $1.75 per foot.

Hence if there was in fact any discovery that a larger area than the original 36,900 square feet within that spoken of and defined by the plan of expropriation, that larger area was respondents' property and the price they named of $1.75 per sq. foot over and over again, sometimes expressed as 36,900 square feet, and at others as that more or less, was theirs within the literal terms declared in the foregoing letters.

The only thing quite apparent is that for years the respondents having allowed the appellants the opportunities I have outlined above, then ceased to do so and claimed payment on basis of $1.75 a foot upon which appellant would be entitled to its commission. That had been paid before the appellant sued herein on the basis of 36,900 sq. feet being the correct measurement as assumed throughout till execution of deed;

unless in regard to an incident connected with the work of one Addie, a surveyor, who was not called, and whose computation of the area in question may have been the foundation for claims alleged to have been made by the Government that it contained only 34,312 square feet.

The deed to the Crown which resulted, after a year or more of delay, and is dated 2nd June, 1915, professes to convey 38,723 feet.

I am unable to identify the two descriptions, that is the one given in expropriation and that given in the deed, as being identical, though I see nothing to demonstrate that the area in the original description had been for any reason increased and yet why a new description was resorted to is neither explained nor explicable on the evidence before us. Either they are the same or the contract under which appellant worked has been departed from in a way that would not help it herein.

If they are, as is quite possible, within the same boundaries, only differently expressed, then the appellant has nothing to complain of herein unless by reason of an error of computation of area that he has not got his commission upon the price of $1.75 per square foot.

The apparent difference in area would be 1,823 feet, which, at $1.75 per foot, would be $3,190.25, and appellant's commission thereon would be, as I make it, $159.51 due him, if this later computation of area correct.

On my construction of the appellant's contract with respondents, as evidenced by the above quoted letters and the attendant circumstances interpreting same, this would be the ultimate result for appellant.

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I can see no ground for the extension of the implications of profit after the time limit therefor had expired and the respondents had declared by their letter of 2nd June, 1914, to Mr. Gutelius, the terms upon which they were willing to accept as compensation for their land expropriated, whether it be 36,900 feet or 38,723 feet.

It would have been highly improper for those serving the Crown to have given more; if more given, it must be attributed to mistake, or something worse, which I hope did not exist, and, in any event, could not benefit appellant.

In this view of the contract between the parties hereto there never was any foundation for the pretension of appellant to any share in the interest to be paid by the Crown for the detention of payment.

The claim set up by appellant of about twenty to twenty-five per cent profit, under all the circumstances, is most repulsive and suggestive of much suspicion of its having been founded upon hopes and expectations offensive against the provisions of the public policy enunciated in section 158 of the Criminal Code.

Unless we are to assume, what is inherently improbable, that the respondents were so ignorant and incapable as to be quite unfitted for taking care of their own affairs, and much less of discharging their duties as trustees, the result seems inexplicable upon any other theory than that the Crown was made to pay twenty-five per cent more than respondents were willing to accept.

Which alternative should be adopted: That the Crown was not well advised, or that it was imposed upon? And again, that such imposition was designedly brought about, or merely that the feeble folk serving the Crown were overcome by those serving the respondents?

And again, was it the result of a clear recognition on the part of the respondents that it was only by engaging an equipment adequate to surmount the lethargic resistance of such feeble folk, that the respondents could get a just consideration of their rights which led them to offer such a price for the service?

In the evidence there is a good deal that is very suggestive of some willingness to do some manoeuvering.

In justice to the Minister of the Department there is not the slightest ground of suspicion attaching to him or to others directly serving the Crown.

We must, however, I submit, aid them in removing the tendency of suspicion on the part of those believing otherwise that such things can be done, by always scrutinizing closely the conduct of those dealing with their subordinates.

There is much to arouse suspicion in some features of the actions of the parties hereto and their respective agents, and if the suspicious discovery of increase in area is unfounded the Crown may recover from the respondents, but that would not or should not help appellant.

There is, in my view of the facts, no need to consider the ground taken in the courts below.

If the result had been to increase the price to the extent claimed by appellant of twenty or perhaps twenty-five per cent beyond the price which the respondents had offered, then, I suspect, there would be much in the case to suggest an examination of the law and facts which the said courts have proceeded upon.

I would dismiss this appeal with costs, but without prejudice to the appellant's right to recover in another action the small item of $159.00 it may be entitled to if in fact there was actually an increase of area beyond that originally contemplated, conveyed to the Crown.

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Whether or not there was an error or computation in the area upon the basis of which the price per foot desired by respondents was such as to entitle appellant to the item I have named as possible based thereon, has not been the foundation of this appellant's action or tried out.

It is quite possible that the respondents have been paid too much, and that such overpayment is recoverable by the Crown, and hence I do not deal with the payments made by respondents to the subordinate agent of the appellant.

DUFF J.—I regret to say that I have been unable to concur in Mr. Lafleur's contention that the decision of the trial judge affirmed by the Court of King's Bench to the effect that the plaintiff's claim arises out of transactions juridically sterile because partaking of the nature of trafficking with influence is entirely without foundation in the evidence.

On the other hand it is quite clear to me that the odious accusation which by the conclusion of the courts below is held to be established was never really put to the witnesses principally concerned in such a way as to give them a fair opportunity of meeting it and clearing themselves; and the point to which I have given my attention is whether, there being some evidence pointing in the direction of the conclusion at which the courts below have arrived, it is of sufficient weight to support the judgments or of so little weight as to require a reversal of those judgments on this point. On the whole I think the more satisfactory course is to order a new trial reserving all the costs including all the costs of the appeal to this Court to abide the result of that trial. This being my conclusion, it would be improper to discuss the evidence in detail.

I am satisfied that as regards the other issues raised by the pleadings the appellants have fully established their right to recover the amount claimed; and the retrial should therefore be limited strictly to the issue whether or not the contract upon which the claim is based is a contract the enforcement of which the law regards as incompatible with those paramount interests of the community which are compendiously indicated by the phrases "public policy" and "public order."

ANGLIN J.—Appealing from a judgment of the Court of King's Bench, affirming the dismissal of their action by the Superior Court, the plaintiffs seek judgment for the amount of their claim, or, alternatively, a new trial on the ground that they were not given an opportunity of meeting a charge of illegality, not pleaded and first preferred in the course of the argument before the trial judge, on which the judgments against them solely rest.

The claim as formulated in the declaration consists of three items:

(a) Balance of commission at five per cent on the price which the defendants agreed to accept for their land..................$	159.51
(b) Price paid in excess of what the vendors agreed to take, exclusive of interest.....	1,809.75
(c) Interest on the price paid between the date of taking possession and the date of closing the transaction ("date of sale")..	10,598.59
	$12,567.85

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Besides particular defences peculiar to each item, two general defences are pleaded—that the action is premature and that the plaintiffs' claim has been satisfied by payments made by the defendants to Mr. C. A. Barnard. Consideration of these pleas may be advantageously deferred. The discussion of the several items will, therefore, proceed subject to them and to the defence of illegality.

(a) and (b). A contract to pay a commission of five per cent on a price of $1.75 per square foot, which the defendants had agreed to accept, is admitted. A supplementary contract that any sum in excess of this figure which the plaintiffs could induce the Government to pay would belong to them as additional remuneration is contested. But in view of the admissions in the examination of Allison C. Davie, the correspondence in evidence, and the acknowledgment of this supplementary contract by the payment of $5,000 on account of it by the defendants to Mr. C. A. Barnard, there seems to be no reason to doubt that it is established. Whether the plaintiffs are entitled to the balance of the commission asked and only to the $1,809.75 claimed as excess price, or whether the demand for a balance of commission is unfounded and the whole $5,000 and interest thereon should have been claimed as "extra price" depends on the true area of the property conveyed to the Crown.

If the area conveyed was in fact that named in the deeds, 38,723 square feet, the claim as formulated is correct as to both items. If it was 36,900 square feet, which was the basis of the negotiations and of the actual settlement with the Government of the price paid ($64,575 for 36,900 square feet at $1.75, plus $5,000, a lump sum agreed to as a compromise), the claim for a balance of commission is ill founded and,

if not debarred by the principle limiting the adjudication to the sum demanded (Art. 113 C.C.P.) the plaintiffs would be clearly entitled to the sum of $5,000 and interest thereon instead of $1,809.75, in respect of item (b) of their claim. In their factum, however, while apparently recognizing that a mistake was made in this respect to their detriment they adhere to their claim as formulated in the declaration.

The notice of expropriation gave the area of the property to be taken as .79 acres, or 34,412 square feet. According to a survey made by Mr. Bourget, P.L.S., the actual area of the land expropriated was 36,900 square feet and the defendants appear to have based their claim throughout on that being the correct quantity. They still adhere to that position. Another survey made for them by Mr. Addie is stated in a letter from the Deputy Minister of Railways to Mr. Barnard to have shown an area of 38,671.3 square feet. The Deputy Minister points out that Mr. Addie probably included land which was already the property of the Crown. The defendants asked that the Government should send a qualified surveyor to check over Mr. Addie's survey on the ground and arrive at a definite result with him. If that was done, the record does not show the result. Whether anything was done or not, and whatever its result if anything was done, it is abundantly clear that the transaction was closed between Mr. Barnard and the Department on the basis of the actual area being 36,900 square feet, which it was agreed should be conveyed at a price of $1.75 per foot ($64,575) plus $5,000 additional. This latter sum was agreed upon, Mr. Barnard tells us, by way of compromise between the figure of $1.75 per square foot stated by the plaintiffs in their letter of 13th October, 1913, to the general manager of the

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I.C.R., and confirmed by the defendants' letter of the 30th of January, 1914, as what they were willing to accept on a basis of 36,900 square feet, and $2.00 per square foot, the price finally demanded from the Department by Mr. Barnard, who represented the plaintiffs. Mr. Barnard's evidence and his letters put that beyond doubt.

The deeds transferring the land to the Crown, in which the area is stated to be 38,723 square feet, were not seen either by the plaintiffs or by Mr. Barnard before execution, although they had asked to be notified of the closing of the matter and had stated (letter of the 14th of March, 1916) that they wished to be present. Mr. Barnard tells us that on the date of closing (2nd of June, 1916) Mr. Dupré, who acted for the Government in investigating the title and in giving instructions for the preparation of the deeds and had arranged to notify Mr. Barnard so that he and Mr. Ogilvie might attend on the closing, telephoned him from Quebec that

the matter was all ready and that the Davies insisted on its being closed that afternoon.

Of course Mr. Ogilvie and Mr. Barnard were unable to be present.

Mr. Banard says that there were three different surveyor's reports and that that meant quite a few interviews between himself and Mr. Dupré. On the 2nd of February, 1916, the plaintiffs wrote to the defendants:—

The situation is simply this: The Government have several plans showing different areas of the property, and it is necessary that Mr. Addie prepare a plan of the property as per the expropriation notice

If the area as shown on this plan appears satisfactory to the Government the matter will be closed at once.

The Department of Railways and Canals informs us that their engineer at Moncton has instructions to go into the matter with Mr. Addie. And we are to-day again taking up the matter with the Department, inquiring as to the delay.

To this the defendants replied on the following day:—

> Plans have already been prepared by Mr. Addie of the property and are now in possession of the Government.
>
> What is required is that an engineer be appointed to go over the ground with Mr. Addie (as Mr. Brown, chief engineer at Moncton, wrote Mr. Addie he had no orders to that effect) and which Mr. Barnard promised he would attend to at Ottawa.
>
> It is urgent that this be done and that a Government engineer go over the ground with Mr. Addie so that we can get the matter closed up and a settlement effected without further delay.

On the 13th of March the papers were sent by the Department of Justice to MM. Dupré & Gagnon with instructions to get the matter closed without delay. It must have been after this date that Mr. Barnard had the frequent interviews with Mr. Dupré of which he speaks. Some delay was occasioned by difficulties of title and in having the order in council for payment put through. There is no further reference in the record, however, to the question of area. Neither Mr. Dupré nor the notary Couillard, who prepared the deed, nor any of the surveyors or railway officials concerned, is called to explain how the area came to be fixed at the figure named in the deeds. Mr. Barnard in a letter of the 22nd of May, 1917, to the late Mr. Stuart K.C., who was then acting for the defendants, refers to the change of area as a "manoeuvre * * with a view to covering up the $5,000." Thomas O'Neill, the defendants' accountant and confidential clerk and a witness on their behalf, also suggests that 38,723 square feet was inserted in the deed "because there was something to cover" in "the making of the $5,000." But if that had been the purpose the area would almost certainly have been increased by 2,857.14 square feet (which at $1.75 per square foot would amount to $5,000) and made 39,757.14 square feet.

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While Allison C. Davie could not explain the statement in the deeds that the area was 38,723 square feet and refused to characterize it as "false," he swore positively that he knew the area of the property to be 36,900 square feet.

Whether there is anything due in respect to item (a) and what should have been the plaintiffs' claim on item (b) depend entirely upon the true area of the property conveyed. In my opinion that cannot be ascertained on the evidence now before us. This question should therefore form one of the issues for determination on the new trial, which must be had for other reasons presently to be stated. The plaintiff's rights in respect to items (a) and (b) should be determined as above indicated when such area is ascertained. To permit of complete justice being done if the true area proves to be less than 38,723 square feet leave should be reserved to the plaintiffs to present an incidental demand under Art. 215 (1) C.C.P. for the whole or any part of the balance of the sum of $5,000 (and interest thereon) not covered by the conclusions of their present declaration. Should such a demand be held not to lie the right to bring action for any such balance not recoverable in this action, should, if the defence of illegality is not successful, be reserved to them.

(c) The claim for interest, $10,598.59, between the date of taking possession (12th of August, 1912) and the date of conveyance (2nd of June, 1916) is preferred on two grounds—as profit secured from the Government over and above $1.75 per foot, and as covered by a contractual stipulation. The sum claimed includes $762.40, interest paid on the $5,000 and recoverable, if at all, under item (b).

If the plaintiff's claim to the interest on the $64,575 rested solely on a stipulation that they should receive so much of the purchase price as exceeded $1.75 per square foot, the view suggested by the learned Chief Justice of Quebec that as an accessory of the principal it would belong to the defendants (*res accessoria sequitur rem principalem*) might occasion difficulty. The principle of the law of mandate adverted to by my brother Mignault might also prove an obstacle to recovery by the plaintiffs. But the special contract invoked by them, if established, overcomes these difficulties.

While the matter was still in the stage of negotiation the plaintiffs informed the defendants by letter (15th of September, 1914), that

> of course when the settlement is effected it will bear interest *from the date of the taking possession* by the railway company of the Davie property.

Allison Davie admits that from this letter the defendants learned that the Government would pay interest from the date of expropriation. When negotiations between Mr. Barnard and the Department had so far progressed that he was able to state the terms of settlement, we find this passage in a letter from the defendants to D. W. Ogilvie of the 17th of March, 1915:

> Mr. Barnard states that the Government will be willing to settle for the property on terms that would give us one dollar and seventy-five cents ($1.75) per square foot for the property with interest at four per cent *from the date of sale* to be passed as soon as the deeds are got in shape. The purchase price to be payable as soon as the Government is in funds and not later than two years from date. This would be satisfactory to us and we hereby authorize you to close the matter on such terms.

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The important words in this letter are "from the date of sale." Although the witness O'Neill says he understood them to mean "from date of expropriation" (testimony probably inadmissible), Allison C. Davie offers no such explanation and George D. Davie, with whom all the negotiations were carried on by Ogilvie, is not called as a witness. Mr. Barnard says that it was distinctly understood that the interest up to the date of actual conveyance was to be given the plaintiffs and himself as additional remuneration. He certainly made a claim on that basis at an interview with Allison C. Davie and O'Neill in January, 1916, when he met them in Quebec to make certain, he says, that they understood the terms of the settlement and precisely what disposition was to be made of the moneys to be paid by the Government. Davie and O'Neill both admit that interview. Barnard says he understood the claim he then made was assented to: Davie and O'Neill that it was to be referred to George D. Davie. The failure to call the latter as a witness is, therefore, most significant. Barnard himself was a witness for the defendants and their counsel had him verify and then put in evidence a letter of the 22nd of May, 1917, from himself to the late Mr. G. C. Stuart, who was then acting for the Davies. In that letter Mr. Barnard says:

> Ogilvie's agreement provided that he would get anything over and above $1.75 a foot. We tried first to get $2.50 a foot and then $2.00, and finally got the Government to offer $1.75. The matter was at a deadlock for some time when, after numerous interviews with the Minister, I arranged that instead of getting $2.00 a foot we should get $1.75 plus $5,000.00 and interest on the whole amount at 4% from the date of taking of possession, the $5,000.00 and interest from taking of possession being a compromise between our demand at $2.00 and the Government's price of $1.75.
>
> I considered that Ogilvie, under his agreement, would be clearly entitled to the $5,000.00 and the interest from the date of taking of possession, but in order to avoid all possible misunderstanding, pre-

pared a special letter which I sent to Ogilvie with instructions to have same signed by the Davies, in which I mentioned that I had arranged with the Government for the sale of the property on terms that would give them $1.75 per foot, "with interest at 4% from date of the sale to be passed as soon as deeds are got in shape," and I thought by reciting "from date of sale to be passed as soon as deeds are got in shape" that I had made it quite clear that they would only get interest from the date of the deed of sale.

I further explained the matter in a letter to Mr. George Davie and also verbally to Mr. O'Neill, and when I found that the cash payment would not be sufficient to pay off Ogilvie took the trouble to go to Quebec and meet Mr. Allison Davie and Mr. O'Neill at Chinic's Hardware Store where we went into the figures and worked out exactly how much the Davie Estate would have to add to the cash payment in order to settle with Ogilvie, and how Mr. Allison Davie and Mr. O'Neill can now pretend that the estate is entitled to the interest from date of taking possession is frankly beyond me.

P.S. In figuring the amount of interest that Ogilvie is entitled to I have in the above letter calculated interest up to the 2nd of June, the date of the passing of the deed of sale. To give you the whole story I should mention that when I met Mr. Allison Davie and Mr. O'Neill in Quebec at Chinic's and we figured the amount of interest coming to Ogilvie they raised the point that if interest until the execution of the deed of sale was to be paid to Ogilvie the settlement might drag on for a long time to the prejudice of the Davie estate. I agreed that this would not be fair as the expectation was, when the Davies agreed to take $1.75 a foot, that they would get payment within a reasonable time, and after some discussion it was agreed that Ogilvie's right to the interest would stop on the 1st of March.

Mr. Barnard's statement as to the objection raised by Messrs. Davie and O'Neill is corroborated by their testimony. The defendants also called Mr. D. W. Ogilvie as a witness on their behalf and had him pledge his oath to the truth of all the facts within his knowledge stated in Mr. Barnard's letter to Mr. Stuart.

Finally, the defendants paid Mr. Barnard $10,763 on the 5th of June, 1916. Allison C. Davie says on examination for discovery by counsel for the plaintiffs that this payment was made in fulfilment of a legal obligation—he is quite sure of it. On examination by counsel for the defendants he at first repeats this

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statement, but under adroit questioning he eventually says that, while the first $5,000 was so paid, the second $5,000 was paid "out of goodwill," after a conference of the family. Once again George D. Davie is not called to verify this statement. The witness O'Neill was not asked as to it. To me it is simply incredible. Five thousand dollars (with $763 interest on it) was admittedly paid to Barnard as principal secured in excess of $1.75 a foot. Barnard had in January also demanded the interest from August, 1912, to the date of closing on the $64,575 to be received by the Davies for themselves. The Davies held Barnard's note for $10,000 principal and $1,500 interest in connection with another transaction. They seem to have assumed that because of the relations between Barnard and Ogilvie's company any payment which they might make to the former would operate *pro tanto* as a discharge of their obligations to the latter. They probably conceived that it would be a good stroke of business to obtain payment of Barnard's note by setting it off against what they apparently believed might safely be credited to him in discharge of their obligation to the plaintiffs. Perhaps to avoid any admission that might prove embarrassing in the event of Ogilvie insisting on his claim for the interest, while they described the first $5,000 of the $10,000 of principal paid to Barnard as "difference on sale of Davie property to I.C.R.," they designated the second $5,000 as "allowance for services rendered" in the statement sent to Barnard and as "bonus for trouble" in a statement certified by O'Neill and filed at the trial. Comment on all this seems unnecessary. I would merely add that the testimony of Allison C. Davie is most unsatisfactory, It gives an impression of shiftiness and unreliability.

Taking into account all the evidence before us bearing upon it, if obliged now to determine the question, I should incline to the view that the Davies did agree with Ogilvie that his firm should have as part of their remuneration the interest on the $64,575 between the date of taking possession and the date of sale, by which I am disposed to think was meant the date of execution of the deeds. But as a new trial must be had on other grounds, it will probably be more satisfactory that this item should be dealt with by a judge who will have the advantage of seeing the witnesses and possibly also of evidence not now before us, such as the testimony of George Davie and the explanatory letter to him mentioned in Barnard's letter to Stuart. We have not the benefit of the views either of the trial judge or of a majority of the learned judges of the Court of King's Bench on the merits of the plaintiffs' claim apart from the defence of illegality. The learned Chief Justice would treat the interest as an accessory and holds the claim for $159.51 unfounded. Mr. Justice Martin would disallow the plea of compensation based on the payments to Barnard and the defence that the action was premature. He finds the claim for interest unfounded and also that for a balance of commission. Mr .Justice Pelletier proceeds solely on the ground of illegality. Mr. Justice Greenshields dissents and there is no opinion delivered by Mr. Justice Carroll. The formal judgment merely dismisses the appeal "considering that there is no error in the judgment appealed from."

The general defences still remain to be considered.

I know of no legal ground on which the defendants can set up payment to Barnard as an answer to the plaintiffs' claim. Neither as a partner nor otherwise

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was he entitled to receive moneys payable to them. He was merely their employee or sub-agent and had apprised the defendants of that fact by sending them a copy of his letter of the 24th of March, 1916, written to D. W. Ogilvie. Nevertheless they chose to pay Barnard instead of the plaintiffs, moneys due, if at all, to the latter.

The defence that the action is premature has occasioned me some difficulty. The answer to it suggested by Mr. Justice Martin, the only judge below who alludes to it, seems open to the objection that the delay in payment was negotiated by Barnard himself and assented to by Ogilvie. The defendants, however, would seem to have recognized by their payments to Ogilvie of commission on $64,575 and to Barnard of $10,763 in June, 1916, that they were then under obligation to pay whatever remuneration had been earned in respect of the entire sale, notwithstanding that they had not yet received $60,000 of the purchase money and the interest thereon. With some doubt I accept the view of my brother Mignault that this defence should not prevail.

I do so the more readily because it does not afford an answer to a part of the claim proportionate to the part of the purchase money paid before action and does not preclude a declaratory judgment as to the balance. Moreover by an incidental demand under Art. 215 (2) C.C.P., all the purchase money having since been paid, the plaintiffs could have put themselves in a position to recover such balance, if not otherwise disentitled to it. The fact that the defence was not given effect to in the courts below affords a strong indication that in their opinion it should not be maintained.

The illegality charged by the defendants at the close of the trial was a violation of Article 158 (*f*) of the Criminal Code. They in effect then alleged that what they agreed to pay the plaintiffs for was an exercise of improper influence with the Government or some Minister or official thereof. They refer to the following features of the evidence as warranting an inference that that was, in part at least, the nature of the consideration which they were to receive for the remuneration to be paid.

Ogilvie says that the Davies "appreciated" that he was "in a better position to negotiate than they were;" that was also his own impression:

> the Davies felt that (he) could get a better price * * * from the Government than they could,

and that

> Mr. Barnard was probably in a more favourable position than (himself) to negotiate with the Government and its officials.

Any price in excess of $1.75 per square foot which they could obtain from the Government was to be divided between the plaintiffs and Barnard.

Although the Davies were always willing to accept $1.75 per square foot for their property and on the 22nd of April, 1914, Ogilvie had written them

> I can get you one dollar and seventy-five cents ($1.75) per square foot for this piece of land from the railway, but I am of the opinion that if we hold out this sum can be increased,

the completion of the transaction was delayed until June, 1916, so far as appears solely to enable Ogilvie and Barnard to secure additional moneys for themselves from the Government. The Government actually paid $5,000 more than the Davies had asked and were willing to take. In addition they paid $10,598.59 of interest which the plaintiffs assert the Davies had agreed to hand over to them.

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For two years the plaintiffs tried unsuccessfully to induce Mr. Gutelius, the general manager of the I.C.R., to agree to pay the defendants' price of $1.75 per foot. Then Mr. Barnard was brought in to break the *impasse* by negotiating with the Minister over Mr. Gutelius' head. The price demanded for the land was immediately raised. Mr. Gutelius was over-ruled and $5,000 additional in principal and $10,598.59 interest—the latter apparently not expected by the Davies for themselves—was eventually paid by the Government.

Mr. Barnard says he was brought into the transaction when it was found that nothing could be done with Mr. Gutelius—and that after he was brought in the negotiations were left entirely in his hands, adding, however,

I had Mr. Ogilvie to help me. I had Mr. Ogilvie use his influence up at Ottawa and with the railway people

and that he (Barnard)

was to use his influence * * * to try and persuade Ottawa that the price was reasonable.

In a letter of the 11th of June, 1915, written to George D. Davie, when matters were dragging, Barnard says

I expect to go to Ottawa this week and take the matter up with my friends.

Thomas O'Neill, the defendants' accountant, says Ogilvie told him

I have handed the whole thing over to Barnard. I do not want to mix with the politicians in Ottawa and he has friends up there.

Then there is the suggestion thrown out in the examination for discovery of D. W. Ogilvie that Mr. Barnard was closely connected by marriage with a member of the Government, and finally the increase

of the area from the 36,900 square feet, claimed by the Davies to be the true area, to the 38,723 square feet mentioned in the deeds, coupled with Barnard's and O'Neill's surmise that it was made to cover up the additional $5,000.

In addition to all this, apparently before Mr. Barnard's services were enlisted, there was a reference to Government valuators, with whom the plaintiffs advised the defendants to "keep in touch"—a mysterious intervention of a Mr. Lockwell, whose status and connection with the matter are not explained—an interview between Lockwell and Ogilvie at the latter's residence in Montreal and eventually a valuation by these valuators at the absurdly high figure of $3.00 a square foot, on which the Department refused to act.

The cumulative effect of all these things is relied upon to warrant the inference that the plaintiffs demanded compensation or reward, by reason of, or under the pretence of, possessing influence with the Government, or with some minister or official thereof (directly or through Barnard as their sub-agent), for procuring from the Government payment of the defendants' claim for compensation for their expropriated property. The learned trial judge considered this inference warranted and that the contract sued upon was therefore illegal as a barter of improper influence. His judgment was pronounced on appeal to be free from error. Two of the learned appellate judges (Lamothe C.J., and Martin J.), added, however, that in the case of a sale to the Government a contract by the vendor to pay an agent, engaged by him to procure the highest possible price, all that such agent could obtain over a figure fixed by the vendor as the minimum net price that he would

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accept, is in itself illegal as contrary to public policy and involving deception of the Department interested and a fraud upon the Government. Mr. Justice Martin speaking of the subject of the present action says

> it was a demand for compensation under a pretence of possessing influence with the Government: it was an agreement intended to mislead and had the effect of misleading the Government as to the price the respondents were willing to take for their property. The manner in which it was made afforded an opportunity for appellant to exploit the Government.

This aspect of the case has been dealt with by my brother Mignault. I agree with his views upon it and cannot usefully add to them. I am unable to appreciate the ground of the distinction drawn by the two learned appellate judges betweeen the Government and a corporation, firm or individual as a purchaser as affecting the legality of a contract for the remuneration of the vendor's agent based on the *quantum* of his interest in an increased price.

But the ground of the judgment of the Superior Court requires further consideration. The first observation I would make upon it is that if the four principal facts relied upon—the over-ruling of Mr. Gutelius, the long delay after the letter of the 22nd of April, 1914, the payment of a large sum over and above the price the vendors were prepared to accept and the increase in the area from 36,900 square feet to 38,723 square feet—have any probative force in support of the defendants' case they tend to establish rather an actual and successful use of improper influence with the Government, or some minister or official thereof, than a mere demand for compensation based on the existence of such influence real or pretended. Yet Mr. Justice Martin says

> there is no evidence or suggestion that any official of the Government was corrupted in any manner,

and the learned Chief Justice of Quebec makes the same statement and adds

> Il n'est pas allégué et il n'est pas prouvé qu'on ait exercé aucune influence indue sur la décision des autorités. Il n'est pas non plus allégué et il n'est pas prouvé que le terrain exproprié avait une valeur inférieure à celle payée par l'Intercolonial. Entre le gouvernement d'une part et Davie & Co. d'autre part, le contrat n'est pas attaqué et ne paraît pas attaquable.

But for the four facts which I have specified, the other matters relied upon in support of this branch of this case—equivocal expressions in evidence and correspondence and sinister suggestions of advantages taken of friendships and family connection carried no further—would not be deserving of notice. Their significance depends wholly upon their connection with the salient facts above stated. Taken with those facts they no doubt give rise to a situation "fraught with suspicion." But, with respect, if the matter were to rest where it now is the inevitable result in my opinion would be a verdict of "not proven"

The appellants quite reasonably do not desire such a Pyrrhic victory. They wish to remove the stigma necessarily left by an accusation such as that under consideration if it be not completely refuted. Unfortunately they did not ask for a postponement of the trial to afford them an opportunity to meet that charge when it was preferred in argument before the trial judge. Had they done so and been refused, even if the evidence were vastly stronger than it is—if it clearly established a *prima facie* case against them—having regard to the manner in which the charge was sprung, they would, in my opinion, have been entitled to a new trial to afford them the opportunity denied—not as a matter of grace, but as of right. Not having taken that course, however, they are now obliged to ask indulgence. Yet, as the

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Lord Chancellor (Halsbury), delivering the judgment of the Judicial Committee, said, in *Connolly et al.* v. *Consumers Cordage Co.* (1), where similar illegality, not suggested in the Courts below, had been found by this Court

it is impossible to resist the cogency of the argument of counsel that he has not had an opportunity of meeting the allegations that are suggested against his client. As already stated, the circumstances are fraught with suspicion. but suspicious as they are, they may, nevertheless, be susceptible of explanation, and, if so, the opportunity for explanation and defence ought to have been given. That has not been done; and whatever may be the suspicions that their Lordships, in common with the learned Judges below, may entertain upon the subject, mere suspicion without judicial proof is not sufficient for a court of justice to act upon.

My only doubt has been whether the proper course in the present case would not be entirely to reject the defence of illegality as unsupported by proof. I defer, however, to what is probably the better judgment of my learned colleagues that there is sufficient of suspicion in the circumstances already before us to warrant sending the case back for a new trial in order that this defence may be fairly and fully investigated and the appellants' guilt established, if they be guilty, or if not their character cleared of what any right-thinking man must regard as an imputation under which they should not remain if it can be removed.

On the new trial the issues to be contested should be restricted to the question of the area of the property conveyed by the defendants to the Crown, the existence of a contract with regard to the payment of the interest to the plaintiffs and the defence of illegality. The question on this defence should be whether the plaintiffs by reason of or under the pretence that they or their agent Barnard possessed influence with the Government or with any Minister or official thereof

[1903] 89 L. T., 347, at p. 349.

demanded or exacted from the defendants or induced the latter to pay, offer or promise any compensation fee or reward for procuring from the Government the payment of the defendants' claim or any portion thereof for the taking by the Government of the defendants' property at Levis.

Under all the circumstances there should be no costs of this appeal to either party.

BRODEUR J.—La demanderesse-appelante réclame le paiement d'une commission au sujet d'un terrain qui appartenait aux défendeurs et qui a été exproprié par la Couronne.

Sur la contestation telle que liée, la demanderesse aurait probablement réussi pour une partie importante de sa réclamation, mais la Cour Supérieure, confirmée en cela par la Cour d'Appel, a trouvé que l'option et les conventions invoquées par la demanderesse n'avaient pour but que de couvrir son intervention auprès des autorités fédérales pour obtenir par son influence des conditions plus avantageuses et un prix plus élevé pour le terrain exproprié, et que ces conventions, étant contraires à l'ordre public, étaient illégales.

Cette question d'illégalité n'avait pas été soulevée par la défense; et la demanderesse dit qu'elle en souffre préjudice parce que certaines circonstances louches qui sont au dossier démontreraient, si elles étaient expliquées par une preuve additionnelle qu'elle se déclare en position de faire, qu'elle a agi d'une manière absolument légale et honnête.

En effet, il serait important d'expliquer cette nomination d'évaluateurs, la présence autour d'eux ou au milieu d'eux de personnages à réputation douteuse, cette lettre des défendeurs où ils disent qu'ils connaissent bien ces évaluateurs,

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we think our Mr. George can keep in touch with them (Letter, 19th Dec., 1913),

et le rapport de ces évaluateurs donnant pour le terrain exproprié une valeur plus considérable que celle que les défendeurs étaient prêts à accepter.

Il serait bon de connaître les raisons pour lesquelles les défendeurs ont choisi comme mandataires des personnes d'une ville éloignée qui ne connaissaient rien ou presque rien des terrains expropriés. Cette circonstance devient d'autant plus mystérieuse que Ogilvie dit, dans sa lettre du 26 mars 1914, qu'il espérait pouvoir compléter la transaction par vente privée

without any of our Quebec friends interfering in same,

et que Barnard, dans une lettre du 15 janvier 1915, dit qu'il irait à Ottawa dans quelques jours

take the matter up with my friends when I am there.

Il est évident que Gutelius, le gérant général de l'Intercolonial, pour l'usage duquel ce terrain était exproprié, ne voulait pas payer le prix demandé par Davie et Ogilvie, et alors on a utilisé les services de Barnard pour négocier avec le ministre et passer pardessus la tête de Gutelius. Ogilvie aurait dit à ce sujet à une personne entendue comme témoin dans la cause:

I have handed the whole thing over to Barnard. I do not want to mix with the politicians in Ottawa, and he has friends up there.

Il serait également important de savoir pourquoi on a inséré dans l'acte de vente une quantité plus considérable de terrain que celle que les défendeurs disent avoir cédée. Barnard ne peut pas s'expliquer ce changement et il suggère

the area was changed with a view to covering up the $5,000,00, for which manoeuvre there was no reason whatever.

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Il y a encore d'autres circonstances dans la cause qui rendent probable l'illégalité de cette transaction: mais comme la demanderesse se croit en position d'expliquer toutes ces circonstances et qu'elle n'en a pas eu l'occasion, je crois que nous devrions, dans ces circonstances, non pas confirmer le jugement des cours inférieures, mais appliquer la décision du Conseil Privé dans la cause de *Connolly* v. *Consumers Cordage Co.* (1), et renvoyer la cause en Cour Supérieure pour faire une enquête complète, et les tribunaux seront ensuite en meilleure position de se prononcer sur cette question de la légalité du contrat intervenu entre les parties.

L'un des items les plus importants de la réclamation de la demanderesse porte sur le question d'intérêt. Il s'agirait de savoir si l'intérêt depuis l'expropriation jusqu'à la passation du contrat appartiendrait aux défendeurs ou à la demanderesse.

Il y a peut-être un peu d'ambiguité dans la lettre que les défendeurs ont signée à ce sujet, mais après les explications de Barnard, qui a préparé cette lettre, j'aurais été enclin à accepter son témoignage; mais comme il est formellement contredit sur un point par d'autres témoins et comme nous n'avons pas l'avantage de l'opinion du juge qui présidait au procès et qui a entendu ces témoins sur leur crédibilité, il vaut mieux ne pas préjuger la question.

Les defendeurs, dans leur défense, ont plaidé que l'action était prématurée et que Barnard avait autorité de recevoir de l'argent d'eux pour et au nom de la demanderesse.

Ces deux moyens de défense sont mal fondés.

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Il n'y a rien dans les conventions entre la demanderesse et les défendeurs qui démontre que le paiement de la commission ou de la partie du prix de vente qui excèderait $1.75 du pied ne serait payé que lorsque les défendeurs recevraient eux-mêmes leur argent du gouvernement. Leur conduite prouve amplement qu'il n'y a pas eu de délai d'accordé. Ils n'avaient reçu, lors de la passation de l'acte fixant l'indemnité, qu'une somme de $11,034.58: et cependant ils ont de suite payé une somme d'au delà de $13,000.00 à la demanderesse et à Barnard.

Quant au paiement fait à Barnard, il ne peut pas être prétendu qu'il doit être invoqué contre la demanderesse. Barnard avait bien été employé par la demanderesse pour aider au règlement par le gouvernement de la réclamation des défendeurs, mais il n'avait pas l'autorisation et le pouvoir de la demanderesse de percevoir des deniers pour elle.

Pour ces raisons, l'appel devrait être maintenu, mais sans frais, vu que l'appelante est en faute de ne pas avoir demandé en cour supérieure à faire l'enquête qu'elle désire maintenant mettre au dossier.

Le contre-appel, vu la disposition du présent appel, devient inutile et devrait être renvoyé sans frais.

Le dossier devrait être renvoyé en cour supérieure pour s'enquérir de la légalité du contrat.

A cette fin les parties devront avoir le droit d'amender leurs plaidoiries. La demanderesse pourra présenter, dans le cas où le contrat ne serait pas illégal, une demande incidente, si la cour supérieure le permet, ou bien le droit lui sera réservé de réclamer par une nouvelle action une somme additionnelle si la quantité de terrain vendu n'est pas de 38,723 pieds mais est d'une quantité moindre.

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MIGNAULT J.—The appellant, a body corporate, which is owned and controlled by Mr. Douglas W. Ogilvie of Montreal, claims from the respondents $12,567.85 made up, as stated in its factum, of the following items:

1. For balance of commission on the sale by the respondents to the Canadian Government for the Intercolonial Railway of a parcel of land at Levis, Que............$		159.51
2. For difference between purchase price of 38,723 square feet at $1.75 per foot, being	$67,765.25	
and the price actually obtained for the property	69,575.00	1,809.75
Interest on $9,575.00 for three years and 295 days at 4%		1,459.59
Interest on $60,000.00 for three years and 295 days		9,139.00
		$12,567.85

To explain this claim, I must say that on the 2nd of June, 1916, the respondents sold the property in question to the Government for a block price of $69,575.00, with interest from "the date of taking" (which the parties admit was the 12th of August, 1912, date of the registration by the Government of the expropriation notice). The deed described the property as containing 38,723 square feet, and the appellant alleges that this was its area, and the Government, on the date of sale, paid to the respondent on account of the price, $9,575.00, with interest at 4% from the date of taking, said interest amounting to $1,459.59, so that the total cash payment was $11,-034.59, The balance of the purchase price, $60,000.00, the Government was to pay in two years from the date of sale, June 2nd, 1916, with interest at 4% from the date of taking The final payment, amounting with interest to $69,575.00, was made to the respondent on or about October 20th, 1918, a year and a half after the bringing of the appellant's action.

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As briefly as can be stated, the appellant's claim is that it is entitled to a commission of 5% on a price giving to the respondent $1.75 per square foot, and it calculates this commission on a price of $67,765.25, representing $1.75 per square foot on a total area of 38,723 feet. The appellant was paid $3,228.75 as 5% commission on $64,575.00, which, at the price of $1.75 per foot, represents an area of 36,900 feet, and it demands an additional amount of $159.51 being 5% on $3,190.25, the difference between $64,575.00 and $67,765.25.

Then the appellant claims that it is entitled, over and above this commission, to anything received by the respondents in excess of $1.75 per foot, and the sale price being $69,575.00, this excess amounts to $1,809.75.

Finally, treating the interest payable to the respondents as being something to which it, the appellant, is entitled as being over and above the price of $1.75 per foot, it demands, as representing this interest, the sum of $10,598.59, the greater part of which was paid to the respondents long after the action was brought.

Among other matters, the respondents plead that the action, in so far as it is based on any amount paid to them after June 2nd, 1916, is premature. They also object that the real area of the property was 36,900 feet and not 38,723 feet as alleged by the appellant and stated in the deed of sale to the Government. They also claim the benefit of payments exceeding $10,000.00 made by them to Mr. Charles A. Barnard K.C., who was associated with the appellant in the negotiations concerning the sale of the property. I will dispose at once of this last defence by saying that, in my opinion, the respondents cannot, as against the appellant, offset any payments made by them to Mr. Barnard.

Before taking up the different items of the appellant's claim, I must refer to the question of the area of the property which was discussed at considerable length at the hearing. No evidence of this area was given at the trial. The appellant alleges that it was 38,723 feet, and the deed of sale, and a subsequent deed between the Government and the respondents correcting it, expressly give this figure as the area sold. On the other hand, both Mr. Ogilvie, who owns the appellant company, and the respondents acted throughout on the assumption that the expropriated property contained 36,900 square feet, which was stated to be shewn by a plan prepared by Mr. Bourget, land surveyor, which plan however is not in the record. The respondents had measurements made by Mr. Addie, land surveyor, and it is mentioned in a letter written to Mr. Barnard by the Deputy Minister of Railways and Canals that Addie reported an area of 38,671.3 feet. The expropriation notice gives the area as being 79/100 of an acre, or 34,412 feet. Mr. Barnard, in one of his letters, qualifies as a "manoeuvre" the statement in the deeds of an area of 38,723 feet, and some of the learned judges of the Court of King's Bench looked on it as being a very suspicious circumstance. The position, however, is this: The appellant founds its action on a sale of 38,723 feet, and no evidence, outside of the deeds, was made of the real area. This seems clearly to be the basis of the appellant's action as it was conceived by the appellant itself.

First item. Claim of $159.51, additional commission. This claim is based on the agreement, which is not disputed by the respondents, to pay 5% on the sale of the property at $1.75 per square foot, and the

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question whether the respondents have paid all the commission owed by them or not depends on the area of the land sold. This, I have said, the appellant alleges was 38,723 feet. The respondents deny this allegation, and aver that the total area was 36,900 feet. The appellant had therefore the onus of establishing its averment, but, as regards the respondents, the statement in the deed of sale from the respondents to the Government as well as in the subsequent deed of correction, in both of which the area is declared to be 38,723 feet, might probably be considered conclusive evidence, as being at least an extra-judicial admission by the respondents of this area; and moreover while Mr. Allison Davie swore, when examined on discovery, that the area was 36,900 feet, he added however the qualification

that is the plan we followed then

and he did not undertake to say that the statement in the deeds was false. The matter could have been cleared up by producing a copy of the plan annexed to the deed of sale, and possibly by a survey on the ground of the area shown on this plan, but as that was not done, I would have been disposed to hold the respondents bound by their admission in the deeds, However, out of deference to the desire expressed by my brothers Anglin and Brodeur, I am willing, inasmuch as the case must be sent back for retrial on the question of the legality of the contract, that new evidence be taken to establish the real area of the property taken by the Crown. When this evidence is made, it will be possible to determine whether the appellant's claim for $159.51 is justified, assuming that its action remains in the form in which it was brought.

Third item. Claim of the appellant for $10,598.59, interest on the purchase price of $69,575.00. In my study of this case I dealt with this item before considering the second item of $1,809.75, which is the one in connection with which the greatest difficulty arises in view of the judgments of the courts below. I had formed an opinion on the merits of this claim for interest, but inasmuch as I now defer to the desire of my brothers Anglin and Brodeur that this question be among those directed to be retried, with the view that some evidence which was not given be made, I deem it my duty, so as not to embarass the new trial, to express no opinion as to this item of the appellant's claim.

Second item. Claim of the appellant for $1,809.75, being the difference in price between $67,765,25. representing 38,723 feet at $1.75 per foot, and $69,-575.00, the total purchase price paid by the Government.

This sum of $1,809.75 is clearly something paid by the Government over and above the purchase price of $1.75 per foot, and the appellant is entitled thereto if the ground on which its action was dismissed in the courts below cannot be sustained.

The learned trial judge dismissed the action of the appellant without costs for the following reason:

Considérant que la dite option et les conventions subséquentes, prouvées et alléguées comme s'y rattachant, n'avaient pour but que de couvrir l'intervention des demandeurs comme intermédiaires entre le Gouvernement du Canada et les autorités du chemin de fer Intercolonial, d'une part, et les défendeurs, d'autre part, pour procurer, par leur position et leur influence, aux dits défendeurs, des conditions plus avantageuses et un prix plus élevé pour le terrain alors ainsi exproprié, et que la considération stipulée était le prix de telle intervention;

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Considérant que toute convention de cette nature est contraire à l'ordre public, et que toute considération stipulée pour y donner effet est illégale et nulle et ne peut faire l'objet d'une réclamation en justice.

The Court of King's Bench affirmed this judgment, Greenshields J. dissenting, but in their reasons for judgment some of the learned judges considered that an agreement the object of which was to obtain from the Government for this land something in excess of the price for which the respondents were willing to sell it, was an illegal contract, contrary to public order, and that the appellant could not recover any compensation for its services under this agreement. In the words of Chief Justice Lamothe,

> Davie & Co. et la compagnie appelante se sont entendus ensemble pour tâcher d'obtenir de l'Intercolonial une somme additionnelle d'environ $5,000, somme que Davie ne réclamait pas. En d'autres mots, ils se sont entendus pour soutirer du trésor public, une somme additionnelle non réclamée et non due. Le motif des contractants et leur but avoué sont clairement illicites. Il s'agissait de tromper le département des chemins de fer sur les intentions de Davie & Co.; il s'agissait de cacher ou de mettre en oubli le prix réel demandé; le département a été induit à croire que Davie & Co. réclamaient réellement $5,000 de plus, et tout cela pour le bénéfice de la compagnie appelante. Il s'agissait de fonds publics. Le gouvernement n'est pas dans la position d'un particulier; il ne peut faire aucune libéralité sans le consentement du parlement.
>
> Je partage les vues du juge de première instance; le contrat entre Ogilvie & Co. et Davie & Co. avait pour base et motif une considération illégale, illicite et contraire à l'ordre public. Les tribunaux ne peuvent en forcer l'exécution.

In consequence, the Court of King's Bench dismissed without costs the appeal from the judgment of the Superior Court.

It should be observed that the grounds on which both judgments below dismissed the appellant's action, were not taken in the respondent's plea, but the contention was raised at the hearing in the first court, and I would, with deference, think that the

parties and particularly the appellant should have been afforded the opportunity of bringing fresh evidence on the issue thus raised. In saying that I do not for a moment dispute that the Court can *proprio motu* dismiss an action when it comes to the conclusion that it is founded on an unlawful and illicit contract; but even then I think it is better to reopen the case so that the parties may, if they can, clear themselves of the imputation of having made an unlawful or illicit agreement.

The words of the learned Chief Justice of the Province of Quebec which I have quoted, may I say so with respect, somewhat overstate the facts of this case as I conceive them. What happened was that the respondents were willing to accept $1.75 per foot for their property and to pay a commission of 5% on this price to the appellant who was their agent, and who was in no wise connected with the Government or under fiduciary relations with it. The respondents agreed also to abandon to the appellant anything in excess of the stated price which the appellant might obtain. There was no suggestion whatever of deceiving the Government, and there was surely no duty incumbent on the appellant to disclose to the Government the price which the respondents would accept. It was the case of an agent bargaining with a third party for the best obtainable price, even a price in excess of that which his principal would accept, and the fact that the agent had stipulated with his principal that the excess price would belong to him does not make the contract illegal. The learned judges of the Court of King's Bench recognize that such a contract can be made when the purchaser is a private individual (see also Guillouard, *Société*,

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no. 16, who discusses the nature, thereby admitting the legality, of such a contract), but why can it not be made when the purchaser is the Government, provided no misrepresentations, no corruption of public officials nor improper methods are resorted to, and provided that the vendor and his agent are under no fiduciary relations with the Government imposing on them the duty of disclosure? Here the learned Chief Justice says:

> Il n'est pas allégué et il n'est pas prouvé qu'aucun officier public ait été corrompu. Il n'est pas allégué et il n'est pas prouvé qu'on ait exercé aucune influence indue sur la décision des autorités. Il n'est pas non plus allégué et il n'est pas prouvé que le terrain exproprié avait une valeur inférieure à celle payée par l'Intercolonial.
>
> Entre le gouvernement d'une part et Davie & Co. d'autre part, le contrat n'est pas attaqué et ne paraît pas attaquable.

That being the case, even though this property was to be paid with public monies, how can it be said that the agreement between the parties was illegal and contrary to public order? The words "public order" may be words to conjure with, but their meaning is very vague, and although undoubtedly a contract contrary to public order is void (arts. 989 and 990 Civil Code), still where a contract is not prohibited by law it should be very obvious that it is contrary to good morals or public order before it be set aside. With respect, I cannot agree with the learned Chief Justice when he comes to the conclusion that this contract, which would not be contrary to public order if the purchaser were a private citizen, is against public order because the lands were bought by the Government, it being remembered that the agents who dealt with the Government were under no fiduciary relation towards it, and resorted to no corruption, misrepresentation or undue influence.

The learned trial judge puts the case on somewhat different grounds when he finds that there was a contract whereby Ogilvie and Barnard undertook, through their position and influence with the Government, to obtain a higher price for the property than that which the respondents were willing to accept, the additional sum so obtained to be divided between them. This, in my opinion, is a very much stronger ground.

It is useless to deny that the facts in evidence lend some support to the theory on which the Superior Court's judgment is based. The respondents contracted with Ogilvie and I have said that, in my opinion, their contract was not *per se* an illegal one. But Ogilvie found Mr. Gutelius, the superintendent or general manager of the Intercolonial Railway, obdurate. He refused to pay even $1.75 per foot for the property, and then Ogilvie secured the co-operation of Mr. Barnard, presumably and even admittedly, because he possessed, or was supposed to possess, influence with the Government. Mr. Barnard asked $2.25 per foot from Mr. Gutelius who had declined to pay even $1.75, and this was naturally refused. (See Barnard's letter to Mr. Geo. D. Davie of April 1st, 1915). Mr. Barnard then negotiated with the Minister of Railways and Canals, the head of the Department, and finally Mr. Gutelius was overruled and the sale was agreed to at a price of $64,575.00, representing $1.75 a foot for an area of 36,900 feet, which the parties then understood was the area of the land, plus $5,000 which the Government agreed to pay over and above this price. Mr. Barnard says, in his letter of May 22nd, 1917, to Mr. Stuart K.C., that this was a compromise between his demand first of $2.50, then $2.00, and the Government's price

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of $1.75. There is no doubt that in all he did, Mr. Barnard acted with the approval of Mr. Ogilvie and also, I think, of the respondents, and but for his intervention and influence it is possible the opposition of Mr. Gutelius would not have been overcome. It is needless to add that the $5,000.00 so obtained was to be divided between Ogilvie and Barnard.

Under these circumstances the two courts have found that the contract giving to Mr. Ogilvie and "those interested" the surplus or profit which he might obtain over and above the selling price of $1.75 per foot, was a contract made with them by reason of their real or supposed influence with the Government, in other words was a purchase of their influence with the Government, and consequently null and void.

The appellant complained before us that it had not been afforded an opportunity to meet, and disprove if it could, the contention that it had bartered its influence with the Government, which contention was raised only at the argument in the first Court. I have already said that I think that it should have been afforded that opportunity and as a matter of justice, and because were I to dispose of the contention on the evidence in the record, I would have great difficulty in determining whether there has been really here a barter of influence with the Government, or an ordinary contract with an experienced broker looking towards the securing from the Government of the best obtainable terms, I have come to the conclusion that the record should be sent back to the Superior Court with directions to reopen the case on this question whether there was, as found by the Superior Court, an agreement by Ogilvie or Barnard, through the influence which they possessed or pre-

tended to possess with the Government or with any Minister or Official thereof, to obtain for the respondents the price of $1.75 per foot for the expropriated property, any sum obtained in addition to the said price to be divided between Ogilvie and Barnard.

I have not referred to the defence that this action is premature. The reason for which this defence was disregarded, to wit that Ogilvie's right to claim commission could not be affected by a delay granted by the respondents for the payment of the purchase price, is in my opinion unsound inasmuch as the respondents sold on terms made for them by Ogilvie or by his agent, Barnard. But, in view of the conduct of the respondents themselves, I do not think that this defence should be maintained. They paid to the appellant, immediately after the signing of the deeds, and although they had received only $9,575.00 on account of capital, the full commission on the purchase price of $64,575.00, the $5,000.00 added thereto being treated by them as something due to Barnard, thereby recognizing that the appellant did not have to wait until the payment of the balance of the purchase price to claim its commission on the balance. They thus put their own construction on their contract with the appellant, and I do not think they should now be allowed to contend that the right of the appellant, whatever it was, was postponed until the monies were actually paid over to the respondents.

I therefore agree that there should be a retrial as stated in the memorandum which will be included in the formal judgment of the Court.

It may well be, if the area of the expropriated property be shewn to be 36,900 square feet, that the appellant has misconceived what are its rights against the respondents, assuming that the contract sued on is a

lawful one. For the surplus price paid to the respondents over and above the price of $1.75 per foot would then be $5,000.00, and not $1,809.75 as alleged in the declaration. Whether the appellant, in view of the retrial, would be entitled to amend its declaration, or to take an incidental demand, is a question on which I do not deem expedient to express in advance any opinion, but I am willing that any opportunity to amend or to take an incidental demand be afforded the appellant on the new trial ordered. It seems to me that if the appellant is entitled to any portion of the price paid the respondents as being over and above the sum of $1.75 per foot, it should get a proportionate part of the interest paid to the respondents on the purchase price of the property.

I would grant no costs to either party of this appeal nor of the cross-appeal which, in my opinion, should be dismissed.

JUDGMENT.

The appeal is allowed without costs and a new trial on certain points is directed as indicated in memorandum. Idington J. dissenting.

MEMORANDUM FOR FORMAL JUDGMENT.

1° The appeal is allowed without costs.

2° The Court declares that the defendants' contentions that the action was prematurely instituted and that Barnard was the plaintiff's partner and that Barnard had authority and power to receive money for the plaintiff company are unfounded.

3° The record will be sent back to the Superior Court to further inquire into and determine

(a) whether the plaintiffs by reason of or under the pretence that they or their agent Barnard possessed influence with the Government or with any Minister or official thereof demanded or exacted from the defendants or induced the latter to pay, offer or promise any compensation, fee or reward for procuring from the Government the payment of the defendants' claim or any portion thereof for the taking by the Government of the defendants' property at Levis;

(b) the area of the property conveyed by the defendants to the Crown; and

(c) whether the defendants contracted to pay the plaintiffs as part of their remuneration the interest paid by the Crown on the purchase money between the date of its taking possession of the property and the date of the execution of the deeds conveying it.

4° The Court orders that both parties shall have liberty to amend relevantly to the new enquête above directed so far as Quebec procedure permits and that, without in any way determining that it would be maintainable, leave shall be reserved to the plaintiffs, should the area of the property be found to be less than the 38,723 square feet mentioned in the deeds, to prefer, if so advised, an incidental demand for an increased allowance in respect of excess price over $1.75 a square foot for the number of square feet by which the property shall be found to fall short of 38,723.

The Court declares that if the illegality of the contract is not established the plaintiff company is entitled to a commission at the rate of 5% on so much of the purchase money paid as represents the price of the land actually conveyed at $1.75 a square foot less the sum of $3,228.75 already paid to it and also

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the sum of $1,809.75 claimed in the declaration in respect of excess price with interest thereon and in addition thereto to any sum for which they may successfully maintain the incidental demand above mentioned.

Should such incidental demand not be preferred or be held not to lie and the defence of illegality fail leave will be reserved to the plaintiffs to bring such action as they may be advised for any balance (over $1,809.75) of the sum of $5,000 paid as excess price which they may see fit to claim.

If it is not established that the contract alleged by the plaintiffs is illegal, adjudication on the defendants' liability in respect of the sum of $10,598.59 claimed for interest is reserved to be disposed of by the Superior Court.

Appeal allowed without costs.

Solicitors for the appellants: *Cook & Magee.*

Solicitors for the respondents: *Pentland, Gravel & Thomson.*

UPPER CANADA COLLEGE (DEFENDANT) .... APPELLANT.

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*Dec. 17.

AND

F. J. SMITH (PLAINTIFF).......... RESPONDENT.

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

Action—Commission—Statute of Frauds—Leave to amend—6 Geo. V., c. 24, s. 19 (Ont.); 8 Geo. V, c. 20, s. 58 (Ont.)

By 6 Geo. V, ch. 24, sec. 19 amended by 8 Geo. V, ch. 20, sec. 58, sec. 13 of the Ontario Statute of Frauds, R.S.O. [1914] Ch. 102 was enacted as follows:—"No action shall be brought to charge any person for the payment of commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Held, Idington J. dissenting, that this enactment is not retrospective and does not bar an action to recover commission under a contract made before it came into force. Opinion of the Appellate Division (48 Ont. L.R. 120) and of the trial judge (47 Ont. L.R. 37) overruled on this point.

Judgment of the Appellate Division (48 Ont. L.R. 120), allowing the pleadings to be amended and damages claimed for breach of contract, affirmed, Idington J. dissenting.

Per Duff J.: The Appellate Division should have allowed the appeal and refused the motion for dismissal of the action. No amendment was necessary, the pleadings as they stood being sufficient

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial (2) in favour of the defendant but allowing the plaintiff to amend his statement of claim if he wished.

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

(1) 48 Ont. L.R. 120. (2) 47 Ont. L.R. 37.

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The plaintiff sued for a commission on the price of land sold through his efforts and the only question raised on the appeal was whether or not the Act 6 Geo. V, ch. 24, sec. 19, amended by 8 Geo. V, ch. 20, sec. 58, which is set out in the head-note applied in the case of a contract entered into before it came into force. The trial judge held that it did. The judges of the Appellate Division took the same view but the majority held that the action should have been one for damages and allowed the pleading to be amended accordingly.

Arnoldi K.C. for the appellant.

J. F. Lawrence for the respondent.

THE CHIEF JUSTICE—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—This is an action for the recovery of a commission on the sale of land under a mere verbal contract which would have entitled the respondents to succeed but for the provisions of the amendment, by 6 Geo. V, ch. 24, sec. 19, and 8 Geo. V, ch. 20, sec. 58, to the Ontario Statute of Frauds, which reads as follows:—

> No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

The parties stated in their respective pleadings their respective contentions and agreed that the issues should be disposed of thereon under Rule 122 of the Ontario Judicature Act.

Upon argument before Mr. Justice Middleton he held that under the imperative requirements of said amendment the respondent's action must fail, and dismissed it accordingly.

On appeal to the Appellate Division they all seemed impressed with the correctness of that decision of the case presented to him but, upon the suggestion of Mr. Justice Riddell that the action had been misconceived and should have been founded upon facts which seemed to imply, in his view, a legal obligation resting upon appellant not to interfere with respondent's right to earn said commission, a judgment was reached, concurred in by the majority that the appeal should be dismissed and leave given to amend and substitute a new action founded upon such implication.

When I say "concurred in by a majority" it is to be observed that one of the three constituting the majority did so hesitatingly.

The others expressed their view by the opinion written by Mr. Justice Masten in which the Chief Justice of the Exchequer Division concurred, holding that the case as presented had been properly decided, but apparently assented to the permission to amend should that be made within ten days, and default thereof, the appeal and action should be dismissed with costs.

No such amendment has been made and the case has been argued before us upon its original footing.

We are always reluctant to interfere with mere matters of procedure in the courts below, but is this proposed alteration of the record a matter merely of procedure? I think not in light of the fact that respondent has not accepted what has been proffered.

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The amendment, if made, would only result in the trial of an action for damages upon the implication of contract and breach thereof, which never could result in any substantial damages.

How can there be substantial damages for breach of an implied contract upon which, in the ultimate result, the respondent could not shew that he had lost anything because he was only deprived of the possibility of acquiring a result upon which in law he could never recover?

I think this cause, in any form it is put, is hopeless in light of the imperative requirements of the above quoted amendment, and hence that this appeal should be allowed with costs here and below, and the judgment of the learned trial judge be restored.

DUFF J.—The principle which in my judgment governs this appeal can be stated in the language of Willes J. delivering the judgment of the Exchequer Chamber and speaking on behalf of a court of six in *Phillips* v. *Eyre* in 1870 (1). The passage is as follows:—

> Retrospective laws are, no doubt, *prima facie* a questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. "*Leges et constitutiones futuris certum est dare formam negotiis non ad facta praeterita revocari; nisi nominatum et de praeterito tempore et adhuc pendentibus negotiis cautum sit.*" Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.

I think the case falls within the principle because, 1st, the considerations upon which that principle rests apply to their full extent to the statute before us and 2nd, the conclusion is powerfully supported by the decisions of the courts in cases in which the principle has been applied.

(1) L.R. 6 Q.B. 1, at page 23.

The well known passage may be recalled in which Lord Coke (2 Inst. 292) lays it down that it is

a rule and law of Parliament that regularly *nova constitutio futuris formam imponere debet non praeteritis*

and the rule that statutory enactments generally are to be regarded as intended only to regulate the future conduct of persons is, as Parke B. said in *Moon* v. *Durden*, in 1848 (1),

deeply founded in good sense and strict justice

because speaking generally it would not only be widely inconvenient but

a flagrant violation of natural justice

to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.

The plaintiff had a contract with the defendants. Under that contract he was entitled, upon the performance of certain conditions, to be paid by them a certain sum of money. He was entitled also to have them refrain from taking steps which would prevent him earning his right to be paid by hindering him in the performance of the conditions. The effect of the statute construed, as we are asked to construe it, on behalf of the defendant, was to enable the defendants to refuse to pay, to refuse to perform their obligations under this contract because the plaintiff could never acquire a right to bring an action upon it unless the defendants consented to sign a memorandum complying with the provisions of the statute. It is quite true that the statute does not in terms declare such a contract to be void but the effect of taking away the

(1) 2 Ex. 22, at pages 42 and 43.

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right to bring an action is that practically as regards the power of the plaintiff to secure the right which the contract gave him according to the law as it then was, the contract is reduced to an abstraction. The plaintiff's right at the time of the passing of the Act was a valuable right, a right capable of being appraised in money; after the passing of the Act it became, if the defendant's construction is the right one, deprived of all value. It is not of any importance that the right of action had not accrued when the statute was passed, for

> words not requiring a retrospective operation so as to affect an existing status prejudicially ought not to be so construed.

Main v. *Stark* (1), in 1890.

The application of the principle is disputed on two grounds: 1st, and this is the ratio of the judgment of Mr. Justice Middleton, it is said that the statute is a statute relating to procedure and the case therefore falls within the rule thus expressed by Lord Penzance, then Wilde B. in his judgment in *Wright* v. *Hale*, (2),

> but where the enactment deals with procedure only unless the contrary is expressed the enactment applies to all actions whether commenced before or after the passing of the Act,

and the 2nd: It is said that the language of the statute sufficiently expresses the intention of the legislature that it should govern all actions without exception begun after the date fixed by the statute itself for the commencement of its operation.

To consider first the language of the statute. As Parke B. said in *Moon* v. *Durden*, (3), the rule is "one of construction only" and

> will certainly yield to the intention of the legislature;

(1) 15 App. Cas. 384, at page 388, per Lord Selborne.

(2) [1860] 6 H. & N. 227, at page 232.

(3) 2 Ex. 22, at pages 42 and 43.

and that intention may be manifested by express language or may be ascertained from the necessary implications of the provisions of the statute, or the subject matter of the legislation or the circumstances in which it was passed may be of such a character as in themselves to rebut the presumption that it is intended only to be prospective in its operation. Examples might be multiplied in which judges of very high authority have said that the intention to affect prejudicially existing rights must appear from the express words of the enactment, e.g., by Fry J. in *Hickson* v. *Darlow,* (1), at page 692,

> they are not to have a retrospective operation unless it is expressly so stated.

And even more numerous instances might be adduced of dicta enunciating the doctrine that the intention must appear from the words of the statute itself.

> The principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively.

Rolfe B. in *Moon* v. *Durden* (2), at page 33. In *Midland Rly. Co.* v. *Pye,* in 1861, (3), at page 191, there is a passage in the judgment of Erle C. J. approved by the Privy Council in *Young* v. *Adams* (4), at page 476. It is in these words:—

> Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language; because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.

(1) [1883] 23 Ch. D. 690.
(2) 2 Ex. 22.
(3) 10 C.B.N.S. 179.
(4) [1898] A.C. 469.

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Again in *Perry* v. *Skinner*, in 1837 (1), Parke B. in a passage approved in the last cited case says that

> the law will not give retrospective effect to any Act of Parliament unless the words are manifest and plain.

The foundation of the rule being, as Lord Coke says that it is a

> rule and law of Parliament that regularly *nova constitutio*

non praeteritis "formam imponere debet," this practice of Parliament itself would seem to be an adequate justification for the practice of the courts in restricting the application of statutes to the future unless the intention that they are to have a wider effect is perfectly plain.

Decisions seemingly inconsistent with this principle may generally be explained as having proceeded from the view that either the subject matter or the circumstances of the legislation excluded the application of the consideration of justice and convenience upon which the practice of Parliament is based. In *Cornill* v.*Hudson*, (2), for example, the court had to decide the question whether section 10 of the Mercantile Amendment Act of 1856, providing that the limit of the Statute of James should not be extended- by reason of a person, in whom the right of action was vested, being at the time the cause of action accrued, beyond the seas or in prison. Lord Campbell in delivering the judgment of the Court said:—

> The intention was to prevent actions thereafter to be brought whether on past or future transactions. Does that tend to injustice? I see none. It only carries out what was probably the intention of the legislature, that persons should not, by merely remaining abroad, now that travelling is so easy and directions are so readily transmitted, be enabled indefinitely to prolong the time within which they may commence their actions. The period might extend to fifty years. Then

(1) 2 M. & W. 471. (2) [1857] 8 E. & B. 429.

as to imprisonment. An imprisonment of six years for crime is extremely rare in this country: persons might often commit the grossest injustice by remaining voluntarily in prison to keep alive the right of action. The legislature intended to prevent this vexatious prolongation of the right. I see no injustice in this intention, which may fairly be collected from the words of the 10th section.

On the other hand in *Jackson* v. *Wooley*, in 1858 (1), at pages 787-8, the Court of Exchequer Chamber held that section 14 of the same Act should not be applied in such a way as to deprive the plaintiff of a right of action existing at the time the statute was passed and the rule of construction laid down by Lord Cranworth then Rolfe B. in *Moon* v. *Durden* (2), at page 33, quoted above was approved. Lord Hatherley L.C., *Pardo* v. *Bingham* in 1869 (3), at page 740, seems to have thought that *Cornill* v. *Hudson* (4), had been overlooked by the judges who decided *Jackson* v. *Woolley* (1), but the report shews that *Cornill* v. *Hudson* (4), was cited before the Exchequer Chamber; and in *Williams* v. *Smith*, in 1859 (5), at pages 563-4, it was stated by Erle and Crompton JJ. that all the judges of the King's Bench (the judges who decided *Cornill* v. *Hudson* (4)) agreed with the opinion of the Exchequer Chamber and Crowdy J. explicitly adopted the passage quoted above from the judgment of Rolfe B. in *Moon* v. *Durden* (2). Singularly Lord Hatherley does not refer to *Williams* v. *Smith* (5).

West v. *Gwynne*, a decision of the Court of Appeal in 1911 (6), is another case in which the point of view exemplified by the judgment of Lord Campbell in *Cornill* v. *Hudson* (4) dictated the opinion of the Court and it was held that the general

(1) 8 E. & B. 778.
(2) 2 Ex. 22.
(3) 4 Ch. App. 735, 740.
(4) 8 E. & B. 429.
(5) 4 H. & N. 559.
(6) [1911] 2 Ch. 1

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words of a statute passed for the purpose of correcting a state of law lending itself to grave abuse should not be restricted for the purpose of enabling people to exercise their legal rights unreasonably or oppressively from the vantage ground of the *apex juris*. Emergency statutes passed during the war providing for the suspension of particular remedies and intended only to be measures of temporary duration (see *Welby* v. *Parker* (1)), have been held to apply to existing contracts and securities on the ground that the language was clear and that the object of the legislation would otherwise be defeated.

Now coming more precisely to the language of the statute before us, there is one peculiarity of it which brings it within the scope of judicial comment of high authority, namely, the fact that the words "shall be in writing" point to a writing to be brought into existence after the passing of the Act. Because of the corresponding language of the Statute of Frauds, Pratt B. said, in *Moon* v. *Durden* (2), at page 27, that the

> form of the condition on which the right to bring an action was made to depend imported that future agreements alone

were struck at; and Rolfe B. in his judgment delivered in the same case at page 36 expressed the opinion quite decidedly that the previous decision in *Towler* v. *Chatterton* (3), was open to criticism on the ground that the similar language in Lord Tenterton's Act

> points to a writing to be signed by the parties * * that is to future acts only.

And the form of this phrase appears to be a complete answer to the suggestion made by Mr. Arnoldi that the postponement of the date of the coming into

(1) [1916] 2 Ch. 1. (2) 2 Ex. 22.
(3) 6 Bing. 258.

operation of the statute is in itself a ground for thinking that it is to have a retrospective effect. As to this point, moreover, it could have little weight in relation to the bearing of the statute upon *negotia pendentia* in respect of which, of course, a cause of action might not accrue until after the date named.

I come now to the first mentioned ground upon which the appellant relies, the ground upon which Mr. Justice Middleton proceeded. Is this a statute predudicially affecting rights as contemplated by Lord Coke's canon or is it a statute relating to procedure only within the rule stated by Lord Penzance. The last mentioned rule rests upon the simple and intelligible reason stated by Mellish L. J. in *Republic of Costa Rica* v. *Erlanger,* in 1876 (1), at page 69, in these words:—

No suitor has any vested interest in the course of procedure, nor any right to complain if during the litigation the procedure is changed provided, of course, that no injustice is done.

True, in the application of this rule difficulties and differences of opinion frequently arise. In *Wright* v. *Hale,* (2), already referred to, it was held that a statute enabling a judge to deprive the plaintiff of costs in a case in which but for the statute he would have had an unqualified right to receive costs, was a statute relating to matter of procedure only (23-24 Vict. c. 126, s. 34); but in a subsequent case, *Kimbray* v. *Draper,* in 1868 (3), Cockburn C. J. and Blackburn J. used language indicating that in their view the decision in *Wright* v. *Hale* (2) was not a proper application of Lord Penzance's principle.

(1) 3 Ch. D. 62

(2) 6 H. & N. 227.

(3) [1868] L. R. 3 Q. B. 160.

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The rule, of course, does not imply that all new laws prejudicially affecting remedial rights are *prima facie* retrospective. Both Lord Penzance and Mellish L.J. used very guarded language, the former limiting the application of the rule to statutes which affect procedure alone and the latter excluding it where the effect of applying it would be to make the statute an instrument of injustice. It seems too obvious for argument that a statute declaring contracts enforceable by the usual method, (that is to say by action) for the breach of which either party may recover damages, to be no longer enforceable by action so that the parties have no longer any legally enforceable right under such contracts, is a statute which, if our language is to have any relation to the facts of the economic world, abrogates or impairs rights just as a statute taking away property does. A right in the legal sense, not only in the common language of men but in the language of common lawyers everywhere, connotes a right which the courts will protect and enforce by some appropriate remedy.

This may be illustrated by a reference to statutes giving or taking away a right of appeal. A right of appeal is, of course, a remedial right and the courts have had to consider frequently the question whether a statute giving or taking away a right of appeal should *prima facie* be construed as affecting the parties to pending litigation. If such statutes are to be regarded as regulating procedure only within the meaning of this rule, then prima facie their application would not be restricted to proceedings subsequently instituted. Speaking broadly, the courts have persistently refused to take this view of such statutes; they have almost uniformly been held not to

fall within the category of statutes relating to procedure only on the reasoning expressed in these words by Lord Macnaghten in *Colonial Sugar Refining Co.* v. *Irving* (1), at page 372.

> On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

There is however a group of authorities, which in this connection merits some discussion—cases relating to the construction of statutes dealing with the limitation of actions.

First, a word as to the decisions under the statute of William IV. The language of section 8 of 3 & 4, Wm. IV, ch. 27, was held to be retrospective. *Jukes* v. *Sumner*, in 1845 (2); *Angell* v. *Angell*, in 1846 (3). That section is declaratory in its terms and was said by Parke B. in the first mentioned of these cases speaking on behalf of the Exchequer Chamber to effect a "parliamentary conveyance." In Doe d. *Evans* v. *Page* (4) it was held by the Court of King's Bench that section 7 of the Act was not retrospective.

In *Towler* v. *Chatterton* (5), it was held that 9 Geo. IV, ch. 14 (Lord Tenterden's Act) prevented the plaintiff recovering in an action brought after the

(1) [1905] A.C. 369.
(2) 14 M. & W. 39.
(3) 9 Q.B. 328.
(4) 13 L. J. Q. B. 153.
(5) 6 Bing. 258.

passing of the Act based upon an oral promise made before the passing of the Act but six months after the cause of the action first accrued. The decision there rested upon the fact that an express provision of the statute postponed the operation of it for a period of seven months after the date of its passing and this provision, it was held, enabling plaintiffs to protect themselves by commencing their action before the Act should take effect removed all possibility of the mischief which the canon was intended to prevent. With this decision Rolfe B. disagreed. *Moon* v. *Durden* (1). The same kind of question arose in *The Queen* v. *Leeds and Bradford Rly. Co.* in 1852 (2), where the Court of Queen's Bench had to consider a statute imposing a limitation of six months in respect of certain proceedings before a justice of the peace which provided that the enactment should not come into force until the expiration of 7 weeks after its passing. The Court held the statute to apply to proceedings taken after the passing of the Act in respect of a ground of complaint which had arisen before; but Lord Campbell is reported to have said in giving judgment

> if it had been enacted that the provisions of the statute should come into operation immediately I should have said that there was a hardship in their being construed retrospectively and I should have been unwilling so to construe them.

Crompton J. added

> all the conditions of the enactment might be carried out without unjustly excluding any remedy for existing complaints.

Two decisions both reported in 8 E. & B. illustrate the manner in which the courts have dealt with such statutes. In *Jackson* v. *Woolley* (3), the Court of

(1) 2 Ex. 22. (2) 18 Q.B. 343.
(3) 8 E. & B. 784.

Exchequer Chamber had to consider the effect of sec. 14 of the Mercantile Amendment Act of 1856. The precise point to be determined was whether (payments having been made within six years before suit by a co-contractor of the defendant and before the passing of the Act) the effect of that action was to deprive the plaintiff of his right of action. The Court, (Williams J., Martin B., Willes J., Bramwell, B., Watson B., and Byles J.) held that such operation could not be given to that section without offending against Lord Coke's canon. The other case is *Cornill* v. *Hudson* (1) already discussed.

The combined effect of these two decisions apparently is that a statute dealing with the subject of time limit upon actions is not to be given a retrospective effect and is not to be applied in such a way as to deprive the plaintiff of a right of action which he had at the time when the statute was passed unless the court can clearly see from the provisions of the statute that such was intended to be the effect of it or unless the circumstances in which the statute was passed shew that no injustice of the kind struck at by Lord Coke's maxim would result from giving such operation to it. The last of the relevant authorities dealing with statutes on this subject is *The Ydun* (2) in which it was held that the Public Authorities Protection Act, 1893, (prescribing a time limit of six months for actions against public authorities and imposing a liability to costs as between solicitor and client upon the unsuccessful plaintiff in any such action) was an answer to an action commenced after the passing of the Act and after the expiration of the period of six months limited by the statute. The trial judge, Jeune P., seemed to think the language of the Act too clear to admit of the

(1) 8 E. & B. 429. (2) [1899] P. 236.

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application of any rule of construction but proceeded to say that it was a case of a statute relating to procedure and that, at all events, there was no hardship because of the fact that some weeks had elapsed between the passing of the Act and the date on which it was to come into force. In the Court of Appeal A.L. Smith L.J. and Vaughan Williams L.J., treated the Act as an act dealing with procedure only and therefore retrospective. Romer L. J. expressed the opinion that the Act was retrospective but gave no reasons for his opinion.

With great deference, it is questionable, I think, whether the judgments in this case are of such a character as to afford any real guide for the interpretation of another statute in so far as they profess to lay it down that an Act attaching a time limit to the assertion of rights of action is within the rule an enactment relating to procedure only. Such a proposition is difficult to reconcile with *Jackson* v. *Woolley* (1), and it was not competent to the Court of Appeal in 1899 to overrule a decision of the Court of Exchequer Chamber in 1858. I am not suggesting that the decision in 1899 was an erroneous decision or that the Court of Exchequer Chamber would have decided that case otherwise. I am inclined to think that the language of the Public Authorities Protection Act points very clearly to an intention that the Act should apply to existing causes of action as well as to causes of action arising after the passing of the Act. But the judgment in the later case cannot, in face of *Jackson* v. *Woolley* (1), be regarded as satisfactorily establishing the general proposition that such statutes are to be regarded as statutes dealing with procedure only and therefore *prima facie* retrospective.

(1) 8 E. & B. 784.

But a complete answer to all the reasoning based upon these decisions touching legislation upon limitation of actions is afforded by the decisions on the 4th section of the Statute of Frauds. The language of the statute now under consideration, so far as relevant to the present question, reproduces the language of that section almost *ad verbum*; and if a decision upon one statute can ever be a conclusive authority for the construction of another statute these decisions upon the Statute of Frauds if not overruled would appear conclusive here. Of these there are two: *Helmore* v. *Shuter* (1), and *Ash* v. *Abdy* (2). The first is a decision of the Court of King's Bench, the second of Lord Nottingham L.C. Both were decided in 1678. The second is never cited and its value as an authority, for the reasons given by Lord Campbell in the well known passage in vol. 4, Lives of the Chancellors, p. 271, may be slight. But no such doubt rests upon the decision of the King's Bench. In *Moon* v. *Durden* (3), *Helmore* v. *Shuter* (1) was accepted expressly by three of the judges, Platt, Rolfe and Parke BB., as being unquestionably a sound decision. And Rolfe and Parke BB. explicitly treated it as an example of the application of the rule that *prima facie* statutes are to be construed as prospective, which indeed is the ratio upon which the decision was in terms put by the Court that pronounced it. It was accepted as not open to dispute that the rights of promisees would be prejudiced if the statute were held to relate to past promises. The view which appears to have decided Mr. Justice Middleton in declining to apply the principle of these decisions is that the authority of them disappears in

(1) 2 Shower 17.
(2) 3 Swanston 664.
(3) 2 Ex. 22.

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consequence of the distinction which in modern times has been drawn between statutes directly invalidating contracts and statutes forming part of the *lex fori* as only affecting remedial rights; and the learned judge considers that because the effect of a statute is only to bar the

legal remedy by which a contract might otherwise have been enforced

without directly invalidating the contract, it should for the present purpose be regarded as a statute relating to procedure only. The view of the 4th section which was taken in *Leroux* v. *Brown* (1) is that while contracts affected by it are not immediately vacated, the courts are prohibited from enforcing them, in other words, the right of action is taken away; this distinction was held to be sufficient to support the conclusion that the statute was a part of the *lex fori*. Upon that point the soundness of the decision has been doubted by at least one very eminent judge; see judgment of Willes J. in *Gibson* v. *Holland*, in 1865 (2), at page 8 and 1 *Smith's Leading Cases*, 5th ed., p. 272, and *Williams* v. *Wheeler*, in 1860, (3), at page 312.

It is quite clear, nevertheless, as Middleton J. says, that the rule of *Leroux* v. *Brown* (1), that the 4th section of the Statute of Frauds governs the proceedings on contracts in suit before an English court wherever made, is accepted law. *Maddison* v. *Alderson*, in 1883 (4), and *Morris* v. *Baron* (5). And it is quite true, also, that Lord Blackburn in *Maddison* v. *Alderson* (4), seems to say that the effect of the 4th section of the Statute of Frauds is only to prescribe certain indispensable evidence "when it is sought to

(1) 12 C.B. 801.
(2) L.R. 1 C.P. 1.
(3) 8 C.B.N.S. 299.
(4) 8 App. Cas. 467.
(5) [1918] A.C. 1.

enforce the contract." It may be doubted whether Lord Blackburn was for the moment adverting to the decisions in which (as Willes J. observed in *Williams* v. *Wheeler* (1), at p. 312, and in *Gibson* v. *Holland* (2) at p. 9, it had been held that the existence of the memorandum at the time of the commencement of the action is a condition of the right to sue, a rule as Lindley L.J. said in *In re Hoyle* (3), at page 97, is "founded upon the words of the statute;" and Lord Selborne, at all events, at p. 474 ascribes to the statute the wider effect of "barring the legal remedies" which but for the statute might have been available.

I will not repeat what I have said above in answer to the contention that a statute abrogating a right of action which otherwise a party to a contract might have asserted is not a statute prejudicially affecting an "existing legal right or status" but an enactment relating merely to procedure. With great respect, I think for the reasons mentioned it is one thing to affirm that a statute is a part of the *lex fori* but to conclude that it is consequently retrospective as relating to procedure only involves a *non sequitur*. The appeal ought therefore to be dismissed.

But I am unable to concur with the view of the majority of the Court that the judgment of the court below is the right judgment. The appeal from the judgment of Middleton J. ought, in my opinion, to have been allowed and the defendant's motion to dismiss the action dismissed with costs.

Two paragraphs in the judgment of Mr. Justice Riddell give the grounds upon which the Appellate Division proceeded:—

(1) 8 C.B.N.S. 299. (2) L.R. 1 C.P. 1.
(3) [1893] 1 Ch. 84.

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In the view I take of the case the statutes have no bearing: the case has not been placed on the right basis. The real action is not to recover commission at all. Admittedly commission cannot be recovered under the contract between the parties and on its terms, for the money has not been received by the defendant, and therefore it is not payable to the plaintiff on the terms of the contract. *Adlar* v. *Boyle* (1). The real cause of action is damages for breach of the implied agreement on the part of the defendant not to do anything to prevent the payment by the purchaser of the purchase money out of which the plaintiff was to receive his commission. I place this duty on a minimum basis when so expressing it,

The statement of claim alleged facts giving rise to a cause of action at least for damages on the principle stated by Willes J. in *Inchbald* v. *Western Neilgherry Coffee &c. Co.*, in 1864 (2), in a passage cited with the approval of the Judicial Committee in *Burchell* v. *Gowrie & Blockhouse Collieries, Ltd.*, (3), at page 626 in the following words:—

> I apprehend that whenever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it;

and I have no doubt that the facts disclosed in the statement of claim *prima facie* establish the right of the plaintiff to have the damages measured by the commission he would have been entitled to receive had the business proceeded to its conclusion in the ordinary course. See per Lord Atkinson, *Burchell* v. *Gowrie* (3), at page 626.

I do not discuss the question whether the statement of claim does or does not disclose a cause of action for the commission itself. I think that may be an arguable question; see the judgment of Lord Watson, *Mackay* v. *Dick*, in 1881 (4), at page 270, in addition to the judgment of Willes J. in the case already cited.

(1) 4 C.B. 635.
(2) 17 C.B.N.S. 733.
(3) [1910] A.C. 614.
(4) 6 App. Cas. 251.

I do not pursue the point, it is enough to say the statement of claim (whose function it is not to cast the plaintiff's right of action into formal legal shape but to state the constitutive facts giving rise to the right upon which he relies and to formulate the relief he demands), does state facts constituting a good cause of action and does ask for relief to which, as I have said, he is *prima facie* entitled, namely, the recovery of a sum equivalent to the amount of the commission to which he would have been entitled had matters proceeded in their normal course. True it is commission is claimed as commission and no doubt, if the view of the Court of Appeal be the right one, namely, that a right of action for the commission as such does not arise out of the facts stated, this in that view was not strictly accurate pleading; but there was a claim for "further and other relief" and, with all due respect, I am unable to perceive upon what ground it could be successfully contended that this claim for "further and other relief" would not embrace a claim for the amount of the commission as damages.

We have not been referred to the particular rule in the Ontario Rules of Procedure but no doubt under the Ontario practice as in the other judicature systems a prayer for further or other relief was unnecessary, the court having full power to grant such relief as it might deem to be just in addition to the specific relief claimed, this power being limited by two conditions as Fry J. said in *Cargill* v. *Bower*, in 1878 (1), at page 508, 1st, that the plaintiff is entitled to such relief upon the facts alleged and 2nd, that it is not inconsistent with the relief specifically prayed. It is unnecessary to point out that no such inconsistency

(1) 10 Ch. D. 502.

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could be suggested as between the claim for commission as commission on the principle stated by Willes J. and a claim for damages measured by the amount of the commission which the plaintiff ought to have been allowed to earn. In *Inchbald's Case* (1), the plaintiff claimed payment of the commission as such and the court held that he was entitled not to the full amount of the commission but to the amount which, making allowance for the chances against him, it was probable he would have earned but for the conduct of the defendants.

But apart from all this, I cannot refrain from observing that the defendant's proceeding was a proceeding taken under consolidated rules 122 and 123, and that the point of law raised under the first mentioned rule was strictly limited to this, namely, that the statute was an answer to the action, and that the proceeding before Mr. Justice Middleton was a proceeding taken by consent for the purpose of having that specific question decided under that rule. And indeed as one might have expected in these circumstances the only point raised before Mr. Justice Middleton and the only point dealt with by him, indeed, the only point raised by counsel for the defendants prior to the judgment of the Appellate Division was that specific point.

I assume that, in the proceeding under rule 122, a judge might (according to the Ontario practice) have power to dismiss an action on the ground that the statement of claim disclosed no reasonable cause of action; but that is a power which could not properly be exercised where the facts stated in the statement of claim did disclose a cause of action however inappro-

(1) 17 C.B.N.S. 733.

priate the relief demanded might be unless it should appear that the action was brought solely for the purpose of obtaining some relief which the court had no power to grant, as in *Dreyfus* v. *Peruvian Guano Co.* in 1889 (1).

ANGLIN J.—A curious situation is presented by this appeal. The action is brought on a contract made in 1913, to recover commission on a sale of land. The facts stated (2), disclose rather a cause of action for damages for breach by the defendant of an implied term of the contract sued upon whereby it made the coming into existence of the state of facts on which the plaintiff would have been entitled to payment of the commission sued for impossible. Amongst other defences section 13 of the Statute of Frauds (R.S.O., c. 102), first enacted by 6 Geo. V, c. 24, s. 19, assented to on the 27th of April, 1916, and amended by 8 Geo. V, c. 20, s. 58, was pleaded. That provision is as follows:—

> No action shall be brought to charge any person for the payment of commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing (separate from the sale agreement) and signed by the party to be charged therewith or some person thereunto by him lawfully authorized. This section shall come into force on the 1st day of January, 1917.

The words which I have put in brackets were added by the amendment of 1918.

The applicability of this statutory provision was brought before Mr. Justice Middleton for determination as a point of law, under Ontario Con. R. No. 122. That learned judge, while fully recognizing the general rule excluding retrospective construction,

(1) 41 Ch. D. 151. (1) 47 Ont. L.R. 37; 48 Ont. L.R. 120.

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(*Gardner* v. *Lucas*, (1), at page 601), on the authority of *Towler* v. *Chatterton* (2), and *Grantham* v. *Powell*, (3), held the statute applicable, notwithstanding that the plaintiff was thereby deprived of a right of action, complete or accruing, existing when it was enacted. *Moon* v. *Durden* (4), and *Gillmore* v. *Shooter* (5), had been relied on by the plaintiff. The learned judge distinguished the former on the ground that by the statute there in question the contracts affected by it were declared null and void, and the latter he held in effect over-ruled by the distinction made in *Leroux* v. *Brown* (6), between statutes which avoid contracts and those that have to do merely with the enforcing of them by action. The statute now before us, says the learned judge,

bars the legal remedy by which the contract might otherwise have been enforced, and so affords an answer to this action not by any retrospective effect but because it speaks from its date and prohibits the action.

He accordingly directed judgment dismissing the action.

On appeal the Second Divisional Court of the Appellate Division made an order setting this judgment aside and allowing the plaintiff to amend his statement of claim within a stated period, but in default of such amendment being made confirmed the dismissal of the action. The amendment contemplated, as appears from the principal judgment delivered by Mr. Justice Riddell, and concurred in by Clute J., and *sub modo* by Sutherland J., was the substitution of the claim for damages, above indicated, for that to recover commission which, it was thought, must fail because the conditions on which the commission claimed would have become payable (through whose fault is not material) had not been realized.

(1) 3 App. Cas. 582.
(2) 6 Bing. 258.
(3) 10 U.C.Q.B. 306.
(4) 2 Ex. 22.
(5) 2 Mod. 310.
(6) 12 C.B. 801.

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The making of this order would seem to imply that the Divisional Court, or at least a majority of the judges composing it, held the view that although the statute invoked would afford a defence to the action as presented it would not be an answer to it if amended as suggested. That was certainly the opinion of Mr. Justice Sutherland, who expressly states his agreement with Middleton J., and, unless it was shared by the learned Chief Justice of the Exchequer Division and Mr. Justice Masten, inasmuch as they also agreed with Mr. Justice Middleton, I find it difficult to understand their concurrence in the order allowing the plaintiff to amend.

Counsel for the respondent, however, stated, with the assent of counsel for the appellant, that Mr. Justice Riddell had subsequently intimated that in his opinion the statute was not applicable to the action in either form. That may be what the learned judge meant when he wrote

in the view I take of the case the statutes have no bearing; the case has not been placed on the right basis.

Counsel for the respondent contended that section 13, if applicable at all, would afford the same defence to the action whether amended as proposed or as originally framed. With great respect for the learned judges of the Divisional Court who appear to have thought otherwise, I share that view. Both actions are based on the contract for payment of commission. Both alike require proof of it in support of the claim made. That proof under the statute, if it applies, must be made in writing and if such evidence be lacking any remedy by action is taken away.

Counsel for the respondent (plaintiff) then stated that the determination of the issue as to the applicability of the statute to the action in either form is

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what his client really desires. But he omitted to give notice of intention to cross-appeal, as prescribed by our rule No. 100, from the portion of the judgment of the Divisional Court which directs the dismissal of the action in default of the amendment allowed being made.

On the other hand the only part of that judgment from which the defendant can appeal is that setting aside the judgment of Middleton J. and allowing the plaintiff to amend. In so far as that order may be regarded as discretionary an appeal from it does not lie. But if the action, in the form which the Divisional Court proposes it should take, would be equally open to the statutory defence invoked by the defendant, the order allowing the amendment could scarcely be upheld as an exercise of discretion. There can be no discretion to direct a futile amendment. It should be assumed that the amendment was allowed only because in the opinion of the court, or a majority of its members, the statute would not preclude the action so amended being maintained. On the questions whether the statute applies to an action based on a pre-existing contract and if so whether the claim, if amended as proposed, will be equally within its purview with that originally preferred, the defendant's appeal may be entertained and, the purpose of a cross-appeal by the plaintiff being thus attained, it probably becomes unnecessary to accede to his request for a dispensation from R. 100.

I am, with great respect, of the opinion that the rule against the retrospective construction of statutes, which is fundamental in English law, *Lauri* v. *Renad* (1), at page 421, applies to this case. In the first place, section 13 of the R.S.O., ch. 102,

is not retrospective by express enactment or by necessary intendment

(1) [1892] 3 Ch. 402.

On the contrary the words

> unless the agreement shall be in writing

point rather to future contracts than to those already made. See observations of Baron Platt in *Moon* v. *Durden* (1), at page 30. The negative implication in section 5 of the Interpretation Act should also not be overlooked.

The language of section 13 is the same as that of the fourth section of the Statute of Frauds—

> No action shall be brought (whereby) to charge any person, etc., unless, etc.

We have in *Ash* v. *Abdy* (13th June, 30 Car. 2) (2), the view of Lord Nottingham (who states that "he brought the Bill into the Lords' House") that the Statute of Frauds (29 Car. 2) did not apply to an action which though begun after, was brought on a contract made before, its enactment. His Lordship overruled a demurrer based on the statute. It is no doubt to *Gillmore* v. *Shooter* (3) (30 Car. 2, Trin.) that Lord Nottingham refers as

> another case in the King's Bench this very term where the same point being specially found was likewise adjudged upon argument.

It was there held that

> it could not be presumed that the Act has a retrospect to take away an action to which the plaintiff was then intituled.

Lord Nottingham naively adds

> which I was glad to hear of, but said, if they had adjudged it otherwise, I should not have altered my opinion.

Gillmore v. *Shooter* (3) has never been overruled. It is cited in many later cases without a question or adverse comment (e.g., *Re Athlumney* (4), at page 552),

(1) 2 Ex. 22.
(2) 3 Swanst. 664.
(3) 2 Mod. 310; Jones T. 108.
(4) [1898] 2 Q.B. 547.

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and is referred to as authority in such standard text books as Maxwell on Statutes, 6 ed., 384; Craies' Hardcastle on Statutes, 2 ed., 348, and Potter's Dwarris on Statutes, 163; see too 27 Hals. L. of E., No. 305. We thus have that "*contemporanea expositio*" which the oft quoted maxim declares to be "*optima et fortissima in lege.*" (Maxwell, 6 ed., pages 531 *et seq.*)

It was as an addition to the Statute of Frauds, incorporated in the R.S.O. 1914 as c. 102, that the legislation now under consideration was enacted. The same form of words is used as is found in what is perhaps the most important provision of the principal Act. It is not unreasonable to assume, notwithstanding section 20 of the Interpretation Act, that these words were intended to bear the same meaning. *Casgrain* v. *Atlantic & North Western Rly. Co.* (1). At all events the construction put upon the like words used elsewhere in the same statute is perhaps the safest guide to their construction in section 13 (*Blackwood* v. *the Queen* (2); *Cox* v. *Hakes*, in 1890 (3); and authorities dealing with them should be followed rather than decisions upon the language of other Acts however close the resemblance. I therefore abstain from examining numerous decisions upon other statutes in which the same construction as prevailed in the Gillmore and Ash cases was put upon provisions somewhat similar to that of the fourth section of the Statute of Frauds. A collection of them will be found in 27 Hals. L. of E. No. 305, note h.

Towler v. *Chatterton* (4), and *Grantham* v. *Powell* (5), cited by Mr. Justice Middleton, deal with Lord

(1) [1895] A.C. 282, 300.
(2) 8 App. Cas. 82, 94.
(3) 15 App. Cas. 506, 529.
(4) 6 Bing. 258.
(5) 10 U.C.Q.B. 306.

Tenterden's Act, the latter merely following the former. Of *Towler* v. *Chatterton* (1), Baron Rolfe says in *Moon* v. *Durden* (2), at page 36, that

> It is worthy of remark that Lord Tenterden's Act points to a writing to be signed by the parties—that is, to future Acts only; and consequently the decision giving to that section a retrospective effect was not a just one even if in conformity with the most narrow construction of its language.

Some observations on one of the chief factors in the decision of the Towler and Grantham cases will be found in *Re Athlumney* (3), at p. 553.

While *Moon* v. *Durden* (2) may not aid the respondent as much as it would if the action there dealt with had not been begun before the statute came into force, it is of value because *Gillmore* v. *Shooter* (4), is cited by Barons Platt, Rolfe and Parke as authority on the construction of the Statute of Frauds. Baron Parke certainly did not regard the second member of the section of the Gaming Act under consideration in that case—

> no suit shall be brought or maintained in any court, etc.—

as an enactment merely affecting procedure, because he thinks (p. 44) that if it stood alone it would not apply to pending actions. The case of *Knight* v. *Lee* (5), dealing with a similar provision of the Gaming Act of 1892, may also be referred to. Bruce J. there says at page 44,

> Here the plaintiff had a vested right of action acquired before the statute came into force and it cannot be supposed that the statute was intended to take such right away.

(1) 6 Bing. 258.
(2) 2 Ex. 22.
(3) 2 Q.B. 547.
(4) 2 Mod. 310.
(5) [1893] 1 Q.B. 41.

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When carefully considered the foundation of Mr. Justice Middleton's judgment holding the section now under construction applicable to the present action, seems to be that it falls within the exception made, in the case of statutes dealing with procedure, to the general rule prohibiting retrospective construction. The learned judge in his reference to *Leroux* v. *Brown* (1), indicates that he thought the effect of that decision was to bring the fourth section of the Statute of Frauds within that exception. What *Leroux* v. *Brown* (1) actually decided was that as a provision dealing with and affecting merely the remedy for, and not the right created by a contract, the fourth section of the Statute of Frauds forms part of the *lex fori* and as such is applicable to all actions brought in English courts to enforce contracts within its purview wherever made. No doubt Chief Justice Jervis does say that the fourth section "relates only to procedure," but he uses the word procedure in contradistinction to "the right and validity of the contract itself" and probably meant no more than that it formed part of the adjective law In the same sense Maule J. says:

> It is part of the procedure and not of the formality of the contract;

and Talfourd J.

> That section has reference to procedure only and not to what are called by jurists the rights and solemnities of the contract.

"Procedure" in the exception to the rule of construction under consideration is used in a more restricted sense. It has to do with the method of prosecuting a right of action which exists, not with the taking away of such right of action. As Lord Hatherly observes in *Pardo* v. *Bingham* (2), at page 741, referring to section 10 of

(1) 12 C.B. 801. (2) 4 Ch. App. 735.

the Mercantile Law Amendment Act (19 & 20 Vic., ch. 97) which did away with the disability of absence overseas as an answer to the Statute of Limitations (21 Jac. 1, ch. 16).

There is a considerable difference between this case and a case where the right of action is actually taken away.

Although statutes creating new remedies have sometimes been held available to enforce rights which had accrued before they were enacted, *The Alex Larsen*, (1), at page 295; *Boodle* v. *Davis* (2), it is a very different thing to hold that a statute has, in the absence of express provision or necessary intendment, the effect of destroying an existing right of action. The taking away of a right of action is more than mere procedure and a statute which has that effect is *prima facie* within the general rule and not within the exception.

In dealing with Acts of Parliament which have the effect of taking away rights of action,

says Baron Channell in *Wright* v. *Hale* (3), at page 231,

we ought not to construe them as having a retrospective operation, unless it appears clearly that such was the intention of the legislature; but the case is different where the Act merely regulates practice and procedure;

and Baron Wilde adds:

The rule applicable in cases of this sort is that, when a new enactment deals with rights of action, unless it is so expressed in the Act an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act.

This passage from the judgment of Baron Wilde is expressly approved in *The Ydun* (4), at page 245.

(1) 1 W. Rob. 288.
(2) 22 L.J. Ex. 69.
(3) 6 H. & N. 227.
(4) [1899] P. 236.

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The thirteenth section under consideration prohibits the bringing of an action. Therefore, if retrospective, it takes away the right of action itself. It does more than prescribe

what evidence must be produced to prove particular facts,

which Pollock C.B. in *Wright* v. *Hale* (1) describes as a matter of procedure merely. It does not merely regulate the method or the means of enforcing the remedy; it takes the remedy wholly away. This subject is satisfactorily dealt with in Hardcastle on Statutes (Craies, 2 ed.), pages 343-355.

When it is borne in mind that statutes excepted from the application of the general rule because they deal with procedure are held to apply to pending actions unless the contrary intention appears, *R E Joseph Suche & Co., Ltd.*, (2), the decisions with regard to the operation of statutes taking away rights of appeal appear to be in point. Of these perhaps *Colonial Sugar Refining Co.* v. *Irving* (3), may best be referred to. The right to appeal from the Supreme Court of Queensland to His Majesty-in-Council given by the Order-in-Council of June 30th, 1860, was taken away by the Australian Commonwealth Judiciary Act of 1903 and an appeal to the High Court of Australia substituted therefor. This legislation was held not to affect the right of appeal to the King in Council in a suit pending when the Act was passed, but decided by the Supreme Court afterwards. Lord Macnaghten after adverting to the general rule and the exception and to the fact that

the Judiciary Act is not retrospective by express enactment or necessary intendment,

proceeded as follows:—

(1) 6 H. & N. 230. (2) 1 Ch. D. 48, 50.
(3) [1905] A.C. 369.

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And therefore the only question is, was the appeal to His-Majesty-in-Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure * * * . There is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

The same view had prevailed in this court in *Hyde* v. *Lindsay* (1), and their Lordships' decision was followed and applied in *Doran* v. *Jewell* (2). If the right to appeal be a right of such a character that its abolition is not a matter of procedure, *a fortiori* the taking away of an existing right to bring an action would seem to be so and the construction of section 13 involving that result

an interference with existing rights contrary to the well-known general principle.

As Baron Parke said in *Moon* v. *Durden* (3), at page 43:

It seems a strong thing to hold that the legislature could have meant that a party who under a contract made prior to the Act had as perfect a title to recover a sum of money as he had to any of his personal property should be totally deprived of it without compensation.

I am for these reasons of the opinion that section 13 of the Statute of Frauds, R.S.O., ch. 102, does not apply to this action either as originally framed or as it is proposed that it should be amended.

Rule 122, under which the proceeding now in appeal was instituted by consent, provides for the disposition before the trial of points of law raised on the pleadings. It is common ground upon the pleadings that

(1) 29 Can. S.C.R. 99. (2) 49 Can. S.C.R. 88. (3) 2 Ex. 22.

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the defendants have received only $244,000 (in payment in full for one parcel) of the purchase moneys payable under the agreement for sale in respect of which commission is claimed by the plaintiff and that the plaintiff has been paid $6,100, which exceeds the proportion of commission payable to him in respect of the moneys so actually received by the defendants. It is also common ground that as to the rest of the property the agreement for sale has been rescinded by mutual consent of vendor and purchaser. By the third paragraph of the statement of claim the plaintiff avers that the sum of $25,000 which he was to receive as a commission for affecting the sale, was made payable proportionately as the purchase money for the property should be paid. An issue of law is thus presented involving the plaintiff's right to maintain this action in the form in which it was launched, i.e., to recover the balance of the $25,000 commission. If of the opinion that the position taken in the defence, that under the stipulation of the contract admitted in the third paragraph of the statement of claim, commission cannot be recovered on unpaid purchase money, is sound, it was within the discretion of the Appellate Divisional Court, instead of dismissing the plaintiff's action because upon the facts stated by him it was wrongly conceived, to permit an amendment of the statement of claim. The exercise of that discretion, as already stated, is not a proper subject of appeal to this court. But, in so far as it may be appealable by the defendant I should incline to support the order made. I should have thought the allowance of such an amendment under the circumstances almost a matter of course in modern practice. There is no appeal by the plaintiff against the holding that he had misconceived his remedy.

I am by no means so well satisfied, however, that, as Mr. Justice Riddell puts it,

> the amount of money he (the plaintiff) would have received had the defendants not broken their implied contract with him, will give a very satisfactory measure of damages.

In the third paragraph of the statement of defence it is alleged that it was expressly stipulated and agreed by the plaintiff that in the event of the contract of sale being rescinded as to any portion of the lands embraced in it for any cause whatever, all right and claim of the plaintiff to commission in respect of such lands should be thereby determined and the contract therefor rescinded. This allegation is denied in the reply. The existence of the implied term of which the breach would be alleged in the action, if amended as proposed, is thus in issue. Moreover, other circumstances beyond the control of the defendants might have resulted in the purchase moneys not being paid in full. In this connection reference may be had to the recent decision of this court in *Gold* v. *Stover* (1), But these are questions with which we are not presently concerned. They will have to be considered when the action comes to trial.

The appeal should be dismissed with costs.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—If the construction of the 13th section of the Statute of Frauds, R.S.O. 1914, ch. 102, added by 6 Geo. V, ch. 24, as amended by 8 Geo. V, ch. 20, be still open to us, in view of the decisions under section 4, my opinion would be that this section

(1) 60 Can. S.C.R. 623, 632.

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does not apply to actions brought after the statute on agreements for the payment of a commission on the sale of real property made before its enactment and which, before this statute, did not require to be in writing. This section reads as follows:

> No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

If the question of the meaning of this provision be not concluded by authority, I would have no hesitation in saying that, in my opinion, it applies to subsequent agreements only. The language of the statute clearly shows this.

> No action *shall* be brought * * * unless the agreement * * * *shall* be in writing.

I cannot conceive this language being applied to prior agreements, for if that had been the intention, the natural language would be "unless the agreement *is* in writing." The word "shall" refers to the future, and is used in connection with both the bringing of the action and the form of the agreement. If saying that the agreement *shall* be in writing means past as well as future agreements, then stating that no action *shall* be brought unless the agreement *shall* be in writing would bar actions validly brought before the amendment but not decided at the time it came into force. Therefore if the appellant's counsel be right in applying the 13th section to an agreement made before, where the action is brought after, the statute, he would also be right in extending it to actions brought before the statute on a parol agree-

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ment for commission, where the action was still pending at the time of the enactment, that is to say to pending cases. I cannot think that such was the intention of the legislature.

This is my reading of the statute if its construction be still open to us. My brother Anglin has shewn that it is still open, his quotation of the words of Lord Nottingham in *Ash* v. *Abdy* (1), being especially illuminating. It is with considerable satisfaction, therefore, that I concur in my learned brother's judgment.

I also agree that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Arnoldi & Grierson.*

Solicitors for the respondent: *Lawrence & Dunbar.*

(1) 3 Swanst. 664.

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L. L. FULLER (PLAINTIFF).........APPELLANT;

AND

L. GARNEAU (DEFENDANT)........RESPONDENT.

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

Sale—Sale of land—Agreement—Reservation of mines and minerals to Crown—Implied powers—Whether greater than those expressly reserved in Crown grant.

The reservation, in a Crown grant, of the mines and minerals "with full power to work the same and for this purpose to enter upon and use or occupy the * * * lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals * * * " confers greater powers than those implied in a bare reservation in an agreement for the sale of the land so granted of "all mines and minerals." Sir Louis Davies C.J. and Idington J. dissenting.

Per Duff, Anglin and Mignault JJ.—The terms of both reservations imply the right to win, get at and take away the minerals; but the terms of the reservation in the Crown grant may imply furthermore the right to cause subsidence or destruction of the surface.

Judgment of the Appellate Division (15 Alta. L.R. 194) reversed, Sir Louis Davies C.J. and Idington J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Scott J. (2) and dismissing the appellant's action.

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

(1) [1920] 15 Alta. L.R. 194; [1920] 1 W.W.R. 619.

(2) [1920] 1 W.W.R. 154.

The appellant is the purchaser from the respondent of certain lands under an agreement of sale "reserving unto His Majesty, His successors and assigns, all mines and minerals." Later on, the appellant discovered by a search made in the Land Titles Office that the reservation of mines and minerals in favour of the Crown was not in the terms as represented by the respondent; and alleging that it was a much more complete reservation, he claimed rescission of the agreement of sale.

J. R. Lavell for the appellant.

C. H. Grant for the respondent.

THE CHIEF JUSTICE (dissenting).—The single and only question which arises on this appeal for us to determine is whether the words of the reservation in the Crown grant are greater than, or different from, the words in the agreement of sale from the defendant respondent to the plaintiff appellant.

The words in the latter agreement are

reserving unto His Majesty, his successors and assigns, all mines and minerals.

The reservation in the Crown grant is as follows:—

Reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under such lands together with full power to work the same and for this purpose to enter upon and use or occupy the said lands or so much thereof or to such an extent as may be necessary for the effectual working of the said minerals, pits, seams and veins containing the same.

After reading the authorities cited by the counsel at bar to sustain their respective contentions, I am of the opinion that the appeal fails.

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I think that Mr. Justice Ives, who delivered the judgment of the Appellate Division, correctly stated the question at issue, in his reasons for judgment, as follows:—

> Do the words in the Crown grant enable more extensive colliery operations to be carried on to get (or win) the minerals than do the words used by the defendant vendor in the agreement, extended by legal implication?

And he answered that question, I think, correctly when he said he thought they did not.

The full reservation merely adds to the reservation of the mines and minerals

> the full power to work the same and for this purpose to enter upon and use

so much of the lands and to such an extent as may be necessary for the "effective working of the minerals" or the mines, etc.

I cannot doubt under the authorities that these express powers are impliedly and necessarily contained in the simple reservation of the mines and minerals and that they do not extend or enlarge these implied powers which are essential to give efficacy to the reservation.

See per Bayley, in *Cardigan* vs. *Armitage* (1), and Lord Wensleydale in *Rowbotham* vs. *Wilson* (2); *Duke of Hamilton* vs. *Graham* (3),

We are not called upon to decide upon the respective rights of the mine owners under these reservations as against the surface owner, and, of course, do not do so. Whether or not they carry the right as against the surface owner to cause subsidence of the soil it is not either necessary or desirable on the facts

(1) [1823] 107 E.R. 356. (2) [1860] 8 H.L.Cas. 348.
(3) [1871] L.R. 2 Sc. App. 166 at p. 171.

before us to determine. That question is certainly a difficult and a delicate one and should only be dealt with, where necessary to determine, on the facts as found in each case. I do not, in the present appeal and on the facts as they appear in the record, feel called upon or justified in expressing any opinion on that question.

I simply determine that, in my opinion, the two reservations mean the same and that the implied powers arising in the one are equivalent to the express powers given in the other. But whether they give the right to cause subsidence as against the surface owner I leave for determination when a case actually involving that question arises and all the facts necessary to decide it are before the Court.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—If the language used upon which it is attempted herein to rest a charge of fraudulent misrepresentation, is only applied in a common sense way, having regard to what I suspect is common knowledge on the part of every one dealing in real estate in Alberta, it would mean, to him to whom it was addressed there, exactly what the language of the reservation in a Crown grant expresses, when the title rests upon that with the reservation therein of mines and minerals.

I must be permitted to doubt if it took seven years on the appellant's part to discover this in face of such a falling market as ensued.

The ground of delay not having been expressly taken and argued out by reason of the narrow limitations of the direction of trial as presented to us, I need not pursue that phase of the question of delay.

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But the pleadings shew that the agreement of purchase which appellant accepted pursuant to such alleged misrepresentation, contained an express provision for the appellant purchaser getting a deed of conveyance pursuant thereto, subject to the conditions and reservations in the original grant from the Crown. That is all he is entitled to get and surely it embraces such a well-known common reservation of mines and minerals in the form now in question.

The cases relied upon by the appellant, in his factum, to overcome this express feature of the contract in question, do not seem to touch its force and efficacy as a complete answer to the pretension of misrepresentation and fraud as specified by appellant's pleadings set up as the fundamental part of his case.

The cases so cited and relied upon are the well-known cases of *Venezuela Co.* v. *Kisch* (1); *Redgrave* v. *Hurd* (2), and *Rawlins* v. *Wickham* (3).

And besides in their essential features of fraud or misrepresentation going far beyond anything pleaded herein, the first named shews how prompt action is required and delay may be inexcusable and destructive of such a claim.

There is in short no fraud or misrepresentation herein, if the pleadings are to be read as a whole, as the factums seem to indicate. We have in the case no copy of the order directing what is to be disposed of, but no doubt that in the record and the recognition by each factum of what is involved, may be taken as our guide to the limitations thereof.

(1) [1867] L.R. 2 H.L. 99. (2) [1881] 20 Ch. D. 1.
(3) [1858] 44 E.R. 1285.

I may be permitted to say that it does not seem to me at all necessary to rely upon some of the decisions cited in support of the judgment appealed from, and thereby impliedly to assume that the reservation in the Crown grant means, in every case, exactly what many of the decisions cited seem to imply in regard to subsidence of the surface, for they were, in many instances, by the consideration of a course of legal and judicial history which ultimately may not be found exactly to fit all the conditions leading to what was intended to be expressed in the reservations in the Crown grants for land in our North West provinces; especially when coal, for example, forms part of that very surface in question which inevitably must subside when such coal is taken.

It seems better to avoid putting, impliedly, an interpretation, or construction of the Crown reservation which I hold must have been, or should have been, from the foregoing considerations, presented to the mind of appellant.

The appeal should be dismissed with costs.

DUFF J.—The point of law to which the Appellate Division directed its attention is stated in the judgment of Mr. Justice Ives:—

The plaintiff is the purchaser from defendant of certain lands, under an agreement of sale "reserving unto His Majesty, his successors and assigns, all mines and minerals."

The full reservation of the Crown grant is in the following words:—

Reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under such lands together with full power to work same and for this purpose to enter upon and use or occupy the said lands or so much thereof or to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same.

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The issue is whether the words used in the Crown grant confer a wider power on the owner of the mines and minerals over the surface, than the words in the agreement, which admittedly are extended by the implied right to the mineral owner to enter upon the surface and dig for, get and carry away the minerals. Or perhaps we might put the issue thus: Do the words of the Crown grant enable more extensive colliery operations to be carried on to get the minerals than do the words used by the defendant vendor in the agreement, extended by the legal implication?

The precise question therefore upon which it is necessary to pass is whether an exception of "mines and minerals" gives in favour of the grantor rights as large as the rights given by such an exception associated with an express reservation of the right to work in the terms above stated. It is to be noted that the easement given by the reservation involves not only the right to take the minerals found in the lands granted but to enter and occupy the land for the working of all veins containing minerals that may be found in them. I should hesitate before holding that the powers of entry for the purpose of exploration under such a reservation are not greater than those given by a provision of the deed excepting *simpliciter* "mines and minerals."

There are other points which might be suggested but it is unnecessary to discuss them because in one respect at all events I have come to a definite conclusion that the reservation of the right to work in the terms of the patent confers wider rights than an exception in the more limited form. It is established doctrine that the right to work in such a way as to let down the surface does not arise under an exception of "mines and minerals" unless there is something in the terms of the deed which expressly or by necessary implication gives such a right. That is settled in a series of cases. *Love* v. *Bell* (1); *Butterley* v. *New*

(1) [1884] 9 App. Cas. 286.

Hucknall Colliery Co. (1). (See especially the judgment of Lord Macnaghten at pp. 385-6). But the rule seems to be also established that where there is an express right to work a specified kind of mineral even in terms less comprehensive than those we have now to pass upon that may, according to the circumstances, involve the right to work that kind of mineral notwithstanding this consequence. Ashbury J. in *Welldon* v. *Butterley Co.* (2), fully discussed the effect of a disposition where the reserved rights include by express stipulation the power to work the subjacent coal *eo nomine,* and where it is established as a fact that by no known method of working the coal can subsidence be avoided.

The reservation in the patent does not specifically mention coal or any other mineral but there is a reservation of all "mines and minerals" and a right to work all of them. It does not appear to me that a right expressed in these terms is less comprehensive as regards any particular mineral that may be found than a right derived from a stipulation in the same terms but applicable to that particular mineral alone. I think the judgment of Ashbury J. is convincing and although in express terms it applies only to the case of a reservation of the right to work specific minerals the reasoning does, I think, involve the conclusion that the rights under such a clause as that we have to consider are of the same character; and in that reasoning I concur.

This suffices to dispose of the precise question passed upon by the Appellate Division and decided by them in a sense adverse to appellant and the result is that the appeal from that decision should be allowed and the judgment dismissing the action set aside.

(1) [1910] A.C. 381. (2) [1920] 1 Ch. 130.

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The action will of course proceed in accordance with the Alberta practice in the usual course to the trial of the other questions which remain to be determined.

I express no opinion of course upon any of these questions nor do I make any suggestion whatever as to the ultimate effect of the present decision upon the determination of the concrete questions in controversy in this litigation.

The appellant is entitled to his costs of the appeal and of the hearing in the court of first instance.

ANGLIN J.—The question to be determined on this appeal is whether a reservation of mines and minerals *simpliciter* in a grant of land carries with it all the rights and privileges, actual and potential, which the reservation of mines and minerals

> with full power to work the same, and for this purpose to enter upon and use or occupy the lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams and veins containing the same

found in the grant of the land here in question from the Crown, may confer. For the appellant it is contended that there is a substantial difference in regard to the right to destroy or cause subsidence of the surface and certain other rights.

The implication in the mere reservation of them in a grant of land of the right to win, get and take away the minerals is recognized by a long series of authorities. The powers which this implied right gives are well stated by Kekewich J., in *Marshall* v. *Barrowdale* (1). They may be formulated in terms not dissimilar to those above extracted from the Crown grant.

(1) [1892] 8 Times L.R. 275.

But that the right so implied is always subject to the condition that its exercise shall not prejudice the surface owner's natural right to support is conclusively established by many authorities in English courts of which the most recent is the decision of the House of Lords in *Thomson* v. *St. Catharine's College, Cambridge* (1). The surface cannot be destroyed however necessary it may be to do so for the practical working of the mines.

The same result follows in the case of an express power to work, etc., where it is possible to work the mines and extract the minerals without causing subsidence or destruction of the surface, and the right to do so is not conferred expressly or by necessary implication in the terms in which the power is couched. *Dixon* v. *White* (2); *Davis* v. *Treharne* (3). A modern instance of such a necessary implication is found in *Davies* v. *Powell Duffryn Steam Coal Co.* (4).

As Lord Macnaghten said in the *Butterknowle Case* (5), after referring to the more recent decisions of their Lordships:—

> The result seems to be that in all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance is authorized by the instrument of severance either in express terms or by necessary implication. This presumption in favour of one of the ordinary and most necessary rights of property holds good whether the instrument of serevance is a lease, or a deed of grant or reservation, or an inclosure act or award. To exclude the presumption it is not enough that the mining rights had been reserved or granted in the largest terms imaginable, or that powers or privileges usually found in Crown grants are conferred without stint, or that compensation is provided in measure adequate, or more than adequate, to cover any damages likely to be occasioned by the exercise of those powers and privileges.

(1) [1919] A.C. 468.
(2) [1883] 8 App. Cas. 833 at p. 843.
(3) [1881] 6 App. Cas. 460.
(4) [1917] 1 Ch. 488.
(5) [1906] A.C. 305, at p. 313.

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But where it is established that the mines cannot be worked or the minerals extracted without entailing such consequences, an express power to work the mines and get the minerals necessarily implies the right to cause subsidence and destruction of the surface. This is the result of the decisions in *Butterley Co.* v. *New Hucknall Colliery Co.* (1); *Duke of Buccleuch* v. *Wakefield* (2), and *Bell* v. *Earl of Dudley* (3). The authorities on this branch of the law are ably discussed in the recent judgment of Astbury J. in *Welldon* v. *Butterley Co.* (4).

In this latest case it is stated to be now scientifically established that all systems of coal mining necessarily result in the subsidence of the surface. It may be that in the present case it can be shewn by evidence that whatever coal lies under the land in question cannot be removed without destruction of the surface. At all events the fact that the express powers reserved in the Crown grant expose the purchaser to the risk of such a result, to which he would not have been subject had the reservation been merely of "mines and minerals," in my opinion suffices to preclude an *a priori* finding that the title offered him is such as the vendor can compel him to accept.

Other differences between the scope of the expressed and implied powers urged by the appellant are probably negatived by the limitative word "necessary" in the clause of the Crown grant. But they, as well as the defences of notice by registration and waiver of the right to repudiate, and the effect of the provision in the agreement that the deed to be given shall be

(1) 1910 A.C. 381.
(2) [1869] L.R. 4 H.L. 377.
(3) [1895] 1 Ch. 182.
(4) [1920] 1 Ch. 130.

subject to the conditions and reservations in the original grant from the Crown,

can be dealt with more satisfactorily after a full trial of the action.

I am for these reasons, with great respect, of the opinion that the appeal should be allowed and the judgment of dismissal set aside and the action allowed to proceed to trial in the ordinary course. It may be that the plaintiff will then fail to satisfy the court that whatever minerals may be upon, in or under the land cannot be removed without permanent injury to the surface and that the defendant will on that ground eventually succeed.

The appellant is entitled to be paid his costs of the appeals to the Appellate Division and to this court; and the costs of the motion before Mr. Justice Scott should be costs in the cause to the plaintiff in any event thereof.

MIGNAULT J.—The issue of law tried on the pleadings in this case is whether the contention expressed in paragraphs 10 and 11 of the respondent's statement of defence is well founded for if it is the appellant's action was rightly dismissed. These two paragraphs are as follows:—

10.—The defendant says that the reservations set out in paragraph 7 of the statement of claim are the same reservations or less reservations than those implied by reservation of the mines and minerals.

11.—The defendant says that in law, reservation of the mines and minerals is equivalent to reservation of mines and minerals together with full power to work the same and, for this purpose, to enter upon and use or occupy the said lands, or so much thereof and to such an extent as may be necessary for the effective working of the said minerals or the mines, pits, seams and veins containing the same.

The appellant's action claimed rescission of an agreement of sale made with the respondent, on the ground, *inter alia*, that although the respondent stated that he could not agree to sell the mines and minerals, which were reserved, he represented that this was the only reservation, whereupon the agreement of sale was signed, reserving to His Majesty, his successors and assigns, all mines and minerals. And the appellant alleges in paragraph seven of his statement of claim (referred to in paragraph ten of the statement of defense), that since the agreement of sale, he has discovered by a search made in the Land Titles Office that the reservation of mines and minerals in favour of the Crown was not as represented by the respondent, but was a much more complete reservation, being as follows:—

Reserving thereout and therefrom all mines and minerals which may be found to exist within, upon or under such lands together with full power to work the same, and for this purpose to enter upon and use or occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals or the mines, pits, seams, and veins containing the same.

The appellant's case is that under a bare reservation to the Crown of mines and minerals, while the mines and minerals lying under the surface could be—to use the terms found in most reservations—won, got at and taken away, this could only be done subject to the surface owner's natural right of support of the surface by the subjacent strata, whereas, under the reservation found in the Crown's grant, the Crown could, if necessary, cause a subsidence of the surface; so that the reservation in favour of the Crown is materially different from that represented by the respondent, and much more serious in its effects than a general reservation of mines and minerals would be.

The respondent's contention, as expressed in paragraph 10 and 11 of his plea, in my opinion, is clearly unfounded. I take it as being now well settled that a bare reservation of mines and minerals does not carry with it the right to cause subsidence of the surface. An express reservation, on the contrary, in terms such as those to be found in the grant from the Crown and quoted above, where the mines and minerals cannot be won, got at or taken away without causing subsidence of the surface, carries with it by necessary implication the right to work the mine and extract the minerals even to the point of depriving the owner of the surface of his right of support by the subjacent strata.

This distinction is well expressed in the head note to the decision of the English Court of Appeal in *Butterley Co. Ltd.* v. *New Hucknall Colliery Co. Ltd.* (1), as follows:—

> In construing instruments which involve the severance of surface or of a higher seam and subjacent minerals it is presumed that the owner of the surface or of the higher seam intends to reserve his common law right of support; the onus of shewing that this was not the intention of the parties to the deed lies on the mineral owner, and this onus is not discharged by the insertion of full powers of working and carrying away all the minerals expressed in general terms, or of wide provisions for compensation. But when the mineral owner proves not only that the upper seam will not be destroyed, but only injured to such an extent as will admit of compensation, and, further, that it is impossible to get the minerals at all without letting down the upper seam, all reasons for qualifying the general words of the powers of working are gone, and if the terms of the instruments make it clear that it was the intention of the parties that subjacent seams should be worked, it is a necessary implication that they intended that there should be a subsidence of superjacent strata.

As an example of a case where there is only a bare reservation of mines and minerals, I may refer to the recent decision of the House of Lords in *St. Catharines College, Cambridge*, v. *Dowager Countess of Rosse* (2),

(1) [1909] 1 Ch. 37. (2) [1919] A. C. 468

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where the right to cause subsidence of the surface was denied. And, as shewing where this right can be implied, when the terms of the reservation are sufficiently wide, and the mine cannot be worked without causing subsidence, there is the still more recent decision of Mr. Justice Astbury in *Welldon* v. *Butterley Co., Ltd.* (1). This last case, while not binding on us, is very instructive as shewing where the right to cause subsidence can be considered as a necessary implication of the right to work the mine, and the learned judge very exhaustively deals with all the authorities bearing on the matter.

On the issue of law raised in this case by the respondent's plea, I, with respect, think that the appellant is right in complaining of the dismissal of his action. His action should therefore go to trial, and inasmuch as the respondent alleges that he, the appellant, purchased subject to the conditions and reservations in the original grant from the Crown, it should be determined whether this (if proved) renders his purchase subject to the express reservation above quoted, and whether it is possible or not to win, get at and carry away the minerals without causing subsidence of the surface. The question will then be whether the appellant has made out a case for rescission of the agreement of sale.

The appeal should be allowed with costs here and in the Appellate Division, costs of motion to the plaintiff in any event.

Appeal allowed with costs.

Solicitors for the appellant: *Lavell & Ross.*

Solicitors for the respondent: *Rutherford, Jamieson & Grant.*

(1) [1920] 1 Ch. 130

JOHN S. ARCHIBALD (PLAINTIFF) APPELLANT;

1920
*Nov. 22.
1921
Feb. 1.

AND

JAMES H. MAHER.................DEFENDANT;

AND

GEORGE W. COOK (MIS-EN-CAUSE) RESPONDENT.

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

Privilege—Architect—Registration—Sale—Delay—Arts. 1695, 2009, 2013 *to* 2013g, 2082, 2083, 2084, 2103 *C.C.*—(*Que.*) (1894), 57 *Vict., c.* 46; (1895) 59 *Vict.*, c. 42; (1904) 4 *Ed. VII.*, *c.* 43, (1916) 7 *Geo. V.*, *c.* 52.

There was no provision in the Civil Code, as it stood before the 22nd December, 1916, allowing the architect to assert a privilege during the progress of the work unless his claim has been registered; and his privilege "takes effect" only from the date of registration.

The sale to a third party of an immovable upon which buildings have been erected is conclusive against any rights the architect employed in their erection may have, if the latter has not registered his privilege before the registration of the deed of sale.

Judgment of the Court of King's Bench (Q.R. 29 K.B. 364) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of Weir J. and dismissing the appellant's action.

The action was instituted by the appellant to have certain property declared affected by an architect's privilege for a sum of $7,851. In October, 1912, one Maher, who had bought the property from the respondent, instructed the appellant to prepare

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

(1) [1819] Q.R. 29 K.B. 364.

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plans and specifications for a ten story building. The work was commenced but discontinued about May, 1913, owing to lack of funds on the part of Maher. On September 1st, 1916, the property was retroceded by Maher to the respondent. After May, 1913, some work was done for protection from the weather of the part of the buildings erected. In November, 1916, the respondent leased the property to one Chadborn who erected a garage on it between December, 1916, and May, 1917. On September 14th, 1916, the appellant registered his claim against the property, and on March 31st, 1917, also addressed a notice, to the registrar as well as to Maher and the respondent, claiming $7,851 for his services as architect and he registered this notice on April 13th, 1917.

Aimé Geoffrion K.C. and *L.P. Crépeau K.C.* for the appellant.

J. W. Cook K.C. and *F. J. Laverty K.C.* for the respondent.

THE CHIEF JUSTICE.—I am to dismiss this appeal with costs and concur in the reasons for judgment stated by Mignault J.

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

DUFF J.—I concur in dismissing this appeal for the reasons given by Brodeur J.

ANGLIN J.—I concur with Mr. Justice Mignault.

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BRODEUR J.—La question que nous avons à décider dans cette cause est de savoir si un architecte peut réclamer le privilège qu'il a, en vertu des articles 1695 et 2009 du code civil, contre un tiers acquéreur, dans le cas où l'enregistrement de son privilège est postérieur à l'enregistrement du titre de ce tiers acquéreur.

La question se complique du fait que les travaux de l'édifice pour lequel l'architecte avait fait des plans avaient dû être abandonnés par l'ancien propriétaire, faute d'argent, et que l'édifice n'était pas terminé quand le tiers acquéreur a été mis en possession.

La Cour Supérieure a décidé que le privilège de l'architecte primait le droit du tiers détenteur, mais ce jugement a été renversé par la Cour d'Appel (1) pour le motif que l'enregistrement du privilège n'avait pas été fait en temps utile, c'est-à-dire dans les trente jours qui ont suivi la cessation des travaux.

Le privilège de l'ouvrier a subi des contretemps dans la législation des trente dernières années, surtout depuis la loi qu'on est convenu d'appeler la loi Augé qui a été adoptée en 1884. Mais cette législation avait trait plutôt aux conditions dans lesquelles le privilège pouvait être exercé qu'à l'existence du privilège lui-même.

Le privilège de l'architecte est de droit bien ancien. Il repose sur ce principe d'équité qui veut que ceux qui

mettent leur temps, leur travail, leur soin ou quelque matière sort pour faire une chose ou pour la refaire ou la conserver

aient un privilège sur la plus-value de l'héritage qui résulte de son travail. Domat, vol. 3, édition de 1822, p. 448; Pothier, éd. de 1844, vol. 17, Des criées, n° 129.

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Ce privilège a été porté dans notre code par les codificateurs dans les articles 1695 au titre du Louage, 2009 et 2013 au titre des Privilèges et Hypothèques, et 2103 au titre de l'Enregistrement. DeLorimier, Bibliothèque du code civil, vol. 17, pp. 384 et 404; vol. 18, pp. 235 et 236.

A l'exception de l'article 1695, tous ces articles ont été amendés par la loi Augé et la législation subséquente, c'est-à-dire par les statuts suivants: 1894, 57 Vict., ch. 46; 1895, 59 Vict., ch. 42; 1904, 4 Ed. VII., ch. 43; 1916, 7 Geo. V, ch. 52.

Sous l'ancien droit français le privilège existait sans enregistrement, et il en était de même au Bas-Canada jusqu'en 1841 lorsque l'ordonnance de l'enregistrement a été promulguée par le Conseil Spécial qui a décrété que les architectes, constructeurs ou autres ouvriers employés à la construction d'une bâtisse devaient faire enregistrer leur privilège en faisant faire des procès-verbaux de l'état des lieux avant les travaux commencés et après les travaux terminés. Cette dernière disposition de la loi a été incorporée dans l'article 2013 du code civil (DeLorimier, vol. 17, p. 404). Cette loi cependant édictait une procédure tellement compliquée et dispendieuse que l'entrepreneur et l'architecte seuls pouvaient s'en prévaloir et qu'elle donnait peu de confort au pauvre ouvrier ou journalier qui, avec son salaire alors peu rémunérateur, ne pouvait se payer le luxe d'un avocat pour s'adresser aux tribunaux et faire nommer des experts pour faire la visite des lieux. Alors la loi Augé, du nom de son auteur, a été adoptée en 1894 pour venir au secours de l'ouvrier en déclarant que le journalier, l'ouvrier, le fournisseur de matériaux et le constructeur ne seraient pas tenus de faire faire des rapports

d'expertise que leur privilège subsisterait sans enregistrement pendant la durée des travaux, mais qu'ils devaient enregistrer leur privilège dans les trente jours qui suivraient le parachèvement des travaux ou la cessation de l'ouvrage.

L'architecte était omis dans cette nomenclature. Les articles 2009, 2013 et 2103 du code civil, qui le désignaient nommément, étaient rappelés et remplacés par d'autres articles où son nom n'apparaissait pas, et d'autres articles, soit 2013a, 2013b, 2013c, 2013d et 2013e désignaient la procédure à suivre pour les conditions de l'existence du privilège, son rang et les droits du propriétaire dans le cas de notification du privilège. Par contre, cependant, l'article 1695 subsistait toujours qui déclarait:

> Les architectes, constructeurs et autres ouvriers ont un privilège sur les édifices et autres ouvrages par eux construits pour le paiement de leur ouvrage et matériaux, sujet aux règles contenues au titre des privilèges et hypothèques et au titre de l'enregistrement des droits réels.

Il est possible que la loi Augé n'eût pas pour effet de faire disparaître le privilège de l'architecte, car les termes généraux de certains articles aux titres des Privilèges et de l'Enregistrement auraient pu permettre l'enregistrement de ce privilège si formellement énoncé par l'article 1695. Mais la législature a évidemment cru qu'il pouvait y avoir lieu à des incertitudes et alors elle a, en 1895, rappelé entièrement la législation de l'année 1894 et lui a substitué une nouvelle législation où cette fois l'architecte reparaît dans les articles 2009, 2013, 2013a, 2013c et 2103.

Le fournisseur de matériaux, qui avait été en 1894 désigné nommément avec le journalier, l'ouvrier et le constructeur dans les articles 2009, 2013, 2013a,

2013b, 2013c, 2013d et 2103, disparaît de ces articles; et le législateur adopte six nouveaux articles, 2013 (g) à 2013 (1) où il indique une procédure à suivre pour donner au fournisseur de matériaux

> un droit d'hypothèque qui prendra rang après les hypothèques enregistrées antérieurement et les privilèges créés par la présente loi (art. 2013 (1)).

L'architecte par cette législation de 1895 reprenait incontestablement son rang parmi les privilégiés; et, par contre, le fournisseur de matériaux, qui, antérieurement au code civil, avait un privilège, ainsi que le déclare Domat (loc. cit. p. 448), se trouvait soumis à un régime particulier qui participait de la saisie-arrêt, de l'hypothèque et du privilège tout à la fois. Plus tard, en 1904, (4 Ed. VII, ch. 43), on a rétabli le fournisseur des matériaux parmi les privilégiés des articles 2013 et 2013a du code civil tels qu'amendés en 1895, mais on ne l'a pas désigné à l'article 2009 qui énumère les créances privilégiées sur les immeubles.

Je ne puis m'empêcher aussi de signaler la rédaction de l'article 2013a qui, avec l'amendement fait en 1904, se lit maintenant comme suit:

> Relativement à leur privilège, le journalier, l'ouvrier, l'architecte et le constructeur prennent rang dans l'ordre qui suit:
> 1° Le journalier;
> 2° L'ouvrier;
> 3° L'architecte;
> 4° Le constructeur;
> 5° Le fournisseur de matériaux.

Il est étonnant qu'on n'ait pas jugé à propos de mentionner dans la première partie de l'article le fournisseur de matériaux, comme on a fait pour les autres. C'est qu'il y a des oublis bien évidents et qui nous démontrent bien que toute cette législation a

été rédigée bien hâtivement et qu'elle donne lieu à certain doute et à une certaine ambiguité qui doivent nous faire rechercher l'intention du législateur (art. 12 C.C.).

Dans cet ordre d'idées, je remarque que l'article 2009, tel qu'édicté par la loi Augé de 1894, en énumérant les créances privilégiées sur les immeubles, donne au paragraphe 7me

> la créance du journalier, de l'ouvrier, du fournisseur de matériaux et du constructeur

sujette aux dispositions de l'article 2013. L'article 2013 alors adopté en 1894 disait que ce droit de préférence de ces quatre privilégiés s'exercerait sur la plus-value; et dans l'article 2013b, il énumérait encore ces quatre privilégiés et déclarait que leur privilège existerait sans enregistrement pendant les travaux et avec enregistrement après les travaux terminés.

Dans la loi de 1895, on fait disparaître dans l'article 2009 le fournisseur de matériaux et on le remplace par l'architecte; de même, dans les articles 2013 et 2013a. Mais quand on vient alors à rédiger l'article 2013b on ne mentionne plus l'architecte mais simplement le journalier, l'ouvrier et le constructeur. Pas un mot de l'architecte. Est-ce par inadvertance, comme dit l'honorable juge-en-chef de la Cour d'Appel? C'est bien possible, car, comme pour le constructeur, ses services acquièrent de jour en jour pendant la construction une plus grande valeur. Sa créance augmente au fur et à mesure que les travaux progressent et alors je comprendrais qu'il ne fût pas obligé d'enregistrer au cours des travaux.

L'ordre-en-conseil qui établit les honoraires d'architectes et qui a été produit dans la cause nous démontre que les honoraires de l'architecte sont susceptibles

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d'augmenter avec le progrès des travaux. Il est donc fort possible que ce soit un oubli du législateur de ne pas avoir mentionné l'architecte parmi les personnes qui à l'article 2013b ont un privilège sans enregistrement.

Mais la Cour d'Appel, dans une cause de *Carrière* v. *Sigouin* (1), semble avoir disposé de cet argument. Il s'agissait dans cette cause de savoir si le privilège du fournisseur de matériaux existait dans le cas où il n'avait pas donné l'avis exigé par l'article 2013g.

L'honorable juge Demers, en étudiant la législation alors existante, disait sur l'article 2013b:

> L'article 2013 (b) n'a pas été amendé par la loi 4 Edouard VII. Or par la loi de 1895 le fournisseur de matériaux n'est pas compris dans l'article 2013b. L'article 2103 ne peut donc être appliqué au fournisseur de matériaux, puisque ce dernier n'est pas mentionné dans l'article 2013b.

Cette opinion de l'honorable juge Demers est bien décisive: c'est que l'article 2013b ne peut pas s'appliquer au fournisseur de matériaux, parce qu'il n'est pas mentionné. Alors il en serait donc de même pour l'architecte, puisqu'il n'en est pas question non plus dans cet article 2013b. Cette cause de *Carrière* v. *Sigouin* (1) ne devrait pas être invoquée comme autorité pour décider, comme la Cour d'Appel l'a fait dans la présente cause, que l'architecte doit enregistrer dans les trente jours de la cessation des travaux.

Je partage l'opinion du juge Demers que le fait du législateur de ne pas avoir mentionné l'architecte dans l'article 2013b démontre que cet article ne peut pas être invoqué par l'architecte ou contre lui.

Quand, en 1895, le législateur a voulu parler de l'architecte, il l'a nommément désigné, et notamment aux articles 2009, 2013, 2013a et 2013c. Ce dernier article surtout rend pour moi la chose évidente qu'il n'y a pas eu inadventance en rédigeant l'article 2013b.

(1) [1908] Q. R. 18 K.B. 176.

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J'en suis venu à la conclusion que le demandeur ne devait pas réussir pour les raisons suivantes:

Par l'article 1695 du code civil, le privilège de l'architecte est soumis aux règles contenues au titre des *Privilèges et Hypothèques* et au titre de l'*Enregistrement des Droits réels*. Les dispositions des articles 2013, 2013b et 2103 du code civil, tels qu'ils existaient en 1916 quand Cook est devenu tiers détenteur de l'immeuble, ne sont pas très claires et peuvent porter à controverse, comme je viens de le dire: mais, par contre, les articles 2082, 2083 et 2084 du code disposent des droits des parties dans le présent litige.

D'abord l'article 2082 nous dit que l'enregistrement des droits réels leur donne effet et établit leur rang suivant les dispositions contenues au titre de *l'Enregistrement.*

L'article 2084 nous indique les droits réels qui sont exempts des formalités de l'enregistrement: et il inclut notamment les privilèges mentionnés en premier, quatrième, cinquième, sixième et neuvième lieux dans l'article 2009. Il en résulte donc, en raison de la règle *expressio unius est exclusio alterius* que le privilège de l'architecte, qui est mentioné à l'alinéa 7me de l'article 2009, doit être enregistré. Suivant l'article 2083, les droits réels soumis à la formalité de l'enregistrement ont effet du moment de leur enregistrement à l'encontre des autres créances dont les droits n'ont été enregistrés que subséquemment.

Dans le cas actuel, l'appelant n'a enregistré son privilège que postérieurement à la date où Cook a fait enregistrer son titre de propriétaire. Cet enregistrement est tardif et ne peut pas constituter un privilège qui pourrait être opposé à Cook.

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Sans adopter les motifs de la Cour d'Appel, j'en confirmerais, pour les raisons ci-dessus, le dispositif avec dépens.

MIGNAULT J.—This is an action by the appellant to have it declared that he has, as architect, a privilege for $7,851 affecting subdivision 7 of lot No. 1339 and lot No. 1340 of St. Antoine Ward in the City of Montreal belonging to the respondent.

One James H. Maher had purchased these lots from the respondent in October, 1912, for $110,000 of which $20,000 was paid in cash and the balance, $90,000, was secured in the respondent's favour by a vendor's privilege and was payable by instalments. Immediately after the purchase, Maher instructed the appellant's firm, Saxe and Archibald, in whose rights the appellant now is, to prepare plans and specifications for a ten story building on this property. Tenders were then called for and that of one Deakin for $192,500 was accepted by Maher and a contract made between him and Deakin for the construction of the building, stipulating that it should be completed in September, 1913. The work was commenced and continued until May, 1913, when Maher became financially embarrassed and the work was stopped. On the 31st of July, 1913, a contract was made between Deakin and Maher, which had been drafted by the appellant, whereby it was agreed that the building operations would be postponed until March 1st, 1914; that the value of the building as it stood was $33,550 on which $25,000 had been paid, leaving a balance of $8,550; that there was a balance of $9,135 due the contractor for which Maher gave his note; that the contractor would proceed with the work on March 1st, 1914, on receiving 20 days previous notice, pro-

vided he was guaranteed that the necessary financial arrangements to complete the work had been made; and that should the construction not be proceeded with by March 1st, 1914, the contractor would then be entitled to claim the balance due him to date.

No notice to continue the work on March 1st, 1914, was given by Maher to Deakin, nor were the necessary financial arrangements made. No work was done save what was necessary to protect the part already built, which was nothing more than the foundations and reached the level of the sidewalk.

On September 1st, 1916, Maher, being unable to pay the respondent the balance due on the purchase price of the property, reconveyed it to the latter, represented by his brother, Mr. J. W. Cook, K.C., in consideration of the balance he owed him, $90,000, for which the respondent gave him a discharge. This deed of sale was registered on September 2nd, 1916.

On September, 14th, 1916, the appellant addressed a notice to the registrar of Montreal West and to Maher, stating that he claimed $7,851, and demanding that his claim be registered against the property. This notice was registered on December 16th, 1916. On March 31st, 1917, the appellant also addressed a notice to the registrar as well as to Maher and the respondent, claiming $7,851 for his services as architect

in the construction of a building now being erected on said lots

and required that it be registered against this property, This notice was registered on April 13th, 1917.

It may be observed that although the appellant stated that the building was then being erected, the work had been stopped since May, 1913, except what was done for the protection of the work from the weather, and the idea of any further construction

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had evidently been abandoned. It should be added that in November, 1916, the respondent leased the property to one Chadborn who erected a garage on it some time between December, 1916, and May, 1917.

The Superior Court dismissed the respondent's plea and gave judgment for the appellant on two grounds: 1, that the ratification by the respondent of the acceptance of Maher's reconveyance by Mr. J. W. Cook was insufficient; 2, that the appellant's privilege had been registered in due time.

The Court of King's Bench (1) reversed this judgment, rejecting, and I think rightly, the first and somewhat technical ground, to which I will not further refer, the more so as it was not urged before this court, and as to the registration of the appellant's privilege holding as follows in the formal judgment:

> Attendu que le 1er mars 1914, Maher n'a pu, à raison de ses difficultés financières, continuer les travaux qui, dès lors, étaient censés terminés;
>
> Attendu que Archibald, architecte, ne pouvait enrégistrer son privilège d'architecte ni le 16 décembre 1916, ni en avril 1917 plus de 30 jours après que les travaux étaient censés terminés.

In effect, and indeed in terms, this decision is that the appellant could not register his privilege more than 30 days

après que les travaux étaient censés terminés.

With respect, I am of opinion that no such term as 30 days after the work is deemed to have terminated or to have ceased is to be found in this frequently amended and somewhat unskilfully drafted legislation. The case of work abandoned before completion is clearly a *casus omissus* in these articles, as is likewise the case of an architect or contractor dismissed during the course of the building operations.

(1) Q. R. 29 K.B. 364.

It appears unnecessary to go into the history of this legislation, for we are only concerned with its proper construction as it existed at the time the appellant's services were rendered. Articles 2013 (first paragraph), 2013a, 2013b and the first paragraph of article 2103 were then as follows:—

2013. The labourer, workman, architect, builder and supplier of materials, have a right of preference over the vendor and the other creditors, on the immovable but only upon the additional value given to the immovable by the work done.

2013a. For the purposes of the privilege, the labourer, workman, architect, builder and the supplier of materials rank as follows: 1, the labourer; 2, the workman; 3, the architect; 4, the builder; 5, the supplier of materials.

2013b. The right of preference or privilege upon the immovable exists, as follows:—

Without registration of the claim, in favour of the debt due the labourer, workman and the builder, during the whole time they are occupied at the work or while such work lasts, as the case may be; and, with registration, provided it be registered within the 30 days following the date upon which the building has become ready for the purpose for which it is intended.

But such right of preference or privilege shall exist only for one year from the date of the registration, unless a suit be taken in the interval, or unless a longer delay for payment has been stipulated in the contract.

2103. I. The privilege of the persons mentioned in article 2013 dates, in the cases mentioned in the first clause of article 2013b, only from the registration within the proper delay, at the registry office of the division in which is situated the immovable affected by the inscription of a notice or memorial drawn up according to form A, with a deposition of the creditor, sworn to before a justice of the peace or a Commissioner of the Superior Court, setting forth the nature and the amount of the claim and describing the immovable so affected.

The learned judges of the Court of King's Bench appear to have considered that through some inadvertence the paragraph of Art. 2013b commencing with the words "without registration" omitted any mention of the architect, and that during the continuance of the work superintended by him the architect could claim a privilege without registration. I have been unable so to construe this article, nor do I think it

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competent for the court to supply an omission which appears to have been intentional. It was no doubt considered that inasmuch as the labourer, the workman and, to some extent, the builder have claims which become payable at fixed times as the work progresses, it would, especially in the case of the two first, be inconvenient to require them to register a series of claims payable day by day or week by week for varying amounts. In the case of the architect there is no exemption from registration during the progress of the work and there is no provision allowing him to assert a privilege while the work progresses, unless his claim has been registered.

A careful reading of article 2013b shows that this difference was clearly intentional. "The right of preference or privilege upon the immovable" which "exists" is obviously the "right of preference" mentioned by Art. 2013, and is that in favour of the labourer, workman, architect, builder, and supplier of materials. Therefore the right of preference referred to in the first line of Art. 2013b is the right of the five classes enumerated in article 2013 and also in article 2013a. Then article 2013b states how this right "exists," and it exists:

(a) without registration of the claim, in favour of the debt due the labourer, workman and the builder, during the whole time they are occupied at the work or while such work lasts: and

(b) with registration, provided "it," that is to say the right mentioned in the first line of article 2013b, be registered within the 30 days, etc.

If it had been intended that the words "in favour of the debt due the labourer, workman and the builder" should apply to and govern the two clauses above indicated as (a) and (b) respectively, they would

have been placed in the introductory clause immediately after the verb "exists." Placed as they are, their restrictive effect is confined to the phrase "without registration, etc.," leaving the phrase "and with registration, etc.," unrestricted and applicable to the entire subject of the verb "exists," thus embracing in clause (b) the architect and the supplier of materials as well as the other three classes. No valid reason has been advanced for rejecting this plain grammatical construction. There is no accidental omission to supply. The architect is deliberately left out of the first clause and equally deliberately included in the second. The architect's right of preference or privilege "exists," "dates," or "takes effect" only from the date of registration, in view both of article 2013b and of art. 2103, and also by virtue of the general rules applicable to the registration of real rights (arts. 2082, 2083), unless it be expressly exempt from registration (arts. 2013b and 2084), which it clearly is not.

It is true that article 2013b grants a delay of 30 days for the registration of the architect's privilege; but this is in case the work has been completed, for the starting point of this delay is the date when the building has become ready for the purpose for which it is intended. If the building operations are not completed, but, as in this case, abandoned in course of prosecution, there is no delay for registration, for there is no date fixed by law from which this delay could be computed. It follows that, in such a case, although the architect must register his claim, he is granted no delay for registration and his right of priority as to other registered claims can only count from the date of the registration of his own claim (art. 2083).

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I may now cite art. 2013f for it leads to the consideration of the legal principle upon which the dismissal of the appellant's action should in my opinion be supported.

2013f. The sale to a third party by the proprietor of the immovable or his agents, or the payment of the whole or a portion of the contract price, cannot in any way affect the claims of persons who have a privilege under Art. 2013, and who have complied with the requirements of articles 2013a, 2013b, 2013c and 2103.

It follows that the sale of the immovable to a third party will be conclusive against the architect if the latter has not complied with the requirements of the articles here mentioned, and therefore, in a case like this where the work has been stopped and abandoned and the building has never become ready for the purpose for which it is intended, if the property be sold to a third party who registers his deed of sale before the architect registers his privilege, the architect's claim cannot be asserted against the immovable.

Here when the appellant registered his claim the respondent was the registered owner of the property and in my opinion it was then too late for the appellant to register his claim against the property. I may add that there is no suggestion of bad faith on the respondent's part, and the appellant must stand or fall on his strict compliance with the provisions I have cited.

It is unnecessary to express any opinion upon the question whether the appellant could have effectively registered his claim either on the 16th of December, 1916, or on the 13th of April, 1917, had Maher remained the owner of the property.

I make no reference to the amendments made to this legislation by the statute 7 Geo. V, ch. 53, because it came into force only on Dec. 22, 1916, at which

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date the respondent was the registered owner of the property, and any work done by the appellant had been finished long before its enactment.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Elliott & David.*

Solicitors for the respondent: *Cook & Magee.*

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B. E. KELLY (PLAINTIFF)..........APPELLANT;

AND

C. H. WATSON (DEFENDANT).......RESPONDENT.

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

Contract—Part performance—Terms vague—Specific performance—Construction—Powers of the courts.

Though, where there has been part performance of an agreement, the courts, when asked to decree specific performance, should struggle against any difficulty arising from vagueness in the terms of the agreement in order to effectuate the real intention of the parties, they cannot do what would amount to making an agreement as to some of the essential terms on which the parties were never *ad idem.*

Judgment of the Appellate Division (15 Alta. L.R. 587) reversed, Idington J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Walsh J. (1) and dismissing appellant's action.

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

C. C. McCaul K.C. for the appellant.

H. R. Milner for the respondent.

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

(1) [1919] 15 Alta. L.R. 587; [1920] 1 W.W.R. 939.

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THE CHIEF JUSTICE.—I have had the opportunity of reading the reasons for judgment on this appeal prepared by my colleagues Anglin and Mignault JJ. and find that they have expressed very clearly the views which I had myself formed after hearing the argument and carefully reading and considering the reasons for judgment of the trial judge and Mr. Justice Beck speaking for the Appellate Division.

It is one thing, and no doubt commendable, for a court in cases where there has been part performance of an agreement to struggle against the difficulty ensuing from vagueness in the terms of the agreement and, if possible, without creating a new agreement, to spell out one which they conclude from the evidence represents the real intention of the parties. It is quite another thing, however, to make a new agreement for the parties as to which they themselves were never *ad idem*.

With great respect for the Appellate Division I cannot help concluding after reading over the evidence that they have done the latter in this case and have made an agreement for the parties which they themselves never intended. It may be, I do not doubt it, a very fair agreement and one calculated to do justice to both parties, but it is not the agreement the parties themselves reached or intended.

I concur in the proposed judgment allowing the appeal with costs throughout and restoring the judgment of the trial judge.

IDINGTON J. (dissenting).—This is an action of ejectment in which respondent counterclaimed asking for specific performance of a contract of sale and purchase under which the vendor put the respondent

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in possession of the land in question, and the latter, in reliance upon the good faith of said vendor, made substantial improvements in way of buildings and fencing and cultivation.

The appellant admittedly has no higher rights than the vendor, who was her father.

He admits negotiating with the respondent for a sale of the premises to him and gave a written memorandum which defined the land accurately, named the price and the cash deposit to be paid on a stated date, and the rate of interest for the balance. And thereby he induced respondent to enter into possession and make the said improvements in question.

The learned trial judge held that as the parties differed in some of the minor details as to later payments, there was no enforceable agreement.

The Appellate Division unanimously reversed that judgment and by accepting respondent's version as to the first crop to be reaped that year, and the vendor's version as to those details relative to later payments, properly, as I hold under the circumstances, declared the respondent, on assenting thereto, to be entitled to specific performance.

I have no doubt that according to what was within the common knowledge of the learned judges in appeal, so deciding, there was nothing very substantial in the possibly different results likely to be reaped from the operative effect of either version relative to these details.

And the vendor's repeated assertion that the terms of payment, which he was to become bound to observe in the contract with his vendor, should govern those he was to receive from respondent, seems to furnish, if believed, a clear ground for the completion of the contract in an enforceable form.

Those terms had been fixed and never were changed but the original vendor had stipulated he was not to be bound until a third party, then abroad, had assented to such terms of payment.

That party might have made some change but in the ultimate result he did not. That detail of the contract was in suspense, as it were, but all else was settled absolutely and the result I have adverted to effectually disposed of that suspensive condition.

Indeed if respondent had been as astute as the Appellate Division and had, on the development of this unsubstantial difference in the probable result of these details in evidence, simply said to the learned trial judge: "This is a quarrel about nothing, I am, though literally correct in my version, content to accept that of the other party to the contract, and be bound thereby," I incline to think the result might have been satisfactorily settled at the trial. At least I can see no answer there would have been to the counterclaim for specific performance within the principles upon which the courts of equity have long rested their judgments in cases dependent upon part performance of the contract.

Unfortunately the conduct of the respondent's vendor had been so wanting in straightforward dealing as to provoke the former into an insistence on his version of the details being correct and what should be observed.

I think the Appellate Division has taken a view that is quite maintainable and that this appeal should be for the reasons it has assigned, dismissed with costs throughout.

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DUFF J.—Equity has gone very far in affording relief to a person who, occupying land, has spent money in making improvements or in connection with his occupation under the belief created or encouraged by the owner of the land that an interest would be granted to the occupier sufficient to enable him to enjoy the benefit of his expenditures. Relief is not afforded on the ground of agreement but on the ground that it would be unjust to permit the owner to dispossess the occupant in the circumstances without at all events making compensation. The cases are discussed and summed up in the judgment of Lord Hobhouse in *Plimmer* v. *Corporation of Wellington* (1). The respondent is not entitled to stand upon this ground in this appeal because a claim to relief upon this ground was never put forward and no such claim has been the subject of investigation.

The courts would also give effect to a properly founded inference arising from the conduct of the parties that possession of land was taken or continued under an understanding amounting to an agreement for sale either upon terms ascertained in fact or upon reasonable terms as to price and otherwise to be determined in case of dispute by the judgment of a competent court.

I think the judgment of the trial judge was right that the parties never arrived at an agreement in terms and I think moreover that the facts disclosed in the evidence are not sufficient to support an inference that they proceeded upon such an understanding as that just indicated.

It follows that the appeal should be allowed and the judgment of the trial judge restored.

(1) [1884] 9 A.C. 699.

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ANGLIN J.—With very great respect I am of the opinion that the learned trial judge reached the correct conclusion upon the evidence in this record and that what the Appellate Division has done, under the guise of exercising to its fullest extent or even straining its power and duty to ascertain the terms and to enforce the complete performance of a somewhat vague contract of which there had been part performance, (*Wilson* v. *West Hartlepool Ry. Co.* (1)), amounts in fact to the making of a new contract for the parties.

In regard to the amount of the second instalment it is no doubt common ground that some agreement was reached. The memorandum, however, is indefinite. Raymer, who made the contract with the defendant and is a witness for the plaintiff, deposes that it was to comprise the whole, the defendant that it was to consist of half of the proceeds of the 1918 crop. In view of this direct contradiction in the evidence the learned trial judge was unable to determine which story should be accepted. The Appellate Division, however, has seen fit to accept that of the defendant and to reject that of Raymer, fixing the value of one-half of the 1918 crop at $500. While that may not be making a contract but merely determining what one term of the contract actually made really was, the sufficiency of the ground for rejecting the conclusion of the trial judge on this branch of the case seems to me to be questionable.

As to the remaining instalments, however, the only provision of the memorandum signed by Raymer is that the balance of the purchase money should be payable in yearly payments with interest at 8%. The defendant's story is that it was agreed that each of these instalments was to be one-half the proceeds of the annual crop whatever it might amount to. On the other

(1) [1865] 2 dé G. J. & S. 475 at p 494

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hand, Raymer says that the amounts of the instalments were to be arranged after the terms of his own purchase of the land from Mr. Symington had been agreed upon, that they were to be of fixed sums, and were to be paid out of the proceeds of the annual crops so far as they might suffice, but that any deficiency was to be supplemented in cash. Here again the learned trial judge was unable to decide to which version credence should be given. The Appellate Division, however, has entirely rejected the defendant's story on this branch of the case and has determined that there shall be five equal annual instalments of $800 each payable with interest at 8% on the balance from time to time remaining unpaid, making the dates of those payments synchronize with those of the five payments of $700 each to be made to Symington, thus accepting in part Raymer's story of what it was his intention to exact when the final agreement should be made. It seems to me, with great deference, that this is nothing else than making an agreement for the parties in respect to matters which they themselves had left open for future settlement and goes beyond any powers that courts of equity have ever asserted—great and wide as those powers undoubtedly are. This is not the case of a completed agreement couched in general terms and omitting only some details which the law will supply. Neither is it a case of nothing being left to be done except the embodiment in a formal instrument of terms fully agreed upon and sufficiently evidenced. Here essential elements are left open to be made the subject of future agreement. The language of Kay J. in *Hart* v. *Hart* (1), and that of Turner L. J. in *Wood* v. *Midgley* (2), cited by Mr. McCaul, seems closely in point.

(1) [1881] 18 Ch. D. 670, at p. 689. (2) [1854] 5 deG. M. & G. 41 at p. 46.

I would allow the appeal with costs in this court and in the Appellate Division and would restore the judgment of the learned trial judge.

MIGNAULT J.—In this case, although the learned trial judge (Walsh J.) found that Raymer and the respondent had agreed for the purchase and sale of the property here in question conditionally on Raymer acquiring it from Symington, the total sale price being $4,800; he also found that they never were *ad idem* as to the terms of payment and that therefore there never was any agreement which could be enforced. This judgment was reversed by the Appellate Division, Mr. Justice Beck, with whom the other learned judges concurred, stating, after having cited the conflicting versions given by Raymer and the respondent Watson as to the terms of payment, that he accepted the respondent's evidence that the first payment was to be $300 and half of the 1918 crop, (which would give $500, the respondent having valued this crop at $1,000). Mr. Justice Beck also expressed the opinion that the balance, $4,000, was to be apportioned so as to accord with the terms of the sale agreement between Symington and Raymer's daughter, the appellant, and should be paid at the same dates at 8% interest. He proceeds to determine the issues between the parties as follows:—

> The judgment will contain a declaration to the effect that the contract is one for the payment of $300 on the 10th of July, 1918, and for the payment of one-half of the proceeds of the crop of 1918, the value of the one half being fixed (on the defendant's evidence) at $500; and for the payment of the balance, $4,000, of the purchase money, in five equal annual instalments with interest at 8%, on the 25th February in each of the years 1919-23; interest on the purchase price of $4,800 (except the $300 which was refused by the plaintiff) to be calculated from the 8th of April, 1918.

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The judgment should also provide in some form for the protection of the defendant against the plaintiff's non-payment to Symington. It should allow the defendant one month from the date of his acceptance of this judgment for the payment of the arrears owing to the plaintiff.

These amounts can be calculated and inserted in the formal judgment.

If the defendant declines to accept this judgment his counterclaim will be dismissed with costs, and the judgment for the plaintiff will stand. If the defendant accepts this judgment he will have his costs of the action, and the plaintiff's action will be dismissed with costs. If the defendant accepts this judgment he will have his costs of the appeal, otherwise the appeal will be dismissed with costs.

In view of the finding of Mr. Justice Beck that the contract is as stated in the first paragraph of the above excerpt it seems strange (may I say so with all deference) that the defendant is left free to decide whether he will accept or refuse the judgment. However he accepted it and the plaintiff now asks that this judgment be set aside and the judgment of the learned trial judge restored.

Recognizing to the fullest extent that where a contract has been partly performed, the court, when asked to decree specific performance, will struggle against the difficulty ensuing from the vagueness of the contract, still it is obvious that the court cannot make a contract for the parties if the latter have not agreed on its material terms. So the proper inquiry on this appeal is whether what the Appellate Division declares to be the contract was really what the parties had agreed on, for if they had not agreed on these terms the contract contained in the judgment is one made by the Court for the parties and obviously cannot be sustained.

A careful reading of the evidence has convinced me that the terms of payment stated in the judgment were agreed to by neither Raymer nor Watson.

They had made and signed a memorandum stating their agreement as far as it had gone, viz., a sale of the property for $4,800; a cash payment of $300 on or before July 10th, 1918; a further payment to be made from the proceeds of the crop to be grown on the land; an agreement for sale to be executed during the season; and the balance of payments to be payable yearly at 8% interest. It would really be difficult to imagine anything more indefinite than this memorandum (the wording of which I have followed as closely as possible) in so far as the terms of payment are concerned, and the confusion becomes greater still when we refer to the testimony of Raymer and Watson.

The former says he was to get $300 in cash; the entire crop for 1918; and the balance of the payments were to be governed by the contract he would make with Symington.

According to Watson he was to pay $300 in cash, make a half crop payment in 1918, and give half the crop from that on.

In view of this testimony I must find that the contract, as stated by the judgment of the Appellate Division, agrees with neither of the versions of the parties. It takes from Watson's story the half crop payment of 1918 and from Raymer's evidence the division of the balance of the sale price so as to fit in with the payments to be made to Symington. This in my opinion could not be done.

We have therefore this result that the parties by their testimony contradict each other as to the material terms of their contract and that the terms contained in the judgment of the Appellate Division are inconsistent with either of their versions. It follows that

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the judgment really makes a contract for the parties, and, unless I do the same, I find it impossible, on my consideration of the evidence, to state what the agreement between Raymer and Watson really was. Under these circumstances, the conclusion of the learned trial judge that the parties were never *ad idem* in respect of the terms of payment seems inevitable.

With some reluctance, for the good faith of Raymer of whom the appellant is merely the nominee seems open to suspicion, I have therefore come to the conclusion that the appeal must be allowed and the judgment of the learned trial judge restored. Costs will go to the appellant here and in the court below.

Appeal allowed with costs.

Solicitors for the appellant: *Lymburn & Reid.*

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

JAMES W. DAVIDSON (PLAINTIFF) APPELLANT;

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*Oct. 28, 29.
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*Feb. 1.

AND

JAMES G. NORSTRANT (DEFENDANT) .... RESPONDENT.

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

Sale—Sale of land—Option under seal—Condition precedent—Consideration—Nominal—Expressed as "now paid"—Non-payment—Specific performance—Subsequent conduct—Parol evidence—Statute of Frauds.

The respondent was purchasing some land from a company of which the appellant was the sales agent for $86,400 and asked the latter to join him in the undertaking. The appellant, before doing so, wished to see personally his principals who were resident in the United States in order to obtain their consent. The respondent then entered into an option agreement under seal whereby in consideration of the sum of $100 "now paid," of which receipt was acknowledged, and of the payment of half of the cash instalments due in virtue of the purchase agreement, he assigned to the appellant an undivided half-share interest in the land. The above sum of $100 was in fact neither paid nor demanded. The respondent then proceeded to complete the original purchase agreement, paid the cash instalments amounting to $10,000 to the owners and sold part of the land at a profit. The appellant, after having obtained the approval of his principals, sent to the respondent the sum of $5,000 with interest thereon within the delay specified in the option; but the respondent returned it and refused to carry out the agreement. The appellant sued for specific performance.

Held, Duff and Mignault JJ. dissenting, that the option agreement was binding upon the respondent. *Cushing* v. *Knight* 46 Can. S.C.R. 555) discussed.

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

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Per Sir Louis Davies C.J.—The question whether the giver of the option was bound thereby, without the payment of the $100, is entirely one of intention, and, in this case, there was nothing to indicate that it was the intention of the parties that such payment should be a condition precedent to the respondent being bound, both parties understanding that the down payment was immaterial and negligible..

Per Sir Louis Davies C.J.—Upon the evidence, conduct and correspondence of the parties, the option agreement was to become operative only when the consent of the appellant's principals had been obtained; and after such consent there was no unreasonable delay on appellant's part in tendering to the respondent the moneys stipulated in the agreement.

Per Idington J.—When a contract for an option is under seal and purports to bind for a specific time, assented to by the covenantee, its binding effect cannot be affected by any omission to pay the consideration declared to have been received, unless and until actual payment has been demanded and refused.

Per Duff J., Anglin and Mignault JJ.—The actual payment of the sum of $100 was made a condition precedent to the instrument becoming effective as an option, and the consideration cannot be treated as a mere nominal one.

Per Anglin J.—But the subsequent conduct of the respondent has been such as to preclude him from relying upon the non-fulfilment of the condition. Duff J. *contra.*

Per Anglin J.—And parol evidence of the facts warranting this inference is admissible since it does not amount to such a variation of the terms of the contract that verbal proof of it would offend against either the rule in regard to contracts reduced to writing or the Statute of Frauds. Duff J. *contra.*

Per Anglin J.—Assuming that the payment of $100 was a condition precedent to the existence of a binding option, the respondent's offer to sell one-half interest in the lands purchased was not expressly or impliedly revoked before its acceptance by the appellant within reasonable delay.

Per Duff and Mignault JJ. (dissenting).—The payment of $100 was one of the facts which the appellant, relying upon the existence of the option, had to establish in the absence of circumstances dispensing with the performance of this essential condition.

Per Duff J. (dissenting).—The grant of an option has the effect of vesting in the optionee an interest in land, and, if given for valuable consideration, is not revocable; and the giver of the option is not entitled to break it on offering to pay damages.

Judgment of the Appellate Division (15 Alta. L. R. 252) reversed, Duff and Mignault JJ. dissenting.

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Simmons J. and dismissing the appellant'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.

A. H. Clarke K.C. for the appellant.

C. C. McCaul K.C. for the respondent.

THE CHIEF JUSTICE.—The only question for us to determine is the effect of the non-payment of the $100 at the time the agreement for the purchase by Davidson of the undivided half interest in the lands of the respondent Norstrant was signed by the parties.

The written agreement expresses the sum as being "now paid," that is, at the time of its execution, and it being agreed upon and not in controversy that it was not then paid, the respondent contends, and the Appellate Division found, that this action for the enforcement of the agreement would not lie and dismissed it accordingly.

After careful reading of the evidence and the opinions of the learned judges of the Appellate Division I am of the opinion that the conclusion of the Chief Justice, who dissented from the judgment and concurred with the trial judge, was correct and that this appeal should be allowed and the judgment of the trial judge restored, substituting however for the reference to assess damages as directed by him an order for an accounting.

(1) [1920] 15 Alta. L.R. 252; [1920] 1 W.W.R. 700.

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I am strongly inclined to think, after careful reading of their evidence, that both parties regarded the down payment of the $100 as immaterial and negligible, and looking at the very large sum involved in the sale of the one-half of Norstrant's interests in the lands, the kind and character of the transaction and the conduct of the parties, that the down payment was waived.

I desire however to rest my judgment upon the fact, as clearly proved and not challenged or denied, that at the very time the agreement was being signed by the parties it was agreed and fully understood that it was not to become operative or effective unless and until Davidson, who was the agent for the owners and as such had sold the lands to Norstrant, had seen these owners and obtained their consent to his becoming a part purchaser of the lands with Norstrant.

It is quite clear that without such a consent on the part of the owners it would be alike inequitable and unjust for Davidson to become a part owner with Norstrant to whom, as agent for others, he had sold the lands.

The evidence on this point is clear, undisputed and unchallenged. Davidson's statement, not denied, is as follows:—

Q. Will you give a history of the matter so as to explain why the agreement was put in a lateral form as it is? A. Well, Mr. Norstrant had been considering for some time the purchase of these lands and I had discussed, I had charge of the sale of the lands, and I had discussed the purchase of the lands with him, at the time when my associates were here a few months prior to this, they had set the price on these lands of around twenty-five dollars an acre. After discussing the subject with Mr. Norstrant he informed me that, as the total amount was some eighty-seven or eighty-eight thousand dollars, that he thought the deal was too large for him, and at his home near Beiseker, when this matter was discussed, he said to me "Don't you want to take a half interest with me in them?" and I informed him at the time that I thought the purchase was a good purchase for him and would be and would interest me, but that owing to the fact that I was operating

the company for the estate and for Mr. Beiseker, I would not agree to close any transaction of that nature without first having an opportunity of consulting with them and getting their approval. I told him, however, that I thought * * that I felt quite sure there would be no trouble, that they would be quite willing for me to take this interest, behause they had already established the price which Mr. Norstrant was paying and that they would have no objection to my going in, and I informed then I * * and I informed him I wanted to take it up with them personally, and I would be going down to Minneapolis in the early spring and that therefore, we could arrange some agreement that would give me until May. That was along the line of the understand.

The conclusion, and I think the only reasonable conclusion, to be drawn from the evidence is that, while the terms on which Davidson was to purchase the half interest were agreed upon, put into writing and signed by the parties, it was at the same time clearly understood and agreed that, inasmuch as Davidson had acted as the agent of the owners in selling the lands to Norstrant, he could not purchase back a half interest in the same lands from Norstrant without the consent of those for whom he had acted in selling the lands.

As Davidson said in his evidence, he could not "close the transaction" without such consent.

The signed agreement, therefore, was merely a tentative one depending for its coming into effect and becoming operative upon Davidson obtaining the consent of those for whom, as agent, he had acted in selling Norstrant the lands.

Davidson, accordingly, went to Minneapolis, obtained the necessary consent of the parties spoken of, and without any delay, on his return home, on the 14th March, 1918, wrote respondent defendant, Norstrant, that he had, a week before, "returned from the States," and that the parties whose consent

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was necessary to his becoming a purchaser of a half interest in the lands were quite agreeable to his becoming such a purchaser and asked respondent whether he should send his cheque for the $5,000 (which included the down payment of $100) to Norstrant's residence or deposit it to his credit in some bank in Calgary.

On the 19th March, not having received any reply to the letter of the 14th, Davidson again wrote enclosing the cheque for $5,066.16, the $66.16 being interest at 7% up to date.

On March 23rd Norstrant replied to Davidson's letter of March 14th, explaining the delay as having been caused by the "miscarriage somewhere" of Davidson's letter and further stating that he

> had plenty of cash on hand * * * having made arrangements to get $10,000,

and on the 9th April replied to Davidson's letter of the 19th March forwarding him the cheque for $5,066.16, returning the cheque and saying:

> I don't need the money now as I have to pay interest on the money which I borrowed when the deal was made anyway, and this money would only be idle here.

On 23rd April, Davidson again wrote Norstrant formally notifying him that he accepted the offer contained in the agreement of December 8th and was

> prepared to pay him forthwith the $5,000 and interest and the other amounts specified

for the purchase of the undivided half share of the lands and enclosing marked cheque for $5,100.91, being the $5,000 with interest from Dec. 4th, 1917. In this letter he also asks for an accounting of any of the lands Norstrant has sold.

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On the 25th April, Norstrant replied simply returning the marked cheque, having in his previous letter stated why he did not want the money, and saying he "would be in at your meeting the first of the month."

Other correspondence followed but not the faintest hint was given by Norstrant at any time or in any letter or otherwise that he repudiated the agreement or claimed it was not binding on him because of the non-payment of the $100 at the time of the signing of the agreement.

I repeat that the proper conclusion, and I think, the only proper conclusion to be drawn from the evidence, conduct and correspondence of the parties is that they mutually had agreed at the time the agreement was signed, it was not to become operative or effective unless and until Davidson had obtained the consent of the necessary parties to his entering into it.

In this view of the case, the non-payment of the $100 on the date of the signing of the agreement, 5th Dec., 1917, was not imperative or necessary. The "transaction was not closed" and was agreed not to be closed, nor was the agreement to become operative, unless and until such consent was obtained. When it was obtained, there was no unreasonable or undue delay on Davidson's part in notifying Norstrant or in tendering to him the necessary money stipulated by the agreement, including the down payment of $100 and interest.

Under these circumstances and for these reasons, I would allow the appeal with costs here and in the Appeal Court and restore the judgment of the trial judge, with the substitution of an accounting for the reference to assess damages.

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IDINGTON J.—The appellant sues upon an option agreement under seal whereby the respondent agreed to give appellant the opportunity of bearing half the burden and reaping half the profits to be derived from a contract he, the respondent, was entering into for the purchase of five sections of land in Alberta.

The total price on the basis fixed of $27.00 an acre, amounted to $86,400, of which $10,000 had to be paid in cash. The respondent was almost appalled at the magnitude of the undertaking and the appellant, on behalf of his employers, was endeavouring to induce him to make the purchase, when respondent asked him if he would join him in the undertaking.

The appellant in answer properly said he could not do so without the express assent of his employers, who were in Minneapolis, and he would not be able to explain to them fully, without a personal interview, all that might bear on such a question, for which he could not hope till visiting Minneapolis in the early spring.

To overcome that these parties hereto agreed that the respondent should give the appellant an option until the 1st of May following, to become a partner in the purchase by paying the respondent meantime the half of the cash payment and assuming in all other respects the burdens, direct and incidental to the carrying out of the contract.

A Calgary solicitor drew up for them a long written agreement, providing for everything that might be likely to arise in the carrying out of such a contract.

That was dated 8th of December, 1917, and made between said parties, and began by witnessing that

in consideration of the sum of $100, one hundred dollars, of lawful money of Canada now paid by the purchaser to the vendor, receipt whereof is hereby acknowledged, the vendor covenants and agrees

to and with the purchaser to sell and assign to the purchaser on or before the 1st day of May, 1918, one undivided one-half share or interest in sections fourteen (14), fifteen (15), nine (9), ten (10) and eleven (11), in township twenty-eight (28), in range twenty-eight (28), west of the fourth meridian, in the province of Alberta, subject to the covenants and conditions contained in the agreement of sale thereof from the Calgary Colonization Company, Limited, to the vendor, for the price or sum of five thousand $5,000 dollars, on which shall be credited the sum of one hundred ($100) dollars, with interest at six (6%) per cent per annum from December 4th, 1917, and an undivided one-half (½) share or interest in all necessary equipment purchased by the vendor for the operation of the said farm prior to the first day of May, 1918, for the price or sum equivalent to one-half (½) of the actual cash paid for or on account of same by the vendor, subject to the payment of any unpaid purchase money remaining against the same, together with a sum equivalent to one-half the cash paid by the vendor prior to the said first of May, 1918, in the cultivation of the said lands together also, with one half-of the actual cash cost of any necessary buildings which may be erected by the vendor on the said lands prior to the said date.

The remainder of the contract provided for numerous details, needless to repeat as not now in dispute.

The parties executed this agreement under their hands and seals. The respondent then proceeded to complete the original proposed purchase agreement and paid $10,000.

The hundred dollars was never in fact paid or afterwards referred to until the appellant tendered the $5,000 in March, and repeated it in April following, in more formal terms.

The appellant had gone, as expected, to Minneapolis in March, and wrote after his return from there on 14th March, 1918, to respondent as follows:—

March 14th, 1918.

James Norstrant, Esq.,
Rockyford, Alberta.

Dear Jimmie:—

I returned a week ago from the States, and consulted with Mr. Beiseker and Mr. Smith of the estate, and they are quite agreeable to the contract which I made with you in regard to the purchase of half interest in the five sections.

Please inform me whether you desire me to send you my check for $5,000 to Rockyford, or shall I place it to your credit in some bank in Calgary.

If you are not coming in to Calgary again within a week or so, wish you would let me know some day that I could meet you at Rockyford, and I will run out to see you.

Yours truly,
(Sgd.) James W. Davidson.

Getting no reply he wrote him again on 19th March, enclosing his cheque for $5,066.16, to cover the $5,000 and interest at 7%.

On 23rd March, 1918, respondent wrote saying as follows:—

Rockyford, Alberta.

Mr. J. W. Davidson,
Calgary, Alta.

Dear Mr. Davidson:—

Received your letter of March 14th. This letter must have been mislaid somewhere, and then the roads have been so very bad, our teams have not been to town this last week.

I have plenty of cash on hand. I made arrangement at Drumheller, to get ten thousand dollars.

Mr. Davidson, if you could let me know about a week ahead and I will meet you at Rockyford, or I expect to be in the 29th March for the bull sale, if that will be satisfactory to you. Kindly let me know.

Yours truly,
J. G. Norstrant.

And on the 9th April he wrote as follows:—

Rockyford, Alberta,
April 9th, 1918.

Mr. J. W. Davidson,
Calgary, Alta.

Dear Mr. Davidson:—

Enclosed find your cheque for $5,066.16 which I am returning. I don't need the money now as I have to pay interest on the money which I borrowed when the deal was made anyway, and this money would only be idle here.

Am very busy getting at the seeding now. Will try and get in to see you as soon as I can find a few days to spare.

Yours truly,
(Sgd.) J. G. Norstrant.

Respondent not having appeared as promised, appellant wrote, enclosing a marked cheque for $5,100.71, explaining at length what it was for and desiring information on the subject of what had been done relative to the land, and to this the respondent replied as follows:—

Rockyford, Alta., April 25th, 1918

Mr. Jas. W. Davidson,
Calgary, Alta.

Dear Sir:—

Enclosed find your cheque which you left with me yesterday. I will be in at your meeting the first of the month.

Yours truly,
(Sgd.) J. G. Norstrant.

The appellant wrote on 30th of April, 1918, a long letter recounting the history of their dealing and also returning the cheque.

In my view of this case this correspondence, apart from being evidence of the tender or waiver thereof, is only of importance in regard to an aspect of the case which I will refer to presently.

No dispute arises here or below, so far as I can see, as to the tender.

The learned trial judge gave judgment for the appellant after having heard both him and respondent as to such collateral or subsidiary facts as were relevant or irrelevant.

The Appellate Division, by a majority, reversed that judgment, the Chief Justice dissenting and upholding the judgment of the learned trial judge.

The majority of the court seem to hold, notwithstanding the contract being under seal, that unless and until the hundred dollars named therein as consideration had been paid, the contract was void. I wholly dissent, with great respect, from such view of the law.

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I agree that a unilateral offer of an option without consideration can be revoked at any time, unless under seal as this contract was.

I am of the opinion that if the offer is made under seal and not accepted it may be withdrawn within a reasonable time and that the measure of such time might under certain circumstances be very brief indeed.

I am further of opinion that, if there is no other consideration than mutual promises, an agreement for an option without seal may be enforceable.

Such promissory consideration may be in shape of a promissory note, or a promise to give one, or something else of value. And when the contract for an option, as here, is under seal and purports to bind for a specific time, assented to by the covenantee, it binds without the payment of any consideration.

And the binding effect thereof cannot be affected by any mere omission to pay what is named as the consideration which has been declared to have been received, unless and until the offerer has demanded from him bound to pay such consideration, and been refused.

None of the said several propositions of law for the most part need, I respectfully submit, any citation of authority to support them or any of them.

The distinction between the efficacy of contracts under seal and those not, so far as consideration therefor is concerned, still stands good, I think.

The man contracting under seal to give an option to the other party thereto, and stipulating for a consideration named, is entitled to have it paid, but even if it is not paid, it stands as a debt due and, by oral evidence, can be so shown despite the acknowledgment of its receipt.

That debt, or price of consideration, remaining due and owing by virtue of the bargain attested by such debtor executing the contract, is sufficient consideration even if he owing it never accepts the option.

That alone would uphold the validity of the contract even if a mere simple contract not under seal so far as the elements of need of consideration for such like contract is concerned. How can its being made under seal render it less?

There is presented in argument here, as has been elsewhere, what, if I may be permitted to say so with respect, seems to me a mere metaphysical train of thought, which suggests its payment is a condition precedent, inherent in the contract so framed, to render its becoming at all operative. Where is that condition precedent to be found? It certainly is not expressed. And I repeat it never has been successfully invoked in the case of a simple contract.

I have not found in the numerous English and Canadian and other authorities cited, anything to support such a proposition. I find in the judgment of Cowen J. in the case of *McCrea* v. *Purmort* (1), at foot of p. 113 and top of p. 114, two sentences which express more neatly than I have seen elsewhere what is my own view of the relevant law on the subject, as follows:—

> Looking at the strong and overwhelming balance of authority, as collectable from the decisions of the American courts, the clause in question, even as between the immediate parties, comes down to the rank of *prima facie* evidence, except for the purpose of giving effect to the operative words of the conveyance. To that end, and that alone, is it conclusive.

If the case presented were a mere simple contract expressed to be in consideration of the promise to pay one hundred dollars it would be *prima facie* binding.

(1) [1836] 30 Am. Dec. 103; 16 Wend. 460.

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And if the acknowledgment of its receipt were therein expressed that could not be held to be in any way destructive of the vitality of the contract.

It might well be that if and when payment had been demanded and refused such refusal would end the force of the contract.

Such being, as I take it, the condition of things under a simple contract, I repeat, how is it changed by adding a seal? It seems, I respectfully submit, a confusion of thought which should not have existed if the common use of such a form of expression had been borne in mind.

I respectfully submit that this alleged implication of a condition has no foundation in law to rest upon in any aspect of the case.

And the citation in support of respondent's case, of decisions such as *Dickinson* v. *Dodds* (1), or *Davis* v. *Shaw* (2), in which respectively an unaccepted offer of an option for which there was no consideration was properly held null or revocable at will, does not help to commend the curious theory of an implied condition precedent in a case where the offerer is bound both by his seal and the acceptance of a promised consideration which he never demanded before his breach of contract. Had he done so and been refused payment, I should have held him released.

In truth there is no English or Canadian authority, or American either when correctly interpreted, directly supporting such a proposition of an implied condition precedent, as claimed herein.

On the contrary we have the dictum I quote above from the judgment in the *McCrea Case* (3) neatly expressing the law, as I view it, applicable to this case.

(1) [1876] 2 Ch. D. 463. (2) [1910] 21 Ont. L.R. 474.
(3) 30 Am. Dec. 103

The case of *Cushing* v. *Knight* (1) has in it the element of demand and refusal, on unjustifiable grounds, of payment. Then we have the insurance cases, beginning with *Xenos* v. *Wickham* (2), followed by numerous English decisions as well as many American cases which in principle seem to refute this theory of an implied condition precedent as operative, unless and until payment of the consideration.

Of the latter numerous cases, *Basch* v. *The Humboldt Mutual Fire and Marine Ins. Co.* (3), is typical.

The decision in *Morgan* v. *Pike* (4), holding that the covenantee was entitled to recover on a deed although obviously the consideration therefor was his covenant in same deed, which he had never executed, seems to cover the whole ground.

And when we come to the actual facts surrounding the contract and the conduct of the parties in relation thereto, so fully illuminated by the correspondence above quoted, there seems not the slightest ground for reliance upon such a theory, and, if it ever had a possible existence, seems to have been clearly waived.

I would therefore, allow the appeal with costs. I agree, however, with Mr. Justice Beck's suggestion that a judgment for an account would be much more appropriate than an assessment for damages, for this is an action for the sale of a share in the contract. If the parties, or either of them, desire such an amendment it should be granted as the judgment the court should have given.

DUFF J. (dissenting).—I am unable to perceive any difficulty in the point of construction which was the principal point argued and the principal point

(1) [1912] 46 Can. S.C.R. 555.
(2) [1867] L.R. 2 H.L. 296.
(3) [1872] 35 N.J.L.R. 429.
(4) [1854] 14 C.B. 473.

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discussed in the court below. The contract of the 8th Dec., 1917, professes to create an option, to vest an option in the appellant and it is a long settled rule that in the exercise of an option for the purchase of land the terms as to time of payment and otherwise of the contract under which it is created must in all respects be strictly pursued. *Master* v. *Willoughby* (1); *Brooke* v. *Garrod* (2).

In the contract now before us it is, I think, quite clear that the sum mentioned, $100, as the consideration for the option is a sum the payment of which is one of the essential conditions of the constitution of the option, one of the facts which the plaintiff, relying upon the existence of the option, must establish in the absence of circumstances dispensing with the performance of the condition. It is not necessary to consider the effect of *Cushing* v. *Knight* (3). I see no reason to depart from the view I expressed there or indeed to reconsider the subject, but the arguments in favour of the view that the sum nominated to be paid upon the execution of the instrument is a condition of the constitution of the vendor's obligation are much stronger here than in that case by reason of the circumstance that the instrument we are here dealing with is a unilateral instrument, and I repeat, I can entertain no doubt that the payment of the sum mentioned is, by the terms of the instrument, a condition precedent upon the performance of which at the time specified any right of the appellant derived from the instrument alone must rest. I can only add that I am unable to agree with the suggestion that the consideration named can be treated as a merely nominal consideration.

(1) [1705] 2 Bro. Parl. Cas. 244. (2) [1857] 2 deG. & J. 62.
(3) 46 Can. S.C.R. 555.

The question which occupied much attention on the argument—it now proves not to be open as I shall explain presently—is one which does not appear to have been considered in the courts below, and it is this: Has the conduct of the parties been such as to preclude the respondent from relying upon the non-fulfilment of the condition precedent, the point upon which he succeeded in the Appellate Division?

The appellant's contention is twofold: 1st, it is said, the whole of the consideration of the purchase, the sum of $5,000 with interest from the date of the agreement was paid by the appellant and accepted by the respondent and this I shall consider after discussing the second branch of the argument; 2nd, it is said the respondent by his conduct waived the stipulation of the contract requiring the immediate payment of $100 as a condition of the option. It should be noticed that the payment is not a condition of the instrument going into effect; the instrument was unquestionably validly executed and went into effect as a deed but the payment was a condition named in the deed upon the performance of which the appellant's rights under the deed are based. It seems quite clear that the option if validly created would vest in the optionee an interest in land. The decision of the Court of Appeal in *London and South-western Railway Co.* v. *Gomm* (1), seems to be conclusive. Each one of the three judges, Sir George Jessel, Sir James Hannen, and Lindley L.J. explicitly hold that the grant of an option has the effect of creating an interest in land and these opinions are not mere dicta; they are the foundation of a distinct ground upon which the judgment of the court was based.

(1) [1882] 20 Ch. D. 562.

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It has often been held that where the judgment of a court is based on two distinct grounds it is not competent to another court bound by that decision to disregard one of them as being unnecessary to the decision.

True, the interest of the optionee is not the same as that of a purchaser but it is real and substantial and is not revocable and here I must take leave to dissent from the observation made by the learned trial judge in the course of the proceedings to the effect that the giver of the option might lawfully disregard it and pay damages. An option given for valuable consideration is not revocable. *Bruner* v. *Moore* (1); *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (2). And in *South Wales Miners Federation* v. *Glamorgan Coal Co.* (3), Lord Lindley points out that to break a contract it is an unlawful act and that in point of law a party to the contract is not entitled to break it on offering to pay damages. Any attempt on the part of the grantor to withdraw the option would be disregarded by a court administering equitable principles.

Since the option, if validly constituted, vested in the optionee an interest in land the contract embodied in the instrument under discussion was a contract within the 4th section of the Statute of Frauds; and it is, I think, settled law that neither the plaintiff nor the defendant could at law avail himself of a parol agreement to vary or enlarge the time for performing a "contract previously entered into in writing" and required so to be by the Statute of Frauds; and moreover that in equity when a contract falling within the Statute of Frauds is once made no conduct or verbal waiver can be relied upon to substitute a different

(1) [1904] 1 Ch. 305 at p. 309. (2) [1900] 2 Ch. 352 at p. 364.
(3) [1905] A.C. 239 at p. 253.

agreement from the one appearing in the contract itself unless the case can be brought within the equitable principles on the subject of part performance. *Stowell* v. *Robinson* (1); *Morris* v. *Baron* (2). It does not at all follow that one of the parties to the contract may not estop himself by his conduct or by his conduct put himself in a position in which he is precluded from denying that the other party has observed in a particular case the time or manner designated by the contract for the performance of one of its stipulations. *Hartley* v. *Hymans* (3).

Where one party to a contract is under an obligation to pay the other is under a correlative and concurrent obligation to accept and if the party in whom the obligation inheres prevents the performance of it by failure to observe his own concurrent obligation or otherwise by any wrongful act, he will not be allowed to take advantage of the non-performance of the first party; and this principle is comprehensive enough to prevent any person on whom the incidence of the contractual obligation falls justifying or excusing his default in performance of it by setting up the promisee's non-performance of a condition precedent where the promisee's non-performance is due to the conduct of the promisor which makes it unjust or inequitable that the promisor should rely upon such non-performance. *Mackay* v. *Dick* (4). These principles have been applied in a series of cases relating to contracts for the sale of goods where at the request of the buyer or seller there has been a forbearance to deliver at the time named for delivery in the contract. Where

(1) [1837] 3 Bing. N.C. 928, at pp. 936 and 937.
(2) [1918] A.C. 1 at pp. 16 and 17.
(3) [1920] 36 Times L.R. 805 at pp. 810 and 811.
(4) [1881] 6 A.C. 251 at pp. 263 and 270.

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the postponement of delivery took place at the request of the buyer made before the date fixed for delivery, it was held in *Hickman* v. *Haynes* (1), that the buyer was estopped from averring that the seller was not in truth ready and willing to deliver on the contract date. (Page 607). And the principle of the decisions which are summed up in the judgment of Lindley L. J. in the case just mentioned was stated in the judgment of Brett J. in *Plevins* v. *Downing* (2), in these words:—

It is true that a distinction has been pointed out and recognized between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the court cannot give effect, in favour of either, to such attempt, if the parties make an arrangement as to the second, though such arrangement be made only by words, it can be enforced. The question is what is the test in such an action as the present, whether the case is within the one rule or the other.

Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract. He shows that he was so, but that he did not offer to deliver within the agreed time because he was within such time requested by the vendee not to do so. In such a case it is said that the original contract is not altered, and that the arrangement has reference only to the mode of performing it. But, if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract. The statement shows that he was not. He would be driven to rely on the assent of the vendee to the substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do so as to enforce his claim. This seems to be the result of the cases which are summed up in *Hickman* v. *Haynes* (1).

(1) [1875] L.R. 10 C.P. 598.

(2) [1876] 1 C.P.D. 220 at pp. 225 and 226.

There appears, it is true, to be some point in the criticism upon this judgment made in a note at pp. 690-1 of the last edition of Benjamin on Sales, to the effect that the distinction drawn by Brett J. between a postponement at the request of the plaintiff and a postponement at the request of the defendant is not consistent with the decision in the *Tyers case* (1), and that the view of Blackburn J. expressed arguendo in that case gives the true rule, namely, that a postponement of delivery by a seller in consequence of the assent of the buyer to his request stands in the same position as a postponement at the request of the buyer. In neither case, it is suggested, does the plaintiff rely upon a binding contract to postpone delivery but upon a voluntary forbearance brought about by the conduct of the other party and in either case, it is suggested, the plaintiff, if in truth he would have performed the condition, had he not been induced to refrain from doing so by the conduct of the other party, is in a position to aver and prove his readiness and willingness to perform it.

This criticism, it will be observed, really leaves untouched the principle stated in the judgment of Brett J.; it is rather directed to his concrete application of it by which it may at least be plausibly contended the scope of the principle is not adequately recognized.

The principle upon which courts of equity have acted is stated by Lord Cairns in *Hughes* v. *Metropolitan Rly. Co.* (2), in a passage applied by Farwell J. in *Bruner* v. *Moore* (3), to the effect that stipulations as to time in a contract constituting an option may be

(1) [1875] L.R. 10 Ex. 195. (2) [1877] 2 A.C. 439.
(3) [1904] 1 Ch. 305.

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waived by conduct having the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced "where to enforce them would be inequitable having regard to the dealings which have * * * taken place between the parties."

I am discussing, it will be observed, the waiver of conditions precedent. As regards waiver of conditions subsequent somewhat different considerations apply, in the majority of cases at all events, as usually the right affected by the condition is made defeasible at the option of the party entitled to enforce the condition. In such cases the right continues to subsist until the party has declared his election to avoid it which he may of course do by unilateral act, the matter being entirely in his own hands. In dealing with conditions precedent where the act designated is one of the things which enter into the constitution of the right the existence of which is in dispute and consequently if the act is not performed no right arises under the strict terms of the contract, obviously something more than a declaration of intention either by words or by conduct is required to fill the gap. Obviously also the gap is filled if the party entitled to enforce the condition is either estopped by law or on equitable principles precluded from disputing that the other party has done everything required to be done on his part; and there seems to be no reason in principle why the estoppel or the corresponding equitable claim should not be rested upon facts or upon conduct subsequent to the time fixed for the performance of the condition. As Lord Chelmsford said in *Roberts* v. *Brett* (1):—

(1) [1865] 11 H.L.Cas. 337 at p. 357.

I have no difficulty in saying that in such a case the party who may avail himself of the non-performance of the condition precedent but who allows the other side to go on and perform the subsequent stipulations has waived his right to insist upon the unperformed condition precedent as an answer to the action.

Bentsen v. *Taylor* (1); *Panoutsos* v. *Hadley Co.* (2); *Hartley* v. *Hymans* (3); *Leather Cloth Co.* v. *Hieronimus* (4).

Always observing, however, that in those cases in which the Statute of Frauds comes into play the plaintiff must fail if in substance he is relying not upon the written agreement but upon a verbal agreement or an agreement by conduct substituted for the written agreement in whole or in part. *Stowell* v. *Robinson* (5); *Noble* v. *Ward* (6); *Bruner* v. *Moore* (7); *Corn Products Co.* v. *Fry* (8); *Morris* v. *Baron* (9); and subject always, moreover, I repeat, to this, that the plaintiff has been put in a position by the conduct of the other party to aver that he was at the time designated (when the provision as to time is imperative) ready and willing to perform his part of the contract. With the plaintiff "readiness and willingness" where he is seeking to enforce an obligation in which he is involved concurrently with the defendant is always a condition precedent, and this is so even in a case in which if he had been the defendant he might have succeeded in resisting the claim against him on the ground that he was absolved from performance by the conduct of the other party.

Whichever party is the actor

said Lord Halsbury in *Forrestt* v. *Aramayo* (10)

(1) [1893] 2 Q.B. 274.
(2) [1917] 2 K.B. 473.
(3) [1920] 36 T.L.R. 805 at pp. 810-811.
(4) [1875] L.R. 10 Q.B. 140.
(5) [1837] 3 Bing. N.C. 928.
(6) [1867] L.R. 2 Ex. 135.
(7) [1904] 1 Ch. 305 at pp. 312-13.
(8) [1917] W.N. 224.
(9) [1918] A.C. 1.
(10) [1900] 83 L.T. 335 at p. 338.

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and is complaining of a breach of contract he is bound to show, as a matter of law, that he has performed all that was incident to his part of the concurrent obligations. The averment that he was always ready and willing to perform his obligation is a necessary averment. *Hickman* v. *Haynes* (1); *Plevins* v. *Downing* (2); *Hartley* v. *Hymans* (3).

Applying these principles to the circumstances disclosed in the present appeal I should be disposed, as I intimated more than once in the course of the argument, to think that a vendor and purchaser accustomed to deal with one another and on such a footing as the parties to this appeal were having executed an instrument such as that before us and having separated without a word being said as to the payment of the consideration for the option, the sum being comparatively trifling, there was sufficient *prima facie* evidence of a request for forbearance and compliance with that request to constitute an estoppel within the meaning of the cases discussed in *Hickman* v. *Haynes* (1). One circumstance, however, deprives this view of relevancy; the evidence shows quite plainly that the appellant's attention was not drawn to the circumstance that this sum of $100 was to be paid on the execution of the instrument and points rather directly to a similar conclusion as touching the respondent's state of mind. The appellant who never thought of the condition precedent as he states himself, cannot, of course, be heard to say that his default was due to anything done by the respondent who, as far as one can see, was in the same state of inattention as himself. Not only does he not aver readiness and willingness; such an averment if made would be conclusively negatived by his own evidence.

(1) L.R. 10 C.P. 598.
(2) 1 C.P.D. 220.
(3) 36 Times L.R. 805.

The subsequent conduct of the parties gives no additional support to the appellant's contention on this point and indeed a perusal of the case makes it quite clear that neither estoppel nor the corresponding equitable principle is a ground of claim which the appellant is entitled to rely upon in this court. There is no suggestion of it in the pleadings, it was not touched upon by either the trial judge or the judges of the Appellate Division, it was barely mentioned in the appellant's factum and the cross-examination which at first sight might seem to have been directed to it appears on a closer examination to have been aimed at the respondent's plea of mistake on his part and overreaching on part of the appellant.

As to the contention that the purchase price was accepted by the respondent the correspondence establishes that the respondent had no intention of accepting the appellant's cheque and there was nothing in the respondent's conduct calculated to convey to the mind of the appellant the idea that such was his intention. I concur with the comment of Stuart J. as regards the appellant's knowledge of the sales made by the respondent. I do not doubt that the appellant was aware of these sales when he wrote the letter of the 19th March. In making the sales the respondent had committed himself to a series of contracts involving a repudiation of any obligation to sell to the appellant; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1), and *Metropolitan Electric Supply Co.* v. *Ginder* (2); he was asserting openly (and there is no doubt with the knowledge of the appellant acquired anterior to any offer of payment) his right to deal with the property as owner; and I can find in the appellant's conduct thencefor-

(1) [1901] 2 Ch. 37 at p. 51. (2) [1901] 2 Ch. 799 at p. 807.

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ward only a persistent though unsuccessful effort to coax or trick the respondent into a position in which he could aver that his cheque had been accepted.

The appeal should be dismissed with costs.

ANGLIN J.—A defence of misrepresentation having failed at the trial, the only question now before us is the effect on the rights of the parties of the non-payment by Davidson at the time the agreement sued upon was executed of the sum of $100, receipt whereof is thereby acknowledged as the consideration for the vendor's covenant to sell.

The learned Chief Justice of Alberta in his analysis of the opinions delivered in this court in *Cushing* v. *Knight* (1), so much relied on for the respondent, has, I think, satisfactorily distinguished that decision from the case at bar. Yet, if the question now presented were merely one of interpretation of the written agreement, while an implied promise by the respondent to pay the sum of $100 to the appellant as the consideration for which the latter undertook to keep his offer of sale open from the 8th December, 1917, to the 1st of May, 1918, may be found in it, I should think it also clear that actual payment of that sum was thereby made a condition precedent to the instrument becoming effective as an option. Nor do I find in the terms in which it is couched any latent ambiguity in this respect such as might justify resort to evidence of conduct or negotiations to aid in construction.

I cannot assent to the contention that the facts that the agreement is under seal, and that it contains a recital of the payment of the sum of $100 are conclusive in the appellant's favour. Neither can I regard that sum as merely a nominal consideration.

(1) 46 Can S.C.R. 555.

But as Baron Bramwell said in *White* v. *Beeton* (1)

> that which was at one time a condition precedent (may) by my own conduct become no condition precedent. * * The performance of an act may be at one time a condition precedent and not at another.

The reasonable inference from the circumstances immediately following the execution of the agreement and the subsequent letters of the respondent—unless we are to attribute to him bad faith in writing them amounting almost to dishonesty—seems to be that, without relinquishing his right to insist upon actual prepayment of the $100 he voluntarily forbore doing so and made it apparent that he was satisfied to rely upon the undertaking or liability of the appellant to pay that sum either as part of the $5,000 payable on the 1st of May or before the time for making that payment should expire. Parol evidence of the facts warranting this inference is admissible since it does not amount to such a variation of the terms of the contract that verbal proof of it would offend against either the rule in regard to contracts reduced to writing or the Statute of Frauds. It does not involve the substitution of a promise to pay for actual payment as the consideration. Such a case would present great difficulty. *Vezey* v. *Rashleigh* (2). It is merely a withholding by the respondent of the exercise of his right to insist upon the performance at the date thereby fixed of a promise to pay stipulated in the written contract, *Tyers* v. *Rosedale & Ferryhill Iron Co.* per Martin B. (3)—a substituted mode of performance assented to without release of the original obligation; *Leather Cloth Co.* v. *Hieronimus* (4); *Plevins*

(1) [1861] 7 H.&N. 42, at p. 50.
(2) [1904] 1 Ch. 634.
(3) [1873] L.R. 8 Ex. 305, at p. 319; L.R. 10 Ex. 195.
(4) L.R. 10 Q.B. 140, at p.146.

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v. *Downing* (1). The principle taken from Lord Cairns' judgment in *Hughes* v. *Metropolitan Rly. Co.* (2), as applied in *Bruner* v. *Moore* (3), may perhaps also be invoked. That the appellant assumed liability to pay the $100 is, I think, sufficiently evidenced by his execution of the agreement which would otherwise seem to have been purposeless. I incline to the view that there was a binding option, if not from the execution of the instrument, from the 14th of March, or, at all events, from the date of the tender in April.

In any event, however, the document of the 8th December, 1917, may, in my opinion, be regarded as an offer to sell a one-half interest in the lands in question upon the terms therein stated. There was never any express revocation of that offer and nothing had transpired that would imply a revocation before the appellant intimated his intention to accept and tendered the amount which would be due to the respondent on the 1st of May, including the $100 and interest thereon.

Resale of the land was contemplated by the parties. Resale at a profit was the chief object of the venture. The sales made by Norstrant did not imply a revocation of his offer to sell to Davidson an undivided one-half interest in his purchase from the Calgary Colonization Company. Knowledge of those sales by Davidson, therefore, would not amount to notice of revocation of that offer such as would preclude an effective acceptance of it. Moreover Davidson was in fact unaware of Norstrant's sales when he sent the letter of the 14th of March, 1918, intimating his intention to carry out the agreement. No other act of revocation is suggested. Davidson might have some recourse

(1) 1 C.P.D. 220. (2) 2 App. Cas. 439.
(3) [1904] 1 Ch. 305, at p. 312.

in damages against Norstrant if he exceeded his authority and his sales were unsatisfactory. But he can in any event hold Norstrant accountable for his share of their proceeds.

Assuming in favour of Norstrant that the prepayment of the sum of $100 remained a condition precedent to the document becoming binding as an option and, that it was therefore open to him at any time before acceptance of the offer to sell to have withdrawn it, communication of such a withdrawal to the appellant was necessary in order to terminate his right of acceptance and preclude him by exercising it from converting the offer into a firm contract of sale.

While the delay in Davidson's acceptance might, apart from the special circumstances, have been so unreasonable as to render it inefficacious, the evidence here shows that such delay as was required to enable the appellant at his convenience in the early spring to interview the members of the firm of Beiseker and Davidson at Minneapolis was contemplated and provided for. Davidson communicated the result of that interview to the respondent by his letter of the 14th March, written promptly on his return from the trip on which it took place, and informed him of his intention to take up the option and become the purchaser of a one-half interest in the lands. He formally accepted Norstrant's offer and tendered all the money due on the 1st of May by his letter of the 23rd of April, receipt of which in due course has been proved.

I would, for these reasons, with great respect, allow this appeal and restore the judgment of the learned trial judge, substituting however for the reference to assess damages directed by him an order for an accounting as indicated by Mr. Justice Beck.

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MIGNAULT J. (dissenting).—That this case presents some features of considerable difficulty is shewn by the division of opinion in the courts below. And the respondent, who lost in the first court but succeeded in the Appellate Division, the learned Chief Justice of Alberta dissenting, relies on legal principles of an elementary character, the great difficulty not being as to the principles themselves but rather on the question whether a proper case has been made out for their application.

The agreement signed by the parties on the 8th December, 1917, gave rise to this litigation. This agreement, in so far as is material to the present controversy, states that in consideration of the sum of $100 "now" paid by the appellant to the respondent, the receipt of which is acknowledged, the respondent agrees with the appellant to sell and assign to him, on or before the 1st of May, 1918, one undivided half share or interest in certain farm land which the respondent purchased on the same day from the Calgary Colonization Company, subject to the covenants and conditions contained in the agreement of sale from the latter company to the respondent, for the price of $5,000 on which was to be credited the said sum of $100 with interest at 6% per annum from December 4th, 1917, and an undivided one-half share or interest in all necessary equipment purchased by the respondent for the operation of the farm prior to May 1st, 1918, for a price equivalent to one-half of the actual cash paid for the same by the respondent, subject to the payment of any unpaid purchase money remaining against the same, together with a sum equivalent to one-half the cash paid by the respondent prior to May 1st, 1918, in the cultivation of the said lands, together also with one-half the

actual cash cost of any necessary buildings erected by the respondent on the said lands prior to the above date. In the event of the appellant availing himself of the respondent's agreement, certain stipulations were made as to the farming operations to be carried on by the respondent which are not material to the present inquiry. The document witnessing the contract was made under seal and was signed by both parties.

Although by this instrument the respondent acknowledged receipt of $100 stated to be the consideration of the agreement, it is common ground that this sum was not paid nor was it ever demanded by the respondent. The reason the appellant desired to obtain an agreement in this form, was that one Davidson, then deceased, and one of whose executors the appellant was, had had an equitable interest in the property, and the appellant very properly did not wish to enter into the venture before consulting his co-executors, which he expected would require some time. He went to Minneapolis with this object in view, and after his return he wrote, on March 14th, 1918, to the respondent informing him that he had obtained the consent of his co-executors and asking the respondent if he desired that he should send him a cheque to Rockyford or place the money to his credit in a bank in Calgary. On March 19th, the appellant sent the respondent his cheque for $5,066.16, being the half of the cash payment made by the latter to the Calgary Colonization Company with interest at 7 per cent from January 10th. The respondent answered on March 23rd, acknowledging receipt of the letter of March 14th, stating however that he had plenty of cash on hand. On April 19th, the respondent wrote to the appellant returning the cheque for $5,066.16 saying that he did not need the money then as he had

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to pay interest on the money which he had borrowed when the deed was made, and the appellant's money would only be idle in his hands. The appellant wrote again, on April 23rd, insisting on the respondent's acceptance of the half of the cash payment made by him, notifying him that he accepted the offer contained in the agreement of December 8th, and enclosing a marked cheque for $5,100.71, being the $5,000 with interest from December 4th. This cheque the respondent returned without assigning any reason on April 25th.

When this action was taken by the appellant, the respondent contested it, denying the tender of $5,100.71 and any notification of acceptance by the appellant of the offer contained in the agreement of December 8th. It was only at the trial that the respondent amended his statement of defence by setting up total failure of the consideration mentioned in the agreement.

It is on this plea of failure of consideration that the Appellate Division dismissed the appellant's action.

Reliance was placed in the Appellate Division on the decision of this court in *Cushing* v. *Knight* (1), but it seems to me that the fact that in that case a demand was made for the money consideration, which had not been paid although its receipt was acknowledged in the agreement, with notification that if it were not paid within four days, the contract would be treated as rescinded,—sufficiently distinguishes *Cushing* v. *Knight* (1) from the present case where no such demand was made.

Some discussion took place at bar and in the courts below on the question whether the $100 mentioned as consideration could be regarded as a purely nominal

(1) 46 Can. S.C.R. 555.

consideration, the more so as the agreement was under seal and therefore, it was contended, would stand without consideration. Independently of the question whether the sealing of the agreement rendered it enforceable without consideration, I have not been able to satisfy myself that failure of consideration, where a valuable consideration is requisite for the existence of a contract, can be met by saying that the consideration mentioned in the contract is a merely nominal one and can therefore be disregarded. For this would be equivalent to holding that although consideration is required, no consideration at all is necessary. In other words, if this contention is sound, where the parties mention a merely nominal consideration, instead of a substantial one, the contract would stand without payment of this consideration, and, if so, it would be valid without any consideration. If the sum mentioned as consideration be so insignificant that it can be disregarded, then there is no consideration whatever. I may add that even were it open to the appellant to urge that a nominal consideration can be disregarded, here the sum of $100 appears sufficiently substantial, the more so as it was to be credited on the purchase price, to prevent us from holding that it was in any way purely nominal.

Nor is it any answer to say that the agreement being under seal no consideration at all is necessary, for the agreement itself states that it was entered into in consideration of the then and there payment of $100, and if this sum was not paid, the sealing of the agreement would not protect it from the total failure of the consideration it expressly mentions.

Coming now to the objection that the sum of $100 was not paid and therefore that the agreement sued on is void for want of consideration, I think it must be

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conceded, on the construction of the agreement, that the payment of this sum was a condition precedent to the existence of any contract of option between the parties. It is said that the respondent waived this stipulation as to the mode or time of performance, but I have been unable to find any evidence of such waiver. It is true that when the appellant sought to tender the sum which had to be paid before May 1st, the respondent alleged that he was not then in need of money to carry out his purchase from the Calgary Colonization company. But while the respondent may have thought that he was bound by the agreement, still the fact remains that he could not be bound unless the money consideration mentioned in the deed was paid. I cannot see my way to find in the agreement both an option contract conditioned on the prepayment of the consideration and, if the consideration failed, an offer open to acceptance so long as it was not withdrawn. The agreement is either an option contract binding on the respondent from its date, or it is no contract at all, certainly not a mere offer which the appellant could accept before May 1st, 1918, provided the offer had not been withdrawn before that date. The intention clearly was that the respondent should be bound until the first of May to sell a half share of the property to the appellant, if he accepted the option, but the respondent could not be so bound unless the money consideration mentioned in the deed was paid, for the granting of the option to purchase was based on this payment. The answers made by the respondent to the appellant's letter are consistent with the fact, which I think probable, that, not having, as he swore, a copy of the agreement, he was unaware of the existence of the clause requiring the pre-payment

of the $100, and the appellant himself says that he read over the contract without noticing this clause. But then if the respondent was without such knowledge, it certainly cannot be said that he waived this stipulation. The position in fine appears to me to be this. The appellant sues on this agreement and must therefore shew that he fulfilled the condition subject to which it was entered into. This he has not done and he has consequently not made out a case entitling him to succeed.

I would therefore dismiss the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *E. A. Dunbar.*

Solicitor for the respondent: *F. C. Moyer.*

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*Feb. 1, 2.
Feb. 24.

F. V. KILLORAN (DEFENDANT).....APPELLANT;

AND

THE MONTICELLO STATE BANK (PLAINTIFF). } RESPONDENT.

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

Bills and notes—Conditional sale agreement—Promissory notes—Notes on same sheet as agreement—Negotiability—Holder in due course—"The Sale of Goods Ordinance" (*N.W.T.*) *C.O.* 1915, *c.* 39.

The appellant bought a horse from one Dygert for $1,700, paid $300 cash and gave two notes of $700 each. Below each note was written an agreement providing that the property in the horse would not pass until the balance of the purchase price was paid; and stipulating that "no holder of said notes by or to whom * * * said notes * * * have been discounted * * * shall be affected by the state of accounts between the subscriber and the promisee or by any equities existing between the subscriber and the promisee, but shall be deemed to be a holder in due course and for value of the notes held by him." Dygert indorsed the notes to the respondent bank for value. The horse died before the notes were paid and the sale was then avoided between the appellant and Dygert under "The Sale of Goods Ordinance."

Held, that the respondent bank was entitled to recover on the notes from the appellant.

Per Idington, Anglin, Brodeur and Mignault JJ.—Under the agreement, the respondent bank was a holder in due course, though it had notice of the contract between the appellant and Dygert.

Per Idington, Duff and Mignault JJ.—These notes were severable from the agreement and constituted in law promissory notes.

Judgment of the Appellate Division ([1920] 3 W.W.R. 542) affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Walsh J. at the trial (2) and maintaining the respondent's action.

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

(1) [1920] 3 W.W.R. 542. (2) [1920] 3 W.W.R. 17.

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

W. L. Scott for the appellant.

A. B. Hogg for the respondent.

IDINGTON J.—The appellant signed what are in due form two ordinary promissory notes for $700 each That was followed on each of the same sheets of paper at the respective heads of which each of said promissory notes had been written and signed by appellant, by an agreement purporting to be made between said appellant and Dygert, the payee of each of the said promissory notes.

Each of these agreements was signed by appellant but not by Dygert.

Each of the same has indorsed on it an affidavit, purporting to have been sworn to by Dygert; first stating that he is the owner or bailor of the goods mentioned in the written agreement; that said copy of agreement is a true and correct copy of the agreement of which it purports to be a copy, and that

> 3. The said agreement truly sets forth the agreement between myself and the said F. V. Killoran the parties thereto, and that the said agreement therein set forth is *bona fide* and not to protect the goods in question mentioned therein against the creditors of the buyer or bailee.

These promissory notes were indorsed to another party who re-indorsed to respondent who sued to recover same.

The learned trial judge treated each of these promissory notes, and what followed, as one document, and together as an ordinary lien note.

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He then applied or sought to apply sections 9 and 22 of the "Sales of Goods Ordinance" of Alberta thereto and found that the effect thereof, in the event of the death of the stallion, (which was the property agreed to be sold) and which event took place before payment of the said promissory notes, was that the obligation to pay ceased, and dismissed the action.

In the Appellate Division this judgment was reversed and judgment given for the respondent for the amount of the said promissory notes and interest with costs.

Against that judgment this appeal is taken.

The said alleged promissory notes I must hold to be in law promissory notes, and the respective agreements following each, a merely collateral agreement which may or may not have some operative effect between the parties thereto, but cannot effect, even with notice thereof to the respondent taking them in due course, its rights to recover.

In each of these agreements was a clause designed to stop the appellant from denying that indorsees in due course could be otherwise than such.

In my view it is not necessary to follow up all the manifold views that may be taken of the curiously worded agreement.

The respondent was not a party thereto. There was no proof of failure of consideration, nor could there be under such very peculiar circumstances.

The whole contrivance of each of the said supplementary documents and all that followed each, may, if persisted in as a mode of doing business, lead to much litigation, and may result in disappointment to those using it when that has run its course, but for the present case all that has to be determined is that each of the documents first signed is a promissory note, to the suit upon which no effectual answer has been set up.

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Of the curiosities I have found in my search for what might be an answer, I may refer to the cases cited in Byles on Bills, 17th ed., page 251. And of these the case of *Salmon* v. *Webb* (1), in its essential features, including the non-execution of the agreement by the promisee, alike to this, determines in principle how a mere collateral agreement may fail to operate against those holding in due course.

I need not enlarge but may, in deference to the argument presented by counsel for appellant, say that I doubt if his contention for the narrow meaning he claimed for the phrase

any equities existing between the subscriber and the promisee

used in the said agreements, so called, is tenable.

I think the appeal should be dismissed with costs.

DUFF J.—I have no difficulty in concurring with the view of the Appellate Division that the instruments sued upon are promissory notes. In each case there is, it is true, on the same piece of paper one of these instruments and a collateral agreement, but the collateral agreement is no part of the instrument sued upon. By its express terms, indeed, it is not to qualify the absolute obligation of the promissor or to affect the contractual rights of the parties in such a way as to impair the negotiability of the note.

The appeal should be dismissed with costs.

ANGLIN J.—Assuming in the appellant's favour, but without so deciding, that although there is much in the terms of the documents to support the contrary view, the instruments sued upon were not promissory notes, the agreements in my opinion make it clear

(1) [1852] 3 H.L. Cas. 510.

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that the respondent, as a holder with whom the notes had been discounted, is entitled to all the rights which would have attached to its position were the instruments promissory notes of which it was the holder in due course. I cannot understand for what other purposes it was stipulated that

> no holder of said notes by or to whom * * * said notes * * * have been discounted * * * shall be affected by the state of accounts between the subscriber and the promisee or by any equities existing between the subscriber and the promisee, but shall be and shall be deemed to be a holder in due course and for value of the notes held by him.

As "a holder in due course," the respondent is, in my opinion, entitled to recover, whatever might have been the rights of R. F. Dygert had the notes remained in his hands.

On this ground I would dismiss the appeal with costs.

BRODEUR J.—Killoran agreed to purchase from a man named Dygert a horse for $1,700 on which he made a part payment of $300 and signed for the balance of the purchase price two instruments which I might, for the sake of this decision, call lien notes. There is a difference of opinion in the courts below as to whether these instruments should not be considered as promissory notes. But I do not feel obliged in view of the conclusion I have reached to decide this point.

These instruments stipulate that the property of the horse would not pass until the balance of the purchase price would be paid and they contain the following clause:

> These notes * * * may be discontinued, pledged or hypothecated by the promisee and in every such case payment thereof is to be made to the holder of the notes instead of the promisee, and *no holder* of the said notes * * * shall be affected by * * * any equities existing between the subscriber and the promisee, *but shall be, and shall be deemed to be a holder in due course* and for value of the notes held by him.

Dygert indorsed these instruments and besides made a written assignment of them to the plaintiff who now sues Killoran, who signed them.

Killoran contends that the sale of the horse has been avoided under the provisions of the "Sale of Goods Ordinance Act," which declares, in section 9, that

where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer; but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.

In the present case, the goods were delivered, but the property thereof remained with the vendor, they are at his risk and between the vendor and the purchaser the sale should be considered as avoided since the horse sold died before it became the absolute property of the purchaser. *Res perit domino.*

But as far as the transferee is concerned, the situation is different, in view of the provisions of the contract made by the appellant. The latter has agreed that the notes could be transferred and that the holder should be considered as a holder in due course in spite of the notice he might have of the contract between the vendor and purchaser. He contracted himself out of the right of resorting as against the assignee of the creditor to his equities against the creditor himself. (Leake on Contracts, 6th ed., page 865).

This holder should then be considered in the light of this agreement as if he were a holder in due course without notice under the provisions of the Bills of

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Exchange Act. He can recover the payment thereof, though the sale of goods which has brought the signature of these instruments is avoided.

I am of the opinion that the plaintiff is entitled to recover.

The appeal fails and should be dismissed with costs.

MIGNAULT J.—I have duly considered all that Mr. Scott said in his very able argument for the appellant and in the memorandum which he has since filed. Nevertheless, in my opinion, the appeal cannot be sustained.

The promissory notes sued on, although printed on the same sheet of paper as the agreement for the sale of the stallion, are, I think, severable from this agreement, and constitute perfectly valid promissory notes which could be transferred, as was done here, by indorsement. Consequently even if the contract was terminated between the parties by the death of the stallion, the rights of the respondent as holder in due course of these notes are unaffected thereby.

I also concur in the reasons for judgment of my brother Anglin, as a further ground for the dismissal of this appeal.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McDonald, Martin & Mackenzie.*

Solicitor for the respondent: *A. B. Hogg.*

NARCISSE LORD (PLAINTIFF)......APPELLANT;

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*Nov. 19.
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AND

LA VILLE DE SAINT-JEAN (DEFENDANT)......RESPONDENT.

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

Municipal corporation—Public road—Sidewalk—Prescription—Dedication—Servitude—Art. 2193 *C.C.*

On an action *en bornage* instituted by the appellant, the respondent claimed the ownership of a strip of land, used as a sidewalk in front of the appellant's property, by virtue of documentary title, by dedication and by prescription of thirty years. The appellant denied the existence of the documentary title and urged that the respondent's possession was not unequivocal, alleging that, during that possession, the steps leading into his house encroached on the side-walk, the cornices projected over it and the drain crossed the strip of land.

Held, Duff J. dissenting, that the corporation respondent is the owner of the strip of land.

Per Anglin, Brodeur and Mignault JJ.—The encroachments alleged by the appellant did not have the effect of vitiating the respondent's title.

Per Duff and Brodeur JJ.—A municipal corporation can acquire a public way by prescription. Mignault J. *dubitante.*

Per Anglin and Mignault JJ.—The respondent became owner of the strip of land by way of dedication duly accepted.

Per Duff and Brodeur JJ.—The common law doctrine of dedication is not a part of the law of the province of Quebec.

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

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

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

Aimé Geoffrion K.C. and *Georges Fortin* for the appellant.

F. L. Beïque K.C. and *P.A. Chassé K.C.* for the respondent.

IDINGTON J.—I would dismiss this appeal with costs.

DUFF J. (dissenting).—The rule governing the acquisition of a public way by prescription is stated in Proudhon, Vol. 2, at p. 372, in the following words:—

> Concluons donc que, quand un chemin qui sert de communication entre plusieurs lieux habités a été publiquement ouvert et librement pratiqué, c'est-à-dire paisiblement possédé par l'être moral et collectif que nous appelons le public, pendant plus de trente ans qui constituent aujourd'hui le terme extrême de notre prescription la plus longue, le droit en est acquis à ceux qui se trouvent à la portée de s'en servir.

Possession by the public in the manner described is essential. In my opinion the public user proved in this case had not the quality of exclusiveness necessary to enable one to describe it as "possession."

I have not been able to convince myself that the principle of dedication as understood in the common law is a part of the law of Quebec. It has rather been assumed to be so upon the authority of an observation in the judgment of Lord Fitzgerald in *Chavigny de la Chevrotière* v. *Cité de Montréal* (1). Rightly read that passage does not, in my judgment, suggest even that the English principle of dedication is a part of the law of Quebec. The object of the passage is to give a description of the character of the user neces-

(1) [1886] 12 A.C. 149 at pp. 157-8.

sary in prescription, the "abandonment" being referred to as one of the elements indicating the nature of the user; and as regards the character of the user required for the purpose of giving a title by prescription there is no difference between the law of England and Scotland and, of course, as his Lordship points out, the French law on that subject is the same. To construe the passage as laying down the rule that the principle of dedication is a part of the law of Quebec necessarily involves the result that one must ascribe to Lord Fitzgerald speaking for the Judicial Committee the dictum that as regards the principle of dedication the law of England and Scotland are the same. A dictum which would be opposed, as every one knows, to the fact.

There are no doubt dicta and perhaps even decisions of comparatively recent date by judges in Quebec which nominally, at all events, seem to involve a recognition of the common law doctrine of dedication. I have been unable to discover any principle of law upon which these dicta and decisions are based which applies in the province of Quebec. There is one fundamental distinction between the law of England and the law of France in respect of highways. By the law of England, the highway is regarded as a locus in which the public has a right of passage, the proprietorship of the fundus being *prima facie* vested in the adjoining owners. The existence of the public right could be established by prescription, that is by proving a public user from which it might be inferred that the public had enjoyed the right from time immemorial. Later the courts for the purpose of abridging the period resorted to an expedient analogous to the expedient adopted in the case of easements, properly so called, the presumption of a lost grant.

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Facts sufficient to lead to the inference that in fact the owner had devoted the property to the use of the public as a highway and that the public had acted upon and accepted the donation were held to be a sufficient foundation for the public right. But the public right acquired in this way could like the public right acquired by prescription be a right of user only. The proprietorship in the fundus could not pass to the public because the public in whom the right of passage was vested was a public consisting of all the King's subjects and such a fluctuating body could not, by the law of England, be the proprietor of a corporeal interest in land.

In the law of France there appears to be no such obstacle. 2 Proudhon, pp. 370-1. But I have looked in vain for any authority showing that French law ever recognized any principle by which the proprietor of land lost his title to it *eo instante* by the mere act of opening it to the public with the intention of enabling the public to have the enjoyment of it as a highway.

ANGLIN J.—I am not satisfied that the disposition by the provincial courts of the several objections to the regularity and sufficiency of the surveyors' report taken by the appellant was erroneous.

On the merits of the case it is quite clear that the respondent city has not a documentary title to the strip of land in dispute. Without determining the sufficiency of its alleged title by prescription, (I entertain some doubt as to the exclusiveness of the possession shewn) I am convinced, for the reasons assigned by my brother Mignault, that title in the city corporation by dedication has been established.

BRODEUR J.—Il s'agit dans cette cause de savoir qui, du demandeur ou de la corporation défenderesse, est propriétaire du terrain sur lequel est sis le trottoir qui se trouve en face des lots 139 et 140 du cadastre de la ville de St. Jean.

La corporation défenderesse en réclame la propriété par une possession immémoriale qui remonte à une période antérieure à 1868, puisque cette année-là il a été décidé par son conseil municipal de remplacer le trottoir en pierre par un trottoir en bois. Ce nouveau trottoir avait sept pieds de large et était construit sur le coté nord de la rue appelée la Place du Marché et rejoignait les bâtisses du demandeur.

En 1905, la corporation intimée a décidé de remplacer ce trottoir en bois par un trottoir en ciment d'une largeur un peu moindre que le précédent, en laissant cette fois un espace d'environ un pied entre le trottoir lui-même et la maison du demandeur. Evidemment cette politique de la défenderesse ne plaisait pas au demandeur et il a protesté la défenderesse, le 17 août 1905, d'avoir à faire le trottoir de la même largeur que l'ancien, sinon il réclamerait la propriété et la possession absolue du terrain sur lequel serait situé le trottoir.

La ville ayant refusé de se rendre à cette sommation, la présente action en bornage a été instituée. Des arpenteurs experts ont été nommés pour visiter le terrain en litige et entendre les témoins; et ils ont fait rapport que la possession trentenaire réclamée par la corporation était bien fondée. La Cour Supérieure a accepté le rapport des experts: et, enfin, la Cour d'Appel a unanimement confirmé le jugement de la Cour Supérieure.

L'appelant prétend que la possession de la défenderesse intimée est une possession équivoque, pro-

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miscue et commune, et qu'elle ne peut alors servir de base à la prescription acquisitive; et il se base sur l'article 2193 du code civil qui dit

> pour pouvoir prescrire au moyen de la possession il faut qu'elle soit continuë et non interrompue, paisible, publique, non équivoque et à titre de propriétaire,

et il invoque à cette fin que le demandeur a toujours fait acte de propriétaire sur le terrain en litige en y construisant et en y maintenant des perrons, en le traversant d'un canal d'égoût, en érigeant au-dessus du terrain les corniches de sa maison, en y étalant des machines agricoles et en en payant les taxes.

Il est en preuve que cette lisière de terrain a toujours été utilisée par la défenderesse pour un trottoir à l'usage du public et ce depuis un temps immémorial.

Ce trottoir a été construit, maintenu et renouvelé par la corporation intimée et il faisait absolument partie de la rue publique.

Nous ne sommes pas, comme dans la cause de *Gauvreau* v. *Page* (1), en face d'une possession équivoque où le propriétaire du terrain avait ouvert un chemin pour l'exploitation de sa propriété et y avait fait tous les frais d'entretien et de construction. Nous avons dans la présente cause une corporation municipale qui a fait des trottoirs il y a plus de trente ans sur le terrain en litige et les a constamment entretenus.

Mais on se demande si la prescription trentenaire est en force dans notre droit.

Je ne saurais mieux faire sur ce point que de citer Proudhon, *Traité du Domaine Public*, qui dispose de la question dans les termes suivants: (no. 631, p. 964, 2me. édition).

(1)]1919| 60 Can. S.C.R. 181.

Mais un chemin public pourrait-il être établi par le moyen de la prescription ordinaire? . . Il s'est formé un chemin à travers un ou plusieurs fonds, soit communaux, soit de particuliers; et chacum sert de communication entre des lieux habités, ou d'un village à un autre village; dans le principe ceux qui l'ont établi n'en avaient pas le droit; le propriétaire ou les propriétaires des fonds qui en sont traversés ont gardé le silence pendant plus de trente ans, et depuis ce temps il a été constamment et publiquement pratiqué; ces propriétaires seraient-ils encore fondés à en interdire l'usage? Ne pourrait-on pas, au contraire, leur opposer que, par la possession trentenaire, il y a eu prescription acquisitive du chemin au profit du domaine public? . . . Concluons donc que quand un chemin qui sert de communication entre plusieurs lieux habités a été publiquement ouvert et librement pratiqué, c'est-à-dire paisiblement possédé par l'être moral et collectif que nous appelons le public, pendant plus de trente ans, qui constituent aujourd'hui la durée de notre prescription la plus longue, le chemin est acquis au domaine public de la commune.

L'appelant invoque le fait qu'il a des perrons qui couvrent une petite partie du trottoir et que les corniches de sa maison surplombent le trottoir et qu'un canal d'égoût le traverse.

Ces différentes servitudes ne sauraient affecter les droits de la corporation. Comme dit Guillouard, vol. 1er, *Prescription*, no. 375:

Non-seulement on ne peut acquérir par prescription la propriété du sol des voies ou places publiques, mais on ne peut acquérir sur ce sol aucune servitude qui soit contraire à la destination de la rue ou de la place; sans doute, les propriétaires riverains d'une rue ou d'une place peuvent y établir des portes, y ouvrir des vues, y conduire les eaux pluviales ou ménagères, car c'est la destination même de la rue ou de la place de procurer ces avantages aux riverains.

Loca enim publica, utique privatorum usibus deserviunt, jure scilicet civitatis non quasi propria cujusque.

Mais du moment où il s'agit d'un usage de la voie ou de la place de nature à nuire à la destination générale de ces terrains, à entraver les services qu'ils sont appelés à rendre, le riverain ne peut pas plus acquérir un droit de servitude qu'un droit de propriété.

Parlant de la possession équivoque, Guillouard, au no. 273 du même traité, dit:

Mais si la possession est équivoque, la présomption doit être à notre avis en faveur de l'Etat ou de la commune. Dalloz, 1854-1-114.

La défenderesse prétend qu'il y a eu *dedication* (abandon) du terrain en litige.

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Vu la conclusion à laquelle j'en suis venu sur la question de la prescription trentenaire, il n'est pas nécessaire de discuter longuement ce point. J'ai déjà exprimé longuement mon opinion à ce sujet dans la cause de *Gauvreau* v. *Page* (1), et j'en suis venu à la conclusion que la doctrine de *dedication* du droit anglais n'est pas en force dans Québec et qu'un abandon d'immeuble à titre gratuit ne pouvait pas se faire sans titre, vu qu'un acte portant donation entre vifs doit être notarié et porter minute à peine de nullité (art. 776 C.C.). Dans le cas actuel cependant le demandeur paraît admettre dans sa déposition et son protêt que le terrain n'a pas été cédé gratuitement par ses auteurs, mais que cet abandon s'est fait pour bonne et valable considération et que la cession alors participe non pas de la donation mais du contrat de vente. Dans ce cas, un contrat par écrit ne serait pas nécessaire.

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

MIGNAULT J.—Après l'examen du volumineux dossier en cette cause, il ne me paraît pas susceptible de doute: 1° que la lisière en question n'appartient pas à l'intimée en vertu de ses titres comme faisant partie du lot no. 136 du cadastre de Saint-Jean, connu sous le nom de Place du Marché; 2e, que sans cette lisière l'appelant n'a pas, sur la rue Jacques Cartier, toute la largeur que lui donnent ses titres et le cadastre pour les lots ayant front sur cette rue, soit 43 pieds pour le lot no. 140, 31 pieds pour le lot no. 141, 36 pieds pour le lot no. 142, en tout 110 pieds.

Cela explique l'insistance de l'intimée à vouloir borner non suivant ses titres mais d'après ce qu'elle appelle sa possession immémoriale. Sous ce dernier

(1) 60 Can. S.C.R. 181.

aspect, je puis tirer du dossier une troisième constatation de fait qui ne souffre aucun doute, c'est que, lors de l'institution de l'action de l'appelant, en 1905, la lisière en question était occupée par un trottoir à l'usage du public depuis au delà de trente ans, en prenant la date mentionnée par l'appelant, 1873, où il en a eu d'abord connaissance, mais il est évident que l'existence d'un trottoir à l'usage du public sur cette lisière remonte à une date bien antérieure.

Une quatrième constatation de fait que je tire du dossier, c'est que dans l'origine les perrons de l'appelant occupaient une partie de la lisière et du trottoir qui s'y trouvait, que les corniches de l'hôtel de l'appelant se projetaient au dessus du trottoir de vingt-cinq à trente pouces, et qu'il y a , en travers du trottoir, un canal d'égout appartenant à l'appelant, égouttant son hôtel, lequel canal continue ensuite en dehors de la ligne extérieure du trottoir et rejoint un canal du voisin du côté est, se déversant finalement dans l'égout de l'intimée sur la rue Champlain, car il n'y a d'égout public sur la Place du Marché que du côté opposé à la propriété de l'appelant. L'appelant dit que peu après qu'il fût rendu là il a rétréci ses perrons. En 1907, il a rebâti l'hôtel, le reculant du côté nord, c'est-à-dire en s'éloignant de la lisière et du trottoir, d'environ un pied, pour le mettre en ligne avec un magasin qu'il avait sur le lot no. 139. Le plan supplémentaire préparé sur l'ordre de la cour supérieure par les arpenteurs-géomètres pour indiquer les lignes de division respectives réclamées par les parties, fait voir que les constructions de l'appelant sont éloignées d'un pied et demi à un pied huit-dixièmes de la ligne adoptée par les arpenteurs-géomètres, et que les perrons ou marches des portes latérales sont en dedans de cette ligne.

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Prenant pour acquis les faits que je viens de mentionner, l'intimée a évidemment besoin soit de la prescription, soit de l'abandon par destination à l'usage du public (*dedication*) pour réussir en cette cause. Les arpenteurs-géomètres se sont basés sur la prescription trentenaire pour reconnaître les droits de propriété que l'intimée réclame sur la lisière, et les jugements dont est appel reposent également sur cette prescription, mais le jugement de la cour de première instance, qui a été confirmé par la cour du Banc du Roi, invoque aussi l'abandon par destination comme suit:

> Considérant que la preuve démontre que la lisière en question a été abandonnée à la défenderesse pour l'usage de la rue "Place du Marché" et d'un trottoir longeant la propriété du demandeur du côté sud.

Je suis convaincu qu'il a dû en être ainsi et que les auteurs du demandeur ont abandonné cette lisière à la municipalité, celle-ci, au moins depuis 1866, par un règlement adopté par elle, s'étant obligée à faire et réparer à ses frais le trottoir qui s'y trouvait. Dans son protêt du 17 août, 1905, l'appelant allègue que ses auteurs ont permis la construction sur leur terrain d'un trottoir par tolérance et à condition que ce trottoir fût de sept pieds de large. Il n'y a pas de preuve de cette dernière condition, et après tant d'années la prétention de l'appelant d'être déclaré propriétaire exclusif de cette lisière me semble franchement insoutenable. En 1905, lors de son protêt, la seule chose qui l'ait ému c'était la prétention de l'intimée de construire un trottoir en ciment large de cinq pieds pour remplacer le trottoir en bois de six pieds environ de largeur qui depuis longtemps couvrait la lisière, et après ce protêt et l'institution de l'action, l'appelant a lui-même construit sur cette lisière un trottoir en bois à l'usage du public sur le même emplacement que l'ancien trottoir, bien qu'à une largeur

moindre, confirmant ainsi la destination de la lisière- Il est donc évident qu'il y a eu abandon au public de cette lisière, en supposant qu'elle ait primitivement appartenu aux auteurs de l'appelant, ce que je crois probable. Cet abandon a été accepté par l'intimée qui, pendant plus de trente ans avant le procès, a construit et entretenu un trottoir sur la lisière.

L'appelant, surtout pour contester la qualité de la possession de l'intimée, invoque le fait que ses perrons occupaient une partie du trottoir, que ses corniches s'y projetaient et qu'il a été et est encore traversé par le canal d'égout dont j'ai parlé. Cependant l'appelant dans son témoignage admet qu'il y a à Saint-Jean nombre de perrons qui empiètent sur les trottoirs de l'intimée, ce que cette dernière paraît tolérer, et on ne saurait de là conclure sûrement que l'intimée n'ait pas possédé le trottoir. Aujourd'hui aucun perron de l'appelant ne se projette au delà de la ligne adoptée par les arpenteurs-géomètres, et il n'appert pas que ses corniches la dépassent, de sorte que si cette ligne est maintenue l'appelant n'a pas à enlever ses perrons et corniches. Quant au canal d'égout, je n'attache aucune importance au fait qu'il traverse le trottoir, du moins comme pouvant affecter le droit de propriété et la possession du trottoir et de la lisière; cela me paraît être un arrangement tout à l'avantage des deux parties pour le drainage des propriétés sur la Place du Marché, et sans portée aucune sur leurs droits de propriété respectifs.

Si la lisière en dispute a été abandonnée par l'appelant et ses auteurs pour l'usage du public, et si cet abandon a été accepté par l'intimée, ce qui me paraît incontestable, la ligne adoptée par les arpenteurs-géomètres doit être maintenue. Je me base unique-

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ment sur le fait de cet abandon dûment accepté. Dans la cause de *Gauvreau* v. *Page* (1), j'ai exprimé mes doutes sur la question de savoir si un chemin public peut être établi par prescription trentenaire, la difficulté étant toujours de prouver la possession requise pour cette prescription, et cette difficulté dans l'espèce se trouve accrue par le fait de l'existence sur la lisière, pendant plusieurs années, des perrons de l'appelant. Cette difficulté quant à la preuve de la possession avec les qualités requises pour la prescription n'existe pas quand il s'agit de la destination à l'usage du public, car cette destination n'exige que l'acceptation suffisante du public ou de l'autorité municipale qui le représente. De plus, alors que, pour la prescription, il faut que la possession ait duré pendant une période fixée qui peut être interrompue, l'abandon ou destination pour l'usage du public est complet et définitif dès son acceptation, et sans que la possession du public ait duré pendant une période déterminée *a priori*.

Mon étude du dossier m'amène donc à conclure que la ligne de division adoptée par les jugements dont est appel doit être maintenue. De nombreuses objections ont été faites par l'appelant à la procédure des arpenteurs-géomètres. Ces objections ont été rejetées par les deux cours et j'accepte leur décision à cet égard.

Sur le tout, pour les raisons que je viens d'indiquer, et sans adopter les motifs des jugements quant à la question de prescription, je crois que l'appel devrait être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Georges Fortin.*

Solicitor for the respondent: *P. A. Chassé.*

(1) 60 Can. S.C.R. 181, at p. 195.

CANADIAN NORTHERN RAILWAY COMPANY (DEFENDANT)... APPELLANT;

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*Feb. 2, 3.
Feb. 24.

AND

L. O. HORNER (PLAINTIFF)......... RESPONDENT.

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

Negligence—Railway—Jury trial—Res ipsa loquitur—Burden of proof—Master and servant—N.W.T. Ord. (1915), *c. 98.*

The respondent's husband, a brakesman in appellant's employ, was killed by the derailment of his train. The derailment was caused by an unlocked switch being partly open. At the trial, the respondent simply gave evidence of the accident and of the damages claimed by her, resting her case on the doctrine of *res ipsa loquitur*. The appellant then moved for a non-suit on the ground that this doctrine was not applicable in a case between master and servant. The motion was refused and the appellant proceeded to produce evidence to rebut the *prima facie* case of negligence. The jury rendered a verdict in favour of the respondent.

Held, Mignault J. dissenting, that, upon the evidence, the verdict of the jury that the condition of the switch was due to the negligence of the appellant must be upheld.

Per Anglin, Brodeur and Mignault JJ.—In the province of Alberta the doctrine of *res ipsa loquitur* can be invoked by a servant seeking to hold his master liable for injuries sustained in the course of his employment, since the defence of common employment has been taken away by statute; and it was incumbent upon the appellant to rebut the presumption of negligence resulting from the application of the doctrine.

Per Idington, Anglin and Brodeur JJ.—The sufficiency of the evidence adduced by the appellant to rebut such presumption was wholly within the province of the jury.

Per Mignault J. (dissenting).—The evidence adduced by the appellant having completely rebutted the *prima facie* case of negligence resulting from the rule *res ipsa loquitur*, and the respondent not having made any affirmative proof of negligence of the appellant, the jury was not justified in finding a verdict in favor of the respondent.

Judgment of the Appellate Division (]1920| 3 W.W.R. 909) affirmed, Mignault J. dissenting.

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

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming, on equal division of the court, the judgment of Walsh J. with a jury, 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.

D. L. McCarthy K.C. and *N. D. McLean* for the appellant.

David Campbell for the respondent.

IDINGTON J.—The respondent sued as the widow of a brakeman killed in an accident on appellant's railway. That accident and the consequent death of respondent's late husband were caused by the train on which he was serving having been derailed in passing a switch which was found unlocked.

There can be no doubt of the derailment having been the result of the switch having been unlocked.

Prima facie that condition of things must be attributable to the open switch and that in turn to the negligence of appellant. The burden of proof that it was due to some other cause than such negligence thus rested upon the appellant. Until that was established by such clear evidence that the jury could not, as reasonable men, refuse to accept and act upon it the presumption arising from the circumstances, expressed in the maxim *res ipsa loquitur,* stands as the guide for the jurors.

The sole substantial question raised by this appeal is whether or not the jury has by acting upon the said presumption, and unreasonably, either impliedly

(1)]1920| 3 W.W.R. 909.

refused to believe, or so far as believed to accept as a satisfactory rebuttal of such presumption the evidence adduced by the appellant, tending to shew that appellant's servants absolutely discharged their respective duties and that the discharge thereof would cover all that may be involved in the charge of negligence.

Now, it is the province of the jury to decide as to the credibility of each and every witness and the measure of credibility to be given to the evidence of each witness.

The jury may properly disregard the evidence of each witness from many points of view. It may find from his demeanour or otherwise that he is entirely unworthy of credit.

In this case there does not seem to be anything for applying such an extreme view as to any of the witnesses, especially in view of the expressions in the learned trial judge's charge. There is, however, very much in the ordinary experience of life which the jury could well apply in this case, and that is that he on whom the duty is cast and is daily many times discharging, with absolute care and accuracy, may from time to time through a great variety of causes omit to discharge.

Such a man in good faith is apt to persuade himself that he had actually discharged his duty when, as a matter of fact, he had entirely forgotten to do so, or failed from some cause to perform it.

Yet in such a case of failure his master may be legally liable for the negligence involved, if injury to another results therefrom.

The jury in such a case must use the best judgment it can and its verdict is only reviewable and reversible by an appellate court if such as no twelve men could reasonably arrive at on the evidence presented.

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In this case or any other where the jury may have been of a less number, I do not regard the exact number of twelve jurors as governing, though I present it as what has been so often presented by the highest courts in England where twelve is the number of a jury selected to try an issue of fact.

The jury was confronted with the problem of deciding whether the unlocked switch was the result of negligence on the part of some one of the servants of the appellant, or a criminal interference by some stranger.

The evidence tendered to rebut the former depended, in almost every instance bearing on that aspect of the case, upon the unsupported evidence of a single witness, who may have been mistaken. If any link in that chain of events thus failed the whole defence fails.

And we should not forget the very serious consequences presented to the mind of each of such witnesses tempting him to persuade himself that he must have discharged his duty, when in fact he may have failed to do so.

As to the possibilities of the switch being left unlocked, Farrell, a witness for the appellant who had been a brakeman on its trains, testified that he had found switches unlocked "but not very often."

I should have preferred to have seen this point pressed upon others. For what it is worth it shews that appellant's servants are not quite as infallible as it pretends herein.

The alternative question presented to the jury, of whether or not the unlocking in question herein was the result of strangers to the service having improperly meddled with the lock, seems unsupportable by any evidence worth considering.

The fact of someone having taken, on the Sunday in question, a hand car used by the section foreman, and apparently ridden on it for some miles away to a point where it was found later, is relied upon as if important.

One can easily understand how and why some idle men or boys, on a Sunday or holiday, might be tempted to do such a thing. It seems, however, an incident quite incapable of explaining why they, or such like idlers, should engage in the far more serious criminal conduct of unlocking the switch and deliberately planning the wreck of the train in question or any other passing over the point in question.

Moreover the switch was at a part of the country five or six miles away from any habitation but one, other than that of its foreman, and there was not the slightest effort made to attach blame to that party, or indeed to any party.

If there had been any reason to believe that it was the work of any persons designing to wreck the train, some trace would probably have been found of such persons.

The death of three men, and the ruin of property in cars and otherwise, which must have resulted, would have so aroused public attention and the public authorities as to have disclosed if any foundation in fact for such a theory, something more than a commonplace incident of someone taking a ride on a hand-car—left as it was to tempt the idlers to so use it.

There was never, I suspect, much search made for the alleged criminal unlocking of the switch. Probably nobody believed that theory and it was only looked on as fit to ask judges and juries to accept it.

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To my mind the whole of the hints thus thrown out as to the cause of the accident are not deserving of serious consideration as an alternative to the possibilities indeed probabilities of the unlocked switch being the result of neglect.

Before parting with the hand-car incident I cannot forbear remarking that its exposure to such use was apparently the result of carelessness on the part of the foreman on whose inspection of the switch so much reliance is placed. Alternatively he seems to have felt he was in such a deserted district, so remote from possible marauders, that he was quite safe in doing so.

Yet we are asked to presume on such a slender thread of evidence as adduced that the jury coming to a like conclusion were, in doing so, acting as no set of reasonable men could do and hence set aside their verdict.

The point was made in argument here that other trains had passed over unhurt.

It is admitted in evidence that such going in one direction would not be affected by the condition of the switch but contended that one had preceded the one in question and passed in safety going in same direction.

Hence it is argued that assuming we have an account of all trains run on the part of the road in question there was nothing happened for at least twenty-four hours out of which could have arisen the neglect of duty in question.

That would be a cogent, though by no means conclusive, argument had the appellant proven, as it should have done, if possible, that there was no other train passing which needed to use the switch, and left it unlocked.

It is said by counsel for appellant that no such point was made in argument below.

Whether that be correct or not does not matter. It is the evidence we have to be guided by and not the argument of counsel.

I doubt much, however, if it was not present to the minds of the learned judges in the court below, for I find Mr. Justice Ives in writing his judgment, had properly looked for such evidence and found it in the answer of Mr. Irwin, a superintendent of appellant on his examination for discovery, as follows:—

> 224. Q. When, prior to the accident, was the switch in question last operated? A. 17.20 K., July 5th, that would be 5.20 P.M.
>
> 225. Q. And that train proceeded out of the "Y" upon the main track, going west? A. Yes, Sir, I presume it did; I don't know whether it went in and backed through or went into the other switch first and came out of this. My opinion is they would head into this switch and back through the other one, but I am not prepared to say.

Mr. Justice Ives held that this answer to 224 having been put in by respondent's counsel is sufficient. It seems to me quite clear that the party so testifying could not swear to that needed to make effective proof meeting the point raised, and is only assuming it.

I am unable, with great respect, to agree with that view of Mr. Justice Ives as to the weight to be attached to this, but pleased to find that he felt as I do the need of some such evidence to make any possible defence for appellant out of the movement of trains.

I may remark in passing that the learned Chief Justice relied on other grounds entirely, in which, with respect, I cannot agree.

I am quite unable to understand why or by what process of reasoning a fellow servant who had nothing to do with the switch in question, could be debarred or his representatives be debarred from reliance on the maxim of *res ipsa loquitur* which is nothing but a concise expression of common sense applied to circumstantial evidence.

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It is equally applicable to every phase of common sense use of circumstantial evidence.

It could hardly be applied to the case of a man in charge of a switch injured by his own neglect or his representatives founding an action on such injury.

There are many other things incidental to the inquiry which I should have liked, before giving a favourable ear to appellant, to have heard a good deal more relative to.

One of these was the question of the light on this switch and the angle at which the target was set when the train was approaching the point in question; and another as to the results found after the accident in the situation of the switch and light in something more tangible and satisfactory than what appears in evidence.

The frame in which the switch was set is sworn to have been undisturbed after the accident. If so, why was the light so found, as it was, not giving light, and the target turned as it was?

And if not the result of the accident why was it passed instead of stopping?

And again the neglect of someone to lock the switch after using it may have been productive of much in its many possible movements as the result of trains passing over the point in question either way.

On these points the evidence is left in a rather unsatisfactory condition.

The following evidence is worth considering:—

Q. A Juryman. You state this train was the first one that went over the switch before the accident. If you went over that and that switch was apparently open would it have any effect on your train?—A. None whatever.

Q. Your train would not close the switch or throw it wider open? A. Well, it might; it would, but it would spring back to about half way.

Q. It would not affect your train at all?—A. No.

It suggests in the first place that the jury was possibly quite as alive to the several questions thus raised as we can be, and that the passage of the trains upon which so much reliance is placed by appellant, may have had much to do with the changes in the switch's position if left unlocked. Such shaking and disturbance of the switches unchained may have had much more serious results upon an unlocked switch in relation to the accident in question than the evidence discloses.

In conclusion I should say that for a great many years this Court has refused in any way to interfere with the measure of damages as left by the courts below, even when we have felt them excessive. If the courts below cannot find therein a ground for granting a new trial then we should not interfere.

There must be an end, if possible, to litigation being prolonged.

I agree so fully with what has been well said by the learned judges below, taking the view I do of this case, that I rely thereon as well as on the foregoing reasons in reaching the conclusion that this appeal should be dismissed with costs here and below.

DUFF J.—This appeal was argued by Mr. McCarthy with his usual force and ingenuity, but it is unnecessary, in my judgment, to enter upon any of the interesting general questions discussed. I agree with the majority of the Appellate Division that from the circumstances in evidence the jury might properly infer that the condition of the switch was due to the negligence of somebody for whom the appellants are responsible; and I think the jury, by their finding, expressed this conclusion with sufficient clearness.

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ANGLIN J.—Read together, as I think they should be, the answers of the jury to the first and second questions submitted to them cover findings

(a) that the cause of the derailment which resulted in the death of Horner was the switch in question "not being properly set and locked,"

(b) that the existence of this state of affairs was attributable to the defendants, and

(c) that it amounted to actionable negligence.

These findings, unless they are not sustainable, sufficed in my opinion, to warrant the entry of judgment for the plaintiff for such damages as she was entitled to recover.

That the derailment was caused by an unlocked switch being partly open is common ground. The plaintiff offered no evidence to shew how the switch came to be in that condition, invoking the doctrine *res ipsa loquitur* to establish *prima facie* responsibility of the defendants for its being so. That, if attributable to an act or default of them or their servants, the position of the switch amounted to actionable negligence is neither questioned nor questionable.

Nor does it seem open to doubt that, if the plaintiff's husband had been a passenger—if the relation of master and servant had not subsisted between him and the defendant company—upon the fact that the derailment was caused by a partly open switch being established or admitted, the applicability of the doctrine *res ipsa loquitur* would have been incontestible.

The switch belonged to and was under the management of the defendants; in the ordinary course of things it could not have been half open as it was unless the defendants' servants in charge of it had

failed in some respect to use proper care; in the absence of explanation by the defendants it would be reasonable for a jury to infer that the switch was not properly closed and locked because of some want of care on the part of those servants. *Scott* v. *The London and St. Katherine Docks Co.* (1); *Flannery* v. *Waterford and Limerick Rly. Co.* (2).

Mr. McCarthy strongly contended, however, that the fact that Horner was an employee of the defendants excludes the applicability of *res ipsa loquitur*. That and the sufficiency of the evidence adduced by the defendants to establish that they and their servants had fully discharged their duty in regard to the switch and thus to lead to the inference that its admittedly improper position was ascribable to the intervention of some foreign agency for which they were not accountable, or at least to render unwarrantable the inference that it was attributable to them, were the main grounds of the appeal.

That *res ipsa loquitur* cannot ordinarily be invoked by a servant seeking to hold his master liable for injuries sustained in the course of his employment is due to the fact that the injury may have been caused by the fault of a fellow servant for which at common law the master would not be liable or, it may be, to the fault of the servant himself. Where it is equally probable that the master may or may not be liable no presumption of liability can arise. But when, as in Alberta, the defence of common employment has been taken away by statute and the master is liable to a servant for injuries due to the neglect of a fellow employee if the servant injured was himself neither responsible for nor in a position to know the existence of the danger which caused the injury complained of,

(1) [1865] 3 H. & C. 596. (2) [1878] Ir. R. 11 C.L. 30.

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there seems to be no reason why he should not be entitled to invoke the doctrine *res ipsa loquitur* as if he were a stranger. In my opinion upon the admitted facts of this case the plaintiff was clearly justified in invoking that doctrine. In all probability the switch would not have been unlocked and partly open as it was found immediately after the derailment unless there had been neglect of duty by some servant of the defendants. At least that was an inference which a tribunal of fact could properly draw.

The sufficiency of the evidence adduced by the defendants to rebut that inference by shewing that their servants had fully discharged their duty in regard to the position of the switch was eminently a matter for the jury. The credibility of the witnesses who deposed to the discharge of their several duties in regard to the closing of the switch or seeing that it was closed was for the jury to determine. Counsel for the respondent very properly pointed out that while there was the positive evidence of Neil Macdonald, a brakeman on a train which had used the switch twenty-four hours before the derailment, that he had closed and locked it, the conductor of that train upon whom the company's rules cast the duty of seeing that every switch used by this train is left in proper position was not called as a witness, and there was no satisfactory evidence that other trains had not used the switch in the interval. Mr. McCarthy answers that the train despatcher's sheet was produced and shewed every train operating in the division during the period in question. He also stated that the failure to call either the conductor or the train despatcher is urged here for the first time. It is impossible to know whether the jury discredited the evidence of Neil Macdonald, and that of Jordan, the section

foreman, who testified that he saw the switch locked on the morning of the day of the accident, or whether they inferred *proprio motu* from the failure to call the train despatcher that some other train or engine had used the switch during the day of the accident.

Mr. McCarthy also relied very much on evidence that another train travelling in the same direction as that on which the unfortunate Horner was engaged had safely passed over the switch about eleven hours before the derailment. This is no doubt cogent evidence, but its conclusiveness depends wholly on the sufficiency of the proof that there had been no legitimate use of the switch during the intervening eleven hours.

It is common ground that the opening of the switch by accident, if it were locked, was an impossibility. Interference with it by mischevious boys, as was suggested, would be, to say the least, highly improbable. The opening of it by design by any unauthorized adult would be a criminal act such as should not be presumed. While, if trying the case on the evidence in the record and without seeing the witnesses, I might have been disposed to consider that the presumption of actionable fault arising under the doctrine *res ipsa loquitur* was sufficiently met, I am unable to say that a jury properly instructed, as the jury in this case admittedly was, could not reasonably have reached the contrary conclusion.

While the verdict was undoubtedly large, having regard to the facts that the man who was killed was only twenty-six years of age, that he was in good health and in good standing as a railroad man, that he had been already promoted to the rank of conductor and apparently had excellent prospects for future advancement, that he was earning at the time of his death about $175 a month, and that the plaint-

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iff, aged twenty-three years, and two children of tender age survive him, I am not prepared to say that the amount of the judgment is so excessive that we would be justified in setting it aside on that ground.

The appeal in my opinion fails.

BRODEUR J.—This is a railway accident. The plaintiff's husband was employed as brakeman on one of the appellant's trains, which derailed at a switch west of Peace River Station. Three men were killed, amongst whom was this brakesman. In inspecting the wreck it was found that the switch was half open and that the derailment was due to that.

The plaintiff proved her case in establishing the accident and the condition of the switch and of the railway line at this place. She rested her case on the maxim, or, as I prefer to call it, on the rule of evidence *res ipsa loquitur*.

The defendant company then moved for a non-suit on the ground that this rule of evidence does not apply as between master and servant. The trial judge dismissed the defendant's application and the company called evidence.

This evidence is to the effect the switch had been opened the night before for the passage of a train, that it had been properly locked after closing it, that on the day of the accident, some trains passed in both directions and nothing strange was seen in connection with this switch which appeared in good order, that about an hour before the accident happened a train going west passed at that place and the switch looked all right and that when the eastbound train on which the brakesman Horner was working, passed the switch was half open.

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Now how this change in the switch came to happen no evidence is adduced to shew. It was left to the jury as a question of inference. If the verdict had been a general verdict it would without doubt, have to be sustained, because there is enough of evidence to leave to the jury the inference that the accident was due to the negligence of the company. But the verdict was not a general one. It is stated that the defendant was guilty of negligence; and they assign as a cause of the negligence that the switch was not properly set and locked and that it caused the derailment and wreck of the train. In other words, the answer appears to be a finding of the cause of the accident rather than a fixing of the responsibility for it.

But as they have in answer to the first question found expressly that there was negligence on the part of the railway company, their finding may be due to the fact that they may not have believed some of the witnesses for the defence or they may have drawn the inference that the accident was due to the fault of the employees of the company.

As to the rule of evidence *res ipsa loquitur*, it should be observed that the exclusion of the rule in the case of master and servant is based upon the doctrine of common employment. In Alberta, a legislation was passed by which this doctrine of common employment has been discarded; and I am of the view that the rule of evidence should be fully observed in a system of legislation where the doctrine of common employment is no more in force.

For these reasons I would dismiss the appeal with costs.

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MIGNAULT J. (dissenting).—The respondent's husband was killed in an accident on the appellant's railway, and in a suit against the appellant she obtained from the jury a verdict for $25,000 which, subsequently to the appeal by the appellant to the Appellate Division of Alberta, she reduced to $20,000.

The facts fortunately give rise to no dispute between the parties. Late at night on Sunday, July 6th, 1919, a freight train known as Extra East No. 2047 of the appellant was derailed at Peace River Junction, a place where there is practically no settlement, and the respondent's husband, who as head end brakeman was riding in the cab of the engine, was killed, as were also the engineer and fireman. At the place where the locomotive was derailed a loop line known as the "Y," used to permit trains to change their direction, leaves the main line and extends to a branch of the railway to the north, which branch also leaves the main line a short distance further east. The cause of the derailment was discovered immediately by the conductor, the rear end brakeman and an employee who was riding as a passenger, all three of whom were in the "caboose" and were uninjured, the rear part of the train not having left the rails. This cause was that the switch connecting with the "Y" was about half open, so that the wheels of the engine, the tender and the first fifteen cars left the rails, and the engine in which Horner was riding was thrown over onto its right side. The switch, or rather the lever handle by which it was operated, was usually held in place by a locked padlock, but after the accident this padlock was found unlocked. The lamp of the switch was not burning after the accident and, as a matter of fact, it then received a blow which would have sufficed to put out the light had it been

burning. The switch lever handle was raised and was pointing across the main line, while the target was very nearly parallel with the main line. At that place there is a curve and the evidence seems to shew that from the engine of train No. 2047 approaching the switch the lamp would have shewn green if it was then lighted, as it must have been, for otherwise it would have been the duty of the engineer, who had full view of the switch for a mile and a half before he reached it, to stop his train. It is therefore not unreasonable to assume that the light was then burning and showed green. This, however, is, and can only be, a surmise, for none of the ill-fated occupants of the locomotive cab survived to tell the story.

In her action claiming on her behalf and on behalf of her children $30,000 damages for her husband's death, the respondent alleged three grounds of negligence against the appellant:—

(a) In running the said train at the time and place of the said occurrence at an excessive and dangerous speed.

(b) In permitting or causing the said "Y" switch to be set or placed improperly to allow the said train to pass along and upon the main track safely.

(c) In having a defective switch and railway tracks at the time and place of said occurrence, whereby the said locomotive was caused or allowed to leave the railway tracks as aforesaid.

Of these three grounds the first and third may be disregarded because none of them were found by the jury.

At the trial the respondent made formal evidence of the accident, by calling a physician to prove the cause of death and by putting in parts of the examination on discovery of Mr. Irwin, superintendent of the first division western district of the appellant's railway, and also of the damages claimed by her, and

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then declared that she rested her case and relied on the doctrine of *res ipsa loquitur*. The appellant having moved for a non-suit, the question of this doctrine and its applicability between master and servant was argued and the trial was adjourned to give the learned trial judge time to examine the authorities. The following day the learned trial judge refused the motion, but the respondent nevertheless decided to put in additional parts of the examination of Mr. Irwin with the object apparently of further establishing negligence on the part of the appellant. The motion for non-suit was renewed at what was termed the second close of the respondent's case and was again denied.

The appellant then proceeded to call witnesses, to wit its servants and officials, in order to rebut any *prima facie* case resulting from the rule *res ipsa loquitur*, assuming its applicability in a case like this. I will have to discuss this evidence in detail, so I will immediately quote the answers made by the jury to the questions submitted by the learned trial judge.

1. Was the death of Horner caused by the negligence of the defendant? A. Yes.

2. If so, in what did such negligence consist? A. Of switch known as west main track switch leading to the "Y" at Peace River Junction not being properly set and locked causing the derailment and wreck of train known as Extra East No. 2047.

3. If the plaintiff is entitled to recover, what amount of damages is she entitled to recover? A. $25,000 (twenty-five thousand dollars.)

Before discussing the rule of evidence *res ipsa loquitur*, the first point to be considered is whether it applies in a master and servant case like this one, having regard to the state of the law in the province of Alberta.

It is broadly stated in text books such as Beven on Negligence, 3rd edition, p. 130, and Halsbury, Laws of England, vol. 21, p. 439, note m, that this rule does

not apply between master and servant. But on referring to the cases cited by them: *Patterson* v. *Wallace* (1); *Lovegrove* v. *London, Brighton and South Coast Rly. Co.* (2), where a dictum of Willes J. at p. 692 is quoted, it is seen that the fellow servant rule was there applied, and, in cases governed by that rule, it is clear, as stated by Willes J., that

it is not enough for the plaintiff to shew that he has sustained an injury under circumstances that may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation.

And the same eminent judge, at p. 691 of the same report, said that

there can be no doubt that the person injured and the person whose negligence caused the injury were fellow servants.

I am therefore disposed to think that because of the fellow servant rule, which applies (except in matters governed by Workmen's Compensation Acts) in almost every jurisdiction subject to the common law, the maxim *res ipsa loquitur*—which is no more than a presumption of negligence that the defendant must rebut—has been considered inapplicable in master and servant cases. But the fellow servant rule has been excluded in Alberta by chapter 98 of the Ordinances of the North West Territories, whereby is was enacted that:

2. It shall not be a good defence in law to any action against an employer or the successor or legal representative of an employer for damages for the injury or death of an employee of such employer that such injury or death resulted from the negligence of an employee engaged in a common employment with the injured employee any contract or agreement to the contrary notwithstanding.

(1) [1854] 1 Macq. (H.L.Sc.) 748. (2) [1864] 16 C.B.N.S. 669.

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Therefore inasmuch as the liability of the master for injuries suffered by his servant is in Alberta the same as his liability for injuries inflicted on a stranger, I would not be disposed to qualify the application of the maxim *res ipsa loquitur* by distinguishing one case from another. And there is no authority that I know of which excludes this maxim between master and servant in a jurisdiction where the rule as to common employment has been repealed by statute. This point now stands to be determined by this court for the first time, and I think it must be determined against the contention of the appellant.

Now as to the rule *res ipsa loquitur*, a rule of evidence I have said, and a very reasonable one, it is now firmly established, and its scope is well shewn by the following quotations from the opinions of eminent judges.

In *Christie* v. *Griggs* (1), Sir James Mansfield C.J., observed that

> when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it is unfounded; and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a mere accident.

The defendant in that case having made evidence concerning the cause of the accident, the Chief Justice said:—

> There was a difference between a contract to carry goods, and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of the passengers. His undertaking, as to them, went no further than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff has no remedy for the misfortune he has encountered.

(1) [1809] 2 Camp. 79.

In *Carpue* v. *London and Brighton Rly. Co.* (1), Lord Denman said:—

It having been shewn that the exclusive management, both of the machinery and of the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced; which explanation the plaintiff, not having the same means of knowledge, could not reasonably be expected to give.

In *Byrne* v. *Boadle* (2), the case of a barrel falling from a building on the plaintiff, Pollock C.B. expressed himself as follows:—

The fact of its falling is *prima facie* evidence of negligence and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

In *Scott* v. *London and St. Katherine Docks Co.* (3), Erle C.J. said at p. 601:—

There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

In *Kearney* v. *London, Brighton and South Coast Ry. Co.* (4), a case of a brick falling from a bridge and injuring a person passing under it, Cockburn C.J. stated:—

Where it is the duty of persons to keep premises, or a structure of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to shew that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed by the fact that there was the defect from which the accident had arisen. Therefore there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from the negligence of the defendants; and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts.

(1) [1844] 5 Q.B. 747, at p. 751.
(2) [1862] 2 H. & C. 722.
(3) [1865] 3 H. & C. 596.
(4) [1870] L.R. 5 Q.B. 411.

In *Flannery* v. *The Waterford and Limerick Ry. Co.* (1), the plaintiff had been injured by the derailment of a train in which he was travelling. Palles C.B. followed *Scott* v. *London & St. Katherine Docks Co.* (2), and, at p. 39 said:—

> I am of opinion that as the railway, the engine and the waggon were under the defendants' management, and as the circumstance of the wagon leaving the rails does not happen in the ordinary course of things if due care is used, the fact of the accident was sufficient evidence to call upon the defendants to shew that there was no negligence on their part.

I think therefore that the circumstances of this case and the fact of the open and unlocked switch which undoubtedly caused the derailment, suffice to establish a *prima facie* case of negligence making it incumbent on the defendant to rebut the presumption of fault resulting therefrom.

If the appellant has sufficiently rebutted this presumption there is no doubt that it cannot be held liable for Horner's death. *Christie* v. *Griggs* (3); *Readhead* v. *Midland Ry. Co.* (4). This is therefore the question that must be determined by carefully examining the evidence adduced by the appellant.

In so far as the switch is concerned—and in view of the jury's finding I need not consider the other grounds of negligence set up in the respondent's statement of claim, but I may say that the appellant established that the equipment of the train, its air brakes as well as the railway itself were in perfect condition—it was proved to be one of the best switches on the line. It was last used in connection with the "Y" the evening before the accident. Six miles west of the switch is a summer resort, Alberta Beach, and an excursion train had run from Edmonton to

(1) I.R. 11 C.L. 30.
(2) 3 H. & C. 596.
(3) 2 Camp. 79.
(4) [1867] L.R. 2 Q.B. 412.

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this resort on Saturday, July 5th, without stopping at Peace River Junction. On the return trip this train left Alberta Beach about 8.45 P.M. and stopped at this switch to go into the "Y" in order to turn the train. Neil Macdonald, the head end brakeman, on this train, opened the switch to let the train go on to the "Y" track. He swore that after the train had passed on this track, he set the switch in normal position, parallel with the main line, placed the lever handle down and locked it. This witness was not cross-examined by the respondent.

The next day, Sunday, the 6th of July, the day of the accident, Jordan, the appellant's section foreman, as was his duty, inspected the switch between 10 and 11 o'clock in the forenoon. He testified that it was in good condition then, that the lever handle and lock were in proper place, properly locked, and that the switch was set for the main line. He said that on Sundays people are often on the track—it is to be remembered that Alberta Beach is six miles away—and that his hand car, which was some distance east, was stolen that afternoon and taken to near St. Albert, also to the east of the switch. The switch lamp was then burning. He had often inspected the switch and never found it unlocked.

Another freight train of the appellant, known as extra 2147 west, had twice passed the switch along the main line that Sunday. First coming from Edson, which is west of Peace River Junction, it passed the switch about noon, going east, without stopping. The engineer of this train, Fallon, swore that the switch then was all right, and that had it been wrong the train would have been derailed, for it was going in the same direction as Horner's train went that same night. Returning towards Alberta

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Beach that evening, his train passed the switch between 8 and 9 o'clock, and went on to Alberta Beach, where it was crossed by Horner's train No. 2047, which did not stop at Alberta Beach and continued on to the east and was derailed at the switch as already stated. Fallon, the engineer of train 2147, being on the north side of the locomotive (the switch was on the south side of the line), could not see the switch when he went on that evening to Alberta Beach, but the fireman, Wellington, and the head end brakeman, Farrel, of train 2147 were in position to see the switch as they passed, and both swore that the switch was then all right, the target shewing all right for the main line, and Farrel said that had the switch handle been in a horizontal position facing north he would have noticed it, and that he saw nothing like that. It was however stated by Wellington that if the switch was open an inch or two as his train went west, it would not affect the train at all, and that the flanges of the wheels would bring it over into its proper place. As to this, another witness of the appellant, Jordan, confirmed this last statement, saying that a train going west would close the switch, but that it would spring to a certain extent afterwards. None of the men on the train 2147 could say whether the switch light was burning when this train passed the switch going west that evening, for it was not then dark enough to notice the light.

As I have said, train 2047 on which Horner was riding passed train 2147 at Alberta Beach, going east. It was derailed at the switch about half an hour afterwards, and I have described the condition in which the switch was then found, unlocked, the lever handle raised and pointing to the north across the main line.

Of the witnesses called by the appellant, the learned trial judge said in his charge to the jury:

> Now I think I may say with perfect propriety that in my opinion the railway company has acted with great candour and with great fairness in the number and class of the witnesses whom it has placed before you. It seems to me that they practically exhausted the witnesses who were able to cast any light upon this tragedy, and it is to be commended for that. Those men who were called were without exception all employees of the railway company. There has not been a suggestion made against their perfect honesty, and I am very glad that that is so. These men struck me as being fair-minded, honest, intelligent men, who gave evidence they did give with perfect candour and straightforwardness. That is my opinion of them. You may have a different opinion. I am simply expressing my own opinion, but there is no suggestion that simply because they are employees of the railway company they twisted their evidence to suit the purpose of their employer. We all know, in these days at any rate, that the sympathies of railway men are just as apt to be with each other as they are with their employer. However, Mr. Campbell was exceedingly fair in his conduct of this case and has not made the slightest imputation against the perfect honesty of the various witnesses called by the defence. So that you have had these men before you, you have heard from them their story, and it is for you to say now upon a review of all the evidence whether in your opinion this unfortunate accident occurred through the negligence of the railway company.

Elsewhere the learned trial judge said:—

> I feel quite justified in saying that in my opinion all the evidence that could be given has been given in this case, except, perhaps, the evidence of the man by whom this switch was opened and who apparently is not known to any person, and you are entitled to draw such inference from all the evidence as that evidence will justify.

It was contended on behalf of the respondent that the jury may not have believed the testimony of these witnesses, whose credibility however was in no way impeached by her counsel, and the straightforwardness of whose evidence was testified to by the trial judge; that they may not have believed Macdonald who said that he set and locked the switch for the main line on the Saturday evening, and he was not cross-examined by the respondent's counsel,—nor Jordan who on Sunday forenoon found the switch

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locked and set for the main line—nor the train crew of train 2147. If the jury did not believe this evidence there is nothing in the verdict to shew it, for the negligence which they found was that the switch was not properly set and locked, which obviously refers to its condition at the time of the derailment and involves no necessary disbelief in the testimony of Macdonald and Jordan that it had been properly set and locked the evening previous and was so set and locked on the forenoon of Sunday. And this testimony was conclusively corroborated by the fact that train 2147 passed the switch safely at noon on Sunday going east, for had the switch been in the condition in which it was that evening at the time of the derailment, this train would unquestionably have been derailed.

The only possible difficulty to my mind is that it might perhaps be said that the open and unlocked condition of the switch at the time of the accident justified the inference that Macdonald, when he said that he had closed it the night before, and Jordan, when he testified that it was closed and locked between 10 and 11 of the forenoon of Sunday, were mistaken and should be discredited. That inference might have had some weight had train 2147 not passed the switch safely going east at noon on Sunday, but with this fact standing out I would not think that any jury would be justified in disregarding the positive evidence made by the appellant that the switch had been properly set and locked. Indeed the evidence as to the prior condition of the switch is all one way and is so strongly corroborated that it would seem almost a mockery if a verdict finding that the switch had not been properly set and locked when last used could be supported by suggesting that perhaps the jury had not believed this evidence. And, as I have already

said, I construe the jury's answer as referring merely to the condition of the switch at the time of the accident and not to its previous condition that day and the evening before.

I think that taken with what the learned trial judge said to the jury when they were recalled after discussion of objections to the charge, the jury's answer to question 2 must bear this construction. The learned trial judge said:

> I told you at the start of my charge that the plaintiff by a simple proof of the fact that this accident had occurred had imposed upon the company the onus of proving that it did not occur through its negligence. I think I made myself quite plain as to that. And it follows from that, of course, that if the company has not satisfied you that the accident did not occur through its negligence then it did not discharge that onus, and the plaintiff is entitled to a verdict.

The appellant's counsel did not object to this direction, which, in my judgment, may I say so with deference, goes beyond what is incumbent on the defendant in such cases. See *Christie* v. *Griggs* (1) and *Readhead* v. *Midland Ry. Co.* (2). But the jury being told that the simple proof of the accident imposed on the company the onus of proving that the accident did not occur through its negligence, and that if the company did not prove this the plaintiff was entitled to a verdict, naturally considered the open and unlocked switch which caused the accident as being itself the negligence they found against the defendant in answer to the first question, and that is the verdict they rendered.

So we have this result, if the respondent's contention is sound, that because the jury finds that the switch was unlocked and unset at the time of the accident, evidence of regular inspection of the switch, positive

(1) 2 Camb. 79

(2) L. R. 2 Q.B. 412

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proof that when inspected that day it was locked and set for the main line, in fact evidence that the appellant used reasonable care and diligence and did all that human care and foresight could suggest to ensure the safety of its line, is all of no avail to rebut what obviously is a mere presumption under the rule *res ipsa loquitur*.

I cannot concur in this result which would impose on the railway company the obligation of an insurer towards those who travel on its lines. For it is obvious that the best organized and most carefully guarded human systems may and do occasionally fail. But when the railway company has done all that human care and foresight can suggest to render its lines safe to the public and to its own employees, an occurrence like the one under consideration is as much a pure accident as is the breaking of an axle-tree through a hidden flaw in its welding. And where there has been, as here, regular and careful inspection of the switches of the railway, unless it be held that the appellant is obliged to have an employee in constant attendance at each of its switches, I must find that the appellant's evidence completely rebuts and destroys the *prima facie* case—for it is only a *prima facie* case—which results from the rule *res ipsa loquitur*. The respondent was thus without evidence of the negligence which she alleged and which was the very basis of her right of action, and the appellant was entitled to a verdict in its favour. Under these circumstances, the verdict for the respondent appears to me entirely perverse.

I may add that at the argument I asked counsel for the appellant what criticism he had to make of the evidence adduced by the appellant. He said first that the conductor of Macdonald's train, whose

duty it was, as well as of Macdonald himself, to see that the switch opened for that train had been properly closed and locked, should have been called to corroborate Macdonald. In view of the fact that possibly the conductor did not verify this, for otherwise he would no doubt have been called, his testimony would have been useless, and the learned counsel who had not even cross-examined Macdonald, should not therefore criticise the non calling of this conductor. A second criticism was that the appellant had not proved that no train since Macdonald's train had used this switch. The learned counsel probably forgot that he had himself proved this fact by putting in question and answer No. 224 of Irwin's testimony on discovery which read as follows:—

Q. When prior to the accident was the switch in question last operated? A. 17.20 K. July 5th, that would be 5.20 P.M.

I would therefore allow the appeal and dismiss the respondent's action.

Appeal dismissed with costs.

Solicitors for the appellant: *Short, Cross, Maclean & McBride.*

Solicitors for the respondent: *Friedman & Lieberman.*

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*Nov. 25.
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Feb. 1.

E. R. BEATTY (DEFENDANT).......APPELLANT;

AND

WILLIAM T. BEST AND G. P. ASH (PLAINTIFFS).......................RESPONDENTS;

E. R. BEATTY (DEFENDANT).......APPELLANT;

AND

JONATHAN CALVERT AND G. P. ASH (PLAINTIFFS)................RESPONDENTS.

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

Sale — Vendor or trustee — Rights of beneficiaries — Representation — Term "or thereabouts."

The vendor may be a trustee for others of the money payable by the purchaser but his beneficiaries have no rights but those given by the contract and if, in carrying out the sale, the purchaser incurs a loss for which the vendor is liable it may be deducted from the purchase money.

In a contract for sale of a going concern the liabilities were stated to be $36,894, "or thereabouts."

Held, that an excess of $857 was too substantial to be covered by the qualifying expression.

Judgment of the Appellate Division (47 Ont. L.R. 265) reversed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment at the trial which dismissed the actions of the respective plaintiffs (respondents)

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

(1) 47 Ont. L.R. 265.

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The respondent Ash executed an agreement with the appellant to sell to him the stock and assets of a company. Appellant was to assume the liabilities and pay $5,900 in cash. Ash had collected a part of this amount from the other respondents to purchase stock in the company but never procured the stock. The respondents Best and Calvert brought action to recover from appellant the amounts due them.

In a schedule to the agreement of sale the liabilities of the company were given as $36,894, "or thereabouts." Appellant was obliged to pay $857 more and claimed the right to deduct it from the amount payable to Ash. The trial judge acceded to this but on refusal to add Ash as a party he dismissed the two actions. In the Appellate Division Ash was added and judgment was given allowing Best and Calvert the amounts they respectively claimed. The Court held that Ash was a trustee of the amount payable by appellant who could not set off the $857 against it as the debts were not mutual. Beattie then appealed to the Supreme Court of Canada.

W. J. McCallum for the appellant.

J. J. Gray for the respondent.

THE CHIEF JUSTICE.—I would allow this appeal and concur in the reasons for judgment stated by Anglin J.

IDINGTON J.—This is an appeal from the judgment of the second Appellate Division of the Supreme Court of Canada against appellant in two actions alleged to have been consolidated, and founded upon an agreement dated the 27th day of May, 1919.

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That agreement was made between the respondent Ash as vendor, of the first part; appellant as purchaser, of the second part; and the Canadian Drill and Electric Box Company, Limited, thereinafter called "The Company." of the third part,

The recitals set forth his acquisition of the business and assets of two companies and a sale thereof by him to the party of the third part which had by two agreements agreed to issue certain of its capital stock to said vendor who had agreed to pay certain liabilities therein referred to and that the company had purported to carry on business and had

incurred certain obligations, and certain shares of its capital stock have been applied for, sold, issued or allotted or agreed to be sold, issued or allotted either by the company or the vendor, and the vendor has received certain monies from persons who subscribed for shares of the company's capital stock and has paid certain monies either to or for the company.

And whereas the agreements hereinbefore mentioned have not been carried out and default has been made thereunder and the vendor is financially unable to carry out his part of the same and it is inexpedient for the company to insist on the performance of the same, and the company and the vendor have agreed to cancel the agreements between them.

And whereas, on the representation, condition and understanding that at the date hereof the assets of the company are as set out in Schedule "A" attached hereto, and that the total liabilities or obligations of the company are as set out in Schedule "B" attached hereto, and upon all the said assets of the company being transferred and assigned to the purchaser and upon all the shares of the capital stock of the said company which have been sold, issued or allotted and all the interest of the vendor and any other persons in shares which have been agreed to be sold, issued, or allotted, being transferred and assigned to the purchaser or his nominee or nominees and upon the vendor releasing the company and the purchaser from all claims of every nature and kind whatsoever which he may have against the company or under the said agreements or any of them or otherwise howsoever, the purchaser herein called the party of the second part has agreed with the vendor and the company to enter into these presents.

The operative part of the agreement then proceeds in consideration of the premises and of the mutual covenants and agreements to set forth in most comprehensive terms that:—

The vendor doth hereby grant, transfer, assign and set over unto the purchaser all his interest, if any, in the agreements hereinbefore mentioned and, in the shares of the capital stock of the said company which has been subscribed, applied for, sold, issued or allotted, or agreed to be sold, issued, or allotted, whether to the vendor himself or to any other person or persons.

The vendor hereby appointing the purchaser his attorney to transfer on the books of the company either in the name of the purchaser or his nominee or nominees, such of the shares as are owned by or as stand in the name of the vendor or in which he is interested in any way.

And the vendor covenanting and agreeing to procure and deliver to the purchaser within thirty days valid and proper transfers or assignments of all shares owned by or standing in the name of, any other persons or in which such persons may be interested in any way.

And the vendor further covenanting and agreeing to procure the execution and delivery by the company of these presents and the approval and ratification of the directors and shareholders of the same.

And the vendor further waives all claims of every nature and kind whatsover which he may have against the company or under the said agreements or any of them or otherwise howsoever, and hereby releases and discharges the company and the purchaser from all obligations therefor and thereunder.

Then:—

The company doth hereby grant, transfer, assign and set over unto the purchaser all its right, title and interest, if any, in and to the agreements hereinbefore mentioned and its goodwill, chattels, stock, lands, buildings, fixtures, patents, formulas, blue prints, accounts and bills receivable and particularly the assets as set forth in the schedule "A" attached hereto, as well as all other assets and claims whatsoever.

That is followed by the covenant of the appellant now sued upon, which reads as follows:—

And in consideration of the foregoing the purchaser hereby covenants and agrees to assume the obligations and liabilities of the company as set forth in Schedule "B" attached hereto amounting to the sum of $36,894.38 or thereabouts, and to pay to the vendor or the various persons entitled thereto the sum of $5,900.00 upon receiving releases of their respective rights arising from the payment of money to the vendor, or transfers of the shares in the said company upon which the said amount has been paid by the persons making said payments or subscribing for shares.

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The respondent Ash presumed to assign $1,000, part of the said $5,900 to Best, his father-in-law, and to Calvert, his brother-in-law, the sum of $900.00 out of said $5,900.00.

Then, as the evidence discloses in the following questions and answers

Q. Did they instruct the bringing of these actions or did you? A. I instructed my solicitor to take action.

Q. For them? A. Yes.

he instituted these actions in the respective names of his said friends.

The defendant, now appellant, set up that the liabilities represented in said schedule had substantially exceeded the total represented in said Schedule "B" and that in some respects the assets had fallen short of the total represented.

The learned trial judge arrived at the conclusion that these assignees could not maintain, as mere assignees of the chose in action, any action unless the covenantee Ash was added as party plaintiff.

He proceeded then at the close of the trial to set forth the difficulties in the way of such plaintiffs, even if Ash were added as a party attempting to recover, and, in any event, inasmuch as the covenant sued upon, had proceeded upon the implied covenant on the part of Ash, relative to the substantial correctness of the Schedules "A" and "B," the defendant, now appellant, was entitled to have the balance, due under his covenant, reduced by the sum of $857.06, and such further sums as a reference might, if desired, disclose.

He then gave the plaintiffs a limited time to procure the consent of Ash to be so added.

It turned out, as represented later to the learned trial judge, that Ash had refused to give such consent.

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He then, quite properly, proceeded to dismiss the actions and in support of his judgment referred to relevant authorities which support the position he took.

Thereupon, the plaintiffs appealed to the court of appeal for Ontario, and, on the case coming up before the Second Appellate Division, that court properly held Ash was a necessary party, and he consented to be added accordingly.

The appellant seems to have consented to that being done.

The next question that thus arises was whether the said claim of $857.06 could be, as that court treats it, set off, or, as I prefer, set up by way of defence to the action on the covenant sued upon.

In my opinion an assignment of anything less than a whole chose in action does not entitle the assignee to sue, and these actions should, I submit with respect, have been dismissed on that ground, long before they were.

The statute enabling an assignee of a chose in action to sue, in my opinion, never was intended to enable the possessor of a valuable chose in action to issue a kind of currency, as it were, by dividing up his right into little bits and distributing them amongst his friends, and giving each of them a chance to worry and annoy the debtor.

The Second Division of the Appellate Court would seem also to have held, at first blush, something akin thereto, else it need never have insisted upon Ash being made a party plaintiff, as it seems to have directed.

Having, however, so directed and allowed the argument to proceed on that basis, it seems to be alleged by the judgment appealed from that counsel for appellant admitted or made some admission from which it had inferred as follows:—

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In the course of promoting the Canadian Drill and Electric Box Company, Limited, Ash went about seeking subscribers for shares, and obtained $5,900 of money which it now transpires he received as trustee for the subscribers in order that he might procure for them shares in the company. No shares were ever issued to these subscribers and Ash remained a trustee of the moneys which he had received and of the $5,900 payable by the defendant under the terms of the agreement in recoupment of these trust moneys which are traced to the defendant.

This situation does not appear to have been brought to the attention of the trial judge by counsel for the plaintiff and only transpired in the course of the argument in this court from the admissions of counsel for defendants in answer to questions from the court. This circumstance appears to me to be decisive of the controversy. The issue is as to the right to set off against the $5,900 due by defendant to Ash as trustee the over payment made by defendant on account of general liabilities, for repayment of which Ash is alleged to be personally responsible.

There is nothing in the respondents' case at the trial as presented in the evidence supporting same, or in reply to justify counsel in making any such admission and he stoutly asserts he never did.

It is difficult to see how, after all that had transpired in the trial court, and the contentions set up there and in appeal, that he should have done so, and given away his client's case.

He may no doubt in argument have conceded something not intended, as young men may almost concede anything and then be mistaken.

I have no hesitation in holding that in such a case as is presented herein, counsel could not bind his client to something the document sued upon does not warrant him in conceding.

I deal, therefore, only with the document and the relevant facts as disclosed at the trial.

Nothing appears therein to constitute a trust or a condition of things involving a trust and notice thereof to appellant.

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I fully agree with the law as set forth by the late Street J., one of the best of Ontario judicial authorities in law, in the following paragraph quoted by the judgment appealed from, as follows:—

> In all the cases since *Tweddle* v. *Atkinson* (1) in which a person not a party to a contract ha brought an action to recover some benefit stipulated for him in it he has been driven, in order to avoid being shipwrecked upon the common law rule which confines such an action to parties and privies, to seek refuge under the shelter of an alleged trust in his favour: *Mulholland* v. *Merriam* (2) *Re Empress Engineering Co.* (3) *Re Rotherham Alum Co.* (4) *Gandy* v. *Gandy* (5) *Hendersom* v. *Killey*; (6) *Osborne* v. *Henderson* (7); *Robertson* v. *Lonsdale* (8)

An examination of the authorities thus cited and what they demonstrate leads me to conclude that a covenantor who is a bare trustee need not be made a party to enable his *cestuis que trustent* to sue; that a covenant to pay to some third party a sum named, or fruit of something being contracted for, does not create such a trust as to entitle the third party to sue; and that the trustee may be made a party if the requirements of justice so demand.

The first of these decisions clearly indicates conclusively the legal truth of the first of the propositions I submit, and the foundation for the next of foregoing propositions is found in the others, as well as the reason for the last, which is merely a safeguard against injustice in executing the equities involved in some complicated cases.

With great respect I cannot agree with the deductions which the court below appears to have drawn from said decisions.

(1) 1 B. & S. 393.
(2) 19 Gr. 288.
(3) 16 Ch. D. 125.
(4) 25 Ch. D. 111.
(5) 30 Ch. D. 57.
(6) 17 Ont. App. R. 456.
(7) 18 Can. S.C.R. 698
(8) 21 O.R. 600.

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One more point made on the argument for respondent was that the words "or thereabouts" in the covenant disposed of the claim. No authority was cited, and common sense would perhaps be the best. A trifling or comparatively insignificant sum, which I do not think $857.06 is, even in a large deal, might possibly be covered thereby. Abler judges than I have refused to go further, or so far, perhaps. The cases of *Barker* v. *Windle* (1), *Davis* v. *Shepherd* (2), and *Oddie* v. *Brown* (3), present the use of the phrase. They seem to refer us to common sense.

I think the learned trial judge was right and that his judgment should not have been disturbed, and that this appeal should be allowed with costs herein, and a reference as the learned trial judge offered be again offered if desired by either party, costs thereof to abide the event.

DUFF J.—The only question requiring discussion turns upon the effect of certain provisions in the agreement of the 27th May, 1919. Among other things it is provided as follows:—

Whereas on the representation, condition and understanding that at the date hereof * * * the total liabilities or obligations of the company are as set out in Schedule B attached hereto * * the purchaser * * * has agreed with the vendor to enter into these presents

* * *

And in consideration of the foregoing the purchaser hereby covenants and agrees to assume the obligations and liabilities of the company as set forth in Schedule B attached hereto amounting to the sum of $36,894.38 or thereabouts, and to pay to the vendor or the various persons entitled thereto the sum of $5,900 upon receiving releases of their respective rights arising from the payment of the money to the vendor, or transfers of the shares in the said company upon which the said amount has been paid by the persons making the said payments or subscribing for shares.

(1) 6 E. & B. 675.
(2) 1 Ch. App. 410.
(3) 4 De G. & J. 179.

The liabilities of the company proved in fact to include liabilities not mentioned in the schedule and to be in the aggregate considerably more than the sum mentioned, $36,894.38; the purchaser asserts the right to apply the sum of $5,900 mentioned in the paragraph above quoted in liquidation in part of these obligations.

The Appellate Division has held that the vendor was a trustee in respect of this sum of $5,900 because it was made up of sums which the appellant's counsel was understood to have admitted on the hearing of the appeal were owing by the vendor to various persons from whom he received them for the purpose of applying for and securing shares in the company, which shares were never issued; and the conclusion is drawn from these facts that the covenant contained in the paragraph quoted from the operative part of the agreement in respect of this $5,900 is a covenant entered into with the vendor as trustee for these persons and, consequently, it is said that no part of this sum can be diverted for the purpose of liquidating the undisclosed liabilities.

With respect, I think it is a debatable point whether the covenant in question is a covenant with the vendor as trustee. Assuming that he was accountable to other persons as trustee for these moneys which he received from them for a purpose which was never carried out, it would by no means necessarily follow that the purchaser was contracting with him as trustee. The true meaning of the contract may be that the purchaser agreed with the vendor to indemnify him against these obligations either by paying the vendor or by paying the vendor's creditors.

However that may be, with great respect, the answer to the respondents' contention is to me abundantly clear that, assuming the covenant as regards

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this sum of $5,900 to be a covenant exacted by the vendor and entered into by the purchaser for the benefit of other persons, the rights of these other persons must depend upon the terms of the agreement and the rights of the beneficiaries in respect of the fruits of the enforcement of this covenant can be no higher than the rights given by the covenant itself. The beneficiaries' rights whatever they were as against the vendor, could not be affected by the covenant. The covenant itself takes its effect as part of the agreement in which it is found and gives such rights and only such rights as flow from that agreement.

Now the recital quoted above makes the right of the vendor depend upon the condition that the representation mentioned is a true representation. Saving in so far as subsequent events may have affected the reciprocal rights of the parties, the condition expressed in the recital is an essential term of every obligation undertaken by the purchaser. Now, it is not suggested that anything has happened which has relieved the vendor and the beneficiaries from the exigency of this term to such a degree at all events as to deprive the purchaser of the right to set up the non-fulfilment of it as a defence *pro tanto* against any action on the covenant now sued upon.

The point made upon the words "or thereabouts" in the covenant is without substance. The recital shews that the agreement proceeds upon the representation that the liabilities and obligations of the company are set out in full in Schedule B. There is nothing in the words of the operative part of the agreement to qualify this, the words "or thereabouts" obviously being intended to qualify only the statement as to the aggregate amount of the liabilities and obligations mentioned.

The appeal should be allowed with costs here and in the Appellate Division and I think justice will best be done by making an order in terms of the judgment offered by Mr. Justice Hodgins at the conclusion of the trial.

ANGLIN J.—Whatever they may be, the rights of the original plaintiffs, Best and Calvert, or of the added plaintiff, Ash, as against the defendant Beatty in respect of the moneys sued for in these actions arise out of and are subject to the terms and conditions of the agreement made between Ash and Beatty on the 27th of May, 1919. It is solely under that agreement that any liability exists against Beatty and he is entitled to insist on the terms on which he undertook it being fulfilled. These terms cannot be affected by the relationship between Ash and Best and Calvert.

It may be that the $5,900, if it should reach Ash, would in his hands be subject to a trust for the plaintiffs, Best and Calvert, and others. It does not follow that it was as a trustee that Beatty agreed to pay him this sum. But, assuming that to be the case, Beatty's undertaking to pay it would be subject to the conditions of the agreement whereby he assumed that obligation. Those conditions were, *inter alia*, that the company which Beatty was acquiring possessed certain assets as shewn in Schedule A to the agreement, and that its liabilities did not exceed $36,894.38 "or thereabouts," as shewn in Schedule B. Beatty alleges breaches of both these conditions.

At common law a breach of either condition would preclude recovery on Beatty's covenant. But in equity on the defendant being put in the same position as if the conditions had been strictly observed by deducting from what he has undertaken to pay enough

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to make good the default, he may be required to pay the balance. The case is not one of set-off in the ordinary sense, but one of inability on the part of the plaintiffs to establish their claim until the conditions of the defendant's obligation have been fulfilled at their expense.

Upon evidence warranting such a finding the learned trial judge held that Beatty's claim that the liabilities exceeded $36,894.38 by $857.06 was established. This amount is too large to be covered by such words as "or thereabouts." Having been obliged to expend $857.06 to put himself in the position which he would have held had the condition as to the amount of the company's liabilities been fulfilled, Beatty's obligation to pay $5,900 to Ash "or to various persons entitled thereto" is *pro tanto* reduced. Having already paid $4,000 on this account, to "various persons entitled thereto," subject to the further deductions which he asserts a right to make, there remains due from Beatty $1,900 less $857.06, or $1,042.94.

The defendant also claimed to deduct damages which he alleged he had sustained because certain assets included in Schedule A either did not fulfil representations made as to them or were subject to defects in title not disclosed. This claim was rejected by the learned trial judge on the ground that the evidence did not sufficiently support it and I am not prepared to overrule that finding.

Another deduction claimed referred to a sum of $425 owing by one Aylesworth to the company whose assets were acquired from Ash. This claim was for money advanced and the record contains a written acknowledgment of it by Aylesworth. All that appears in evidence about this item is a statement by Beatty that Aylesworth demurred when asked by him to

pay it on the grounds that he had lost money and time through his connection with the company and that Ash had personally claimed this sum from him. But it is not proved that Beatty is unable to collect this sum from Aylesworth—still less that it was not a valid asset of the company. Ash was not asked about it when he gave evidence. The learned trial judge makes no reference to this claim of the defendant, probably either because it was not pressed upon him or because he thought it could not be seriously contended that the evidence established it.

The sole deduction to which the defendant is entitled, therefore, is the sum of $857.06. The disposition of the case proposed by the learned trial judge in his opinion of the 12th December, 1919, seems to have been correct and should now be directed.

The appellant is entitled to have his costs in this court and the Appellate Division paid him by the respondents.

BRODEUR J.—This case has caused very serious misunderstandings. At the conclusion of the trial, the trial judge expressed his willingness to maintain the action in part if the plaintiffs Best and Calvert would bring into the case G. P. Ash as co-plaintiff with them. But the trial judge having ascertained that the plaintiffs had declined to add Ash as a party plaintiff, later on dismissed the action.

Then in the Appellate Division counsel for the plaintiffs stated that he had been misunderstood by the trial judge and that he was willing to add Ash as a co-plaintiff; he applied to the Appellate Division for an order making Ash co-plaintiff, and the case was argued.

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It was contended in appeal that Ash acted with regard to the sum of $5,900 which Beatty undertook to pay by agreement of the 27th of May, 1919, as trustee and that no deduction could be claimed from that sum for non-fulfilment on the part of Ash of obligations which he contracted in virtue of this agreement.

The Appellate Division declared that in the course of the argument and from admissions of counsel for Beatty in answer to questions from the court, it appeared that the said sum of $5,900 was trust money and that this sum could not be set off against claims that Beatty could claim against Ash personally.

As a result the plaintiffs' actions were maintained by the Appellate Division.

Now Beatty appeals to this court and his counsel virtually states that he never made any admissions which would justify the inferences drawn by the court below.

It seems to me that all these misunderstandings which have arisen, as well before the trial judge as before the Appellate Division, should have been brought formally to the attention of the judge or of the court before whom the consent or admissions have taken place.

If a judgment is rendered upon alleged refusals or admissions which have, according to the views against whom they were invoked, never occurred, then they should bring the matter before the tribunal where the alleged refusals or admissions have been made, in order that the matter be more conveniently discussed and dealt with.

None of the parties however in this case have been willing to adopt this procedure and the appellant now asks relief from this court.

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The respondent claimed at first that we had no jurisdiction, at least in the case of Calvert, because the amount in controversy did not exceed $1,000. (Sec. 48 Supreme Court Act).

It is to be noticed that the real plaintiff, according to the judgment of the court below, is the trustee Ash and that the two actions have been consolidated. The defendant Beatty has a judgment against him for an amount exceeding $1,000, viz., $1,962.72.

In these circumstances, this court has jurisdiction.

As to the merits of the appeal, I have not been able to find in the record the evidence that Ash was acting as trustee for the persons who, like Best and Calvert, purchased shares in the company in question. This item of $5,900 should be treated in the same way as the rest of the purchase price.

As Ash has not fulfilled the conditions of his agreement, the appellant may raise successfully this issue in an action to recover part of the purchase price.

The appellant Beatty claims that he could recover from the plaintiff Ash a sum of $857.06 alleged to be due by him for excess liability which he paid for Ash's benefit. This sum should be deducted from the amount which he still owes to Ash.

There is also a sum of $425 which he claims should be deducted from the $5,900.00. As to this claim of $425.00 the evidence is not complete and the matter should be referred to the Master.

MIGNAULT J.—Ash, having been added as co-plaintiff in the Appellate Division, the question was whether, under the agreement between Ash and Beatty, the latter, being sued by Best and Calvert in two separate actions

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for amounts claimed to be due to Best and Calvert as transferees of Ash by virtue of this agreement, could set off against the plaintiff, the sum of $857.06, being the amount paid by him, Beatty, in excess of $36,894.00, the amount represented to him as the liabilities of the Canadian Drill and Electric Box Company, whose assets were sold by Ash to Beatty. The sale agreement in question represented that the liabilities of this company were $36,894.38 or thereabouts, as set out in a schedule attached to the agreement, and Beatty paid liabilities amounting to $857.06 in excess of this amount. The amount payable by him to Ash by virtue of this agreement was $5,900.00. The two actions were for $1,000.00 and $900.00 respectively as a part of this price, and against these actions Beatty claimed that he was entitled to set off the said sum of $857.06.

The Appellate Division refused him this right of set-off for the following reasons which I quote from the judgment of Mr. Justice Masten:—

In the course of promoting the Canadian Drill and Electric Box Company, Limited, Ash went about seeking subscribers for shares, and obtained $5,900 of money which it now transpires he received as trustee for the subscribers in order that he might procure for them shares in the company. No shares were ever issued to these subscribers and Ash remained a trustee of the moneys which he had received and of the $5,900 payable by the defendant under the terms of the agreement in recoupment of these trust moneys which are traced to the defendant.

This situation does not appear to have been brought to the attention of the trial judge by counsel for the plaintiff and only transpired in the course of the argument in this Court from the admissions of counsel for defendants in answer to questions from the court. This circumstance appears to me to be decisive of the controversy. The issue is as to the right to set off against the $5,900 due by defendant to Ash as trustee the overpayment made by defendant on account of general liabilities, for repayment of which Ash is alleged to be personally responsible.

In other words what is claimed is to set off against a debt due to Ash as trustee a claim against him personally. But these are not mutual debts and could not be set off in law or equity. *Ambrose* v. *Fraser* (1)

The plaintiffs are therefore entitled to recover the full amount claimed without any set off or deduction in respect of the claim of $857.06.

With respect, I am of opinion that while undoubtedly a debt due by a person personally cannot be set off against a claim made by him as trustee, this legal principle is without application in this case. Best and Calvert and their co-plaintiff Ash sue for something alleged to be due under this sale agreement between Ash and Beatty. It was a condition and representation of this agreement that the liabilities assumed by Beatty amounted to $36,894.38 or thereabouts, and notwithstanding this condition and representation Beatty had to pay $857.06 in excess of this amount. It is therefore immaterial whether Ash was or was not a trustee for third parties as to the amount payable by Beatty under the agreement. The actions are for an amount due by Beatty as price of this sale and are founded on the agreement which contains this condition and representation. The defence of set-off of Beatty is also based on this agreement. Therefore if Ash or his assignees claim under the agreement, they can be met by any defence arising out of its terms, and it matters not whether they sue as trustees or otherwise. I am therefore of opinion that the defence of set-off was open to Beatty.

I had some doubts whether the excess amount paid by Beatty could come within the words "or thereabouts." But, on reflection, I have come to the conclusion that the difference is too substantial to permit us to exclude it under so vague a clause.

(1) [1887] 14 O.R. 551.

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The appeal should, therefore, be allowed with costs here and in the Appellate Division and the judgment should be in the terms of the opinion of Hodgins J.A., dated the 12th December, 1919.

Appeal allowed with costs.

Solicitors for the appellant: *Lamport, Ferguson and McCallum.*

Solicitor for the respondents: *T. T. Gray.*

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE CO. (DEFENDANT) .... APPELLANT;

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*Mar. 11.

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S. PARROTT (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Insurance—Accident and guarantee—Breach of contract—Insurer's knowledge—Continuation of defence in action against insured—Waiver of condition—Estoppel.

The respondent held a policy of insurance in the appellant company to indemnify him against accidents to his employees. An employee was injured and brought action against the respondent. The appellant, in pursuance of a condition of the policy, assumed the defence. During the trial, the appellant learned, by the respondent's own admission, that the machine which caused the accident had been unguarded in breach of a condition of the application and of the policy. But the appellant continued the defence down to judgment awarding damages to the employee. The respondent brought this action to recover the amount paid by him. The appellant pleaded that owing to the respondent's breach of the condition of the policy, it was relieved from liability.

Held, that the appellant company, having assumed and continued the defence with knowledge of the fact that the machine was unguarded, waived any right to dispute liability under the policy for such breach of condition.

Judgment of the Court of Appeal (13 Sask. L.R. 405) affirmed.

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

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

(1) [1920] 13 Sask. L.R. 405; [1920] 3 W.W.R. 113.

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

P. E. Mackenzie K.C. for the appellant.

G. H. Yule for the respondent.

IDINGTON J.—The appellant insured respondent against loss from the liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered, while the policy was in force, by an employee while within the factory and in and during the operation of the trade or business described in a specified schedule.

There appear as usual numerous conditions limiting appellant's liability.

And indorsed on the policy was the following:

> Indorsement to be attached to and forming part of Manufacturers' Liability Policy No. M. 165, Modern Laundry.
>
> Notwithstanding anything herein contained to the contrary, it is hereby understood and agreed that all mangling machines owned and operated by the assured shall be provided with fixed guards or safety feed tables, adjusted at the point of contact of the rolls so as to prevent the fingers or hands of the employees from being drawn into the rolls, and that such guards shall be maintained during the term of this policy. Any failure on the part of the assured to provide and maintain such guards shall relieve this company from liability on account of personal injuries due to such neglect, and this policy is accepted by the assured accordingly.
>
> Dated at Winnipeg, Man., this 6th day of February, 1914.
>
> The Western Canada Accident and
> Guarantee Insurance Company.
>
> (Sgd.) A. F. W. Severin,
> Manager and Secretary.

The main questions raised herein are whether or not the said provision can be waived or the appellant

estopped from setting it up against respondent in answer to this suit upon said policy, and whether or not, in either such case, the facts relied upon establish in law either waiver or estoppel.

A young woman working at a mangle in respondent's laundry was injured by her fingers being drawn into the rolls.

The contention set up by appellant was and is that the mangle in question was not guarded in the manner specified and hence no action can lie.

The factum for the respondent claims that there is no evidence from which it can be inferred that the absence of a guard was the immediate cause of the accident.

I confess I am unable to find in the evidence any necessary connection between absence of the guard and the accident. But the parties concerned seem to have assumed there was. The case seems to have been argued out on that assumption.

I may be permitted to point out the difference between the language of the above quoted condition and the terms of the local statutes which provide for the protection of employees thus:—

> 17. No person shall keep a factory so that the safety of any person employed therein is endangered or so that the health of any person employed therein is likely to be permanently injured.
>
> 19. In every factory:—(a) All dangerous parts of mill gearing machinery * * * shall be, so far as practicable, securely guarded.

The words of this section 19 only require that the

> machinery shall be, so far as practicable, securely guarded.

The condition indorsed on the policy and herein relied upon is in form absolutely imperative by requiring

> guards, * * * so adjusted at the point of contact of the rolls so as to prevent the fingers or hands of the employees from being drawn into the rolls.

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This feature of the condition must be borne in mind when we are asked to consider that the appellant had no notice of the actual fact of a want of guard.

In the report of the respondent to appellant of the nature of the accident and probable cause which was made on the form supplied by appellant, we find the following question and answer:—

> 35. Narrate below how accident happened, its cause, etc., and illustrate by any marked rough sketch which you think will enable the cause of the accident to be easily understood:
>
> Girl was ironing handkerchiefs and odds and ends. It is figured out that the ring on her finger caught in the fabric and the rolls took her hand in on to the heated ironing surface before hand was released, was burned.

How could appellant relying, if its present pretensions are well founded, upon such a clause as quoted above by way of limitation of its obligation, fail to discern instantly on reading such an answer that there was no guard such as called for?

It seems to me inconceivable that any one knowing and relying upon such a condition could read said statement of the nature of the accident and not have his attention aroused thereby. I can conceive of his feeling that no known guard could have prevented it.

Its next or concurrent step was to send its agent, Sinclair, who was such a trusted agent as to be the same man who had countersigned the policy in question and given it vitality a few months previously, to make inquiries on its behalf into all that was involved.

He was shewn the place and how the accident happened, and returned and had further discussion, according to respondent's evidence. And, according to the foreman's evidence, he was told the machine was running in the same condition at the time of the accident. It was unguarded.

Trotter, the manager of appellant's local agency, came later, as I infer, and was told by the mother of the injured employee that the machine was unguarded. Trotter pretends he does not recollect, but admits it was possible she had done so.

Severin, the general manager of the appellant, was examined for discovery, and part of his said examination was put in evidence.

He was asked and answered thus:—

> Q. Who were your authorized agents at Saskatoon. A. Willoughby-Sumner & Company.
>
> Q. Was there a Mr. Sinclair connected with that company? A. There was in 1914.

That examination disclosed a mass of correspondence which passed between him and appellant's head office and the local agency, which leads me to the conclusion that the appellant abandoned, if it ever had any intention of relying upon, such a defence as now set up, and instead to take its chance in preference thereto of defending the action the employee might bring against the respondent.

And when that action was brought the appellant was notified by respondent and the former asserted its right under the policy to defend same.

It entrusted the defence to a firm of solicitors of whom one was called and produced the appellant's letter of instructions to defend.

That letter clearly indicates that, instead of raising any question such as involved in the condition in question, the appellant could by defending the action try to defeat the employee in that action by relying on her having worn a heavy ring and thus being drawn in, and the law which shewed she had assumed the risk, despite the law for her protection.

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I cannot understand and I am not at all inclined to believe the assertion or contention that the writer of such a letter did not well know and understand all the foregoing facts, tending to prove that it was by that time well understood by the appellant that there were no such guards in use as required at the time of the accident, or for a long time before the policy issued, as required either by the local statute or the more rigid terms of the condition indorsed on the policy.

The solicitor says, after producing said letter:

> I assumed machinery was unguarded from letter from defendant instructing me. I discussed question of guard having been removed with Severin before trial.

I agree with him that the clear inference from the letter of instructions indicates as much and in face of his disclosure as to discussing the question of absence of guards with Mr. Severin before the trial, I am unable to understand why the trial was gone on with unless upon the assumption that Severin had for the appellant elected his chance of defeating the employee to his then chance of defeating respondent in such an action as this.

There is abundant evidence I think that the respondent was induced by the action of the appellant to change his position, by reason of the course of conduct of appellant, to his detriment. And I am of the opinion that it is thereby estopped from setting up the condition relied upon.

I might have mentioned the contribution by appellant to redress the wrong the employee had suffered, which never should have been made if it had any thought of turning round on respondent and setting up the condition in question.

Hence I am of opinion that the Court of Appeal was right in allowing the appeal on the main issue and in regard to the cross-appeal which arose out of such contributions.

They, in any other light than as flowing from appellant's election to abandon its condition, might be treated as voluntary payments and hence not recoverable.

The allowance of the costs of defence in pursuing such a course of conduct is, if possible, still more indefensible.

The cases cited in *The Atlas Assurance Co.* v. *Brownell* (1), proceed on the want of authority in those concerned and are clearly distinguishable from this where the general manager is ultimately the authority who made the election to abandon the condition.

The appeal should be dismissed with costs throughout.

DUFF J.—After carefully considering the evidence I have come to the conclusion that the appeal should be dismissed. I think the weight of evidence supports the view contended for on behalf of the respondent that the appellant company assumed the defence of Miss Oxenham's action with the knowledge that the basis of the claim was, in part at all events, the fact that the machine she was tending was unguarded and that there was no misrepresentation of fact by the respondent as to the state of the machine.

The defence having been assumed in such circumstances and persisted in down to the trial with the acquiescence of the respondent, there is, I think, ample evidence to support the inference, and that I think is the right inference, that the company agreed to assume responsibility under the policy.

(1) [1899] 29 Can. S.C.R. 537.

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The agreement of the respondent by which the control of the proceedings and negotiations for settlement, if there should be any, were delivered over to the company is a sufficient consideration.

There is, I think, not the slightest ground for suggesting that the company's officials were not acting with the authority of the company; and I can see no ground whatever for doubting that the company is bound by the agreement.

The case does not raise any of the nice points that sometimes arise when a claim is founded upon election, estoppel or waiver taking effect on equitable principles.

ANGLIN J.—Assuming in the appellant company's favour that, but for its continued conduct of the defence in the action of *Oxenham* v. *Parrott* after becoming aware by Parrott's own admission that the machine on which Oxenham was injured was unguarded, it would have had a good defence to Parrot's claim in this action for indemnity under the policy held by him on the ground that accidents in the use of unguarded machinery were not within the risk, its continuation of that defence down to judgment estops it in my opinion from now setting up that answer to this action. Its right to conduct Parrott's defence to the Oxenham claim existed only if and because the injury to Oxenham was within the risk covered by its policy.

On becoming aware of the fact which it now alleges excluded Parrott's liability to Oxenham from that risk, it had an election to repudiate liability to Parrott and decline further to carry on his defence or to accept such liability and continue that defence. Its action in continuing the defence would seem to be unequivocal and to import an election to undertake

liability upon its policy. But it was at all events conduct from which Parrott was justified in assuming that it had so determined and that he therefore need not concern himself with the Oxenham claim—either to defend that action or to endeavour to settle it.

Judgment was recovered by Oxenham for $1,400.09. Parrott's evidence is that he believed he could have effected a settlement of the action for $700, and circumstances detailed in the evidence indicate a probability that a settlement could have been effected for a sum substantially less than $1,400. The principles enunciated in the judgment of the Court of Exchequer Chamber in the leading case of *Clough* v. *London and North Western Rly. Co.* (1), delivered by Mellor J., but written by Blackburn J. as he tells us in *Scarf* v. *Jardine* (2), and approved in *Morrison* v. *Universal Marine Ins. Co.* (3), govern this case.

Assuming that the fact that Oxenham was injured on an unguarded machine excluded any claim in respect thereof from its policy, the appellant company had a right of election either to repudiate or to accept liability therefor. With full knowledge of that fact, if it did not actually elect to do so—*Scarf* v. *Jardine*—(2), it so acted as to create the impression that it accepted responsibility. The position of the respondent—the other party to the contract—was affected. He took no step to protect himself because lulled into security by the belief, induced by the company's action, that it would indemnify him against whatever judgment Oxenham might recover. Prejudice sufficient to support an estoppel would seem to be implied in these circumstances. *Ogilvie* v. *West Australian*

(1) [1871] L.R. 7 Ex. 26, at p. 35. (2) [1882] 7 A.C. 345, at p. 360.
(3) [1873] L.R. 8 Ex. 197, at pp. 203-5.

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Mortgage and Agency Corporation (1); *Knights* v. *Wiffen* (2). After Oxenham had recovered judgment the respondent had no chance to avoid payment of the damages thereby awarded. The burden lies on the appellant company, whose conduct lulled the respondent to rest, to shew that he could not have escaped any part of that liability after the time when its officers learned the fact that the machine on which Oxenham was injured was unguarded. *Dixon* v. *Kennaway & Co.* (3).

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

BRODEUR J.—I concur in the result.

MIGNAULT J.—I am inclined to think that the fact that the mangling machine by which Miss Oxenham was injured was unguarded, notwithstanding that the respondent had declared that all machinery would be provided with proper guards, was a breach of the conditions of the policy issued to him by the appellant at a lower premium than if the risk insured were against accidents caused by unguarded machinery, and that for this reason the appellant could have been relieved from liability under the policy. But the question here is whether the appellant is now entitled to repudiate liability for this breach of contract, in view of the fact that when the respondent was sued by the mother of Miss Oxenham, the appellant undertook to contest the latter's claim with the result that a judgment was recovered against the respondent for $1,409.09, which the latter has paid and now seeks

(1) [1896] A.C. 257, at p. 270. (2) L.R. 5 Q.B. 660, at pp. 664-7.
(3) [1900] 1 Ch. 833, at pp. 839-40.

to recover from the appellant. The respondent states that if he had been left free to compromise the claim against him, he could have settled it for $700. Mrs. Oxenham, at the trial, swore that she refused an offer of $100 made on behalf of the appellant, but that she offered to the respondent to settle for $700 and would have done so.

The learned Chief Justice of Saskatchewan, who tried the case, stated that the appellant may be held to have first had knowledge of the unguarded condition of the mangling machine at the time the solicitor for the plaintiff in the Oxenham action became aware of the fact on the examination for discovery of Parrott. The learned Chief Justice however considered that the appellant having under the policies the right to defend the action, the fact that it continued to do so after having obtained this knowledge, did not suggest any waiver of the conditions of the policy.

The Court of Appeal being of opinion that this conduct involved waiver of any right to dispute liability under the policy and that the position of Parrott had been prejudiced by the conduct of the appellant in contesting the Oxenham action, when he, Parrott, could have settled for one-half of the amount he was eventually condemned to pay, reversed the judgment the learned trial judge had rendered in favour of the appellant.

The only construction, in my opinion, that can be placed on the conduct of the appellant in defending the Oxenham action on behalf of the respondent is that it assumed liability under the policy, for this was its obligation by virtue of the contract it made with the respondent. So far as this conduct was induced by its ignorance of Parrott's breach of con-

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tract, it could not be set up by the latter against the appellant. But when the appellant discovered this breach, which entitled it to repudiate liability under the policy, it was placed on its election between repudiating liability and treating the policy as existing between Parrott and itself. It was then that it should have made its election and given notice thereof to Parrott. By continuing with full knowledge of the breach to contest the action it elected to treat the policy as existing. From that point of view it would not seem necessary to shew that the respondent was prejudiced by the continuance of the defence set up by the appellant against the Oxenham action, but the existence of this prejudice strengthens the respondent's contention that, notwithstanding his breach of contract, the appellant should be held to have elected to treat the contract as still existing. And the least that can be said is that the appellant so conducted itself as to give Parrott reason to believe that it had elected to continue the policy and thus prevented him from making the best terms possible with Mrs. Oxenham.

I do not think that under the law of contract there can be any doubt that when a breach of contract by one of the contracting parties occurs, the other party can elect to rescind the contract or to continue it notwithstanding the breach, and if it elects to continue the contract, it is held to all the covenants therein contained. I may perhaps on this point be permitted to refer to my judgment in *American National Red Cross* v. *Geddes Bros.* (1), in which, although I wrote a dissenting opinion, there was, as I understand it, no dissent as to this legal proposition

(1) [1920] 61 Can S.C.R. 143.

which rests on very solid authority: *Clough* v. *London & Northwestern Rly. Co.* (1); *Scarf* v. *Jardine* (2); *Frost* v. *Knight* (3); *Johnstone* v. *Milling* (4).

Applying therefore this rule, I must find that the appellant, which could have repudiated liability when it acquired knowledge of the unguarded condition of the mangling machine, elected not to do so by continuing to contest in the respondent's name the Oxenham action. And therefore I think it cannot now set up the breach as a defence to the respondent's action claiming to be reimbursed for what he was forced to pay to Mrs. Oxenham, the more so as the conduct of the appellant in continuing to contest the Oxenham action after knowledge of the breach, caused a prejudice to the respondent by preventing him from effecting an advantageous compromise with Mrs. Oxenham.

My impression is that some forms of guarantee policies expressly state that the defence by the company of any action taken against the insured shall not be deemed an admission of liability under the policy. There is nothing of the kind here, and the conduct of the appellant distinctly shews that it recognized its liability towards the respondent.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McCraney, Mackenzie & Hutchinson.*

Solicitor for the respondent: *G, H. Yule.*

(1) L.R. 7 Ex. 26, at p. 34.
(2) 7 App. Cas. 345.
(3) [1872] L.R. 7 Ex. 111.
(4) [1886] 16 Q.B.D. 460

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NEWMAN CLARK.................APPELLANT;

AND

HIS MAJESTY THE KING........RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK.

Criminal law—Trial—Plea of insanity—Charge to jury—Proof—Beyond a reasonable doubt.

On a criminal trial where the prisoner pleads insanity it is misdirection for the judge to charge the jury that insanity must be proved beyond a reasonable doubt. *Rex* v. *Anderson* (7 Alta. L.R. 102) approved. *The King* v. *Kierstead* (45 N.B. Rep. 553) overruled. Idington J. dissents.

APPEAL from the judgment of the Appeal Division of the Supreme Court of New Brunswick affirming the conviction of the appellant on an indictment for murder.

The appellant being put on trial pleaded that he was insane when the crime was committed. Subject to this defence the crime was proved.

The trial judge in charging the jury instructed them that the onus of proving insanity was on the prisoner and that such defence must be established "beyond a reasonable doubt." The appeal Division having already decided in 1818 in *The King* v. *Kierstead* (1) that this was a proper charge the trial judge refused an application for a reserved case based on it as a misdirection and the Appeal Division refused to direct that he should grant it.

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

(1) 45 N. B. Rep. 553.

In a case of *Rex* v. *Anderson* (1), the Appellate Division of the Supreme Court of Alberta had, in 1814, held that such a charge was misdirection and the prisoner applied for leave to appeal to the Supreme Court of Canada under the provisions of the amendment of the Criminal Code passed in 1920 being 10-11 Geo. V, ch. 43, sec. 16. This amendment authorizes a judge of the Supreme Court of Canada to grant leave to appeal to that Court where provincial courts have given conflicting decisions on a question of criminal law. The leave was granted in this case the effect of which was that the judge granting it held that it can be granted where the court below is unanimous (if not the amendment would be unnecessary, as if there is dissent in the court below an appeal would lie as of right) and also that the refusal of the provincial court to direct the trial judge to reserve a case is an affirmance of the conviction under sec. 1024 C.C.

W. P. Jones K.C. for the appellant.

W. B. Wallace K.C. for the respondent referred to *Rex* v. *Beard* (2).

IDINGTON J. (dissenting).—The appellant was indicted for murder and convicted thereof. The defence set up was insanity. The facts bearing upon his actual commission of the crime charged seem to have been of such a conclusive character as to leave no room for doubt of his guilt unless he could be excused on the ground of insanity, or rather a doubt of his sanity which is sought to serve the same purpose.

(1) [1914] 7 Alta. L.R. 102. (2) 122 L.T. 625.

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Stripped of undue verbiage confusing or tending to confuse the mind, the issue raised is whether or not if there might have been or ought to have been created by the evidence adduced a doubt as to his sanity in the minds of the jurors who tried him, then he should have been acquitted.

The law in Canada ever since the enactment of the Criminal Code of 1892, is that declared by section 11 thereof continued in section 19 of the Criminal Code, chapter 146 of the Revised Statutes of Canada 1906, as follows:—

19. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.

2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

3. Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

In submitting the question of appellant's sanity to the jury, the learned trial judge told them that the burden was placed upon the accused to make out his insanity at the time of the commission of the offence, beyond a reasonable doubt.

Inasumch as that precise form of direction had been then recently, unanimously approved by the Court of Appeal for New Brunswick in the case of *The King* v. *Kierstead* (1), the learned trial judge refused to reserve a case for said court, founded upon the objection that there was error in so charging the jury. That court upon appeal thereto decided to abide by its ruling in said case and refused to interfere.

(1) 45 N.B.Rep. 553.

The Court of Appeal for Alberta in a similar case of *The King* v. *Anderson* (1), having, in 1914, by a bare majority decided that a charge using similar language to that now in question, was erroneous and granted a new trial, the appellant obtained from my brother Anglin leave to appeal to this court, under and by virtue of chapter 43, section 16, of the Dominion Statutes of 1920, which provides as follows:—

16. The following section is inserted immediately after section one thousand and twenty-four of the said Act:

1024a. Either the Attorney-General of the province or any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside or affirming a conviction of an indictable offence, if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case,

and continues to provide for a judge of this court giving in such case leave to appeal.

It has been argued before us not only that there is a substantial conflict between the judgment in question and that in the *Anderson Case* (1), but also that the ruling of the Supreme Court of the United States in *Davis* v. *United States* (2), is the correct view to adopt.

The head note to that report is as follows:—

If it appears on the trial of a person accused of committing the crime of murder, that the deceased was killed by the accused under circumstances which—nothing else appearing—made a case of murder, the jury cannot properly return a verdict of guilty of the offence charged if, upon the whole evidence, from whichever side it comes, they have a reasonable doubt whether, at the time of killing, the accused was mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing.

No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to shew beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

(1) 7 Alta. L.R. 102. (2) 160 U.S.R. 469.

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Such is the result of an argument in which about a hundred authorities were cited, and many of them are referred to in the judgment of the court.

Such is, as it seems to me, the drift and probable result of accepting the law as laid down in the *Anderson Case* (1), in preference to that by the New Brunswick Court of Appeal.

The grave consequences of our so deciding would be almost tantamount to repealing the above quoted enactment of our Code, obviously designed to put an end to what was presumably an undesirable state of our law as administered, and place it upon clear and, but for what has happened, I should have supposed unmistakable grounds.

In the *Anderson Case* (1), Mr. Justice Stuart was, I respectfully submit, apparently unable to define the difference between a defence to the "satisfaction of the jury" or "clearly proven" and one "beyond reasonable doubt."

And, with great respect, I cannot see how, for a moment, the protection thrown around a prisoner is, as he suggests, necessarily interfered with by the due limitation of the defence set up.

Mr. Justice Beck cited therein as authority Cyc's definition which tends in same direction as ultimately decided in the *Davis Case* (2) I refer to above.

None of the other authorities which he cites, to my mind, I respectfully submit, when closely examined and considered, really touch the kernel of what is involved herein.

On the other hand such decisions as Chief Justice Harvey relies upon, aptly present the identical view he took of the Anderson case, as that which had been

(1) 7 Alta. L.R. 102. (2) 160 U.S.R. 469.

presented by eminent judges in England, using the phrase "beyond reasonable doubt" in the same sense in relation to the proof of insanity as did the learned trial judge in that case.

He cited *Bellingham's Case*, decided in 1812; referred to in Russell on Crimes (7th ed.) at page 65; *Reg.* v. *Stokes* (1), decided in 1848, only five years after *McNaghten's Case* (2), by Baron Rolfe, who had been appointed to the Exchequer Chamber in 1839 and hence possibly one of the judges called to answer the question in the *McNaghten Case* (2), and (though best known as a leader of the Chancery Bar) had had considerable experience in criminal trials as recorder of Bury St. Edmunds, and in presiding at the trial of many notable criminal cases; and the case of *Rex* v. *Jefferson* (3), where Mr. Justice Bigham, as late as 1908, charged the jury in the same terms as now objected to.

And although that case went to appeal no one ever thought of raising such a ground as now taken herein. Why so unless clearly untenable?

The truth would seem to be that the law as laid down in the *McNaghten Case* (2), that in order to establish the defence, on the ground of insanity, it must be "clearly proven" and that "to the satisfaction of the jury" has always been, for at least a hundred years the law in England; and that it has been so presented to juries concerned in the language now complained of without challenge.

Mr. Tremear, in the second edition of his work on our code, in his notes upon the section thereof now in question, says that it was in the draft code prepared by the Imperial Commission, but never adopted by parliament.

(1) 3 Car. & K., 185. (2) 10 Cl. & Fin. 200; 8 Eng. R. 718.
(3) 72 J. P. 467.

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Law seemingly was found to be more stabilized, as it were, in England without a code, than in some other countries with one.

That, however, is no reason for our departing from our criminal code which seems to me in its terms to be more imperatively adverse to the appellants contention in its terms than the logical result of the judicially made law of England.

The word "satisfaction" has given to it, in Murray's Dictionary, as one of its many meanings, the following:

> 6. Release from suspense, uncertainty, or uneasiness (J.); information that answers a person's demands or needs, removal of doubt, conviction.
>
> Phrase, *to* (a *person's*) *satisfaction.*

I am unable to find the thing proved, as our Code so expressly requires, unless it is so beyond reasonable doubt. I should dislike very much to hold any man proved insane, either in a civil or criminal proceeding. unless I could do so beyond reasonable doubt.

And I venture to think that the safety and protection of society is just as important as is the protection of a member thereof, when that member is placed upon trial. On the one hand he or she has been most justly protected for ages by the use of a judicial formula, as it were, lest passion and prejudice should prevail and injustice be done.

And in relation to the defence of insanity, those who have given thought to the matter at all, must realize how easy it has been and still is to abuse the defence by suggestions, for example, of temporary insanity, and mislead those moved by pity or passion, to the deterioration of the due administration of justice.

I respectfully submit that society as a whole is quite as much entitled to be protected as a single member thereof. Such illustrations as proof of an

alibi, which forms part of the evidence of the actual facts pro and con, bearing upon the issue raised relative to the actual perpetration of the offence in question, are quite beside the collateral substantive issue of mental and moral responsibility.

That is only permitted to be raised as a defence in law to the actual commission of the offence when rebutting the presumption of sanity declared by said section until the insanity is proved.

The charge against an accused person should in regard to the acceptance of and weight to be given the evidence of fact for or against him or her so far as bearing upon the actual offence charged, be kept clearly and distinctly severable from the defence of insanity, and each of the issues thus raised be given its own proper place in the presentation thereof, made by the judge's charge, or otherwise.

It must be determined first whether or not upon the evidence bearing upon the actual perpetration of the offence, the accused can be found "beyond reasonable doubt" guilty, and then due consideration be given to the alternative of whether or not at the time in question the accused was of sound mind within the meaning of the statute and that finding must be subject to the like limitations of proof "beyond reasonable doubt."

The appeal, in my opinion, should be dismissed.

DUFF J.—On the trial of an accused person indicted for murder where the defence of insanity is set up, it is incumbent upon the accused in order to negative his responsibility for an act otherwise criminal to prove to the satisfaction of the jury that he was insane at the time he committed the act. *Mcnaghten's Case* (1),

(1) 10 C. & F. 200.

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and Criminal Code, section 19, subsec. 3. The trial judge told the jury that they ought to convict the prisoner unless the defence of insanity was established by the prisoner beyond a reasonable doubt, and he added:

> If you entertain any reasonable doubts as to the sanity of the prisoner at the time he committed the act, why then it is your duty to convict.

This direction was, in my opinion, an erroneous one and calculated to mislead the jury.

Broadly speaking, in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with whom the decision rests. It is, generally speaking, sufficient if he has produced such a preponderance of evidence as to shew that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts. This proposition is referred to by Mr. Justice Willes in *Cooper* v. *Slade* (1), in these words:

> The elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for the verdict.

The distinction in this respect between civil and criminal cases is fully explained in a judgment of Mr. Justice Patteson speaking for the Judicial Committee in the case of *Doe d. Devine* v. *Wilson* (2), The whole passage is so instructive and so apt that it is worth while reproducing it in full:—

> Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case the *onus* of proving the genuineness of a deed is cast upon the party who pro-

(1) 6 H.L. Cas. 746.

(2) 10 Moore P.C. 502, at pages 531 and 532.

duces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery, or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the *onus* of proving the forgery is cast on the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted.

Now, the charge of the learned judge appears to their Lordships to have in effect shifted the *onus* from the defendants, who assert the deed, to the plaintiff, who denies it, for in substance he tells the jury that whatever be the balance of the probabilities, yet, if they have a reasonable doubt the defendants are to have the benefit of that doubt, and the deed is to be established even against the probabilities in favour of the doubt. Certainly, it has been the practice so to direct the jury in a criminal case; whether on motives of public policy or from tenderness to life and liberty, or from any other reason, it may not be material to inquire, but none of those reasons apply to a cicil case. If, indeed, by the pleadings in a civil case, a direct issue of forgery or not, be raised, the *onus* would lie on the party asserting the forgery, and this would be more like a criminal proceeding, but even then the reasons for suffering a doubt to prevail against the probabilities, would not, in their Lordships' opinion, apply.

This exposition of the distinction between the two classes of cases brings out the point that the rule in criminal cases is a rule based upon policy.

The distinction may be illustrated by reference to another class of proceedings in which a similar rule applies, namely, proceedings to establish illegitimacy and proceedings in which the validity of a *de facto* marriage is called in question. Where a child is born of a married mother and husband and wife have had access during the relevant period the presumption of legitimacy is of such a character that it can only be overcome by evidence producing in the mind of the tribunal a moral certainty. And this moral certainty is contrasted by Lord Lyndhurst in a celebrated passage in *Morris* v. *Davies* (1), with a conclusion

(1) 5 C. & F. 163.

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reached by weighing the probabilities and resting upon a mere balance of probabilities. The like rule prevails where a marriage having been solemnized, there have been cohabitation and issue and a question arises as to whether the marriage ceremony was formally sufficient. In such a case it is incumbent upon those who impeach the validity of the marriage to demonstrate the existence of the defect.

All this is sometimes expressed by saying that the law presumes innocence and legitimacy but in truth the fact that in given circumstances there is a rebuttable presumption of law in favour of a certain conclusion does not necessarily afford any guide as to the weight or strength of the evidence required to rebut the presumption. The law presumes for example that a promissory note is given for a valuable consideration; a presumption which has only the effect of establishing a *prima facie* case. The law presumes innocence but it prescribes also a supplementary rule, namely, that in criminal proceedings, at all events, the presumption of innocence is not rebutted unless the evidence offered for that purpose demonstrates guilt in the sense of excluding to a moral certainty all hypotheses (not in themselves improbable) inconsistent with guilt.

The precise question to be determined is whether the same rule governs where the presumption to be overcome is a presumption of sanity. Where the question arises on a criminal prosecution the practice has been to treat the presumption as a presumption of law and this practice seems to be sanctioned both by the answers given by the judges in *Mcnaghten's Case* (1) and by the provision of the Criminal Code of Canada

(1) 10 Cl. & F. 200.

above referred to; but as I have just pointed out the circumstance that the presumption is a presumption of law tells us nothing as to the weight of the proof required to overcome it. Is there a special rule as to this?

I am unable to think of any principle or any reason of policy comparable in importance to those upon which rest the rules touching the presumptions of innocence and legitimacy for holding that a similar rule should be applied as touching the character of the proof to be exacted where the presumption to be overcome is the presumption of sanity; or why the general principle should not be adhered to that in judicial proceedings conclusions of fact may legitimately be founded upon a substantial preponderance of evidence.

I have moreover no doubt that the expressions which have for generations been used by judges in instructing juries in criminal proceedings as to the degree of certainty justifying a conviction (as "the prisoner must be given the benefit of the doubt," "guilt must be established to the exclusion of reasonable doubt"), are expressions which have passed into common speech; and that a Canadian jury receiving instructions couched in similar terms as to the probative weight of the evidence necessary to justify a given conclusion would in the great majority of cases attach to these expressions the significance which they ordinarily bear and are intended to bear when used in relation to the presumption of innocence. A jury being instructed that a finding of insanity would only be proper if they should be satisfied to the exclusion of all reasonable doubt upon that point, would not, I am quite sure, understand that an affirmative conclusion would be justified by proof consisting only of a substantial preponderance in the weight of evidence.

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It will be necessary to refer very briefly to some authorities that have been mentioned. And first of the charge of Mansfield C. J. in *Bellingham's Case*, which is said to have been approved by Lord Lyndhurst C. B. in *The Queen* v. *Oxford* (1). The report of Sir James Mansfield's charge seems to be a newspaper report only, and Lord Lyndhurst's words of approval seem to be rather directed to the Chief Justice's definition of insanity than to his remarks upon the burden of proof. Lord Lyndhurst indeed in *Oxford's Case* (1), contents himself with stating that the jury must be satisfied that the prisoner was insane before they can properly acquit him. *Bellinghams's* Case was a very painful case and I do not think it can be regarded as a satisfactory authority upon this point. See *The Queen* v. *Oxford* (1); *The Queen* v. *McNaughton* (2), and especially the speech of Mr. Cockburn. In *Oxford's Case* (1), just referred to, Lord Denman C.J., who with Alderson B. and Patteson J. presided, limited himself to remarking as regards the burden of proof that all persons "*prima facie* must be taken to be of sound mind till the contrary is shewn." In similar terms the jury was charged in *The Queen* v. *Vaughan* (3); *Reg.* v. *Higginson* (4); *Reg.* v. *Davies* (5); *Reg.* v. *Barton* (6); *Reg.* v. *Townley* (7); *Reg.* v. *Layton* (8).

It is quite true that in *Reg.* v. *Stokes* (9), Rolfe B. is reported to have said that if the jury were left in doubt it would be their duty to convict, and similar language is attributed to Bingham J. in *Rex.* v. *Jefferson* (10). When the remarks of these learned judges are

(1) 4 State Trials 508.
(2) 4 State Trials 847.
(3) 1 Cox 80.
(4) 1 C. & K. 129.
(5) 1 F. & F. 69.
(6) 3 Cox 275.
(7) 3 F. & F. 839.
(8) 4 Cox 149.
(9) 3 C. & K. 185.
(10) 72 J. P. 467.

read as a whole, however, the fair interpretation of them seems to be that the jury must be satisfied with the evidence of insanity. They were not, I think, intended to convey to the jury the impression that they must arrive at that degree of moral certainty which is necessary to justify a conviction upon a charge of crime. As against these observations may be put the language of Tindal C. J. in addressing the jury in *McNaughton's Case* (1), where he presided with Williams J. and Coleridge J. The learned Chief Justice used these words:—

> If on balancing the evidence in your minds you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to all the penalties the law imposes. If not so, and if in your judgment the subject should appear involved in very great difficulty, then you will probably not take upon yourselves to find the prisoner guilty. If that is your opinion, then you will acquit the prisoner.

It seems clear that there has been no uniform practice of directing the jury on the issue of insanity in the manner adopted by the trial judge in this case and as it appears, as I have said, to be more consistent with principle that the jury should be told that insanity must be clearly proved to their satisfaction but that they are at liberty to find the issue in the affirmative if satisfied that there is a substantial, that is to say, a clear preponderance of evidence, I am constrained to the conclusion that there was substantial error in the conduct of the trial and that a new trial should be directed.

ANGLIN J.—Is it misdirection to instruct a jury that to justify a verdict of acquittal on that ground (sec. 966 Crim. Code) in a prosecution for murder the defence of insanity must be established beyond a

(1) 4 State Trials 847.

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reasonable doubt? The Supreme Court of Alberta en banc (Harvey C. J. dissenting), held that it was in *Rex* v. *Anderson* (1). The Appeal Division of the Supreme Court of New Brunswick, following its own previous judgment in *The King* v. *Kierstead* (2), has unanimously held in this case that it is not. Hence this appeal—the first brought to this court under section 1024 (a) of the Criminal Code, enacted by 10-11 Geo. V., c. 43, s. 16.

If this question were entirely open, I should be disposed to accept as more logical and humane than that approved in English law (however defensible the latter may be on grounds of policy) the view which has prevailed in the Supreme Court of the United States and in many states of the Union (Lawson on Presumptive Evidence, p. 537; 16 C.J., 775) that, while the presumption of sanity relieves the prosecutor in the first instance from proving that fact, if, upon the whole evidence, a reasonable doubt remains in the mind of the jury whether at the time of the killing the accused was mentally competent to distinguish between right and wrong or to understand the nature of his act, it cannot properly render a verdict of guilty. *Davis* v. *United States* (3); *German* v. *United States* (4). The reasoning of Mr. Justice Harlan, delivering the judgment of the court in the *Davis Case* (3), seems to me unanswerable. How can a man rightly be adjudged guilty of a crime

> if upon all the evidence there is reasonable doubt whether in law he was capable of committing crime ? (P. 484).
>
> * * *
>
> How upon principle or consistently with humanity, can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, viz., the capacity in law of the accused to commit that crime ? (P. 488).

(1) 7 Alta.L.R.102; 22 Can.C.C.455.
(2) 45 N.B. Rep. 553, 565.
(3) 160 U.S.R. 469.
(4) 120 Fed. R. 666.

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Where, as in murder, intent is an essential element in the crime, if the evidence as a whole so far rebuts the presumption of intent that it is left doubtful whether the accused was capable of forming the necessary intent—could have had *mens rea*—how can it be held that all the constituent elements of criminality are established beyond reasonable doubt? Professor Thayer in his excellent Treatise on the Law of Evidence (1 ed., pp. 381-4) discusses this question with his customary lucidity.

The defence of insanity, which goes to negative an essential ingredient of the crime—criminal intent—just as does the defence of inevitable accident—and as the defence of an alibi goes to negative another essential element, the identity of the accused—is thus put on the same footing as other defences. Evidence in support of them which creates in the minds of the jury a doubt whether some essential element of the crime has been established—a doubt which on the whole evidence is not removed—entitles the accused to an acquittal, since the burden of satisfying the jury of his guilt beyond reasonable doubt, which always rests on the prosecutor and never changes, has not been discharged. *Rex.* v. *Schama* (1); *Rex.* v. *Stoddart* (2); *Rex.* v. *Myshrall* (3).

But this is not the law of England with regard to the defence of insanity as is stated by the judges in their answers to questions propounded to them by the House of Lords in *McNaghten's Case* (4), which, notwithstanding criticism by eminent judges and writers, have ever since been generally accepted in English courts as authoritative. It does not suffice in

(1) 24 Cox 591, at p. 594.
(2) 2 Cohen Cr. App. C. 217.
(3) 8 Can. Cr. C. 474.
(4) 10 Cl. & F. 200, at p. 210.

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English law that a defendant pleading insanity should create a doubt as to his sanity in the minds of the jury. He must prove his irresponsibility "to their satisfaction"—it must be "clearly proved." So said Lord Chief Justice Tindal, speaking for himself and his fellow judges.

As the learned Chief Justice of Alberta says (1) the authority of *McNaghten's Case* (2) not having been accepted in the United States

a reference to American text writers and cases can furnish no aid in determining the law in Canada on this subject.

On the other hand our Parliament has seen fit in s. 19 (3) of the Criminal Code to define the law which is to govern Canadian courts in these terms:—

Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

It is noteworthy that, although the codifiers undoubtedly had the language of *McNaghten's Case* (2) before them, our legislators have not said that, in order to overcome the presumption of sanity, mental irresponsibility must be "clearly proved" or even that it must be "established to the satisfaction of the jury"—but merely that it must be "proved."

Another point of difference between our statutory law and that of England, perhaps not devoid of significance, is that whereas here on insanity being "proved" the verdict is to be "not guilty", (the jury being required to find the insanity specially and, if that be the case, to state that the acquittal is on account of it s. 966), thus indicating that insanity with us goes to the question of guilt or innocence, in England since 1883 (46-47 Vic., c. 38) in like circumstances the verdict must be guilty of the act or omis-

(1) 7 Alta. L.R. 102 at p. 109. (2) 10 Cl. & F. 200, at p. 210.

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sion charged but insane at the time when he did the act or made the omission, thus indicating that insanity is there not an absolute defence but rather matter available in arrest of judgment. This would seem to be a logical outcome of the view that, notwithstanding reasonable doubt as to sanity raised by the evidence, criminality involving intent may exist beyond reasonable doubt.

No doubt, however, "proved" in subsection 3 of section 19 of our Code must mean "proved to the satisfaction of the jury," which, in turn, means to its reasonable satisfaction. *Braunstein* v. *Accidental Death Ins. Co.* (1). It may possibly have been meant to cover the phrase "clearly proved" used in *McNaghten's Case* (2). "Clear and positive proof," however, was held in an Indian case cited in Stroud's Jud. Dict. (2 ed.), 323, (the report is not available here) to mean "such evidence as leaves no reasonable doubt." If the adverb "clearly" adds to the force of the participle "proved" its use, in my opinion, is not warranted under our Code. Still less is it justifiable to add to the "proved" of the Code such a distinctly qualifying phrase as "beyond all reasonable doubt," if a higher degree of certainty is thereby required than the word "proved" itself imports.

"Proved" is not a word of art. *Aaron's Reefs* v. *Twiss* (3). It may have different shades of meaning varying according to the subject matter in connection with, and the context in which, it is used. "Tested" or "made good" or "established" are its ordinary equivalents. Murray's Dict. *Crampton* v. *Swete* (4). It may require only evidence of the *factum probandum*

(1) 1 B. & S., 782, 797.
(2) 10 Cl & F. 200, 210.
(3) [1896] A.C. 273, 282.
(4) 58 L.T. 516.

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sufficient to be left to a jury. *Tatam* v. *Haslar* (1); see too *The People* v. *Winters* (2). Here I find nothing to warrant requiring evidence of greater weight than would ordinarily satisfy a jury in a civil case that a burden of proof had been discharged—that, balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was mentally incapable of knowing its nature and quality, or if he did know it, did not know that he was doing what was wrong. That I believe to be the law of Canada, as it appears to be that of most of the states of the American Union. Underhill on Criminal Evidence, s. 158.

The latter clause of the ancient maxim, *stabit praesumptio donec probetur in contrarium*, does not import that any special amount or degree of evidence is required to rebut the presumption. Its whole office is to shift to him against whom it operates the burden of adducing such evidence as will satisfy the tribunal that the presumption should not prevail (Best on Evidence, 11 ed., p. 314), such proof as may render the view which he supports reasonably probable. To require that a particular presumption must be negatived beyond reasonable doubt is to super-add to the force of the presumption a rule of substantive law—and that has been done in the case of the presumption of innocence. Thayer, Law of Evidence, 1st ed., pages 336 and 384. The history of this presumption of law and the distinction between it and the doctrine of reasonable doubt is dealt with by Mr. Justice (now Chief Justice) White in *Coffin* v. *United States* (3), at pages 452-60.

(1) 23 Q.B.D., 345. (2) 125 Cal. 325.
(3) 156 U.S.R. 432.

I quite appreciate the difficulty experienced by Harvey C. J. (1), and by White J. (2), in formulating the distinction between proof to the satisfaction of the jury and proof beyond reasonable doubt. How can I be satisfied of a fact if I have reasonable doubt that it is so? But, with Mr. Justice Beck, (p. 117) I am convinced that the expression "proved beyond reasonable doubt" has become consecrated by long judicial usage as pointing to an amount or degree of proof greater than is imported by the word "proved" standing alone or by the expression "established to the satisfaction of the jury," or even by "clearly proved"—certainly greater than is required to discharge the burden of proof in civil matters. That learned judge quotes an extract from the judgment delivered by Sir John Patteson in *Doe d. Devine* v. *Wilson* (3), at page 531, and a passage from Taylor on Evidence (par. 112) as illustrating this difference. But the actuality of the distinction in law between an instruction that the existence of a fact or condition must be proved and that it must be proved beyond a reasonable doubt is perhaps best tested by the inquiry whether an accused would not have ground for complaint if the trial judge having charged that the jury must be satisfied of his guilt—that it is clearly proven—should refuse to direct them that they must be so satisfied beyond reasonable doubt. I put that question to counsel for the Crown during the argument. It was not answered. I find it was anticipated by Mr. Justice Stuart in Andersons's case (pp. 113-4). With that learned judge

I think the rule is well established that an accused person is entitled to have such a direction given,

(1) 7 Alta. Rep. 102, at p. 109-10. (2) 45 N.B. Rep. 553.
(3) 10 Moore P.C. 502.

accompanied by an explanation of what is reasonable doubt. *Rex.* v. *Stoddart* (1); *Rex.* v. *Schama* (2); *Reg.* v. *White* (3), are instances of the recognition of this right in English law. In *R.* v. *Sterne,* cited in Best on Evidence (11 ed.) 84, Baron Parke instructed that there should be

such moral certainty as convinces the mind of the tribunal as reasonable men, beyond all reasonable doubt.

I also agree with Mr. Justice Stuart that

if the expression (beyond reasonable doubt) was not improper in the present case, then it inevitably follows that it is not necessary in the ordinary case,

i.e., in directing the jury as to the burden of the prosecution.

The case of *Reg.* v. *Layton* (4), in which the trial took place shortly after *McNaghten's Case* (5), where the direction given by Rolfe B. was

the question therefore for the jury would be not whether the prisoner was of sound mind but whether he had made out *to their satisfaction* that he was not of sound mind,

may perhaps be referred to as an instance of a correct appreciation of the effect of the McNaghten Case. Lord Lyndhurst had delivered a similar charge in *Rex* v. *Offord* (6). The charge of Bigham J. in *R.* v. *Jefferson* (7), that the prisoner has to make out the charge of insanity

to your satisfaction without any reasonable doubt; if you have reasonable doubt as to whether he knew he was doing wrong or not you must find him guilty.

though similar to that in *Bellingham's Case,* as noted in (6), and to that in *R.* v. *Stokes* (8), was, I venture to

(1) 2 Cohen Cr.App. C. 217.
(2) 24 Cox 591, at page 594.
(3) 4 F. & F. 383.
(4) 4 Cox 149, at p. 156
(5) 10 Cl. & F. 200.
(6) 5 C. & P. 168.
(7) 72 J. P. 467, at page 469.
(8) 3 C. & K. 185.

think, a misapprehension of the effect of the answer of the judges in the House of Lords. Such a charge, would, in my opinion, be clearly wrong in Canada. These *Nisi Prius* reports, however, are really of little value.

On appeal in *Jefferson's Case* (1), Lawrence J., delivering the opinion of the court setting aside the verdict on another ground, was careful to state that no question had been raised as to the direction of the trial judge (p. 470), probably to make it clear that approval of it was not to be inferred.

I am, for these reasons, of the opinion that there was misdirection at the trial of the appellant and that it is not possible to say that substantial wrong did not result therefrom. The application of the appellant for leave to appeal should, therefore, be granted and his conviction set aside and a new trial directed.

BRODEUR J.—I concur with my brother Duff.

MIGNAULT J.—A presumption being, by definition, a deduction from a known or ascertained fact, or, as the old writers expressed it, *ex eo quod plerumque fit*, it is clear that the presumption of sanity of mind, entailing civil and criminal responsibility, would be fully recognized even if it had not been made the subject of a statutory declaration. So paragraph 3 of section 19 of the Criminal Code, which states that

every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved,

merely gives an unnecessary, I do not say a useless, legislative sanction to a universally recognized presumption of fact, entitling us to consider it as a

(1) 72 J. P. 467.

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presumption of law—although that does not add to its evidential force—which will stand as proof of the basic element of criminal responsibility, until it is rebutted or, to use the words of the Code, "until the contrary is proved."

This shews that although we have an express declaration by the legislature, the Code really adds nothing to the common law; in fact the presumption of sanity of mind, involving criminal responsibility, is recognized in England as well as in all countries, and our inquiries need not carry us further, which are subject to the common law.

We may, therefore, take the rule stated by the judges in *McNaghten's Case* (1), that the jurors should be told that every man is presumed to be sane until the contrary is proved to their satisfaction, (I do not here refer to the further statement of the judges, speaking by Tindal C. J., that insanity must be "clearly proved") as being in effect the rule of our criminal code, for although the words "to the satisfaction of the jury" are not contained in paragraph 3 of section 19, inasmuch as the contrary of the presumption must be proved, and the proof must be passed on by the jury, this proof must be sufficient to satisfy the jury that the presumption has been rebutted.

I do not think that it is necessary to consider cases that have been decided in the United States, although I have read with interest and with some measure of sympathetic consideration the able opinion of the late Mr. Justice Harlan in *Davis* v. *United States* (2), to the effect that if on the whole evidence any reasonable doubt exists as to the sanity of the accused the jury should acquit. This manifestly would transgress the

(1) 10 Cl. & F. 200. (2) 160 U.S.R. 469.

rule of our Code, for instead of proving his insanity, it would be sufficient for the accused to create in the minds of the jury a reasonable doubt whether he was sane when he committed the crime, which would, in my judgment, deprive the legal presumption of its legitimate effect.

Here the learned trial judge in charging the jury emphasized that it was their duty to convict the accused unless in their opinion he had proved his insanity beyond a reasonable doubt. Is this misdirection in law? The Supreme Court of New Brunswick, whose judgment in the case of *The King* v. *Kierstead* (1), the learned trial judge followed, has unanimously held that it was not. Inasmuch, however, as the Appellate Division of Alberta, in *Rex* v. *Anderson* (2), had decided that such a direction was wrong, the appellant was enabled to appeal to this court by reason of a recent amendment of the Criminal Code 10-11 Geo. V., ch. 43, sec. 16.

My first impression at the hearing was that if the jury entertained a reasonable doubt whether the plea of insanity was proved, the legal presumption was not rebutted. Further reflection has, however, led me to think that it is sufficient that the jury be satisfied on all the evidence that the plea of insanity has been established, and for that reason I fear that the direction which was given in this case may have been, to say the least, misleading. It is, moreover, open to the objection that something is added to the law, which is content with requiring that the contrary be proved, without specifying the degree of proof to be adduced. It is unquestionable that guilt must be proved beyond a reasonable doubt, so that the presumption of innocence is stronger, and rightly so, than the presumption of sanity. Proof in ordinary matters does not sup-

(1) 45 N.B.R. 553. (2) 7 Alta. L.R. 102; 22 Can. C. C. 455.

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pose that the evidence removes all doubt; it is the result of a preponderance of evidence, or of the acceptance on reasonable grounds of one probability in preference to another, and, in the case of insanity, the evidence generally is largely a matter of expert opinion. To say that insanity must be proved to the satisfaction of the jury does not weaken the legal presumption, but it places the plea of insanity on the same footing as all other defences which must be established so as to satisfy the jury. I would certainly not say that if the jury be in doubt whether the accused was sane or insane they should acquit him, because, if they accept his plea of insanity, they must expressly find that he was insane and return a verdict of not guilty because of insanity (sect. 966 Crim. Code). But while unquestionably all the onus here is on the accused, still the jury may accept his evidence as having greater weight than that of the Crown, although they might not feel that all reasonable doubt has been removed. Such a doubt might be caused by the testimony of one reputable expert against the opinion of other experts, and, in such a case, it is certainly within the province of the jury to accept the views of the latter in preference to those of the former. I would therefore think that a proper direction would be to call the attention of the jury to the legal presumption of sanity and to inform them, the onus being on the accused, that insanity must be proved by him to their satisfaction. Further than that I would not go.

A serious wrong or miscarriage may have resulted from the direction given by the learned trial judge, so on full consideration I concur in the judgment allowing the appeal and ordering a new trial.

Appeal allowed.

LEO PAGE (PLAINTIFF)............APPELLANT.

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*Mar. 11.

AND

WALLACE CAMPBELL AND ANOTHER (DEFENDANTS)........ } RESPONDENTS.

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

Action—Sale of land—Building restrictions—Conveyance by vendee—Breach by purchaser—Action by original vendor—Interest—Laches.

A syndicate owning land conveyed it to P., one of their number, in trust to subdivide and sell. P. made several subdivisions and sold lots in one with a covenant by his grantees to erect only residential buildings. The grantees conveyed the lots to a church corporation who proceeded to build a church thereon . In an action by P., in his personal capacity, for an injunction and demolition of the church building.

Held, Brodeur J. dissenting, that P. had no interest to maintain the action having before the trial sold all his holdings in the subdivision containing the church. Brodeur J. held that he owned and continued to own one lot in the area affected by the covenant of P.'s grantees.

Held also, per Idington and Anglin JJ., that as the injunction was not applied for until the church was practically completed P. was probably estopped by laches from bringing an action.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, reversing the judgment on the trial in favour of the appellant.

The only question raised on this appeal is whether or not the appellant could maintain his action under the circumstances set out in the head-note. The trial judge held that he could but was reversed by the Appellate Division.

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

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F. D. Davis for the appellant.

Wigle K. C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs for the reasons stated by Chief Justice Sir William Meredith in delivering the unanimous judgment of the Appellate Division. The grounds on which the learned Chief Justice based his opinion are succinctly and clearly stated in the following paragraph of his reasons for judgment:

> In my opinion the respondent is not entitled to the relief awarded to him. He has no interest in the question raised, and does not represent any one who has an interest. If the owners of the other lots have rights, the dismissal of the action will not affect them. The extraordinary remedy sought ought not to be awarded even if the respondent had a technical right to enforce the covenant, especially in the circumstances to which I have referred, and he has not been damnified by what the appellants have done.

I concur in these conclusions alike of law and fact and have nothing useful to add to them.

IDINGTON J.—The appellant and others were owners of some farm lands, of which, by and through him, as their trustee, they made a subdivision for residential purposes.

All of said subdivisions had been sold before this action except two lots, and at the beginning of the action those two were sold.

Hence at the trial he had no interest in the maintenance of such an action as this, which is brought against the respondents, as trustees and owners of some lots in said sub-division upon which a church was being built, to restrain their building there because doing so is alleged to be in violation of a restrictive covenant given appellant by some of his grantees from whom respondents acquired their title.

The substance of the said covenant is thus set forth in the appellant's factum:—

The grantees, for themselves, their heirs and assigns, hereby covenant and agree with the grantor, his heirs and assigns, that no buildings shall be erected upon the said lands except for residences and their necessary outhouses, such residences to be erected as single residences or double tenements only, and all such residences, if they be single residences, are to be erected at a cost of not less than $1,500.00, and if they be double tenements are to be erected at a cost of not less than $2,500.00, and no buildings are to be erected on the said lands at a distance of less than twelve feet from the street line of the said Moy Avenue.

The decision in the case of *London County Council* v. *Allen* (1), seems conclusively to restrict the right recognized in *Tulk* v. *Moxhay* (2), and asserted by appellant herein to enforce such a covenant to one who owns part of the land in question.

Surely all that was within the contemplation of him and the parties giving such like covenants was to protect the area of the sub-division of which each so covenanting was buying a part. Appellant pretends herein that he holds under the trust deed from his fellow adventurers other lands not subdivided and hence owns part of the land in question and therefore comes within the terms of the judgment in the said *London County Council Case* (1).

The trust deed to him and under which he acted imposes no such restrictive scheme as part of his trust.

It would seem as if the restrictive covenant scheme was a development of his own and was limited to the area of the sub-division in question, and though presumably his *cestuis que trustent* assented to the use thereof so far as that area was in question, it by no means follows that they would assent to it in regard to other sub-divisions and he certainly, in execution

(1) [1914] 3 K.B. 642. (2) 2 Phillips, 774.

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of his trust, could not impose it, without their consent, in relation to other subdivisions. That might in one section of the property be advantageous to the sellers but in another quite the reverse.

Again it is urged that he is a trustee for those who bought other lots than those immediately in same subdivision.

I fail to find the trust anywhere expressed. Indeed the appellant seems to have carefully avoided creating such a trust, or having it imposed upon him.

Though the covenant is made with the appellant "his heirs and assigns" there is no evidence of his having assigned it, or of ever having given the purchasers of other lots the benefit thereof in any deed.

I fail to find, therefore, how any of those he pretends to be taking a paternal interest in, could set up any such claim.

Hence in light of the above cited cases appellant has no interest in equity to assert such right as he does and cannot properly pretend he is acting as trustee for such others as suggested in argument.

In conclusion the acquiescence and delay from at least some time in November until the 24th January, whilst the church was being built, should debar him seeking any injunction when the building was almost completed.

The purpose of so building was evident in October and if an injunction was to be the remedy, it should have been applied for promptly.

The covenant does not run with the land and hence the only possible remedy was in equity which does not countenance such a course of conduct.

This appeal should be dismissed with costs.

DUFF J.—The appeal should be dismissed with costs.

ANGLIN J.—That as owners deriving title under the covenantor the defendants are not bound to the plaintiff covenantee if he does not retain any land for the benefit of which the restrictive covenant sued upon was entered into is clearly established by *London County Council* v. *Allen* (1), and *Formby* v. *Barker* (2), decisions of the English Court of Appeal.

The doctrine of *Tulk* v. *Moxhay* (3), does not extend to the case in which the covenantee has no land capable of enjoying as against the land of the covenantor the benefit of the restrictive covenant. * * * Where the covenantee has no land, the derivative owner claiming under the covenantor is bound neither in contract nor by the equitable doctrine which attaches in the case where there is land capable of enjoying the restrictive covenant. Per Buckley L. J.

The plaintiff and certain co-adventurers formed a syndicate to purchase the Davis farm, a property in the city of Windsor, for the purpose of subdividing and disposing of it in building lots. The title was vested in the plaintiff as trustee for sale on behalf of himself and the other members of the syndicate. Three plans of subdivision of parts of the farm were prepared and registered in the following order as Nos. 579, 591, and 648 respectively. It does not appear whether any lot on plan 579 was disposed of before the registration of plan 648. The lots owned by the defendants they acquired from the original purchasers from the plaintiff, and on them they built the church which the plaintiff seeks to have removed. These lots are within subdivision 579 and front on Moy Avenue.

When the action was begun the plaintiff had some interest in a lot in this street and in another in Hall Avenue, both within subdivision 579, but he has since parted with both these lots and neither he nor

(1) [1914] 3 K.B. 642.
(2) [1903] 2 Ch. 539.
(3) 2 Ph. 774.

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his co-adventurers have any interest now in any lot fronting either on Moy Avenue or Hall Avenue within subdivision 579. Personally he owns no land whatever within the subdivision.

He and his co-adventurers some time since divided amongst themselves all the unsold lands shewn on plan No. 579 and his trust as to that subdivision thereupon terminated. He still owns lot No. 605 in Moy Avenue within subdivision 648.

The purpose of the covenant sued upon would seem to have been to require the owners of lots 138 and 139, Moy Avenue, on which the offending church is built, to conform to the building scheme of the syndicate whereby Hall Avenue and Moy Avenue within the subdivision covered by plan No. 579 were to remain exclusively residential streets. It would appear to have been the lands abutting on these two streets within this subdivision and no others that were intended to be benefited thereby. While this is not explicitly stated in the record the following extract from the examination-in-chief of the plaintiff makes it tolerably clear that the trial proceeded on that footing.

Q. Which of these subdivisions are the lands in question in? A. 579.

Q. The lots are included in registered subdivision 579? A. Yes.

Q. There were restrictions included in your conveyance of the lots? A. Yes.

Q. Tell us how that happened? A. Certain streets, Moy and Hall, were restricted to residential property only.

His Lordship: Is not that a matter of written record?

Mr. Davis: I wish to show the general scheme. We say it was restricted property.

His Lordship: The deeds put in, I take it, contain the restrictions on which you rely?

Mr. Davis: Yes, my lord.

Q. Were all the lots sold under restrictions? A. Yes. Every individual lot was sold with a restriction of some kind on it.

His Lordship: It might be helpful to know over what land or lands the restrictions now in issue extended.

Witness: I can show it from the plan.

Mr. Davis: Q. What portion of the lands covered by these plans was subject to restrictions?

Mr. Wigle: Confine yourself to 579. That is the only one in question.

Mr. Davis: What portion of 579 was subject to restrictions? A. All of it except the one large block that was sold for a large home—everything except that.

His Lordship: Subject to what restrictions?

Mr. Davis: What restrictions were there? A. Moy and Hall avenues were restricted to residential streets.

The plaintiff therefore appears to have no status to maintain this action.

Moreover he represented to the church authorities, through the defendant Allworth, before the church was erected, that personally he had no objection to its being built—that his opposition was solely because as trustee of the farm he deemed it his duty to protect customers to whom he had sold. In his evidence he says that it is in their interest that this action, although not purporting to be brought by him as a trustee or in any other representative capacity, is maintained. In view of the subsequent change in the defendants' position by the erection of the church, even if he still held land within the benefit of the covenant, it would seem not improbable that suing as an individual he would be confronted by an awkward estoppel.

He never was trustee for his vendees and has no status to assert any rights they may have. His trust for the syndicate, if still subsisting, would not seem to help his position, since the syndicate retains no land for the benefit of which the covenant was obtained. That trust, however, has come to an end.

Finally the fact that this action was brought only when the defendants' building was nearing completion would probably afford a defence on the ground of laches to the claim for the extraordinary remedy of a mandatory injunction for its removal.

The appeal fails and must be dismissed with costs.

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BRODEUR J. (dissenting)—The appellant's action is for an injunction restraining the defendants from erecting on the corner of Moy and Niagara Streets, in the City of Windsor, a church, contrary to the building restrictions which were stipulated in the deed of sale which the appellant made of the lots of land on which this church was to be built.

The appellant was the owner with some others of a farm which is within the boundaries of Windsor and they decided to subdivide it into building lots and the appellant was appointed trustee for his co-owners to make the sale of these lots; and a conveyance to that effect was made to him on the express covenant that building restrictions should be placed upon the lots fronting Moy Street. This covenant was fully carried out by the appellant in all the grants which he made.

In 1913, a sale was made of the lots in question in this case to the Turners, with the usual building restrictions; that sale was duly registered and the defendants purchased these lots from the Turners with notice of those building restrictions. The defendants tried to obtain the consent of several of their neighbours to the construction of the church because they realized that such an edifice would be a violation of those building restrictions. They failed to obtain the consent of a larger number of interested parties who petitioned the appellant to institute proceedings to restrain the trustees from constructing the church. Hence the present action, which was maintained by the trial judge but whose decision was reversed by the first Appellate Division on the ground that the plaintiff has no interest in the question raised since he has no lots on Moy Street.

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The evidence shews that the plaintiff, after his co-owners entrusted him with the sale of the farm in question, had four subdivision plans prepared. The first one was made by Owner McKay on the 24th of April, 1911, and was registered under No. 579. It covered the front part of the farm to Erie Street and contained lots which were numbered 1 to 445. It contained on Moy Street the lots 138 and 139 in dispute in this case. At the time of the institution of the action, the plaintiff was personally the owner of lots 228 and 229 which were shewn on this survey plan No. 579, but he had sold them before the trial took place.

On the 22nd of March, 1912, the plaintiff went on with the survey of the farm from Erie Street. The same land surveyor, McKay, prepared a plan which was registered as plan No. 591. The lots described on this plan were known as Nos. 450 to 562. Moy Street was continued on this new plan as a prolongation of the one shewn on plan 579. There was on this latter plan a block of land called "Block A," which was then left without being subdivided; but on the 16th of November, 1912, the subdivision of this Block A was made and registered. The lots covered by this subdivision of Block A were numbered 566 to 591 inclusively.

On the 30th of January, 1913, plaintiff had the work of the subdivision of the farm continued from above Erie Street to Ottawa Street and a plan giving a description of the lots 592 to 707 was prepared by the same surveyor and registered under the number 648. On this survey is shewn the lot 605 which was situate on Moy Avenue and which was purchased by the plaintiff on the 17th of December, 1915, and which was at the time of the institution of the action and of the trial, and which is still, his property.

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Those three surveys covered a great part of the farm which the plaintiff and his associates had purchased in 1911.

When the plaintiff sold to the Turners on the 5th of August, 1913, the lots 138 and 139 situate on Moy Street, the three subdivision plans had been registered and the purchasers covenanted that they would not erect buildings upon these lots 138 and 139, except for residences.

When the plaintiff acquired lot 605, it was on a restrictive agreement of about the same nature as the one stipulated in the Turner contract.

The respondents acquired lots 138 and 139 from the Turners in Sept. 1917 and got notice of the restrictive clauses affecting these lots, though no formal covenant was stipulated in their deed of acquisition. They tried to obtain the consent of their neighbours for the erection of a church on these lots. Some of them acquiesced and waived their rights. Some others, amongst whom is the plaintiff, refused to give the necessary consent. It is possible that if the church authorities had been willing to erect a stone or brick building all the objections would have vanished. It is not very clear in the evidence, but it may be surmised that a large construction of inflammable materials would be of such a dangerous character that these neighbours would not feel disposed to waive their rights under the building scheme which had been devised as to the nature of the constructions on Moy Avenue.

I cannot see how the Appellate Division has made the mistake of stating that the respondent had no interest in any lot on Moy Avenue. There has been perhaps a confusion as to some lots, viz., 228 and 229,

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—

which appear on the plan 579 which the plaintiff possessed at the institution of the action but which he sold before the trial. He is asked the following:

Q. Do you own any lands now in the subdivision where the lots in question are? A. At the present time, no sir.

The witness evidently refers as we may see by the context to the subdivision plan No. 579. But he makes it very clear that he is still the owner of a lot, No. 605, on Moy Avenue.

This lot, No. 605, appears on the subdivision plan No. 648, of the 30th January, 1913, which was the continuation of the two previous plans Nos. 579 and 591, made respectively in 1911 and 1912. These three plans had been registered long before the Turners purchased in 1913, and long, also, before the respondent purchased in 1917.

This Moy Street was running in a straight line from Sandwich Street to Ottawa Street and all the lots sold on this street, including No. 605, were sold with building restrictions.

This is a case in which we should refuse to apply the principles laid down in the cases of *Formby* v. *Barker* (1); *London County Council* v. *Allen* (2); *Milbourn* v. *Lyons* (3), relied upon by the respondent, because in those cases the plaintiff had no interest in any land situate near the one in dispute.

In the present case the appellant is still the owner of a lot situate on Moy Avenue. He is himself under restrictive obligations. He is then entitled to rely on *Tulk* v. *Moxhay* (4), and to ask that the respondents, the subsequent purchasers of the lots 138 and 139 on Moy Avenue, be ordered to demolish the building which they have erected contrary to the covenant contained in their vendor's title.

(1) [1903] 2 Ch. 539.
(2) [1914] 3 K.B. 642.
(3) [1914] 2 Ch. 231.
(4) 2 Ph. 774.

The respondents contended also that the plaintiff should not succeed because when the church was constructed he stood by and allowed the respondents to complete their building. The work began in December and the plaintiff almost immediately saw the respondents and made his objections to the building being erected. Correspondence was exchanged between the parties until January and, not being able to agree, the present action was instituted on the 16th of January. It cannot be contended in those circumstances, that the respondents may effectively say that the plaintiff stood by.

The judgment *a quo* should be reversed and the decision of the trial judge restored with costs of this court and of the Appellate Division.

MIGNAULT J.—On the ground that the appellant at the time of the trial owned no lots in the subdivision where the church erected by the respondents is situated, and therefore had no interest in the restrictious imposed when the lots were first sold by him, I think the appeal fails and should be dismissed.

He clearly says that he owns no land in this subdivision:

Q. Do you own any lands now in the subdivision where the lots in question are? A. At the present time, no, sir.

His Lordship: In 579? A. I did when this action was started, but they have since been sold.

Mr. Davis: Have you no lands at all in the subdivision? A. No, sir, not at the present time. They have been sold since this action was started.

The restrictions preventing the erection of buildings not of a residential character had been imposed by the appellant on the predecessors in title of the respondents. The latter purchased the property with know-

ledge of these restrictions but without having, by their deed of purchase, covenanted to observe them. There is therefore no privity of contract between the appellant and the respondents.

On the authority, however, of *Tulk* v. *Moxhay* (1) the appellant contends that he is entitled in equity to enforce this covenant against the respondents who purchased with notice of the building restrictions.

The answer is that having disposed of all land in the subdivision, he is without interest to enforce the covenant, and that therefore the doctrine of *Tulk* v. *Moxhay* (1), does not apply; *London County Council* v. *Allen* (2); *Milbourn v. Lyons* (3).

The appellant when asked what interest he had in the enforcement of the covenant, answered that, as trustee of the farm, it was his duty to protect the customers to whom he sold lots. It seems to me that these customers, if they are aggrieved by the erection of the respondents' church, should assert their own rights. I am clear, however, that the appellant, having no longer any interest in the land to be benefited by the covenant, cannot now enforce the restrictions.

Appeal dismissed with costs.

Solicitors for the appellant: *Davis & Healy.*

Solicitors for the respondents: *Rodd, Wigle & McHugh.*

(1) 2 Ph. 774. (2) [1914] 3 K.B. 642.
(3) [1914] 2 Ch. 231.

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ACTION—*Commission—Statute of Frauds —Leave to amend*—6 *Geo. V., c.* 24, *s.* 19 (*Ont.*); 8 *Geo. V, c.* 20, *s.* 58 (*Ont.*) By 6 Geo. V, ch. 24, sec. 19 amended by 8 Geo. V, ch. 20, sec. 58, sec. 13 of the Ontario Statute of Frauds, R.S.O. [1914] ch. 102 was enacted as follows:—"No action shall be brought to charge any person for the payment of commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.—*Held*, Idington J. dissenting, that this enactment is not retrospective and does not bar an action to recover commission under a contract made before it came into force. Opinion of the Appellate Division (48 Ont. L.R. 120) and of the trial judge (47 Ont. L.R. 37) overruled on this point.—Judgment of the Appellate Division (48 Ont. L.R. 120), allowing the pleadings to be amended and damages claimed for breach of contract, affirmed, Idington J. dissenting.—*Per* Duff J.: The Appellate Division should have allowed the appeal and refused the motion for dismissal of the action. No amendment was necessary, the pleadings as they stood being sufficient. UPPER CANADA COLLEGE *v.* SMITH........ 413

2——*Sale of land—Building restrictions—Conveyance by vendee—Breach by purchaser—Action by original vendor—Interest—Laches.*] A syndicate owning land conveyed it to P., one of their number, in trust to subdivide and sell. P. made several subdivisions and sold lots in one with a covenant by his grantees to erect only residential buildings. The grantees conveyed the lots to a church corporation who proceeded to build a church thereon. In an action by P., in his personal capacity, for an injunction and demolition of the church building.—*Held*, Brodeur J. dissenting, that P. had no interest to maintain the action having before the trial sold all his holdings in the subdivision containing the church. Brodeur J. held that he owned and continued to

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own one lot in the area affected by the covenant of P's grantees.—*Held* also, per Idington and Anglin JJ., that as the injunction was not applied for until the church was practically completed P. was probably estopped by laches from bringing an action. PAGE *v.* CAMPBELL 633

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ARBITRATION AND AWARD—*Previous action—Agreement to arbitration—Larger claim fyled—Ultra petita.*] The respondent, alleging that the appellants had encroached upon beach lot No. 586 of St. Roch Nord, took an action for $96,000.00, the value of 384,000 square feet. Before any contestation, both parties agreed to submit to one arbitrator the question whether such encroachment on lot No. 586 had taken place and, if in the affirmative, the amount of compensation. The respondent then fyled with the arbitrator, under protest by the appellant, a larger claim for $162,040.50, representing 681,162 square feet of land comprised in lot No. 586. The arbitrator rendered his decision allowing $51,539.58, the value of 572,662 square feet.—*Held*, that the arbitrator's sentence was not *ultra petita.*—Judgment of the Court of King's Bench (Q.R. 29 K.B. 302) affirmed. QUEBEC HARBOUR COMMISSIONERS *v.* LA CIE DU PARC ST. CHARLES........................ 29

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2——*Sale — Judicial Sale — Taxes due—Fraud—Nullity—Municipal law—Practice and procedure—Irregularities—Arts.* 689 *and sef.*, 1043, 1045, 1591, 1701, 1709, 1710, 1851, 1967, 1983, 2017, 2161 (*i*) *C.C.—Art.* 748 *C.C.P.—Arts.* 373, 718, 723, 734, 735, 946, 955, 962, 998 *to* 1015 *M.C.*] In 1846, one O. became owner of a certain lot of land comprising two cadastral lots. In 1867, he bequeathed it to seven legatees who were thus joint undivided proprietors, one of whom was his daughter, D., owner of one-eighth of the property. In 1879, being indebted to the respondent, D. signed a deed of obligation in his favour and, as collateral security, D. transferred to the respondent all her rights in the above property. In 1899, the respondent obtained judgment for the amount then due which was never registered nor executed. The whole property was then assessed for taxing purposes under the name of "Estate O," without any objection on the part of the respondent who never concerned himself about the property. In 1902, the appellants, two of the legatees, purchased about the two-thirds of the shares of their co-legatees, with the exception of those of D. and others which they tried but failed to acquire. Up to two years previous to 1906, the municipal taxes had been paid, without the evidence showing positively by whom. In 1907, the taxes not having been paid for more than two years, the property was sold by the municipality and adjudicated to the appellants who were the only bidders. Two years later, they became absolute owners by virtue of a deed of sale from the municipality. In 1912, the respondent took an action to set aside the adjudication and the deed of sale, alleging fraud on the part of the appellants and also irregularities in the proceedings of the sale.—*Held,* Sir Louis Davies C.J. and Brodeur J. dissenting, that the appellants, as co-owners of the property, were not in law bound to pay the taxes or to give to the respondent notice of the sale and that there was no fraud on their part in making use of the means of a sale for taxes in order to dissolve the undivided ownership.—*Per* Idington, Duff, Anglin and Mignault JJ.—The first offer, even if the only one, made in a sale for taxes, is an "enchère" within the meaning of Art. 1101 M.C.—*Per* Idington, Duff, Anglin and Mignault JJ.—The party owing municipal taxes is not deprived of the right to bid and be declared purchaser of the property sold by the municipality for the payment of those taxes.—*Per* Idington, Duff, Anglin and Mignault JJ.—The property having been entered on the valuation roll under the name of "Estate O.," without any objection by the respondent the sale ought to be considered as made *super domino.*—*Per* Idington, Duff, Anglin and Mignault JJ. The seizure and the sale of the goods and chattels of the party owing municipal taxes is not a preliminary condition to the sale of the immovable property, the provision of Art. 962 M.C. being permissive and not imperative.—*Per* Anglin and Mignault JJ.—The respondent was not the "owner" of the

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eighth undivided part transferred to him by D.—*Per* Brodeur J. (dissenting). The evidence is sufficient to create the presumption that the appellants were in possession, if not of the whole property, at least of the seven-eighths part of it, and they were bound in the circumstances of this case to pay all the taxes due on it or to give notice to the respondent of the sale of the property for taxes due.—Judgment of the Court of King's Bench (Q.R. 30 K.B. 252) reversed. MUNROE *v.* LEFEVRE.............. **284**

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BILLS AND NOTES—*Bills and notes—Acceptance—Holder in due course—Damaages against drawer—Set off—"And exchange"—Definite liability.*] The appellants agreed to buy certain goods from A., who assigned, for an indebtedness, to the respondent bank his interest in the contract. A. later on shipped the goods, attached bills of lading to the drafts and delivered them to the bank, which credited A. with the proceeds of the drafts and forwarded them with the bills of lading to its branch where appellants accepted them and received the bills of lading. The bank brought action on the drafts but the appellants, having a claim for damages suffered by them by reason of A.'s breach of contract, set it off against the bank's claim.—*Held*, Duff J. dissenting, that the acceptance of the drafts by the appellants, with full knowledge of A.'s breach of contract, implies an acknowledgment of unconditional liability towards the respondent bank, which had no notice of the breach. The appellants raised for the first time in this appeal the objection that the words "and exchange," written on the bills without indicating the rate of exchange, prevented them from being for a sum certain under the "Bills of Exchange Act," section 28.—*Per* Sir Louis Davies C.J., Anglin and Mignault JJ. This objection should not be entertained now, as, if it had been raised on the pleadings or at the trial, evidence might have been adduced to show, by custom of trade or otherwise, that these words import a definite and precise liability.—*Per* Sir Louis Davies C.J. and Anglin J. If these words have any application at all in the case of these inland bills, they cannot be taken to deprive the instruments before us of their character as bills of exchange because of any indefiniteness or uncertainty in the amount for which the acceptors became liable.—Judgment of the Appellate Division (15 Alta. L.R. 482) affirmed, Duff J. dissenting. ANTONIOU *v.* UNION BANK OF CANADA........ **253**

——*Conditional sale agreement—Promissory notes—Notes on same sheet as agreement—Negotiability—Holder in due course—"The Sale of Goods Ordinance" (N.W.T.) C.O.* 1915, *c.* 39.] The appellant bought a horse from one Dygert for $1,700, paid $300 cash and gave two notes of $700 each. Below each note was written an agreement providing that the property in the horse would not pass until the balance of the purchase price was paid; and stipulating that "no holder of said notes by or to whom * * said notes * * have been discounted * * shall be affected by the state of accounts between the subscriber and the promisee or by any equities existing between the subscriber and the promisee, but shall be deemed to be a holder in due course and for value of the notes held by him." Dygert indorsed the notes to the respondent bank for value. The horse died before the notes were paid and the sale was then avoided between the appellant and Dygert under "The Sale of Goods Ordinance."—*Held*, that the respondent bank was entitled

BILLS AND NOTES—*Concluded.*

to recover on the notes from the appellant.—*Per* Idington, Anglin, Brodeur and Mignault JJ.—Under the agreement, the respondent bank was a holder in due course, though it had notice of the contract between the appellant and Dygert.—*Per* Idington, Duff and Mignault JJ. These notes were severable from the agreement and constituted in law promissory notes.—Judgment of the Appellate Division ([1920] 3 W.W.R. 542) affirmed. KILLORAN *v.* MONTICELLO STATE BANK 528

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R.S.N.S. [1900] ch. 141.—It was contended that the time for completion of the purchase was a term of the contract and should have appeared in the written memorandum.—*Held,* that the finding of the trial judge that the time for completion was agreed on after the document was signed should be accepted and it was, therefore, not a term of the original contract but an arrangement for carrying it out.—*Per* Duff J.—This defence was not pleaded nor submitted to the jury and, as a question of fact, could not be raised after verdict since it was not disclosed so as to challenge the attention of the plaintiff.—It was also alleged that the property sold was mortgaged and the purchase was only of the equity of redemption which the memorandum did not disclose.—*Held,* that the purchase was of the whole property and not of the equity of redemption only and that the contract contained in the memorandum could be worked out as if it provided for the mortgage. MCKENZIE *v.* WALSH **312**

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6——*Sale—Sale of land—Option under seal — Condition precedent — Consideration— Nominal—Expressed as "now paid"—Non-payment—Specific performance—Subsequent conduct—Parol evidence—Statute of Frauds.*] The respondent was purchasing some land from a company of which the appellant was the sales agent for $86,400 and asked the latter to join him in the undertaking. The appellant, before doing so, wished to see personally his principals who were resident in the United States in order to obtain their consent. The respondent then entered into an option agreement under seal whereby in consideration of the sum of $100 "now paid," of which receipt was acknowledged, and of the payment of half of the cash instalments due in virtue of the purchase agreement, he assigned to the appellant an undivided half-share interest in the land. The above sum of $100 was in fact neither paid nor demanded. The respondent then proceeded to complete the original purchase agreement, paid the cash instalments amounting to $10,000 to the owners and sold part of the land at a profit. The appellant, after having obtained the approval of his principals, sent to the respondent the sum of $5,000 with interest thereon within the delay specified in the option; but the respondent returned it and refused to carry out the agreement. The appellant sued for specific performance.—*Held,* Duff and Mignault JJ. dissenting, that the option agreement was binding upon the respondent. *Cushing* v. *Knight* (46 Can. S.C.R. 555) discussed.—*Per* Sir Louis Davies C.J.—The question whether the giver of the option was bound thereby, without the payment of the $100, is entirely one of intention, and, in this case, there was nothing to indicate that it was the intention of the parties that such payment

CONTRACT—*Continued.*

should be a condition precedent to the respondent being bound, both parties understanding that the down payment was immaterial and negligible.—*Per* Sir Sir Louis Davies C.J.—Upon the evidence, conduct and correspondence of the parties, the option agreement was to become operative only when the consent of the appellant's principals had been obtained; and after such consent there was no unreasonable delay on appellant's part in tendering to the respondent the moneys stipulated in the agreement.—*Per* Idington J. When a contract for an option is under seal and purports to bind for a specific time, assented to by the covenantee, its binding effect cannot be affected by any omission to pay the consideration declared to have been received, unless and until actual payment has been demanded and refused.—*Per* Duff J., Anglin and Mignault JJ.—The actual payment of the sum of $100 was made a condition precedent to the instrument becoming effective as an option, and the consideration cannot be treated as a mere nominal one.—*Per* Anglin J. But the subsequent conduct of the respondent has been such as to preclude him from relying upon the non-fulfilment of the condition. Duff J. *contra.*—*Per* Anglin J. And parol evidence of the facts warranting this inference is admissible since it does not amount to such a variation of the terms of the contract that verbal proof of it would offend against either the rule in regard to contracts reduced to writing or the Statute of Frauds. Duff J. *contra.*—*Per* Anglin J. Assuming that the payment of $100 was a condition precedent to the existence of a binding option, the respondent's offer to sell one-half interest in the lands purchased was not expressly or impliedly revoked before its acceptance by the appellant within reasonable delay.—*Per* Duff and Mignault JJ. (dissenting).—The payment of $100 was one oi the facts which the appellant, relying upon the existence of the option, had to establish in the absence of circumstances dispensing with the performance of this essential condition.—*Per* Duff J. (dissenting). The grant of an option has the effect of vesting in the optionee an interest in land, and, if given for valuable consideration, is not revocable; and the giver of the option is not entitled to

CONTRACT—*Concluded.*

break it on offering to pay damages.—Judgment of the Appellate Division (15 Alta. L.R. 252) reversed, Duff and Mignault JJ. dissenting. DAVIDSON *v.* NORSTRANT.................... **493**

7——*Sale—Vendor or trustee—Rights of beneficiaries—Representation—Term "or thereabouts."*] The vendor may be a trustee for others of the money payable by the purchaser but his beneficiaries have no rights but those given by the contract and if, in carrying out the sale, the purchaser incurs a loss for which the vendor is liable it may be deducted from the purchase money.—In a contract for sale of a going concern the liabilities were stated to be $36,894, "or thereabouts."—*Held*, that an excess of $857 was too substantial to be covered by the qualifying expression.—Judgment of the Appellate Division (47 Ont. L.R. 265) reversed. BEATTY *v.* BEST........ **576**

8——*Gas company—Rates—Existing rate—Public Utility*.................... **213**
See COMPANY 2.

9——*Agreement for sale—Promissory notes—Severance*.................. **528**
See BILLS AND NOTES 2

CRIMINAL LAW—*Seduction under promise of marriage—Previous illicit connection—Previous chastity of complainant—Findings of the jury—Arts.* 210, 212, 1102, 1140 *Cr. C.*] The appellant was convicted for having, under promise of marriage, seduced and had illicit connection with an unmarried female of previously chaste character under the age of 21 years. The girl complainant, at the trial, admitted that she had had illicit connection with the appellant on one previous occasion under mutual promise of marriage.—*Held*, Duff and Brodeur JJ. dissenting, that the fact of the previous seduction did not preclude the jury from finding the complainant to be "of previously chaste character" within the meaning of article 212 Cr. C., the question whether or not the facts and surrounding circumstances could justify such a conclusion being one to be determined by the jury alone.—Judgment of the Appellate Division (15 Alta. LR. 313; [1920] 2 W.W. R. 251) affirmed, Duff and Brodeur JJ. dissenting. MAGDALL *v* THE KING.................... **88**

CRIMINAL LAW—*Continued.*

2——*Bribery—Violation of provincial Act—"Administration of justice"—Cr. C. ss.* 2, 157, 164—(*C*) 31 *Vict., c.* 71, *s.* 3—*"The Saskatchewan Temperance Act," Sask., S.* (1917) *c.* 23.] A bribe given in order to induce a police officer not to proceed against the party giving it for violation of "The Saskatchewan Temperance Act" is given with intent to interfere with the "administration of justice" under section 157 of the Criminal Code. Idington J. *contra.*]—*Per* Idington J. (dissenting). Section 157 of the Criminal Code can only herein be held relevant to a peace officer or public officer as defined in the interpretation clause of the said code; and appellant was not acting within such definition but merely performing a duty of inspecting books under the "Saskatchewan Temperance Act," and reporting, which could have been discharged by anyone. The offence in question was one against section 39 of the said "Temperance Act," and hence impliedly excluded by section 154 of the said code from falling within section 157 thereof. KALICK *v.* THE KING **175**

3——*Speedy trial—Election—Jury trial—Requirement by the Attorney-General—Sections* 446 (*a*), 690, 825, 826, 827, 828, 830, 833, 873, 1018, 1024 *Cr. C.*—(*D.*) 32-33 *Vict., c.* 29, *s.* 28—(*D.*) 8-9 *Ed. VII, c.* 9, *s.* 2.] The appellant was accused of an offence, punishable by imprisonment for a period exceeding five years and for which he had the right of election to be tried by a judge or a jury. He first elected to be tried by a jury and, after the preliminary hearing, he was committed for trial. Whilst still in custody of the sheriff, he wrote to the latter that he was electing for a speedy trial and the sheriff notified the judge of the sessions of this election. He was then brought before a district magistrate and there elected for a speedy trial. Later on, the Attorney-General signed a declaration that the indictment has been on his order "brought before the grand jury." It was so brought, a true bill was found and the appellant tried before a jury and found guilty.]—*Held*, Idington J. dissenting, that the conviction of the appellant by a jury was legal.—*Per* Sir Louis Davies C.J. and Duff J. The requirement signed by the Attorney-General was in compliance with section 825 Cr. C., as amended by 8-9 Ed. VII,

CRIMINAL LAW—*Concluded.*

c. 9, s. 2. Idington J. *contra* and Anglin J. *semble.*—*Per* Anglin, Brodeur and Mignault JJ. The election for a speedy trial made by the appellant before a district magistrate was not valid, as it should have been made before the residing judge of the sessions of the peace, according to section 827 Cr. C.—*Per* Idington J. (dissenting).—The election by the appellant for a speedy trial, contained in his letter to the sheriff, was valid, as being made in conformity with s.s. 2 of s. 828 Cr. C., and any subsequent irregularity could not affect the appellant's rights. MINGUY *v.* THE KING...... **263**

4——*Trial—Plea of insanity—Charge to jury—Proof—Beyond a reasonable doubt.*] On a criminal trial where the prisoner pleads insanity it is misdirection for the judge to charge the jury that insanity must be proved beyond a reasonable doubt. *Rex* v. *Anderson* (7 Alta. L.R. 102) approved. *The King* v. *Kierstead* (45 N.B. Rep. 553) overruled. Idington J dissents CLARK *v.* THE KING... **608**

CROWN LANDS—*Crown's Land Act—Crown's agent—Receipt—Title to land—R.S.Q.* (1909) *arts.* 1559, 1562.] The appellant, by a petitory action, asked to be declared owner of certain land subject to the Crown's Lands Act and invoked as his title the following receipt delivered to him by the Crown's Lands Agent: "Crown Lands Agency. $1.00.—Dec. 29th, 1910.—Received from Adélard Diotte the sum of one dollar as fee for registration (description of land). Wm. Clarke, agent."]—*Held,* that the terms of such a receipt do not fall within the provisions of articles 1559 and 1562 R.S. Q., as the money was not paid on account of the purchase price. DIOTHE *v.* BERNIER............................ **188**

2——*Sale—Sale of land—Agreement—Reservation of mine sand minerals to Crown—Implied powers—Whether greater than those expressly reserved in Crown grant.*] The reservation, in a Crown grant, of the mines and minerals "with full power to work the same and for this purpose to enter upon and use or occupy the * * * lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals * * * " confers greater powers than those implied in a bare reservation in an agreement for the sale of the land so

CROWN LANDS—*Concluded.*

granted of "all mines and minerals." Sir Louis Davies C.J. and Idington J. dissenting.—*Per* Duff, Anglin and Mignault JJ. The terms of both reservations imply the right to win, get at and take away the minerals; but the terms of the reservation in the Crown grant may imply furthermore the right to cause subsidence or destruction of the surface.—Judgment of the Appellate Division (15 Alta. L.R. 194) reversed, Sir Louis Davies C.J. and Idington J. dissenting. FULLER v. GARNEAU... **450**

DEBTOR AND CREDITOR — *Mortgage—First and third mortgagee—Foreclosure of first and sale—Action on covenant in third* **1**

See MORTGAGE.

2——*Transfer of property—"À la charge de l'hypothèque—Personal obligation.* **65**

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DEDICATION—*Public road—Law of Quebec*............................ **535**

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DOMICILE—*Succession duty—Property in province other than that of domicile—Method of taxation*................ **127**

See SUCCESSION DUTIES.

EMPLOYER AND EMPLOYEE

See MASTER AND SERVANT

ESTOPPEL—*Sale of land—Building restrictions—Injunction—Delay in applying*............................ **633**

See ACTION 2.

EVIDENCE—*Negligence—Jury trial—Res ipsa loquitur—Burden of proof*.. **547**

See MASTER AND SERVANT 3

FORECLOSURE

See MORTGAGE.

HYPOTHEC

See MORTGAGE

INJUNCTION — *Nuisance — Theatrical performance—Crowd on street—Obstruction!*............................ **100**

See NUISANCE.

INSANITY—*Criminal law—Plea of insanity—Charge to jury—Proof—"Beyond a reasonable doubt"* **608**

See CRIMINAL LAW 4.

INSURANCE, ACCIDENT—*Accident and guarantee—Breach of contract—Insurer's knowledge—Continuation of defence in action against insured—Waiver of condition—Estoppel.*] The respondent held a policy of insurance in the appellant company to indemnify him against accidents to his employees. An employee was injured and brought action against the respondent. The appellant, in pursuance of a condition of the policy, assumed the defence. During the trial, the appellant learned, by the respondent's own admission, that the machine which caused the accident had been unguarded in breach of a condition of the application and of the policy. But the appellant continued the defence down to judgment awarding damages to the employee. The respondent brought this action to recover the amount paid by him. The appellant pleaded that owing to the respondent's breach of the condition of the policy, it was relieved from liability.—*Held*, that the appellant company, having assumed and continued the defence with knowledge of the fact that the machine was unguarded, waived any right to dispute liability under the policy for such breach of condition.—Judgment of the Court of Appeal (13 Sask. L.R. 405) affirmed. WESTERN CANADA ACCIDENT AND GUARANTEE INS. CO. *v.* PARROTT **595**

LEGAL MAXIMS—*Volenti non fit injuria* **223**

See MASTER AND SERVANT 2.

2——*Res Ipsa Loquitur* **547**

See MASTER AND SERVANT 3.

MASTER AND SERVANT—*Workmen's Compensation Act—Tramways Company—Free transportation—Injury to employee—Liability—R.S.Q.* (1909) *arts.* 7321 et *seq*] The respondent, an employee of the company appellant, when injured, was returning from his work to his home in a tramcar on which he was entitled to be carried free under certain provisions in the company's regulations.—*Held*, that the respondent had a right to compensation under the Quebec Workmen's Compensation Act, as the injury was occasioned "by reason of or in the course of (his) work," within the meaning of article 7321 R.S.Q. (1909.)—Judgment of the Court of Review (Q.R. 57 S.C. 394) affirmed MONTREAL TRAMWAYS CO *v* GIRARD **12**

2——*Railways—Injury to servant—Knowledge of danger—Volenti non fit injuria—Liability of master.*] The respondent, employed by the appellant railway company as roadmaster, had been specially instructed to repair a certain section of the road-bed which was in a dangerous condition owing to bad rails. The respondent frequently applied for new rails which the appellant company did not supply. While, in the course of his employment, the respondent was travelling over that section in a hand-car, an accident occurred through the car leaving the tracks and he was injured.—*Held*, Sir Louis Davies C. J. dissenting, that the appellant company was liable, the defence of *volenti non fit injuria* not being applicable under the circumstances.—Judgment of the Appellate Division (15 Alta. L.R. 464) affirmed, Sir Louis Davies C. J. dissenting EDMONTON, DUNVEGAN AND BRITISH COLUMBIA RAILWAY CO. *v.* MULCAHY **223**

3——*Negligence—Railway—Jury trial—Res ipsa loquitur—Burden of proof—Master and servant—N.W.T. Ord.* (1915), *c.* 98.] The respondent's husband, a brakesman in appellant's employ, was killed by the derailment of his train. The derailment was caused by an unlocked switch being partly open. At the trial, the respondent simply gave evidence of the accident and of the damages claimed by her, resting her case on the doctrine of *res ipsa loquitur*. The appellant then moved for a non-suit on the ground that this doctrine was not applicable in a case between master and servant. The motion was refused and the appellant proceeded to produce evidence to rebut the *prima facie* case of negligence. The jury rendered a verdict in favour of the respondent.—*Held*, Mignault J. dissenting, that, upon the evidence, the verdict of the jury that the condition of the switch was due to the negligence of the appellant must be upheld.—*Per* Anglin, Brodeur and Mignault JJ. In the province of Alberta the doctrine of *res ipsa loquitur* can be invoked by a servant seeking to hold his master liable for

MASTER AND SERVANT—*Concluded.*

injuries sustained in the course of his employment, since the defence of common employment has been taken away by statute; and it was incumbent upon the appellant to rebut the presumption of negligence resulting from the application of the doctrine.—*Per* Idington, Anglin and Brodeur JJ. The sufficiency of the evidence adduced by the appellant to rebut such presumption was wholly within the province of the jury.—*Per* Mignault J. (dissenting). The evidence adduced by the appellant having completely rebutted the *prima facie* case of negligence resulting from the rule *res ipsa loquitur*, and the respondent not having made any affirmative proof of negligence of the appellant, the jury was not justified in finding a verdict in favour of the respondent.—Judgment of the Appellate Division ([1920] 3 W.W.R. 909) affirmed, Mignault J. dissenting. CANADIAN NORTHERN RY. CO. *v.* HORNER..... **547**

MINES AND MINERALS — *Crown grant—Reservation—Implied powers.* **450**
See CROWN LANDS 2.

MORTGAGE—*First and third mortgage—Foreclosure of first mortgage and sale of land—Recovery under covenant on third mortgage—Collateral security not discharged.*] The appellant, having purchased a property from the respondent, transferred to him, as security for the balance of the purchase price, a first and a third mortgage due by one Yandt upon another property; and, as collateral security, he also gave a mortgage on the property bought, payable at dates corresponding with the respective due dates of the above two mortgages. In course of time, the respondent obtained foreclosure under the first mortgage and sold the land. The appellant then claimed a discharge of the collateral mortgage.—*Held* that, notwithstanding the foreclosure of the first mortgage and the sale of the foreclosed property, the respondent could still recover under the appellant's covenant for payment contained in the third mortgage and the appellant was not entitled to the discharge of the collateral mortgage until the payment of the third mortgage.—Judgment of the Court of Appeal (12 Sask. L.R. 445; [1919] 3 W.W.R. 719) varied. ISMAN *v.* SINNOTT **1**

2——*Transfer of property—"A la charge de l'hypothèque"—Personal obligation—*

MORTGAGE—*Concluded.*

Articles 1019, 1508, 2016, 2056, 2065, *C.C.*] The mere taking of a transfer of property subject to a hypothec,—"à la charge de l'hypothèque"—does not, under the civil law of Quebec, *per se*, entail any personal obligation on the part of the transferee to pay the debt for which the hypothec is security.—Judgment of the Court of King's Bench (Q.R. 29 K.B. 375) affirmed. LEGAULT *v.* DESÈVE. **65**

3——*Order allowing purchase by mortgagee—Execution for balance of claim—Foreclosure—"The Land Titles Act," (Alta.) S. (1919) c. 37, s. 62b.*] An order by which a mortgagee becomes the owner of the mortgaged land as purchaser at a named price with leave to issue execution for the balance of his claim, is not an order for foreclosure operating as satisfaction of the debt under section 62 b of "The Land Titles Act" as amended by chapter 37 of the Alberta Statutes, 1919.—*Per* Sir Louis Davies C.J. and Idington and Brodeur JJ. (affirming the judgment of the Appellate Division).—Though the order should have been set aside and a proceeding *de novo* directed, the decision of the Appellate Division that, notwithstanding the terms of the order, the mortgagee may still pursue his remedy for the balance of his claim should not be disturbed, the question involved being one of practice and procedure.—*Per* Duff, Anglin and Mignault JJ. (reversing said judgment). The order should be set aside as the doctrine of equity in regard to mortgages preclude the making of an order which purports *uno flatu* to vest the mortgaged property in the mortgagee as purchaser free from all equity of redemption and to enforce the personal liability of the mortgagor for some part of the mortgage debt. A mortgagee cannot have both the mortgaged property and the mortgage money—*Per* Duff and Anglin JJ. The sale sanctioned by the order was not a sale of the land within the meaning of s.s. 2 of s. 62 of "The Land Titles Act" and the mortgagee is therefore prohibited by that section from issuing execution under his judgment on the covenant.—The sale contemplated by the statute is a sale to a stranger, not to the mortgagee.—Judgment of the Appellate Division (15 Alta. L.R. 17; [1919] 3 W.W. R. 634) affirmed on equal division of the court. SAYRE & GILFOY *v.* SECURITY TRUST CO. **109**

MUNICIPAL CODE, QUEBEC

1——*Art.* 14 (*Irregularities*)........ **40**
See MUNICIPAL CORPORATION 1.

2——*Arts.* 20 *and* 27 (*Interpretation*). **237**
See ASSESSMENT AND TAXES 1.

3——*Art.* 116 (*Meetings of Council*).. **40**
See MUNICIPAL CORPORATION 1.

5——*Art.* 519 (*Roads*)............. **40**
See MUNICIPAL CORPORATION 1.

6——*Art.* 651 (*Valuation roll*)...... **237**
See ASSESSMENT AND TAXES 1.

7——*Art.* 962 (*Municipal taxes*).... **284**
See ASSESSMENT AND TAXES 2.

8——*Art.* 1001 (*Tax sale*).......... **284**
See ASSESSMENT AND TAXES 2.

MUNICIPAL CORPORATION—*By-law—Special meeting—Notice—Absence of councillor—Minutes of the meeting—Closing of road between two municipalities—Consent of the county council—Articles* 505, 1233 *C.C.—Articles* 14, 115, 116, 118, 332, 334, 340, 344, 345, 355, 359, 467, 473, 474, 475, 519 *M.C.—R.S.Q.* (1909), *articles* 2064, 2065.] The notice for a special meeting of a municipal council having been given to all the councillors by a non-registered letter sent to them by mail, instead of the notice being served on each councillor individually as required by the municipal code, the minutes of the meeting could not and did not mention that such notice had been served on one of the councillors who was absent (Art. 116 M.C.). At the trial it was proved, (which evidence was objected to by the appellants) by this councillor's own admission, that he had in fact received notice in due time.—*Held*, Anglin J. dissenting, that the proceedings of the council at the meeting were irregular and null. *Hudon* v. *Roy dit Desjardins* (Q.R. 19 K.B. 68) overruled.—*Per* Anglin J. (dissenting). Any irregularity that there may have been in the giving of notice of the meeting was cured by article 14 M.C.—A colonization road, which passed through the municipality respondent and a neighbouring municipality, had been opened by the provincial authorities long before the existence of both municipalities. The municipality respondent changed, within its limits, the course of this road without changing the place where it connected with the neighbouring municipality, and passed a by-law closing the other road.—*Per* Anglin and Mignault JJ. It was not necessary for the municipal council to obtain, previously, the consent of the county council. (Art. 519 M.C.). Duff and Brodeur JJ. *contra.*—Judgment of the Court of King's Bench (Q.R. 29 K.B. 146) reversed, Anglin J. dissenting. BOILY *v.* CORPORATION DE ST-HENRI DE TAILLON........................ **40**

2——*Right to cut timber—Immovable property—owner—Valuation Roll—Arts.* 378, 381, 382 *C.C.—Arts.* 16, *s.s.* 20 *and* 27, 649, 651, 684, 688 *M.C.* (*Que.*) 2 *Geo. V, c.* 45.] Although article 381 C.C., as amended by 2 Geo. V, c. 45, declares that "the right to cut timber" is "immovable." —*Held, Per* Duff, Anglin and Mignault JJ. The possessor of that mere right cannot be placed on the valuation roll for the purpose of municipal taxation under the Municipal Code.—*Per* Duff J. The possessor of that right is not an "owner" within the meaning of paragraph 20 of article 16 M.C.—*Per* Brodeur J. The possessor of that right, if he is at the same time the owner of the standing timber, can be placed on the valuation roll. Anglin J. *semble.*—*Per* Anglin, Brodeur and Mignault JJ. Such a right is not "immovable property" within the meaning of that term as defined by paragraph 27 of article 16 M.C. and as used in article 651 M.C.—*Per* Idington J. dissenting. The definition of the word "immovable" by the legislature ought to be observed in the interpretation of article 651 of the new municipal code which was enacted subsequently to the amendment of article 381 C.C.—Judgment of the Court of King's Bench (Q.R. 29 K.B. 309) reversed, Idington J. dissenting. BREAKEY *v.* TOWNSHIP OF METGERMETTE NORD........................ **237**

3——*Highway—Dedication — Reservation of easement—Title to soil—Ontario Municipal Act,* 1913, *s.* 433—3 *Edw. VII, c.* 19, *s.* 601 (*Ont.*).] Prior to 1913 the soil and freehold of roads and highways in Ontario were vested in the Crown and the roads and highways themselves in the respective municipalities subject to any rights in the soil reserved by the person who laid out such road or highway." Sec. 433 of the Municipal Act, 1913,

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repealed these provisions and vested the soil and freehold of roads and highways in the municipalities without any reservation of right. Prior to 1913 land had been dedicated for a highway with the right reserved to maintain a raceway across it.—*Held*, Davies C. J. dissenting, that sec. 433 did not take away the right so reserved; to effect that purpose clear and unambiguous language is necessary and a mere inference from the repeal of the provisions protecting the rights reserved is not sufficient; and that the purpose of sec. 433 was to do away with the confusion arising from the joint proprietorship over roads and highways to which effect can be given without causing the injustice of taking private property without compensation.—Judgment of the Appellate Division (45 Ont. L.R. 79) reversed and that of the trial judge (39 Ont. L.R. 382) restored. ABELL *v.* COUNTY OF YORK 345

4——*Municipal corporation—Public road—Sidewalk—Prescription — Dedication—Servitude—Art.* 2193 *C.C.*] On an action *en bornage* instituted by the appellant, the respondent claimed the ownership of a strip of land, used as a sidewalk in front of the appellant's property, by virtue of documentary title, by dedication and by prescription of thirty years. The appellant denied the existence of the documentary title and urged that the respondent's possession was not unequivocal, alleging that, during that possession, the steps leading into his house encroached on the side-walk, the cornices projected over it and the drain crossed the strip of land.—*Held*, Duff J. dissenting, that the corporation respondent is the owner of the strip of land.—*Per* Anglin, Brodeur and Mignault JJ. The encroachments alleged by the appellant did not have the effect of vitiating the respondent's title.—*Per* Duff and Brodeur JJ. A municipal corporation can acquire a public way by prescription. Mignault J. *dubitante*.—*Per* Anglin and Mignault JJ. The respondent became owner of the strip of land by way of dedication duly accepted.—*Per* Duff and Brodeur JJ. The common law doctrine of dedication is not a part of the law of the province of Quebec. LORD *v.* VILLE DE SAINT-JEAN...... 535

5——*Contract—Gas company—Rates—Existing rate—Public utility*........ 213
See COMPANY 2.

NEGLIGENCE—*Accident — Damages—Jury's findings — Inconsistency — New trial.*] The respondent was injured by placing his hand on a defective electric motor in motion. He alleges that he was obliged to do so to ascertain if the motor was overheated; but the appellant contends that he acted contrary to instructions. The principal findings of the jury were: "4. Was the accident caused by the common fault of the plaintiff and the defendant; and if so, state in what the fault of each one consisted? Yes. The defendant is to blame for having had a defective machine in operation, knowing that it was defective. The plaintiff is to blame for having exceeded what he was told to do, by getting up and putting his hand on the motor while in motion and taking unnecessary risks. Unanimous." The verdict of the jury, awarding $3,000 to the respondent, was affirmed by the Court of King's Bench.—*Held*, Idington J. dissenting, that a new trial should be ordered, as the jury's findings are obscure and inconsistent. MONTREAL LOCOMOTIVE WORKS *v.* MCDONNAUGH...... 232

2—— *Railway — Jury trial — Res ipsa loquitur—Burden of proof—Master and servant—N.W.T. Ord.* (1915), *c.* 98.] The respondent's husband, a brakesman in appellant's employ, was killed by the derailment of his train. The derailment was caused by an unlocked switch being partly open. At the trial, the respondent simply gave evidence of the accident and of the damages claimed by her, resting her case on the doctrine of *res ipsa loquitur*. The appellant then moved for a non-suit on the ground that this doctrine was not applicable in a case between master and servant. The motion was refused and the appellant proceeded to produce evidence to rebut the *prima facie* case of negligence. The jury rendered a verdict in favour of the respondent.—*Held*, Mignault J. dissenting, that, upon the evidence, the verdict of the jury that the condition of the switch was due to the negligence of the appellant must be upheld.—*Per* Anglin, Brodeur and Mignault JJ. In the province of Alberta the doctrine of *res ipsa loquitur* can be invoked by a servant seeking to hold his master liable for injuries sustained in the course of his employment, since the defence of common employment has been taken away by statute; and it was incumbent upon the appellant to rebut the presumption of

NEGLIGENCE—*Concluded.*

negligence resulting from the application of the doctrine.—*Per* Idington, Anglin and Brodeur JJ. The sufficiency of the evidence adduced by the appellant to rebut such presumption was wholly within the province of the jury.—*Per* Mignault J. (dissenting). The evidence adduced by the appellant having completely rebutted the *prima facie* case of negligence resulting from the rule *res ipsa loquitur*, and the respondent not having made any affirmative proof of negligence of the appellant, the jury was not justified in finding a verdict in favour of the respondent.—Judgment of the Appellate Division ([1920] 3 W.W.R. 909') affirmed, Mignault J. dissenting. CANADIAN NORTHERN RY. CO. *v.* HORNER..... **547**

And *See* MASTER AND SERVANT.

And *See* WORKMEN'S COMPENSATION ACT.

NEW TRIAL—*Contract — Illegality—Public order—Questions raised only at argument—New trial—Arts.* 989, 990 *C.C. Sect.*158 (*f.*) *Cr. C.*]—*Per* Duff, Anglin, Brodeur andMignault JJ. Where a contract sued upon has been held void for illegality on a ground not pleaded and not referred to at the trial until after the close of the evidence, and the circumstances relied upon to establish such illegality may be susceptible of explanation, a new trial should be directed to afford the plaintiff an opportunity to adduce evidence to meet the defence of illegality. **Connolly v. Consumers Cordage Co.** (89 L.T. 347) followed. OGILVIE & CO. *v.* DAVIE **363**

2——*Negligence—Action for damages—Inconsistent findings of jury*........ **232**

See NEGLIGENCE 1.

NUISANCE — *Theatrical performance—Crowd on street—Obstruction of neighboring premises—Injunction.*] A theatre Co. may be restrained by injunction from so arranging its performances that persons waiting for admission assemble in such numbers that they obstruct the access to neighbouring business premises and seriously inconvenience the proprietors. STRAND THEATRE CO. *v.* CAHILL & CO.......................... **100**

PARTNERSHIP—*Sale of interest by one partner to the other—Oral agreement—Evidence—Statute of Frauds—"The Partnership Ordinance," N.W.T. Ord.* (1905) *c.* 94, *s.* 24.]—*Held*, Duff J. dissenting, that, though the assets of a partnership include an interest in land, an oral agreement by one partner to buy out the other partner's interest in the partnership is enforceable and the Statute of Frauds is inapplicable in such a case, unless it be shown that there appears a "contrary intention" to the rule enacted by s. 24 of "The partnership Ordinance" that "land" which has "become partnership property * * * shall * * * "be treated as between the partners * * * as personal or "movable and not real estate." — Judgment of the Appellate Division (15 Alta. L.R. 556) affirmed, Duff J. dissenting. LAVIN *v.* GEFFEN **356**

PATENT OF INVENTION—*Installation of invention—Foreign vessel—Infringement—"Patent Act," R.S.C.* (1906), *c.* 69, *ss.* 30 *and* 53.] The respondent, having a contract from the French Republic to construct twelve vessels at Fort William for use during the late war, agreed, by a supplementary contract, when the vessels were 95% completed, to install on each of the ships a wireless apparatus which the respondent claims to be an infringement of its patent. These apparatus were bought by the French Republic in New York and shipped to itself at Fort William. The respondent did nothing else than allow its men, under the direction of a naval officer of the French Republic, to install these apparatus on the vessels.—*Held*, Anglin J. dissenting, that the respondent did not "construct or put in practice" the invention of the appellant within the meaning of section 30 of the "Patent Act."—*Per* Mignault J. The terms of section 53 of the "Patent Act," cover not only the case of a foreign ship visiting a Canadian port, but also the case of a foreign ship built in Canada. Anglin J. *contra.*—Judgment of the Exchequer Court (19 Ex. C. R. 311) affirmed, Anglin J. dissenting, and Duff J. taking no part in the judgment owing to absence. MARCONI WIRELESS TELEGRAPH CO. OF CANADA *v.* THE CANADIAN CAR AND FOUNDRY CO.................... **78**

PRACTICE AND PROCEDURE—*Criminal law—Trial—Plea of insanity—Charge to jury—Proof—Beyond a reasonable doubt.*] On a criminal trial where the prisoner pleads insanity it is misdirection for the judge to charge the jury that insanity must be proved beyond a reasonable doubt. *Rex* v. *Anderson* (7 Alta. L.R. 102) approved. *The King* v. *Kierstead* (45 N.B. Rep. 553) overruled. Idington J. dissents. CLARK *v.* THE KING.............................. **608**

PRESCRIPTION—*Municipal Corporation—Public road—Bornage—Law of Quebec—Art.* 2193 *C.C.*................ **535**

See TITLE TO LAND.

PRINCIPAL AND AGENT—*Commission—Sale of land—Statute of Frauds—R.S.O.* [1914] *c.* 102, *s.* 13.......... **413**

See STATUTE 5.

PRIVILEGE — *Architect* — *Registration* — *Sale* — *Delay* — *Arts.* 1695, 2009, 2013 *to* 2013g, 2082, 2083, 2084, 2103 *C.C.*—*(Que.)* (1894), 57 *Vict., c.* 46; (1895) 59 *Vict., c.* 42; (1904) 4 *Ed. VII, c.* 43, (1916) 7 *Geo. V, c.* 52.] There was no provision in the Civil Code, as it stood before the 22nd December, 1916, allowing the architect to assert a privilege during the progress of the work unless his claim has been registered; and his privilege "takes effect" only from the date of registration. The sale to a third party of an immovable upon which buildings have been erected is conclusive against any rights the architect employed in their erection may have, if the latter has not registered his privilege before the registration of the deed of sale.—Judgment of the Court of King's Bench (Q.R. 29 K.B. 364) affirmed. ARCHIBALD *v.* COOK.................... **465**

RAILWAY—*Master and servant—Railways—Injury to servant—Knowledge of dangers—Volenti non fit injuria—Liability of master.*] The respondent, employed by the appellant railway company as roadmaster, had been specially instructed to repair a certain section of the road-bed which was in a dangerous condition owing to bad rails. The respondent frequently applied for new rails which the appellant company did not supply. While, in the course of his employment, the respondent was travelling over that

RAILWAY—*Concluded.*

section in a hand-car, an accident occurred through the car leaving the tracks and he was injured.—*Held*, Sir Louis Davies C. J. dissenting, that the appellant company was liable, the defence of *volenti non fit injuria* not being applicable under the circumstances.—Judgment of the Appellate Division (15 Alta. L.R. 464) affirmed, Sir Louis Davies C. J. dissenting EDMONTON, DUNVEGAN AND BRITISH COLUMBIA RAILWAY CO. *v.* MULCAHY **223**

SALE OF GOODS—*Bills and notes—Conditional sale agreement—Promissory notes—Notes on same sheet as agreement—Negotiability—Holder in due course—"The Sale of Goods Ordinance" (N.W.T.) C.O.* 1915, *c.* 39.] The appellant bought a horse from one Dygert for $1,700, paid $300 cash and gave two notes of $700 each. Below each note was written an agreement providing that the property in the horse would not pass until the balance of the purchase price was paid; and stipulating that "no holder of said notes by or to whom * * * said notes * * * have been discounted * * * shall be affected by the state of accounts between the subscriber and the promisee or by any equities existing between the subscriber and the promisee, but shall be deemed to be a holder in due course and for value of the notes held by him." Dygert indorsed the notes to the respondent bank for value. The horse died before the notes were paid and the sale was then avoided between the appellant and Dygert under "The Sale of Goods Ordinance."—*Held*, that the respondent bank was entitled to recover on the notes from the appellant.—*Per* Idington, Anglin, Brodeur and Mignault JJ. Under the agreement, the respondent bank was a holder in due course, though it had notice of the contract between the appellant and Dygert. *Per* Idington, Duff and Mignault JJ. These notes were severable from the agreement and constituted in law promissory notes.—Judgment of the Appellate Division ([1920] 3 W.W.R. 542) affirmed. KILLORAN *v.* MONTICELLO STATE BANK **528**

2——*Trustee vendor—Rights of beneficiaries—Going concern—"Or thereabouts"* **576**

See CONTRACT 7.

SALE OF LAND

See VENDOR AND PURCHASER.

SPECIFIC PERFORMANCE—*Sale of land—Memo. in writing—Statute of Frauds—Additional terms* **312**

See SALE 4.

2——*Part performance—Vague terms—Construction* **482**

See CONTRACT 5.

STATUTE—*Crown Lands Act—Payment for title—Receipt—R.S.Q. [1909] Arts. 1559, 1562.*] The appellant, by a petitory action, asked to be declared owner of certain land subject to the Crown's Lands Act and invoked as his title the following receipt delivered to him by the Crown's Lands Agent: "Crown Lands Agency. $1.00.—Dec. 29th, 1910. —Received from Adelard Diotte the sum of one dollar as fee for registration (description of land). Wm. Clarke, agent."—*Held*, that the terms of such a receipt do not fall within the provisions of articles 1559 and 1562 R.S.Q. DIOTTE *v.* BERNIE **188**

2——*Municipal corporation—Contract—Gas company—Maximum rate—"Existing rate"—"Public Utility"—"Public Utilities Act," (Alta.), s. (1915), c. 6, s. 20 (b) and s. 23 (c).*] The maximum rate stipulated in a contract between a gas company and a municipal corporation while the company has not yet by by-law or otherwise fixed any rates which it proposes to charge, is not an "existing rate" as used in section 23 (*c*) of the "Public Utilities Act" of Alberta; and the Board of Public Utility Commissioners has no jurisdiction to modify it.—*Per* Sir Louis Davies C. J. and Anglin J. A gas company, which has a number of wells drilled and ready for operation but has not yet constructed pipe lines to carry their output, nor begun to render service to the public, is a "public utility," within the purview of the "Public Utilities Act." Idington J. *contra.*—Judgment of the Appellate Division (15 Alta. L.R. 416) affirmed. NORTHERN ALBERTA NATURAL GAS DEVELOPMENT CO. *v.* ATTORNEY GENERAL OF ALBERTA **213**

STATUTE—*Continued.*

3——*Assessment and taxes—Land—Actual value—Assessment on adjacent lands—Principle—Ontario Assessment Act, R.S.O. [1914] c. 195, s. 40 (1) and s. 69 (16).*] By sec. 40 (1) of the Ontario Assessment Act "land shall be assessed at its actual value" and by sec. 69 (16) "the court may, in determining the value at which any land shall be assessed, have reference to the value at which similar land in the vicinity is assessed."—*Held*, that in assessing land under these provisions the governing principle is to ascertain its actual value.—*Held, further*, Brodeur J. dissenting, that in this case the assessment was made chiefly, if not entirely, on consideration of the value at which adjacent lands were assessed and the actual value was disregarded. The case was, therefore, sent back to the tribunal appealed from to have the land assessed on the proper principle. DREIFUS *v.* ROYDS **326**

4 —— *Highway — Dedication — Reservation of easement—Title to soil—Ontario Municipal Act, 1913, s. 433—3 Edw. VII, c. 19, s. 601 (Ont.).*] Prior to 1913 the soil and freehold of roads and highways in Ontario were vested in the Crown and the roads and highways themselves in the respective municipalities subject to any rights in the soil reserved by the person who laid out such road or highway." Sec. 433 of the Municipal Act, 1913, repealed these provisions and vested the soil and freehold of roads and highways in the municipalities without any reservation of right. Prior to 1913 land had been dedicated for a highway with the right reserved to maintain a raceway across it.—*Held*, Davies C.J. dissenting, that sec. 433 did not take away the right so reserved; to effect that purpose clear and unambiguous language is necessary and a mere inference from the repeal of the provisions protecting the rights reserved is not sufficient; and that the purpose of sec. 433 was to do away with the confusion arising from the joint proprietorship over roads and highways to which effect can be given without causing the injustice of taking private property without compensation.—Judgment of the Appellate Division (45 Ont. L.R. 79) reversed and that of the trial judge (39 Ont. L.R. 382) restored. ABELL *v.* COUNTY OF YORK **345**

STATUTE—*Concluded.*

5 —— *Action — Commission — Statute of Frauds—Leave to amend—6 Geo. V, c. 24, s. 19 (Ont.); 8 Geo. V, c. 20, s. 58 (Ont.).*] By 6 Geo. V, ch. 24, sec. 19, amended by 8 Geo. V, ch. 20, sec. 58, sec. 13 of the Ontario Statute of Frauds, R.S.O. [1914] Ch. 102 was enacted as follows:—"No action shall be brought to charge any person for the payment of commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.—*Held*, Idington J. dissenting, that this enactment is not retrospective and does not bar an action to recover commission under a contract made before it came into force. Opinion of the Appellate Division (48 Ont. L.R. 120) and of the trial judge (47 Ont. L.R. 37) overruled on this point.—Judgment of the Appellate Division (48 Ont. L.R. 120), allowing the pleadings to be amended and damages claimed for breach of contract, affirmed, Idington J. dissenting.—*Per* Duff J. The Appellate Division should have allowed the appeal and refused the motion for dismissal of the action. No amendment was necessary, the pleadings as they stood being sufficient. UPPER CANADA COLLEGE *v.* SMITH........ **413**

STATUTE OF FRAUDS—*Sale of land—Memo. in writing—Additional terms.* **312**
See VENDOR AND PURCHASER 4.

2——*Partnership—Sale to co-partner—Oral agreement*.................... **356**
See PARTNERSHIP 4.

3——*Ontario—R.S.O.* [1914] *c.* 1025, *s.* 13—*Sale of land—Commission*...... **413**
See STATUTE 5.

STATUTES—*(D.)* 55-56 *V. c.* 29, *ss.* 154, 157—*(Criminal Code)*............... **175**
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2——*(D.)* 55-56 *V., c.* 29, *s.* 212 *(Criminal Code)*........................... **88**
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3——*(D.)* 55-56 *V., c.* 29, *s.* 828 *(Criminal Code)*........................... **263**
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4——*R.S.C.* [1906], *c.* 69, *ss.* 30 *and* 33 *(Patent Act)*..................... **78**
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5——8-9 *Edw. VII., c.* 9, *s.* 2 *(Criminal Code)*........................... **263**
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6——*R.S.O.* [1914] *c.* 102, *s.* 13 *(Statute of Frauds)*........................... **413**
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7——*R.S.O.* [1914] *c.* 195 *(Assessment Act)*............................ **326**
See ASSESSMENT AND TAXES 3.

8——(O) 3 *Edw. VII, c.* 19, *s.* 601 *(Municipal Act)*....................... **345**
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9——(O) 3-4 *Geo. V., c.* 43, *s.* 433 *(Municipal Act)*........................ **345**
See STATUTE 4.

10——(O) 6 *Geo. V., c.* 24, *s.* 19 *(Statute of Frauds)*........................... **413**
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11——*(O)* 8 *Geo. V., c.* 20, *s.* 58 *(Statute of Frauds)*........................... **413**
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12——*R.S.Q.* [1909] *Arts.* 1559 *and* 1562 *(Public Lands)*.................. **188**
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13——*R.S.Q.* [1909] *Art.* 7321 *(Workmen's Compensation Act)*........... **12**
See WORKMEN'S COMPENSATION ACT.

14——*(Q.)* 2 *Geo. V., c.* 45 *(Immovables* **237**
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15——*R.S.N.S.* [1900] *c.* 141, *s.* 7 *(Statute of Frauds)*........................ **312**
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16——*R.S.B.C.* [1911] *c.* 217, *s.* 7 *(Succession Duties)*...................... **127**
See SUCCESSION DUTIES.

17——*(Alta.)* s. 1915, *c.* 6, *ss.* 20 *(b) and* 23 *(c) (Public Utilities)*............. **213**
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18——*(Alta.)* s. 1919, c. 37, *s.* 62*b (Land Titles)*............................ **109**
See MORTGAGE 3.

19——*(Sask.)* s. 1917, *c.* 23 *(Temperance Act)*............................ **175**
See CRIMINAL LAW 2.

SUCCESSION DUTIES—*Deceased domiciled without the province—Property within and without the province—Method of taxation on property within—"Succession Duty Act," R.S.B.C.* (1911), *c.* 217, *s.* 7, *as amended by* (*B.C.*) 1915, *c.* 58, *s.* 4.] Where a person domiciled out of the province of British Columbia dies leaving property both in and out of the province, the provincial authorities have the right, for the purpose of computing succession duty according to section 7 of the "Succession Duty Act," to take into account all the property.—Judgment of the Court of Appeal ([1919] 3 W.W.R. 76) reversed, Anglin and Mignault JJ. dissenting. MINISTER OF FINANCE OF BRITISH COLUMBIA *v.* THE ROYAL TRUST CO.... **127**

TEMPERANCE ACT—*Saskatchewan—Violation—Bribery—Cr. Code, ss.* 154, 157.............................. **175**
See CRIMINAL LAW 2.

TIMBER—*Right to cut—Immovable property—Valuation roll*................ **237**
See ASSESSMENT AND TAXES 1.

TITLE TO LAND—*Municipal corporation—Public road—Sidewalk—Prescription—Dedication—Servitude—Art.* 2193 *C. C.*] On an action *en bornage* instituted by the appellant, the respondent claimed the ownership of a strip of land, used as a sidewalk in front of the appellant's property, by virtue of documentary title, by dedication and by prescription of thirty years. The appellant denied the existence of the documentary title and urged that the respondent's possession was not unequivocal, alleging that, during that possession, the steps leading into his house encroached on the sidewalk, the cornices projected over it and the drain crossed the strip of land.—*Held*, Duff J. dissenting, that the corporation respondent is the owner of the strip of land.—*Per* Anglin, Brodeur and Mignault JJ. The encroachments alleged by the appellant did not have the effect of vitiating the respondent's title.—*Per* Duff and Brodeur JJ. A municipal corporation can acquire a public way by prescription. Mignault J. *dubitante*.—*Per* Anglin and Mignault JJ. The respondent became owner of the strip of land by way of dedication duly accepted—*Per* Duff and Brodeur JJ. The common law doctrine of dedication is not a part of the law of the province of Quebec. LORD *v.* VILLE DE SAINT-JEAN...... **535**

TRAMWAY—*Workmen's Compensation Act—Free transportation—Injury to employee—"In course of work"—Art.* 7321 *R.S.Q.* [1909]..................... **12**
See WORKMEN'S COMPENSATION ACT.

TRUSTEE—*Sale—Vendor or trustee—Rights of beneficiaries—Representation—Term "or thereabouts".*] The vendor may be a trustee for others of the money payable by the purchaser but his beneficiaries have no rights but those given by the contract and if, in carrying out the sale, the purchaser incurs a loss for which the vendor is liable it may be deducted from the purchase money.—In a contract for sale of a going concern the liabilities were stated to be $36,894, "or thereabouts."—*Held*, that an excess of $857 was too substantial to be covered by the qualifying expression.—Judgment of the Appellate Division (47 Ont. L.R. 265) reversed. BEATTY *v.* BEST......... **576**

VENDOR AND PURCHASER—*Mortgage—Mortgagee holding first and third mortgages—Foreclosure of first mortgage and sale of land—Recovery under covenant on third mortgage—Collateral security not discharged.*] The appellant, having purchased a property from the respondent, transferred to him, as security for the balance of the purchase price, a first and a third mortgage due by one Yandt upon another property; and, as collateral security, he also gave a mortgage on the property bought, payable at dates corresponding with the respective due dates of the above two mortgages. In course of time, the respondent obtained foreclosure under the first mortgage and sold the land. The appellant then claimed a discharge of the collateral mortgage.—*Held* that, notwithstanding the foreclosure of the first mortgage and the sale of the foreclosed property, the respondent could still recover under the appellant's covenant for payment contained in the third mortgage and the appellant was not entitled to the discharge of the collateral mortgage until the payment of the third mortgage.—Judgment of the Court of Appeal (12 Sask. L.R. 445; [1919] 3 W.W. R. 719) varied.

2——*Mortgage—Order allowing purchase by mortgagee—Execution for balance of claim—Foreclosure—"The Land Titles Act," (Alta.) S.* (1919) *c.* 37, *s.* 62*b*.] An order by which a mortgagee becomes the

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owner of the mortgaged land as purchaser at a named price with leave to issue execution for the balance of his claim, is not an order for foreclosure operating as satisfaction of the debt under section 62 b. of "The Land Titles Act" as amended by chapter 37 of the Alberta Statutes, 1919.—*Per* Sir Louis Davies C.J. and Idington and Brodeur JJ. (affirming the judgment of the Appellate Division).—Though the order should have been set aside and a proceeding *de novo* directed, the decision of the Appellate Division that, notwithstanding the terms of the order, the mortgagee may still pursue his remedy for the balance of his claim should not be disturbed, the question involved being one of practice and procedure.—*Per* Duff, Anglin and Mignault JJ. (Reversing said judgment)—The order should be set aside as the doctrines of equity in regard to mortgages preclude the making of an order which purports *uno flatu* to vest the mortgaged property in the mortgagee as purchaser free from all equity of redemption and to enforce the personal liability of the mortgagor for some part of the mortgage debt. A mortgagee cannot have both the mortgaged property and the mortgage money—*Per* Duff and Anglin JJ. The sale sanctioned by the order was not a sale of the land within the meaning of s.s. 2 of s. 62 of "The Land Titles Act" and the mortgagee is therefore prohibited by that section from issuing execution under his judgment on the covenant. The sale contemplated by the statute is a sale to a stranger, not to the mortgagee.—Judgment of the Appellate Division (15 Alta. L.R. 17; [1919] 3 W.W. R. 634) affirmed on equal division of the court. SAYRE *v.* SECURITY TRUST CO.............. **109**

3——*Judicial Sale—Taxes due—Fraud—Nullity—Municipal law—Practice and procedure—Irregularities—Arts.* 689 *and sef.*, 1043, 1045, 1591, 1701, 1709, 1710, 1851, 1967, 1983, 2017, 2161 (*i*) *C.C.—Art.* 748 *C.C.P.—Arts.* 373, 718, 723, 734, 735, 946, 955, 962, 998 *to* 1015 *M.C.*] In 1846, one O. became owner of a certain lot of land comprising two cadastral lots. In 1867, he bequeathed it to seven legatees who were thus joint undivided proprietors, one of whom was his daughter, D., owner of one-eighth of the property. In 1879, being indebted to the respondent, D. signed a deed of obligation in his

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favour and, as collateral security, D. transferred to the respondent all her rights in the above property. In 1899, the respondent obtained judgment for the amount then due which was never registered nor executed. The whole property was then assessed for taxing purposes under the name of "Estate O." without any objection on the part of the respondent who never concerned himself about the property. In 1902, the appellants, two of the legatees, purchased about the two-thirds of the shares of their co-legatees, with the exception of those of D. and others which they tried but failed to acquire. Up to two years previous to 1906, the municipal taxes had been paid, without the evidence showing positively by whom. In 1907, the taxes not having been paid for more than two years, the property was sold by the municipality and adjudicated to the appellants who were the only bidders. Two years later, they became absolute owners by virtue of a deed of sale from the municipality. In 1912, the respondent took an action to set aside the adjudication and the deed of sale, alleging fraud on the part of the appellants and also irregularities in the proceedings of the sale.—*Held*, Sir Louis Davies C. J. and Brodeur J. dissenting, that the appellants, as co-owners of the property, were not in law bound to pay the taxes or to give the respondent notice of the sale and that there was no fraud on their part in making use of the means of a sale for taxes in order to dissolve the undivided ownership.—*Per* Idington, Duff, Anglin and Mignault JJ. The first offer, even if the only one, made in a sale for taxes, is an "enchère" within the meaning of Art. 1001 M.C.—*Per* Idington, Duff, Anglin and Mignault JJ. The party owing municipal taxes is not deprived of the right to bid and be declared purchaser of the property sold by the municipality for the payment of those taxes.—*Per* Idington, Duff, Anglin and Mignault JJ. The property having been entered on the valuation roll under the name of "Estate O." without any objection by the respondent the sale ought to be considered as made *super domino.*—*Per* Idington, Duff, Anglin and Mignault JJ. The seizure and the sale of the goods and chattels of the party owing municipal taxes is not a preliminary condition to the sale of the immovable

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property, the provision of Art. 962 M.C. being permissive and not imperative.—*Per* Anglin and Mignault JJ. The respondent was not the "owner" of the eighth undivided part transferred to him by D.—*Per* Brodeur J. (dissenting). The evidence is sufficient to create the presumption that the appellants were in possession, if not of the whole property, at least of the seven-eighths part of it, and they were bound in the circumstances of this case to pay all the taxes due on it or to give notice to the respondent of the sale of the property for taxes due.—Judgment of the Court of King's Bench (Q.R. 30 K.B. 252) reversed. MUNROE *v.* LEFEVRE....................... 284

4——*Sale of land—Memo. in writing—Statute of Frauds—Additional terms.*] Pursuant to an agreement to purchase her property the vendor signed the following document: "Received from A. C. McKenzie the sum of two hundred dollars on the purchase of house No. 33, Spring Garden Road. Purchase price ten thousand five hundred dollars. Balance on delivery of deed." In an action by the purchaser for specific performance.—*Held*, that this document contained all the essential terms of a contract for the sale of land and complied with the conditions of sec. 7 of the Statute of Frauds. R.S.N.S. [1900] ch. 141.—It was contended that the time for completion of the purchase was a term of the contract and should have appeared in the written memorandum.—*Held*, that the finding of the trial judge that the time for completion was agreed on after the document was signed should be accepted and it was, therefore, not a term of the original contract but an arrangement for carrying it out.—*Per* Duff J. This defence was not pleaded nor submitted to the jury and, as a question of fact, could not be raised after verdict since it was not disclosed so as to challenge the attention of the plaintiff.—It was also alleged that the property sold was mortgaged and the purchase was only of the equity of redemption which the memorandum did not disclose.—*Held*, that the purchase was of the whole property and not of the equity of redemption only and that the contract contained in the memorandum could be worked out as if it provided for the mortgage. MCKENZIE *v.* WALSH.............. 312

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5——*Partnership—Sale of interest by one partner to the other—Oral agreement—Evidence—Statute of Frauds—"The Partnership Ordinance," N.W.T. Ord.* (1905), *c.* 94, *s.* 24.—*Held*, Duff J. dissenting, that, though the assets of a partnership include an interest in land, an oral agreement by one partner to buy out the other partner's interest in the partnership is enforceable and the Statute of Frauds is inapplicable in such a case, unless it be shown that there appears a "contrary intention" to the rule enacted by s. 24 of "The Partnership Ordinance" that "land" which has "become partnership property * * * shall * * * "be treated as between the partners * * * as personal or "movable and not real estate."—Judgment of the Appellate Division (15 Alta. L.R. 556) affirmed, Duff J. dissenting. LAVIN *v.* GEFFEN 356

6——*Sale of land—Agreement—Reservation of mines and minerals to Crown—Implied powers—Whether greater than those expressly reserved in Crown grant.*] The reservation, in a Crown grant, of the mines and minerals "with full power to work the same and for this purpose to enter upon and use or occupy the * * * lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals * * * " confers greater powers than those implied in a bare reservation in an agreement for the sale of the land so granted of "all mines and minerals." Sir Louis Davies C.J. and Idington J. dissenting.—*Per* Duff, Anglin and Mignault JJ. The terms of both reservations imply the right to win, get at and take away the minerals; but the terms of the reservation in the Crown grant may imply furthermore the right to cause subsidence or destruction of the surface.—Judgment of the Appellate Division (15 Alta. L.R. 194) reversed, Sir Louis Davies C.J. and Idington J. dissenting. FULLER *v.* GARNEAU.............. 450

7——*Action—Sale of land—Building restrictions—Conveyance by vendee—Breach by purchaser—Action by original vendor—Interest—Laches.*] A syndicate owning land conveyed it to P., one of their number, in trust to subdivide and sell. P. made several subdivisions and sold lots in one with a covenant by his grantees to erect only residential buildings. The grantees conveyed the lots to a church

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corporation who proceeded to build a church thereon. In an action by P., in his personal capacity, for an injunction and demolition of the church building.—*Held*, Brodeur J. dissenting, that P. had no interest to maintain the action having before the trial sold all his holdings in the subdivision containing the church. Brodeur J. held that he owned and continued to own one lot in the area affected by the covenant of P.'s grantees.—*Held*, also, per Idington and Anglin JJ., that as the injunction was not applied for until the church was practically completed P. was probably estopped by laches from bringing an action. PAGE *v.* CAMPBELL..... **633**

8——*Sale of land—Option under seal—Condition precedent—Specific performance* **439**

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WAIVER—*Insurance—Accident and guarantee—Breach of contract—Insurer's knowledge—Continuation of defence in action against insured—Waiver of condition—Estopped.*] The respondent held a policy of insurance in the appellant company to indemnify him against accidents to his employees. An employee was injured and brought action against the respondent. The appellant, in pursuance of a condition of the policy, assumed the defence. During the trial, the appellant learned, by the respondent's own admission, that the machine which caused the accident had been unguarded in breach of a condition of the application and of the policy. But the appellant continued the defence down to judgment awarding damages to the employee. The respondent brought this action to recover the amount paid by him. The appellant pleaded that owing to the respondent's breach of the condition of the policy, it was relieved from liability.—*Held*, that the appellant company, having assumed and continued the defence with knowledge of the fact that the machine was unguarded, waived any right to dispute liability under the policy for such breach of condition.—Judgment of the Court of Appeal (13 Sask. L.R. 405) affirmed. WESTERN CANADA ACCIDENT AND GUARANTEE INS. CO. *v.* PARROTT......... **595**

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See CRIMINAL LAW 2.

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"Of previously chaste character"..... **88**

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"Or thereabouts"................... **576**

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"Owner".......................... **237**

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See STATUTE 2.

WORKMEN'S COMPENSATION ACT—*Tramways Company—Free transportation—Injury to employee—Liability—R.S.Q.* [1909] *arts.* 7321 *& seq.*] The respondent, an employee of the company appellant, when injured, was returning from his work to his home in a tramcar on which he was entitled to be carried free under certain provisions in the company's regulations.—*Held*, that the respondent had a right to compensation under the Quebec Workmen's Compensation Act, as the injury was occasioned "by reason of or in the course of his work" within the meaning of article 7321 R.S.Q. (1909).—Judgment of the Court of Review (Q.R. 57 S.C. 394) affirmed. MONTREAL TRAMWAYS CO. *v.* GIRARD.............. **12**