REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

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1908.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Hon. Sir Charles Fitzpatrick C.J., K.C.M.G.

" Désiré Girouard J.

" Sir Louis Henry Davies J., K.C.M.G.

" John Idington J.

" James Maclennan J.

" Lyman Poore Duff J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Allen Bristol Aylesworth, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Jacques Bureau, K.C.

ERRATA AND ADDENDA.

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

Page 48, add foot-note "(1) Q.R. 16 K.B. 127," referring to report of the judgment appealed from.

Page 82, add foot-note "(1) Q.R. 16 K.B. 142," referring to report of the judgment appealed from.

Page 151, line 11, for "ch. 9" read "ch. 79."

Page 244, line 16, for "acqueduc" read "aqueduc," and add foot-note "(1) Q.R. 16 K.B. 101," referring to report of the judgment appealed from.

Page 258, at bottom of head-note, add "Leave granted to appeal to Privy Council."

Page 265, add at bottom of head-note, "Leave to appeal was refused by the Privy Council."

Page 312, add foot-note "(1) Q.R. 31 S.C. 469," referring to report of the judgment appealed from.

Page 323, add foot-note "(1) Q.R. 16 K.B. 178," referring to report of the judgment appealed from.

Page 336, add foot-note "(1) Q.R. 31 S.C. 370," referring to report of the judgment appealed from.

Page 340, line 14, for "and rent" read "of rent."

Page 365, add foot-note "(1) Q.R. 31 S.C. 273," referring to report of the judgment appealed from.

Page 390, at bottom of head-note, add "Leave granted to appeal to Privy Council."

Page 429, line 19, for "Cransworth" read "Cranworth."

Page 506, add, at bottom of head-note, "Leave to appeal to Privy Council granted."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOL. 38 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Bank of Montreal v. *The King* (38 Can. S.C.R. 258). Leave to appeal was refused with costs (31st July, 1907).

Day v. *The Crown Grain Co.* (39 Can. S.C.R. 258). Special leave to appeal to the Privy Council was granted (10th Dec., 1907).

Grand Trunk Railway Co. of Canada v. *Robertson* (39 Can. S.C.R. 506). Special leave to appeal to the Privy Council was granted (8th March, 1908). (See 50 Can. Gaz. 591.)

Hamburg-American Steam Packet Co. v. *The King* (33 Can. S.C.R. 252). The order granting special leave to appeal to the Privy Council (22nd July, 1903) (34 Can. S.C.R. vii.) was rescinded and the appeal was dismissed (28th July, 1906).

McNichol v. *Malcolm* (39 Can. S.C.R. 265). Application for leave to appeal to the Privy Council was refused (12th March, 1908).

McVity v. *Trahouth* (36 Can. S.C.R. 455). The appeal to the Privy Council was allowed and the judgment of the Supreme Court of Canada was reversed with costs (1908) A.C. 60; (3rd Dec., 1907).

Norton v. *Fulton* (39 Can. S.C.R. 202). Special leave to appeal to the Privy Council was granted (29th Oct., 1907). (See 50 Can. Gaz. 131.)

Polushie v. *Zacklynski* (37 Can. S.C.R. 177). The appeal to the Privy Council was dismissed with costs (1908) A.C. 65; (3rd Dec., 1907).

Red Mountain Railway Co. v. *Blue* (39 Can. S.C.R. 390). Special leave to appeal to the Privy Council was granted (50 Can. Gax. 544; 24th Feb., 1908).

Saint John Pilot Commissioners v. *The Cumberland Railway & Coal Co.* (38 Can. S.C.R. 169). Application for leave to appeal to the Privy Council was dismissed with costs (31st July, 1907).

Toronto Railway Co. v. *King* (not reported). The appeal to the Privy Council was dismissed with costs in the Privy Council and in the court below (Court of Appeal for Ontario), the cross-appeal, by the plaintiff, was allowed with costs, and a verdict for plaintiff, on the amended claim, ordered to be entered for $3,999 (50 Can. Gaz. 591; 13th March, 1908).

Toronto Railway Co. v. *City of Toronto* (37 Can. S.C.R. 430; (1907) A.C. 315). Application on behalf of the City of Toronto to have the terms of the judgment of the Privy Council modified was refused with costs (2nd July, 1907).

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CASES

DETERMINED BY THE

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ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

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

OLIVE VALIQUETTE AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

JOHN B. FRASER AND WILLIAM H. C. FRASER, TRADING AS FRASER & CO. (DEFENDANTS) ..... } RESPONDENTS.

1907

*March 25.
*May 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Construction of building—Contract for construction—Collapse of wall—Building not completed—Vis major.

Held, per Davies and Maclennan JJ.—The owner of a building in course of construction owes to those whom he invites into or upon it the duty of using reasonable care and skill in order to have the property and appliances upon it intended for use in the work fit for the purposes they are to be put to. Such duty is not discharged by the employment of a competent architect to prepare plans for the building and a competent contractor to attend to the work of construction.

Per Idington J.—The fact that the building is in an unfinished state may render the obligation of the owner towards a workman employed upon it less onerous in law than it would be in the case of a completed structure.

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

1907

VALIQUETTE v. FRASER.

Per Duff J.—Does the rule governing the duty of occupiers respecting the safe condition of the premises apply without qualification where the structure is incomplete and the invitee is engaged in completing it or fitting it for its intended use?

Per Davies and Maclennan JJ.—In the present case the failure to guard against the effect of a sudden storm of so violent and extraordinary a character that it could not have been expected was not negligence for which the owner was liable.

Judgment of the Court of Appeal (12 Ont. L.R. 4) and of the Divisional Court (9 Ont. L.R. 57) affirmed, Idington J. *dubitante.*

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment of a divisional court(2) in favour of the defendants, Fraser & Co.

The plaintiffs are the widow and children of J. S. Valiquette who was killed while working in a boiler-house under construction for Fraser & Co. by collapse of the walls owing to the roof having been blown off by a severe wind storm. The action was brought to recover damages from the owners and the contractor and in the courts below the owners were exonerated from liability.

J. Lorne McDougall, Jr. for the appellants, cited *Francis* v. *Cockrell*(3); *Hyman* v. *Nye & Sons*(4); *Heaven* v. *Pender*(5).

Shepley K.C. and *John Christie* for the respondents referred to *Indermaur* v. *Dames*(6); *Welfare* v. *London & Brighton Railway Co.*(7); *Pearson* v. *Cox* (8); *Broggi* v. *Robins*(9).

(1) 12 Ont. L.R. 4.
(2) 9 Ont. L.R. 57.
(3) L.R. 5 Q.B. 184, 501.
(4) 6 Q.B.D. 685.
(5) 11 Q.B.D. 503.
(6) L.R. 2 C.P. 311.
(7) L.R. 4 Q.B. 693.
(8) 2 C.P.D. 369.
(9) 15 Times L.R. 224.

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VALIQUETTE v. FRASER.

GIROUARD J.—The appeal should be dismissed with costs for the reasons given in the court below.

Girouard J.

DAVIES J.—I am not able to assent to the law laid down by Street J. in deciding this case to the full extent stated by him, and apparently followed by the Court of Appeal, though in the ultimate result I do not dissent from the conclusions reached.

Davies J.

I do not think there is any difference in the result whether the duty which the owner of a building or structure into or upon which he invites workmen or people to enter owes to such workmen or people may be said to arise out of contract or tort.

That duty, as defined in *Indermaur* v. *Dames* (1); *Francis* v. *Cockrell* (2); *Tarry* v. *Ashton* (3); *Marney* v. *Scott* (4), and other cases, seems to be that he is bound towards those whom he invites into or upon the building or structure to use reasonable care and skill in providing that the property and appliances upon it, which it is intended shall be used in any work, are fit for the purposes they are to be put to or used for. The owner does not discharge that duty by contracting with a competent workman to do the work for him. It is no answer in a case where such building or structure is found unfit, for him to say I am myself incompetent to do the work or to say how it should be built so as to make it fit and proper, and I have employed a person who is competent to do the work for me, and if he fails in the discharge of his duty I am not liable. This is not the law as decided expressly

(1) L.R. 2 C.P. 311.
(2) L.R. 5 Q.B. 501.
(3) 1 Q.B.D. 314.
(4) [1899] 1 Q.B. 986

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VALIQUETTE v. FRASER.

Davies J.

in the cases I have cited. In *Tarry* v. *Ashton*(1), Blackburn J. says at page 319:

> It was the defendant's duty to make the lamp reasonably safe; the contractor failed to do that and the defendant having the duty has trusted the fulfilment of that duty to another who has not done it. Therefore the defendant has not done his duty and he is liable to the plaintiff for the consequences.

The question is not one solely of the owner's competence or knowledge but whether the building work or appliances have been erected or provided with reasonable care and skill for the purposes intended. And the same rule must apply to an architect. It is not a question alone whether a competent architect was employed. The affirmative answer to that question would not of itself settle the liability of the owner any more than the affirmative answer to the question whether or not he employed a competent contractor. The ultimate question upon which the liability of the owner or occupier must rest is whether the building or structure was erected, or appliances were provided, with reasonable care and skill having in view the object and purpose for which they were intended and were to be used or applied. If that reasonable care and skill is shewn to have been wanting and to have been the cause of the injury complained of the owner cannot escape from liability by shewing simply that he employed a competent architect or competent contractor. As Sir Frederick Pollock puts it in the 5th edition of his work on Torts, at page 477, adopted by Bigham J. in his judgment in *Marney* v. *Scott*(1);

> The duty (of the owner or occupier) goes beyond the common doctrine of responsibility for servants for the occupier cannot discharge himself by employing an independent contractor for the

(1) 1 Q.B.D. 314. (2) [1899] 1 Q.B. 986.

maintenance and repair of the structure, however careful he may be in the choice of that contractor. * * * The structure has to be in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so.

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Davies J.

And see Addison on Torts, 8 ed. (1906), at page 722.

Compare on this point the judgments of this court in *Grant* v. *Acadia Coal Co.*(1); *McKelvey* v. *Le Roi Mining Co.*(2); *Canada Woollen Mills* v. *Traplin*(3).

The question then that seems to be for us to decide is whether or not the structure at the time it was blown down had been constructed with reasonable care and skill, having regard to its size, situation and intended purpose.

I have gone carefully through the evidence and find upon this crucial point a great difference of opinion between contractors and architects of great experience and reputation.

I have reached the conclusion that the storm of wind, call it cyclone, tornado, hurricane, or what you will, was of a very unique, severe and exceptional kind, confined to a narrow area and striking upon this building in its unfinished state with extraordinary force and fury.

The openings in the gable wall which first blew down, intended for doors and windows, were all open and unclosed and were being used in part to take into the building parts of the boiler and its appurtenances then being erected. I do not think that under the circumstances the failure to have these openings closed at the moment the storm struck the building necessarily indicated negligence as the sudden and extra-

(1) 32 Can. S.C.R. 427. (2) 32 Can. S.C.R. 664.
(3) 35 Can. S.C.R. 424.

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Davies J.

ordinary wind was not one of a character which should reasonably have been expected or guarded against.

I am not satisfied from a careful reading of the conflicting evidence that I could clearly find there was want of reasonable care and skill in the construction of the building and that this caused its destruction and the consequent loss of life.

I am rather inclined to hold that the cause of the disaster was the violent hurricane of an extraordinary kind which struck the unfinished building at a time when the opening for the windows and doors on the gable end were still unclosed, a condition which under the circumstances as I have stated already did not necessarily indicate actionable negligence.

I would therefore dismiss the appeal.

IDINGTON J.—I understand that a majority of this court, some for reasons of fact, and others of law, have come to the conclusion that this appeal should be dismissed.

I desire to say that in my opinion, if the findings of fact by the learned trial judge be correct, I have great doubt of the correctness of the result about to be arrived at.

It may be that the unfinished state of the building, to the knowledge of deceased, rendered the responsibility of respondents less onerous than in law it seems to be in the case of a completed structure into which the possessor invites others.

The stress laid upon the engagement of a competent superintendent in the place of an architect and competent contractors, does not seem to me warranted when we find the superintendent architect disclaiming

all responsibility for the connection between the steel and brick just where the weak spot proved to be in the building.

It can serve no useful purpose for me now to pursue the matter further than to express my doubt.

MACLENNAN J.—I concur in the opinion of my brother Davies.

DUFF J.—As the evidence does not entirely satisfy me that the collapse of the defendants' building was due to any want of care or skill in the construction or maintenance of it, I am unable to say that the case is within the operation of the rule expressed in the passage quoted from Pollock on Torts (7th ed.) at page 498, and relied on by Mr. McDougall; that passage, I think, correctly states the rule governing the duty of occupiers respecting the safe condition of completed structures ready for use and occupation; but I should require further consideration before deciding that it applies without qualification where the structure is incomplete, and the person injured is engaged either in the completion of the structure itself or in fitting it for its intended use.

Appeal dismissed with costs.

Solicitors for the appellants: *Latchford & Daly.*
Solicitors for the respondents: *Christie, Green & Hill.*

1907
*May 17.
*May 20.

RUDOLPHE TURCOTTE AND CHARLES DESJARDINS (DEFENDANTS) ..... APPELLANTS;

AND

CATHERINE RYAN AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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

Master and servant—Negligent driving—Horse owned by servant—Vehicle and harness owned by master—Duty of employee — Liability for damages.

T., an employee of D., while in discharge of the duties of his employment, driving his own horse attached to a vehicle belonging to his employer, who also owned the harness, negligently caused injuries to C., which resulted in his death. In an action for damages by the widow and children of C.,

Held, affirming the judgment appealed from (Q.R. 15 K.B. 472), that as the injury complained of was caused by the fault of the servant during the performance of duties in the course of his employment, the master and servant were jointly and severally responsible in damages.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Montreal, which maintained the plaintiffs' action with costs.

The defendant, Turcotte, was employed by the defendant, Desjardins, as a travelling clerk to take orders

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

(1) Q.R. 15 K.B. 472.

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for merchandise and, for this purpose, it had been agreed that Desjardins should furnish him with a vehicle and a harness which Turcotte used in the course of his employment, soliciting orders and delivering merchandise. This arrangement had been made, at Turcotte's suggestion, in order that he might not be blamed for driving his employer's horse at excessive speed.

While engaged in the course of his said employment, Turcotte was driving the horse and vehicle mentioned, at a trot, round the corner of two public streets in Montreal, and carelessly drove against one Callery, the deceased, who was in the act of crossing one of the streets, thereby causing injuries which resulted in his death.

In an action by the widow and two daughters of the deceased to recover damages against both master and servant, jointly and severally, they were successful in both courts below.

Descarries K.C. for the appellants. The death of Callery was not due to any fault of Turcotte, but resulted from his own imprudence and want of proper care in attempting to cross the street in front of the approaching vehicle.

The defendant, Desjardins, cannot be held responsible in damages for the act of his employee because, at the time of the injury, Turcotte was driving his own horse, the harness and vehicle being merely loaned to him, and he alone could be held liable, in case of negligence. See Beauchamp, Code Civil, art. 1053, No. 716; *Moffette* v. *Grand Trunk Ry. Co.*(1); *Brouillard* v. *Coté*(2); *Garand* v. *Allan*(3); Beau-

(1) 16 L.C.R. 231. (2) 15 R.L. 715.
(3) Q.R. 15 S.C. 81.

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dry-Lacantinerie, *n.* 2912, pp. 1140, 1141, 1142; Fuzier-Herman, art. 1384, *n.* 31, p. 1738; *n.* 53, p. 1739; Cass. 30 Oct., 1902.

Atwater K.C. and *Morrison* for the respondents. The defendant, Turcotte, was disobeying the city by-law No. 50, section 31, which declares that "No person shall drive any horse faster than a walk, when coming out of any cross street or court-yard into any of the main or leading streets, in the said city or *in turning any corner of a street in the same.*" He therefore, was guilty of gross carelessness; *Grand Trunk Railway Co.* v. *Hainer*(1); *Sault Ste. Marie Pulp and Paper Co.* v. *Myers*(2) *per* Taschereau C.J., at pages 28 *et seq.; Canada Atlantic Railway Co.* v. *Henderson*(3); *Halifax Electric Tramway Co.* v. *Inglis* (4); *Grant* v. *The Acadia Coal Co.*(5).

He was, at the time, in the course of his employment, and his employer is, beyond question, jointly and severally liable for the damages caused. Art. 1054 C.C.; 3 Beaudry-Lacantinerie, "Obl." *n.* 2911, pp. 1138, 1144-5; *Limpus* v. *London General Omnibus Co.*(6); *Joel* v. *Morison*(7); *Martin* v. *Temperley* (8); *Patten* v. *Rea*(9).

The judgment of the court was delivered by

THE CHIEF JUSTICE.—The appeal is dismissed with costs on the very simple ground that the accident was

(1) 36 Can. S.C.R. 180.
(2) 33 Can. S.C.R. 23.
(3) 29 Can. S.C.R. 632.
(4) 30 Can. S.C.R. 256.
(5) 32 Can. S.C.R. 427.
(6) 1 H. & C. 526.
(7) 6 C. & P. 501.
(8) 4 Q.B. 298.
(9) 2 C.B. (N.S.) 606.

caused, as found by the two courts below, through the fault of the defendant, Turcotte, when he was in the service of the other defendant, Desjardins, and during the course of his employment.

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TURCOTTE v. RYAN.

The Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *Cressé & Descarries.*

Solicitors for the respondents: *Morrison & O'Sullivan.*

1907

*May 7, 8.
*May 23.

SPENCER BROTHERS (SUPPLIANTS), APPELLANTS;

AND

HIS MAJESTY THE KING .....RESPONDENT.

Customs Act — Importation of cattle — Smuggling — Clandestinely introducing cattle into Canada—Claim for return of deposit made to secure release of cattle seized—Evidence.

APPEAL from the judgment of the Exchequer Court of Canada (1) by which the appellants' petition of right was refused with costs.

The petition of right prayed for re-payment to the suppliants of a sum of money deposited by them to obtain the release of a number of cattle seized for infraction of the "Customs Act" and held by the Crown as forfeiture. The questions raised on the appeal depended almost entirely on the proper conclusions of fact to be drawn from the evidence.

The Supreme Court of Canada heard counsel on behalf of both parties and reserved judgment. On a subsequent day the appeal was dismissed with costs.

Notes of reasons for judgment were delivered as follows:—

GIROUARD J.—I agree with the learned judge of the Exchequer Court. The appeal should be dismissed with costs.

DAVIES J. concurred in the dismissal of the appeal.

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

(1) 10 Ex. C.R. 79.

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SPENCER BROTHERS v. THE KING.

Idington J.

IDINGTON J.—I see no reason to complain of the methods by which the learned trial judge has arrived at his conclusions.

If the methods or mode of reasoning adopted by him be liable to produce results that would not be mathematically speaking exactly correct, he has allowed, or has at all events had, such a wide margin to spare that I see no reason whatever to doubt the absolute correctness of his conclusion.

In view of the heavy burthen of proof the law casts on the appellants, it would require, if not a clear mathematical demonstration, at least a great deal more cogent evidence than has been presented to us in argument, (and from the careful preparation thereof, no doubt all that could be presented has been presented,) to discharge that burthen and entitle us to set aside the conclusions of Mr. Justice Burbidge, supported as they are by a mass of evidence needless to dwell upon.

I think the appeal should be dismissed with costs.

MACLENNAN J. concurred in the dismissal of the appeal with costs.

DUFF J.—I have nothing to add to the reasons stated by Mr. Justice Burbidge, in the court below.

Appeal dismissed with costs.

J. Lorne McDougall and *Kilgour,* for the appellants.

Chrysler K.C. for the respondent.

1907

*Mar. 13-15.
*May 13.

THE ATTORNEY-GENERAL OF ONTARIO (CLAIMANT) ..... } APPELLANT;

AND

THE ATTORNEY-GENERAL OF CANADA (RESPONDENT)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Constitutional law—Liabilities of province at Confederation—Special funds—Rate of interest—Trust funds or debt—Award of 1870—*B.N.A. Act,* 1867, *ss.* 111 *and* 142.

Among the assets of the Province of Canada at Confederation were certain special funds, namely, U. C. Grammar School Fund, U. C. Building Fund and U. C. Improvement Fund, and the province was a debtor in respect thereto and liable for interest thereon. By sec. 111 of the B.N.A. Act., 1867, the Dominion of Canada succeeded to such liability and paid the Province of Ontario interest thereon at five per cent. up to 1904. In the award made in 1870 and finally established in 1878, on the arbitration, under sec. 142 of the Act to adjust the debts and assets of Upper and Lower Canada, it was adjudged that these funds were the property of Ontario. In 1904 the Dominion Government claimed the right to reduce the rate of interest to four per cent., or if that was not acceptable to the Province to hand over the principal.

On appeal from the judgment of the Exchequer Court in an action asking for a declaration as to the rights of the province in respect to said funds,

Held, affirming said judgment (10 Ex. C.R. 292), Idington J. dissenting, that though before the said award the Dominion was obliged to hold the funds and pay the interest theron to Ontario, after the award the Dominion had a right to pay over the same with any accrued interest to the province and thereafter be free from liability in respect thereof.

Held, also, that until the principal sum was paid over the Dominion was liable for interest thereon at the rate of five per cent. per annum.

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

1907

ATTORNEY-GENERAL OF ONTARIO v. ATTORNEY-GENERAL OF CANADA.

APPEAL and CROSS-APPEAL from a judgment of the Exchequer Court of Canada(1), declaring that the Dominion Government was entitled at any time to pay to the Province of Ontario the principal of the Upper Canada Grammar School Fund, Upper Canada Building Fund and Upper Canada Improvement Fund, and that until the same was paid the province was entitled to interest thereon at the rate of five per cent. per annum.

The action was brought on behalf of the Province of Ontario to recover from the Dominion of Canada the sum of $9,549.23 alleged to be payable to the province on the 31st of December, 1904, being one-half of one per centum interest on the capital of certain trust funds held by the Dominion and belonging to the province, such trust funds being known as:

The Upper Canada Grammar School Fund	$ 312,769.04
The Upper Canada Building Fund	1,472,391.41
The Upper Canada Improvement Fund	124,685.18
Total	$1,909,845.63

The province also asked for a declaration that the Dominion of Canada is not entitled, without the assent of the Province of Ontario, to make any alteration in or reduction from the rate of interest of five per centum per annum alleged to be payable upon such trust funds.

The Dominion of Canada by its answer denied its liability to pay the sum demanded and asked for a declaration:—

(1) 10 Ex. C.R. 292.

1907

ATTORNEY-GENERAL OF ONTARIO v. ATTORNEY-GENERAL OF CANADA.

1. That the Dominion is under no obligation to pay interest at the rate of five per centum per annum upon the said funds, but may reduce the interest to a lower rate; and

2. That the said trust funds may at the option of the Dominion be paid over to the province.

By an amendment to the statement of defence it was alleged on behalf of the Dominion that on the 29th day of December, 1903, the Minister of Finance of Canada, being the proper Minister of the Crown in that behalf, duly made a tender in writing to the treasurer of Ontario to pay the amount of the indebtedness due by the Dominion to the Province of Ontario in respect of the said trust funds; that the said tender was not accepted by the government of the Province of Ontario, whereby the Dominion became and was discharged from further payment of interest upon the said indebtedness.

The alleged tender was contained in a letter written by the Minister of Finance to the treasurer of Ontario on 29th December, and was as follows:

SIR,—The question of the rate of interest to be allowed and paid upon the amount in the hands of the Dominion belonging to the Provinces of Ontario and Quebec and known as trust funds, has been under consideration in my Department, and in this connection I beg to refer you to my letter of 28th April last.

The amount of these funds, in the case of Ontario is $1,909,845.63, embracing the Upper Canada Grammar School Funds, the Upper Canada Building Fund, and the Upper Canada Improvement Fund.

It has been decided to pay, on the 1st of January, 1904, the interest on these funds, at the rate hereto-

fore paid, namely, 5 per cent. After that date, interest at the rate of 4 per cent. will be paid until further notice, or until the principal of the funds is paid to Ontario in full. If this arrangement is not satisfactory to your government I shall be pleased to receive notice to that effect, whereupon arrangements will be made to pay off the principal sum at an early date.

The questions that are presented for solution are stated by the learned judge as follows:

1. Was the Dominion of Canada prior to the 31st day of December, 1904, under an obligation to pay to the Province of Ontario interest on the funds mentioned at the rate of five per centum per annum?

2. Had the Dominion the right at the date mentioned without the assent of the province, to reduce the rate of interest from five to four per centum per annum?

"3. Has the Dominion the right at any time to pay or hand over to the province the amount of such trust funds, with interest accrued thereon, in discharge of its obligations in respect thereof, both as to the principal and the interest?

"4. Was a good tender made to the province on behalf of the Dominion, before this action was brought, of the amount of such funds, so as to discharge the Dominion of any obligation theretofore existing to pay interest on such funds?"

The action was tried by Mr. Justice Burbidge at Toronto, on the 5th and 6th days of October, 1905, and the court was pleased to direct that the action should stand over for judgment and on 9th April, 1906, it was adjudged as follows:

1. THIS COURT DOTH DECLARE that the Dominion of Canada is liable under contract to pay interest on

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the trust funds referred to in the pleadings mentioned herein at the rate of five per centum per annum, so long as the Dominion of Canada retains the said trust funds and doth order and adjudge the same accordingly.

2. AND THIS COURT DOTH FURTHER DECLARE that the Dominion of Canada while retaining such funds is not entitled to reduce the said rate of interest thereon without the assent of the Province of Ontario, and doth order and adjudge the same accordingly.

3. AND THIS COURT DOTH FURTHER DECLARE that the Dominion of Canada may at any time pay or hand over to the Province of Ontario the said trust funds or any one of them with interest at the rate aforesaid then accrued thereon, if any, in full discharge of its obligation in respect to the said funds or any one of them as the case may be, and doth order and adjudge the same accordingly.

4. AND THIS COURT DOTH FURTHER DECLARE that the Dominion of Canada did not before action make to the Province of Ontario any sufficient tender of the said funds or any of them and doth order and adjudge the same accordingly.

5. AND THIS COURT DOTH ORDER AND ADJUDGE that the Province of Ontario do recover against the Dominion of Canada the sum of $9,549.23.

6. AND THIS COURT DOTH not see fit to make any order as to the costs of this action.

The Province of Ontario, by notice duly filed and delivered, has appealed, as dissatisfied with so much of the learned judge's decision, as appears on the third paragraph of the judgment as follows:

"That the Dominion of Canada may at any time pay or hand over to the Province of Ontario the said

trust funds or any one of them with interest at the rate aforesaid then accrued thereon if any, in full discharge of its obligation in respect to the said funds or any one of them as the case may be, and doth order and adjudge the same accordingly."

And the Dominion of Canada by notice of cross-appeal duly filed and delivered has appealed against so much of the learned judge's decision as appears in the first, second, fourth and fifth paragraphs of the judgment. Such notice specifying as follows:

"Take notice that upon the hearing of the claimant's appeal from the decision of the Honourable Mr. Justice Burbidge in this cause, delivered on the 9th day of April, A.D. 1906, the respondent intends to contend and insist that the said decision should be varied by striking out and vacating such parts of the said decision as adjudge and declare that the rate of interest payable on the funds in question is five per centum per annum and that the Dominion of Canada cannot retain such funds and reduce such rate of interest without the assent of the Province of Ontario and that the letter from Mr. Fielding to Mr. Ross, of the 29th day of December, 1903, did not constitute a good and sufficient tender and offer by the Dominion of Canada to the Province of Ontario of the funds in question, and that the province is entitled to recover from the Dominion the sum of $9,549.23 claimed in this proceeding, and the respondent intends to contend and insist that it should be declared that the respondent is under no obligation to pay interest at the rate of five per centum per annum upon the said funds, but may reduce the interest to a lower rate, and that this action in respect of the said claim for the sum of $9,549.23, being one-half of one per centum

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interest on the capital of certain trust funds, should be ordered to be dismissed.

By section 111 of the "B. N. A. Act, 1867," Canada became liable for the debts and liabilities of each province existing at the union.

By section 112 it was enacted as follows:

"112. Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the union sixty-two millions five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon."

"113. The assets enumerated in the fourth schedule to this Act, belonging at the union to the Province of Canada, shall be the property of Ontario and Quebec conjointly."

Schedule 4 referred to in the foregoing section is as follows:

"THE FOURTH SCHEDULE."

Assets to be the property of Ontario and Quebec conjointly.

Upper Canada Building Fund.

Lunatic Asylums.

Normal School.

Court Houses in Aylmer, Montreal and Kamouraska, Lower Canada.

Law Society, Upper Canada.

Montreal Turnpike Trust.

University Permanent Fund.

Royal Institution.

Consolidated Municipal Loan Fund, Upper Canada.

Consolidated Municipal Loan Fund, Lower Canada.

Agricultural Society, Upper Canada.

Lower Canada Legislative Grant.

Quebec Fire Loan.

Temiscouata Advance Account.

Quebec Turnpike Trust.

Education—East.

Building and Jury Fund, Lower Canada.

Municipalities Fund.

Lower Canada Superior Education Income Fund.

By section 142 of the above recited Act, it was further enacted as follows:

"142. The division and adjustments of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the government of Ontario, one by the government of Quebec, and one by the government of Canada; and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the government of Canada shall not be a resident either in Ontario or in Quebec."

In accordance with the last named section, arbitrators were chosen and on the third day of September, 1870, two of them, namely, Hon. John Hamilton Gray and Hon. D. L. Macpherson, September 3rd, 1870, gave their award in part as follows:

"V. That the following special, or trust funds, and the moneys thereby payable, including the several investments, in respect of the same or any of them are, shall be, and the same are hereby declared to be the

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property of, and to belong to, the Province of Ontario, for the purposes for which they were established, namely:

"1. Upper Canada Grammar School Fund.

"2. Upper Canada Building Fund.

"3. Upper Canada Municipalities' Fund.

"4. Widows' pensions and uncommuted stipends, Upper Canada, subjects to the payment of all legal charges thereon.

"5. Upper Canada Grammar School Income Fund.

"6. Upper Canada Improvement Fund.

"7. Balance of special appropriations in Upper Canada.

"8. Surveys ordered in Upper Canada, before 30th June, 1867.

"9. Amount paid and payable by Upper Canada to the Canada Land and Emigration Company.

VII.—That the Common School Fund, as held on the thirtieth day of June, one thousand eight hundred and sixty-seven, by the Dominion of Canada, amounting to one million seven hundred and thirty-three thousand two hundred and twenty-four dollars and forty-seven cents ($1,733,224.47), (of which fifty-eight thousand dollars ($58,000) is invested in the bonds or debentures of the Quebec Turnpike Trust, the said sum of fifty-eight thousand dollars being an asset mentioned in the fourth schedule to the British North America Act, 1867, as the Quebec Turnpike Trust), the sum of one hundred and twenty-four thousand six hundred and eighty-five dollars and eighteen cents ($124,685.18) shall be, and the same is hereby taken and deducted and placed to the credit of the Upper Canada Improvement Fund, the said sum of one hundred and twenty-four thousand six hundred and

eighty-five dollars and eighteen cents ($124,685.18) being one-fourth part of moneys received by the late Province of Canada, between the sixth day of March, one thousand eight hundred and sixty-one and the first day of July, one thousand eight hundred and sixty-seven, on account of common school lands sold between the fourteenth day of June, one thousand eight hundred and fifty-three, and the said sixth day of March, one thousand eight hundred and sixty-one.

"X.—That the Province of Ontario shall be entitled to retain out of such moneys six per cent. for the sale and management of the said lands, and that one-fourth of the proceeds of the said lands, sold between the fourteenth day of June, one thousand eight hundred and fifty-three, and the said sixth day of March, one thousand eight hundred and sixty-one, received since the thirtieth day of June, one thousand eight hundred and sixty-seven, or which may hereafter be received, after deducting the expenses of such management as aforesaid shall be taken and retained by the said Province of Ontario for the Upper Canada Improvement Fund."

Sir Æmilius Irving K.C. and *Shepley K.C.* for the appellants. The learned counsel dealt at length with the history of the respective funds in question on the appeal and the proceedings on behalf of the governments of Canada, Ontario and Quebec prior and preparatory to the arbitration of 1870.

These funds were held by the government of Canada in trust, first for the Province of Ontario and Quebec jointly and, after the award of the arbitrators finally confirmed in 1878 for the Province of Ontario alone. On the principal of these funds five per cent.

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interest has been paid to the province from Confederation up to 1904 when the Dominion government claimed the right to reduce the rate. This income from the funds has always been under the control of the provinces, subject, of course, to its disposition according to the conditions of the trust. The sole duty and obligation of the Federal Government was to pay the interest. As to the disposition of it that government had nothing to say.

Then the Province of Ontario and Quebec have always paid to the Dominion, under section 112 of "The British North America Act," five per cent. on the excess of the debt of the old Province of Canada over $62,500,000 at the union. That, we submit, is confirmatory of the principle laid down at Confederation as applicable to these funds.

Section 109 of "The B. N. A. Act" vests in the province all the property it owned at the union and it follows that the province must have the sole legislative control over it. That position has always been asserted by Ontario in respect to these funds and practically recognized by the Federal Government up to 1904.

Then the arbitrators who took the accounts between the Dominion and the Provinces of Ontario and Quebec up to 1892 allowed five per cent. on these funds the question of rate of interest having been especially submitted to them. We submit that that was a recognition of our legal position.

If the sole legislative control over these funds is with Ontario the Federal Government cannot, except with the concurrence of the Legislature, pay over the capital and so be relieved of its liability to pay this interest.

Newcombe K.C., Deputy Minister of Justice, and *Hogg K.C.* for the respondent. In their statement of claim the appellants base the right to receive five per cent. interest on these funds, first, on the fact that prior to the arbitration of 1870 the Dominion and the two provinces agreed upon certain principles and rules by which the arbitrators were to be governed, one of which was that the Dominion should pay said rate on the funds in question; secondly, that the award fixed the same rate as an obligation of the Dominion.

The correspondence does not establish this claim. One feature of it was that the Upper Canada Improvement Fund was to be paid in any case. It is said by our learned friends that that only applied to a small portion of the fund, but we do not so understand it. But as to all the funds the alleged agreement was only come to as governing the parties until the arbitrators should decide as to the ownership which the award eventually provided was in Ontario so far as these funds were concerned. Moreover, in a letter from Hon. Mr. Wood, treasurer of Ontario, to the Hon. Mr. Rose, dated 5th December, 1868, the writer states that it would be unwise for the province to commit itself to cast iron rules in the classification or allocation of the varied items of debt and credit, practically saying that they did not agree in the policy of settling rules at all. And in a subsequent document, described as a "memo, of an informal conference between the Treasurer of Ontario and the Minister of Finance" the former agrees to the Dominion retaining the funds "for the present" and paying five per cent. interest thereon. We submit that the meaning was that the award would determine the question.

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Then we come to the question of the right of the Dominion to pay over the capital of the funds when it is deemed expedient to do so. This question has been obscured by speaking of the funds as trust funds and the Dominion as a trustee. We submit that they were never held in trust. That it was always a debt due from the Dominion, and Ontario always treated it as such. Then, when the award finally affirmed in 1878, decided that these funds belonged to Ontario the Dominion government was in a position to pay its debt the creditor having been ascertained.

The learned counsel then dealt at length with the later arbitration dealing with accounts between the Dominion and the two provinces not settled by the award of 1870 and argued that two of the funds in question were not submitted in that reference and that the award determined nothing as to the matters in issue on this appeal.

Shepley K.C. was heard in reply.

Newcombe K.C. in reply on the cross-appeal.

GIROUARD J.—The appeal and cross-appeal should be dismissed for the reasons given in the court below.

DAVIES J.—For the reasons given by Mr. Justice Burbidge of the Exchequer Court of Canada in his judgment in this case, I am of the opinion that the appeal and the cross appeal should both be dismissed and the judgment below confirmed.

I only desire to add a few words upon the argument strenuously urged at Bar by Sir Aemilius Irving and Mr. Shepley with respect to the funds in dispute between the two Governments in this suit, that since

Confederation Ontario's sole right has been to receive interest at the stipulated rate and Canada's sole obligation has been to pay it, and that these relative rights can only be affected, altered or modified by concerted legislation on the part of the Dominion and the Province, and that in any case even if legislation was not necessary on the part of the Dominion, it was necessary on the part of the Province which could not, as I understand the argument, in its absence either enforce payment as against the Dominion or be compelled to receive the moneys in question by the Dominion.

I confess myself quite unable to follow this reasoning. I am in full accord with Burbidge J. in his holding that from Confederation until the validity of the award made by the arbitrators appointed under the 142nd section of the British North America Act, 1867, it was necessary that the Dominion should hold these funds. It could neither get rid of its statutory obligations with respect to them by voluntary payment or tender, nor could payment be enforced from it by suit. After, however, the validity of the award had been sustained, the right of the Province to demand payment and the correlative right of the Dominion voluntarily to pay over the monies seems to have become complete.

In my opinion these correlative rights and obligations are not dependent upon concerted legislation of the Parliament and Legislature or upon legislation by the province alone.

The rights and obligations arose out of the provisions of the British North America Act, 1867, and although while they were unascertained as to their extent and amount, they were incapable of being enforced or acted upon either by the Dominion or the

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province, the moment the award of the arbitrators defining and fixing their amount and extent was validated, that moment the rights and obligations of the Dominion and the province became capable of being exercised and enforced. The Legislature of Ontario could not by *ex parte* legislation prejudice the right of the Dominion to discharge its statutory liability and obligation with respect to these moneys, or alter its rights with respect to them in any way.

The liability was one created by Imperial legislation and completed and rendered definite and capable of being discharged by the award made pursuant to that legislation. The right of the Legislature of Ontario to deal with the funds themselves when paid over to the province even to the extent of modifying or altering the trusts which it is contended are impressed upon them, is not before us for consideration and is of course not dealt with by us.

The liability of the Dominion to the province with respect to these funds and their payment over when the amounts were ascertained and awarded is one entirely apart from and unaffected by the fact that the moneys were trust moneys and should be so treated by the province when received by it.

The old Province of Canada having disappeared at Confederation, and the two Provinces of Ontario and Quebec having been carved out of it, provision had to be made for the adjustment between the two newly created provinces of the debts, liabilities, assets, etc., of the late province. The mode adopted by the Imperial Act and the award following it and made in pursuance of it, was to treat these funds which really and practically existed as a matter of book-keeping only, as real and existing funds and as alike assets and liabilities of the late Province of Canada.

As a liability of course they added to the debt of the old province on which, beyond a fixed amount, the two new provinces had to pay interest to the Dominion at the rate of 5 per cent., and as an asset of the late province a special tribunal was created by the Act to adjust and divide them as well as other assets between the two new provinces. Pending the decision of this statutory tribunal the Dominion held the books of the late Province of Canada, and continued the accounts of the several special or trust funds and was contingently liable to account for them to whichever one of the two new provinces the arbitration tribunal determined and apportioned them.

That tribunal determined in the 5th paragraph of its award that the

> special or trust funds (now in question) including the several investments in respect of the same or of any of them should be and the same are hereby declared to be the property of and to belong to the Province of Ontario for the purposes for which they were established.

When that award was made and completed, the obligations and rights of the Dominion with respect to these moneys so far as the Province of Ontario was concerned, which previously had been uncertain and indefinite, became definite and certain. Its obligation to pay to Ontario the moneys of these funds if demanded became and was clear, and the right of the province to demand and receive them equally clear. No further legislation was in my opinion necessary either concerted as between the Dominion and the province, or by the Province alone, to enable the Dominion to discharge its obligations or the province to enforce its rights.

The Dominion was in no way or sense obliged to see to the execution by the province of the trusts impressed upon the moneys nor could it by legislation

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of its own in any way interfere in the matter. It had one clear duty and obligation, and that was to pay over to the province the moneys which had been awarded to it. That obligation could be discharged by the voluntary payment or tender of the moneys or by its payment if and when the province demanded it; and the right of the province so to demand or enforce the payment did not in any way depend upon further or other provincial legislation.

With respect to the question whether Mr. Fielding's letter to Mr. Ross of the 29th December, 1903, constituted a good and sufficient tender of the funds in question, I entertain grave doubts, but I am not satisfied that the judgment appealed from is so clearly wrong on the point as to justify me in voting to reverse it.

I would, therefore, dismiss the appeal and cross-appeal in both cases.

IDINGTON J.—In the province of Upper Canada there was set apart in the reign of his late Majesty George the III., a quantity of waste lands of the Crown for the endowment of grammar schools and also of a university.

Thereafter 2 Vict. ch. 12 passed by the Parliament of that province directed amongst other things the investment of the moneys derived or derivable from such source in the debentures of the province at six per cent. interest.

The provinces of Upper and Lower Canada were subsequently reunited by 3 & 4 Vict. ch. 35, of the Parliament of the United Kingdom of Great Britain and Ireland.

On the 18th September, 1841, the Parliament of

these united provinces repealed 2 Vict. ch. 12, above mentioned, but directed the investment of the moneys derived or derivable from above mentioned source to be invested in debentures. One section speaks of debentures of Upper Canada bearing six per cent. interest and the next of debentures without naming a rate of interest. These sections I refer to as obviously shewing that no particular rate of interest at that date formed an essential feature of the trust. Debentures of Upper Canada would no longer be available and I infer that the rate of interest for new investments of the fund was left for future conditions to determine.

16 Vict. ch. 186 of the Province of Canada repealed the last named Act and out of the same subject matters and other possible sources of a like nature created a fund to be called "The Upper Canada Grammar School Fund," which was to be invested in Government or other securities by the direction of the Governor in Council.

It may, to shew the spirit of this legislation, be noted before leaving, for the present, this history of the fund, that for a time the administration of the trust was confided to the Council of King's College.

Another fund was created by the Parliament of Canada at a later date, from entirely different sources, and designated "The Upper Canada building fund." This was directed by Consolidated Statutes for Upper Canada, 1859, ch. 70, sec. 3, to be invested by the Receiver-General under instructions from the Governor in Council in "Provincial Securities" and the interest on such securities to form part of the said fund.

This fund was primarily to be drawn upon to meet

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the expenses of building a lunatic asylum and then to defray the expenses of procuring a site for or of erecting any other public building in Upper Canada for any institution of general importance to the inhabitants of that portion of the Province of Canada.

This Act provided that such securities might be disposed of by the Receiver-General on the approval of the Governor in Council, and the proceeds applied to meet lawful payments out of the fund.

To appreciate the history of this fund and the bearing thereof on what ensued, we must bear in mind that though Upper and Lower Canada were united, yet the past history and the conditions of each, during the period from the Union of 1840 to the time of the Confederation of the provinces in 1867, was of such a nature as to render the united government and administration thereof in some respects substantially one of a dual character.

To compensate Upper Canada for the advances made to bring to a close the system of feudal tenures in Lower Canada, the Upper Canada building fund was used.

When we penetrate to the bottom we may be tempted to smile at the device adopted, and possibly needed, to reconcile one part of the common country to the payment made, to aid in sweeping away what was an obvious hindrance to the progress of another part, and incidentally to that of the whole.

We may even be tempted to think that this device was after all but a bundle of book-keeping entries. Yet it was a recognition and record to be borne in mind, and when separation came and Upper Canada became in regard to such matters an independent province, this setting apart of such fund was properly dealt with as a trust.

Another fund of $124,685.18 which was, by the Board of Arbitrators hereinafter referred to, set apart as part of a fund designated "The Upper Canada Improvement Fund," representing things and purposes that enured or were to enure to the benefit of Upper Canada, is also in question.

The next step in the history of these trust funds, first and secondly dealt with, appears in a report of the then Minister of Finance dated March, 1860, in the following language:

> By the assumption of the Provincial securities held by Trust Funds the Government have, as stated in the report of the Board of Audit, assumed these amounts as due to the funds by the Province and have thus cancelled so much of the debt, an arrangement more consistent with the actual position of these trusts and more correctly shewing the actual debt of the Province.

The report of the Board of Audit upon which the foregoing report proceeds, shews that there had actually been issued debentures to represent these two funds first named above, and that as a matter of convenience it was deemed better to destroy the securities, so far as consisting of provincial debentures, and credit the sums to the funds and pay interest thereon as a debt, in fact, of the province.

The report of the Board, somewhat inconsistently with the view taken by the minister, represents it as virtually a public debt; though not appearing so in the statement of affairs. I gather from what appears that the rate of interest had theretofore been six per cent., and for another year was continued at six per cent.

In 1861, the report of the Audit Board proposed that the rate be five per cent. as the then prevailing "public interest" instead of six per cent.

There does not seem to have been any legislation

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giving authority to do all this, or when done to confirm it.

Such, as far as I can see, was the position of matters when the British North America Act, 1867, was passed; and it was then found necessary to provide for the liabilities of the Province of Canada.

Section 111 of that Act provided that

> Canada shall be liable for the debts and liabilities of each Province existing at the Union.

Section 142 of the same Act provided as follows:

> The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one to be chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada; and the selection of the arbitrators shall not be made until the Parliament of Canada and the legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec.

Preceding the reference, thus provided for, a good deal of negotiation took place, and correspondence was had between the respondent's Minister of Finance and appellant's treasurer. Amongst other things, the respective rights of the parties hereto and the rates of interest to be credited appellants, in relation to the funds now in question, were discussed.

It was pointed out that what would in effect be a permanent annuity based on a five per cent. rate of interest might be agreed upon. It was pointed out by appellant's treasurer in answer thereto, that such an arrangement might not meet with the approval of the people of Ontario, and at all events, was *ultra vires* the powers of the Government.

Nothing came of these suggestions except to recognize for the time being five per cent. as the rate,

coupled with consents or rules to facilitate the work of the arbitrators. It is to be observed that though these rights were discussed, no question of a duty in the nature of a trusteeship on the part of the Dominion was then raised, as in later times.

The Board of Arbitrators appointed pursuant to section 142 of the British North America Act, 1867, heard the Provinces of Ontario and Quebec and on the 3rd September, 1870, awarded amongst other things, as follows:

> V. That the following special or trust funds, and the moneys thereby payable, including the several investments, in respect of the same of or any them are, shall be, and the same are hereby declared to be the property of, and to belong to, the Province of Ontario for the purposes for which they were established, namely:—* * * .

Amongst those trust funds, specified, are these in question herein. It seems to me that up to the making of this award there was only a general obligation created by section 111 of the British North America Act, 1867, and by this award it was reduced to a degree of certainty.

It might have happened that the arbitrators in the manifold adjustments possible between the Provinces of Ontario and Quebec might have determined in such a way as to wipe out any of these liabilities of the Dominion arising out of the existence of the two first created of these trust funds. If they had there would have been no help for it. Indeed the third of these now in question was created by this award. What then was prior to the award, or thereupon became, the legal relation of the parties in regard to these funds?

The Dominion claims it stood thereafter and stands now as a simple debtor to Ontario for certain

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specified sums of money and that it has a right to terminate instantly the relation by tendering the money.

The province denies this, and claims that until it gives consent the simple relation of debtor and creditor does not exist; a trusteeship existed and must remain so, coupled with an obligation to pay the rate of 5 per cent. interest as heretofore.

The appellant received from the respondent interest at the rate of five per cent. ever since Confederation (perhaps not up to the award as regularly and in settled form as after) upon the two first named, and since the award above mentioned, on all three of these funds until 29th December, 1903, without material objection on either side. What happened then was that the Minister of Finance on that date wrote the premier and treasurer of Ontario that it had been decided to pay on the 1st January, 1904, interest on these funds at the rate of five per cent., but after that date, interest at the rate of four per cent. would be paid, until further notice, or until the principal of the funds be paid to Ontario in full.

If that proposal should not be satisfactory to the Ontario Government arrangements would be made to pay off the principal at an early date.

To this the premier and treasurer of Ontario replied 6th January, 1904, denying the right of the Dominion to terminate its trusteeship by the payment over to Ontario of the trust funds in question, and that the five per cent. rate of interest could not be modified without the consent of Ontario, and suggesting a judicial determination be had of these questions.

Correspondence ensued on this subject between these ministers and those representing them, without much progress, until on the 13th October, 1904, the

solicitor for the Ontario treasury pointed out different methods of getting a judicial decision respecting the interest on these trust funds.

Nothing seems to have been agreed upon but the Dominion on the 1st of January, 1905, only paid at the rate of four per cent. instead of five per cent. as theretofore and hence this suit, begun immediately after.

The action was brought by appellants not only to enforce payment of the usual rate of interest which had been denied by the respondent, but also to have it declared that the Dominion is not entitled, without the assent of the Province of Ontario, to make any alteration in or reduction from the rate of five per centum per annum payable upon the trust funds in question.

Not having succeeded in obtaining this declaration in the court below, and that court having declared

> that the Dominion of Canada may at any time pay or hand over to the Province of Ontario the said trust funds or any one of them with interest at the rate aforesaid then accrued thereon, if any, in full discharge of its obligation in respect to the said funds or any one of them, as the case may be, and doth order and adjudge the same accordingly,

hence this appeal wherein we are limited to the express affirmation or denial, or affirmation of one and denial of the other claim, as thus stated.

It seemed to me at the close of the argument that the true ground upon which the Dominion might rest a claim and method it might adopt, had not been taken. I therefore asked counsel if we could go beyond either of the limits I have just stated, and was expressly answered by both sides, that it was not desired by either party that the court should do so.

It appeared and still appears to me that the rate of interest is the kernel of the whole matter in dispute.

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It is for that reason that I have traced the history of the funds, specially in relation to the question of interest.

If the appellants can maintain the proposition that the Dominion is bound to pay interest at the rate of five per centum per annum on these funds until Ontario directs otherwise, it means, under modern economic conditions, that an interminable annuity has been created, as the result of the history I have recounted, in favour of the appellant at the expense, to a very material extent, of the Dominion, without any consideration therefor, and without any contract therefor, either express or implied, and solely by and through a legislative accident.

Can this be? Can it ever have been intended that the substitution of one trustee or *quasi* trustee for another whose existence was terminated by this same Act that created the obligor and the obligation, should become bound to benefit the appellant thus at the expense of other provinces?

It seems unnecessary to labour with such a proposition.

Counsel for Ontario did not seem desirous of pushing their client's claim so far.

But why stop short of that if there is no relief for the Dominion save by the consent of Ontario?

If the province is entitled to exact five per cent. until its assent is given the position it holds is so clearly and so substantially advantageous to it that it may safely be assumed assent never will be given.

Any interpretation of section 111 that would be so strained as to produce results contrary to justice, and foreign to the probable intention of the parties to the compact, upon which the British North America Act,

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1867, rests, must be guarded against. The express language of the section will not justify such results.

Even if the section can be so read as to cast upon the Dominion at least the investment part of the burthen of executing the trust, as to which I express no opinion, surely that cannot carry with it unless expressly so declared the duty of finding an investment at five per centum per annum.

It formed no part of these trusts as originally constituted that the self-constituted trustee should pay five per cent. Their history shews no fixed rate of interest, save when Upper Canada issued debentures at six per cent., and by its legislation constituted King's College Council Managers of the Grammar School Fund for a short time and then directed investment in such debentures.

The interest varied from time to time. It was six, or five, or less, as accident of investment brought.

Officers of the Crown, without statutory authority therefor, fixed it at five per cent., because that was the then prevailing "Public interest."

Can the successor to such a trusteeship, even if we are to treat the Dominion as a trustee, be expected to find more than the market value of the money will bring? And bring by investment a trustee can justify?

Unless the trust can be clearly shewn to be by virtue of the terms of its creation one that must produce five per cent. to the *cestui que* trust and the liability thus created fall within section 111 as a liability to be met by the Dominion; or a contract can be shewn to so bind the Dominion; I fail to see any right the province has to claim five per cent. in perpetuity.

I would be disposed to think that a contract of that

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kind must be sanctioned by Parliament before it could bind.

I cannot find that there has ever been a contract express or implied binding the Dominion to pay five per cent. per annum in perpetuity.

Of course so long as the Dominion uses the money as has been done, and the user has not ceased, the rate must, if the principles that usually govern the conduct of ordinary trustees is applicable, be the legal rate of five per cent.

For these reasons I am unable to assent to declaring in this regard as the province has prayed for.

When we pass to the question of whether or not there has been created any contract express or implied of a less extensive purport, what do we find?

We have between these parties a relationship of nearly forty years' duration arising either contractually (if such relation could exist) or as a recognized mode, in accord with the creation of these trusts, whereby the Dominion was discharging a statutory obligation in regard thereto, by paying half yearly interest at the rate of five per centum per annum, recognized as binding by old Canada in administering the trust when the obligation of that province was transferred, and imposed upon the Dominion.

The principle that the reasonable expectations raised by a mode of dealing over long periods ought not to be disappointed, has found solution in many cases by the law imputing as part of the contract an obligation to continue until a definite time had been fixed by notice of the termination of the dealing fixing a time therefor either according to the expiration of what would be a reasonable time or a recognized legal period of time. Without discussing what would be a

reasonable time to be inferred here as part of the contract, I may point out that the Finance Minister evidently realized this principle and suggested six months hence from the time of notice. That notice he gave has failed and I think properly so. The correspondence since has furnished no substitution therefor, but ended in three days' notice. If the position declared in the court below be correct notice never was necessary. I cannot look at the matter so. I would not look at it so if similar questions had arisen, as arise here, between private individuals.

The necessity for clear, explicit notice is, I can see, much greater here where so large a sum of money and so important a trust and so many questions of a difficult character have to be considered and settled.

Moreover the constitutional principles that must be held to govern the conduct of the Ontario ministers in a matter of this kind rendered it impossible for them to deal with and determine what should be done on three days' notice, in relation to the acceptance or rejection of the proposal tentatively made by the Minister of Finance.

The province had, by 33 Vict. ch. 9, sec. 5, enacted what should be done with the income, but no similar or any provision ever appears to have been made for the corpus of these trust funds.

Assuming the Minister of Finance armed with the necessary Parliamentary authority to make such proposals, upon which the argument has not so enlightened us as to make his position in that regard clear beyond doubt, it seems to me his proposals must under such circumstances fail of present effect unless assented to by Ontario ministers authorized to deal with the matter as proposed.

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It was urged that these sums of money were and always had been from the time of the award in 1870 declaring the funds "to be the property of, and to belong to the Province of Ontario, *for the purposes for which they were established,*" simple debts due from the Dominion to Ontario; as if from a banker to his customer. Neither the history of the funds nor the respective character of the trusts first and secondly referred to, nor the language used can justify such an assumption.

These funds might well be, within the language of the award, the *property* of Ontario, yet held for that province in trust, for the purposes for which the trusts were established.

It may be but a form that the representatives of the people are asked to sanction every important step of ministers in the conduct of the business of the Crown but these forms, that seem to some but mere forms, to be set aside at will, are constituted law that bind ministers and Crown alike and have secured and still secure the liberties of the people.

The questions raised of what is meant by the terms of these trusts or either of them; the nature of the obligation resting upon the Dominion relative thereto by virtue of section 111 of British North America Act, 1867; the discharge of the Dominion from such obligation; the effect of the award in 1870, between the provinces in settling or solving that obligation; the determination of what the award means in using the words I have quoted; the want of some constituted authority on behalf of Ontario to receive and discharge and take charge of such a trust; are by the contentions of the respondent apparently of no consequence but to be solved by the treasurer or assistant-treasurer of On-

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tario or a marked cheque handed to him and which practically it is declared below it would be his duty to accept.

Matters of infinitely less importance than a combination of all these questions, raised as they are by the proposal of the Finance Minister, are daily deferred until the people have by their representatives passed thereon.

The minister who would have dared without the sanction of the legislature to have transferred and perhaps transformed trust funds that by the sanction of the Legislature had been administered for over thirty years in one way, that is by leaving the fund in a safe place beyond the personal control of any provincial minister, at interest, would I venture to think have deserved the censure of that Legislature.

It seems to me that until the province has in a proper constitutional method shewn it is ready to receive "for the purposes for which they were established" as awarded, the moneys thereby payable it could not claim from the Dominion such payment.

Until it does so the Dominion must, in my opinion, remain the custodian of these funds. What its duties may become merely as such, forms no part of this case calling for our decision.

The Upper Canada Land Improvement Fund is so different in origin and character that it may not stand on the same footing in this regard as the other funds.

They have all, however, been treated as regards the proffered payment as if one and the same and hence for the present must stand disposed of here in the same way.

I am therefore unable to uphold the declaration

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made in the court below and think the judgment in that regard should be reversed.

It is to be observed that the case presents many novelties. When the rights were created upon which the parties rest, there was no court to determine which might be right or wrong. When we look at it as a case of the Crown against the Crown it is anomalous indeed.

When we try to grasp the principles that must guide us we find those principles of law that govern individuals in their several relations in many respects apt for the purpose. They do not, however, cover the whole ground.

When we reflect for a moment, we find that to apply only these principles to the adjustment of the rights of independent provinces, or of an independent province and the Dominion, we find we are face to face with problems requiring other considerations and for which we have no precedent. If the ordinary constitutional principles we have been accustomed to deal with fail to cover the whole ground, when we seek for precedents amongst those who are governed by a federal system, and the fundamental principles of our English law, and have developed those principles and those of constitutional government in relation to the rights of federated states *inter se,* we are warned by the recent case of *Webb* v. *Outrim*(1) how much the Crown may stand for in our federal system.

I have, following the lines of argument before us, treated the matter in part as if in law there could be a contract, and as if in fact there were a contract, though obviously it is an assumption of the Crown, contracting with the Crown. I have reasoned as if

(1) [1907] A.C. 81.

there might be and as if there were a trust created in fact, and in law, and as if we could bring to and within our jurisdiction a partial supervision of the execution of such a trust.

In *Kinloch* v. *Secretary of State for India* (1) at pages 625 and 626, Lord Selborne explained and justified the application of the word "trust" in such a connection and drew the line between the lower trust that the Court of Chancery could administer and the higher which lies beyond its jurisdiction.

The Crown or Crown and the High Court of Parliament, must respectively, as occasion calls for, control and administer the so-called higher trusts, and may confide such part of the control or administration thereof as either or both may respectively see fit, in regard to such cases, to such authority as deemed fit.

The trusts in question here are clearly of these higher trusts, and we are given jurisdiction by the following section 72 of the Exchequer Court Act in R.S.C. 1906:

> 32. When the legislature of any Province of Canada has passed an Act agreeing that the Exchequer Court shall have jurisdiction in cases of controversies:—
>
> (*a*) Between the Dominion of Canada and such province;
>
> (*b*) Between such province and any other province or provinces which have passed a like Act;
>
> the Exchequer Court shall have jurisdiction to determine such controversies.
>
> 2. An appeal shall lie in such cases from the Exchequer Court to the Supreme Court.

And the same has also been enacted by R.S.O. 1897, ch. 49.

This section does not trouble with such difficulties as suggested above, but in a most drastic manner imposes on the court below and on us, the duty of set-

(1) 7 App. Cas. 619.

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tling the controversy whether arising from contract or trust. The principles upon which the administration of trusts proceed are better applicable to our settling the controversy than by acting upon a supposed contract of the Crown with the Crown especially as all that in fact appears to have the element of contract in it is applicable to solving the question, assuming we do proceed on the basis of a trust.

There has been no question raised, and the case was argued without reference to the peculiar features of the Crown's relation thereto which I have adverted to.

I think the cross-appeal fails. I do not think this a case for costs.

The appeal should be allowed without costs to the extent of rescinding para. 3 of the formal judgment of the court below, and declaring that the declaration asked for by the statement of claim cannot be made as asked.

MACLENNAN J.—I agree in the opinion of my brother Davies.

DUFF J.—I think the appeal should be dismissed. I agree with the reasons given by Mr. Justice Burbidge in the court below.

Appeal and cross-appeal dismissed without costs.

Solicitor for the appellant: *Æmilius Irving.*

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

THE SAINT LAWRENCE TERMINAL COMPANY (PLAINTIFFS) } APPELLANTS;

AND

JEAN BAPTISTE HALLÉ (DEFENDANT) } RESPONDENT.

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*May 13.
*June 24.

THE SAINT LAWRENCE TERMINAL COMPANY (PLAINTIFFS) } APPELLANTS;

AND

JOSEPH RIOUX (DEFENDANT) ..... RESPONDENT.

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

Title to land—Promise of sale—Entry in land-register—Tenant by sufferance—Squatter's rights—Possession in good faith—Eviction — Possessory action — Compensation for improvements — Rents, issues and profits—Set-off—Tender of deed—Restrictive conditions—Evidence—Commencement de preuve par écrit—Pleading and practice—Arts. 411, 412, 417, 419, 1204, 1233, 1476, 1478 *C. C.*

The appellants, plaintiffs, are the grantees of the lands in question, part of the Seigniory of Metapedia, the former proprietors of which had an agent resident in the seigniory, who administered their affairs there. It had been customary, on applications by intending settlers for the purchase of their wild lands, for this agent to take memoranda of their names and permit them to enter upon the lands, and this was done in respect to the lots in question and the applicants were allowed to hold possession and make improvements thereon without notice of any special conditions limiting the titles which might, subsequently, be granted to them by the owners. The defendants, respondents,

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

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acquired the rights of these applicants and, when the plaintiffs tendered deeds of the said lots to them, they refused to accept them on the ground that conditions were inserted which had not been stipulated for at the time of the original entries upon the lots and of which no notice had been given. In actions, *au pétitoire*, the defendants pleaded that their possession had been in good faith in expectation of eventually receiving titles without such restrictive conditions as were sought to be imposed and that, in the event of eviction, they were entitled to full compensation for the value of all necessary improvements made on the lands without deductions in respect of rents, issues and profits.

Held, affirming the judgment appealed from, the Chief Justice and Duff J. dissenting, (1) that the memordanda made by the agent were *commencements de preuve par écrit* and, having been followed by possession of the lots, were equivalent to a binding promise of sale without unusual conditions in limitation of any titles which might be granted; (2) that the entries made upon the lands, the possession thereof held by the defendants and their *auteurs* and the works done by them thereon could not be held to be in bad faith nor with knowledge of defective title; (3) that, under the circumstances and notwithstanding that the defendants had actual notice of prior title, the plaintiffs could not maintain actions *au pétitoire*, although they might be entitled to declarations in confirmation of the deeds tendered, if approved, and to recover the price of the lots; and (4) that the defendants could not be evicted without compensation for the full value of the necessary and useful improvements so made upon the lands with the knowledge and consent of the agent, and subject to being retained by the proprietors, without any deductions in respect of the rents, issues and profits derivable from the lands. *Price* v. *Neault* (12 App. Cas. 110) followed; *Lajoie* v. *Dean* (3 Dor. Q.B. 69) discussed.

Per Fitzpatrick C.J.—Under article 412 of the Civil Code of Lower Canada, the good faith of a possessor of land is dependent upon a grant sufficient to convey real estate or transmit an interest therein.

APPEALS from the judgments of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgments of the Superior Court, District of Rimouski, in two petitory actions for the recovery of two lots of land in the Seigniory of Metapedia, whereby it was declared that the plaintiffs, appellants, were owners thereof but that the defendants, respondents,

had made entries thereon and held possession thereof in good faith and that, before eviction therefrom, the defendants were entitled to compensation for the value of certain necessary and useful improvements made by them, respectively, upon the lots in question and which the plaintiffs were entitled to retain, and ordering that the plaintiffs should pay the costs of the actions.

The circumstances in each case are stated and the questions at issue on the present appeals are discussed in the judgments now reported.

Lafleur K.C. and *Peers Davidson K.C.* for the appellants.

G. G. Stuart K.C. and *Fiset* for the respondents.

THE CHIEF JUSTICE (dissenting).—This (Hallé's case) is an appeal from a judgment of the Court of King's Bench, Quebec, confirming a judgment of the Superior Court (Carroll J.) rendered in a petitory action brought to recover possession of a lot of land containing about 99 acres, and described in the declaration as lot 103 in the first range west of the plan of the Seigniory of Metapedia.

The lot in question forms a part of the Seigniory of Lake Metapedia at one time the property of King Bros, lumber merchants, who exploited it for the purposes of their business. The seigniory contained about forty thousand acres.

The judgment of Mr. Justice Carroll in the first court proceeds upon the principle that the respondent and his two predecessors Bélanger and Otis had been in possession of the lot from 1895, and had made sub-

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stantial improvements to the knowledge of the then owners and on a promise that a deed of sale would be given. I can find no evidence after a most careful examination of the record to support the finding that any promise was ever given to consent to a deed of sale except in so far as such a promise may be inferred from the conversation between Otis and Nolin, to which I shall refer at length hereafter, or that King Bros. had any knowledge of the fact that defendant or his *auteurs* were in possession of the lot in question.

Appellants say in their declaration that the respondent wrongfully and without any title took and obtained possession of the lot and has kept illegal possession of it, and pray deliverance of the land.

Respondent at first attempted by his plea to put in issue the validity of the appellants' title asserting a title in himself, but from this untenable position he was compelled to recede and he now relies upon the allegation that about 1895 one Otis having acquired, for the sum of $7, certain improvements made by one Laberge a squatter on the lot in question entered into possession and made substantial improvements with the consent of Nolin, the authorized agent of King Bros., and upon his undertaking that a deed would be given by his principal. From Otis through one Bélanger respondent claims to hold his title.

The appellants in October, 1902, bought the seigniory from King Bros., including the lot in question, by notarial deed duly registered. The respondent on the issues as we now have them claims no title to the land, but asserts that as possessor in good faith he has acquired the fruits and in addition is entitled to be reimbursed the value of the necessary improve-

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ments made by him. The judgment of the court below maintains the respondent's position and fixes the value of these improvements at $800. On this appeal there is no dispute as to this amount.

The only question to be determined here is as to whether or not the defendant, now respondent, has in the circumstances acquired the fruits and is entitled to retain possession of the property until reimbursed the value of the improvements made by him, he having been, as he pretends, a possessor in good faith; (arts. 411, 412 and 417, C. C.).

The solution of this question depends upon the character of the title under which the respondent possessed.

The Civil Code, art. 411, says:

A mere possessor only acquires the fruits in the case of his possession being *in good faith* * * *

And art. 417:

When improvements have been made by a possessor with his own materials, the right of the proprietor to such improvements depends on their nature *and the good or bad faith* of such possessor.

Art. 412:—

A possessor is *in good faith* when he possesses in virtue of a *title* the defects of which * * * are unknown to him.

I would observe that these articles are only cited in part and at the same time draw attention to what must evidently be an omission in art. 412. The word title is used alone and not *titre translatif de propriété* as in the corresponding article of the C. N. 550. Title which answers to *"titre"* means here a written or express grant which would convey property otherwise it would not be reasonably possible to assume it as the

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basis of good faith; *e.g.*, a deed of lease or of usufruct would be a title but not such as is contemplated by this article.

What is the character of the title required to enable the defendant to retain the fruits of the land and justify his claim to remain in possession of a property of which he is admittedly not the owner until paid the value of the improvements made by him.

Marcadé, (code civil), vol. 2, No. 550, art. 418:

> Le possesseur de bonne foi est celui *qui se croit propriétaire, et qui a un juste motif de se croire tel,* parce que sa possession repose sur un *titre qui lui aurait réellement transmis la propriété,* s'il n'avait pas été entaché d'un vice que ce possesseur ne connaît pas.

Laurent, vol. 6, No. 208:

> L'article 550 porte: "Le possesseur est de bonne foi quand il possède comme propriétaire, en vertu d'un *titre translatif* de propriété dont il ignore les vices. Il cesse d'être de bonne foi du moment où ces vices lui sont connus." De là suit que *la bonne foi du possesseur doit être absolue,* c'est-à-dire qu'il ne suffit pas de la croyance que l'auteur du possesseur était propriétaire de la chose qu'il lui a transmise, *il faut qu'il ignore tous les vices du titre en virtu duquel il possède.* La loi ne distingue pas, et il n'y avait pas lieu de distinguer. Pourquoi le possesseur gagne-t-il les fruits? Le motif juridique est qu'il est consideré comme propriétaire du fonds et par conséquent des fruits. Or, un propriétaire est certain de son droit, il le fait valoir contre tous. Le possesseur doit avoir cette même certitude; si non il ne peut être mis sur la même ligne que le propriétaire. *Dès qu'il y a lieu à doute, l'incertitude existe, et par conséquent la bonne foi légale cesse. Nous disons la bonne foi légale, car la loi la définit; il faut donc laisser de côté la notion ordinâire de la bonne foi, qui pourrait varier beaucoup d'après les sentiments et les idées, pour s'en tenir à la définition du code.*

Let us now examine the respondent's title which is printed at length on pages 13 and 14 of the case, and from which I make this extract:

> *Au vendeur (Belanger) appartenant ce que dessus vendu pour l'avoir acquis d'Eugène Otis* suivant acte de vente devant Mtre. M.P.

Laberge, notaire, le vingt-six décembre mil huit cent quatre-vingt-dix-huit, enregistré à Matane, sous No. 7447, Reg. A. vol. 8, *l'acquéreur devant s'acquitter envers les seigneurs de la dite seigneurie de tout ce qui pourrait leur être dû pour la concession de la dite terre.*

The vendor Belanger's title is printed on pages 14 and 15 of the case and there it is declared by Otis that he acquired *"par conventions verbales"* from King Bros. I quote the words:

Le dit immeuble appartient au vendeur pour *l'avoir acquis de messieurs King Brothers par conventions verbales* et l'acquéreur devra prendre à ses frais, un titre authentique des dits messieurs King Brothers, mais le vendeur ne sera pas tenu de payer aucuns arrérages d'intérêt sur le prix de vente dû aux dits messieurs King Brothers, s'il en existe.

Can it be seriously argued in the presence of these deeds that he, Hallé, was not aware from the day he purchased *of a defect in his title* (412 C. C.)? Did not elementary prudence suggest that he should then have approached the landlord to inquire about the *verbal title* which Otis claimed to have?

Defendant as witness, page 98, line 30, says:

Q. Vous avez dit que vous saviez que les MM. King attachaient certaines conditions à la vente, mais que vous ne saviez pas au juste quelles étaient ces conditions?

R. Oui.

Q. Vous êtes-vous jamais informé quelles étaient ces conditions?

R. Non.

Q. Jamais?

R. Non.

Q. *Vous n'êtes jamais allé voir les MM. King ni monsieur Nolin pour demander quelles étaient ces conditions?*

R. *Non.*

Q. *Vous avez pris possession du lot sans demander à personne?*

R. *Non, d'apres l'achat de mon contrat.*

Q. *Vous n'êtes pas allé plus loin?*

R. *Non.*

It is contended that the question of good or bad faith is one of fact and having been decided by two

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courts we should not disturb their finding. It is not a pure question of fact, but is a legal inference to be drawn from facts in evidence. In the case of *Mayrand* v. *Dussault*(1) we reversed the concurrent finding of two courts on a question of fact, and as was staed by their Lordships of the Privy Council in the very recent case of *Barrette* v. *Syndicat Lyonnais du Klondyke,* even if a mere question of fact, although the natural inclination of the court is to be guided largely by the opinion of the learned judge who tried the case there may be circumstances which justify this court in departing from it.

I might here observe that the question we are now considering has not been before this court to my knowledge for judicial determination, although the subject of many conflicting decisions in the Province of Quebec. The case gathers importance not only because the judgment to be rendered affects some twenty other cases which are depending upon it, in the Superior Court at Rimouski, but also because it will determine the rights of many large property owners in the Province of Quebec who are in the same position as the appellants. The conditions existing under the old seignorial system in that province has left the impression that large areas of land formerly held under seignorial tenure are still open for settlement to be occupied by any one who chooses to enter into possession and make the necessary improvements and pay rent as appears by defendant's evidence, page 93, line 6:

Q. Lorsque vous êtes allé vous établir à Cedar Hall et que vous avez acheté cette propriété de monsieur Bélanger saviez vous quels étaient les seigneurs de cette siegneurie-là?

(1) 38 Can. S.C.R. 460.

R. J'avais toujours entendu dire que c'étaient les messieurs King.

Q. Pouvez-vous dire à quelles obligations vous vous croyiez tenu envers les MM. King?

R. *Non, monsieur, je croyais qu'on pouvait avoir des obligations comme on peut en avoir dans les seigneuries ordinaires, payer les rentes de terre, c'est la seule chose que je pouvais croire.*

Q. Si d'autres conditions que celles que vous venez d'indiquer et que vous croyiez à cette époque-là être vos obligations vis-à-vis les MM. King, avaient existées, des obligations comme celles du contrat qu'on a voulu vous faire signer, quel aurait été, à cette époque, l'effet de ces conditions additionelles, si vous les aviez connues?

R. *Si j'aurais acheté? Je n'aurais pas acheté si je les avais connues.*

What are the facts? Broadly stated the respondent's contention is that his *auteur,* Otis, by verbal agreement *conventions verbales* acquired the property in question from the then owners, King Bros., in 1895 represented by their agent Nolin and through Belanger he is in Otis's right. It is, therefore, important to examine the exact nature of the agreement which is said to have been entered into between Otis and Nolin, for, although the respondent has, by reason of the sale by King Bros. to the appellants, lost his right to get a title, nevertheless the question of good or bad faith depends as to him on what occurred at that time. His title can be no better and he can put his case on no higher ground than Otis could if he was the respondent. It is not contended and there is certainly no evidence in the record to support such a contention that King Bros. were parties to or were ever in any way either before or after made aware of the alleged *conventions verbales* except in so far as they were bound by what Nolin did.

First, as to the character of Nolin's agency. Can it be said that he was empowered to bind his principal by a contract of alienation. Article 1703 of the Civil Code, last par.:

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For the purpose of alienation and hypothecation, and for all acts of ownership other than acts of administration, the mandate must be express.

No attempt was made to prove that Nolin was expressly authorized to sell property. It was not contended at the argument and no reference to any such power is to be found in the respondent's factum. The only evidence on this subject is to be found in the case at pages 65-66, when Nolin was examined by the defendant as his witness:

Q. C'est vous qui les représentiez (les MM. King) à Cedar Hall?
R. C'est moi qui étais gérant.
Q. *C'est vous qui aviez l'administration absolue des affaires, en bas?*
R. Oui.
Q. Vous ne voyiez jamais les MM. King en bas?
R. Oui, quelque fois, une fois ou deux par année.
Q. Ils ne demeuraient pas là?
R. *Non. Lorsqu'il s'agissait de vendre les terres c'est eux autres qui décidaient ça.*

It should be quite unnecessary to quote authorities to support the elementary proposition that an agent with the most general powers of administration cannot validly consent to a deed of sale. In a few lines Laurent, vol. 27, No. 426, states the doctrine:

Le mandataire général ne peut jamais aliéner les immeubles; les auteurs mêmes qui donnent le plus d'extension au pouvoir de l'administrateur lui refusent ce droit; cela est décisif.

Here we have the positive uncontradicted evidence of Nolin to the effect that he had no power to sell. He says, at pages 66-67

Q. Le fait d'entrer son nom sur cette feuille voulait dire seulement que si les MM. King se décidaient à vendre le lot, ça donnerait un droit de préférence?
R. Oui.
Q. Ca n'obligeait les MM. King à rien?

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R. Non, c'était à eux à décider cela. Ca c'était décidé par eux.

Q. *Vous n'avaiez pas le droit de vendre le lot?*

R. Non.

Q. Lorsque vous entriez le nom comme ça est-ce que celui d'ont le nom était entré savait qu'il avait à prendre un titre des MM. King et à payer?

R. Oui.

Q. Il ne payait rien pour faire entrer son nom?

R. Non.

Q. Etait-il entendu que ce titre devait être satisfaisant pour les MM. King?

R. Oui, ils devaient prendre un titre comme tous les autres.

No attempt was made to prove his authority *aliunde* and there is not a word of evidence that I have read to the contrary.

The respondent in his factum at page 6 says:

While it may be that in consequence of the respondent having no registered title derived from King Brothers he was unable to set up the defence, which proved successful in the case of *Price* v. *Neault* (1), as against the present appellant, it does not admit of doubt that he was a possessor in good faith, *if against the previous proprietors, namely, King Brothers, he would have been entitled to compel them to give him a title to the land.*

Can it be seriously argued that on the evidence just quoted Otis could force King Bros. on a direct issue between them to grant him a title ?

Admitting that article 1703 is to be ignored and that article 1730 would apply,

the mandator is liable to third parties who in good faith contract with a person not his mandatary, under the belief that he is so, when the mandator has given reasonable cause for such belief,

on the evidence in this record can it be said that the respondent comes within the meaning of that article and that King Bros. gave Otis reasonable cause to believe that Nolin had authority to make a contract of alienation. *Price* v. *Neault* (1) was relied on. In that

(1) 12 App. Cas. 110.

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case the respondent did not appear on the appeal and we therefore have the assurance that in accordance with the traditions of the Privy Council nothing was overlooked that could be invoked in the interest of the absent litigant. The facts in *Price* v. *Neault* (1) bearing upon the question of Beaudry's agency and his relation with his principal Price are stated by their Lordships at page 115:

But on a careful examination of the evidence, their Lordships think that Beaudry was empowered to bind his principal by a contract of alienation. In the letter of November, 1865, Beaudry is directed by David Price to inform the local public of the terms of sales, and Mongraine's letter of May, 1870, shews that this was done by notice at the church door. In the same letter David Price tells Beaudry that certain persons have applied to him for plots, and that he has referred them to Beaudry as his agent. The letter of Mongraine is an appeal to David Price to give him one of the plots on which he had entered and worked, in preference to a rival claimant, and David Price gives no answer except that Beaudry will do what is just. In his letter of the 5th of September, 1870, David Price instructs Beaudry to insert certain conditions "in all the sales that you effect."

In his letter of the 21st of September, 1872, David Price tells Beaudry not to sell land in range B without taking a specified sum at once, and gives him discretion to make other arrangements, it is not easy to say what, while the lots are unsold. Magnan, the municipal secretary and treasurer, who himself settled on a plot, improved it, and afterwards purchased it, being asked how the plaintiff proceeded to sell his plots says that it was through his agent Beaudry. This gentleman's evidence is of much weight as regards the course of business on the estate, because few of the neighbors could write, and he was chosen to write to Beaudry on their behalf. The postscript to Beaudry's letter of the 4th of August, 1876, is an illustration of what passed between them, and both Magnan and Beaudry say that communications in the same sense frequently took place. *In view of these letters from David Price and Beaudry's action upon them, which must have been known to his employers,* their Lordships have no hesitation in holding that Beaudry had authority to contract for alienation, though it is true that of the powers of attorney executed by the plaintiff, that which was given to David Price in January, 1866, expressly mentions sales, and that given to Beaudry in September, 1872, speaks only of general regulation and management.

(1) 12 App. Cas. 110.

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Where is the evidence in this case that at any time or on any occasion Nolin was held out by King as having authority to sell? Where is the letter from King; where is the conversation; what is the public act of Nolin or King which would justify such a conclusion? If such facts existed they should have been proved so as to bring this case within the rule of *Price* v. *Neault* (1).

In my opinion the case fails here because Nolin is not proved to have been an agent with power to make such a contract as that alleged to have been entered into with Otis, and the latter had no reasonable cause to believe that he had any such power.

Assuming that Nolin had some authority express or implied, let us now see what actually occurred in 1895 when Otis went to see him as he says to get permission to enter into possession of the lot, and as Nolin says to give his name so that he might have the preference if King decided to sell. There were three persons present at the interview, Otis, father and son, and Nolin. Here I give what occurred in their own words. Abel Otis, the father, at page 55, line 14:

Q. Après cela avez-vous fait quelque'autre démarche quelque part, avec votre fils?

R. J'ai été chez monsieur Nolin,—mon fils était jeune, il n'etait pas bien vieux, j'ai été avec lui après qu'il acheté pour faire mettre son nom, pour pas que personne ne vint à le déranger de son ouvrage.

Q. Vous êtes allé chez monsieur Nolin?

R. Oui.

Q. Qu'est-ce qu'il faisait monsieur Nolin?

R. C'était l'agent des messieurs King, de Cedar Hall.

Q. Vous étiez présent avec votre fils chez monsieur Nolin?

R. *Oui, j'étais présent avec lui pour faire mettre son nom, mon garçon a demandé de son nom dans le livre; de ce que j'ai pu comprendre il a mis son nom dans le livre.*

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Q. Combien y a-t-il d'années de cela?

R. Entre huit ans à neuf ans.

Being questioned later on as to the sale by his son to Belanger from whom the respondent bought he makes it clear that, as he understood what occurred, his son had not acquired the ownership of the property, page 58 of case:

Q. Ce que votre garçon a vendu c'est son travail?

R. Comme de raison, *il n'a pas vendu la terre, elle ne lui appartenait pas.*

Eugene Otis, the alleged purchaser, page 58, line 30, *et seq.*

Q. Avez-vous eu affaire à monsieur Nolin au sujet de cette affaire-là?

R. J'ai eu affaire lorsque j'ai été pour mettre mon nom, c'est tout; à part de cela je n'ai pas eu affaire.

Q. Vous êtes allé là avec votre père?

R. Oui.

Q. Que s'est-il passé?

R. J'ai demandé à monsieur Nolin de mettre mon nom sur la terre, il repondu oui, devant moi il ne l'a pas rentré ce n'est pas de ma faute.

Q. Que vous a-t-il répondu?

R. Il ma répondu que oui, qu'il le mettrait, mon nom.

Q. A-t-il été dit autre chose que cela?

R. Non, c'est tout ce que il m'a dit.

Again page 59, line 25:

Q. Lui avez-vous expliqué ce que vous aviez l'intention de faire?

R. J'avais l'intention de me mettre sur la terre pour y rester, pour me mettre habitant.

Q. Que vous a-t-il répondu?

R. *Il a dit * * * il ne m'a pas dit que je faisais bien, il n'a pas parlé, il s'est mis à sourir, il n'avait pas grand discours à faire avec moi.*

Q. Qu'avez-vous conclu des paroles de M. Nolin?

R. *Il m'a dit qu'il allait mettre mon nom, et c'est tout.*

Q. Vous avez pris possession du lot après ça?

R. Oui, je me suis bâti, j'ai travaillé à la terre, j'ai bâti une grange, j'ai fait un défriché, j'ai fait du serpé.

And on page 61, line 36:

Q. Ce que vous avez vendu à Bélanger, c'est la même chose?

R. *Oui, j'ai vendu mon travail seulement.*

Q. Lorsque vous avez fait entrer votre nom comme ça vous saviez qu'il fallait prendre un titre des MM. King?

R. Oui, je le savais.

And on page 62, lines 5 and 6:

Q. Vous n'avez jamais réclamé de titre de MM. King?

R. Non, je ne l'ai pas demandé, ils ne m'en ont pas donné non plus.

Raphael Nolin examined as defendant's witness, page 63, line 37:

Q. Est-ce que vous avez concédé le lot à Otis?

R. J'ai entré son nom dans mon petit livre *pour qu'il vint à avoir la préférence de prendre la propriété lorsque les MM. King se décideraient de vendre.*

Q. Que'est-ce que Otis vous a demandé en allant chez vous? Pourquoi allait-il chez vous?

R. Pour me demander à inscrire son nom sur ce lot là.

Q. Une fois leur nom inscrit dans le livre, pouvez-vous dire s'ils prenaient possession de leur lot?

R. Il y avait des fois qu'ils le prenaient; lorsqu'on s'apercevait de cela on leur disait de ne pas travailler sur le lot.

And on cross-examination at pages 66 and 67 he referred again to this interview:

Q. Le fait d'entrer son nom sur cette feuille voulait dire seulement que si les MM. King se décidaient à vendre le lot, *ça donnerait un droit de préference?*

R. Oui.

Q. *Ça n'obligeait les MM. King à rien?*

R. *Non c'etait à eux à décider cela. Ça c'était décidé par eux.*

Q. *Vous n'aviez pas le droit de vendre le lot?*

R. *Non.*

Q. Lorsque vous entriez le nom, comme ça est-ce que celui dont le nom était entré savait qu'il avait à prendre un titre des MM. King et à payer?

R. Oui.

Q. Il ne payait rien pour faire entrer son nom?

R. Non.

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Q. Etait-il entendu que ce titre devait être satisfaisant pour les MM. King?

R. Oui, ils devaient prendre un titre comme tous les autres.

From all that occurred on this occasion and assuming Nolin to have been the owner of the property in question, could he be obliged to grant Otis a title? I hold not.

It is impossible to find in what occurred the elements necessary to constitute a contract of sale, object, price, consent (art. 1472, C.C.), or a promise of sale. All that can be inferred was that Otis asked for permission to enter into possession of the lot, but that Nolin gave no formal consent to his doing so. It is in my opinion abundantly clear that both parties Otis and Nolin expected Otis would get a preference if the lot was sold, but that the Seigneurs King Bros. alone could decide whether or not the lot was to be sold, and they alone could give a title. It has been argued that because, following on the conversation, Otis's name was entered in a book improperly described as a *livre terrier* that he took possession of the lot and made improvements and paid the taxes he was entitled to a deed. In my opinion it is somewhat difficult to infer a contract to sell from the mere entry of Otis's name in such a book as the one produced here and described by Nolin as a mere memorandum book, and it is to be observed that Nolin denies all knowledge of Otis's possession, improvements or payment of taxes (page 64) and asserts that had he known Otis had any such intention he would have prevented him from giving effect to it.

In *Price* v. *Neault* (1) their Lordships at page 113 say:

(1) 12 App. Cas. 110.

The ground laid by the court for their decree is that the defendant and Perron were put into possession of the land, had possessed it for more than ten years, and had made substantial improvements within the sight and knowledge and with the consent of the plaintiff by means of his agents, and on a promise that he would consent to a deed of sale for the price of $150.

Their Lordships cannot find their way to the whole of the conclusion thus expressed. The transactions between Beaudry on the one hand and Ludger Neault and his successors on the other, rest entirely on Perron's evidence. It has been shewn under what circumstances Perron entered and made improvements. Translating his language freely, he proceeds thus: "I did not ask to buy the plot of Beaudry. I only asked him if I might work and build a flour-mill. I had bought the plot of Neault. I was bound to observe the conditions under which the plot had been sold to him, that is to say, Beaudry had to notify to Neault to come in and take up his contract. *I never asked Neault what price he was to pay to the plaintiff for the land. I did not exactly know the price at which the plaintiff was then selling those lands.* I did not know that there was a price fixed for all the lots of land of the said range B. north. I do not think that the price was the same for each of the lots. I expected to pay for the ground the price for which the plaintiff was selling his lands in that range. I thought that price was $1 per arpent. I never heard tell of it. I did not know it." *On that evidence it is difficult to say that there was any promise or contract as regards the purchase money.* The book kept by Beaudry has not been produced, nor does he give any such description of it as would justify their Lordships in inferring a contract to sell from the entry of a name. And there is even greater difficulty in fixing $150 as the price.

For over eight years Otis, Belanger and the respondent remained in possession of the property now in question with the full knowledge that they had no title, and without at any time during all that period making an attempt to get a title or making any inquiry as to the conditions of sale. They do not appear to have at any time inquired as to the price they were expected to pay. As each successive occupant acquired the improvements of his predecessor he got by his deed formal notice of the fact that he had no title, but now that it suits the respondent to give up the property of which he has been for all these years in

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illegal possession, he asks to be paid for his improvements made with timber cut on the defendant's property. Pages 97 and 98:

Q. *La partie principale de vos constructions a été prise sur le lot?*

R. *A part celui qui demandait à être varlopé et embouveté, qui a été acheté chez MM. Fenderson et chez M. Price à Amqui.*

Q. *Le reste est de votre lot?*

R. *Le reste a été pris sur la terre.*

In their factum the appellants conclude as follows:

The appellant on the other hand is not anxious to acquire the fruits of this man's toil either at a just valuation or for nothing. His chief aim is to keep his title clear and his lumbering interests free from molestation.

There can be no doubt that in the Province of Quebec because of the conditions existing there the courts have been astute, I do not say improperly, to construe article 412 broadly, but there has been considerable diversity of judicial opinion as the respondent makes abundantly clear by the numerous cases which he cites. *Ellice* v. *Courtemanche*(1); *Chinic Hardware Co.* v. *Laurent*(2); *Galarneau* v. *Chrétien* (3). Hard cases make bad law.

After they entered into possession the appellants on inquiry found that a large number of persons, about one hundred in all, were in possession of different lots in the seigniory without title from King Bros. They then offered to give titles to these different persons in all respects similar to those which their predecessors had been in the habit of granting and this has been made a grievance against them in this case,

(1) 17 L.C.R. 433. (2) 1 Rev. de Jur. 278.
(3) 10 Q.L.R. 83.

the contention being that they would not offer to give a title if they were not bound to do so as a result of what occurred between Otis and Nolin. The fact that Nolin was not the appellants' agent in any sense and that they could not be bound by what he did is of course overlooked.

I am disposed to take a different view of the appellants' conduct in the premises. Anxious to avoid litigation and assuming that the occupants had entered into possession as they alleged on the faith of an undertaking that a title would be given to them, although the respondent and his *auteurs* allowed some eight years to go by without as he admits having ever asked for a title, they offer to give him a deed in all respects similar to the one generally in use in the seigniory. This was refused on the ground that the condition were too onerous.

Hallé, page 100, line 30:

Q. La pensée de réclamer vos améliorations vous est venue seulement après l'action lorsque vous avez été poursuivi?

R. J'ai pensé, lorsqu'il ont commencé à me parler de signer un contrat, j'ai dit à ma femme et à n'importe quel autre, *j'ai dit que plutôt que de signer ce titre ils me paieraient mon ouvrage.*

In *Ainsworth* v. *Bentley*(1), Wood V.C. said:

A person might be willing to forego his rights and so avoid litigation; but, after the litigation, which he had shewn himself anxious to avoid, had begun the circumstances were altered and he surely should be allowed to insist on his rights to the utmost.

I fail to understand the principle upon which it is to be assumed that King Bros. were under any obligation to part with any portion of their property except upon such terms and conditions as they thought proper. This is not a case of expropriation, or compul-

(1) 14 W.R. 630.

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sory purchase, and the question of reasonable or unreasonable terms has no place here and should not have been considered. It is not alleged and I have not heard it suggested by any one that at any time the terms and conditions of the deed of sale which it is assumed Otis expected to get as the result of his conversation with Nolin were settled. Assuming an agreement to sell, a most violent assumption in the circumstances, if both parties were silent as to the conditions of sale then the legal inference is that the conditions would at most be such as were generally in force in the locality for lands similarly situated.

It has been suggested here, but not in the courts below, that the deeds offered by the appellants to the respondent is not in terms similar to those generally granted by the Kings. From this I most emphatically dissent. The undoubted indisputable facts are that previous to the bringing of the suit a deed was tendered to the defendant for signature as appears by protest on page 16 of the case where it is said that the deed contained the usual conditions admitted to be those generally found in all deeds in the seigniory. This deed the defendant refused to sign, not because the terms were different from those generally in force, but because these conditions were not satisfactory to him.

The same thing flows from the pleas to the action as appears by paragraphs 14, 15 and 16, where it is admitted that a deed was offered and the alleged ground for defendant's refusal to sign or accept was that the conditions were exorbitant. The witnesses Nolin, case page 53, and French, case page 42, both say that the deed offered to the defendant is in effect the same as those granted by King Bros. The defend-

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ant examined as a witness in his own behalf is questioned closely as to the conditions of the deed at pages 99 and 100 and did not even remotely suggest that the deed offered him in any way differed from that granted all the other *censitaires* by King Bros. And finally the judge who tried the case in his reasons for judgment at page 109 says:

> Ce document endossé "vente," et qui, suivant les *assertions de la demanderesse et la preuve, serait analogue à tous les titres qui ont été généralement signés* comporte vente du lot avec entr'autres les restrictions suivantes * * .

So that in my opinion this point is conclusively settled and at the argument here I assumed that this was admitted by counsel.

In my view the refusal of the respondent to accept the title offered to him greatly weakens his position.

If King Bros. were still the owners of the seigniory and had offered Hallé, the respondent, a title such as was generally used in the seigniory in 1895, at the time Otis took possession after his conversation with Nolin, could he, Hallé, refuse to take such a deed and say, "No, I will not take this deed, the conditions are too onerous. You must pay me for my improvements before you can get possession of your land." I can hardly conceive that such a position would receive the sanction of any court in this country. In effect that is what happened here. The plaintiffs are in a stronger position than King Bros., for as against them the respondent cannot claim a title as is admitted in his factum.

In the absence of an express agreement the most that Hallé was entitled to was such a title as was generally in use in the seigniory at the time Otis had his conversation with Nolin, and if he refused to take

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such a title, as he undoubtedly did, then he must be considered to be illegally in possession without a title and consequently in bad faith. Are the appellants to be penalized for having in the interest of peace agreed to give effect to an arrangement alleged by the respondent to have been made by their *auteurs,* but by which they were not legally bound? If it is urged that his case is a hard one to be ejected after all these years, the answer is that the fault is with himself as he might at the very outset before going into possession have made his position clear and certain by applying to the seignior to know what were the obligations towards them which he was assuming by the deed which he then signed, instead of taking for granted that he was merely obliged to pay rents, etc, as appears by his evidence already quoted. Having failed to do so he cannot now complain if he is made to suffer the consequences of his own negligence.

In the case of *Lajoie* v. *Dean*(1), page 71, Lajoie and his *auteurs* had been in possession of their property, made improvements and were entered on the valuation roll and paid taxes. The land was Government land intended for settlement, and those in possession were *bonâ fide* settlers; nevertheless Dorion C.J., found that in the absence of title they had not that good faith required by article 412 of the Civil Code, and while he declared they were entitled to be compensated for the improvements, obliged them to account for the rents and profits. That case is not, I admit, on all fours with this, but in view of the declaration made by the appellants in their factum that their sole desire is to settle the question of title and the conflicting jurisprudence in the Province of Que-

(1) 3 Dor. Q.B. 69.

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bec, I would be disposed in this case to follow that precedent, and while holding that the defendant does not come within the rule laid down in article 412, allow him compensation for his improvements to the extent of $800, and hold him accountable for the rents, issues and profits, and I would allow the appeal, each party paying his own costs.

(This opinion applies also to the appeal in Rioux's case.)

GIROUARD J.—This (Hallé's case,) is a petitory action, which, as I understand it, involves a mere question of fact decided by the district judge, Carroll J., and the court of appeal, Bossé, Blanchet and Lavergne JJ., and Lemieux and Cannon JJ., both *ad hoc,* and I would require a very clear case of error on their part to reverse their unanimous finding.

By his defence, the defendant admits the prior title of the plaintiffs, and consents that they be declared proprietors of the lot in question. But he claims that, as a possessor in good faith, before he can be forced to quit, he is entitled to the value of his necessary and useful improvements on the property, which have been allowed by both courts to the extent of $800, without any deduction for rents and revenues, art. 417 C.C. Mr. Justice Carroll and Mr. Justice Cannon have gone fully into all the details of this case, and the reasons they advance fully convince me that the judgment which is now attacked was the only one which could be rendered. As, however, we are far from being unanimous, and the case is an important one and affects many settlers of this same locality, I will give the grounds which induce me to concur in that judgment.

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The whole case turns upon the application of art. 412 of the Civil Code:

A possessor is in good faith when he possesses in virtue of a title the defects of which * * * are unknown to him.

The appellants contend that the respondent, admitting that he has no title, that is, as he explains, no notarial or authentic title, transferring the land, cannot be considered to be in good faith. In fact they look upon him in no more favourable position than a squatter. What are the facts?

Respondent purchased this lot of land on the 7th September, 1900, from one Bélanger, by deed of sale before Gagnon, notary public, duly registered in the registry office of the County of Rimouski, where the land is situated. He purchased not only the rights of said Bélanger, but the said lot—"une terre contenant trois arpents," etc., with all the buildings thereon erected. The vendor declares that he acquired the said land from one Otis by a notarial deed of sale of the 26th December, 1898, also duly registered. The only reference to the seigneurs, King Bros., is that the said purchaser undertook to pay everything that could be due to them for the grant of the said land, *"la concession de la dite terre."*

And if we refer to the deed of sale to Otis, we find that it was a complete sale that was intended of the said piece of land—*"une terre située en la dite paroisse,"* etc., and the vendor declares that the said land belongs to him for having acquired the same from Messrs. King Bros. *"par conventions verbales,"* and the purchaser agreed to obtain an authentic title from Messrs. King Bros. at his cost.

As stated in the latter deed, Otis knew that he

had no authentic title, but he considered that he had some title, and I believe he had, defective it is true, as it was not authentic and could not transfer the land against a third party having a title duly registered; but he had reason to expect that authenticity would some time follow.

About the year 1896 or 1897, Otis went to one Nolin, agent of the then seigneurs, King Bros., at Cedar Hall in the seigniory and near where the lot of land in question was situated, and according to the custom prevailing at the time, and authorized by the seigneurs, requested Nolin to put his name upon the said lot in the land-register, which he calls *livre-terrier,* and kept by him for the purpose of recording all applicants for lots of land, which had been properly surveyed. The book is produced and shews that the title of hundreds of settlers in that seigniory originated in that manner. The reason was very simple. There was no notary in the place, as explained by Nolin himself, and it might take several years, even as many as eight or nine, before one of the Messrs. King would go down with a notary to complete the title deeds.

Nolin says that until this deed was obtained no work could be done on the lots. The learned trial judge throws some suspicion upon this statement of Nolin. He calls it *"chose étonnante,"* and he is right in his appreciation. Nolin is contradicted by every witness who knows something about these transactions, and by the facts. Nolin does not recollect that he gave any warning to Otis, and the latter and also his father, who was with him, both affirm that Nolin did not make any prohibition; that if he had Otis would not have entered his name. And this is

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plain common sense. How could a settler wait seven or eight or nine years for a notarial title deed to work on his lot, if in the meantime he has to pay all the taxes, school and municipal, church assessments, the opening of roads and all municipal charges, as was done in this case and in all the cases? Nolin is also contradicted by the facts.

Otis and all the other settlers took possession immediately of their respective lots, their names were entered upon the municipal assessment rolls as proprietors, they built houses, some of them even two, erected barns and out-buildings, cleared the lands, put up fences, opened roads and ditches, and this to the knowledge of Nolin, who, as he says, never took the trouble to inquire who were so acting.

I look upon the entry in the land-register, followed by a complete possession with the knowledge and under the eyes of the local agent, as establishing between the seigneurs and the applicants for lots not only a *commencement de preuve par écrit,* but an implied promise of sale, which the seigneurs were bound to carry out whenever requested by the settlers. In such a case, as was decided by the Privy Council in *Price* v. *Neault*(1), if the settler refuses or neglects to come and pay the purchase money and take a title, the remedy of the seigneur is not a petitory action, but an action to have a title offered by him confirmed by the competent court of justice, and a condemnation for the payment of the purchase money.

The respondent, however, has decided not to take that position. He says to the appellants, "If you want your land, take it; you may be in the position of a third party who has acquired under a perfect title

(1) 12 App. Cas. 110.

duly registered; but pay me fully my improvements." Is he going to be deprived of such payment?

The respondent when he bought the lot was not moved by any spirit of speculation; he says he had made up his mind to become *"habitant"*; he took possession of the said piece of land immediately, commenced the enlargement and construction of buildings, the clearing of the land, building of fences, and making of other improvements; in fact, at the time of the institution of the present action, he had sixteen acres under cultivation and in consequence the said land had increased in value to the extent of the said $800, as found by the said courts.

The respondent never applied for a title from Messrs. King Bros. or their successors, but on the 16th June, 1905, the appellants tendered to him a notarial deed or title which he refused to sign because it contained conditions which he had not agreed to. These conditions appear on the face of the deed tendered; but it is sufficient to quote the summary which the trial judge made and which is translated in appellant's factum as follows:

"a. Prohibition to cut merchantable timber or pay $2 per arpent.

"b. A reserve in favour of the appellants of all land bordering on Lake Metapedia to a depth of 300 feet, and of all land bordering any river, stream or watercourse passing through the lot to a depth of 100 feet on each side.

"c. Reserve of all falls and water-powers with a right to the seller to take at any time any land necessary for the exploitation of such water-powers, at a price of $2 per arpent for uncleared land, and of $10 per arpent for cleared land.

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"d. Reserve of all merchantable timber except such as was necessary for the buildings and fencing and fire-wood of the purchaser.

"e. Right of the vendors to explore the land at any time without indemnity.

"f. Obligation of the purchaser to conform to the conditions and fulfil the obligations stipulated in the letters patent granting the seigniory. These are unspecified.

"g. Obligation on part of the purchaser to do all fencing between him and the vendor.

"h. Right of the vendors to assess on all lands sold by him in the seigniory all sums which he should be called upon to pay for municipal or school taxes or road work, *pro ratâ,* to the extent of land sold to each purchaser.

"i. Payment by the purchaser of all costs of survey, and obligation of the purchaser to furnish a registered copy of the deed of sale.

"j. Dissolution of the sale in the event of the purchaser failing to pay two consecutive instalments of the price, or if he should cut or remove any merchantable timber with the right in such event to the vendors to retake the land with all buildings and improvements without indemnity.

If King Bros. had never promised a title of the said land to the respondent, I cannot understand why the appellants, as their successors and without being asked to do so, should have made the said tender of a deed at $1 per acre or, in fact, of any deed. If they considered themselves bound to make a tender why did they not take an action to have the same declared good and valid, and force the defendant to take the

title they offered him and pay the price, that is $1 per acre? There is no dispute as to the price.

Nolin admits that that was the amount. At page 65 of the case, line 27, speaking of the lot in question, he says:

C'aurait été vendu une piastre de l'arpent, je suppose, comme les autres.

French, at pages 43, 45 and 46, says the same thing. At page 45 he says:

Oui, nous vendons le fonds de la terre pour une piastre de l'arpent; c'est comme cela qu'on fait les contrats, on vend une piastre de l'arpent et nous réservons le bois.

Were the said conditions reasonable? Are such conditions generally imposed by seigneurs granting concessions of land? Were they known generally in the seigniory of Metapedia owned by King Bros? Were they known especially to the respondent?

The appellants in their factum say that all the settlers accepted them with the exception of some 22, who have resisted and are to-day defendants in the Superior Court of the district to answer to petitory actions like the one in question in this cause. Moreover, that is only the saying of their agents, Nolin and French, and perhaps also their notary Laberge, but none of the settlers were examined to shew that they accepted those conditions because they understood that they existed from the beginning, or that, as a fact, any such form of deed with such conditions had been adopted by King Bros. at the time Otis entered into possession of the land. Judging from what the respondent swears, and his statement is not contradicted, they were all afraid of these new seigneurs. He says: *"Ils ont peur des seigneurs."* And no wonder when we see

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that, instead of making one test case which would afford only one appeal, we have before us two appeals entirely similar, and the counsel for the appellants admitted before us that there were many other cases pending in the first court. It is even not impossible that the present appeals will reach the Privy Council. No wonder, I say again, that these poor settlers were frightened.

The above officials, Nolin, Laberge and French, do not say that the above conditions were those imposed during the time of King Bros. French, at page 42 of the case, relied upon by the appellants, says that these conditions are to be found in all the titles which have been given for the lands in the seigniory, but he evidently refers only to the time that the appellants were landlords, because he knew nothing of what happened before. The same thing is to be said of Notary Laberge who received many deeds in favour of the settlers who submitted to the exactions of the Terminal Company; these deeds are all to the same effect, in the same form, and having the same conditions. In fact the notary had a printed form to that effect. Nolin, who should have known what form of deed was given in the time of King Bros., before Laberge was employed, and before the latter resided in the locality, who never mentioned to applicants for entries in the *livre-terrier* the conditions which regulated the grants, after looking at the form of deed tendered by the appellants to the respondent, says that it looks very much like the deeds granted by King Bros., but he is not sure.

Après examen (he says) je déclare que ce document, exhibit D du défendeur, m'a bien l'air pareil au titre que donnaient les messieurs King.

This statement was made by Nolin when he was recalled specially for the purpose, and was the strongest and only piece of evidence given by appellants on the point.

But suppose that Nolin had been positive that the deed offered to the respondent was just the same as those granted to settlers by King Bros., will that proof be sufficient? Will it be legal? Is it the best proof of which the case in its nature is susceptible, as required by article 1204 of the Civil Code? Why not produce one of the numerous deeds made by King Bros. to some of the settlers under similar circumstances, for instance, that of the 8th November, 1894, before Bérubé, notary, in favour of one Lefrançois, and duly registered as the registry certificate produced shews? It was easy for the appellants to get a copy of the said deed. The onus was upon them to shew that the conditions were the same. For these reasons I attach no importance to the testimony of Nolin, French and Laberge on the point now being discussed as to whether the deed tendered substantially conformed to those used on the seigniory in the time of King Bros.

But suppose we had such a proof before us, is it established that the respondent knew or ought to have known, or must be held to have known, anything of the said conditions? He swears he knew nothing about them, except one, that the seigneurs reserved to themselves the merchantable timber beyond the quantity required by the settler for his own use; but that did not trouble him as that timber had been already removed by King Bros., less a small quantity which he had a right to use. His ignorance of a condition would not, it is true, of itself justify his refusal of a

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deed, but the fact that such a condition was a usual and customary condition must be proved. If no evidence of any special conditions having been customary in the deeds given by King Bros. was given, then the only reasonable inference to be drawn is that there were no such special conditions.

Nolin says that all these conditions were known in the seigniory, but I am afraid his statement in this respect is still more astonishing than the other one that he prohibited all settlers from working on their lots until they got a deed. It is absurd to suppose that uneducated farmers would be able to recollect and talk among themselves of twelve complicated reservations, some obscure and contradictory, the effect of which would be almost to destroy their right of proprietorship. It is not surprising, therefore, that none of the settlers knew anything of those conditions except about the merchantable timber. That is all that the two Otis and the respondent knew. In fact the latter adds that when he bought the farm in question from his uncle Bélanger, he thought that he was buying the lots subject to the usual conditions in the ordinary seigniories, that is to say, that it was subject to the payment of such dues as might be payable to the seigneurs, or such additional conditions as may have been customary or expressly proved. The former is exactly what the deeds from Bélanger and Otis provide for and nothing else.

To resume, I have not a doubt in my mind that the respondent is a possessor in good faith by virtue of a title, the defects of which were unknown to him. These defects consisted in not having an authentic title, which is not the same as being without any title; so much so, that I believe the respondent having re-

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gard to the evidence in this case, could at any time have taken an action against the seigneurs King Bros. based upon the promise of sale, that is the *livre-terrier* and his possession, and demand that they be condemned to give him a title upon the tender of the purchase money, $1 an acre, and that in default of so doing, the judgment of the court should stand in lieu of the said title(1); *a fortiori,* he can demand the payment of the value of his improvements on the land before he can be evicted, without any deduction for the revenues he derived from the land, having made *les fruits siens* in consequence of his good faith(2).

I think this conclusion is supported by the decision of the Privy Council in *Price* v. *Neault*(3), and also by many other decisions of the highest courts of the Province of Quebec: *Stuart* v. *Eaton*(4); *Ellice* v. *Courtemanche*(5); *Joyal* v. *Deslauriers*(6); *Savoie* v. *Gastonguay*(7); *St. Pierre* v. *Sirois*(8); *Montgomery* v. *McKenzie*(9). In some of these cases, it was held that even a squatter was entitled to his necessary or useful improvements, if they were made to the knowledge, express or implied, of the local agent of the seigneurs, a point not, however,, involved in this case.

The decision of the court of appeal, delivered by Dorion C.J., in *Lajoie* v. *Dean*(10), is cited as being contrary to this jurisprudence. I think that this case is entirely different. The possessor or defendant was

(1) Arts. 1476 and 1478 C.C.
(2) Arts. 411, 417, 419 C.C.
(3) 12 App. Cas. 110.
(4) 8 L.C.R. 113.
(5) 17 L.C.R. 433.
(6) 34 L. C. Jur. 115.
(7) Q.R. 10 K.B. 459; 29 Can. S.C.R. 613.
(8) 6 Rev. de Jur. 431.
(9) M.L.R. 6 S.C. 469.
(10) 3 Dor. Q.B. 69.

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not the settler who had obtained a permit or location ticket or applied for one or for an entry in the *livre-terrier* of the seigneur; he had done nothing to give him some reasonable expectation that he will one day have a perfect title; he was in fact a mere squatter, and was allowed his useful improvements, less the fruits and revenues. Had he been, as in this case, a recorded settler upon the lot in question, Chief Justice Dorion would no doubt have arrived at a different conclusion, as he did in *Neault* v. *Price*(1), where he held that the seigneur was not entitled to the land, but only to compel the possessor to pass title to it and pay the price for it, a conclusion which the Privy Council approved of.

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

The same reasons for judgment apply to the appeal taken by the same appellants against Rioux.

Having arrived at this conclusion, I express no opinion on the point of jurisdiction raised by the respondent.

DAVIES, IDINGTON and MACLENNAN JJ. concurred with Girouard J.

DUFF J. (dissenting) concurred with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellants: *Davidson & Wainwright.*
Solicitors for the respondent: *Tessier, Fiset & Tessier.*

(1) 4 Dor. Q.B. 348.

THE CHICOUTIMI PULP COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM PRICE (PLAINTIFF) ..... RESPONDENT.

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*May 13, 14.
*June 24.

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

Appeal to the Court of King's Bench—Time limit—Appeal by opposite party to Court of Review — Arts. 957, 1203, 1209 C.P.Q.— Pleading and practice — Injunction — Discretionary order—Reversal on appeal—Possessory action—Trouble de possession— Right of action—Actio negatoria servitutis — Trespass—Interference with watercourse—Agreement as to user—Expiration of license by non use—Tacit renewal—Cancellation of agreement— Recourse for damages—Appeal as to question of costs only.

An appeal from a judgment of the Superior Court, rendered on the trial of a cause, will lie to the Court of King's Bench, appeal side, if taken within the time limited by article 1209 of the Code of Civil Procedure of Quebec, notwithstanding that, in the meantime, on an appeal by the opposite party, the Court of Review may have rendered a judgment affirming the judgment appealed from.

Although the granting of an order for injunction, under article 957 of the Code of Civil Procedure of Quebec, is an act dependent on the exercise of judicial discretion, the Supreme Court of Canada, on an appeal, reversed the order on the ground that it had been improperly made upon evidence which shewed that the plaintiff could, otherwise, have obtained such full and complete remedy as he was entitled to under the circumstances of the case. Davies and Idington JJ. dissenting, were of opinion that the order had been properly granted.

A possessory action will not lie in a case where the *trouble de possession* did not occur in consequence of the exercise of an adverse claim of right or title to the lands in question, and is not of a permanent or recurrent nature. Davies and Idington JJ. dis-

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

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senting, were of opinion that, under the circumstances of the case, a possessory action would lie.

P. brought an action *au possessoire* against the company for interference with his rights in a stream, for damages and for an injunction against the commission or continuance of the acts complained of. On service of process, the company ceased these acts, admitted the rights and title of P., alleged that they had so acted in the belief that a verbal agreement made with P. some years previously gave them permission to do so, that this license had never been cancelled but was renewed from year to year and that, although the privilege had not been exercised by them during the two years immediately preceding the alleged trespass in 1904, it was then still subsisting and in force, and tendered $40 in compensation for any damage caused by their interference with P.'s rights.

Held, reversing the judgment appealed from, Davies and Idington JJ. dissenting, that, as there had been no formal cancellation of the verbal agreement or withdrawal of the license thereby given, it had to be regarded, notwithstanding non user, as having been tacitly renewed, that it was still in force in 1904, at the time of the acts complained of and that P. could not recover in the action as instituted. The Chief Justice, on his view of the evidence, dissented from the opinion that the agreement had been tacitly renewed for the year 1904.

Per Davies and Idington JJ. (dissenting). As the appeal involved merely a question as to costs, it should not be entertained.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of His Lordship Mr. Justice Gagné, in the Superior Court, District of Chicoutimi, whereby the plaintiff's right to recover damages was reserved and an injunction made absolute in his favour with costs.

The circumstances of the case and questions at issue on the appeal sufficiently appear in the head-note and statements in the judgments now reported.

The dispositions of the formal judgments in the courts below, which are specially referred to are as follows:

GAGNÉ J. (8 mars, 1906).—"Considérant, etc., etc. "Maintient l'action en partie, rejette les dites

offres, ordonne à la défenderesse de cesser de troubler le demandeur dans la jouissance de son pouvoir d'eau et de son moulin ci-dessus mentionnés, et lui ordonne de cesser d'envoyer et de laisser tomber dans la dite rivière Chicoutimi des écorces, sciures de bois et autres déchets, et d'obstruer par les dites écorces et autres déchets, le pouvoir d'eau, le canal et le moulin du demandeur, le tout avec dépens, réservant au demandeur son recours pour tous dommages qu'il peut avoir soufferts, à raison des faits dont il se plaint; et adjugeant sur la requête pour injonction, maintient la dite requête, déclare l'injonction émanée en cette cause perpétuelle et finale, et ordonne à la défenderesse, à ses officiers, représentants et employés de cesser d'envoyer et laisser tomber dans la rivière Chicoutimi des écorces, sciures de bois et autres déchets, et d'obstruer par les dits déchets le pouvoir d'eau, la chaussée, le canal et le moulin du dit demandeur, avec dépens," etc.

COUR DE REVISION (31 mai, 1906).—"La cour, après avoir entendu les parties par leurs avocats sur le mérite en cette cause en conséquence de l'inscription en revision faite de la part du demandeur, examiné le dossier de la procédure et sur le tout mûrement délibéré:

"Confirme le jugement rendu par la cour supérieure siégeant en la ville de Chicoutimi, pour le district de Chicoutimi, le huitième jour de mars mil neuf cent six, en ce qui concerne le recours en dommages réservé au demandeur, avec dépens de la revision contre le demandeur en faveur de la défenderesse; et la cour donne acte à la défenderesse de sa déclaration qu'elle n'acquiesce pas au jugement relativement à l'action possessoire et à l'injonction."

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COUR BANC DU ROI (6 dec., 1906).—

"Considérant que la demande en injonction du demandeur intimé est bien fondée, et qu'il n'y a pas erreur dans le jugement de la cour de première instance qui l'a maintenue;

"Considérant que le demandeur, intimé, ayant inscrit en revision afin d'obtenir une adjudication sur sa demande en dommages qui avait été réservée l'appelante (intimée en revision) s'est opposée à la modification du jugement;

"Considérant que la cour of revision siégeant à Québec a, le 31 mai dernier, (1906), confirmé le jugement de la cour supérieure en ce qui concerne le recours en dommages réservé au demandeur et a simplement donné acte à l'appelante de sa déclaration qu'elle n'acquiesçait pas à ce jugement quant à la demande au possessoire et à l'injonction;

"Considérant qu'aux termes de l'article 1203 C.P.C. ce jugement de la cour de revision est devenu celui de la cour supérieure, qu'il remplace absolument, et que l'inscription en appel ne fait aucune mention de ce dernier;

"Cette cour rejette l'appel avec dépens contre l'appelante, savoir l'appel du jugement final rendu par la cour supérieure à Chicoutimi le 8 mars dernier. (1906)."

Belleau K.C. for the appellants.

G. G. Stuart K.C. for the respondent.

THE CHIEF JUSTICE.—The respondent, plaintiff in the court below, brought an action in the Superior Court at Chicoutimi against the appellants, in respect

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of interferences with his rights, alleging that he and his predecessors had been for a great number of years in possession as proprietors of a water-power on the Chicoutimi River; that the defendants, now appellants, owned and operated a large pulp-mill situated a short distance above on the same river in connection with which they used several machines known as barking mills; that the refuse from these machines, consisting of bark, sawdust, etc., was dumped into the river and thence carried by the current into the flume and cistern of his mill thereby injuring the power, mill, and machinery, and generally causing the plaintiff damages for which he claims in compensation $2,000.

To this action the defendants filed a plea admitting the plaintiffs' title to the water-power alleged to have been interfered with and denying that they ever at any time claimed any right or title to the use or possession of any portion of it; and they alleged affirmatively that such refuse as did get into the river was put there as the result of a misunderstanding; that during previous years an agreement existed under which the bark and sawdust were thrown into the river and that portion that reached the plaintiff's premises was under agreement removed by the latter at the defendants' cost, and they undertook to prevent in future a recurrence of the trespass complained of.

An interlocutory injunction was applied for and granted when the action was first launched.

As I read the pleadings and evidence the plaintiffs' title was not in dispute. The trespass complained of is proved as is also the agreement alleged by the defendants to have existed during previous years. I do not find evidence to support the allegation that this

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agreement was renewed for 1904, and the evidence that defendants continued to dump their refuse into the river after being notified that the agreement was at an end in my opinion is far from conclusive.

A preliminary question of procedure raised for the first time by the judges in the court of appeal, though not argued there as stated by the appellants in their factum, is pressed on us here. I give the facts as they appear by the record.

In the Superior Court the plaintiff's pretensions were maintained except as to his claim for damages for which his recourse was reserved. The interlocutory injunction was declared permanent and the possessory conclusions of his declaration maintained. Both parties deeming themselves aggrieved by the judgment appealed, the respondent to the Court of Review and the appellants to the Court of King's Bench, as each had under the Quebec Code of Procedure the right to do. The case came on for hearing in review first and then the defendants made this formal declaration:

> Aussi sans aucunement acquiescer au jugement de première instance dont nous entendons appeler, en ce que nos offres auraient dû être déclarées valables, en ce que l'action comme l'injonction auraient dû être renvoyées avec dépens, nous soumettons humblement que le présent appel du demandeur doit être rejeté avec dépens.

The Court of Review held unanimously that as to the damages, which was the only point submitted, the judgment of the Superior Court was right. Then the appellants here, who had succeeded in review, being within the delay prosecuted their appeal to the Court of King's Bench and the majority of that court held that the injunction had been properly granted, but

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they said that the appellants should have appealed from the judgment of the Court of Review which had become, under article 1203 of the Code of Procedure, the judgment of the Superior Court. As I understand the *considérants* of their Lordships' judgment they contend that the judgment from which the appeal should have been taken was the judgment of the Superior Court sitting in review and not the judgment of the Superior Court sitting as the court of first instance, although both are absolutely the same in so far as the "*dispositifs*" go. In review the judgment of the Superior Court is confirmed purely and simply, and the technical point raised in appeal was merely as to the date of the judgment from which the appeal was taken. When, as I said before, the judgment was rendered in the Superior Court both parties had the right to appeal *instanter* from that judgment either to the Court of Review or the Court of King's Bench. One appeal must be taken within eight days and the other can be taken at any time within six months, but if at once after judgment rendered both parties appealed as they subsequently did, one to the Court of Review and the other to the Court of King's Bench, the judgment appealed from would necessarily have been the judgment of the Superior Court of date 8th March, 1906, and because by the judgment of the Court of Review that judgment must thereafter bear a different date, though it remained the same in substance and form, the appeal, in the opinion of their Lordships, must be refused. In this highly technical view I cannot concur.

It would be interesting to know what the position would be if in this case the judgment of the Court of Review had not been rendered until after the expiration of the six months within which the de-

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fendants were obliged to take their appeal. Which would then be the judgment appealed from, or when would the delay of six months expire?

Now, as to the merits.

By the judgment below the injunction was maintained, the conclusions of the possessory action were granted and the recourse of the respondent for the damages he alleges to have suffered is reserved to him.

I am of opinion that the injunction should not have been granted and that the possessory conclusions of the action should have been dismissed; and I would reform the judgment below to that extent and reserve the right of the respondent to claim such damages as he may have suffered, the two courts below having concurred in the opinion that on the pleadings and evidence it is impossible to determine the quantum of damages.

Article 957 Code of Procedure:

> Any judge of the Superior Court may grant an interlocutory order of injunction in any of the following cases:
>
> 1. At the time of issuing the writ of summons:
>
> *a.* Whenever it appears by the petition that the plaintiff is entitled to the relief demanded, and that such relief consists, in whole or in part, in restraining the commission or continuance of any act or operation, either for a limited period or perpetually:
>
> *b.* Whenever the commission or continuance of any act or operation would produce waste, or would produce great or irreparable injury;
>
> 2. During the pendency of a suit:
>
> *a.* Whenever the commission or continuance of any act or operation during the suit would produce waste, or would produce great or irreparable injury;
>
> *b.* Whenever the opposite party is doing or is about to do some act in violation of the plaintiff's rights, or in contravention of law, respecting the subject of the action, which is of a nature to render the final judgment ineffectual.

By the plea to the action and the answer to the petition for an injunction defendants admit plain-

tiff's right to the water-power and deny that they ever had any intention to interfere with it. They further declare that the improper use which they admittedly made of the river had been so made under the belief that an agreement admitted to have previously existed between them and the plaintiffs was still in force and under which a mode of settling the damages complained of had been fixed.

It has been suggested that there is a difference between the case of the appellants as stated in their pleadings and as made by the evidence, and that in fact the trespass was continued after the suit was brought.

The only evidence to support the statement that the appellants continued to throw their refuse into the river after the injunction is to be found on page 36, lines 20 *et seq.*

Dubuc, at page 86, line 10, says that he forbade his employees to do this. On pages 87 and 88 Dubuc explains what occurred. Dubuc at page 90 denies having allowed any of the refuse to get into the river from the time the injunction was actually served, and no attempt is made to cross-examine him on that point.

To justify interfering by interlocutory injunction the court must be of opinion that there is a substantial question to be tried and some legal right as to property to be protected during the litigation. The granting of an injunction is, it is true, an act dependent on the discretion of the court, but in exercising this discretion the court must consider whether the act complained of will produce injury to the applicant or whether the injury can be condoned for by damages.

The only question here was whether the bark or

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refuse had been thrown into the river by the permission of the plaintiffs' employees. There was no attempt made to put in issue the legal right of the plaintiff to prevent the defendants from doing what was complained of. (See evidence by Racey, at page 38 of the case on appeal, lines 20 *et seq.*) If done without the permission of plaintiff's employees the defendants had incurred a liability for which there was a remedy full and complete by an action of damages. The plaintiffs had for a couple of years acquiesced in what defendants were doing and had accepted compensation from them, thus shewing that it was not impossible to fix compensation for future injury. *Omerod* v. *Todmorden Mill Co.*(1).

As to the possessory conclusions, which were maintained by the judgment of the Superior Court, the defendants admit plaintiffs' title as alleged—affirm they have no right or title to the use or possession of the water-power and say that what was done was under the erroneous impression that the previous existing agreement was renewed, and that the trespass complained of ceased when the action was brought, and for such damage as was caused they offer in compensation the sum of forty dollars.

On these facts would a possessory action lie? Leconte, No. 93, first paragraph:

> *Il ne suffit pas qu'un fait porte atteinte au droit de propriété,* même au droit de possession, pour qu'il donne lieu à une action possessoire, il faut que le possesseur soit empêché, ou de moins menacé dans sa possession même, que le trouble soit tel, *que l'intention de celui qui le cause, d'exercer un droit à la possession ou à la propriété, soit manifeste.*
>
> * * * * *

(1) 11 Q.B.D. 155, at p. 162.

94. On doit réputer trouble de possession, dit cet auteur, tout acte emportant prétention à la propriété ou à un droit de servitude.

* * * * *

Mais puisque le même acte peut, suivant l'intention de celui qui le commet, passer pour un trouble de possession ou pour un pur fait nuisible, comment le demandeur fera-t-il pour qualifier sa demande? Ne faut-il pas admettre que l'action possessoire sera régulièrement formée, toutes les fois qu'il sera possible d'interpréter le fait dénoncé à la justice comme un acte de possession? Sans doute, j'admets que dans ce cas la demande sera bien dirigée, en ce sens qu'aucune faute n'étant à impliquer au plaignant, les frais de citation devront être mis à la charge du défendeur. Mais je n'oserais pas dire que l'action sera toujours possessoire; *je crois au contraire que cela dépendra de la réponse que fera le défendeur. S'il déclare qu'il n'agissait pas jure domini*, qu'il n'a aucune prétention à répéter des actes semblables il me répugne de voir une action possessoire là où il n'y a nul débat sur la possession.

The same doctrine will be found in Dalloz, Repertoire de Jurisprudence, No. 53, *vo. "Action possessoire."* See also, Bioche "Actions possessoires" page 11, para. 32; Pothier, "Possession" No. 39; Boitard, "Procedure" page 425; *Price* v. *Girard* (Chronique Judiciaire de Beaubien); *Bertrand* v. *Levesque*(1). Both these cases were decided in review by a very strong bench.

The nature of the act complained of here was in itself sufficient to shew that the possessory action should not have been brought because evidently there was no intention manifested by the appellants to exercise any claim of right. Dalloz again, *loc. cit.* para. 59. And by their plea the defendants made it abundantly clear that they did not pretend to do the acts complained of *jure domini.*

I wish to repeat that I am clearly of opinion that under the Quebec Code the disturbance must be one of a permanent or recurrent nature; isolated acts of

(1) Q.R. 28 S.C. 460.

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interference give rise to an action for damages but do not constitute a ground of action to justify the plaintiff in having recourse to the *action négatoire* which corresponds to the Roman *actio negatoria*. The Roman *actio negatoria* applied principally in cases in which the defendant claimed to be entitled to do the act complained of by virtue of a servitude affecting the owner's land.

I would allow the appeal. The action of the respondent is dismissed and the injunction dissolved, with costs in all the courts *sauf recours* as to the damages suffered. I would add that this conclusion has been reached after much hesitation because I am obliged to differ from the trial judge, for whose great learning and impartiality I have always entertained the highest respect, if I may with proper deference be permitted to say this much.

GIROUARD J.—Il s'agit ici d'une action possessoire intentée le 30 mai, 1904, par le propriétaire inférieur d'un moulin à scie, situé sur la rivière Chicoutimi, contre le propriétaire supérieur d'un moulin à pulpe, qui, depuis le mois d'avril précédent, jetait à la riviére quantités d'écorces, de ripes, sciures de bois et d'autres déchets du même genre. Il allègue que ces matières, emportées par le courant, finissent par obstruer le canal et le pouvoir d'eau de son moulin et en arrêter la marche. Il conclut aussi à $2,000 de dommages-intérêts.

Cette action fut précédée d'un protêt notarié qui fut signifié à l'appelante le 4 mai, 1904, et fut suivie d'une injonction provisoirement accordée le 4 juin. Dans tous ces documents, il n'est fait aucune allusion à l'arrangement qui jusqu'alors avait reglé les rela-

tions de ces deux industriels, appuyées apparemment sur des motifs de bon voisinage.

Par sa défense produite le 9 juin, l'appelante nie d'abord qu'elle ait jamais voulu troubler l'intimé dans la libre jouissance de son pouvoir d'eau, puis elle allègue:

> Il a toujours été entendu entre la défenderesse et le demandeur représenté par son agent M. Blair d'abord et ensuite par son agent, M. Racey, et ce verbalement, que lorsque la défenderesse serait comme elle a été pendant quelques jours avant l'action en cette cause, obligée de laisser tomber quelques écorces dans la dite rivière Chicoutimi, par suite de réparations à ses machines, qu'elle paierait au demandeur les services d'un homme pour empêcher les dites écorces de passer dans les dalles et dans le moulin du demandeur, ce que le demandeur a toujours accepté et reconnu pour agréable, et ce par ses dits agents, le dit homme pour enlever les dites écorces devant être mis là par le demandeur et ses agents et la défenderesse devant payer son salaire.

Puis elle offre $40.00 et les frais d'une action de cette classe en tout $49.75, pour payer les frais d'enlèvement des écorces pour le printemps de 1904, sauf à parfaire.

L'arrangement est prouvé hors de tout doute, tant par l'agent de l'intimé, Blair, que par celui de l'appelante, Dubuc. Le juge de première instance (Gagné J.) est d'opinion qu'il n'était que pour l'année où il fut fait et qu'il ne s'applique pas à l'avenir. Il est admis que si c'est là le vrai sens de l'entente, l'action doit être maintenue; si, au contraire, elle liait les parties tant qu'elle n'était pas révoquée—point que le savant juge n'examine pas—elle doit être renvoyée.

La preuve établit que cet arrangement fut suivi et exécuté par les deux parties jusqu'au temps du protêt du 4 mai, l'intimé remettant ses comptes de charges qui furent invariablement payés par l'appelante. Etait-il encore en force le printemps de 1904 et de fait

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toute la saison de cette année là? Voici la nature de l'arrangement tel que défini par Blair, l'agent de l'intimé avec qui il fut fait:

Au commencement, (sans donnee de date précise) je me suis objecté à ce qu'il (l'agent de l'appelante Dubuc), envoie des ripes dans la riviére, par rapport que cela nous faisait un grand dommage et ensuite nous sommes venus à une entente, que l'on mettrait. * * * Je leur ai demandé premièrement de mettre un homme ou deux hommes pour tenir les ratelliers du moulin à scie clairs et monsieur Dubuc n'a pas voulu. Ils m'ont demandé de mettre des hommes moi-même et qu'ils paieraient le coût du nettoyage.

Q. C'est ce qui a été fait monsieur Blair?

R. Oui, c'est ce qui a été fait.

Q. Vous avez mis des hommes pour nettoyer les reteliers et la pulpe les payait?

R. Oui.

En transquestion, Blair ajoute:

Q. Les arrangements dont vous avez parlé, monsieur Blair, c'etait pour chaque année, n'est-ce pas?

R. Oui, chaque année.

Q. Vous n'avez jamais fait d'arrangements pour donner le droit à la compagnie de pulpe d'envoyer ses écorces dans l'avenir, indéfiniment, n'est-ce pas?

R. Non, jamais.

L'appelante prétend non pas que l'arrangement obligeait les parties pour toujours, mais qu'il les liait tant qu'il n'était pas révoqué, et qu'il ne pouvait l'être que pour les années futures et non pour celle qui était commencée.

Et d'abord, que comportait cet arrangement, sinon un louage d'ouvrage susceptible de la tacite reconduction aux termes de l'article 1667 du code civil, différent à cet égard de l'article 1780 du code Napoléon? Mais il y a plus.

Comme je lis l'arrangement, il fut stipulé qu'il durerait tant que l'une des parties n'y mettrait pas fin. C'est en effet de cette manière que les deux par-

ties l'ont interpreté par leur conduite. Il ne parait pas qu'il ait jamais été expressément renouvélé aprés avoir été fait. Il fut agréé avant ou vers la saison de 1900, et les reçus des frais d'enlèvement des déchets par l'intimé établissent qu'il fut suivi et exécuté à la lettre en 1900 et 1901, sans renouvellement pour cette dernière année. En 1902 et 1903, les écorces et déchets furent brûlés au brûleur que l'appelante venait de faire construire pour se conformer à la loi, et conséquemment l'intimé n'eut pas de comptes à envoyer pour ces deux années. En 1904, le brûleur se brisa et ce fut pendant que l'appelante le réparaît qu'une petite partie des écores et déchets dont se plaint l'intimé—un sixième de toute l'usine—furent jetés à l'eau. Mais à cette époque, l'ancien arrangement était en force:

Cet arrangement, dit Dubuc, a duré tout le temps que monsieur Blair a été ici, et ses successeurs ne l'ont jamais revoqué et tous les comptes qui nous ont été présentés de ce chef n'ont jamais été disputés, nous les avons payés.

Le protêt du 4 mai, 1904, peut bien être considéré comme un acte de révocation, mais il ne peut avoir d'effet quant au passé ni même pour l'année courante. L'action est donc mal fondée. L'intimé aurait dû faire enlever les déchets par ses hommes et envoyer son compte à l'appelante.

Ainsi que je l'entends, c'était encore la loi des parties le printemps de 1904, au dire même de l'agent de l'intimé. Voici ce que Dubuc représenta à l'agent nouveau de l'intimé, Racey:

Je suis toujours prêt à honorer votre compte d'aprés l'arrangement que nous avons avec votre maison, si vous jugez que ça vaut la peine de nous l'envoyer. Monsieur Racey m'a répondu: correct.

Ce fut aussi de cette façon que Racey comprit la situation après s'être renseigné:

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Q. Qu'est-ce que vous avez compris que cet arrangement-là était?

R. Je ne le savais pas dans le temps, mais plus tard je suis venu à bout de savoir quel était cet arrangement.

Q. Quel était cet arrangement?

R. Il payait des hommes pour faire faire l'ouvrage.

Q. Vos hommes faisaient l'ouvrage et la pulpe les payait?

R. Oui, et si j'avais compris cela, j'aurais accepté.

Q. Vous n'avez pas compris que c'était cela?

R. Non, jamais, quand je lui en ai parlé plus tard, dans le mois de mai, il riait de cela.

Q. Il vous a fait comprendre qu'il voulait payer?

R. Oui, et plus tard il n'a pas voulu.

De là l'institution de l'action possessoire et la demande d'une injonction.

Comment Racey a-t-il pu conclure que Dubuc ne voulait pas payer? C'est ce que je ne puis concevoir. Dubuc n'a jamais déclaré qu'il ne paierait pas. C'est tout le contraire qui apparait. Il envoya un de ses employés, Morrier, deniers en mains, lui offrir $40 pour les frais d'enlèvement et les dépens d'une action de cette classe que Racey ne voulut pas même prendre en considération. Il voulait évidemment avoir recours au possessoire, lorsque sa possession était même reconnue par Dubuc. Il ne réplique pas que le montant n'est pas suffisant. Il ne lui envoie pas de compte. Il est sous l'impression, sans raison, que Dubuc n'était pas sérieux et qu'il l'amusait. Au lieu de recourir au possessoire, il aurait dû faire enlever les déchets, lui envoyer un compte du coût de cet ouvrage et poursuivre en recouvrement, s'il n'était pas payé. Je considère que dans les circonstances, le recours au possessoire est un abus, la possession n'étant pas niée, mais même admise.

La cour de première instance et la cour d'appel ont décidé que l'arrangement n'était que pour une année; les savants juges ne le disent pas en toutes lettres,

mais le résultat démontre que c'était là leur opinion, puisqu'ils maintiennent l'action possessoire et l'injonction. La cour de revision n'en dit rien, pour la raison toute simple que l'intimé avait inscrit seulement sur la demande des dommages qui fut rejetée par les deux cours quant à présent.

Je suis d'avis que le premier arrangement était encore en force en 1904 et qu'il fut même formellement renouvelé cette année là, bien que ce renouvellement n'était pas nécessaire.

Quant à l'objection technique, que l'appelante n'a pas appelé du jugement de la cour supérieure siégeant en revision, je crois qu'elle est mal fondée. C'était son droit d'appeler comme elle le fit. L'intimé ne souffre rien de ce que son inscription fut du jugement du juge Gagné, puis qu'il fut confirmé purement et simplement. Je la considére donc régulière.

Pour ces raisons, je suis d'opinion d'accorder l'appel et de renvoyer l'action et l'injonction de l'intimé avec dépens devant toutes les cours, sauf recours pour les frais d'enlèvement des écorces et déchets.

DAVIES J. (dissenting) concurred in the opinion of Mr. Justice Idington.

IDINGTON J. (dissenting).—There is really nothing but costs involved in this appeal and for that if no other reason we should refuse to interfere.

The appellants owned a pulp mill about a mile higher up the same stream as that on which the respondent owned and ran a planing mill.

In 1897, being forbidden by law from throwing into the stream the refuse of such mills, the appellant's manager says it was agreed that until his com-

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pany got a burner erected to burn the refuse, his company agreed to make their peace with the respondents by paying for the expenses of the removal of so much of the refuse as should lodge about and be detrimental to the respondent's mill and there were several payments made for that sort of service.

The facts are not put exactly thus by the respondents, but they admit some payments made for such a purpose. It is of little consequence which is exactly right, for appellant's burner was, in or before 1902, completed, and that ended any need or reasonable expectation for a continuation of any such arrangement.

In 1904, respondent desired to start up his mill and found not only a large quantity of old refuse from appellant's mill accumulated and needing removal, but also found further that appellants had renewed, in April of 1904, without asking permission their former practice of throwing refuse into the stream.

The manager of appellants did not when remonstrated with, stop this being done. After some time the respondent's manager caused a formal protest against this utterly unjustifiable conduct to be served on the other manager on the 4th of May, 1904.

It continued, however, from time to time and on the 2nd June, 1904, the respondent took steps to get, and on the 4th of June, 1904, got an injunction and sued for its continuation and also to recover damages.

At the trial the injunction was continued, but the right to recover damages in this action was refused and reserved to the respondent to be recovered by such means as the respondent found open to him.

The appellants' manager had after action tendered, he says, forty dollars to cover these damages. One is

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at a loss to know how, if honestly desirous of having damages assessed at the trial, the appellants could not bring it about when the respondent was pressing for it.

The respondent appealed unsuccessfully to have this done. The Court of Review dismissed this appeal, and a nice question of practice arises here, which I will not dwell upon, though, if the respondent's contention is right as to the effect of article 1203 of the Code of Procedure and the other things he urges, appellants ought not to have been heard here. I pass that and many other things that are or have been in the case to say that the court of appeal did not accept the contention of the respondent in this regard, but dismissed the appeal which the present appellants had carried there and upheld the judgment of the learned trial judge.

The appellants by way of appeal therefrom, come here asserting that they had never denied and do not now deny the rights of the respondent to enjoy his property, and use it free from such disturbances as the respondent complains of.

They in this case suffer nothing, by the judgment and injunction standing, but the costs they have been ordered to pay.

They have escaped paying damages they certainly ought to have paid and, as I understood counsel to state without contradiction, nothing further had been done and the respondent's right to damages had been thus prescribed. If the material damages really were as the court seems to think after action, though I might have thought otherwise, the appellants practically escape.

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It is said, however, this action is wrong in form by claiming an injunction that is not maintainable.

Even in this I do not agree. It is in the last analysis a question of fact whether it be so or not. It has been passed upon and upheld by two courts at least in the Province of Quebec, and according to one contention, by three, and yet respondent is not satisfied.

I do not think it is open to any one, in Quebec or elsewhere, by a continuous and persistent system of disturbing others in the enjoyment of their property, such as appellants were here guilty of, to say that because they do not do it in assertion of a right and in denial of the wronged party's title, the jurisdiction to enjoin cannot be exercised. It was continued even a day or two after the injunction. So persistent was appellants' manager.

In Martineau & Delfausse, annotated edition of the Code of Procedure(1), there is collected under section 1064 of the same, such a review of the authorities as leads me to come to the conclusion that this action was on the evidence here rightly brought and has been properly maintained.

It is said, however, there was an agreement between the parties regulating this practice, but the only one proven is the one that I have shewn ended in 1902, and it never was revived.

There is a loose sort of conversation given as taking place between the managers, but exactly when or how or where is not clear.

At best it seems to have taken place after at least a good deal of what is complained of was done. The evidence is very unsatisfactory unless we accept entirely, and discard all else, a sentence or two of the appellants' manager which I am not disposed to do.

(1) P. 691.

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I would infer, if anything in the way of assenting to it was done by the respondent, it was conditional upon settling for the past and ceasing to disturb, and that no such spirit of settling was ever shewn by appellants' manager, but rather a contemptuous treatment of the other manager, and a continuation of the disturbances which rendered an injunction necessary.

It rests on the evidence of appellants' manager and he swears that the protest and the suit for injunction were on one and the same day.

Q. *Monsieur Racey a dit qu'il vous avait téléphoné le quatorze mai qu'il allait vous protester et que vous auriez répondu en riant?*

R. *Je ne me rappelle pas de cela.*

Q. *Avez-vous reçu un protêt?*

R. *Je crois avoir reçu un protêt en même temps que l'action; une heure avant ou ensemble.*

If that is a fair specimen of the reliability of his evidence when we know from the record these two events were nearly a month apart, I want evidence of some one more credible to go upon than one so reckless, before I reverse the courts below.

Moreover, the story is not that which is pleaded. The pleading alleges only one bargain. The evidence of this man shews two. It is only the last that is applicable if at all to this case.

If it had in fact transpired as he puts it with nothing done after it, we would likely have seen it so pleaded.

The other manager's story clearly shews when read as a whole that so much of this story as he assents to was conditional upon getting together and settling as I have already said.

The only right bound or affected by the judgment below being one of costs, the cases of *Moir* v. *The Vil-*

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lage of Huntingdon(1), and *Schlomann* v. *Dowker* (2), ought, I submit, to be followed, and the appeal be dismissed with costs.

MACLENNAN and DUFF JJ. concurred with Mr. Justice Girouard.

Appeal allowed with costs.

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

Solicitors for the respondent: *Pentland, Stuart & Brodie.*

(1) 19 Can. S.C.R. 363.

(2) 30 Can. S.C.R. 323.

JULES AUDETTE (DEFENDANT).....APPELLANT; 1907

AND

*May 16.
*June 24.

PETER O'CAIN (PLAINTIFF).....RESPONDENT.

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

Rights appurtenant to dominant tenement—Construction of ice-house—Change in natural conditions—Flooding of servient tenement—Aggravation of servitude—Injunction—Damages—Abatement of nuisance—Arts. 406, 501, 549 *C.C.*

The construction upon a dominant tenement of an ice-house in a manner to cause the water from melting ice stored therein to flow down upon adjoining lands of lower level and injuriously affect the same is an aggravation of the natural servitude in respect of which the owner of the servient tenement may recover damages for the injury sustained and have a decree for the abatement of the nuisance.

Judgment appealed from affirmed, Girouard J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of Paradis J. in the Superior Court, District of Iberville, and maintaining the plaintiff's action with costs.

The plaintiff brought his action, *au possessoire,* to recover compensation for damage caused to his land and buildings in consequence of the construction by the defendant of an ice-house upon adjoining lands, upon a higher level than those of the plaintiff, which, on account of its large dimensions, arrangement, mode of operation, defective construction and want of pro-

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

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per drainage, caused water from melting ice stored therein to flow upon and inundate the plaintiff's property and thereby, and by the continual dampness permeating the soil, aggravating the natural servitude and injuring the plaintiff's land and buildings thereon constructed.

By the judgment of the Superior Court, the plaintiff's action was dismissed with costs. On appeal to the Court of King's Bench, the judgment of the Superior Court was reversed, the action was maintained, damages being assessed at ten dollars up to the time of action, the plaintiff's right to recover subsequent damages was reserved and the defendant was enjoined against continuing to trouble the plaintiff in his possession of his lands by permitting the water escaping from the ice-house to flow thereon and ordered, within a time limited, to take proper means to abate the nuisance.

The material facts in evidence and the questions discussed on the appeal are stated in the judgments now reported.

Beaudin K.C. and *Belcourt K.C.* for the appellant.

Bisaillon K.C. and *H. R. Bisaillon* for the respondent.

THE CHIEF JUSTICE.—The plaintiff and defendant are owners of contiguous properties in the Town of St. John, Iberville. The plaintiff, now respondent, being the owner of the lower land complains that the defendant, now appellant, the owner of the upper land, has built, quite recently, on his, the defendant's, property, a large ice-house (135 feet long, by 30, by

35 feet), the water from which, as the plaintiff alleges, flows down on to his land to his damage.

The defence, in effect, is that the ice-house is constructed at a distance of about three feet from the division line, every proper precaution having been taken to prevent damage or injury by flooding; that the water produced by the melting of the ice does not reach the plaintiff's property; and, finally, that the defendant is entitled to use his property in any way not prohibited by law or by regulation. Art. 406 C. C.

There is a mass of conflicting testimony as to whether the most scientific rules were observed in the construction of the ice-house, but the real question of fact to be determined by us is: Has the ice-house erected by the defendant aggravated the servitude of the lower land so as to create any appreciable damage(1), or has what would be, if permitted, a new servitude resulted from its construction?

In the Superior Court the judge finds:

> Considérant qu'il n'est pas prouvé que l'humidité de l'amas de glace dans la glacière ait suinté à travers le mur de la glacière du coté nord, ni que l'eau provenant de la fonte de la glace se soit infiltrée le long des cotés du mur de la maison et de la cuisine, ni dans le terrain du demandeur, de manière à causer des dommages au demandeur.

And in appeal, the unanimous finding of their Lordships is:

> Considérant que l'intimé, en se servant de la glacière comme il le fait, aggrave la servitude du fonds de l'appelant, en envoyant sur ce fonds plus d'eau qu'il n'en decoule naturellement du fonds de l'intimé, et cause à l'appelant des dommages qui ne peuvent qu'aller en augmentant.

The difference between the findings is more apparent than real. In appeal their Lordships, on the evi-

(1) Art. 501 C.C.

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dence, came to the conclusion that there has been an aggravation of the legal servitude to plaintiff's detriment, and in the Superior Court, Mr. Justice Paradis finds, not that there is no overflow, but that the water has not penetrated plaintiff's property so as to cause him damage. We are again in this case without the notes of the judges below and we can only speculate as to the reasons which induced them to adopt these apparently divergent conclusions. Presumably, the only difference is in the appreciation of the meaning of the word "aggravated" in article 501 of the Civil Code.

By what is admitted to be a departure from the strict rule of construction, the French text book writers hold that, where the aggravation results merely from a change in the natural conditions without materially adding to the volume of water which the proprietor of the lower land is obliged to receive, then the resulting damage must be serious (*dommage sérieux*), to justify a possessory action, as, for instance, in the case of contiguous properties used for agricultural purposes, if the proprietor of the higher land ploughs his furrows in the ordinary way and that the rain or other surface water accumulates therein and thence flows with accelerated speed on to the lower property, the proprietor of the latter cannot complain unless there is serious damages. 7 Laurent no. 370; Baudry-Lacantinerie, no. 1432; 3 Mignault, page 16; *Faucher* v. *Hall*(1).

A careful examination of the books has satisfied me that when the French text writers and courts speak of *dommage sérieux* they have reference to some

(1) 11 Q.L.R. 15.

serious damage resulting from the diversion of or other interference with water which would otherwise flow naturally from the upper land without the aid of man, and which the proprietor of the lower land is, in any case, bound to receive. See *considérant* in the case of *Bareau* v. *Servois*(1) on page 718:

> Qu'en presence de ces faits ainsi declarés constans, l'arrêt attaqué, en décidant, comme il le fait, que le propriétaire supérieur n'avait rien enterpris qui fût de nature à aggraver la servitude du fonds inférieur, etc.

A great deal of the doubt and uncertainty which apparently prevailed in the Superior Court as to the facts might have been avoided if the case had been referred by the judge of that court to experts for a report as to the character of the building and the cause of the increased flow with special reference to that part of the water artificially brought on to the higher land by reason of the construction of the ice-house, and I have anxiously considered whether, even at the present time, this should not be done. But a careful examination of the record has led me to the conclusion that, to make such an order would save neither time nor money. We must decide the question before us, which is not so much whether the legal servitude existing when the appellant acquired his property has been aggravated, but whether the appellant can establish a new and different servitude without either grant or recognition. Art. 549 C. C.

I have come to the conclusion, not without serious hesitation, that the ice-house is proved to have been built without the proper precautions being taken to prevent the overflow of the water produced by the

(1) S.V. 48, 1, 716.

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melting of such a large body of ice and that this water does penetrate, as found by the court of appeal, through the soil to the plaintiff's property and to his injury.

The witnesses say that fifteen or twenty per cent. of the ice melts during the summer months, and this is established in the present case to be equivalent to fifty thousand gallons of water which must find an outlet somewhere and the natural slope of the land is towards plaintiff's premises. The defendant very properly contends that, in law, the plaintiff, as owner of the lower land, is obliged to receive such waters as flow from the adjoining land on a higher level; but the code and the commentators add that this obligation is limited to such waters as flow naturally and without the agency of man, such as, for instance, snow water, rain water, *eaux pluviales;* he is not obliged to receive the waters which flow, for instance, from an artesian well created by artificial means. This, I submit, with deference, is the effect of article 501 of the Civil Code, which corresponds with article 640 of the *Code Napoléon.*

In Laurent, Dr. Civ., vol. 7, no. 360; Demolombe (Servitude), vol. 1, no. 36; Baudry-Lacantinerie (Des Biens), vol. 5, no. 828; Aubry et Rau, vol. 3, para. 240, page 11, note 21; will be found the conflicting opinions and speculations of the text writers as to the obligations of the owner of the lower land and the rights of the proprietor of the upper land. The accepted doctrine is, however, I think fairly stated by Dalloz (Répertoire de Jurisprudence vo. "Servitude," no. 84):

Il faut donc reconnaître qu'en définitive la question de préjudice dominera toutes les décisions et que les juges n'hésiteront pas à

consacrer les actes nouveaux du propriétaire supérieur, si le propriétaire inférieur ne peut pas justifier d'un sérieux préjudice. L'art. 640 confirme ces principes dans sa dernière partie. Il dit:—"Le propriétaire ne peut pas élever de digue qui empêche l'écoulement des eaux. *Le propriétaire supérieur ne peut rien faire qui aggrave la servitude du fonds inférieur.*" Il a été jugé, par application de ce principe, d'une part, que l'art. 640 ne peut autoriser le propriétaire d'un fonds inférieur à demander la suppression des ouvrages pratiqués par un propriétaire supérieur, pour faciliter l'écoulement des eaux, s'il est constant en fait que ces ouvrages, en maintenant les eaux dans leur cours naturel, n'ont pas aggravé la servitude des fonds inférieurs.

But the same author, at no. 88, says:

Le propriétaire inférieur serait-il tenu de recevoir les eaux d'une fontaine nouvellement ouverte, si l'ouverture était due à des travaux du propriétaire supérieur? M. Pardessus, t. I., p 204, a établi une distinction." Si la source nouvelle, dit-il, se fait jour par l'effet des travaux dont se compose habituellement la culture d'un champ, par example en creusant un fossé, cet événement n'est que la conséquence du droit de propriété, l'écoulement nous semble devoir être considéré comme naturel; mais si, par des fouilles faites pour se procurer de l'eau, on vient à créer un puits artésien, il serait douteux que le propriétaire inférieur dut recevoir ces eaux. Nous croyons cependant, ajoute le même auteur, que les tribunaux auraient le droit d'obliger celui des propriétaires inférieurs qui leur paraitraient pouvoir recevoir les eaux avec le moins de dommage à subir cet écoulement au moyen d'une indemnité." Nous pensons, avec MM. Duranton, t. 5, no. 166; Demolombe, Servit. p. 32; Duvergier sur Toullier, t. 3, no. 509, note 1; Marcadé, art. 640, no. 2; Daviel, t. 3, no. 901; Ducarroy et Bonnier, t. 2, no. 264; que ce système n'est pas admissible. Il ne l'est pas d'abord évidement en ce qui concerne les puits artésiens. L'art. 640 est formel, et les tribunaux seraient évidemment sans pouvoir pour forcer l'un des propriétaires à recevoir les eaux, même avec indemnité. *Il ne s'agit pas ici d'une simple aggravation, mais d'un servitude nouvellement créée.*

And herein I find the solution for the difficulty that has arisen in this case. If it is beyond doubt, as all the authors admit, that the proprietor of the lower land is not obliged to receive the waters from the higher land which are brought there by the act of man, even on payment of an indemnity, and the case of the

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artesian well is given by many as illustrating the distinction, then—Can the proprietor of the lower land be obliged to receive the waters from the ice-house in question in this case? Where is the difference in principle? It must be noted that in the Quebec Code there is no disposition corresponding with the amendments made to the *Code Napoléon,* 29th April, 1845; 10th June, 1854; and, finally, 8th April, 1898, by which provision is made for an indemnity to be paid to the proprietor of the lower land for damages caused to him in such a case as the present one.

Under the Quebec system, if the proprietor of the lower land is prejudiced, he is not entitled to an indemnity; there is no provision in our law to justify him in applying for it. If his property is prejudicially affected, he is without any remedy, except the one adopted in this case. Therefore it is necessary to give a more rigid interpretation to the article of our Code than is given to the corresponding article of the *Code Napoléon,* which, as amended, recognizes, in effect, the principle of expropriation on payment of indemnity in cases where the public interest requires it, *e.g.,* agriculture or industry.

It would, no doubt, be more convenient and more in the interests of adjoining proprietors to adopt, in Quebec, the rule of the French law, but that is for the Legislature and not for us.

5 Baudry-Lacantinerie, no. 826, states the law as it was before the amendments to the French Code, as follows:

> En principe, d'après l'art. 640, les fonds inférieurs ne sont pas tenus de reçevoir les eaux qui découlent des fonds supérieurs par suite du fait de l'homme, (argument des mots *sans que le main de l'homme y ait contribué*), telles que les eaux ménagères, industrielles

ou celles provenant d'un puits artésien. D'autre part, en vertu du même texte, le propriétaire du fonds supérieur ne peut "rien faire qui aggrave la servitude du fonds inférieur." *La servitude naturelle doit, en effet, être limitée aux seules nécessités dérivant de la situation des lieux. Si, dans un but quelconque, le propriétaire du fonds supérieur intervient pour modifier l'écoulement naturel des eaux, le propriétaire du fonds inférieur est en droit de s'y opposer et de dire que la nature, la situation des lieux ne l'obligent pas à subir une modification provenant du fait de l'homme.*

I will not attempt to analyse the evidence for the purpose of proving that their Lordships of the court of appeal came to a proper conclusion on the facts, but I have no doubt that the 50,000 gallons of water produced by the melting of the ice is not all absorbed by the earth and that the greater portion filters through the soil and reaches the plaintiff's land.

It is to be observed that, while the injury at the time the suit was brought may not have been of a very serious character, still it is a permanent injury which, in the course of time, must become more and more serious and will last so long as the present conditions are allowed to prevail.

I have not overlooked *Claude* v. *Weir*(1), and in reading the judgment of Dorion C.J., I am reminded of the observations of Brett L.J., at page 225, in *Ecclesiastical Commissioners* v. *Kino*(2), in 1880:

> To my mind (said His Lordship), the taking of some expression of a judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion as laying down a rule of conduct for other judges in considering a similar state of facts in another case is a false mode of treating authority. It appears to me that the view of a learned judge in a particular case as to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be different circumstances to be taken into consideration.

(1) M.L.R. 4 Q.B. 197. (2) 14 Ch. D. 213.

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I would confirm the judgment of the court of appeal with costs.

The Chief Justice.

GIROUARD J. (dissident).—Nous voilà encore en face d'une de ces actions possessoires qui nous sont soumises presqu'à chaque terme, et à l'on trouve en jeu plus d'entêtement que de principes de droit ou d'intérêt pécuniaire; mais le présent terme est particulièrement remarquable, puisque nous avons quatre causes (sur neuf) de ce genre, qui nous viennent toutes des districts ruraux. L'intimé n'en est pas à son premier essai au sujet de l'aggravation de la servitude des eaux à laquelle son fonds est assujeti. En 1897, il avait un premier démêlé avec les voisins Dunn, mais plus sagement avisé cette fois, il porta non pas une action possessoire qui relève de la plus haute cour de la province, mais une action en dommages pour $25, qui fut renvoyée. Ces procès, toujours ruineux pour les plaideurs particulièrement s'ils sont au possessoire, sont, en France, jugés sommairement depuis un siècle par les juges de paix; mais en la province de Québec, comme au temps de l'ancien droit français, ils traversent toutes les hautes jurisdictions du pays et arrivent même au Conseil Privé.

Comme toujours, nous avons ici un dossier volumineux, qui ne soulève qu'une simple question de fait et l'application d'un principe de droit élémentaire. Un propriétaire élève sur sa propriété, à St. Jean, une immense glacière de 135 pieds de long sur 30 de haut, suivant les règles de l'art et sans violer aucune loi de la province ou de l'autorité municipale. Le demandeur, qui a vu ériger cette glacière, n'a pas protesté ni représenté qu'elle aggraverait la servitude. (Cass. 22 janvier, 1866. S.V. 66, 1. 68; *Delorme* v. *Cus-*

son (1); *Parent* v. *Quebec North Shore Turnpike Road Trustees* (2). Il demanda seulement de la placer plus loin de la ligne, afin de ne pas lui enlever complètement la vue, l'air et le jour, concession à laquelle il n'avait pas droit. Il n'offrit pas de faire creuser à frais communs ou à ses frais un fossé d'égout dans les trois pied que l'appelant laissa entre la glacière et la ligne de division, ce qui de son aveu n'aurait coûté que quelques piastres et aurait probablement fait disparaître les effects de la servitude naturelle elle-même. Le fonds sur lequel la glacière est bâtie est en effet supérieur à celui de l'intimé, son voisin, dont la surface est d'un sol mou, marécageux et humide, et qui en sus subit une pente graduelle d'une couple de pieds. Il fut toujours assujéti à la servitude des eaux provenant du fonds de l'appelant, mais l'intimé soutient qu'elle fut aggravée par la construction de la glacière. L'on conçoit aisément que cette construction n'a pas amélioré la situation des lieux de l'intimé, dont la vue s'est trouvée obstruée et que l'ombrage dérobait dorénavant aux rayons du soleil. Mais l'appelant n'a pas agi avec malice ou rancune; il s'est tenu dans la mesure de son droit et n'a pas aggravé la servitude du fonds inférieur. C. C. art. 406 et 501. C'est ce qu'a trouvé la cour de première instance, présidée par le juge du district (Paradis J.), résidant à St. Jean même depuis nombre d'années et par conséquent connaissant bien la localité qui n'est pas très étendue et n'a qu'une population de 4,000 âmes—

Considérant (dit-il) qu'il n'est pas prouvé que l'humidité de l'amas de glace dans la glacière ait suinté à travers le mur de la glacière du côté nord, ni que l'eau provenant de la fonte de cette

(1) 28 Can. S.C.R. 66.
(2) 31 Can. S.C.R. 556.

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glace se soit infiltrée le long des côtés du mur de la maison et de la cuisine, ni dans le terrain du demandeur, de manière à causer des dommages au demandeur.

Considérant qu'il est en preuve que dès avant la construction de la dite glacière le terrain du demandeur était humide et impropre à la culture, etc.

Le savant juge a vu et entendu les témoins durant une longue enquête qui dura plusieurs mois, et je ne crois pas que les juges d'appel (Lacoste J.C., Bossé, Blanchet, Trenholme et Champagne, *ad hoc*, JJ.) étaient en aussi bonne position d'apprécier la preuve et les circonstances de la cause.

Mais c'est particulièrement lorsque je lis leur jugement que je deviens convaincu qu'ils ont fait erreur. Ils ne nous ont pas transmis de notes, mais le texte du jugement nous fait suffisamment connaître leur pensée. Elle n'est pas selon moi très éloignée de celle du Juge Paradis. Ce dernier a trouvé que l'eau de la glacière n'était pas descendue sur le terrain de l'intimé "de manière à causer des dommages au demandeur.' Il est vrai que la cour d'appel est arrivée à une conclusion contraire, mais elle ajoute que les dommages quant à présent ne sont pas appréciables:

Considérant (dit-elle) que la cour ne peut apprécier actuellement l'étendue des dommages que l'appelant a subis, bien qu'elle en constate l'existence.

Je ne puis voir en loi aucune différence dans une cause comme celle-ci, entre des dommages inappréciables et des dommages qui n'existent pas. La cour d'appel accorde $10 à titre de dommages accrus à l'institution de l'action et maintient l'action possessoire. C'est évidemment un dommage nominal qu'elle fixe au hazard et d'une façon arbitraire.

Il ne suffit pas pour une cour d'appel, dans mon

humble opinion, de déclarer qu'il existe des dommages et de renverser le juge de première instance qui en nie l'existence, sans indiquer au moins où est la preuve de ce qu'elle avance. C'est ce qu'elle n'a point fait. Nous faut-il parcourir les 600 pages imprimées de la cause pour la trouver? Quelle est la nature des dommages qu'elle accorde? Elle ne le dit pas. Il ne faut pas oublier que le demandeur les réclame de trois chefs: $75 pour dommages à la maison, $42 pour perte de loyer et $300 pour dépréciation de la propriété. De quel chef, les $10 sont-elles accordées? C'est ce qui n'apparait pas. A-t-elle considéré l'eau de la couverture des deux cuisines de l'intimé qui finit par pénétrer dans la cave de ses logements? Impossible de le dire.

Dans mon humble opinion, cette cause n'est pas susceptible de dommage nominal. L'appelant n'a violé aucune loi, aucun droit foncier appartenant à l'intimé, condition qui est essentielle pour l'accorder. Puis, il n'y a aucune preuve de dommages spéciaux qu'un juge peut régler et fixer, s'ils sont constatés, en accordant une somme nominale, ce qui fut fait dans plusieurs espèces, particulièmenent dans *Dunning* v. *Girouard* (1); *County of Ottawa* v. *Montreal, Ottawa and Western Ry. Co.* (2); et ce qui fut refusé faute de preuve de dommages spéciaux, dans *Williams* v. *Stephenson* (3); *Coghlin* v. *La Fonderie de Joliette* (4).

Enfin, supposons qu'il y aurait des dommages inappréciables. Est-ce une raison suffisante pour avoir recours à l'action possessoire, l'une des plus onéreuses qui soient connues dans notre système de procédure? Est-ce bien là le trouble prévu par l'article 1064 du

(1) 9 R.L. 177.
(2) 14 Can. S.C.R. 193.
(3) 33 Can. S.C.R. 323.
(4) 34 Can. S.C.R. 153.

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code de procédure. Il n'y a pas eu empiètement de propriété, ni aucune intention de le faire. Il n'y a eu aucun acte d'usurpation qui porte une atteinte sérieuse à la possession. Dans de pareilles circonstances, le recours du plaignant est non pas l'action possessoire, mais l'action en dommages.

En effet, l'action possessoire ne doit être prise que dans les cas de trouble appréciable, réel et sérieux. Je suis loin de dire que pour réussir, le demandeur doit recouvrer des dommages-intérêts. Non, mais le trouble dont il se plaint doit être grave et sérieux, comme dans les espèces signalées par Mr. Bisaillon C.R., à la fin de son factum et résumée par Demolombe, t. 12, n. 662. Dans le cas de trouble ou dommage inappréciable, il y a lieu d'appliquer la règle *de minimis non curat lex*. C'est la jurisprudence non seulement de la province de Québec, mais de tous les pays. Ce principe fut consacré par M. le juge deLorimier, une autorité reconnue en ces matières, dans la cause de *Rivest* v. *Savignac*(1), qui fut confirmé en revision par un fort banc (Tait, Taschereau et Davidson JJ.) en 1895. Il s'agissait d'une action possessoire prise par un propriétaire contre son voisin dans des circonstances certainement auss favorables que dans la présente espèce. Il y fut jugé :

> Considérant que les actes faits par le défendeur et dont se plaint le demandeur, ne sont pas d'une nature abusive du droit de propriété, ni faits en vue de causer injustement aucun trouble dans la possession du demandeur;
>
> Considérant, que les actes du défendeur n'ont causé et ne peuvent dans l'avenir causer au demandeur aucun tort, trouble, préjudice ou dommage appréciable, et qu'aucun d'iceux ne peut en loi donner ouverture à l'exercice du droit d'action possessoire en complainte, etc.

(1) 1 Rev. de Jur. 305.

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Le juge deLorimier, dans une opinion très élaborée, discute longuement le principe que pour avoir recours au possessoire, il faut un trouble appréciable, un dommage réel et sérieux. Le savant juge (1) observe:

C'est ici le cas d'appliquer la maxime du droit romain *"de minimis non curat prætor."* On ne trouve ici aeun des caractères qui distinguent les actes de trouble pouvant donner ouverture à l'action en complainte. En effet, tous les actes de troubles causés par un voisin ne donnent pas ouverture à la complainte, autrement le voisin ne pourrait point causer le moindre tort ou dommage, soit à la clôture, ou au mur ou au fossé de ligne sans que de suite il y eût matière à l'action possessoire en complainte.

"Le trouble (dit Bélime, no. 315) doit être un acte qui menace la *possession,* et non pas seulement tout *acte* contraire à cette possession." "C'est un acte flagrant d'usurpation," dit Jocotton, Des actions civiles, p. 460.

Le même principe me paraît avoir été reconnu par le juge Pagnuelo dans *Hampson* v. *Vineberg*(2), et son jugement fut confirmé par la cour d'appel. La condition du "préjudice sérieux" pour le fonds inférieur est requise pour établir l'aggravation de la servitude des eaux aux termes de l'article 501 du code civil.

Le juge de Lorimier cite un grand nombre d'autorités françaises à l'appui de son opinion. Je me contenterais d'attirer l'attention sur une ou deux.

C'est ainsi que par arrêt du 31 mai, 1848, la cour de cassation a jugé:

Le propriétaire inférieur est tenu de reçevoir les eaux qui s'écoulent du fonds supérieur, encore bien que, par des travaux exécutés par le propriétaire supérieur, la quantité des eaux soit augmentée, si, d'ailleurs, il n'en résulte aucun dommage réel ou apprêciable, pour le fonds inférieur, etc. S.V. 48, 1, 716.

Par arrêt du 22 janvier, 1866, (S.V. 66, 1, 70), la même cour interprète de la même façon le principe de

(1) P. 309.

(2) 19 R.L. 620.

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l'article 501 de notre code, correspondant à l'article 640 C.N.:

Attendu que l'art. 640 C. Nap. n'interdit pas au propriétaire du fonds supérieur tout changement, toute transformation dans son héritage;—Que, suivant une saine interprétation de la loi, il peut modifier son exploitation, élever des constructions, alors même que ces travaux auraient pour résultant d'accroître le volume des eaux coulant naturellement vers les fonds inférieurs, pourvu qu'il n'en résulte pas un sérieux préjudice pour ces derniers, etc. S.V. 66, 1, 69.

L'arrêtiste fait suivre le rapport de ces deux arrêts d'une foule de décisions et commentateurs.

Enfin, Huc, un savant jurisconsulte qui fait école de nos jours, dans son nouveau commentaire, t. 4, p. 326, n. 284, éd. 1893, résume la doctrine dans ces quelques lignes:

La disposition naturelle des lieux étant la seule cause de la charge imposée au fonds inférieur, le propriétaire du fonds supérieur doit s'abstenir de tous travaux qui auraient pour résultat d'augmenter la pente du terrain ou de rendre l'écoulement des eaux plus rapide ou plus considérable, de manière à causer au fonds inférieur un préjudice appréciable.

Huc cite un arrêt de la cour de cassation de 1er. avril, 1886, S.V. 90, 1, 467.

Voir aussi Gilbert sur Sirey, éd. 1892, p. 334, n. 23; Fuzier-Herman, t. 1er. p 824.

Enfin, dans la cause *Drysdale* v. *Dugas*(1) invoquée par l'intimé, cette cour a reconnu le même principe. Comme l'observe le juge Taschereau, un propriétaire peut bien bâtir une écurie sur son fonds, pourvu qu'il n'incommode pas son voisin "gravement." et ne lui cause pas de "dommages sérieux." Ici les dommages prouvés étaient de $398 pour le passé.

La cour d'appel reconnaît que le préjudice causé

(1) 26 Can. S.C.R. 20.

par l'appelant n'est pas appréciable, à tout événement qu'elle n'a pu l'apprécier. C'est ce que les témoins de l'intimé eux-mêmes établissent. L'architecte Benoit dit:

Comme je l'ai dit tantôt, il n'y a pas de dommages appréciables maintenant; si j'étais pour acheter la propriété, je ne dis pas que j'en ferais une différence pour moi-même.

En présence d'une telle preuve, ce que la cour d'appel aurait dû faire, c'était de confirmer le jugement de la cour de première instance, sauf recours pour l'avenir.

J'avais pensé qu'il serait peut-être dans l'intérêt de la justice d'ordonner une expertise afin de s'assurer des dommages existant aujourd'hui, car elle ne pourrait évidemment éclaircir la situation à l'époque de l'institution de l'action et avant. Le demandeur lui-même nous empêche d'avoir recours à cet expédient; il se réserve en effet tous ses recours pour l'avenir. Il peut se faire qu'il puisse établir que depuis l'institution de l'action, ses logements sont devenus "inhabitables et insalubres" par suite de l'aggravation de la servitude, ainsi qu'il allègue à tort qu'ils étaient avant son action. Dans ces circonstances graves ou autres semblables, il peut invoquer le possessoire; mais qu'il n'oublie pas que ce n'est que dans les cas d'aggravation de la serviture, c'est-à-dire, de trouble appréciable, réel et sérieux, qu'il peut réussir. Le trouble doit être non seulement appréciable, c'est-à-dire, qu'il puisse être déterminé; il faut de plus qu'il soit sérieux, eu égard aux circonstances. S'il est inappréciable, comme dans la présente espèce, ou presqu'insignifiant, peu considérable, le plaignant doit se pourvoir en dommages devant les juridictions inférieures. La porte des hautes cours lui est fermée et s'il

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l'ouvre, il ne lui sera pas permis d'écraser de frais inutiles un voisin qui lui a causé quelques petits torts, mais qui a agi de bonne foi et n'a jamais eu l'idée de porter atteinte à son droit de propriété, ni à sa possession.

Il ne me reste qu'une observation à faire, au sujet de l'incertitude des travaux à faire pour vaire disparaître la nuisance dont l'intimé se plaint. Le jugement n'indique aucunement les travaux à faire; il autorise en termes vagues "les ouvrages ou démolitions qui seront jugés nécessaires." Sera-ce la démolition de la glacière ou le creusage d'un fossé dans les trois pieds ou autre ouvrage? Impossible de le dire. L'appelant a droit de savoir exactement ce que la cour demande de lui. Cette omission a été jugée fatale à un pareil jugement. *Claude* v. *Weir* (1), *per* Dorion J.C., confirmé en cour suprême (2); S.V., 1865, 1. 811.

Pour ces raisons, je suis d'avis d'accorder l'appel et de rétablir le jugement de la cour supérieure avec dépens devant toutes les cours. Mais je suis seul de ce sentiment.

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

The case is not free from difficulties, owing to the conformation of the ground in question, and to the fact that the dampness, shewn to exist inside respondent's building, may in part arise from want of proper provision on his own part, to conduct water falling on and off his own building away therefrom. I cannot, however, help feeling that this dampness has been materially increased by the daily melting, for four

(1) M.L.R. 4 Q.B. 197, at p. 221.

(2) 16 Can. S.C.R. 575.

months of summer, of so much ice, in such close proximity to the respondent's house as this melting ice is placed.

I cannot infer that three feet of earth will, as a matter of course, pen back this water, so constantly soaking into that three feet of earth, so that it will not damage the building of respondent.

On the contrary, I must say, that in the absence of express proof that the said three feet of earth consist of such an unusual quality that its texture is impervious to water, it would seem to me proper to infer that it becomes by the constant soaking so saturated that like a large sponge it conducts the water to the respondent's building, to the impairment and ultimate destruction thereof.

MACLENNAN J.—I agree that this appeal should be dismissed with costs.

DUFF J.—I concur in the opinion of His Lordship the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellant: *I. S. Messier.*

Solicitors for the respondent: *Bisaillon & Brossard.*

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*Feb. 21, 22.
*March 7.

HENRY S. DALY PERSONALLY AND AS EXECUTOR OF THE ESTATE OF PAUL DALY, DECEASED. ..... } APPELLANT;

AND

EDITH K. BROWN AND DOROTHY BROWN. ..... } RESPONDENTS.

IN RE ESTATE OF PAUL DALY.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Executor and trustee — Moneys of testator — Deposit in bank — Authority to draw against—Gift—Sale by executor—Under value —Jurisdiction of Probate Court.

D. deposited money in bank in the joint names of himself and a daughter with power in either to draw against it. The daughter never exercised this power and when D. died she and her co-executor of his will, in applying for probate, included said money in their statement of the property of the testator.

Held, that the money in bank remained the property of D. and did not pass to the daughter on his death.

An executor sold property of the estate for $800, his wife being the purchaser. On passing of the accounts the judge of probate found as a fact that the property was worth $1,800 and ordered that the executor account for the difference.

Held, that the executor having really sold the property to himself secretly for an inadequate price he was properly held liable to account for its true value.

Held, also, that though the Probate Court could not set aside the sale it had jurisdiction to make such order.

Where by will money was bequeathed to the testator's daughter "to hold and be enjoyed by her while she remained unmarried" with a bequest over in case of her decease or marriage.

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

Held, that the daughter was only entitled to the income from said money and not to the possession and deposition thereof.

Remarks on the absence from the record of the decree of the Court of original jurisdiction.

APPEAL from a decision of the Supreme Court of New Brunswick affirming the ruling of the judge of probates for the City and County of St. John on passing the accounts of the estate of the late Paul Daly.

The several questions raised for decision on the appeal are sufficiently stated in the above head-note.

Newcombe K.C. and *McKeown K.C.* for the appellant. The deposit by the testator of money in the joint names of himself and his daughter with power to either to withdraw it vested such money at the testator's death in the daughter as surviving joint tenant. *O'Brien* v. *O'Brien*(1); *In re Eykyn's Trusts* (2); *Sayre* v. *Hughes*(3); *Hepworth* v. *Hepworth* (4); *Bennet* v. *Bennet*(5); *Fox* v. *Fox*(6), at p. 99; *O'Brien* v. *Sheil*(7); *Standing* v. *Bowring*(8); *Payne* v. *Marshall*(9).

Next as to the sale by appellant. Having assented to the devise to his sister as tenant for life and put her in possession he had no power to sell. At all events he is not subject to the jurisdiction of the Probate Court in this respect. *Dix* v. *Burford*(10).

The sale was properly conducted and no fraud or collusion is alleged or proved. A decree against him could only be made when he is guilty of a breach of duty. *Norris* v. *Howe*(11).

(1) 4 O.R. 450.
(2) 6 Ch. D. 115.
(3) L.R. 5 Eq. 376.
(4) L.R. 11 Eq. 10.
(5) 10 Ch. D. 474.
(6) 15 Ir. Ch. 89.
(7) Ir. R. 7 Eq. 255.
(8) 31 Ch. D. 282.
(9) 18 O.R. 488.
(10) 19 Beav. 409.
(11) 15 Mass. 175.

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The sale is not void but only voidable; Am. & Eng. Ency. of Law, vol. 2, p. 1149; and it has been ratified by long continued acquiescence.

Gregory K.C. and *Macrae* for the respondents. The money deposited belonged to the testator and the evidence must be clear that he intended to divest himself of the property in it. *Grant* v. *Grant*(1); *Marshal* v. *Crutwell*(2);

There is nothing except the form of the deposit to imply a gift and that is not sufficient: *In re Bolin* (3); *Kelly* v. *Home Savings Bank*(4); *Taylor* v. *Coriell*(5); *Flanagan* v. *Nash*(6).

The sale of the leasehold property by appellant was for a very inadequate price and it was secretly purchased by his wife. He was properly held liable to account for its true value. See Am. & Eng. Ency. of Law, vol. 2, pp. 1020-1022 and notes. *Pepperell* v. *Chamberlain*(7).

The devise to testator's daughter for her life or while she remained unmarried only entitled her to the income of the moneys bequeathed. *In re Adam's Trusts*(8); *In re Thomson's Estate*(9).

The judge of probates had jurisdiction to decree an account from the executor for the true value of the property sold and for the money in bank. See *Harrison* v. *Morehouse*(10).

THE CHIEF JUSTICE.—This appeal is dismissed with costs.

(1) 34 Beav. 623.
(2) L.R. 20 Eq. 328.
(3) 136 N.Y. 177.
(4) 103 N.Y. App. Div. 141.
(5) 66 N.J. Eq. 262.
(6) 185 Pa. St. 41.
(7) 27 W.R. 410.
(8) 11 Jur. N.S. 961.
(9) 14 Ch. D. 263.
(10) 4 N.B. Rep. 584.

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DAVIES J.—This is an appeal from a judgment of the Supreme Court of New Brunswick confirming an order or decree of the Probate Court for St. John City and County settling the accounts of the executor of the estate and distributing the surplus amongst the legatees.

The proceedings taken were at the instance of the surviving executor Henry S. Daly, the present appellant, who had fyled his accounts and obtained a citation calling upon all parties interested, chiefly his nephews and nieces, children of his sister Hester, to shew cause why these accounts should not be finally allowed and passed, and an order should not be made for the distribution of the estate according to the will of the testator.

The accounts as fyled did not credit the estate with any money of the testator at the time of his death and only credited $800 as the cash received from the sale of certain leasehold premises of testator.

About seven or eight days after testator's death in 1891, Henry S. Daly and his sister Jane Agnes, as executor and executrix of their father's will, had applied for probate thereof, and amongst other statements in their petition which the statute required to be verified on oath, was one that testator had died possessed of personal property to the value of about $4,800.

It was conceded on the argument that this valuation included certain moneys now in dispute which had been deposited by the testator in his life time in the Savings Bank and Bank of Montreal, in the joint names of himself and his daughter Jane Agnes "with power for either of them to withdraw."

As a fact it was shewn that between March 31st,

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1887, when the account in the Savings Bank was opened by the testator, and June, 1891, when he died, there had been two additional deposits made by him personally, and that there had been no withdrawal.

No inventory of the estate was fyled by the executor as required by law until the time when, many years after his father's death, he obtained the citation to pass his accounts and no reference was made in the inventory to these moneys left on deposit, the personal estate being alleged to consist of a certain leasehold interest in some lands and that alone.

The main questions tried out in the Surrogate Court and the Supreme Court of New Brunswick, were first, whether the surviving executor was liable to account to the estate for the moneys standing to the credit of testator and his daughter at time of testator's death in these banks, or whether they passed to the daughter Jane, his co-executrix, as joint depositor with their father by survivorship, in which latter case they went to the appellant under Jane's will; secondly, the true meaning of the bequest by the testator of all moneys he died possessed of

> to his daughter Jane to hold and be enjoyed by her while she remained unmarried;

and thirdly, whether the executor had accounted for the *real* value of the leasehold sold by him at auction when he returned $800 as that value, or was bound so to account for its true value in the open market.

About a month previous to obtaining the citation the appellant had fyled an inventory in which the value of the leasehold was put at $1,500. The evidence of the witnesses at the hearing put the value between that and $3,500. The probate judge settled it at $1,800.

A preliminary question as to the jurisdiction of the Probate Court of New Brunswick to determine the liability of the trustee executor so far as determining the value of this leasehold was concerned, and to pass his accounts and make distribution of the estate amongst the *cestuis qui trustent,* under the will, was raised in this court by the appellant for the first time. He had invoked such jurisdiction himself, fyled his accounts, placing such value at $800 at which he had sold, and transferred the leasehold interest, issued his citation for passing same, and for distribution of the estate, and in this court of appeal for the first time raises the question of the powers of the court he had invoked to make the orders he had prayed for, so far as the value of the leasehold he had disposed of was concerned.

A careful reading of "The Probate Courts Act" of New Brunswick, 61 Vict. ch. 35; R.S.N.B. ch. 118, satisfies me that the Probate Courts of that province have been invested with co-ordinate and concurrent jurisdiction with the courts of equity over "all the estates of deceased persons in the province," and as well over the accounts of executors and administrators as such and the distribution of the personal estate of the deceased, as over their accounts as trustees under the will and "over the administration of the trust estate." See secs. 13, 50, 51, 52, 53 and 54.

These concurrent powers are carefully guarded so as to protect all interests concerned. In the first place an appeal is given by section 115, as *of right* to the Supreme Court of the province from any *final order or decree* of the judge and when allowed by the Supreme Court or a judge thereof from *any decision* of the judge of probate, whether a final order or decree or otherwise.

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Secondly, the Supreme Court in Equity or a judge thereof has power, section 77, in cases where "concurrent or like jurisdiction" has been given to the Court of Probate, to assume exclusive jurisdiction and to stay the exercise of such concurrent powers by the Probate Court or judge taking such powers to itself alone.

Section 58 declares that the passing and allowing of any account of a trust as provided in the Act shall subject to appeal *have the same force and effect as if the accounts had been passed and allowed by the Supreme Court of Equity.*

There are many other sections unnecessary to refer to, protecting the interests of parties interested in the administration of an estate and in the passing of the accounts.

The Probate Court having concurrent jurisdiction therefore with the court of equity over the administration and distribution of the estate of Paul Daly, the appellant, as executor and trustee invoked that jurisdiction, fyled his accounts, and prayed that they might be passed and the estate distributed according to the will. He appealed from the order or decree made by the judge to the Supreme Court of New Brunswick, not excepting to the jurisdiction but simply to the merits of the decree. From the judgment of the Supreme Court confirming the decree of the Probate Court, he appeals to this court, and for the first time raises the question of the jurisdiction and powers of the Probate Court. For the reasons I have given I do not think his objections to jurisdiction can be entertained. His remedy if he doubted the jurisdiction of the Probate Court or thought that the circumstances demanded that the estate should be ad-

ministered and distributed by the court of equity, was to have applied to that court to stay the proceedings of the Probate Court and to administer and distribute the estate.

Then with reference to the merits and assuming that these accounts had been passed and administration and distribution awarded by the court of equity, would this court alter, modify or annul the decree, if that court had determined that under the circumstances it would be an injustice to the beneficiaries under the will to set the sale aside and order a new sale, and had held the executor, trustee, liable to account for the true value of the interest he had disposed of instead of the nominal value he had returned?

Assuming therefore the Probate Court to have had general jurisdiction, the questions remain as to its proper exercise.

Appellant contends with respect to two several sums, one of $1,095, standing on deposit in the Government Savings Bank at the time of Paul Daly's death in the joint names of himself and his daughter Jane "with power for either one to withdraw" and another sum of $1,020 standing in a somewhat similar position in the Bank of Montreal, that these sums became Jane Daly's absolutely on her father's death by right of survivorship.

The Court of Probate and the Supreme Court of New Brunswick both held under the evidence that there was absolutely nothing beyond the mere fact of the deposit in the joint names, with power for either to withdraw, to shew that Paul Daly intended these moneys to be a gift to his daughter, and that such fact of a joint deposit standing alone did not create a trust for the daughter under the facts as

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disclosed. When considered with all the accompanying facts I am of the opinion that this conclusion is correct and that these moneys must be accounted for as part of the estate. Shortly stated these accompanying facts are that each person in whose names the moneys were deposited had the right to withdraw them at any time, that this right could only be exercised with respect to Savings Bank deposits at any rate on production of the deposit book, that Paul Daly appeared to have retained exclusive possession of this during his life and by his will executed previously to the deposits had left all his moneys that he died possessed of to his daughter Jane (the joint depositor who lived with her father alone) while she remained unmarried for her life, and in the event of either contingency (marriage or death) then over to his son and his daughter Hester, and that after testator's death, Jane, together with her brother the appellant, jointly petitioned for probate of their father's will and in such petition stated that the father died possessed of personal property to the value of $4,800 of which these moneys on deposit admittedly formed a part.

Jane had therefore either been kept by her father in entire ignorance of these deposits in which case the father's silence and the retention by him of the deposit books in his own possession taken in connection with the disposition he had made of the moneys by his will of which she was an executrix would be strong evidence to shew that these deposits were made in the joint names simply for convenience to enable her to draw moneys in his life time in case of sickness or if he thought it desirable for other reasons or after his death as executrix, and not for the purpose of

creating a trust for the daughter or making a gift of the moneys to her; on the other hand, if she knew from her father of these deposits having been made then the statement in the petition which had to be filed under oath a few days after the death of the father that these moneys belonged to the estate was cogent evidence that she was aware from the knowledge gained from her father that it was not his intention to make a gift to her by the joint deposit. Any such knowledge as she possessed on the point was doubtless communicated to her co-executor who joined with her in the petition.

Taking all the circumstances together including the facts that the executors continued to deposit to the credit of the same accounts the moneys arising from the sale of the personal property of the deceased, I am not satisfied that the judgments of the courts below on this point should be disturbed.

A large number of cases Irish and American were cited at bar to which I have referred. There is no general governing principle applicable to questions of the kind I am now considering. In every case it is a question of intention to be gathered from the special facts and circumstances and the family relations or otherwise of the parties.

Then Mr. Newcombe raised the question as to the power of the executor to sell the remainder of the leasehold having assented to the legacy and put the tenant for life into possession.

Considering that the objection is raised by an executor who has already done the thing he now complains he had no power to do, and has sold the remainder of the leasehold and applied for an order for distribution of the proceeds, the objection seems an

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extraordinary one. But I do not think there is anything in it. The sale was made not by the executor *quâ* executor, but in his capacity of executor trustee for the beneficiaries. In Williams on Executors, 10th ed., p. 49, the law is stated to be as follows:

> It sometimes happens that a testator directs his estate to be disposed of for certain purposes without declaring by whom the sale shall be made. In the absence of such a declaration if the proceeds be distributable by the executor, he *shall have the power by implication.*

I think that rule applies here.

It was next argued that it was incompetent to charge the executor on the basis of wilful default in a proceeding of this kind without pleadings and notice. But as I have already attempted to shew the determination of the facts respecting the value of this leasehold property and its distribution as part of the assets of the estate are questions over which the Probate Court has general concurrent jurisdiction with the equity courts. Any difficulties which exist in the exercise of this jurisdiction are the creation of the appellant himself and he, be it remembered, is the man who has invoked the jurisdiction and asked the court to pass his accounts and make distribution of the assets.

The question arises upon the power of the court to charge appellant as executor trustee with a larger sum than he returned in his accounts as the proceeds of the sale.

The courts below held, I think correctly, that the sale of the leasehold was for a totally inadequate price, that the sale was made without the precautions necessary to safeguard the beneficiaries and that although ostensibly made at auction and to a third person it was really for the trustee executor himself.

That being so it needed no authority to shew that the sale could not stand and was not binding on the beneficiaries. It could have been set aside by them on application to the court of equity. The principle is not that a man shall not sell to himself, but that the sale shall be voidable if he is both seller and has a substantial interest in the purchase money. *In re Moore*(1). But the appellant denies that he was the purchaser or interested in the purchase. He contends that the sale was a *bonâ fide* auction sale at which the best obtainable price was had. The whole evidence gathered round that issue with the result that the courts below found that this property was purchased secretly but really for the appellant for the sum of $800, that it was worth at least $1,800, and directed he should be charged with that sum for it instead of the $800 he returned as the purchase money.

I agree with the contention in the plaintiff's factum that a purchase by an executor at his own sale is not necessarily void but merely voidable at the option of those who may be interested in the estate and that if they do elect to avoid the court of equity would be the proper court for them to appeal to. But here the facts are peculiar. The factum of the appellant shews that up to the hearing of this appeal the point of his contention was that there was no evidence he had any interest in the sale. The proceedings had gone on for some time before it transpired that the sale of the leasehold was really made by appellant to and for himself. The courts below have both found against him on the contention on this point, and we agree in their finding. General jurisdiction over the administration of the testator's estates being vested in the Probate Court and concurrent powers with the

(1) 51 L.J. Ch. 72.

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court of equity to allow and pass any account the appellant invoked that jurisdiction, the whole case was fought out on the assumption that the court had the necessary jurisdiction and the disputes related alone to the propriety of its exercise.

If the appellant had resold the property at an advance price it is beyond argument that under the findings of fact of the probate judge he would be liable to account to the estate for the enhanced price. In the notes to the leading case of *Fox* v. *Mackreth*(1), I find it laid down that:

> Executors and administrators will not be permitted either immediately or by means of a trustee to purchase for themselves any part of the assets, but will be considered as trustees for the persons interested in the estate and *must account to the utmost extent of the advantage made by them of the subject so purchased.*

I see no injustice in compelling an executor who has secretly sold the testator's property to himself for an inadequate price being compelled to account to the estate for its real and true value. *Hall* v. *Hallett*(2), and other cases are referred to. In that case the defaulting trustee who had sold shares improperly was not compelled by the court to go into the market and buy back other shares, but the court thought that justice would be done under the circumstances by *compelling him to pay the value of the shares.*

In the case of *Nant-Y-Glo and Blaina Iron Works Co.* v. *Grave*(3), V. C. Bacon says at page 748:

> I can find no authority and no case has been referred to but *Hall* v. *Hallett*(2) in which the court has confined its power of relief to the mere restitution of the thing which has been taken away.

(1) White & Tudor's Leading Cases in Equity, 7 ed., vol. 2, at page 745.

(2) 1 Cox 134.

(3) 12 Ch. D. 738.

The court of equity would doubtless mould its relief so as to meet the justice of the case and would not in all cases necessarily consider that full justice had been done by a defaulting trustee by the mere restoration of property he had improperly taken away. The Probate Court might under the circumstances of this case have stayed its hand and referred the parties to the court of equity for relief. But the appellant invoked its jurisdiction, pressed for its exercise, contested and disputed all the facts including the *real value of the leasehold he had sold* and bought for himself and now in this court of final resort to which he has appealed desires to have the proceedings reopened and the parties, for a very small sum, put to the great expense of an equity suit to have determined the questions he himself sought to have decided and practically consented should be determined by the Probate Court. I do not think he should be heard to do so.

The only remaining question is as to the meaning of the bequest to the daughter Jane and the executors' duty with respect to the control of the "moneys" which the testator left to her "to hold and be enjoyed by her while she remains unmarried" with a bequest over in case of her decease or marriage.

I am of opinion that with respect to "moneys" Jane was not entitled to the possession and disposition of the same but to the income only.

In the case of *Thorpe* v. *Shillington*(1), Mowat V.C. held that:

> Where money, mortgages and promissory notes were bequeathed to a legatee for life she was not entitled to the possession and disposition of the same, but to the income only, though of farming stock and

(1) 15 Gr. 85.

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implements given for life by the same clause she was to have the use in specie.

This being so then the executor would be liable to account to the estate if he handed over the corpus of the moneys to the legatee and any of it was lost. In this case it is apparent none was lost as the appellant on his sister's death received back $5,000 or $6,000 being practically her entire estate.

Before closing I wish to say a word about the form in which the case came before us. No formal decree or order was made in the Probate Court and had the fact been brought to our notice at the beginning of the argument I would have been strongly inclined to urge that in accordance with the practice of the court the appeal should either be dismissed or stand over until the record was properly completed and the decree was actually taken out and was before us, but as all parties strongly urged that the issues were sufficiently defined in the reasons for judgment given in the courts below and that further postponement would in view of the amount in dispute result in comparatively speaking heavy costs, the court somewhat reluctantly consented to hear the argument, intimating, however, that its doing so must not be taken as a precedent.

Whatever may be the practice of the Supreme Court of New Brunswick in hearing appeals from the Surrogate Court, a jurisdiction covering interlocutory as well as final judgments, I think it should be clearly understood that an appeal to this court will not be heard unless the formal decree has been taken out and appears upon the record.

In my judgment the appeal should be dismissed with costs and the decree taken out in accordance with the judgment of the judge of probate.

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Idington J.

IDINGTON J.—This is an appeal by Henry S. Daly the surviving executor of the last will of his late father, Paul Daly, from a judgment of the Supreme Court of New Brunswick, affirming the judgment of the Probate Court of the City and County of St. John, upon the hearing of a petition by said surviving executor to the judge of the said court to have the accounts of the administration of said estate, by said surviving executor, duly allowed and passed.

The petition alleged that the petitioner had administered the said estate, and that there was annexed to the petition the account of such administration.

In pursuance of the prayer to have all proper citations issued and orders given in the premises, such citations were issued and all persons concerned in the estate appeared.

The account annexed to the petition has been as a result of the inquiry amended in some ways that the appellant does not complain of but in others that he does complain of.

The testator died on or about the 5th of June, 1891.

The last will now in question was made on the 12th of February, 1886, and appointed the appellant and his sister Jane Agnes Daly, executor and executrix thereof.

The testator bequeathed to Jane Agnes Daly certain leasehold property while she remained a single woman or until death and then over to be sold and equally divided between the appellant, if living, and another sister or others; or over otherwise in alternative events and in ways needless to detail here.

The testator's said will then contained the following provisions:

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> And as to any money of which I may die possessed after the paying of my funeral expenses and the charges of proving this my last will, I give, devise and bequeath the same to my said daughter, Jane Agnes Daly, to hold and be enjoyed by her while she remains unmarried, and in case of her decease or marriage, whichever event may first happen, I direct the same to be divided equally between my son, Henry S. Daly, and my daughter Hester V. Brown; and in case of the death of either the said Henry S. Daly or Hester V. Brown before such division takes place, then the share of the one so dying without children her or him surviving, shall enure and be paid to the survivor, otherwise the children of the one first dying shall be entitled to share equally with the survivor.

The testator after making this will deposited from time to time in the Savings Bank and in the Bank of Montreal on deposit receipts.

A feature common to each set of these deposits was that either the testator or his said daughter Jane Agnes Daly could withdraw such deposit.

Some slight differences might be noted in the mode of deposit, in each case, but in the view I take these need not, as they might otherwise have required to be, dwelt upon.

At the time of the death of the testator the result of these deposits was that over a thousand dollars was left in each place of deposit. The daughter never drew upon either account, and may not have known of either.

The appellant in his account annexed to the petition for passing accounts, gave no credit for these sums deposited, though in the petition for probate signed by him and his sister, they were included in the estimated sum of the personalty belonging to the testator's estate.

Many presumptions of law and of fact may have left it a fairly arguable question, whether or not these sums had not by survivorship become the property of Miss Daly, but I cannot see how these slight pre-

sumptions can be now maintained by the appellant, against this solemn admission on his part, that in fact they did form part of the testator's estate.

I am therefore unable to come to any other conclusion than that thus declared by the appellant and his sister.

She was allowed by the appellant who received them to use, and in part at least to carry, these deposits, received after the grant of probate to them, as executor and executrix, beyond the jurisdiction of the court granting probate.

It is urged that she was entitled to possess them, and so deal with such deposits as she saw fit, until the bequest over became operative.

I cannot assent to such a proposition.

She cannot be said to have been the specific legatee of these sums in any such sense as to entitle her to the exclusive possession of them.

The rule laid down in *Howe* v. *Earl of Dartmouth* (1) seems applicable and the principle upon which it proceeds is conclusive against such a contention.

The appellant as executor became possessed of these funds and in duty bound to see that they were so secured that they should be available for those entitled, to what remained of them at her death.

Clearly the appellant once possessed of these moneys, (which were not like the leasehold estate specifically bequeathed), as the facts shew he was, is bound to account for them.

It seems no formal judgment ever issued in the Probate Court.

We are left to construe the opinion of His Honour Judge Trueman as a decree. I understand counsel for respondent do not claim it means more than that

(1) 7 Ves. 137.

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the appellant must, after reasonable time to realize upon the securities the late Miss Daly held, representing these moneys, become bound to pay over and distribute the same.

I would give the time that would be reasonable to do so, but in any event declare that he must account for the sums in question within such reasonable time with interest from the death of the late Miss Daly.

Another question raised by the appeal is, that the appellant claims he has been wrongfully charged with the sum of one thousand dollars, lost to the estate by reason of his having sold at a sacrifice the leasehold property.

He sold at public auction, without proper means to protect the estate from loss, and I have no doubt by circuitous methods, not countenanced by any law, acquired in name of his wife this leasehold property.

I doubt somewhat the jurisdiction of the Probate Court thus to deal with such a matter upon an application to pass accounts.

Though a sale by a trustee to an agent for himself, in substance to himself, is often spoken of as no sale, and as void, the result is not accurately described by these words.

It is for the *cestui que trust* to say whether or not he will permit it to stand.

It may be better for him to affirm such a sale. It may be more advantageous than to insist on avoiding it. In such a case it is not open to the offending trustee to insist upon its nullity.

The rule first suggested by Lord Thurlow, and later adopted by Lord Eldon, in *Ex parte Hughes*(1) and *Ex parte Lacey*(2), that the property should, if

(1) 6 Ves. 617. (2) 6 Ves. 625.

the *cestui que trust* so elect, be put up for resale at the price at which the trustee had purchased and if any advance made the resale should take effect, but if no bidding the trustee should be held to his bargain, seems to be in accord with reason and justice.

Lewin on Trusts, 10th ed., says at p. 561, that

> the same principle has since been followed in numerous other cases, and the practice may be considered as settled.

What authority has the Probate Court to deal with the matter in that way in passing accounts?

I asked counsel to point out to me the statutory provision giving the Probate Court, which is the creation of statute, or judge thereof, any such jurisdiction. He faintly relied on the implied power in the section providing for a final passing of accounts and discharging the executor or trustee.

I fail to be able to construe that section or anything in the Act in question as giving any such power.

The property in sales such as that in question often passes out of the control of the trustee into hands entitled to retain it and then the trustee may be compelled by the *cestui que trust* to account for the differences of *price* or for the difference between the sum the trustee paid and the *real value* of the estate at the time of the purchase with interest. See Lewin, p. 561.

I doubt if on the passing of accounts the Probate Court or judge can apply this remedy against the will of either party concurred. I incline, however, to the opinion that all parties agreeing he can. Many things here and there in the statute, such as the jurisdiction given over the property, the power to enforce filing an inventory and the power of removal of the

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executor guilty of waste and to substitute another who no doubt could sue for such loss by waste, indicate that by consent the probate judge might in assessing such damages be acting within what is implied in these more comprehensive powers.

The parties are not agreed as to what was intended here.

Counsel for appellant urges that all that took place in regard to the valuation of the property in question is attributable to the issue of whether or not the appellant had become entitled to his discharge.

If the appellant had been able to satisfy the learned judge of the Probate Court that he had credited full value of the property no need for going further. But it is said if he failed to so satisfy the learned judge then all the judge could do was to refuse to discharge him, and let the matter stand over until, by some more appropriate proceeding, the amount of loss to the estate might be determined and recovery from the executor had.

The difficulty I find is that while the evidence given on both sides might be attributed to the determination of this suggested primary question, it seems to be impossible to suppose on all the facts appearing that such was the real purpose of the appellant in conducting his side of the question.

I cannot find that he ever took the ground that it was not competent for the learned judge to determine the whole matter in difference as he has done.

A perusal of the evidence, and consideration of the manner of presenting it, leads me to the conclusion that both sides assumed the learned judge had jurisdiction to try such issues, and at all events understood that the contest conducted was of that nature and

that its result would be, if the evidence warranted it, the charging appellant with such loss.

I do not infer that any other contest was made than the *right* of respondents to have the appellant made answerable for such loss. The appellant clearly denied the loss, and in any event, the liability on his part, even if it existed, inasmuch as he had sold by auction to the highest bidder, to make it good.

These are objections quite different from objecting to the jurisdiction of the forum. Indeed he seems to have selected this forum to dispose of the whole of those matters in issue. Can he escape from the result?

His grounds of appeal to the Supreme Court of New Brunswick are set forth in detail, and I do not see my way to reading them as covering an objection to the jurisdiction of the trial judge.

Can he now raise that question? Can he do so any more than one who has submitted to any other form of arbitrament?

This is not the case of a tribunal absolutely without jurisdiction. In such cases the mere trial decides nothing.

It is the case of a tribunal having a jurisdiction to pass upon accounts the party moving it presents, and in which rectification of such accounts is clearly a matter incidental to the full discharge of the duty thus devolving upon the court. The boundary lines of this power of rectification are exceedingly difficult to define in some cases. The mistake in stating an amount received from a sale is clearly within it. The petitioner, assenting to that power of rectification, being extended to the case of an amount set down, not by mistake but correctly, yet the result of mis-

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take, in conducting the business of the trust, clearly must bind him.

I cannot distinguish this case from the latter.

There was no surcharge as I conceive there ought to have been to present the matter properly. There were no pleadings or issue of any kind such as might have possibly been directed. The ordinary case requires none. I mention these things to shew how loosely the parties proceeded without objection by the appellant. Hence when they disagree here as to the meaning of their proceedings below we have to extract from the whole proceedings the intention of the parties as best we can. The respondents must be held to have assumed and recognized that the property itself had got into innocent hands.

The appellant cannot be heard now to take any other position. His case has not, on the facts, any merits. His appeal must be dismissed. But the formal judgment should protect him from the possible embarrassments created by want of any formal judgment in the Probate Court.

MACLENNAN J.—There are two main points in this appeal. The first relates to the jurisdiction of the Probate Court to charge the appellant with the loss to the estate by reason of a sale of the testator's leasehold house at an undervalue; and the second to the claim of the appellant, as executor of the estate of his sister Jane, that his sister became, at her father's death, entitled by survivorship to the money on deposit with the government and the Bank of Montreal on savings account.

As to the first point, it is contended that the leasehold having been sold at public auction, after due ad-

vertisement, the propriety or validity of that sale could not be attacked or questioned by the probate judge, and that the only forum in which that could be done was the Supreme Court in Equity. It may be that the sale could not be set aside in the Probate Court, but it is not necessary to decide whether that could be done or not, for the probate judge did not assume to do that, and could not have done so without the purchaser Wilson, or the appellant's wife, for whom the purchase was said to have been made, or both of them, being made parties to the proceeding, which was not done.

What the learned judge has done, and what he had undoubted authority to do, is to find that the property was sold at a great undervalue, by the wilful neglect and default of the appellant, as the surviving executor of his father's estate.

The testator died on the 5th June, 1891, and on the 12th of the same month, the appellant and his sister Jane who were appointed executor and executrix of his will, presented a petition to the judge of probate asking for probate thereof to be granted to them, and stating that the testator had no real estate, but had personal property to the value of about $4,800 all situate within the City of St. John. Allowing for the money and household furniture, which was the only other property left by the testator, the leasehold must have represented about $2,200 of that valuation.

The appellant made no application to have his accounts as executor passed until after the death of his sister Jane, on the 6th of April, 1903. On the 16th May, 1903, he made an affidavit, verifying an inventory of the estate, in which he described the lease-

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hold in question as being valued at $1,500, and it is shewn to have been assessed at that sum. There is evidence that offers of $1,500 and $1,800 for the property had been made to the appellant and refused by him, and witnesses of experience deposed to valuations as high as $2,500 and $3,000.

The property was sold for $800, a sum slightly less than the clear rental income for two years.

It is clear that when an executor or trustee for sale has disposed of property at a gross undervalue, he may be called upon, in an accounting, to explain his conduct, and if it appears that the loss arose by reason of his neglect, carelessness or other misconduct, he may be charged therewith, as for wilful neglect and default.

In such a case it is not necessary for the *cestui que trust* to take proceedings to set aside the sale. In many cases that may not be possible; the purchaser may have bought fairly and honestly, and may have got a good title, and the only remedy available to the beneficiary may be to hold the executor or trustee responsible for his neglect of duty.

That is what the learned judge has done here, and I think he had sufficient evidence before him to support his finding.

The appellant and his wife had been living in the ground floor of the house for about seven years, and were still in occupation at the time of the sale, and another tenant occupied the first floor. The purchaser at the sale was one Wilson, who deposes that he bought the property for the appellant's wife, that he had the request from her personally, saw her personally and spoke to Mr. Bustin about it, and he understood that Bustin and Porter were acting for the ap-

pellant. The appellant however denies that he knew his wife was the purchaser until after the sale, but knew immediately afterwards. He was present at the sale, which was managed by his solicitors Bustin & Porter. In his evidence he at first endeavoured to conceal that his wife had been the purchaser. He said:

> Mr. Wilson was the purchaser. Mr. Wilson is my landlord now. I have made no arrangement with Mr. Wilson for rental. He has not paid me the $800. I do not know of my own knowledge that Mr. Wilson has paid the $800. I do not intend purchasing the property, and I do not know that my wife intends purchasing.

Afterwards, however, he admits that he knew immediately after the sale that Wilson purchased for his wife. It is not difficult from all this to infer that the cheque which Mr. Wilson says he gave in payment, was repaid with the money which was drawn upon it.

It is noticeable that the advertisement of sale is defective. It is silent as to the duration of the term, or whether renewable, or what the income was from rents. The sale was without reserve or a reserved bid, notwithstanding a suggestion by the solicitor of the respondents that a sale without reserve, or without an upset price being fixed, might result in the property being greatly sacrificed. The answer by the appellant's solicitors to this suggestion was, in effect, that neither he nor his clients had any right to interfere, and that the executor had the sole right to decide how it should be disposed of. In the same letter they stated that the property was assessed for $1,500, and in a subsequent letter that two offers had been made of about $1,750 each.

I am of opinion that the probate judge was right in charging the appellant on the footing of wilful neg-

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lect and default, and that the sum with which he has charged him was well warranted by the evidence.

It was objected before us that it was not competent to the probate judge to take the account against the appellant on the footing of wilful neglect and default, for want of jurisdiction and for want of pleading. I think, looking at the provisions of the Probate Act, ch. 118, R.S.N.B., 1903, there can be no question of the learned judge's power, and as to the want of pleading it is too late, the appellant not having, so far as appears, raised the objection in either of the courts below, to raise it for the first time in this court.

The other question has also in my opinion been rightly decided against the appellant.

It is hardly disputed, and I think could not be for a moment, that the money which was deposited, both in the Bank of Montreal and in the Government Savings Deposit, was the testator Paul Daly's money. But it is said that the form of the receipts given for those deposits made the father and his daughter Jane joint tenants of the money, so that at the father's death his daughter became entitled to the whole by survivorship. I do not see how that can be so. In a case of joint tenancy neither party is exclusive owner of the whole. Neither can appropriate the whole to himself. Here, however, the father did not lose his right to take the whole, by authorizing his daughter also to draw. He could still draw the whole whenever he pleased, up to the day of his death, and if he did it would all be his own money. Could his daughter have done that? I do not think so. She could as against the bank have drawn it all, and a payment to her would have discharged the bank; but the money would still have been the father's money in her hands.

She would have been accountable to him for it all. If I authorize another to draw a cheque on my bank account that is not necessarily or *primâ facie* a gift. My mandatory would be responsible to me for so much money, unless I gave it to him expressly as a gift. Here there are no words at all of gift used by the father. He gave her nothing but authority to draw or to receive his money, expressly reserving and retaining his own right. It is no more than if he wrote to the bank saying, I authorize you to honour my daughter's cheques on my deposit.

The daughter was therefore no more than an authorized agent, and when her father died the authority he had given was revoked by operation of law, and the funds remained the money of the testator's estate, subject to the provisions of his will.

The daughter never drew anything during her father's life time, but within eight days after his death, instead of claiming the money as her own, joined her brother the appellant in a petition for probate, declaring that her father's estate was of the value of about $4,800, which it could not possibly be without including the savings deposits.

Not only that but on the same day of the signing of the said petition she deposited $250 of money found in the testator's house in one of the savings accounts, and made two further similar deposits, one of $100 admitted to have been her father's money, and the other on the 6th October afterwards, the sum of $189 the proceeds of the sale of the testator's household furniture.

These subsequent deposits shew that neither at the time of the testator's death nor for months afterwards, had his daughter Jane any idea that the de-

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posits stood in any different position from the rest of her father's estate.

I am therefore clear that the judgment is right in relation to the savings deposits. On the other minor questions which were raised by the appellant I entirely agree with the judgment of the probate judge.

DUFF J.—I concur for the reasons stated by Mr. Justice Maclennan.

Appeal dismissed with costs.

Solicitors for the appellant: *Bustin & Porter.*

Solicitor for the respondents: *A. J. Gregory.*

PHILIAS VANIER (DEFENDANT).....APPELLANT; 1907

*May 14, 15.
*June 24.

AND

THE CITY OF MONTREAL (PLAINTIFF).....} RESPONDENT.

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

Municipal corporation—Montreal city charter—52 V. c. 79, s. 120 (Que.)—Construction of statute—"Current year"—Assessment and taxes—Limitation of action—Local improvements—Special tax.

By section 120 of the charter of the City of Montreal, 52 Vict. ch. 9 (Que.), the right to recover taxes is prescribed and extinguished by the lapse of "three years, in addition to the current year, to be counted from the time at which such tax, etc., became due." A special assessment for local improvements became due on the 14th of March, 1898, and action was brought to recover the same on the 4th of February, 1902.

Held, affirming the judgment appealed from (Q.R. 15 K.B. 479) the Chief Justice and Duff J. dissenting, that the words "current year" in the section in question, mean the year commencing on the date when the tax became due and that the time limited for prescription had not expired at the time of the institution of the action.

APPEAL from the judgment of the Court of King's Bench, appeal side, (1) affirming the judgment of the Superior Court, District of Montreal, which maintained the action with costs.

The circumstances of the case material to the question at issue upon the present appeal are stated in

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

(1) Q.R. 15 K.B. 479.

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the head-note and discussed in the judgments now reported.

Beaudin K.C. and *Mignault K.C.* for the appellant.

Atwater K.C. and *J. A. Archambault K.C.* for the respondent.

THE CHIEF JUSTICE (dissenting).—By virtue of a special assessment made in connection with the widening of St. James street, and which became due and exigible on the 14th March, 1898, the appellant, as a proprietor interested in the work of improvement, was indebted to the city in the sum of $3,788.02, with interest, as claimed from the first of April, 1898. To recover these sums an action was brought by the city on the 4th February, 1902. To this action the defendant pleaded the prescription of three years and the current year under section 120 of the city charter then in force, 52 Vict. ch. 79.

By special answer the city alleged interruption of prescription, but this was not insisted upon and may now be considered as withdrawn.

The question to be determined on the pleadings is as to the meaning of the words "within three years in addition to the current year" to be found in section 120, which section reads thus:

120. The right to recover any tax, assessment or water-rate under this Act is prescribed and extinguished, unless the city within three years, *in addition* to the current year, to be counted from the time at which such tax, assessment or water-rate became due, has commenced an action for the recovery thereof, or initiated legal proceedings for the same purpose under the provisions of this Act; and the privilege securing such tax, assessment, or water-rate avails to the city, notwithstanding any lapse of time for the recovery of any

sum which may, by any judgment, be awarded to the city, for such tax, assessment or water-rate; provided that in case any special assessment is made payable by annual instalments, the prescription runs only from the expiry of each such instalment.

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The Superior Court, Taschereau J., held that the action was brought *en temps utile,* that is to say, within the time fixed by this section, and on appeal this judgment was confirmed.

We are, much to our regret, deprived of the advantage of reading the notes of the judges who sat in the case below, and who must have given the question much careful consideration. Although somewhat inartistically expressed, I am of opinion that the intention of the legislature, so far as I can gather it from the words used, was to give the city a right to recover the amount of the assessment by suit brought within three years from the time at which it became due in addition to the year then current. The three years are to be counted in addition to the current year as I read the statute. Which is the *current* year to which the three *calendar* years are to be added? Surely the year current when the tax became due and not the year then beginning. The word "year" used alone means a calendar year. *Gibson* v. *Barton* (1) page 329; and "current year" means the year running —passing—current—on its progress: *Année courante celle qui est en voie de s'accomplir* (Baudry-Lacantinerie, Vol. 3, No. 1729).

Can we hold that the Quebec legislature intended two terms which have such distinct meaning as current year and calendar year to be interpreted as convertible.

The tax became due and exigible on the 14th

(1) L.R. 10 Q.B. 329.

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March, 1898, when the special assessment roll, as finally revised, was deposited in the treasurer's office. Section 231 of the charter. And the year current when the tax was due was for purposes of taxation the year beginning May, 1897, and ending May, 1898.

In the *City of Montreal* v. *Cantin*(1), Taschereau C.J. says at page 228, construing the same statute:

> Here the statute decrees not merely that the assessment became due but also that *it may be recovered* immediately after the deposit of the roll creating the debt, and gives the remedy, the right to collect it immediately. And when it adds that the prescription runs from the date that the assessment *became due*, using the same expression, or when payable by instalments from the date of the expiry of each such instalment, that cannot but be construed as if it said, in so many words, that the prescription runs from the date of the deposit of the roll, or from the expiry of each instalment, if any.

This is a special tax payable once and for all, and prescription runs from the date of the deposit of the roll as it would run in the case of a tax payable by instalments from the expiry of each instalment.

On page 2 of their factum, the respondents say:

> Take the case of an annual assessment or tax imposed and levied, we will say, for the period of time comprised between the 1st of May of one year and the 1st of May of the next and becoming due, as the majority of taxes do, on the 1st day of November, the city would have the right to sue for three full years of such annual assessment as well as for the year current at the time of the institution of the action; thus, an annual tax or assessment which became due on the 1st of May, 1898, would not be prescribed until the 1st of November, 1902, that is, the city at any time between the 1st November, 1901, and the 1st November, 1902, could take action for the amount of the assessment which became due on the 1st November, 1898, as well as for any assessments in subsequent intermediate years, in addition to the current year.

I cannot quite understand what this paragraph means. If the tax became due on the 1st May, 1898,

(1) 35 Can. S.C.R. 223; (1906) A.C. 241.

prescription would begin to run from that date and an action could then be taken for the recovery of the amount of the taxes unless some provision in the city charter postponed payment until November. No such provision has been pointed out to us and I have not been able to find any. I repeat however that in my opinion the words "current year" in section 120, mean the year current at the time the tax became due. It is immaterial in so far as this case goes whether it is the current year for taxation purposes May, 1897, to May, 1898, or the fiscal year which is the same as the calendar year, 1st January, 1898, to 1st January, 1899. In one case the current year would end May 1st, 1898, and in the other January 1st, 1899; and in either alternative therefore the three years would have expired either May 1st, 1901, or January 1st, 1902. The action brought in February, 1902 was beyond the term. To hold otherwise is to refuse to give effect to the words "current year," and to say that when the legislature used the words "three years and the current year" it meant four calendar years, and the four years must be counted from the day the tax became due.

The natural and ordinary meaning of the word "current" used in this connection, is running—moving—flowing—passing—present in its course as the current month or year: (Century Dictionary).

The question we must answer is, what was the year running—passing—current in its progress when the tax became due in March, 1898, not what was the year then beginning. I repeat the answer is either the year fixed by the municipality for taxation purposes or the then calendar year.

It is unnecessary to say that the sense in which a word is used is to be gathered from the context, and

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one of the most elementary rules of construction requires that effect must be given if possible to every word, clause or sentence in a section. Undoubtedly three years means three calendar years, and if the legislature meant four calendar years why not have substituted the word four for the word three, but having used the words "current year" instead must we not say that it was obviously their intention by these words to refer to the year then running. If the legislature used the word "current" to qualify year, must it not presumably have been for some purpose to which we must give effect.

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

GIROUARD J.—The old charter of the City of Montreal in force at the time the proceedings in this cause took place, 52 Vict. ch. 79, sec. 120, provides that "the right to recover any tax, assessment, or water rate, under this Act, is prescribed and extinguished, unless the city, within three years, in addition to the current year, to be counted from the time at which such tax, assessment or water rate became due, has commenced an action," etc. The judges of both courts below have held that the "current year" means the year of the institution of the action. I am inclined to agree with them, especially in view of section 117, granting a privilege upon the land assessed. That section declares that

> such privilege does not extend beyond the amounts due for three years, that is to say, for the year when such claim is made, and for the three years next preceding that year.

I think that these two clauses of the charter must be read together; at least one helps the other; and if any

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doubt exists in section 120, section 117 removes it. Practically, the city has four years to sue for taxes or assessments, and in this case the action was taken in due time.

The expression "current year" is not unique in the legislation of the Province of Quebec. It is to be found in arts. 2122, 2123 and 2124 of the Civil Code, and it is remarkable that the above interpretation had been adopted by the courts and commentators. *Macdonald* v. *Nolin*(1); Troplong, Priv. Hyp. n. 698, *ter;* 3 Aubry et Rau, 4th ed., par. 285, 698.

In my opinion the appeal should be dismissed with costs.

DAVIES J.—The determination of this appeal depends upon the proper construction of section 120 of 52 Vict. ch. 79 (1889) of the Province of Quebec. That statute was the city's charter at the time of the assessment and levying of the special tax now in dispute. The section reads:

> The right to recover any tax, assessment or water-rate under this Act is prescribed and extinguished unless the city within three years in addition to the current year *to be counted from the time at which said tax, assessment or water-rate became due* has commenced an action for the recovery thereof or initiated legal proceedings for the same purpose under the provisions of this Act; and the privilege securing such tax, assessment or water-rate avails to the city, notwithstanding any lapse of time, for the recovery of any sum which may, by any judgment, be awarded to the city, for such tax, assessment or water-rate; provided that in case any special assessment is made payable by annual instalments, the prescription runs only from the expiry of each instalment.

Much ingenuity was exercised in trying to give a limited meaning to the words of the section both with respect to the kind of taxes whether special as well as

(1) 14 L.C. Jur. 125.

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general to which it was applicable, as also to the time within which the city could recover the tax. I think the controlling words of the section are the words I have italicized above "to be counted from the time at which the said tax, assessment or water rate became due." Those words interpret, define and make certain what otherwise might be held indefinite and uncertain, namely, the meaning of the words "current year" excluding the idea that they could mean either the "city financial year" or the "calendar year" as alternately suggested, and covering ordinary as well as special taxes or assessments. They make, in my opinion, that quite plain which in their absence might be doubtful, namely, exactly what "current year" meant, and the exact time it covered in each case by arbitrarily fixing its commencement, namely, the day the tax became due. The reason, no doubt, for such a definition was the fact that the special and general taxes fell due on different days. I think the appeal should be dismissed with costs.

IDINGTON J.—I concur for the reasons stated by Mr. Justice Girouard.

MACLENNAN J.—I am of opinion that this appeal must be dismissed.

Whatever may have been the motive or reason for expressing the law limiting actions for the recovery of taxes and rates by the defendant corporation in the language which has been used, I think that language does not admit of the construction contended for by the appellant.

The section in question declares that the right to recover is extinguished, unless the city, within three

years, in addition to the current year, to be counted from the time at which the tax becomes due has commenced an action, etc. I think it is impossible to contend or hold that the current year here mentioned commences otherwise than as expressed, namely, at the time when the tax becomes due.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—I dissent from the judgment of the majority of the court for the reasons stated by His Lordship the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Beaudin, Loranger & St. Germain.*

Solicitors for the respondent: *Ethier, Archambault, Lavallé, Damphousse & Butler.*

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*May 15.
*June 24.

HENRY K. WAMPOLE ET AL. (PLAINTIFFS) ..... } APPELLANTS;

AND

GEORGES A. SIMARD ET AL. (DEFENDANTS) ..... } RESPONDENTS.

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

Breach of contract—Conspiracy—Fraud—Assessment of damages.

APPEAL from the judgment of the Court of King's Bench, appeal side, (Trenholme J. dissenting,) affirming the judgment of Archibald J. in the Superior Court, District of Montreal, which maintained the plaintiffs' action, without costs, to the extent of a balance found to be due to them after deducting damages assessed in favour of the defendants upon an incidental demand which was maintained with costs.

The action was for the price of medicinal pills, called "red pills" which the plaintiffs had manufactured for the defendants according to a special formula, supplied by the defendants, under a contract with a condition that pills manufactured according to that formula should not be manufactured for or sold to any persons other than the defendants. The defendants denied liability, counterclaimed for damages for breach of the condition of the contract and charged the plaintiffs with having sold a quan-

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

tity of similar pills to certain persons who had infringed their trade-mark and with having participated, with these persons, in a fraudulent conspiracy to injure the defendants' business. The learned trial judge maintained the plaintiffs' action in part, without costs, maintaining the incidental demand in respect to damages sustained by loss of profits through the wrongful sale of the pills and for expenses in obtaining evidence as to breach of contract, with costs, but disallowed certain other expenses incurred in the prosecution of the conspirators by the defendants, and he also found that the plaintiffs had not participated in the conspiracy.

The Court of King's Bench affirmed this judgment, and the plaintiffs appealed.

The majority of the judges of the Supreme Court of Canada were of opinion that the appeal should be dismissed. Davies and Maclennan JJ. dissented in respect to the damages allowed on the incidental demand for loss of profits alleged to have been sustained in consequence of the sale of the pills supplied in breach of the contract.

The following notes of reasons for the judgment were delivered.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. I am of opinion that the appeal should be dismissed for the reasons given in the court below.

GIROUARD J.—This case involves only questions of fact decided by two courts. The respondents charge fraud against the appellants; it has been found by the two courts below, and I do not think that the evidence would justify me in disturbing their findings. For that

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reason, I do not feel disposed to quarrel with the principles they applied to assess the damages. Arts. 1065, 1073, 1074 C. C.

In my opinion, the appeal should be dismissed with costs.

DAVIES J. (dissenting).—This was an appeal from the judgment of the court of appeal for the Province of Quebec confirming a judgment of Mr. Justice Archibald of the Superior Court in favour of the appellants for the sum of $413.67 and condemning each party to pay his own costs.

The amount of the judgment given in favour of the plaintiff was reached by allowing him $2,435.33 for goods sold and delivered to the defendants (respondents) and deducting therefrom a sum of $2,021.66 for damages claimed to have been sustained by the defendants by reason of a breach of contract made between the parties by which the plaintiffs received a private formula from the defendants for the manufacture of a particular pill and agreed not to manufacture and sell pills from the formula to others than the defendants.

The items which were found by the trial judge as damages were for

Loss of profits on a quantity of these pills manufactured and sold by plaintiffs to one Gauvreau and his associates.	$1,586.66
Expenses paid by defendants in employing detectives and analysts in finding out the necessary facts. . . .	435.00
	$2,021.66

There was some argument on the appeal as to the correctness of the amount found in plaintiffs' favour of $2,435.33 it being contended on his behalf that they were entitled to a much larger amount for pills which they were in process of manufacturing for defendants, but which were not delivered to them owing to their breaking off business relations with plaintiffs on discovery of the latters' breach of their contract. On this point, however, we were all of opinion that the judge's findings were correct and should not be disturbed.

The questions in dispute were thus reduced down to those arising out of the defendants' counter claim for damages.

These naturally divide themselves into two, first the claim for defendants' expenditure in employing detectives to discover and discovering through their own agency the fact that plaintiffs had manufactured and sold pills from their private formula to other parties (one Gauvreau a chemist and his associates) and the expenses paid by them to analysts to analyze the pills so sold in order to prove that they were made from their private formula. Secondly, damages in the nature of loss of profit claimed by reason of the subsequent sale of the pills by Gauvreau and his associates to the public in wrappers counterfeiting defendants' trade mark.

With regard to the first items amounting to $435 I am of opinion that they were properly allowed because I think there was a contract proved between the parties of which the plaintiffs were guilty of a breach and these expenses were under the circumstances necessary and legitimate in view of the fact that plaintiffs when charged with the breach emphatically denied the facts through their manager and threw the onus upon defendants of proving them.

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That the manager's denial may have been hasty and *bonâ fide* when made with the knowledge he then had can avail nothing in the light of the facts subsequently proved that the alleged sales had been made.

The evidence of Brick, plaintiffs' manager, is conclusive as to the existence of the contract claimed by defendants because he frankly states, that all their trade circulars issued to the public contained the explicit statements and assurances that

> private formulæ entrusted to our temporary care are treated and handled in the strictest confidence in manufacture. Numbers and not names are invariably used.

It was on these assurances defendants contracted with them and the sales made by them (even if inadvertent and unintentional) to the chemist Gauvreau and his associates were in breach of such contract.

The other main question argued was as to the plaintiffs' liability to pay the damages claimed by defendants by reason of the sales to the public by Gauvreau and his associates of a portion at least of the 300,000 or more pills sold to them by plaintiffs. Can these alleged damages be held in any way under the facts as proved to be the direct result of plaintiffs' breach of contract ?

The parties Gauvreau and others who purchased these pills from the defendants did so according to the evidence alike of Gauvreau, who ordered the pills, and Pineo, the plaintiffs' agent in Montreal, who received the orders from him and transmitted them to the plaintiffs in Toronto as "Blaud's Nux Vomica No. 4 pill," a standard preparation which if it had been supplied would have been a sufficient answer to defendants' claim, they not having any special right or property in the formula.

As the evidence shewed, however, the pills supplied Gauvreau and his associates contained the two additional ingredients which defendants had added to Blaud's Nux Vomica No. 4 pill and so came within the private formula of defendants supplied to the plaintiffs for manufacture. Whether this arose from carelessness or negligence matters not; it was clearly such carelessness or negligence as under their contract with defendants they would be liable for, so far as any direct damages are concerned.

But Gauvreau, who bought the pills, had entered into a conspiracy with one Cloutier and others fraudulently to counterfeit the defendants' trade mark, enclosed the pills in boxes similar to those in which defendants sold their pills, and wrapped them up in defendants' counterfeited trade-mark.

This alone would constitute a wrong as between Gauvreau and the defendants. A mere sale by the latter parties of the pill without any violation of defendants' trade-mark would not have rendered them liable to defendants. But, of course, without using and counterfeiting of the defendants' trade mark there would not probably have been any sales. There is no pretence under the evidence for saying that the plaintiffs were parties in any sense to these fraudulent sales or fraudulent attempts to sell. On the contrary the criminals themselves, who were afterwards indicted and punished for their crimes expressly in their evidence in this suit exonerated Pineo, plaintiffs' agent, from any complicity in or knowledge of their intended fraud and Pineo's evidence is to the same effect.

There is no evidence to the contrary and the learned trial judge, speaking of the only bit of evidence

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which could be urged as supporting the contention of plaintiffs' complicity in the violation of defendants' trade-mark by Gauvreau and his associates, says:

> In this case I am not prepared to say that the plaintiffs in applying the red colour to the pills sold by them to Gauvreau, Massicotte and Cloutier did apply a false description to these goods within the meaning of the article of the Criminal Code or did *violate the trade-mark of the defendants.*
>
> I therefore come to the conclusion that the expense of the defendants in convicting the parties of forgery of their trade-mark in *which forgery the plaintiffs took no part* other than the rendering it possible, as above pointed out, cannot be charged against the plaintiffs.

In these findings I entirely concur and while I agree with the learned judge in striking out of defendants' claim the counsel fees paid by them in the prosecution of the fraudulent counterfeiters for counterfeiting defendants' trade mark, I cannot see on what principle these fraudulent sales under these counterfeited trade marks can in any way be held to give rise to a claim for damages against the plaintiffs who were not in any way parties to the fraud.

In the chain of events which led up to the fraudulent sales by Gauvreau and his associates the plaintiffs were parties to the extent of furnishing the goods. But they knew nothing whatever of the contemplated fraud and it certainly cannot be inferentially imputed to them in the face of the explicit denials of Pineo, their agent, on the one hand and of all the conspirators on the other.

The judgment of the court of appeal seems to proceed upon the ground stated by Lavergne J. that "the fraud was perfectly proved." So it was as against all the conspirators. But certainly not as against the plaintiffs, who in the words of the finding of the trial judge, did not "violate the defendants' trade mark" and "took no part" in the conspirators' forgery.

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At the utmost they did something, sold the pills, which enabled the purchasers without their knowledge subsequently to commit a crime.

People are not supposed to commit crimes and the protection against them is not the vigilance of the parties excluding the possibility of committing them, but the law of the land. See the judgment of the Judicial Committee in *Colonial Bank* v. *Marshall*(1), at pp. 567-8, where the authorities are referred to.

The damages, if any, sustained by defendants were so sustained because of sales by Gauvreau and his associates of a quantity of pills sold in boxes similar to those used by defendants and wrapped in the latter's trade-mark which Gauvreau *et al.* had counterfeited.

As I have shewn the plaintiffs were in no way parties to this fraud nor can it be imputed to them from the only fact which at all connects them with Gauvreau *et al.*, namely, that they sold him 300,000 or more of these pills and that such sale was a violation of their contract with defendants.

Such criminal action of Gauvreau's from which defendants suffered was, it is true, a sequence of the improper sale by plaintiffs to Gauvreau, but in no way a consequence of such sale.

They cannot be presumed to have had any knowledge of Gauvreau's criminal intentions as to the counterfeiting and use of defendants' trade-mark, which alone enabled him to make the sales and so damage defendants; on the contrary the evidence negatives such presumption.

These damages therefore not being the direct and

(1) [1906] A.C. 559.

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proximate cause of the plaintiffs breach of their contract with defendants are not recoverable against plaintiffs.

The result would be that the appeal should be allowed with costs in this court and in the court of appeal and the judgment of the Superior Court confirmed by the court of appeal amended by disallowing the $1,586 allowed for damages for loss of profits on the alleged fraudulent sales of pills, leaving a balance in favour of plaintiffs of $2,000.43 for which judgment should be entered for them.

The judgment of the Superior Court on the question of costs to stand.

IDINGTON J.—For the reasons assigned by the learned trial judge and in the court below, I think this appeal should be dismissed with costs.

MACLENNAN J. (dissenting).—I am of opinion that this appeal should be allowed with costs for the reasons stated by Mr. Justice Davies.

Appeal dismissed with costs.

Solicitors for the appellants: *Smith, Markey & Skinner.*

Solicitors for the respondents: *Brosseau & Holt.*

THE ELK LUMBER CO. (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CROW'S NEST PASS COAL CO. AND OTHERS (DEFENDANTS) ... } RESPONDENTS.

1907

*May 21.
*June 24.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Agreement for sale of land — Principal and agent — Estoppel — "Land Commissioner"—Specific performance.

The plaintiffs, as assignees, claimed specific performance of an alleged agreement for the sale of lands based upon the following letter:—"Fernie, B.C., June 5th, 1900.—D. V. Mott, Esq., Fernie, B.C.:—*Re sale to you of mill site.*—Dear Sir:—The Crow's Nest Pass Coal Company hereby agree to sell to you a piece of land at or near Hosmer Station, on the Crow's Nest line, to contain at least one hundred acres of land, at the price of $5.00 per acre; payable as follows: When title issued to purchaser, title to be given as soon as the company is in a position to do so. Purchaser to have possession at once. The land to be as near as possible as shewn on the annexed sketch plan. Yours truly, W. Fernie, "Land Commissioner."—The lands claimed were not those shewn on the sketch plan but other lands alleged to have been substituted therefor by verbal agreement with another employee of the defendant company, at the time of survey.

Held, affirming the judgment appealed from (12 B.C. Rep. 433) but on different grounds, that specific performance could not be decreed in the absence of any proof of authority of the agent to sell the lands of the defendant company, and that the mere fact of investing their employee with the title of "Land Commissioner" did not estop the defendants from denying his power to sell lands.

APPEAL from the judgment of the Supreme Court of British Columbia(1) affirming the judgment of

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

(1) 12 B.C. Rep. 433.

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Morrison J. by which the plaintiffs' action was dismissed with costs.

The facts of the case and questions at issue on this appeal sufficiently appear from the head-note and the judgments now reported.

Nesbitt K.C. and *Deacon* for the appellants.

Marsh K.C. and *J. A. Macdonald K.C.* for the respondents.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. I concur for the reasons given in the court below.

DAVIES J.—At the conclusion of the argument I was of the opinion that this appeal was a hopeless one.

The action was one for specific performance and the contract relied upon to bind the company was a letter written to one Mott, plaintiff's assignor, by an official of the company who signed himself "W. Fernie, Land Commissioner." The letter purported to agree to sell to Mott a piece of land at or near Hosmer Station on the Crow's Nest line to contain at least 100 acres of land at the price of $5 per acre, and contained the following:

> The land to be as near as possible as shewn on annexed sketched plan.

Now as a fact the plan of the piece of land as surveyed by plaintiffs produced in evidence and a conveyance of which was sought to be enforced shewed a plot of land, alike it is true in acreage, but altogether different in its boundaries from the land shewn on

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the sketch plan attached to Fernie's letter. It was contended on the appellants' part that Tonkin, a general manager of the company, had subsequently orally authorized a survey to be made of the lands for which specific performance was sought to be enforced under the alleged agreement made by the land commissioner, Fernie.

I am quite unable to put any construction upon the evidence with respect to Tonkin's position or powers, or as to what he told the surveyor when he was going to make the survey which would justify the court in assuming or concluding that Tonkin had made or intended to make or had authority for making a new agreement entirely altering the boundaries of the lands referred to in Fernie's letter relied upon as a binding agreement. I do not see how it is possible to construct a binding agreement against the company by combining Tonkin's statement with Fernie's letter and substituting for the lands described in the letter other quite different lands.

On this ground alone the action would fail. But I fully agree with respondents' contention that there was no evidence shewing any authority in Fernie to bind the company to any agreement for the sale of their lands or of any other lands excepting perhaps it might be in the town-site of Fernie, or any evidence by which the company held him out to the person to whom the letter was written or to the public as one who possessed such authority.

The respondents were not a land company and had not authorized any one to sell the lands which they were acquiring from the railway company and they had never offered so far as appeared any lands for sale outside of their town-site lots. Whatever author-

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ity to sell lands Fernie may have had on the date of the writing by him of the letter relied upon was confined to the town site and it is not contended that these lands in question were within these confines.

Fernie it is alleged did make a sale of a lot within the town site to one Mott but that was not until some months after the alleged agreement in this case.

Then is there anything in the agreement that the company by investing him with the title of "Land Commissioner" necessarily and in absence of other evidence estopped themselves from denying his power to sell their lands? I do not think so. I do not think the title necessarily implies any such power and under the facts of this case I cannot find any good grounds for supporting the agreement arising out of estoppel. I agree with respondents' counsel that in itself and apart from other evidence the title has no legal significance and that at any rate it does not *per se* imply an authority to sell lands. No such extrinsic evidence was given. See *Hobbs* v. *Esquimault and Nanaimo Ry. Co.*(1).

For these reasons and without expressing any opinion on the point as to its having been a condition of the agreement for sale that Mott should build a mill upon the property at any early date and that he abandoned all idea of doing so, I think the appeal must be dismissed with costs.

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

I do not find any authority for Mr. Fernie to bind the company to such an agreement. Not do I find

(1) 29 Can. S.C.R. 450.

any evidence of his having been so held out by the company as their agent to sell the lands in question as to entitle the appellants to claim relief as the result thereof.

The uncertainty of the land in respect of which the negotiations were had, the want of identity of the lands referred to in the memorandum (even if it be otherwise sufficient to comply with the Statute of Frauds,) with those claimed, the want of authority in Tonkin to make a new agreement, and the legal impossibility, as it seems to me, to construct, as submitted to us, a case from what Tonkin said, coupled on to what Fernie wrote and did, and refer the acts of possession thereto so as to entitle the plaintiffs, if that case had been made on the pleadings, to relief on the ground of part performance of an oral contract, render the appeal hopeless.

MACLENNAN J.—I agree that the appeal should be dismissed with costs.

DUFF J.—I concur in the judgment dismissing the appeal with costs for the reasons stated by my brother Davies.

Appeal dismissed with costs.

Solicitor for the appellants: *W. R. Ross.*
Solicitors for the respondents: *Herchmer & Herchmer.*

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*May 8.
*June 24.

THE CITY OF HALIFAX (PLAINTIFF) ..... } APPELLANT;

AND

THE McLAUGHLIN CARRIAGE CO. (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Stated case—Provincial legislation—Assessment—Municipal tax—Foreign company—"Doing business in Halifax."

An Ontario company resisted the imposition of a license fee for "doing business in the City of Halifax" and a case was stated and submitted to the Supreme Court of Nova Scotia for an opinion as to such liability. On appeal from the decision of the said court to the Supreme Court of Canada council for the City of Halifax contended that the proceedings were really an appeal against an assessment under the city charter, that no appeal lay therefrom to the Supreme Court of the Province, and, therefore, and because the proceedings did not originate in a superior court, the appeal to the Supreme Court of Canada did not lie.

Held, per Fitzpatrick C.J. and Duff J., that as the appeal was from the final judgment of the court of last resort in the Province, this court had jurisdiction under the provisions of the Supreme Court Act and it could not be taken away by provincial legislation.

Per Davies J.—Provincial legislation cannot impair the jurisdiction conferred on this court by the Supreme Court Act. In this case the Supreme Court of Nova Scotia had jurisdiction under Order XXXIII., Rule 1 of the Judicature Act.

Per Idington J.—If the case was stated under the Judicature Act Rules the appeal would lie but not if it was a submission under the charter for a reference to a judge at request of a ratepayer.

By sec. 313 of the said charter (54 Vict. ch. 58) as amended by 60 Vict. ch. 44, "Every insurance company or association, accident and guarantee company, established in the City of Halifax, or having any branch office, office or agency therein shall * * *

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

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pay an annual license fee as hereinafter mentioned. * * * Every other company, corporation, association or agency doing business in the City of Halifax (banks, insurance companies or associations, etc., excepted) shall * * * pay an annual license fee of one hundred dollars."

Held, that the words "every other company" in the last clause were not subject to the operation of the *ejusdem generis* rule but applied to any company doing business in the city. Judgment appealed from overruled on this point.

A carriage company agreed with a dealer in Halifax to supply him with their goods and give him the sole right to sell the same, in a territory named, on commission, all monies and securities given on any sale to be the property of the company and goods not sold within a certain time to be returned. The goods were supplied and the dealer assessed for the same as his personal property.

Held, Davies and Maclennan JJ. dissenting, that the company was not "doing business in the City of Halifax" within the meaning of sec. 313 of the charter and not liable for the license fee of one hundred dollars thereunder.

Judgment of the Supreme Court of Nova Scotia (39 N.S. Rep. 403) affirmed, but reasons overruled.

APPEAL from a decision of the Supreme Court of Nova Scotia(1) in favour of the defendants on a stated case.

The case stated and submitted to the Supreme Court of Nova Scotia was in the following terms:

"STATED CASE.

"In re The Assessment of The McLaughlin Carriage Company, Limited, by The City of Halifax.

"The McLaughlin Carriage Company, Limited, an Ontario corporation entered into the following recited agreement with one A. L. Melvin, of Halifax:

"Dealer's Contract.

"THIS AGREEMENT, made (in duplicate) between McLaughlin Carriage Company, Limited, of Oshawa,

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Ontario, hereinafter called "The Company," and A. L. Melvin of Halifax in the County of Halifax, Province of Nova Scotia, hereinafter called "The Dealer."

"WITNESSETH, that it is agreed and understood by and between the parties hereto:—

"1st.—This agreement is not operative until signed by both of the parties hereto.

"2nd.—In cases where a previous agreement of a similar nature has been in existence between the parties hereto, or their predecessors, all goods under the dealer's care at the time of the execution hereof are to continue the property of the company under the conditions of this agreement.

"3rd.—This agreement may be cancelled by the said company at any time with or without notice, and in case of such concellation the said dealer agrees to settle forthwith by notes or cash for all goods sold by him, up to the time of such concellation, and to hand over to the company, free of incumbrance and in good condition, all goods unsold under his care that have been shipped to him and which are not settled for as aforesaid, but this agreement is to be deemed as existing between the parties hereto until cancelled by one or the other of them.

"4th.—In case of the company's inability to furnish the dealer with goods, or in case the dealer through sickness is unable to canvass the said territory, neither of the parties hereto is to look to the other for damages, and both the company and the dealer are free to make other arrangements *re* sale or supply of vehicles temporarily till such inability ceases.

"5th.—Each wheeled vehicle not sold and settled for by the dealer within six months (or, in case of

cutters four months) after the vehicle was shipped by the company shall be returned to the company at the expense of the dealer, unless otherwise agreed in writing by the company.

"6th.—The company will allow a discount of five per cent. off the wholesale price of all vehicles on all sales for which they shall receive the cash from the dealer within one month after the shipment of the vehicle and on all sales for which cash shall be sent after thirty days, but within six months after shipment (or four months in case of cutters) a discount at the rate of seven per cent. per annum shall be allowed the said dealer. In case any vehicle so shipped shall not be returned, re-shipped, or sold and settled for in full within six months after the time of shipment, the dealer agrees to allow out of his commission an amount sufficient to pay interest at seven per cent. on the wholesale price of all vehicles unsold, or, if sold, on the balance remaining unsettled after the expiration of said six months until the same shall be fully paid.

"7th.—The said company is not to be held responsible or liable for any charges express freight telegrams, or any other expenses whatever, except as authorized by the said company or traceable to their negligence or errors. And for and notwithstanding any matter or thing herein contained, that nothing herein contained shall be held or construed as a sale of any goods whatever by the company to the dealer, but that, on the contrary, the property in any goods that may be shipped or delivered by the company to the dealer shall be and remain, until *bonâ fide* sale to a customer, the absolute property of the company and only in the dealer's hands for sale according to the

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terms and conditions hereof, and to be accounted for by the dealer. And that the company or its agent may enter into or upon any lands, buildings or enclosures and use such force as may be necessary for that purpose, for the purpose of taking and removing any of such goods at any time, in case from any cause or reason they see fit to do so.

"8th.—All monies, notes, or other securities that the dealer may take and receive by way of payment, or on account of any goods of the company sold by him or received for or on account of the company, are the property of the company and shall be taken in name of company payable to the company's order and are and shall be received by the dealer only in trust for the company and not otherwise howsoever.

"9th.—In case of default by the dealer the company have to recover damages by civil process.

"10th.—In no case except when permission is obtained from the company are goods to be sold on longer time than 18 months, and terms are always to be short as possible.

"THE COMPANY AGREES:—

"1st.—To reserve (for the sale of their finished vehicles) to the said dealer, subject to the conditions of this agreement the following territory:—Halifax city and county, except Hubbard's Cove and Musquodoboit Harbour districts, and to grant the privilege to sell in the vicinity thereof.

"2nd.—To supply said dealer, to the best of their ability, with their vehicles for sale on commission.

"3rd.—To pay the said dealer as commission in full a sum of money equivalent to the amount by which the proceeds received on sales effected by said dealer shall exceed the regular wholesale prices

charged by the company for vehicles such as those for which said proceeds are received; such payments of commission, however, is to be made *pro ratâ* as the company receives cash from proceeds forwarded to them by the dealer, and to be subject to additions or reductions for interest, etc., as herein provided.

"3½.—To allow for rent for first year fifty dollars on 3 per cent. of business done, if it is more than $50.00.

"4th.—To reserve the option of rejecting any order should they consider it advisable to do so.

"5th.—To deliver free on cars at Oshawa station all goods shipped by them to the said dealer, and to make no charge for packing or crating the same.

"THE SAID DEALER AGREES:—

"1st.—To accept all the foregoing as binding on him and as forming a part of this agreement.

"2nd.—To thoroughly canvass or cause to be canvassed the territory herein mentioned; to judiciously distribute all printed matter furnished by the company; to see that every vehicle is properly set up and delivered to the party to whom it is sold, and not to become interested either directly or indirectly in the sale of any other vehicle similar to those described in the company's catalogue for the current season.

"3rd.—To take all notes for vehicles sold on blanks supplied by the company, such notes to be made payable at the company's office, in St. John, N.B., or at some agency of a chartered bank, express or post office, and not elsewhere; to fill in all blanks in such notes carefully in ink before they are signed, and the said dealer hereby guarantees the payment of said notes when due and is liable for the same until fully paid, hereby waiving notice of presentation or non-

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payment and protest on the same. And it is agreed that in case any debtor pays the dealer any amount on account of such notes, it can only be received by the dealer as agent for the maker of the note, and shall not be considered a payment to said company until actually received by them.

"4th.—To obtain from the purchaser of each vehicle, on delivery thereof, settlement for same and to forward the same to the company immediately as follows:—

"(*a*) If cash, a sufficient portion thereof to pay invoiced price of vehicle sold.

"(*b*) If notes, to forward all of them to company.

"(*c*) If both notes and cash be received, all notes and one-half of the cash, if that amount is sufficient to pay the balance of the wholesale price, and if not, then such amount of cash as shall be sufficient for that purpose. In no case, however, shall the amount of cash paid the company be less than one-half the amount received, and if that is more than the balance of the wholesale price the excess shall be held by the company until the notes are paid, as security therefor, and shall then be refunded to the dealer.

"(*d*) If any portion of settlement be taken in live stock, merchandise, etc., in trade or barter, details to be reported to company, and when same are sold proceeds to go to company as per above paragraphs, *a*, *b*, *c*.

"5th.—To carefully store and keep insured, free of charge to the company all vehicles under his care, and in any event of loss or depreciation in value occasioned by neglect or exposure, to become responsible for the same, and at the termination of contract to continue to store the then stock free of charge to

the company for sixty days, if company cannot sooner re-ship same.

"6th.—To sell all vehicles subject to the printed warranty of the company only, and to promptly report to the company whenever requested on any matter pertaining to their business, and mail them on the 15th day of each month, memo. of their goods on hand not sold.

"7th.—To pay all freight and cartage charges on vehicles shipped to him or his order, and to sell all goods at a fair margin above wholesale prices and on terms in accordance with this agreement.

"8th.—To crate and deliver free on board cars at the nearest railway station———— any vehicles he may have undisposed of after the 15th day of October next, provided the company requests him so to do.

"9th.—To pay $2.00 on every vehicle sold by him for which returns have not been made to the company by or before the expiry of the first sixty days after delivery of the same to the purchaser.

"10th.—To carefully keep in a book provided by the company an accurate statement of all the carriages or property delivered to him under this agreement, with the numbers and other particulars respecting the same and a full account of the manner in which the same shall be disposed of and the price received therefor, and the portion of the same received in notes and cash, and such other particulars as shall be required by the company from time to time, or as the book shall provide for. The said book to remain and continue the property of the company and to be open to the inspection of the company, its servants and agents, at all times upon request, and to

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be delivered to the said company, its servants and agents upon request at any time.

"We have carefully read the articles of this agreement, and hereby respectively grant and accept an agency and agree to be bound by all the articles and provisions contained herein.

"Signed this fourth day of March, 1903.

"Witness to the signature of the company,

McLAUGHLIN CARRIAGE CO., LTD.,
Per W. J. McAlary,
"The Company."

"Witness to the signature of the dealer,

A. L. MELVIN,
"The Dealer."

"In pursuance of the terms of such agreement the company shipped a number of carriages to said Melvin, who was a dealer in agricultural implements, etc., with premises on Bedford Row, Halifax, and while some of said carriages were on Melvin's premises, the same were assessed, together with other property on the premises, at the regular rate as private property of Mr. Melvin.

"Melvin had no other relation to the company than that created by the recited contract, but he exhibited a sign over his door, "The McLaughlin Carriage Company's Carriages."

"Besides assessing the stock as aforesaid to Melvin, the assessors have imposed upon the company a special tax of $100, as a company doing business within the city. The company objects to pay such $100 special tax. The question for the court is, "Is the

company liable, under any Act or ordinance, to pay it"?

Dated, Halifax, N.S., March 19th, 1906.

F. H. BELL,
Acting City Recorder, City of Halifax.

W. F. O'CONNOR,
Solicitor for McLaughlin Carriage Co., Ltd."

The Act under which the license fee of $100 was imposed is sufficiently set out in the above head-note. The court below held that the "Every other company, etc., doing business in the City of Halifax" meant a company of the same kind as insurance companies previously mentioned in the Act and the McLaughlin Co. not being *ejusdem generis* was not liable to pay it.

F. H. Bell for the appellants.

Newcombe K.C. for the respondents.

THE CHIEF JUSTICE.—The facts of this case are stated fully in the notes of Sir Louis Davies.

The preliminary objection to the jurisdiction must be dismissed. The Legislature of Nova Scotia, with respect to this court, has no power to limit the right of appeal any more than it can confer jurisdiction. The only question to be considered by us is as to whether or not the judgment appealed from is the final judgment of the highest court of final resort in the province on a special case. If the case comes within the terms of our "Supreme Court Act," as we hold it does, there the matter ends. *Clarkson* v. *Ryan*(1).

(1) 17 Can. S.C.R. 251.

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The Chief Justice.

I agree with Sir Louis Davies that the doctrine of *ejusdem generis* has no application in the present case because the intention of the legislature is made abundantly clear by the language used. It is undoubtedly a general rule for the interpretation of statutes that, where particular words are followed by general words, the generality of the latter should be limited by reference to the former, but when the language used leaves no doubt as to the intention of the legislature, I see no reason why we should introduce a rule of construction to cut down the plain meaning of the words used in the statute. Section 313 of the city charter provides, in the first place, for the assessment of the real estate and personal property owned by insurance companies or associations, accident and guarantee companies established in the City of Halifax, or having any branch office or agency there, and for the payment, in addition, of an annual license fee which varies according to the nature of the business done by the company. The same section provides, in addition, for the assessment of the real estate and personal property owned by *other* companies, corporations, associations or agencies (excepting insurance companies or associations,) which are assessed under the first part of the section, and for the payment, in addition, of a license fee which differs from that imposed on the excepted companies.

Clearly the intention of the legislature was to distinguish the different classes of companies and make different provision for each class. That, is, in my opinion, the plain meaning of the statute and, if this construction is correct, the doctrine of *ejusdem generis,* as I said before, has no application.

The next question is as to whether or not the com-

pany was doing business in Halifax within the meaning of the section. It is to be borne in mind that, on this appeal, the question to be decided is whether or not the respondent company was obliged, in the circumstances, to pay an annual license fee of one hundred dollars. To decide this question, it is not necessary to consider whether or not the company was exercising a trade or carrying on a business for profit which would bring it within the cases decided as to the meaning of the Income Tax Acts.

The special case on which this appeal comes before us, after setting out in full the agreement between the respondent company and Melvin, the dealer at Halifax, contains the following paragraphs:—

> In pursuance of the terms of such agreement, the company *shipped* a number of carriages to said Melvin, who was a dealer in agricultural implements, etc., with premises on Bedford Row, Halifax, and *while some of said carriages were on Melvin's premises, the same were assessed, together with other property on the premises, at the regular rate as private property of Mr. Melvin.*
>
> Melvin had no other relation to the company than that created by the recited contract, but he exhibited a sign over his door, "The McLaughlin's Carriage Company's Carriages."
>
> Besides assessing the stock as aforesaid to Melvin, the assessors have imposed upon the company a special tax of $100, as a company doing business within the city. The company objects to pay such $100 special tax. The question for the court is,—Is the company liable, under any Act or ordinance, to pay it?

It does not appear that anything was ever sold by the respondents or that any business was ever done by them in the City of Halifax.

The facts, as disclosed by the agreement, briefly are:—1st. That Melvin, who is called the dealer, was appointed to sell, or rather solicit orders for the sale of, the finished vehicles of the company within the limits of the City and County of Halifax.

2ndly. Orders were to be sent by the dealer to the

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office of the company, at Oshawa, in Ontario, where they might be filled or rejected at the option of the company.

3rdly. When the orders were accepted, the goods were delivered free on the cars at Oshawa station:—

4thly. All goods shipped by the company to the dealer direct were to remain the absolute property of the company;

5thly. The dealer was paid by a commission equivalent to the difference between the wholesale price charged by the company and the retail price at which the vehicles were sold by the dealer who guaranteed all the sales;

6thly. It does not appear that the goods in Melvin's store were there for sale or merely as samples, or that they were intended to be delivered on sales entered into at the City of Halifax or on sales made in the county;

7thly. The company allowed the dealer for rent for the first year $50, or three per cent. of the business done, if it was more than $50.

Under these circumstances, it cannot be said that the company rented any definite portion of Melvin's premises or that they did or that they contemplated doing business in Halifax so as to come under the obligation to pay the license fee.

To send property into Halifax for the purpose of filling orders received at Oshawa or to execute orders received from purchasers in the county, is not doing business in Halifax within the meaning of section 313.

Municipal corporations cannot be allowed to impose burdens unless the authority to do so is clearly given them by law.

Melvin was doing business in Halifax and part

of the business for which he was taxed was the selling of respondents' carriages and, by the special case, it appears that he was assessed as owner of the carriages which he had in his possession.

It cannot be said that the company was obliged to take out a license to authorize Melvin to sell carriages for which he was assessed as owner. On the facts as stated in the special case, all that can be said is that Melvin was appointed to solicit orders, but I do not think it can be reasonably held that the company exercised or carried on business in the City of Halifax.

I would dismiss the appeal with costs.

DAVIES J. (dissenting).—This was an appeal from the judgment of the Supreme Court of Nova Scotia in a special case submitted to it by the parties in which judgment it was determined that the question asked as to the liability of the respondent company to pay a special annual tax or license fee as being a company doing business within the City of Halifax, should be answered in the negative and that the appellant should pay the costs.

A preliminary objection was taken at the argument to our jurisdiction to hear the appeal but, after hearing counsel on the point and considering the rule of the "Nova Scotia Judicature Act," under which the special case was submitted a majority of this court was clearly of the opinion that the objection must be disallowed and the case heard upon its merits.

Our jurisdiction to hear appeals depends, of course, upon the "Supreme Court Act" and its amendments, and no legislation of the provincial legislatures could impair that jurisdiction. It did not

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seem to us, however, after reading order xxxiii, rule I., of the "Judicature Act," that any reasonable doubt existed as to the power of the Supreme Court of Nova Scotia to hear and determine the question submitted to them on the facts of this special case, nor in fact was any such doubt suggested by the court below.

The decision appealed from was based entirely upon the application to the construction of section 313, as it now stands amended, of the charter of the City of Halifax, of the rule of construction sometimes applied to Acts of Parliament of doubtful meaning and known as the doctrine of *ejusdem generis.*

I have carefully read and considered the section of the charter in question and am bound to say that I cannot understand how the rule of construction referred to can be invoked or applied with regard to that section so as to exclude the company, respondents, sought to be charged with this license fee.

The rule, when applicable at all, operates to cut down and limit the otherwise plain meaning of general terms by reference to the terms and language of their immediate context. If the language of the statute had been "every bank, fire insurance, life insurance or marine insurance company or other company doing business in the city shall pay a license fee of one hundred dollars" it might, under the authorities, reasonably be contended that the rule of construction adopted by the court below applied and that the "other companies" to be subjected to the tax must be construed to be other companies of the same class as those enumerated if a common class was capable of being ascertained.

But the section is not framed in any such way, but

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in a way which, to my mind, prohibits the application of the *ejusdem generis* rule of construction altogether. In the first place, the annual license fees imposed upon marine or fire insurance companies is four times greater than that imposed upon life assurance, accident or guarantee companies or associations. Banks are dealt with in another section, 316, and are expressly exempted from this as are also other companies at the time of the enactment of the section "exempt from taxation." Provision is made in the case of companies engaged in more than one branch of insurance business that they shall pay license fees for the two branches of insurance for which licenses are imposed, and exempting them altogether for the period of time when they are only winding up their business in Halifax and not doing any new business.

Then follows the general independent sentence, now in controversy, relating to "every other company" specially exempting from its *operation* banks which are dealt with in a subsequent section, insurance companies previously dealt with and other companies "exempt from taxation."

I am utterly unable to accept the argument that, in such a clause and with reference to such general words so used their plain meaning could be cut down and limited by the arbitrary application of the doctrine of *idem genus*. The argument does not commend itself to me as reasonable and no authority was or could be cited in its support.

Then respondents relied upon the contention that, under the special case as submitted, they could not be held to be a company "doing business" in Halifax within the section. I do not suppose there can be any difference between "doing business," as used in

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this section, and "carrying on business." The authorities seem to me conclusive against the respondents as I understand the facts and construe the special case. I have carefully read all the cases cited before us. All these cases before that of *Grainger & Son* v. *Gough* (1), in the House of Lords, were cited and reviewed in the decision of that case and the true principle which must be invoked as a test to determine whether, in any case, a person or company can be said to be "carrying on business" laid down and acted upon.

I think that principle is embodied clearly in the head-note to that case, which reads as follows:—

> A foreign merchant, who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, *so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country.*

As Lord Herschell says, at page 335:

> In all previous cases contracts have been habitually made in this country. Indeed this seems to have been regarded as the principal test.

And he then quotes with approval the rule as stated by the then Master of the Rolls, in *Erichsen* v. *Last* (2).

> Whenever profitable contracts are habitually made in England, by or for foreigners with persons in England because they are in England to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad.

Lord Watson, in his judgment, pages 339-340, says:—

(1) [1896] A.C. 325. (2) 8 Q.B.D. 414.

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In *Werle & Co.* v. *Colquhoun*(1), the decision of the Court of Appeal was based upon the express ground that the foreign wine merchant exercised his trade in England by making contracts there for the sale of his champagnes through his English agent. *Erichsen* v. *Last*(2), although it did not relate to the wine trade, was a decision of the same class.

Lord Davey, concurring with the majority of the law lords in their judgment, says, at page 346,

> that all Mr. Roederer's sales to this English customers are *made at Rheims for delivery in that place*, and the goods sold are, in fact, delivered to the customers in Rheims,

and further on he says he forbears commenting on the earlier cases because

> *they all differ in the vital respects that sales of goods were in those cases made in England.*

The case cited in our court of *The City of London* v. *Watt & Sons*(3) seems to have been decided on the same principle and reasoning.

Now, applying that principle to the facts of this case, I cannot see that there can be any doubt on the facts of the special case that the carriages, etc., sent by the respondents to their agent in Halifax were so sent for the purpose of being sold and delivered by that agent in such city to the purchasers there. The goods of the respondents were, by the very terms of the agreement, placed with their agent in Halifax for the purpose of sale and delivery by him, they retaining the property in the goods until sale, contributing towards the rent of the premises their agent occupied and providing that any sale made by the agent was to be made for the company respondent and any note

(1) 20 Q.B.D. 753. (2) 8 Q.B.D. 414.
(3) 22 Can. S.C.R. 300.

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for the price taken in their name and sent to them. The agent was to receive a commission only and every provision of the agreement goes to satisfy my mind that it was the respondent company which was carrying on business, it was their goods that were being sold and delivered in Halifax, it was there the contract was made and there delivery took place to the purchaser and it was there the purchase money was collected for them.

An objection was taken that the special case did not specifically state that any carriages had actually been sold and delivered by the agent. But the company were surely carrying on business just as much while their agent was engaged in the act of selling as they were a moment afterwards when the contract was completed. The goods of the respondents were in their agent's shop in Halifax, exposed for sale with the sign over the door, "The McLaughlin Carriage Company's Carriages" inviting the public to enter and buy, and it would, to my mind, be an unfair refinement upon the meaning of words to hold that, although they had sent their stock to their agent in Halifax to sell and he had entered into an agreement with them to sell the goods for them and actually exposed for sale with public notice over his door that they were respondents' carriages there was no carrying on of business until some purchaser had positively purchased one of the carriages. There is a carrying on of business, in my opinion, when the goods are exposed for sale in a business shop or store by a servant or agent authorized for the purpose and the public invited to buy. Some observations of Lord Herschell in the case of *Grainger & Son* v. *Gough* (1)

(1) [1896] A.C. 325.

above cited, at page 332, are pertinent. Speaking of the language used by one of the judges of the court of appeal, in that case, he says:—

> Another member of the court seems to have regarded the finding in the case that "the appellants are agents in Great Britain for the sale of Roederer's wine" as invoking a finding that sales by Roederer took place in this country. Standing by itself, the finding would probably have this meaning.

It is true that he finds that the *whole facts* of that case, when considered, shewed that the finding did not have such meaning. But, in this case, I cannot entertain any doubt, on the whole case, that the language of the case, read in the light of the agreement which forms part of it, justifies the finding that respondents were "doing business" in Halifax within the meaning of these words in the section of the charter before referred to.

I would therefore reverse the finding of the court below, answer the question put in the affirmative and allow the appeal with costs in this court and the court below.

IDINGTON J.—This is an appeal from a judgment of the Supreme Court of Nova Scotia on what is said to be a stated case.

The so-called stated case is so meagre in what it presents as a case that I feel at a loss in dealing with it.

It is headed, as follows:

STATED CASE.

In re, The Assessment of the McLaughlin Carriage Company, Limited, by the City of Halifax.

Then follows, without note or remark of any kind, a copy of a long agreement between the respondents

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and one Melvin in relation to the terms upon which he agrees to sell goods of respondents' making. Then there follows:

In pursuance of the terms of such agreement, the company shipped a number of carriages to said Melvin, who was a dealer in agricultural implements, etc., with premises on Bedford Row, Halifax, and, while some of said carriages were on Melvin's premises, the same were assessed, together with other property on the premises, at the regular rate as private property of Mr. Melvin.

Melvin had no other relation to the company than that created by the recited contract, but he exhibited a sign over his door, "The McLaughlin Carriage Company's Carriages."

Besides assessing the stock to Melvin, the assessors have imposed upon the company a special tax of $100, as a company doing business within the city. The company objects to pay such $100 special tax. The question for the court is,—"Is the company liable, under any Act or ordinance, to pay it?"

Dated, Halifax, N.S., March 19th, 1906.

F. H. BELL,
Acting City Recorder, City of Halifax.

W. F. O'CONNOR,
Solicitor for McLaughlin Carriage Co., Limited.

That is what is called the stated case which we are expected to pass upon.

It so happens that the Nova Scotia statutes of 1891, ch. 58 sec. 313, called "An Act to consolidate and amend the Acts relating to the City of Halifax" provide for a stated case being submitted by the Assessment Court of Appeal which hears ratepayers' appeals from their assessments.

Counsel for the respondents would, I think, have been right in his objections that the appeal would not lie if it had been, as he supposed, a submission under those provisions for referring at the request of a ratepayer to a judge. It would have fallen within the same class as *The James Bay Railway Co.* v. *Arm-*

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strong(1), which we refused to hear last March. Assuming, as appellant's counsel shewed, that the statutory case was framed pursuant to order 33, Rule 1, of the Rules of the Supreme Court of Nova Scotia, the appeal may lie. The majority of this court have held so. I should have preferred further consideration of the matter. I think the stated case ought to have shewn upon its face clearly the authority for the court before which it is submitted to hear such a case in order that the very foundation of our jurisdiction and theirs should appear.

If the reference by the stated case were something in the nature of making the court, without authority, co-assessors of the City of Halifax, I should not hear it.

If, however, it was intended to raise some question, such as appears in the cases of *The City of London* v. *Watt & Son*(2), and *The Toronto Railway Company* v. *The City of Toronto*(3) approving the former and cases cited in both, it would be a proper case to submit, and for us to hear on appeal from the judgment thereon.

So long as the officers and courts specially designated to make and adjust assessments are, as they generally are, independent of, and as they ought to be, free from influence or direction by the municipal council, such a corporation has no right to interfere and, generally speaking, cannot be impleaded in any matter arising from a due discharge of the duty to be done by these special courts and officers.

In the meagre statement of this case, it is impossible to say how it came about, at what stage in the

(1) 38 Can. S.C.R. 511. (2) 22 Can. S.C.R. 300.
(3) [1904] A.C. 809.

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assessment proceedings, or in, or for what year, or at what time of the year the assessment in question was made, or if the city assessors or city had imposed the $100 as a rating, or city claims it in any way as a license fee, or raises the question of the right to assess a company, or corporation, or an agency, or because the company has an agency in Halifax or, in either case, is submitting an actual concrete case or merely an academic one.

The part of the sub-section 313 to which we have been referred and which we have to interpret, when amended, is as follows:—

> Every other company, corporation, association or agency doing business in the City of Halifax (banks, insurance companies or associations and other corporations now exempt from taxation excepted) shall be assessed in respect of the real estate and personal property owned by said company, corporation or association, in the same way as the other ratepayers of the City of Halifax are assessed, and shall, in addition thereto, pay an annual license fee of one hundred dollars. If the amount of such assessment should exceed a sum equal to one per cent. on the paid-up capital of any such company or corporation, it shall be reduced to an amount equal to one per cent. on such paid-up capital, which sum shall include the license fee. Every plate-glass insurance company, and the boiler inspection and insurance company of Toronto, shall only pay, under this section, a license of twenty-five dollars.

With respect, I cannot think the *ejusdem generis* rule has anything to do with interpreting this part of section 313, which evidently was, or ought to have been, intended for an independent sub-section. I do not discard, however, the rest of the section or other sections in that part of the Act, as amended, in trying to get at the meaning of the part I have quoted.

If a license fee is what we have to deal with, why should it be called, in the stated case, a tax? Why should it have been mixed up with the assessment? A license may be referred to as a tax, but every tax

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by way of assessment is not necessarily a license fee. The legislation blending these subject matters together is objectionable and makes the statute obscure. That obscurity is not removed but increased by the mode the case is framed.

I agree with Mr. Justice Russell that the statute imposing a tax must be construed strictly and should be expressed by clear and explicit language.

Do the words "agency" and "doing business" in the City of Halifax mean such a business as Mr. Melvin seems to carry on, or something else? He seems a sort of general agent and selling carriages is only one of the many things his agency business covers. I cannot help reading the word "agency" here as being applicable to that sort of agency Mr. Melvin himself is carrying on. Yet, I cannot imagine that he is the kind of party the City of Halifax is in pursuit of.

It is quite likely that when the city induced the legislature to frame this section as it is, the intention was to reach companies outside of Halifax, which had agencies engaged solely, or substantially only doing business for them in the City of Halifax.

Clearly, if this latter was, as I imagine, what was intended, the intention has not been expressed, and I have no right to interpret by my imagination but by what is said.

Again, the license fee is to be "in addition" to other rates imposed and seems to imply that it is applicable to such company or agency as may have such a footing in Halifax as to be assessed for some property. I think the test of whether the company to be reached was doing business of that substantial character as to be possessed of assessable property may well be considered.

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The company here in question does not seem ever to have had any property in Halifax to be assessed. The carriages have been assessed to Mr. Melvin, as the case shews.

For these reasons alone, I would be unable to find that the company in question came within the meaning of the Act.

Again, if we take the words "doing business" literally, any company owning and assessed for a small lot in Halifax and getting a horse shod in that city might be accused of "doing business" there and require a license of $100 for the privilege of thus "doing business."

If these suggested interpretations be supposed fanciful, I can only say they are no more so than that which the appellant asks us to adopt. We are not, as in some cases, bound to find the true meaning. If we cannot find that this remarkable section means in law what the appellant claims, the matter ends.

Let us turn to the agreement and assume that the words "doing business" were intended to cover the case of a company carrying on business in Halifax, either as having its home and head-quarters there, or by establishing a business that might reasonably be treated as a branch or agency of a home business elsewhere. The agreement provides a means of selling goods to Mr. Melvin of Halifax, at Oshawa, to be by him re-sold in Halifax City or the County of Halifax, and, at the same time, securing payment therefor. Such seems to me the end of the transaction. He sells for such prices as he sees fit, for cash, or on credit, as he sees fit; but, if on credit, he must take notes to be approved of, and of a specific character, as security to the company; for he remains

liable for the prices named to him. He can make such sales where he sees fit, in such shop, or out of shop, as he seems fit. He binds himself to sell at reasonable prices and not to sell other carriages as long as the company supply him with their make and must thoroughly canvass the assigned territory. He must pay freight and expenses as a purchaser would, where, as often happens, for security sake, the title remains in the company.

The company rents no premises, pays no rent, hires nobody, fixes no hours of labour, in short, controls nothing in the way of doing business except retaining, as security, the title to the goods. For the first year, *which ended, 4th March,* 1904, by way of provision for encouraging energetic work, something was to be allowed, and it was expressed, to help to pay rent. It might as well have been expressed for money spent on cigars during the first year. We are not shewn it had anything to do with tax or license fee for *the year now in question.* The so-called commission might have been put as a discount for cash when paid.

I cannot find that a business which is so little under the control of the company, and carried on as I describe, can be said to be within the meaning of the words "doing business" in Halifax, and, looked at as meaning carrying on business there. I fear the appropriate illustration, respondents' counsel gave, of the methods by which sales are made of proprietary medicines, would not be the only instance to be found wherein the business community would be surprised, if such a supplying of goods to another man as this company does to Melvin, would be interpreted as establishing an agency or carrying on business with-

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in a city elsewhere than at their home, within the meaning of this and similar statutes.

The company are manufacturers who do not seem desirous of becoming merchants as well. I have not failed to read appellant's factum, which asserts how:

> that *in practice the assessors* of the city have confined this tax almost entirely to foreign companies doing a considerable business in the city without the possession in the city of much taxable property.

If the City of Halifax has, as this statement indicates, entrusted a discriminating option, in the making of the assessments, to the assessors, the zeal to tax foreign companies has outrun both law and discretion. If the legislature desires to prohibit anybody doing business in Halifax and has power to do so, it would be simpler to say so, and add the condition, "unless $100 first paid."

The reference in the agreement to Melvin as an agent suggests the case of *Ex parte White, Re Nevill* (1) wherein, though in an entirely different connection, but on an analogous agreement, observations are made that have a pertinent application.

I think the appeal should be dismissed with costs.

MACLENNAN J. (dissenting).—I am of opinion that the appeal should be allowed.

I think the facts clearly establish that the defendants are a company doing business in the City of Halifax.

That being so, the only remaining question is whether section 313 of the city charter applies to them and I think it does.

(1) 6 Ch. App. 397.

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I think the words "every other company, corporation, etc.," cannot be held to mean companies *ejusdem generis* as those previously enumerated, that is, of the same nature as insurance and guarantee companies.

That is apparent from the express exception of banks, and corporations exempt from taxation, from those *other* companies which are made subject to the $100 tax.

In my opinion the respondents are subject to the $100 tax, and the appeal should be allowed with costs.

DUFF J. concurred with the Chief Justice.

Appeal dismissed with costs.

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

Solicitor for the respondents: *William F. O'Connor.*

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*May 20.
*June 24.

WILLIAM THOMAS NORTON (PLAINTIFF) ..... } APPELLANT;

AND

THE HONOURABLE FREDERICK FULTON (DEFENDANT) .. } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Constitutional law—Construction of statute—"Crown Procedure Act" R.S.B.C. c. 57—Duty of responsible ministers of the Crown—Refusal to submit petition of right—Tort—Right of action—Damages—Pleading—Practice—Withdrawal of case from jury—New trial—Costs.

Under the provisions of the "Crown Procedure Act," R.S.B.C. ch. 57, an imperative duty is imposed upon the Provincial Secretary to submit petitions of right for the consideration of the Lieutenant Governor within a reasonable time after presentation and failure to do so gives a right of action to recover damages.

After a decisive refusal to submit the petition has been made, the right of action vests at once and the fact that a submission was duly made after the institution of the action is not an answer to the plaintiff's claim.

In a case where it would be open to a jury to find that an actionable wrong had been suffered and to award damages, the withdrawal of the case from the jury is improper and a new trial should be had.

The Supreme Court of Canada reversed the judgment appealed from (12 B.C. Rep. 476), which had affirmed the judgment at the trial withdrawing the case from the jury and dismissing the action and allowing the plaintiff his costs up to the time of service of the statement of defence, costs being given against the defendant in all the courts and a new trial ordered. Davies and Maclennan JJ. dissented and, taking the view that the refusal, though illegal, had not been made maliciously, considered that, on that issue, the plaintiff was entitled to nominal damages, that, in

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

other respects, the judgment appealed from should be affirmed and that there should be no costs allowed on the appeal to the Supreme Court of Canada.

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APPEAL from the Supreme Court of British Columbia (1), affirming the judgment of Morrison J., at the trial, whereby the case was withdrawn from the jury and the appellant's action was dismissed without costs to the respondent, but with costs to the appellant up to the time of the service of the statement of defence.

The respondent is Provincial Secretary of the Province of British Columbia and a member of the Executive Council. The appellant, on 24th April, 1906, left with the respondent a petition of right in order that the same might be submitted to the Lieutenant Governor of the province for his consideration and for the purpose of obtaining from him the necessary fiat as provided by the "Crown Procedure Act" (R.S.B.C. ch. 57) sec. 4. The respondent, on 2nd May, brought the petition of right before the Executive Council. It was then discussed but no minute of council was prepared, nor was any order in council made. Pursuant, however, to the decision arrived at by the council, the appellant's solicitors were notified by the respondent, by letter dated 2nd May, that the council did not see their way to recommend that the fiat be granted. To this the appellant's solicitors replied by letter of 3rd May, asking whether they were to understand from this that the respondent declined to submit the petition to the Lieutenant Governor. The respondent by letter of 4th May replied in the affirmative.

The action was brought by the appellant on 7th

(1) 12 B.C. Rep. 476.

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May, 1906. On 21st June, 1906, the respondent brought the matter again before the Executive Council and a formal minute was prepared refusing the fiat, which was duly approved by the Lieutenant Governor. The respondent then, on 22nd June, filed his defence, in which this submission and refusal is set up, and also paid into court the sum of $5.00 to satisfy the appellant's claim. The appellant refused to accept this, and proceeded to trial. There was no suggestion in the evidence of fraud or malice on the part of the respondent.

Mr. Justice Morrison, at the trial of the action, withdrew the case from the jury and gave judgment for the respondent, dismissing the action but ordering the respondent to pay the costs up to the time of the service of the defence. This judgment was sustained by the judgment appealed from.

W. S. Deacon for the appellant. As all the members of the full court agreed that the defendant's refusal to submit the petition was an actionable wrong —Hunter C.J. and Irving J., expressly so deciding, and Martin J. not disagreeing, we submit that the case should not have been withdrawn from the jury, and that the grounds upon which the majority of the court refused a new trial were insufficient.

The action was not for mere delay in submitting, or for omission or neglect to submit, but for a specific refusal to do so. The defendant being sued for obstructing and preventing the plaintiff in the prosecution of his remedy on 4th May, 1906, it is immaterial that he ceased to do so on 21st June, following—if his conduct on the latter occasion can be regarded as a cessation of his obstruction.

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The question is not whether a new trial should be refused because only nominal damages were recoverable, nor as to the amount of damages recoverable, but merely whether the plaintiff had been accorded that trial by jury which had been ordered, and to which he was entitled. There was no verdict, as the whole case had been withdrawn from the jury by the trial judge, and there was nothing for the appellate court to review but the propriety of the course adopted. *Wood* v. *Rockwell*(1); *Beatty* v. *Oille*(2), *per* Ritchie C.J. at page 712; *Scammell* v. *Clarke*(3). The plaintiff has the right to have left to the jury all issues proper to be passed upon by the jury. See "Supreme Court Act," 3 Edw. VII. ch. 15, sec. 66 (B.C.); *Lewis* v. *Old*(4); *Cowan* v. *Affie*(5); *Denmark* v. *McConaghy*(6); *Canadian Pacific Ry. Co.* v. *The Cobban Manufacturing Co.*(7).

If the consideration of what damages the jury might have properly awarded, had it been permitted to pass upon that question, was proper to be entered upon by the full court, the conclusion that such damages would necessarily be assessed as nominal is erroneous, because the right infringed was not a mere naked right, the enjoyment of which could be said to be of no value, but an important constitutional privilege and civil right. See *Ashby* v. *White*(8), *per* Holt C.J.; *per* Bowen, L.J., in *The Queen* v. *Commissioners of Inland Revenue*(9), at page 236; *per* Langdale M.R., in *Ryves* v. *Duke of Wellington*(10), at

(1) 38 Can. S.C.R. 165.
(2) 12 Can. S.C.R. 706.
(3) 23 Can. S.C.R. 307.
(4) 17 O.R. 610.
(5) 24 O.R. 358, at p. 364.
(6) 29 U.C.C.P. 563.
(7) 22 Can. S.C.R. 132.
(8) 1 Sm. L., Cas. (11 ed.), 240, at p. 263.
(9) 53 L.J.Q.B. 229.
(10) 15 L.J., Ch. 461.

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page 464; *per* Jervis C.J., in *Eastern Archipelago Co.* v. *The Queen*(1), at pages 914 and 915.

The remedy by petition of right is an absolute and specific form of legal remedy, and the defendant has interfered with and prevented the plaintiff from prosecuting it. See Chaster on Powers of Executive Officers (5 ed.), pages 162, 163, and cases there cited. The defendant's conduct derived no validity from his having procured the concurrence in it of the Executive; *per* Romer J., in *Raleigh* v. *Goschen*(2), at page 77, and *per* Sir R. E. Webster, A.G., *arguendo,* at page 78. See also *Ferguson* v. *Earl of Kinnoull*(3), pages 251 and 305, and cases cited, and the language of Lord Brougham, at page 305.

The circumstances under which a tort is committed are proper for a jury to consider on the question of what damages should be awarded. *Merest* v. *Harvey*(4).

Nesbitt K.C. for the respondent. The rights of the appellant, if any, were under section 4 of the "Crown Procedure Act," and, had it not been for the letter of the respondent of 4th May, there could have been no cause of action as the petition was ultimately submitted in due form and without unreasonable delay. *Irwin* v. *Grey*(5). There was, in truth, no real refusal to submit in the first instance, but, if what happened amounted to a technical refusal to submit the petition as required by the statute, the appellant became thereby entitled to nominal damages only. No actual damage resulted, and there were no circum-

(1) 2 E. & B. 856.
(2) (1898) 1 Ch. 73.
(3) 9 Cl. and F. 251.
(4) 5 Taunt. 442.
(5) 3 F. & F. 635.

stances of aggravation. The court, will not order a new trial merely for the purpose of enabling a plaintiff to obtain a judgment for nominal damages; *Scammel* v. *Clarke*(1); *Simonds* v. *Chesley*(2); *Milligan* v. *Jamieson*(3); nor where nothing is to be gained thereby. The court may itself direct the proper judgment. *Goddard* v. *Midland Railway Co.*(4); *Allcock* v. *Hall*(5); *Bryant* v. *North Metropolitan Tramways Co.*(6); *Feize* v. *Thompson*(7); *Yorkshire Guarantee & Securities Corporation* v. *Fulbrook & Innes*(8).

THE CHIEF JUSTICE.—This appeal is allowed with costs. I agree in the opinion stated by Mr. Justice Duff.

DAVIES J. (dissenting).—In this case I concur with the reasons for judgment of Mr. Justice Maclennan and would dismiss the appeal.

IDINGTON J.—The appellant claimed to be entitled to a renewal of a license from the Crown, which expired on the 26th of January, 1906, to cut timber and had made, on the 24th of January, 1906, application to the Chief Commissioner of Lands and Works for British Columbia, for such renewal of license.

He was either refused or his application so neglected that he had a grievance.

The question raised by the appellant was whether or not he had been thus denied properly a renewal of license.

(1) 23 Can. S.C.R. 307.
(2) 20 Can. S.C.R. 174.
(3) 4 Ont. L.R. 650.
(4) 80 L.T. 624.
(5) (1891) 1 Q.B. 444.
(6) 6 Times L.R. 396.
(7) 1 Taunt. 121.
(8) 9 B.C. Rep. 270.

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He presented a petition of right seeking to have this question determined and his alleged right to renewal declared.

The petition was presented on the 24th day of April, 1906, under the Crown Procedure Act, R.S.B.C. ch. 57. Section 4 thereof reads as follows:

> 4. The said petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in order that the Lieutenant-Governor, if he shall think fit, may grant his fiat that right be done. No fee or sum of money shall be payable by the suppliant on so leaving such petition, or upon his receiving back the same.

The defendant seems to have had no regard to the statute and after he had, as he alleges, brought the matter under the notice of his colleagues at council, refused to submit this petition to the Lieutenant-Governor as the statute requires.

This refusal is shewn by the respondent's letters to the appellant's solicitors in the correspondence in evidence. The acknowledgment of the receipt of the petition is shewn and then an ambiguous letter comes from respondent and the following letters cover the point now raised:—

May 3rd, 1906.

The Honourable the Provincial Secretary,

Victoria, B.C.

Dear Sir,—

Norton v. *Rex*. We are in receipt of yours of the 2nd instant. Will you kindly let us know if we are to understand from same you decline to submit the petition of right to the Lieutenant-Governor for his fiat and oblige.

Yours truly,

WADE, DEACON & DEACON,

Per W. S. D.

EXHIBIT 5.

Provincial Secretary's Office, Victoria, No. 1207.

May 4th, 1906.

Messrs. Wade, Deacon & Deacon,
Barristers, Vancouver, B.C.

Sir,—

Norton v. *Rex*. I have the honour to acknowledge the receipt of yours of 3rd instant, asking if you are to understand from my communication that I have declined to submit the petition of right to His Honour the Lieutenant-Governor. In reply I beg to say that is what I intended to convey in my previous letter.

I have the honour to be Sir, your obedient servant,

FRED. J. FULTON,
Provincial Secretary.

There seems here an express refusal to discharge a duty created by statute.

The appellant became entitled the moment of this refusal to an action for breach by respondent of his statutory duty.

The action was brought and then awakening to a sense of duty the respondent proceeded, before filing his pleas herein, to an apparent discharge of this duty.

The result was a refusal by the Lieutenant-Governor on the advice of the respondent to grant a fiat.

The respondent then pleads this and payment into court of five dollars to cover the damages.

The case proceeds to trial by means of a special jury without any motion to stay proceedings, if such a step were open.

The case is tried with that jury until the foregoing defence is shewn by the evidence of defendant and then upon motion of his counsel the learned trial judge dismissed the action.

By what right this was done, I am quite unable to

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understand. A majority of the court below, however, uphold the proceedings.

The learned Chief Justice assigns as a reason for so doing that the statute specifies no time within which the Provincial Secretary is required to submit the petition and, therefore, a reasonable time must be allowed for him and the Executive Council to consider the matter.

Inasmuch as the respondent's letters shew that the executive had been consulted and had come to the decision that he announced and he explicitly states a refusal after all that to submit the petition as the law directs, I fail, with great respect, to understand this reason in its relation to the right of action that had already, as clearly as possible, arisen before action as the result of respondent's express refusal.

The respondent's evidence shews that the reason assigned by him when advising the Lieutenant-Governor to refuse the fiat was the same as present to the mind of respondent and his colleagues in the first place, when refusing to submit the matter at all.

There was thus, it seems to me, clearly no ground for taking more time.

Under the circumstances set forth in this case, the claim for more time would, of itself, be a matter for the jury's consideration in estimating the damages.

The payment into court of a nominal sum does not seem to me to mend matters.

It does not seem as if the respondent had even then properly realized his dereliction of duty and thereby evinced such recognition of it.

His Majesty and His Majesty's representatives have not yet become mere pawns.

I will not affirm that as a matter of course and as

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settled by law a neglect to submit a subject's petition to the representative of the Crown is to be covered by a tender of five dollars.

The speculation as to the possible result may in any such case be a matter of some difficulty for the jury in considering the damages, so far as it can properly enter into the matter of such consideration.

The minister's act in anticipating, as he did, the result thereof, by moving without any new fact or change of position in the subject matter he had to deal with, may or may not have improved his position. All that was for the jury. The case ought to be tried out and properly tried out.

To maintain the proposition that a minister of the Crown can be so protected in disregarding the statute seems to me equivalent to repealing it.

The result, if the petition had been properly dealt with, is something we can say nothing about.

I think Mr. Justice Irving, in his dissenting judgment, put the matter in the only way it can be properly viewed.

It is peculiarly a case for a jury to assess damages in, if they come to be assessed. A direction to assess only nominal damages would have been an error. And, much more grave is the dismissal of the action without going through even the form of finishing the trial.

The appeal should be allowed with costs and the costs of the abortive trial be borne, in any event, by the respondent.

MACLENNAN J. (dissenting).—This is an appeal by the plaintiff from a judgment of the Supreme

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Court of British Columbia, dismissing an appeal from a judgment at the trial dismissing the action.

The action was brought against the defendant who is the Provincial Secretary of the Province of British Columbia, and claimed damages for the refusal by the defendant to submit a petition of right on the plaintiff's behalf for the consideration of the Lieutenant-Governor.

The petition was dated the 24th April, 1906, and was received by the defendant on the 26th of April. On the 2nd of May, the defendant wrote to the plaintiff saying that the petition had been laid before the Executive Council and they did not see their way to recommend the fiat. On the following day the plaintiff wrote to the defendant inquiring whether his letter meant that he declined to submit the petition to the Lieutenant-Governor for his fiat.

This was answered by the plaintiff on the 4th saying that was what his letter intended to convey.

This action was commenced on the 7th of May, and the statement of claim was delivered on the 11th of June following alleging that the defendant wrongfully and illegally, and maliciously declined and refused to submit the petition, and claiming $10,000 damages.

On the 22nd of June the defendant filed a statement of defence, in which, after denying the several allegations of claim, he set up two other defences, the first being that after the commencement of the action, namely, on the 21st of June, he had submitted the petition to the Lieutenant-Governor, who had refused his fiat therefor, and the other defence being that, while denying all liability, he brought into court the sum of five dollars as enough to satisfy the plaintiff's claim.

The plaintiff replied, saying nothing as to the payment into court, but joining issue generally, and by way of further reply, denying that the petition of right had been submitted to the Lieutenant-Governor, and alleging that if it was, and if the fiat was refused, it was refused capriciously and without sufficient or any reason; and also that if it was submitted, and the fiat refused, the defendant, and other responsible advisers of the Lieutenant-Governor, so advised him capriciously and without any, or any sufficient, reason.

At the trial, before a special jury summoned at the instance of the defendant, the plaintiff endeavoured to adduce evidence of the merits of his petition, but this was properly disallowed by the learned judge; and there was no evidence whatever of malice on the part of the defendant in omitting or refusing to submit the petition in the first instance, nor any evidence of caprice on the part, either of the Lieutenant-Governor, or any of his advisers, in connection with the subsequent refusal to grant a fiat.

On the contrary, it appeared that when the petition was received by the defendant, it was promptly submitted to the executive council who came to the conclusion that it was not a case in which they ought to advise the Lieutenant-Governor to grant a fiat; and so, what the defendant, erroneously as I think, deemed the unnecessary formality of submitting it to the Lieutenant-Governor, was omitted.

At the conclusion of the trial then, the case stood thus. The defendant had, without any malice or evil intent, committed a breach of duty towards the plaintiff, in not submitting his petition to the Lieutenant-Governor, as well as to his colleagues. Taking the wrong to have been committed on the 2nd of May, the

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action was brought on the 5th, and on the 21st of June the petition was submitted and the wrong was righted. What possible injury or damage could the plaintiff have suffered between the 2nd and the 5th of May, or up to the 21st of June? It is impossible to perceive what such damages could be, beyond the costs of the action. And even those might perhaps have been avoided, if the plaintiff had called the defendant's attention to the positive terms of the statute, instead of at once issuing a writ.

On the 21st of June the duty, the neglect or refusal of which was the cause of action, had been performed. There could be no more damage after that. The cause of action was not the refusal of a fiat. There could be no action for that. The cause of action was the refusal to submit the petition. The plaintiff's damage would be exactly the same if the fiat had been granted, and in either case must have been, at the utmost, merely the delay between the 2nd May and the 21st June, in having the question decided whether he was to have a fiat granted or not. And no other injury or damage was proved or even suggested.

I am, therefore, clearly of opinion that no damage more than merely nominal was proved, and that it would not have been competent to the jury to assess substantial damages, which they could have done only by exercising their imaginations. *Williams* v. *Stephenson*(1).

But while I think the learned judge was right in withdrawing the case from the jury, I think the judgment on the main issue should have been for the plaintiff. I think the defendant did illegally refuse to submit the petition, although not maliciously or wrong-

(1) 33 Can. S.C.R. 323.

fully, and that the plaintiff should have judgment on that issue, with one dollar damages, he having refused to accept the larger sum.

I think the action in other respects should be dismissed, but the judgments as to costs, at the trial and in appeal, should stand, and that there should be no costs of this appeal.

DUFF J.—I am in accord with the majority of the judges of the full court in the opinion, (which seems also to have been the opinion of Erle C.J. as indicated in his judgment in *Irwin* v. *Grey*(1) at page 637,) that by virtue of the Crown Procedure Act an obligation rests upon the Provincial Secretary, with whom a petition of right has been left, to submit it to the Lieutenant-Governor, and that for his refusal to perform that obligation an action lies at the suit of the suppliant. The contention—vigorously pressed upon us—that the duty of the Provincial Secretary under the statute is discharged when, after consideration of the petition, it is decided by him and his colleagues of the Executive Council not to recommend that a fiat be granted,—leaves out of account two things;—1st. That the statute speaks of a submission to the Lieutenant-Governor, a consideration by the Lieutenant-Governor, the grant of a fiat by the Lieutenant-Governor; —and, 2ndly. That, while His Majesty or (in a province of Canada,) His Majesty's representative, cannot under the constitution act without the advice of a responsible minister or ministers, and while the decision in all questions of administration must ultimately rest with those who will be responsible, still the constitutional function of any particular minister

(1) 3 F. & F. 635.

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or ministers of the Crown is to inform and advise and not to dictate.

It seems necessary to point out that to this last stage the development of cabinet rule has not yet come; and it is, perhaps, not superfluous to mention that the Provincial Secretary's statutable obligation to submit the petition is something altogether different from the political obligation he owes to the Crown as its officer and one of its advisers, in respect of advice and otherwise, wherein he is not accountable at the suit of any individual.

That the plaintiff left with the defendant, as Provincial Secretary, his petition of right, or that there is evidence upon which a jury might properly find that prior to the commencement of the action the defendant refused to submit it to the Lieutenant-Governor is not disputed.

It is to be observed that the plaintiff does not rest his title to relief upon the neglect of the defendant to submit the petition, but upon his express refusal to perform his statutable obligation. The plaintiff's case is that, upon this refusal, a cause of action vested in him, and I am, consequently, unable to concur in the view, expressed by the learned Chief Justice of British Columbia and by the learned trial judge, that the submission of the petition, six weeks after the cause of action arose and the action had been commenced, is an answer to the plaintiff's claim.

It is quite true that not every neglect to submit a petition would so prejudice a suppliant in his legal rights as to give rise to a right of action. The suppliant's right is not to have his petition submitted instanter. The Provincial Secretary has his duties as a minister of the Crown, and considerations regarding the

orderly conduct of business would indicate the desirability that, on the submission of a petition to the Lieutenant-Governor, it should be accompanied by the advice of his minister or ministers, together with such information as should enable him intelligently to appreciate the grounds of that advice. The time necessary to get such information and to consider and consult respecting such advice, the Provincial Secretary is unquestionably entitled to take.

But no such justification seems to be suggested here.

It was, on the evidence at least, open to the jury to find that the defendant's refusal was a decisive refusal to submit the petition, in any event, a refusal in denial of the plaintiff's right to have it submitted.

If, upon that refusal, the plaintiff was not entitled to sue, how long was he bound to wait?

And, to concede that he could then sue is surely to concede that he had then a right of action.

It does not, indeed, seem to be contested that the plaintiff's evidence would have supported a right of action if nothing further had happened;—a right of action, that is to say, for damages founded on the defendant's wrongful act in refusing to submit his petition.

Such a right of action, once vested, cannot, I think, be got rid of except by a release or by satisfaction of it;—and the subsequent submission cannot, I think, be said to be either of these.

The plaintiff having presented evidence upon which a jury might not improperly have found that he had, at the hands of the defendant, suffered an actionable wrong, it was his right to have his case submitted to the jury, with—at the lowest—a direc-

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tion that, if they should so find, he would be entitled to a verdict for nominal damages; and, on such a finding, it would be his right to have judgment against the defendant for such sum as the jury should under that direction award. In point of fact, the plaintiff's case was not submitted to the jury; and his action was dismissed. It is argued that, in these circumstances, the plaintiff can now have no relief, because, it is said, the evidence clearly shews that no jury acting within its duty, could award more than nominal damages. This view seems to have met with the approval of Martin J. in the court below.

With great respect, I cannot agree with it. Assuming it to be clear on the evidence that nominal damages only could properly be awarded, it is at least as clear that the plaintiff has not had judgment pronounced upon the issues of fact involved in the action. The tribunal appointed to try those issues—the jury—has had no opportunity of passing upon them; and assuming it to be the rule that in such a case a new trial should not be granted, if on the evidence the only proper verdict would be a verdict for such damages, the basis of the rule must be that in such a case the court of appeal has power to enter such a verdict and will do so. Somewhere, by some tribunal, the plaintiff is entitled to have the validity of his claim determined by a judgment in the action he has brought. *Ubi jus ibi remedium.* A cause of action which—its constituent facts having been proved in a proper proceeding—the courts will not enforce, seems to be a contradiction in terms. The plaintiff would, therefore, be entitled, even in this view, to have the judgment dismissing the action set aside; and judgment entered in his favour for nominal damages.

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But I wish to express no opinion upon the question—where, that is to say, the jury has not had an opportunity of passing upon the case, whether or not the court of appeal can, under the practice at present in force in British Columbia, against the will of either party, enter such a verdict; in my opinion it is unnecessary.

I am unable to come to the conclusion that there is not evidence fit for the consideration of a jury upon the question whether or not they should award the plaintiff nominal damages only. Very cogent arguments may unquestionably be urged in favour of the view that an affirmative answer should be given to that question; but I think it should be left to the jury to pass upon the validity of them.

The plaintiff is, therefore, entitled to a new trial. He should also have the costs of the appeals to this court and to the full court.

Appeal allowed with costs.

Solicitor for the appellant: *E. J. Deacon.*

Solicitor for the respondent: *D. G. Marshall.*

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*May 29.
*June 24.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... } APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS) .. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Specific performance—Tender for land—Agreement for tender—One party to acquire and divide with other—Division by plan—Reservation of portion of land from grant.

By agreement through correspondence the G.T.R. Co. was to tender for a triangular piece of land offered for sale by the Ontario Government containing 19 acres and convey half to the C.P.R. Co., which would not tender. The division was to be made according to a plan of the block of land with a line drawn through the centre from east to west, the C.P.R. Co. to have the northern half. The G.T.R. Co. acquired the land but the Government reserved from the grant two acres in the northern half. In an action by the C.P.R. Co. for specific performance of the agreement:

Held, affirming the judgment of the court of appeal (14 Ont. L.R. 41) Maclennan and Duff JJ. dissenting, that the C.P.R. Co. was entitled to one half of the land actually acquired by the G.T.R. Co. and not only to the balance of the northern half as marked on the plan.

The court of appeal directed a reference to the Master in case the parties could not agree on the mode of division.

Held, that such reference was unnecessary and the judgment appealed against should be varied in this respect.

APPEAL from a decision of the court of appeal for Ontario(1) reversing the judgment at the trial by which plaintiffs' action was dismissed.

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

(1) 14 Ont. L.R. 41.

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The action was for specific performance of an agreement for division of land acquired by the defendant company from the Ontario government. The material facts affecting the appeal are stated in the above head-note.

Walter Cassels K.C. and *Cowan K.C.* for the appellants.

Armour K.C. and *MacMurchy* for the respondents.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. I agree in the opinion stated by Mr. Justice Davies and in the direction varying the judgment appealed from.

DAVIES J.—For the reasons given by the Chief Justice of the court of appeal for Ontario I think this appeal should be dismissed with costs and the judgment of the court of appeal confirmed excepting that part referring to the Master the division of the land.

The land respecting which the agreement between the railways was made was a particular plot of land in Toronto belonging to the Crown well known to the officials of both railways and in form a triangle or nearly so bounded on one side by the appellant's railway tracks, and on the other by those of the respondent with Pacific Ave. as a base line. An agreement to be gathered from the correspondence of the officials of the respective railway companies was made that the Canadian Pacific Railway Co. should abstain from tendering for the land and "leave the appellants free to deal with the Crown in the interest of both parties,"

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that the Grand Trunk Railway Co. should purchase it and that it should be divided equally between the companies, both paying one half the purchase money.

After the land was purchased by the appellants subsequently to the above agreement the parties treated the land bought and conveyed by the Crown to the appellants as the identical parcel which had been the subject matter of their agreement although as a matter of fact a small portion at the north-west corner of the plot of about two acres was withheld by the Crown and not sold leaving 17.91 acres conveyed to the appellants for the sum of $32,500.

I think it must be taken to have been the common intention of the parties and that it sufficiently appears in the correspondence that whatever land was in fact acquired was to be divided equally between the companies, each paying half the purchase money.

The plaintiffs (respondents) tendered a conveyance of the north half of the lands acquired by appellants divided in accordance with the principle of division adopted, and I think agreed to by both companies at the time when both supposed the plot would include the two acres subsequently withheld by the Crown, and the plaintiffs at the same time offered to pay the defendants one half of the purchase money according to the agreement.

I think they are entitled to the decree asked by them. Once the conclusion is reached that the land less the two acres is the subject matter of the contract, then the same scheme and principle of division should be applied as was I think understood and agreed to when the parties thought the parcel would embrace the two acres.

I think the judgment of the Court of Appeal

should be varied accordingly and that the cross-appeal against the reference to the Master should be allowed and the appellants declared entitled to have the deed of the one half of the lands executed and delivered to them as prayed for on payment of $16,250 and interest at 5 per cent. from 6th May, 1903.

IDINGTON J.—These parties agreed that a triangular piece of land in Toronto, of about 19 acres, offered or about to be offered for sale, by the Ontario government should be tendered for by the appellants and that in consideration of the respondents' refraining from tendering they should have an option for five years after the appellants' acquisition of the same to pay one-half the purchase price and receive a conveyance of a specified half of what was thus acquired.

This specified half was defined by a line drawn through the block as shewn on a plan prepared for the purpose, assigning the half, north of the line, to the respondents.

The dividing line that was thus drawn makes as clear as can well be, the principle upon which the division was to be made. The line was drawn from the apex of the triangle to the base line thereof. The apex was formed by the intersecting and diverging boundary lines of the respective properties on which the respective tracks of these companies were laid.

But for the fact that the Government did not offer, as expected, the entire block of 19 acres, but reserved two acres of the north half thus defined, and sold the remaining 17 acres, there could not be the slightest question about the certainty of the land that was to be bought or the part of which the respondents were to get. The two acres were the extreme north-west

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part of the triangle, and therefore, would come out of the part allotted by the plan to the respondents. These two acres were neither an essential part for the purposes of the whole dealing in question nor were they necessary to enable a fair and equal division by applying the principle or method of division shewn by the dividing line drawn, as already described, through the block.

It is not clear when the Government decided to reserve these two acres. It is clear, however, that from the beginning to the close, one-half of the whole land being dealt with was what the parties contemplated each should get. It was agreed that the appellants should carry, if need be, until the expiration of the option, the whole property, and receive from the respondent 5 per cent. per annum upon half of the cost price of the whole. It is fair to infer, from the close attention paid by both parties to the subject matter of the purchase that they were both aware of the reservation of the two acres in question.

It is clear to me, reading the correspondence and plans in question, that the parties were of one mind throughout, until after two years from the drawing of the above mentioned plan, a new manager came into control of the appellant company.

It was I think intended by both to accept the division of the whole upon the principle indicated by the dividing line I have referred to. The tender was deposited with the Commissioner of Public Works in November, 1901, some six months after the understanding was arrived at. The correspondence shews respondents' officers never lost sight of the matter, but kept pressing it on until the tender was so deposited. This tender was accepted by an order in council on the 22nd Sept., 1902.

Curiously enough, the respondents, two days after the order in council, revived the correspondence, and pressed for closing up of the transaction between the appellants and the Government, and the appellants and themselves.

The appellants having been rather tardy, the respondents' solicitor, on the 3rd of June, 1903, prepared a deed, and forwarded it to the appellants' solicitor with an intimation that the purchase money, half of the whole price, would be forthcoming on execution of the deed. This seemed to be the result of appellants' general manager asking respondents to confer with the appellants' manager McGuigan.

This was an explicit exercise of the option. Between the date of this letter of June 3rd, tendering the deed and money, and the 5th Oct., 1903, much correspondence ensued, urging attention to the matter. Many excuses were given, but chiefly that appellants' new general manager had not been able to attend to it.

Some months afterwards, this general manager attempted to make appellants' action in this matter conditional upon something entirely foreign to this particular business. He seemed to claim that there was no understanding. He was told very decidedly by respondents' vice-president that this business would not be made dependent upon any other business and that there was an understanding. The general manager claimed then that there was no record with his company, and finally refused to concede what everybody dealing with the matter up to that time had apparently assumed was within the respondents' rights.

There never could have been any doubt in law or

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in fact of the respondents' right to the land north of the dividing line drawn at the start. Appellants seek to set that aside by the alternative plan they offer. They are not entitled to do so. They recognized the respondents' right to one-half the total area purchased. They made and yet make no question of the two acres. The plan adopted in the proposed deed tendered for execution is, I think, under all the facts and circumstances absolutely correct. It manifestly is the fair and reasonable manner in which the division of the whole seventeen acres should be divided as between these parties, if divided into two equal parts, and especially, having regard to their respective needs and the benefits to be derived from such partition, and the appropriate line of division in principle acted upon from the beginning of the dealing in question.

It is clearly what any one in the position of respondents was entitled to expect and what they might fairly understand as had in view by appellants throughout, until the change of manager.

I see, therefore, no need for a reference unless there be a doubt as to the accuracy of the measurements in the proposed deed, about which no question has been raised.

I am unable to understand why the respondents should, under the circumstances of the application to the railway commission, have brought up anything, in regard to their rights in question, there. They had exhausted by that time all that long continued pleading and remonstrance could have possibly done to press their rights upon the attention of the appellants. The railway commission had no authority to determine the dispute.

The appeal should be dismissed with costs, the

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cross-appeal allowed with costs, and the judgment in the court below amended in regard to the matter of reference in the way I have indicated.

MACLENNAN J. (dissenting).—I regret to be obliged to decide that this appeal ought to be allowed.

I think there was a good contract between the parties for a defined piece of land. The appellants were to acquire the whole, one defined half for themselves, and the other defined half for the respondents, in case the latter within a limited time exercised the option of taking it. And the price to be paid by the respondents was one-half of the price paid by the appellants for the whole, with interest at five per cent. from the time of payment. The contract, in effect, was for an option upon a defined parcel.

The appellants were unable, without any fault on their part, to acquire the parcel which was the subject of the agreement. But having obtained a very large part of it, I think that, in all fairness, they ought to have acceded to the demand of the respondents for so much of it as they did acquire. But standing, as they have a right to do, upon their strict legal rights, I think we must give effect to them.

By the contract the respondents were to have no rights whatever in the south half of the land. Their right was exclusively in the north half, the part surrounded green, in the plan 1(a), dated 31 May, 1901, referred to in Mr. McNicol's letter of the 1st June, 1901.

The contract unfortunately makes no provision for the case which has occurred, of the appellants failing to obtain all the land bargained for. There was no tenancy in common created in the whole parcel.

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The price to be paid was one-half the price to be paid for the whole.

If the respondents are to receive so much of the north half as was actually acquired, how is the price which they should pay to be ascertained? There is no evidence how the price paid for the whole was estimated, whether at so much per acre, or how otherwise. I see no way in which the price to be paid by the respondents, for the only part of the land to which they can have any claim under the contract, can be ascertained.

This difficulty is overcome, in the judgment appealed from, by holding that the respondents are entitled to one-half of the land actually obtained by the appellants; and that the price to be paid is one-half of the purchase money of the whole, with interest, and by referring it to the Master to make a proper division. In my humble opinion that is not warranted by the only agreement made between the parties.

I think the appeal should be allowed, and that the action should be dismissed with costs, in the courts below but without costs of the present appeal.

DUFF J. (dissenting).—I concur in the judgment of Mr. Justice Maclennan.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Biggar.*
Solicitor for the respondents: *Angus MacMurchy.*

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CHARLES SUMNER SCOTT (DEFENDANT)..... } APPELLANT; *June 5. *June 24.

AND

WILLIAM JAMES SWANSON (DEFENDANT)..... } RESPONDENT.

AND

THE FEDERAL LIFE ASSURANCE COMPANY OF CANADA } PLAINTIFFS;

AND

JAMES STINSON AND OTHERS.....DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Assignment by mortgagor for benefit of creditors — Priorities — Assignment of claims of execution creditors — Redemption — Assignments and Preferences Act, s. 11 *(Ont.).*

After judgment for foreclosure of mortgage or redemption judgment creditors of the mortgagor with executions in the sheriff's hands were added as parties in the Master's office and proved their claims. The Master's report found that they were the only incumbrancers and fixed a date for payment by them of the amount due to the mortgagees. After confirmation of the report S. obtained assignments of these judgments and was added as a party. He then paid the amount due the mortgagees and the Master took a new account and appointed a day for payment by the mortgagor of the amount due S. on the judgments as well as the mortgage. This report was confirmed and the mortgagor having made an assignment for benefit of creditors before the day fixed for redemption an order was made by a judge in chambers adding the assignee as a party, extending the time for redemption and referring the case back to the Master to take a new account and appoint a new day.

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

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Held, affirming the judgment of the court of appeal (13 Ont. L.R. 127) that under the provisions of sec. 11 of the Assignments and Preferences Act the assignee of the mortgagor could only redeem on payment of the total sum due to S. under the mortgage and the judgments assigned to him.

APPEAL from a decision of the court of appeal for Ontario(1), affirming the judgment of a divisional court in favour of the defendant Swanson.

The question raised for decision on the appeal was whether the appellant, assignee of the defendant Stinson, mortgagor, under an assignment for benefit of creditors, could redeem on payment of the mortgage debt alone or had to pay as well the amount due on the judgments assigned to Swanson by judgment creditors who had proved their claims in the Master's office. The Master ruled that he need only pay the mortgage debt but his ruling was reversed on appeal to the Chief Justice of the King's Bench Division whose decision was affirmed by a divisional court and the court of appeal.

D. L. McCarthy for the appellant.

Hamilton Cassels K.C. and *R. S. Cassels* for the respondent.

THE CHIEF JUSTICE.—I concur in the reasons given by Mr. Justice Maclennan for dismissing this appeal.

GIROUARD J.—I am of opinion that the appeal should be dismissed.

(1) 13 Ont. L.R. 127, *sub nom. Federal Life Assurance Co.* v. *Stinson.*

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DAVIES J. having heard a portion only of the argument took no part in the judgment.

Idington J.

IDINGTON J.—I think this appeal should be looked at as raising only the question of the right the appellant would have after Swanson had redeemed the prior mortgagee and been thereafter found by the consequent report of the Master to be redeemable only upon payment of the entire sum of mortgage and executions.

The appellant as assignee can have no higher right than the mortgagor, unless when representing his creditors, and seeking to set aside some act his creditors might, but which he could not attack.

An application of the mortgagor, at the same stage in the proceedings as that in which the assignee made his application, could have been rested only upon an appeal to the equitable consideration of the court.

The only right the mortgagor had as such, at the date of the assignment, was to apply to the court to allow him to redeem Swanson, and I fear the answer to such an application on the mortgagor's part would have been; you can redeem only on paying all the Master's report has found him entitled to. Else when might the process end? The mortgagor had imposed upon the judgment creditors by his neglect and default the burthen and expense as well as hazard of redeeming the mortgagee. I do not think he should be heard without excuse and as of course to ask to set all that aside.

The assignee was liable to have been, and should have been, met by this same answer upon the motion before Mr. Justice Mabee and had his status fixed

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then and there. Respondents, I infer, did not insist upon that there.

At all events the result in the divisional court, of which the same learned judge was a member, seems to reduce the position to that I have indicated as what ought to have been, and possibly was intended; save the election given conditionally to have a sale of the property in question.

I agree with Mr. Justice Meredith that neither tacking, nor consolidation, technically and properly, so called, have, or at least, should have anything to do with the matter.

I cannot say that the discretion, if open to the court, was ill exercised in refusing to the appellant more than it has given.

I am unable, however, as at present advised, to follow beyond this the reasoning upon which the courts below have proceeded. An execution such as those here in question against a mere equitable interest in lands and unenforceable without some proceeding in court constitutes a lien and nothing but a lien. I am unable to appreciate the mental process by which it is transformed into another kind of claim or lien, as it were in the twinkling of an eye, by the Master signing a report *to settle priorities*. I reserve to myself, should the occasion ever call for it, the right to reconsider the authorities relied upon in the court below, resting upon such as I, with the greatest respect, consider rather metaphysical reasoning.

I would prefer giving the fullest effect that possibly can be given to a beneficent statute that is intended to administer the debtor's estates upon an equitable basis as between all the creditors. The distinction between this case and such others as I

refer to, may not be quite clear, but appear to me substantial. For example, a judgment creditor holding more than one judgment as the respondent Swanson did, might have chosen after redemption of a mortgagee to have said he was doing it by virtue of No. 1 of his judgments. He might thus have reserved his other judgments, to enforce them against other parts of the debtor's estate. I do not see why he should not. I do not understand why any hard and fast rule should be applied to bind him against his will.

I take it for granted that in this case having elected to consolidate (I use the term in no technical sense but as expressing the fact) his judgment debts with the mortgage debt he could not escape, when applying for his final order for foreclosure, the consequence of being held to have taken the land in satisfaction of the mortgage and the four judgments. He thus elected to be cut out of resorting to the possible rest of the estate.

Had he elected otherwise, I am unable to understand how he could have been held bound to have done so. He need not have proven for more than the one by virtue of which he elected to redeem. I put this to counsel on the argument and have no reply backed by authority.

I think the appeal should be dismissed with costs.

MACLENNAN J.—The question in this appeal is whether an assignment for the benefit of creditors, made by an insolvent mortgagor, in pursuance of the "Assignments and Preferences Act," R.S.O. (1897) ch. 147, as amended by 3 Edw. VII. ch. 7, sec. 29, has the effect of practically undoing and vacating the

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proceedings in an action for the foreclosure of the mortgage, after redemption of the mortgage, by one or more judgment creditors duly made parties to the foreclosure proceedings, and after final account taken, and a day appointed for final redemption or foreclosure.

I agree with the judgment of the court of appeal, affirming a judgment of a divisional court, that the assignment had no such effect.

The Act provides that an assignment for creditors shall take precedence of attachments, garnishee orders, judgments and executions not completely executed by payment, etc.

When the foreclosure proceedings were commenced, there were four executions against the mortgagor in the hands of the sheriff. In the course of those proceedings the execution creditors were made parties, and they and the mortgagee proved their respective claims, and a day was appointed for redemption by the mortgagor.

Afterwards the respondent acquired the judgment debts proved in the action, and redeemed and obtained an assignment of the mortgage.

A further account was then taken both of the mortgage and judgment debts, and a day was appointed for redemption, or foreclosure in default of payment by the debtor of the aggregate sum of the mortgage and judgment debts, and interest and costs; and it was a few days before the expiration of the time for redemption that the assignment for the benefit of creditors was made.

Now, I think that under those circumstances the defendant had become something more than a mere judgment or execution creditor. He had become a

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mortgagee of the lands in question, not merely to secure the original mortgage debt, but also the judgment debts. The judgment debts had become a charge upon the mortgage lands in due course of law, and that charge was as valid, and as much binding upon the mortgagor, as if he had made the charge by deed. The moment the judgment debts had been proved, the executions in the sheriff's hands might have been allowed to expire without affecting the charge on the mortgage lands.

That being so, I am clearly of opinion that the defendant's rights in the foreclosure proceedings were not affected by the assignment, and that the appeal should be dismissed with costs.

DUFF J.—I concur in the opinion of Mr. Justice Idington.

Appeal dismissed with costs.

Solicitors for the appellant: *Carscallen & Cahill.*

Solicitors for the respondent: *Farmer & Gould.*

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*June 6.
*June 24.

WILLIAM HENRY SINCLAIR.....APPELLANT;

AND

THE CORPORATION OF THE TOWN OF OWEN SOUND.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Act—Vote on by-law—Local option—Division into wards—Single or multiple voting—3 Edw. VII. c. 19, s. 355.

Sec. 355 of the Ontario Municipal Act, 3 Edw. VII. ch. 19, providing that "when a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to enable him to vote on the by-law" does not apply to the vote on a local option by-law required by sec. 141 of the Liquor License Act (R.S.O. [1897] ch. 245).

Judgment of the court of appeal (13 Ont. L.R. 447) affirming that of the divisional court (12 Ont. L.R. 488) affirmed.

APPEAL from a decision of the court of appeal for Ontario(1) affirming the judgment of a divisional court(2) in favour of the Town of Owen Sound.

The question for decision was whether on submission to ratepayers of a by-law under the local option provisions of the "Liquor License Act" of Ontario(3) a ratepayer was restricted to one vote or could vote in every ward of the town in which he had property.

The court of appeal and divisional court held that only single voting was permissible in such case overruling the opinion of Mr. Justice Mabee to the contrary.

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

(1) 13 Ont. L.R. 447. (2) 12 Ont. L.R. 488.
(3) R.S.O. [1897] ch. 245.

Nesbitt K.C. and *Wright* for the appellant.

Hodgins K.C. and *Frost* for the respondents.

GIROUARD J.—I am of opinion that this appeal should be dismissed.

DAVIES J.—The questions for our determination are whether in cases where a municipality is divided into wards and a by-law other than one for contracting a debt is submitted for the approval of the electors each rate payer is entitled to vote in each ward in which he has the necessary qualification, and secondly whether in the case of the particular by-law now in question where the right of the rate payer to vote in each ward was denied and refused the by-law should because of such refusal be quashed.

The able and exhaustive analysis to which the "Municipal Act of Ontario" was subjected in its several consolidations and amendments by counsel for the several parties satisfied me that amidst much which was ambiguous and obscure one fact was clear and that was that the whole controversy depended upon the construction to be given to section 355 of the "Consolidated Municipal Act of 1903."

That section lying in the statute between sections 353 and 354 defining the qualifications of ratepayers entitled to vote "on any by-law *for contracting a debt*" and sections 356 and 357 giving the form of oaths of freeholders and leaseholders in the expressed cases of *"by-laws for contracting* a debt" reads as follows:

Where a municipality is divided into wards each ratepayer shall be *so entitled to vote in each ward* in which he has the qualification necessary to entitle him to vote on the by-law.

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Do the words "so entitled to vote in each ward" refer to the by-laws "for contracting debts" with respect to which alone the two preceding sections refer or can they be made to apply to all by-laws as to which the assent of the ratepayers is required?

In his very clear factum, as also in his oral argument, Mr. Nesbitt frankly conceded it was only as regards electors who are ratepayers entitled to vote under sections 353 and 354 that the appellants are here raising any claim. It seemed to me on the argument that this admission made it next to impossible to give to the words of section 355 the broad interpretation he sought to put upon them.

When the "Liquor License Act," R.S.O. 1897, ch. 245, was passed providing that such a by-law as that now before us should be duly approved before its final passing

> by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act.

there existed a section of the latter Act, 137, expressly providing that

> in towns and cities every voter may vote in each ward in which he has been rated for the necessary qualification

except with respect to the mayor or reeve when he was restricted to one vote.

In the consolidation of 1897 that section was continued as section 158, but in the revision of 1899 it was entirely changed and the duplicate voting no longer extended to by-laws but was expressly confined to councillors and aldermen where they were elected by wards.

Until this change was made there can be no doubt that the principle of duplicate voting was applicable

to all by-laws requiring the approval of the electors. Sections 353 and 354 had not then been limited to by-laws for contracting debts and Mr. Nesbitt contended that at any rate until that limitation was introduced into these sections in 1903, the principle of duplicate voting by wards must be held to have been continued, notwithstanding the dropping out and changing of section 158 in 1897.

But conceding all that, we find in 1899 the legislature in express terms limiting sections 353 and 354 to "by-laws for contracting debts."

When this change was made section 158 had disappeared and all trace of express provisions for polling duplicate votes on by-laws other than those for contracting debts seems to have been eliminated from the Act.

Mr. Nesbitt now frankly admits that the ratepayer referred to in the disputed section 355 of the consolidation of 1903 is the ratepayer whose qualification is determined by the two preceding sections 353 and 354. Then, if so, it seems to me the words "so entitled to vote" must necessarily relate to and be confined within the limitation of subjects on which he can vote expressly set out in these sections—which would mean so entitled to vote on by-laws for contracting debts.

I thought at one time it might be possible to hold that these words "so entitled to vote" might be held to have reference to any preceding sections in which the right to vote was defined or clearly set out on which construction it might refer to section 348 providing in the case of municipalities divided into wards for the delivery to the deputy returning officer for every ward of

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Davies J.

a voters' list containing the names of all persons appearing by the then last revised assessment roll *to be entitled to vote* in that ward.

But Mr. Nesbitt disclaims, as I understand his argument, that these persons so appearing on the list are the persons "entitled to vote" referred to in section 355. The reference is exclusively he says to those electors who are such ratepayers as are defined in sections 353 and 354 and it is only as to the manner of their voting that he contends.

That being so, and the principle of duplicate voting upon by-laws generally which formerly expressly existed having been eliminated, by the dropping out from the Act of the old section 158 and by the express limitation introduced into sections 353 and 354 confining them to by-laws for contracting debts, I am of the opinion that, in view of the frank and proper admission before referred to made by Mr. Nesbitt, there is only one reasonable construction which section 355 can in its present collocation bear and that is that the words so entitled to vote mean so entitled on by-laws for contracting debts to which the two preceding sections 353 and 354 and the two subsequent sections 356 and 357 exclusively relate. They are only entitled to vote in each ward on by-laws submitted to them for contracting debts.

The appeal therefore must be dismissed with costs.

IDINGTON J.—I concur in the opinion of Mr. Justice Maclennan.

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

Unless the appellant's argument in favour of

double voting can be maintained, there is nothing else to support his contention, and I think a careful consideration of the various sections of the "Municipal Act," affords no warrant for double voting on a liquor by-law.

Section 141 of the "Liquor License Act" requires such a by-law to be approved by the *electors, in the manner* provided by the sections in that behalf of the "Municipal Act."

By section 2(5) of the latter Act, the word "electors" is defined to mean the persons entitled to vote at any municipal election, or in respect of any by-law, * * * in the municipality, ward or polling division.

The question then is, what is *the manner,* provided by the "Municipal Act," for the approval of a by-law by the persons entitled to vote in the municipality of Owen Sound?

The answer to that question is found in section 338, and following sections. Section 338 provides that in case a by-law requires the assent of the electors of a municipality, before the final passing thereof, the following proceedings shall, *except* in cases otherwise provided for, be taken for ascertaining such assent: after which follow various detailed directions, preparatory to the poll.

Section 350 directs that the poll shall be held at the day and hour previously fixed, and that the vote shall be taken by ballot.

Section 351 then declares that the proceedings at the poll, and for and incidental to the same, and the purposes thereof, shall be the same, as nearly as may be, as at municipal elections, and all the provisions of sections 138 to 206 inclusive, except section 179,

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Maclennan J.

of this Act, so far as the same are applicable, and *except so far as herein otherwise provided, shall apply to the taking of votes at the poll,* and to all matters incidental thereto.

Now looking back to sections 138 to 206, we find a number of sections from 158 to 163 inclusive under the general title of: "Where and *how often* electors may vote." These sections provide, with minute particularity, that in cities and towns, townships or villages, no persons shall vote more than once, for mayor, reeve, councillor or alderman, except in cities and towns where aldermen or councillors are elected by wards, in which an elector may vote *once* in each ward in which he has the necessary qualifications, for each alderman or councillor to be elected. The same rule of one vote is applied by section 160 to elections for county councillors, and section 162 imposes a penalty of $50 for voting oftener than allowed by the Act.

These sections being made applicable to votes on by-laws by section 351 conclude the question, unless they are excluded from application to the present by-law by the words in that section, *except so far as herein otherwise provided.*

I think it is clear that there is nothing *otherwise provided,* except as to by-laws for contracting debts.

Sections 353 and 354 deal with by-laws for contracting debts and with those alone, and make minute provision for by-laws of that kind; and it is plain that the following section 355 must be held to refer to by-laws of the same kind, when it provides that each ratepayer shall be *so* entitled to vote in each ward in which he has qualifications.

The appeal should be dismissed with costs.

DUFF J.—I concur in the opinion of Mr. Justice Davies.

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Appeal dismissed with costs.

Solicitors for the appellant: *Lucas, Wright & McArdle.*

Solicitor for the respondents: *J. W. Frost.*

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*June 10.
*June 24.

WILFRID CLICHE (PLAINTIFF).....APPELLANT;

AND

VENERAND ROY (DEFENDANT).....RESPONDENT.

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

Construction of deed — Title to land — Servitude — Acquiescence — —Estoppel by conduct—Actio negatoria servitutis—Operation of waterworks.

By a deed executed in 1879, C. granted to R. the right of building a reservoir in connection with a system of waterworks, laying pipes and taking water from a stream on his land, and in 1897, executed a deed of lease of the same land to him with the right, for the purposes of the waterworks established thereon, "de vaquer sur tout le terrain * * * et le droit d'y conduire des tuyaux, y faire des citernes et autres travaux en rapport au dit acqueduc et aux réparations d'icelui."

Held, that the deed executed in 1897 gave R. the right of bringing water from adjoining lands through pipes laid on the lands so leased.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of His Lordship Mr. Justice Pelletier in the Superior Court, District of Beauce, and dismissing the plaintiff's action with costs.

In the court below, His Lordship Sir Alexandre Lacoste C.J. stated the case as follows:—(Translation)—"In 1879, Vital Cliche, the *auteur* of Wilfred Cliche, then proprietor of a farm, which now forms lots Nos. 540 and 598 of the Parish of St. Joseph de Beauce, granted to Benjamin Roy a servitude for

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

waterworks over his farm permitting him to establish a reservoir on lot 598 and use a stream at that place for the supply of the reservoir, moreover to bring, by means of a pipe, water from a spring on lot 540. Following this, the waterworks were constructed which furnish water to the inhabitants of the Village of St. Joseph. Two years afterwards, in 1881, the reservoir proving insufficient, B. Roy brought water from adjoining lands through the pipe across the property of Vital Cliche. The right of servitude of B. Roy did not authorize him so to pass water from adjoining lands over the farm of Vital Cliche, nevertheless, he allowed him to do so and the pipe remained there up to the time of the *trouble* complained of. In 1883, B. Roy sold his waterworks and transferred his rights to his brother, Vénérand Roy, the defendant (respondent). On 17th May, 1897, Vital Cliche granted by a deed of lease to the (respondent), for the purposes of his waterworks, 'the right to carry on his works (*vaquer*) upon the lands of the lessor, Nos. 540, 540*a*, 598 and 1399 of the cadastre of St. Joseph and the right of placing pipes and making cisterns and other works in connection with the said waterworks and repairs thereto.' In 1900, Vital Cliche sold to his son, (appellant) the lands charged with the servitude charging him with the obligation to 'conform to the lease granting the servitude by the vendor to V. Roy and generally to all other servitudes which might exist upon the land sold, which the said purchaser declared he was aware of.' In 1899, the (respondent) formed a partnership with one Gagné, who was himself proprietor of certain waterworks supplying the Village of St. Joseph. The two systems of waterworks were combined, and the deed of partnership was registered

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on 23rd November, 1899, conformably to the law. In 1905, the firm of Roy & Gagné wished to renew the pipe which had been placed on the lots in question in 1881. The (appellant) objected to this and brought an action *négatoire* against the (respondent). The latter pleaded that he was not owner of the waterworks, alleged the partnership with Gagné, made public by the registration of the declaration, and, further, that the firm, owner of the waterworks, was within the exercise of its right of servitude in renewing the pipe."

The Superior Court held that the right of bringing water from the adjoining lands had not been granted by the deeds in question and maintained the plaintiff's action. On appeal, the Court of King's Bench held that the defendant had proved that he was acting for the firm of Roy & Gagné which claimed the right of maintaining the pipe on the land of the plaintiff and bringing water through it from the adjoining lands for their waterworks; that the firm was exercising the right of servitude granted by the deeds, and, consequently, reversed the judgment of the Superior Court and dismissed the action with costs. The plaintiff then appealed to the Supreme Court of Canada.

Alex. Taschereau K.C. for the appellant. The deed of 1897 limited the exercise of the servitude to lots 540 and 598. Consequently the respondent must shew authority for what he has done elsewhere. Arts. 549, 558 C.C. From these articles it necessarily follows: that the respondent must find all the rights which he claims in his title deed; that possession, even immemorial, of additional rights of servitude, would not

constitute a title; and that he can do nothing, in the exercise of his servitude, to aggravate the easement over the servient land. See *Riou* v. *Riou*(1); *Chamberland* v. *Fortier*(2); *Commune de Berthier* v. *Denis*(3); *Prévost* v. *Belleau*(4); *McMillan* v. *Hedge*(5); *Roy* v. *Beaulieu*(6); 3 Aubry & Rau, pp. 92, 93, 94; 8 Laurent No. 256; 8 Demolombe Nos. 847, 848.

Sufferance confers no title. The Code specially enacts that a written title is necessary and that possession, even immemorial, is insufficient to establish a servitude. Even if Vital Cliche had verbally consented to the extension of the pipes, such consent could not be proved by parol evidence. He is not a party in this case, and there is no writing and no *commencement de preuve par écrit* to support such evidence. Art. 1233 C.C.

With regard to the partnership with Gagné and the objection that the action should have been directed against both, the court of appeal expressed no opinion. The trespass was committed by the respondent and he is therefore sued for the act which he committed himself; it is immaterial whether or not he was then member of a partnership. The trespass is a *délit* and he is therefore jointly and severally responsible with his partners and may be sued alone. Art. 1106 C.C.

The deed of 1900 contains no acknowledgment of any servitude of bringing the water from the adjoining lands. It merely provides for existing servitudes legally established and cannot be construed so as to include, in general terms, servitudes founded on no title

(1) 28 Can. S.C.R. 53; Q.R. 5 Q.B. 572.
(2) 23 Can. S.C.R. 371.
(3) 27 Can. S.C.R. 147.
(4) Q.R. 14 K.B. 526.
(5) 14 Can. S.C.R. 736.
(6) 9 Q.L.R. 97.

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whatever and without legal existence which cannot be presumed to have been accepted.

In 1879 the waterworks were supplied by the springs on appellant's lots, but they ran dry and the whole supply of water now comes from the adjoining lands. The servitude ceased when the things subject to it assumed such a condition that it could no longer be exercised. Art. 559 C.C. Therefore, the object of the servitude having ceased to exist, the servitude itself is extinct and the servient lands have ceased to be subject to it. But, if the appellant has the right to bring water from the adjoining lands to replace the former supply from these springs, a new servitude, which was not contemplated by the parties, is created.

Morin for the respondent. The respondent is a perfect stranger to the issues raised in this action; if any trespass has been committed, the firm of Roy & Gagné alone is responsible, and the judgment under appeal is right.

We also rely upon the reasoning of Chief Justice, Sir Alexandre Lacoste, which we make part of our arguments.

The circumstances did not call for impleading the firm, as warrantors, as provided by article 187 C.P.Q., because their title was registered; Arts. 2116, 2098 and 2127 C.C. The deed of 19th September, 1897, vested title in the firm to the servitude which has been exercised. The existence of the new branch pipes was known to the appellant at the time he acquired the property and accepted the charge of the servitude granted in favour of the firm and all other privileges vested in them for the purposes

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of the waterworks and for making repairs to the same. If there can be a doubt in the meaning of the deed, it is to be construed, according to Art. 1014 C.C., in such manner as to the effective rather than nugatory.

The branch pipes which the appellant asks to have demolished are an integral part of the whole system of waterworks and demolishing them would prove fatal to the operation of the whole system. The expenses incurred in the repairs are estimated at $800, and the land on which right of servitude is contested is only about 150 feet wide, a pasture field of little value. The damages alleged to have sustained are purely nominal. The Superior Court assessed them at $10 for illegal occupation of that land during 25 years and Roy & Gagné merely renewed, at the same places and with pipes of the same size, the old pipes which had been in the same ground for 25 years.

The judgment of the court was delivered by

GIROUARD J.—Je suis d'avis de confirmer le jugement dont est appel avec dépens, non pas pour les motifs exprimés dans le texte du jugement, mais pour les raisons données par le juge-en-chef Lacoste, aux quelles je ne puis rien ajouter. Qu'il me suffise de signaler le passage suivant des notes du savant juge:—

La cour supérieure * * * a considéré que ni l'intimé ni son auteur n'avait concédé le droit de conduire l'eau venant des terrains voisins et elle a maintenu l'action.

Nous sommes d'opinion que l'acte de 1897 a accordé à l'intimé le droit de passer l'eau des terrains voisins sur la terre de l'intimé.

L'état des lieux à l'époque de l'acte 1897 justifie l'interprétation que nous donnons de cet acte-là. Les parties elles-mêmes ont interprêté l'acte dans ce sens-là, puisque le tuyau est resté de 1897 à 1905 sur la propriété.

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Girouard J.

Il est difficile pour nous de croire que Cliche ignorait l'existence du tuyau puisque dans l'acte de vente que son père lui a consenti, il déclare bien connaître les lieux.

L'intimé prétend que cette servitude créée par l'acte de 1897 ne devait durer que le temps que V. Cliche serait propriétaire, vu que V. Cliche déclare qu'il n'entend pas lier ses "hoirs et ayant cause."

Mais lors de la vente faite à l'intimé en 1900, V. Cliche avait exigé de l'acquéreur qu'il se conformât "au bail comportant servitude fait par le vendeur à Vénérand Roy et généralement à toutes autres servitudes pouvant exister sur le terrain sus vendu, que le dit acquéreur déclare bien connaître."

Vital Cliche avait intérêt à maintenir cette servitude, puisqu'il était propriétaire ou bailleur des terrains du village.

L'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondent: *Pacaud & Morin.*

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) } APPELLANTS;

AND

WILLIAM CARRUTHERS (PLAINTIFF) } RESPONDENT.

1907

*May 20.
*June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Railway Act, 1903—3 *Edw. VII. c.* 58, *s.* 237—*Animals at large—Construction of statute—Words and terms—"At large upon the highway or otherwise"—Fencing of railway—Trespass from lands not belonging to owner.*

C.'s horses strayed from his enclosed pasture situated beside a highway which ran parallel to the company's railway, entered a neighbour's field adjacent thereto, passed thence upon the track through an opening in the fence, which had not been provided with a gate by the company, and were killed by a train. There was no person in charge of the animals, nor was there evidence that they got at large through any negligence or wilful act attributable to C.

Held, affirming the judgment appealed from (16 Man. R. 323), that, under the provisions of the fourth sub-section of section 237 of "The Railway Act, 1903," the company was liable in damages for the loss sustained notwithstanding that the animals had got upon the track while at large in a place other than a highway intersected by the railway.

APPEAL from the judgment of the court of appeal for Manitoba (1), affirming the judgment of His Lordship Mr. Justice Richards, at the trial, by which the plaintiff's action was maintained with costs.

The circumstances of the case are sufficiently stated in the head-note and the questions raised on the appeal are discussed in the judgments now reported.

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

(1) 16 Man. R. 323.

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Blackstock K.C. for the appellants.

J. Edward O'Connor for the respondent.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. I agree in the opinion of Mr. Justice Maclennan.

DAVIES J.—I agree that the findings of the trial judge on the question of the plaintiff's negligence should not be disturbed.

I also agree that the meaning of the rather ambiguous words of the four sub-sections of section 237 of the "Railway Act, 1903," "Animals at large upon the highway or otherwise" must be construed to mean "otherwise at large," that is, at large otherwise than upon the highway and not as suggested by Mr. Blackstock "at large or otherwise upon the highway." This latter suggestion would put a limitation upon the meaning of the section never contemplated by Parliament. Properly construed the section covers the case of the cattle of the plaintiff killed on the railway track.

Since the revision of the Statutes in 1906 the question has ceased to be of importance as the revisors have changed the language so as to make it express what I think was the real meaning of Parliament. It now reads in the Revised Statutes "At large whether upon the highway or not."

IDINGTON J.—The questions raised in this appeal turn upon the interpretation of the 4th sub-section of section 237 of the "Railway Act, 1903," which reads as follows:—

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4. *When any cattle or other animals at large upon the highway or otherwise, get upon the property of the company and are killed or injured by a train,* the owner of any such animal so killed or injured shall be entitled to recover the amount of such loss or injury against the company in any action in any court of competent jurisdiction, unless the company, in the opinion of the court or jury trying the case, establishes that such animal got at large through the *negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent;* but the fact that such animal was not in charge of some competent person or persons shall not, for the purposes of this sub-section, deprive the owner of his right to recover.

It is first claimed that the horses which were killed on appellant's railway track had

got at large through the negligence or wilful act or omission of the owner or his agent, or of the custodian of such animal or his agent,

and, therefore, no action can be maintained.

The case was tried by Mr. Justice Richards without a jury and he has found the facts to be against this contention.

It seems to me if he placed implicit reliance on the evidence of the respondent he could not well find otherwise.

The question then remains, what is meant by "animals *at large upon the highway or otherwise*" getting upon the property of the company and being killed or injured by a train?

A good deal of ingenuity was shewn during the argument to put upon the words "at large upon the highway or otherwise" some meaning other than the plain, ordinary, grammatical meaning the words bear and thus let the appellants free from liability in cases such as this.

Reasons to support these other meanings were sought for in the past history of the legislation bearing on the duty to fence a railway track, and the interpretation thereof by the courts.

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It was urged that behind all that was the common law, which cast the burthen of the care of cattle upon the owner and had to be considered.

Bearing that in mind it was said we must treat all the statutory law on the subject as an invasion thereof, and, therefore, give such statutes a restricted meaning.

The principle appealed to is theoretically sound, but how far is it applicable here?

I doubt if having due regard to the nature of the title the railway company has acquired, and reason for its acquisition, a full examination of the question from the point of view urged would avail the companies much.

I will not labour with it, however, for the reason that the language of the statute is so explicit I do not require to; and for the further reason that the long line of cases so much relied upon and the manifest hardship they wrought, in very many instances, seemed to demand a remedy for cases such as the one now in hand.

To any one conversant with the history of the struggle that had gone on in the courts for half a century over the nature of the obligations resting upon a railway company to fence its track, there is nothing surprising to find a radical change in regard thereto in "The Railway Act of 1903."

Finding that radical change in the language of the legislature relative to the nature and extent of the obligation to fence, I see no reason for restricting or straining the meaning of the words.

The word "otherwise" does not mean the same, but a something different from that preceding it. I cannot find anything more aptly different, from being at

large on the highway, than just the case the facts here present.

I do not think it necessary for this case to attempt to determine the limits of the obvious change introduced by this Act, as I have observed, relative to the duties of railway companies to fence.

One would expect to find the duty to fence and the liability to compensate for losses suffered through want of proper fencing, generally speaking, correlative.

It seems as if we had here a duty to fence created, but when we come to consider the right of action, it seems doubtful, to say the least, whether the action rests on that statute or the section 4, quite independently of what precedes it.

If it remain without amendment, many cases may be found necessary to settle what it does mean.

The appeal should be dismissed with costs.

MACLENNAN J.—The question in this appeal depends on the true construction of section 237 of the "Railway Act."

The horses which were killed strayed from the plaintiff's field, which lay on the south side of a highway, which, running east and west parallel to the railway, crossed the highway, entered a field adjacent to the railway, passed thence upon the track through an opening, which had never been provided with a gate by the company and were killed.

The field adjacent to the railway was not the property of the plaintiff.

The first question is whether the highway crossed by the animals is such a highway as is referred to in

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section 237, or at all events in sub-section (4) of that section.

I think it is clear that the highway referred to in the first three sub-sections, is one crossing, or intersecting, the railway, and not one running parallel to it, as did the highway in question.

The first sub-section forbids animals to be at large upon any highway, within half a mile of the intersection of *such highway* with a railway at rail level unless, etc.

Sub-section (2) provides for the impounding of cattle found at large contrary to the provisions of the section, plainly meaning at large upon an *intersecting* highway.

Sub-section (3) deprives the owner of animals killed at the *point of intersection* of any right of action.

Then follows sub-section (4) which is relied upon by the plaintiff, and it gives an action to the owner of animals at large upon *the highway or otherwise* which get upon the property of the company, and are killed or injured by a train, unless under certain specified conditions.

I think the kind of highway here mentioned is the same as that mentioned in the preceding sub-sections, that is to say, an *intersecting* highway. It is not a highway, or *any* highway, but *the* highway, that is, the same highway mentioned before.

There is no evidence that the highway crossed by the animals was an intersecting highway, and unless the words "or otherwise" make the sub-section applicable to the present case I think the plaintiff cannot recover.

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I think, however, that those words require us to uphold the judgment.

In my opinion those words, reasonably and fairly construed, mean *at large upon the highway, or at large in any other way or place.* They widen the meaning so as to embrace the circumstances in which these animals were. They were at large, first upon the highway parallel to the railway, and afterwards in the neighbouring field, from which they passed upon the company's line.

There is no evidence that they got at large through any negligence or wilful act of the plaintiff or his agent, or of their custodian or his agent, and the subsection makes the fact that no one was in charge of them immaterial.

The appeal should be dismissed with costs here and below.

DUFF J. concurred with Maclennan J.

Appeal dismissed with costs.

Solicitor for the appellants: *J. A. M. Aikins.*

Solicitor for the respondent: *Gregory Barrett.*

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*May 22.
*June 24.

HENRY L. DAY (PLAINTIFF).....APPELLANT;

AND

THE CROWN GRAIN COMPANY AND W. S. CLEVELAND (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Mechanics' lien—Completion of contract—Time for filing claim—Construction of statute—R.S.M., 1902, c. 110, ss. 20 and 36—Right of appeal.

The time limited for the registration of claims for liens by sec. 20 of "The Mechanics' and Wage Earners' Lien Act," R.S.M., 1902, ch. 110, does not commence to run until there has been such performance of the contract as would entitle the contractor to maintain an action for the whole amount due thereunder.

The judgment apealed from (16 Man. R. 366) was reversed. Davies and Maclennan JJ. dissented on the ground that the evidence was too unsatisfactory to justify an extension of the time.

The court refused to quash the appeal on the ground that the right of appeal had been taken away by sec. 36 of the statute above referred to.

APPEAL from the judgment of the Court of King's Bench for Manitoba(1), reversing the judgment of His Lordship Mr. Justice Richards, at the trial, and dismissing the plaintiff's action with costs.

The action was brought against both defendants, respondents, and was maintained with costs by the judge at the trial, who decided that the plaintiff was entitled to a lien on the property in question for the

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

(1) 16 Man. R. 366.

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sum of $2,140.60, claimed for materials supplied and work done under his contract for the installation of certain machinery in an elevator in the Town of St. Boniface, in Manitoba. The defendant Cleveland did not appeal from this judgment, but, on an appeal by the company, the judgment at the trial was reversed and the action dismissed with costs. The issues on the present appeal were, therefore, confined to the claim against the company.

On the appeal coming on for hearing, *Galt,* for the respondents, moved to quash the appeal on the ground that, under section 36 of "The Mechanics' and Wage Earners' Lien Act"(2), there could be no appeal from the judgment in question. Without calling upon the appellant's counsel to reply, the court ordered the argument to proceed upon the merits of the appeal.

The circumstances of the case and the questions raised upon this appeal are stated in the judgment of the majority of the court, delivered by His Lordship Mr. Justice Idington.

C. P. Wilson and *A. E. Hoskin* for the appellant.

Alex. C. Galt for the respondents.

THE CHIEF JUSTICE concurred in the opinion of Mr. Justice Idington.

DAVIES J. (dissenting).—For the reasons given by the court below, I am of opinion that this appeal should be dismissed.

(2) R.S.M., 1902, ch. 110.

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Davies J.

I do not think the time fixed by statute within which proceedings must be taken to enforce a mechanics' lien, should be extended on evidence so unsatisfactory as that here offered. I fully agree in the appreciation given by the Court of Appeal to that evidence, that the plaintiff himself treated the contract as completed on the 20th of April, 1904, and also as to the reason for Burn's intention to return.

The argument failed entirely to satisfy me that he intended to return with any idea of completing a contract he had already, in the view of both parties, practically and substantially completed.

IDINGTON J.—The defendant Cleveland contracted with his co-defendants to build, in Winnipeg, a grain elevator.

It was specified in their contract that a complete dust collecting system was to be installed therein.

The system adopted was one in which at least two kinds of contrivances, known as Day's patented dust collectors and Day's patented furnace feeders, of which the appellant was the patentee, were to be used.

The appellant agreed with Cleveland to do the work and supply the material for that part of his contract with respondents which involved the complete system of dust collecting that was to be installed.

The respondents had nothing to do with this sub-contract beyond approving the system or being satisfied with its execution. It was well known to them that the sub-contract was made, and, no doubt also known, that it was necessary for their contractor Cleveland to obtain this patented machinery from appellant, yet no attention was paid by the company to the Mechanics' Lien Act.

If companies or others disregard the plain and obviously proper provisions of this statute, they should not set up, as is done here, a wail about losing money thereby.

The questions for us are: Did the appellant become entitled by virtue of the said Act to a lien upon the respondent company's property for the amount of work and material covered by this sub-contract? And if so,—Has he lost it by reason of failure to register within thirty days from the completion of such sub-contract?

The lien was registered on the 30th of June, 1904. It is not denied that the work was done, or, alternatively, that the work would have been done by appellant but for the action of respondents.

It is claimed the lien was not registered in time. That depends on whether the work was completed on the 19th April, 1904, or not.

The appellant's work on that date was all done save some parts which would not cost very much to do and which could have been done in a few hours had the rest of the work Cleveland had to do been ready to receive these parts in their proper place.

Appellant's foreman arranged with the man in charge for Cleveland that he, the appellant's foreman, would do these things at a later date; that he would return for the purposes of seeing the machinery he had placed work properly and give satisfaction, and then could and would supply all the minor things in question.

He then went home to Minneapolis, the domicile of appellant also, and on the 20th April, having reported the state of his work to appellant's book-keeper, the whole contract was charged up as if finished. The

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completion having been delayed by Cleveland, the appellant was entitled to look to him for a substantial payment having only received about one-third of his contract price.

On the 2nd of June, without instructions from anybody, the book-keeper wrote a letter to the respondent company's manager calling attention to this and stating that letters on the same subject to Cleveland remained unanswered and that the work was completed.

This letter does not seem to have been answered.

The respondents now lay stress upon the facts of this charging up the contract price and writing this letter and they say that, coupled with statements made by appellants' foreman before leaving Winnipeg in April to the effect that he was "through" and was taking his tools and material away, there can be no doubt but that the appellants' men supposed the work all completed and that, in fact, it must be inferred therefrom that it was completed on the 19th April.

This seems to have been relied upon in the court below.

It appears to me an unwarranted conclusion when we find it as conclusively proven, as anything can be proven, by Clapp, the superintending foreman in charge of the work for Cleveland, when appellant's men left in April, that this foreman of appellant was to return and finish as already stated.

Counsel for respondents on the argument before us would not venture to cast the slightest doubt on the honesty of Clapp and admitted he had no interest in the matter. How then, as I asked, could his story be impeached or affected by the circumstances already referred to?

I have not heard any answer to this. I cannot conceive any effective answer possible. The book-keeper, being human, erred. No claim, resting on such obvious error, can stand. It led to giving an appearance of truth to the ground relied upon by respondents. It was, however, I fear, merely an appearance of truth.

The test question here is whether or not the appellant could in law have sued on the 20th of April and recovered from Cleveland as for a completed contract. I am of opinion he could not. Trifling as the parts unfinished were, the party paying, in such a case, was entitled to insist on the utmost fulfilment of the contract and to have these parts so supplied that the machine would do its work.

We must not overlook the nature of the work to be done and the possibility of the slightest departure from the true way to construct rendering it worthless.

I am not surprised to learn that workmen doing this class of work desire as well for their own reputation as for the purpose of satisfying their patrons that they should see it running, and running in good order, before considering it completed.

Obviously the machine was absolutely useless without some of the parts that remained to be attached thereto, and another part of it so defective as to be liable to burn the buildings down and leave the appellant, in that event, if he had so handed it over, liable to an action.

Apply these tests, and the cases relied on below have no application here.

Truly the things in question do look trifling; so does the most of patented machinery to the wise people that see it working.

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I am abundantly satisfied that if we had been hearing the converse of this case, on the facts it presents, in an action begun by appellant, in April, when the work was charged up in the books, we would have been told by respondents that a clearer case of an unfinished contract could not be found.

I fear interest blinds the apprehension.

I think the appeal should be allowed with costs, and the judgment of the learned trial judge restored, with costs of court below.

MACLENNAN J. (dissenting).—I agree in the opinion of my brother Davies.

DUFF J. concurred with Idington J.

Appeal allowed with costs.

Solicitors for the appellant: *Campbell, Pitblado, Hoskin & Grundy.*

Solicitors for the respondents: *Tupper, Galt, Tupper, Minty & McTavish.*

ANDREW ROBERT McNICHOL (DEFENDANT) ..... } APPELLANT;

AND

ADDIE MALCOLM (PLAINTIFF) AND THE STANDARD PLUMBING COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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*May 23-28.

*June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Landlord and tenant—Negligence—Master and servant—Acts in course of employment — Alterations to plumbing—Damage by steam, etc. — Responsibility of contractors — Control of premises—Cross-appeal between respondents—Practice.

In the lease of a shop, the landlord agreed to supply steam heating and, in order to improve the system, engaged a firm of plumbers to make alterations. Before this work was completed and during the absence of the tenant, the plumbers' men, who were at work in another part of the same building, with steam cut off for that purpose, at the request of the caretaker employed by the landlord, turned the steam on again which, passing through unfinished pipes connected with the shop, escaped through an open valve in a radiator and injured the tenant's goods.

Held, that the landlord was liable in damages for the negligent act of his caretaker in allowing steam to be turned on without ascertaining that the radiator was in proper condition to receive the pressure, and that the plumbing firm were also responsible for the negligence of their employees in turning on the steam, under such circumstances, as they were acting in the course of their employment in what they did although requested to do so by the caretaker.

The judgment appealed from (16 Man. R. 411) was affirmed with a variation declaring the plumbers jointly liable with the landlord.

The action was against the two defendants, jointly, and the plaintiff obtained a verdict, at the trial, against both. The Court of Appeal confirmed the verdict as to McN. and dismissed the action as to the other defendants. McN. appealed to the Supreme Court of Canada, making the other defendants respondents on his appeal.

Held, that the plaintiff, respondent, was entitled to cross-appeal against the said defendants, respondents, to have the verdict against them at the trial restored.

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

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APPEAL from the judgment of the Court of Appeal for Manitoba(1), by which the judgment of Dubuc C.J. at the trial, maintaining the action against both defendants, was affirmed in respect to the verdict against the present appellant and the action was dismissed with costs in respect to the Standard Plumbing Company, respondents.

The circumstances of the case are stated in the head-note and the judgment now reported.

Upon the filing of this appeal by the defendant, McNichol, the plaintiff notified the company that, upon the hearing of the appeal by McNichol, she would contend that the decision of the Court of Appeal should be varied and the judgment of His Lordship Chief Justice Dubuc, entered at the trial of the action, should be restored, except as to some damages caused by the escape of water. The company had filed a factum and also appeared by counsel who was heard on the cross-appeal, subject to objection as to its competency.

The Supreme Court of Canada considered that, under the circumstances, it was competent for the plaintiff to cross-appeal in this manner, permitted supplementary factums to be filed by all the parties and heard counsel on their behalf upon the cross-appeal.

Nesbitt K.C. and *Aikins K.C.* (*Coyne* with them) for the appellant.

Chrysler K.C. and *Ormond* for the respondent, Malcolm, appellant on the cross-appeal.

(1) 16 Man. R. 411.

C. P. Wilson for the respondents, The Standard Plumbing Company.

The judgment of the court was delivered by

DUFF J.—The appellant McNichol was, in 1904, the owner of a building in Winnipeg, and, in July of that year, the respondent, Miss Malcolm (the plaintiff in the action) leased from him part of the building for use as a millinery shop. The appellant agreed to furnish heat sufficient, at a temperature of 40 degrees below zero in the open, to maintain a temperature of 70 degrees above zero in the shop. Shortly before the respondent became his tenant, the appellant adopted a system of heating his building by means of steam to be distributed to radiators in various parts of it through pipes connected with a steam generating plant in the basement.

In consideration of the appellant's agreement to supply heat, the plaintiff agreed to pay in each month, from October to April inclusive, a sum of $15 in addition to the rent reserved. In December the respondent found that her shop was insufficiently heated and that in consequence she was seriously hampered in the prosecution of her business.

In the latter part of December in response to numerous complaints by the plaintiff, the appellant's agent employed the respondent, the Standard Plumbing Co., to place in the shop an additional radiator, by means of which it was expected that sufficient additional heat would be supplied.

To provide a channel for the passage of steam into this radiator, it was necessary to connect it by a pipe with the appellant's main distributing pipe; and

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owing to the absence of any means of isolating the branch pipes supplying individual rooms, it was necessary, while making this connection, to shut off the steam from the distributing pipe at or near the boiler.

The plumbing company's workmen had completed and affixed this branch pipe on the evening of the 28th of December, but finding that the radiator supplied by the appellant required alterations to adapt it to the reception of steam, and that, for this reason, they would be unable to connect it with the branch pipe that evening, inserted a valve at the end of this pipe to prevent its escape and turned on the steam. Almost immediately after this, the plaintiff observed water dripping from the ceiling of her shop. The plumbers, on being informed of this, first went to the basement and turned off the steam. The appellant's caretaker finding that he was unable to get access to the room from which the water was apparently coming, left for the purpose of getting a key from the tenant of it, and the plaintiff, being informed by the plumbers that steam would not again be turned on that night and that it would be unnecessary for her to return in order to give access to the shop, locked the door and went away. In the evening, the foreman of the plumbing company, having arranged with the caretaker to return and assist him in endeavouring to ascertain the source of the flow of water, did return and found that the caretaker, having got access to the room above the shop, had discovered that it was due to the breaking of the air valve in one of the radiators there, and had, by closing the valve attached to the pipe leading to the radiator, obviated the danger of any further escape of water. The foreman then, with the assistance of the caretaker, turned on steam in the basement.

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In the morning, the plaintiff's sister returning to the shop found that the valve, which the plumber had inserted in the branch pipe the day before, was open and that the shop was filled with steam, which was still escaping in considerable volume.

The plaintiff's goods were much damaged by steam and water and, to recover compensation for this damage, the present action was brought.

In my opinion, the act of turning steam into the distributing pipe, without either having taken or immediately taking steps to ascertain with certainty whether the branch pipe constructed that day leading into the plaintiff's shop was so closed as to prevent the escape of steam, was a negligent act for the consequences of which the immediate actors and those responsible for their conduct are answerable in an action. Both the plumber and the caretaker were engaged in the act of turning on the steam. That the continued escape of steam into the shop in the existing state of its temperature would lead to serious damage to the plaintiff's goods and to serious interruption of her business must have been known to both. That there was no person there to observe the escape of steam was known to the plumber and must have been known to the caretaker, if he gave the slightest attention to the subject. In these circumstances, those who undertook to expose this unfinished pipe to the access of steam under the pressure maintained on the appellant's system, for a continuous period, assumed, I think, an obligation to ascertain that this was attended with no risk of its escape. In point of fact, the operation, if proper precautions were taken, was not attended with the slightest risk. Ocular inspection alone, the steam having

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been turned on, would enable anybody, long before its escape in sufficient volume to cause any harm, to ascertain the fact with certainty and to prevent that harm by closing the valves at the boiler.

I agree entirely with the view of the Court of Appeal that, in these circumstances, nothing which occurred in the afternoon absolved either the plumber or the caretaker from the duty of ascertaining the condition of the valve with certainty before the escape of steam would have time to cause serious injury.

The majority of the court having come to the opinion that the plaintiff's cross-appeal is competent, the real questions on the appeal are, I think, whether, for this negligent act, the responsibility can be fixed on the appellant and the plumbing company or upon either and which of them.

First of the responsibility of the appellant. It is contended on his behalf that—following in this, not the usual merely, but the only prudent course—he employed the plumbing company as skilled persons to execute the work of placing the radiator in the plaintiff's shop and connecting it with the distributing pipe; and that this employment included shutting off the steam before commencing and the turning it on after completing the work; and that, having committed the work to competent independent contractors, he cannot be held responsible for the negligent conduct of the contractors or their servants in the course of it.

I have already intimated that, in my opinion, the caretaker and the plumber were jointly engaged in the act of turning on the steam which led immediately to the damage complained of. It is not, I think, a fair inference from the facts in evidence that the land-

lord had abandoned the control of the heating system to the plumbing company during the execution of the work they were engaged to do, and that the caretaker was merely the mechanical helper of the plumber; on the contrary, the evidence shews that the steam was turned on at the suggestion of the caretaker.

Such an intervention on the part of the landlord is sufficient, in my opinion, to fasten upon him responsibility for the act in which they were engaged.

But I cannot agree that, assuming the work in question had been committed to the control of an independent contractor, the landlord could, in the circumstances of this case, for that reason, escape responsibility. The landlord's contract was to supply heat absolutely. This, I think, clearly brought him under an obligation to see that the contract was carried out with reasonable care with a view to the object of the parties in entering into it—that the demised premises should be in a fit state to enable the plaintiff to carry on her business. *North Eastern Railway Co.* v. *Elliott* (1); *Robinson* v. *Kilvert* (2); *Aldin* v. *Latimer, Clark, Muirhead & Co.* (3).

When, then, the landlord, having broken his contract to supply heat, chose, in order to enable him to carry it out—either because the existing system was deficient or because it suited him best so to proceed—to execute the work in progress when the damage occurred, he remained, I think, fully subject to the obligation referred to and consequently was bound to carry out the work in such a way as not to interrupt the tenants in their enjoyment of the premises, in so far at least as such interruption should be preventable by the exercise of reasonable care. But it is said

(1) 1 J. & H. 145. (2) 41 C.D. 88.
(3) [1894] 2 Ch. 437, at p. 444.

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the plaintiff specifically assented to the execution of the work and that having regard to the character of the work, there was involved in this assent the delegation of the execution of it to skilled persons and therewith an assumption of the risk of their careless or unskilful work. I think that the fact that the plaintiff assented to the work is not fairly open to dispute, but what did that assent imply? Possibly an assent to such an interruption of her use of the premises as the execution of the work in the ordinary course—that is to say, with due care and skill—should entail. It is difficult to see on what ground the implication can be carried further. But it is not necessary to put the plaintiff's case so high.

Assuming that the tenant's assent to the placing of the radiator and connecting it with the heating system implied the assumption of the risk of the failure on the part of a competent plumber to use due care and skill, in so far as the work should require the exercise of an expert plumber's skill and knowledge, I am quite unable to discover any reason for extending this implication in the circumstances of this case so far as to absolve the landlord from the duty of taking such precautions as any unskilled person could take, and the necessity of which must have been apparent to any such person applying his mind to the situation; the duty, that is to say, of seeing when steam was turned into the connecting pipe whether or not it had a way of escape into the tenant's shop. It was not, in any sense, a case in which the landlord was dependent upon expert assistance; not, for example, one of those cases in which the carelessness or the unskilfulness of the expert becomes apparent only when the resulting mischief has been accomplished.

From all these considerations, the duty to see that

such precautions were taken, appears to me to arise inevitably from the landlord's contractual relation with his tenant; and to be involved in the responsibility undertaken by him in assuming to execute the work in question for the purpose of enabling him to carry out his contract. I am unable to distinguish the case in principle from cases where works are executed under a statutory obligation.

There remains the question of the responsibility of the Standard Plumbing Co. I have already said that in my opinion the act of the company's foreman in turning on the steam was, in the circumstances, a negligent act. The Court of Appeal has taken the view that in this he was the servant of the landlord only, and that consequently the plumbing company is not responsible. With great respect, and after some hesitation, I cannot agree with this view. I think he was acting in the course of his employment in what he did, although he did it at the request of the caretaker. Moreover, I am not satisfied that the view of the trial judge upon the evidence to the effect that the valve not being closed was due to the neglect of the foreman plumber or his assistant is erroneous.

The appeal is dismissed with costs and the cross-appeal allowed with costs.

Appeal dismissed with costs and cross-appeal allowed with costs.

Solicitors for the appellant: *Aikins, Robson & Co.*
Solicitors for the respondent,
Malcolm: *Hudson, Howell, Ormond & Marlatt.*
Solicitors for the respondents,
The Standard Plumbing Co.: *Hough, Campbell & Ferguson.*

1907

*May 28.
*June 24.

WILLIAM RUSTIN (DEFENDANT).....APPELLANT;

AND

THE FAIRCHILD COMPANY (PLAINTIFFS).....} RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Contract—Sale of machinery—Agreement for lien—Delivery.

The company sold R. an entire outfit of second-hand threshing machinery, for $1,400, taking from him three so-called promissory notes for the entire price. Two days before giving the notes, R. had signed an agreement setting out the bargain, in which the following provisions appeared—"And for the purpose of further securing payment of the price of the said machinery and interest * * * the purchaser agrees to deliver to the vendor, *at the time of the delivery* of the said machinery as herein provided *or upon demand*, a mortgage on the said lands (*i.e.* lands described at the foot of the agreement), in the statutory form containing also the special covenants and provisions in the mortgages usually taken by the vendors. And the purchaser hereby further agrees with the said vendors that the vendors shall have a charge and a specific lien for the amount of the purchase money and interest, or the said amount of the purchase price, less the amount realized, etc., should the vendors take and re-sell the said machinery * * * and any other land the purchaser now owns or shall hereafter own or be interested in, until the said purchase money and all costs, charges, damages and expenses, and any and all notes or renewals thereof, shall have been fully paid, and the said lands are hereby charged with the payment of the said purchase money, obligations, notes and all renewals thereof, and interest and all costs, charges, damages and expenses as herein provided, and, for the purpose of securing the same, the purchaser hereby grants to the vendors the said lands * * * . And, on default, all moneys hereby secured shall at once become due, and all powers and other remedies hereby given shall be enforceable." In an action to recover the amount of the notes past due and to have a decree

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

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for a lien and charge upon the lands therefor under the agreement.

Held, reversing the judgment appealed from, that the right of the company to enforce the lien depended upon the interpretation of the whole contract; that the provision as to the lien only became operative in the case of a complete delivery pursuant to the contract, and that the alternative words "or upon demand" must be taken as meaning upon a demand made after such complete delivery.

APPEAL from the judgment of the Court of King's Bench for Manitoba, affirming the judgment of His Lordship Chief Justice Debuc, at the trial, in favour of the plaintiffs for the sum of $809.50 and for a lien therefor upon the lands described in the statement of claim.

The circumstances of the case are stated in the judgment of His Lordship Mr. Justice Idington now reported.

W. Redford Mulock K.C. for the appellant.

C. P. Wilson and *A. E. Hoskin* for the respondents.

GIROUARD J.—While concurring with my brother Idington in his reasons for allowing this appeal, I cannot assent to the reservations he makes of any other remedies the respondents may have. I prefer to leave them to work out such remedies which are not disposed of by our judgment as they may be advised.

DAVIES J.—I concur in the opinion stated by my brother Girouard.

IDINGTON J.—This appeal is from the Court of King's Bench for Manitoba, which was equally divided on an appeal from the learned trial judge's judgment

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Idington J.

for the respondents. The respondents sold the appellant an entire outfit of second hand threshing machinery for the sum of $1,400 and took from the appellant three so-called promissory notes of equal sums covering the entire price agreed upon. Though these instruments are in the pleadings called promissory notes, I doubt if they are such in law.

The appellant also had signed, two days before giving these, an agreement setting forth the bargain between him and the respondents and, in this agreement, the following provision appears:

> And for the purpose of further securing payment of the price of the said machinery and interest, and of all loss, costs, charges, expenses and damages as herein provided, and of the costs of drawing and registering the mortgage, *the purchaser agrees to deliver to the vendor, at the time of the delivery of the said machinery as herein provided or upon demand, a mortgage on the said lands in the statutory form containing also the special covenants and provisions in the mortgages usually taken by the vendors.* And the purchaser hereby further agrees with the said vendors that the vendors shall have a charge and a specific lien for the amount of the purchase money and interest, or the said amount of the purchase price, less the amount realized by the said vendors after deducting the costs, charges and expenses aforesaid, should the vendors take and re-sell the said machinery under the foregoing powers, whether such amount be considered liquidated damages or the purchase money or price, or the balance thereof, upon the said lands, and any other land the purchaser now owns or shall hereafter own or be interested in, until the said purchase money and all costs, charges, damages and expenses, and any or all notes or renewals thereof, shall have been fully paid, and the said lands are hereby charged with the payment of the said purchase money, obligations, notes and all renewals thereof, and interest and all costs, charges, damages and expenses as herein provided, and for the purpose of securing the same, the purchaser hereby grants to the vendors the said lands. And the said purchaser will pay all taxes, rates, incumbrances or any charges upon said lands from time to time, as the same should be paid, and in the event of the vendors paying at any time any premiums, rates, taxes, incumbrances, or any charge upon said premises (they, the vendors, shall be subrogated to the position and rights of the party to whom the payment is made), the amount thereof, with interest thereon at ten per cent. per annum until re-payment shall be a lien and charge upon the said lands, and shall be payable forthwith to

the vendors, without demand or notice and, on default, all moneys hereby secured shall at once become due, and all powers and other remedies hereby given shall be enforceable.

The lands are described at the foot of the agreement.

The action is to recover the amount of the notes past due and to have a lien and charge upon the said lands for the sum of $1,344 still owing and unpaid under the said agreement, etc., etc.

The entire outfit of machinery bargained for never was delivered by the respondents to the appellant. Very substantial parts thereof needed for immediate use were removed by some prior lien-holder. Some parts never came to the appellant's hands. Other parts came into the possession of the appellant and were tested by him and found wanting in that efficiency he was entitled to expect under the terms of his bargain, and had he notified the respondents of this, he would, apparently, have been entirely freed from any liability of any sort arising out of the bargain. Instead of doing so, he dealt with the matter in such a way that he may have incurred some liability.

The question now raised is independent of that and as to the right of the respondents to enforce the lien called for under the provision above quoted. It must be determined by the interpretation of the whole contract and especially this provision, neither of which anticipate changes in the original bargain.

I am of the opinion that the said provision will only become operative in the case of a complete delivery pursuant to such a bargain.

Such, as I read it, is the express language of the contract.

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Idington J.

The alternative "or upon demand" must be taken to mean upon demand after the delivery.

It certainly would surprise any buyer signing any such agreement to have a demand for a mortgage made upon him at the execution of such an agreement which might only provide for a delivery months after the signing.

The later words regarding a lien upon the lands must, when we consider the scope of the provision, be held to be governed by what precedes them. They are merely intended to cover the same property when a mortgage has not been asked and mean no more than that, in default of the mortgage being given, a lien will be held to have been created by the delivery; or, in other words, by the complete fulfilment by the vendors of their part of the bargain, no alternative modification of the original bargain and sale being provided for by the agreement.

The appeal must be allowed with costs and the alleged lien declared never to have existed and the claim for and action to enforce it be dismissed.

The appellant, however, dealt with the respondent in relation to some parts of the machinery in such a way that he may be liable to pay as for goods sold and delivered or otherwise.

The appellant may have some explanation in regard to this phase of the dealing that may relieve him from such liability.

The respondents may also have some right to place their claim in quite a different light than that presented herein.

They refused to amend or ask leave to amend and put any sort of alternative claim in such a way before the court below as to enable us properly to adjudicate

upon it, and, I think, they must abide the result of doing so.

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Idington J.

I do not feel that we can here give them relief by way of judgment as asked on the notes past due. The questions raised by the elimination of the question of lien, leave the claim upon the notes above as apparently or imperfectly untried. A reference back seemed to me at first possible, but I see nothing to be saved or gained thereby on the whole.

All rights the respondents may have outside of the claim to enforce the lien or mortgage claim on the land must be reserved to the respondents.

In dismissing the action, as it seems we must do with costs, it should be declared to be without prejudice to the rights of the respondents against the appellant for anything save and except the right or claim to enforce the alleged lien or claim for a mortgage.

In assuming that the respondents may have some other remedy of such a nature as I have indicated, it must be clearly understood that I have formed and pass no opinion in favour thereof or against it.

The case, in that regard, has only been considered by me so far as to see if, upon this record, we could here properly give any relief.

It seems quite impossible to deal effectively and properly with anything but the alleged claim for mortgage or lien.

The appeal must be allowed with costs and the action dismissed with costs, including costs of appeal in the court below.

MACLENNAN J.—I concur in the opinion stated by my brother Girouard.

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DUFF J.—I concur in the judgment allowing the appeal with costs and dismissing the action with costs for the reasons stated by my brother Idington.

Appeal allowed with costs.

Solicitors for the appellant: *Mulock & Loftus.*

Solicitors for the respondents: *Campbell, Pitblado, Hoskin & Grundy.*

ROBINSON, LITTLE AND COMPANY, ON BEHALF OF THEMSELVES AND ALL OTHER CREDITORS OF THE DEFENDANT MCGILLIVRAY, (PLAINTIFFS) ..... } APPELLANTS;

1907

*June 6.
*June 24.

AND

M. MCGILLIVRAY AND J. W. SCOTT & SON ..... } DEFENDANTS.

AND

J.W. SCOTT & SON, (DEFENDANTS) . (RESPONDENTS).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insolvency—Preferential transfer of cheque—Deposit in private bank—Application of funds to debt due banker—Sinister intention—Payment to creditor—R.S.O. (1897), *c.* 147, *s.* 3(1).

McG., a merchant in insolvent circumstances, although not aware of that fact, sold his stock-in-trade and deposited the cheque received for the price to the credit of his account with a private banker to whom he was indebted, at the time, upon an overdue promissory note that had been, without his knowledge, charged against his account a few days before the sale. Within two days after making the deposit, McG. gave the banker his cheque to cover the amount of the note. In an action to have the transfer of the cheque, so deposited, set aside as preferential and void.

Held, affirming the judgment appealed from (13 Ont. L.R. 232) that the transaction was a payment to a creditor within the meaning of the statute, R.S.O. (1897) ch. 147, sec. 3, sub-sec, 1, which was not, under the circumstances, void as against creditors.

APPEAL from the judgment of the Court of Appeal for Ontario(1), affirming the judgment of the Divi-

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

(1) 13 Ont. L.R. 232, *sub nom. Robinson* v. *McGillivray*.

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ROBINSON, LITTLE & Co. v. SCOTT & SON.

sional Court(1), and the judgment of Falconbridge C.J., at the trial, by which the plaintiffs' action to set aside an alleged preferential transfer was dismissed with costs.

The material circumstances of the case are stated in the head-note, and are also referred to in the report of the judgment, on 2nd April, 1907(2), dismissing a motion to quash the appeal.

George C. Gibbons, for the appellants.

Meredith K.C. and *Brewster* for the respondents.

GIROUARD J.—This appeal is dismissed with costs.

DAVIES J. agreed that the appeal should be dismissed with costs.

IDINGTON J.—This appeal is from the Court of Appeal for Ontario upholding a judgment of a Divisional Court of that province and a judgment of the learned trial judge in a creditors' suit to set aside a transfer by the debtor of a cheque received within sixty days from the attack thus made on the transaction.

In the Divisional Court the late Mr. Justice Street dissented and gave some strong reasons to shew that the *primâ facie* presumption created by the Revised Statutes of Ontario (1897), ch. 147, against such assignments by an insolvent or one on the eve of insolvency was not rebutted.

Even if the difficulties in the way of the creditors

(1) 12 Ont. L.R. 91. (2) 38 Can. S.C.R. 490.

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ROBINSON, LITTLE & CO. v. SCOTT & SON.

Idington J.

here, arising from the semblance of the transaction to the case of payment, which is not within the statute, could be got over, I fear we cannot, since the case of *Baldocchi* v. *Spada* (1), recently decided in this court, interfere with the judgment of the court below. The comparison seems to me somewhat as follows:

The debtor there was shewn clearly to have been so hopelessly insolvent that, after his estate was depleted by something over $4,100 worth of stock transferred to the preferred creditor, the other creditors would not realize more than a few cents on the dollar.

Here the proof is not so clear. The learned trial judge credited the debtor when he swore that he did not believe he was in fact insolvent at the date of the transaction.

The total debts were small and would have been wiped out by sales of the debtor's real estate, at values for which it had been assessed, and otherwise valued at.

Again, the preferred creditor there was the creditor for money lent and long past due and the guarantor to the bank for his debtor and here the note was past due to the banker.

There the guarantor had been called on to make good his guarantee to the sum of nearly $2,000 and the debtor could not meet his debt but promised he would in a month, just as the debtor here did. In both cases forbearance was shewn for some weeks before the alleged preferential assignments in question were made.

There the creditor was so alarmed that he ad-

(1) 38 Can. S.C.R. 577.

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ROBINSON, LITTLE & Co. v. SCOTT & SON.

Idington J.

mitted under oath he had "felt funny and afraid" when default was made.

Here the creditor swears that he did not believe the debtor was insolvent and that he considered him solvent. This he swore to with the knowledge derived from a statement of the debtor's affairs given him some time before, and the debtor who had given this statement was recognized by him and admitted by appellants' counsel at the trial to be an honest man.

The debtor in the other case was the reverse of this and indeed fled just after the alleged preferential transfer and his creditor contented himself with not inquiring though he had felt "funny and afraid" for a month before.

The evidence here may, in the last analysis, rest on rather too sanguine estimates but, beyond that, seems credible.

The usual course of business between the parties was observed here, but there, as between the parties, there was a clear departure therefrom.

The evidence in the *Baldocchi Case*(1) I dealt with in my opinion therein.

As I intimated there, I would have preferred seeing the parties claiming under such preferences held to a different standard.

This case may not be quite satisfactory but the claim of Garborino in the above case having been upheld with much less to rest upon than that of the respondent, I do not see how I can, in view of these features common to both, refuse to uphold this judgment.

I think the appeal must be dismissed with costs.

(1) 38 Can. S.C.R. 577.

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ROBINSON, LITTLE & Co. v. SCOTT & SON.

Duff J.

MACLENNAN J.—I agree to dismiss the appeal with costs.

DUFF J.—I agree to the dismissal of the appeal. I think it unnecessary to add anything to the reasons given in the Court of Appeal for Ontario.

Appeal dismissed with costs.

Solicitors for the appellants: *Gibbons, Harper & Gibbons.*

Solicitors for the respondents: *Blewett & Bray.*

1907

*May 30, 31.
*June 24.

E. KIRSTEIN SONS & COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THE COHEN BROTHERS, LIMITED (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trade-mark—Infringement—Inventive term—Coined word—Exclusive use—Colourable imitation—Common idea—Description of goods—Deceit and fraud—Passing-off goods.

The hyphenated coined words "shur-on" and "staz-on" are not purely inventive terms but are merely corruptions of words descriptive of the goods (in this case, eye-glass frames) to which they were applied, intending them to be so described, and, therefore, they cannot properly be the subject of exclusive use as trade-marks. A trader using the term "sta-zon" as descriptive of such goods, is not guilty of infringement of any rights to the use of the term "shur-on" by another trader as his trade-mark, nor of fraudulently counterfeiting similar goods described by the latter term; nor is such a use of the former term a colourable imitation of the latter term calculated to deceive purchasers, as the terms are neither phonetically nor visually alike.

The judgment appealed from (13 Ont. L.R. 144), was affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario(1), affirming the judgment of Mulock C.J. at the trial(2), by which the plaintiffs' action was dismissed without costs.

The action was brought to restrain the defendants from continuing an alleged infringement of the trade-

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

(1) 13 Ont. L.R. 144. (2) 11 Ont. L.R. 450.

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KIRSTEIN SONS & CO. v. COHEN BROS.

mark "shur-on" claimed by the plaintiffs as their registered trade-mark as applied to eye-glass frames, sold by them as traders in optical goods, by the use of the coined word or term "sta-zon," as applied to similar optical goods sold by the defendants, and to restrain them from fraudulently counterfeiting the plaintiffs' goods and from selling such similar goods with the brand, label or description "sta-zon," for an account in the usual manner and for damages.

At the trial, Mulock C.J. held that there was no similarity in the terms in question calculated to mislead the public and that there had been no infringement of a trade-mark. This decision was affirmed by the judgment of the Court of Appeal for Ontario from which the present appeal is asserted by the plaintiffs.

The questions at issue on the present appeal are stated in the judgment of His Lordship, Mr. Justice Davies, now reported.

Cassels K.C. and *McIntosh* for the appellants.

J. H. Moss and *C. A. Moss* for the respondents.

THE CHIEF JUSTICE.—I am of opinion that the appeal should be dismissed for the reasons given in the court below.

DAVIES J.—I am for dismissing this appeal on both grounds on which it was sought to be supported, viz.—the infringement of a trade-mark and the fraudulent counterfeiting of plaintiffs' goods. I do not think either of the words or distortions of words "Shur-on"

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KIRSTEIN SONS & CO. v. COHEN BROS.

Davies J.

or "Sta-zon" is merely an inventive word which could be used as a trade-mark.

On the contrary, I hold these terms to be merely corruptions of words descriptive of the eye-glass frames to which they were intended to be applied—and that they were intended to be so descriptive. They cannot therefore be properly trade-marks.

I agree with Mr. Justice Osler that neither visually nor phonetically are these words, or distortions of words, alike, and I do not think that the mere use of "Sta-zon" as applied to their eye-glass frames by the respondents was calculated to mislead purchasers into the belief that they were buying plaintiffs' goods, which they had advertised under their trade-mark or trade-name of "Shur-on." The idea intended to be conveyed by the use of these corruptions of words may have been the same, but the fact that there is a common idea underlying the use of both words or corruptions and intending to describe some special merit in the article would not of itself be sufficient to enable plaintiffs to maintain the action. He could not pre-empt nor claim the exclusive use of the idea descriptive of some merit in the article. The very fact of it being descriptive and not inventive would be fatal to its validity as a trade-mark, while, if not descriptive, his only claim, on the ground of the fraudulently passing off of defendants' goods as his, lay in the use of a word which, as I agree, is neither visually or phonetically like the word he claimed as his trade-mark or name, and is not calculated to mislead the purchasing public into the belief that they were obtaining plaintiffs' eye-glass frames.

In many of the cases cited the question as to the passing off of one man's goods for those of another turned upon the appearance of the goods or the pack-

ages in which they were wrapped as they were put upon the market or upon other misleading methods adopted.

And if the defendants here had by advertising or otherwise adopted means which would mislead the public into the belief that in buying their goods they were really buying plaintiffs', they would have brought themselves within the well-known rule relating to passing off goods.

But the case turns entirely upon the use of the word "Sta-zon" instead of "Shur-on" and the contention that the use of the former word would mislead the public into the belief that they were purchasing the plaintiffs' goods known under the name of "Shur-on."

For the reasons given I do not think it would.

IDINGTON J.—I think, for the reasons assigned by Mr. Justice Osler, in the court below, which though brief cover all the grounds upon which the action might, by any possibility, on the evidence before us, have been rested in either alternative put before us, this appeal should be dismissed with costs.

MACLENNAN J.—I agree in the opinion stated by Mr. Justice Davies.

DUFF J.—I concur in dismissing the appeal for the reasons stated by Mr. Justice Davies.

Appeal dismissed with costs.

Solicitors for the appellants: *Macdonald & Macintosh.*
Solicitors for the respondents: *Aylesworth, Wright, Moss & Thompson.*

1907

*May 10.
*June 24.

JOHN FLEMING AND JAMES DOUGLAS (PLAINTIFFS) ..... } APPELLANTS;

AND

WILLIAM McLEOD (DEFENDANT) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Promissory note—Protest in London, England—Notice of dishonour to indorser in Canada—Knowledge of address—First mail leaving for Canada—Notice through agent—Agreement for time—Discharge of surety—Appropriation of payments—Evidence.

Notes made in St. John, N.B., were protested in London, England, where they were payable. The indorser lived at Richibucto, N.B. Notice of dishonour of the first note was mailed to the indorser at Richibucto, and, at the same time, the protest was sent by the holders to an agent at Halifax, N.S., instructing him to take the necessary steps to obtain payment. The agent, on the same day that he received the protest and instructions, sent, by post, notice of dishonour to the indorser at Richibucto. As the other notes fell due, the holders sent them and the protests, by the first packet from London to Canada, to the same agent, at Halifax, by whom the notices of dishonour were forwarded to the indorser, at Richibucto.

Held, Idington and Duff JJ. dissenting, that the sending of the notice of dishonour of the first note direct from London to Richibucto, with the precaution of also sending it through the agent was an indication that the holders were not aware of the correct address of the indorser and the fact that they used the proper address was not conclusive of their knowledge or sufficient to compel an inference imputing such knowledge to them. Therefore, the notices in respect to the other notes, sent through the agent, were sufficient.

Per Idington and Duff JJ. dissenting, that the holders had failed to shew that they had adopted the most expeditious mode of having the notices of dishonour given to the indorser.

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

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FLEMING v. MCLEOD.

The maker of the note gave evidence of an offer to the holders to settle his indebtedness, on certain terms and at a time some two or three years later than the maturity of the last note, and that the same was agreed to by the holders. The latter, in their evidence, denied such agreement and testified that, in all the negotiations, they had informed the maker that they would do nothing whatever in any way to release the indorser.

Held, that the evidence did not shew that there was any agreement by the holders to give time to the maker and the indorser was not discharged. If the existence of an agreement could be gathered from the evidence, it was without consideration and the creditors' rights against the sureties were reserved.

Per Idington and Duff JJ. that a demand note given in renewal of a time note and accepted by the holders is not a giving of time to the maker by which the indorser is discharged.

Judgment of the Supreme Court of New Brunswick (37 N.B. Rep. 630), reversed.

APPEAL from the judgment of the Supreme Court of New Brunswick (1), affirming the judgment of His Lordship, Chief Justice Tuck, at the trial, by which the plaintiffs' action was dismissed with costs.

The material circumstances of the case are stated in the head-note and the questions at issue on this appeal are discussed in the judgments now reported.

Teed K.C. for the appellants.

W. D. Carter for the respondent.

THE CHIEF JUSTICE.—This appeal is allowed with costs. I concur in the judgment delivered by Mr. Justice Davies.

DAVIES J.—This appeal arises in an action brought by the appellants the payees of four promissory notes

(1) 37 N.B. Rep. 630.

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FLEMING v. MCLEOD.

Davies J.

given to them by George K. McLeod, all dated at St. John, N.B., 1892, falling due respectively September 30th, 1893, 1894, 1895 and 1896, and all indorsed by respondent W. H. McLeod. The first three are for £1625 sterling each, and the last one for £1705 16s. sterling.

The defendant in his pleas denied (1) presentation; (2) notice of dishonour; and alleged; (3) an agreement by the appellant with the maker, Geo. K. McLeod, to give him time for payment of all the notes whereby respondent as surety became discharged; and (4) payment.

The appellants are merchants carrying on business in London, England, and it is conceded that the notes as they respectively fell due were properly presented and protested for non-payment.

The substantial contests are whether or not proper notices of dishonour were sent to respondent and whether or not, even if so, he was discharged by a valid agreement between appellants and the maker of the notes, Geo. K. McLeod, giving him time for payment.

It appears in evidence that the defendant, respondent, lives in Richibucto, New Brunswick, but there is no evidence of knowledge by the appellants of that fact, unless the inference of such knowledge should be drawn from the fact that when the first note fell due a notice of the dishonour of the same was sent to defendant by the appellants, from London, the following day, addressed to Richibucto. At the same time and by the same mail, the appellants forwarded the protest of the non-payment of that note to their agent, the manager of the Merchants' Bank of Halifax, Nova Scotia, instructing him to take the

necessary preliminary steps to obtain from the maker and from respondent W. H. McLeod, payment of the note.

Pursuant to these instructions Duncan, their agent, on the same day that he received by mail this letter from appellants, in Halifax, sent by post notice of dishonour to W. H. McLeod at Richibucto. The fact of the appellants having taken the precaution of sending the protested note to their agent Duncan in Halifax, and having a notice of dishonour sent by him to McLeod, rather rebuts the inference sought to be drawn from the sending of the notice to him from London to Richibucto direct and indicates an uncertainty on the part of the appellants as to McLeod's proper address which goes to rebut knowledge. The fact that they hit upon the proper address is by no means conclusive of their knowledge, or sufficient to compel an inference imputing such knowledge to them. With respect to all the other three notes the practice adopted by appellants was to send the dishonoured note and protest by the "first Canadian mail leaving London for Canada" after the day of the dishonour of the note, to their agent Duncan the manager of the Merchants' Bank, Halifax, by whom notices of dishonour were forwarded to defendant.

The evidence of Wrampe, the appellants' clerk, with respect to the forwarding of these letters from London on the dishonour of the first note leaves no room for doubt on that point. He says, speaking of the notices sent with respect to the first note:

> The mail direct for Canada closed on Thursdays. *There was no mail leaving for Canada between Sept. 30th and Oct. 4th,* so that both of these letters C.H.C. 6 and C.H.C. 7 were posted in time to *catch the first mail leaving for Canada* after Sept. 30th.

His evidence with respect to the sending of the protests of the other three dishonoured notes to Duncan at Halifax to have the notices of dishonour sent

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Davies J.

to McLeod is to the same effect, namely, that they were posted in time "for the first mail leaving for Canada after the note became due." The evidence of Ferand, an official of the general post-office, London, was to the same effect, so far as proving the days when the mail left England for Canada direct. These witnesses were not cross-examined and the only evidence given even suggesting that these mails by which the protested notes were forwarded to Duncan were not the first mails leaving London for Canada after the dishonour of the notes was that of Geo. K. McLeod who of late years had lived in New York and did not profess to have accurate knowledge on the subject. He says that, *so far as his knowledge was concerned,*

> mails leave London for *North America,* Tuesday, Wednesday, Thursday and Saturday as a rule and that (he should think) three-quarters of the Canadian mails came by way of New York.

But whether he was speaking with reference to the postal arrangements of the year when his evidence was given or to the years 1893, 1894, 1895 and 1896, when the notices were sent does not appear.

I have no hesitation in holding on this evidence that the appellants cannot be held to have had knowledge of the defendant W. H. McLeod's address; that they were therefore justified in forwarding the protests of the dishonour of the notes to their agent Duncan in Halifax in order to have the necessary inquiries made and notices of dishonour sent to his proper address, and if as a consequence of so forwarding these protests and notes to their agent any necessary delay occurred (of which fact I am bound to say I see no evidence) the appellants were justified and excused under the law of England which is the law applicable

to this case in respect to such delay. Duncan's evidence is clear and undoubted that he forwarded on from Halifax to McLeod at Richibucto the proper notices of dishonour the *same day* he received the protests in each case from the plaintiffs in London, and there is the further evidence from the post-office clerk at Richibucto of the day the defendant McLeod took the notices out of the post-office at Richibucto they being registered notices. The evidence given on these points, in my opinion, satisfies the requirements of the law as to the giving of proper notices of dishonour and no evidence beyond the quite unsatisfactory general statement of Geo. K. McLeod was given with respect either to the knowledge by appellants of his brother's address or as to the mails leaving London for Canada. W. H. McLeod himself was not examined as a witness.

Then with respect to the defence that there was an agreement between the appellants and the maker of the note Geo. K. McLeod whereby the latter was given time for payment, I am quite unable to conclude that any such agreement existed.

It appears Geo. K. McLeod was in London in the autumn of 1898 negotiating with the appellants for a settlement of his account with them. These negotiations continued for some time until, as McLeod in his evidence says, they culminated in a letter written by him on 12th December, 1898, to the appellants which was put in evidence. This letter professes to state certain terms of settlement as having been proposed by appellants to McLeod which he says he will accept; amongst them was the payment by McLeod of a much smaller sum than he admittedly owed appellants

in full and final settlement of the indebtedness to your firm of my brother and myself.

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The letter winds up with the following:

> You will agree to give me an extended time of payment of sum agreed upon until Dec. 31st, 1900, by which date this settlement is to be finally completed by me. If you will kindly confirm the terms as herein stated you will oblige me.

There was no written confirmation of the terms stated or proposed in this letter, but McLeod says that he had several subsequent interviews with the appellants and that at one of these the partner with whom he was negotiating consented to accept these terms of settlement.

The trial of the case was postponed after this evidence to enable the evidence of appellants to be obtained on this point and that of John Fleming, the senior partner in the firm was obtained by Commission and read in evidence when the hearing was resumed. In his evidence Mr. Fleming says, that his firm had

> provisionally agreed in March, 1898, to accept the sum of £3,250 plus interest in settlement of Geo. K. McLeod and William H. McLeod and George McLeod's indebtedness, but George K. McLeod wanted to reduce this amount as stated in his letter of 12th December, 1898, now before the court. Robinson Fleming & Co. (appellants) never at any time either in writing or verbally agreed to any such desired reduction and they rejected the proposal made in the letter of 12th December, 1898.

He goes on to state further that in all the negotiations his firm informed McLeod they

> would do nothing whatever in any way to release William McLeod or George McLeod, Sr.

until whatever sum which might be agreed upon as a compromise was paid in cash, and he produced another letter to his firm from Geo. K. McLeod dated 1st Sept., 1899, which was read in evidence wherein he, McLeod,

withdraws his previous letter of 12th December, 1898, the terms of which he had stated had been accepted, and submitted new and different proposals for settlement and amongst them one that he George

> engaged to do his best to get necessary consents of W. H. McLeod and of his father (and any other necessary parties if any) to this proposed settlement.

Fleming further states that

> all these negotiations with Geo. K. McLeod were merely proposals and without prejudice to Robinson Fleming & Co., and it was continuously clearly understood that W. H. McLeod's responsibility as indorser remained intact till Robinson, Fleming & Co., were in receipt of the cash.

Geo. K. McLeod was personally present at the adjourned hearing of the case. He was then further examined on behalf of the defendant and stated that he had heard Mr. Fleming's evidence taken on commission read. He gives however no contradiction of any kind to the specific statements of Mr. Fleming which I have set out above or any explanation or statement respecting them.

With this letter of Geo. K. McLeod's in evidence of the date 1st Sept., 1899, unexplained, withdrawing his previous offer of 12th December, 1898, which he had previously stated appellants had accepted, and with the uncontradicted evidence of Mr. John Fleming denying that the negotiations had resulted in any settled agreement or that they were anything more than mere proposals of Geo. K. McLeod's which, if carried out, they were willing to accept and explicitly stating that "it was clearly continuously understood" by all parties that W. H. McLeod's responsibility as indorser was to remain intact, I cannot entertain any doubt upon this branch of the case.

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I conclude from the evidence clearly that there was no binding agreement of compromise made between appellants and Geo. K. McLeod whereby he was given time for payment of the debt he owed appellants; that if any such agreement could be spelled out of the evidence the reservation of appellants' rights against the sureties was a part of it; and that in any event the suggested agreement was without consideration and not binding.

See as to the reservation of rights against sureties, *Gorman* v. *Dixon*(1).

There remains only the question of the balance due upon the notes sued on. No difference of opinion apparently exists as to the credits to which Geo. K. McLeod is entitled in his accounts with the appellants. But there is a dispute as to the manner in which these credits ought to be appropriated having reference to the notes and defendant's liability upon them. As we have all the materials before us to enable us to deal with the point in dispute there is no reason for referring the case back again in order to have the proper calculations and appropriations made.

Counsel on both sides have submitted statements shewing how the balance would stand if the accounts are made up according to their several contentions. When once the defendant's liability on the four notes sued on is determined the only substantial difference of opinion seems to be whether the first payments received by the appellants should be appropriated to the payment of the interest due under the agreement of the 2nd November, 1891, in pursuance of which agreement these notes were given or whether the defendant has the right to have these payments strictly appro-

(1) 26 Can. S.C.R. 87.

priated to the notes ignoring the interest payable under the agreement.

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I do not think there can be any reasonable doubt on the point. The 5th and 13th clauses of the agreement seem conclusive that interest is to be calculated and payable upon the amount of the account as then settled every six months, and that any moneys collected from insurance for total loss on any of the properties referred to in the agreement

should be applied in liquidation of first payments due by Geo. K. McLeod under this agreement.

The first moneys due were the half yearly accruing interest and the account should be settled upon that basis, and the moneys collected from insurances on total loss

appropriated first to the payment of this interest as provided by the agreement.

I think also that they should be settled on the basis of a debt of £6,580 only as due by Geo. K. McLeod to appellants, namely, the £5,000 cash advance and the old debt of Geo. McLeod, Sen., of £1,500, and excluding the subsequent advances of £1,600 made by appellants to Geo. K. McLeod.

Calculated on this basis the balance due on the notes and for which the appellants are entitled to recover I think amounts to the sum of $30,717.57 up to the 1st day of June, 1907, as submitted by appellants' counsel in one of his tabulated statements.

The appeal should be allowed with costs in all the courts and for the purpose of arriving at the actual balance due and recoverable by appellants on the notes sued on a reference should be made to the Registrar of this court, and judgment entered for the amount

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found to be due by him on the basis above referred to together with costs as above.

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IDINGTON J. (dissenting).—The appellants sued the respondent as indorser upon four promissory notes which fell due in the years 1893, 1894, 1895, 1896, respectively. His chief defences are want of notice of dishonour and that time was given the maker of the notes by a binding agreement for the payment of the said notes.

It seems that the principal debtor was unable to pay his debts in full and sought to compromise with the appellants or their predecessor in title in regard to the debts represented by the notes now sued upon. It is alleged by the principal debtor in his evidence that there was, incidentally to the negotiations therefor, such an agreement as set up. I doubt whether what he says was sufficiently definite to constitute an agreement. Besides there evidently was no consideration for any agreement down to the proposal of 1st September, 1899, and he is contradicted as to what he alleges prior to that date.

The proposal of September, 1899, was followed by the acceptance of a deed and a demand note from the principal debtor to the plaintiffs.

The question is raised whether we can fairly infer from the whole of the evidence, including the letter of September, that an understanding had been come to, that time would be extended until the 31st December, 1900 (the time for payment of the £3,250 which was to be taken in satisfaction of the entire debt), in consideration of George K. McLeod giving his demand note and the deed of the property. I am, after giving it the best consideration I can, unable to infer there-

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from any agreement for time. Amongst other considerations that press upon me in consideration of this question, I think it is clearly implied in the letter that the creditors had not, up to the date of the letter, accepted, or intended to accept any proposition by which they would release the sureties.

Can we infer from the giving of the deed to facilitate future sales of property, applicable to the liquidation of the debt, that the demand note referred to was to be demanded only at some future time? We may suspect that such was the arrangement in consideration of getting the deed. I cannot see my way to infer it as a fact. See *Twopenny* v. *Young*(1), in features of fact not unlike this. Then, is a renewal by demand note a giving of time?

The renewal by a promissory note payable at *a future date* assuredly is in itself a giving of time.

But how can a demand note which is instantly due the moment delivered, and can be sued upon then, and upon which the statute of limitations runs from the date or instant of delivery, if they differ and delivery be later, be held to be a giving of time?

If the demand note, either by expressions on its face, importing necessity of a future demand, or by agreement outside of it, was not instantly payable, the defendant should have so shewn to maintain his plea.

I think the defendant fails on this branch of the case.

Then we come to the defence of want of notice of dishonour. It is conceded that it fails on the facts regarding the first note.

The facts relative to the notice of dishonour given

(1) 3 B. & C. 208.

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in respect of the other notes require more consideration. It is not alleged in evidence that the address of the indorser was unknown to the holders when the notes respectively fell due. It cannot be so inferred. No one has asked us to do so. To get the benefit of such ignorance by way of excuse it must be affirmatively proven.

The address of the indorser was known and acted upon when the first note was protested and, as it remained unpaid the knowledge, I would presume, continued, especially as the address was in fact the same throughout and the same parties held the other notes as they fell due.

The appellants' knowledge and means of acquiring further knowledge of the indorser's address were such that I am surprised that we have no attempt at explanation of why these means were not used or this knowledge acted upon. The same clerk who gives evidence as to what was done in relation to the protesting and notice of dishonour seems to have been in charge of that part of the business during the whole time, and I have no doubt knew the address or he would have excused himself in his evidence.

The Halifax agent was not specifically asked regarding indorser's address or residence as he would have been if want of knowledge of residence had troubled the holders. Clearly, the holders ignored the necessity for notice of dishonour and seemed to suppose something else was needed.

Instead, however, of sending a notice of dishonour to that address which was known, none was sent in respect of the three later notes from London, in England, where they fell due.

We find in reported cases many unusual methods

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to have been adopted in transmitting notice to indorsers, but none upheld that were not shewn to have been the result of ignorance of the address or at least as expeditious as if sent by the ordinary mail service from the place of dishonour.

Here the method adopted was simply to have the note protested without the usual notice to indorsers of its dishonour and then the protest and note were sent by mail to an agent in Halifax with instructions to do what was necessary to collect and protect the legal rights of the holders. When the agent at Halifax received these instructions there, he sent, on the respective days on which he received them, a dunning letter by mail from Halifax to the defendant at Richibucto, where he lived, notifying him. Whether the dates of the respective receipts by the agent at Halifax of such instructions were the same day as mail reached Halifax, we are left to guess.

There is no evidence of how long it would have taken these notices, if mailed in London, as they should have been, on the respective dates of protest, directed to the defendant at Richibucto, to have reached there.

Nor is there anything to shew how long it would, in the ordinary course of mail service between Halifax and Richibucto, have taken the notices, mailed as they were at Halifax, to have reached Richibucto, or the defendant at Richibucto, in the respective years of such mailing. We are, in short, without any means of comparison between the time of transmission by proper methods and those which were adopted.

How can we, without some evidence shewing ignorance of residence or address, or that the irregular or unusual method resulted or probably resulted in de-

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fendant's receipt of such notices within the same time as if the business had been properly attended to, assume what we are asked to assume in order to overcome the defence in question?

The burthen of proving notices or excusing want of such rested on the appellants and, when they chose, without excuse, to adopt an unusual method, they were bound to shew that it was quite as effective in regard to time as if they had adopted the ordinary and proper method.

I have tried to get from a tabulation and comparison of the postal results in evidence something to help, but the meagre data we have renders it hopeless.

When I consider that the only evidence we have leaves us entirely in the dark as to the course of transmission of the mails from England to Canada, it is, I respectfully submit, absurd to try and give effect to notices from Halifax.

For aught I know, or appears in evidence, the notices of dishonour, if they had been mailed properly in London, might have reached Richibucto before they could have reached Halifax. A table is given of dates of closing in London of certain mails. Whether the "direct packet for Canada" spoken of in the evidence means a vessel for Halifax or Quebec or Montreal, I know not. Where such packet's mail bags for Halifax, in those years in question, would have been dropped in Canada, I do not know and am not told. If dropped elsewhere than at Halifax, it does not appear whether or not there were direct means of transmission from that point to Richibucto without going via Halifax. Why was Halifax selected for the purpose of following or finding a man that was last heard of at Richibucto in another province than where Halifax is?

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Are we to assume, without proof or a tittle of evidence, that notice re-mailed, for example, from Winnipeg or elsewhere to Richibucto or any other place in the wide Dominion of Canada would be proper and be held good? Are we to assume diligence in selecting Halifax instead of, say Saint John, either to find the man or his address?

In going via Halifax, we are not told how much time would have been lost by re-sorting, or by re-sorting and delivering there, before a re-mailing by Mr. Duncan, the plaintiffs' agent, could take place. Can we assume that Mr. Duncan was at home on each occasion and received on each occasion the several instructions so sent so soon as mail reached Halifax?

Can we venture under such circumstances to say that the most expeditious way was adopted, even if it were proper to adopt an irregular means of transmission? For aught that appears, a re-mailing from Quebec or Saint John, or any other place than Halifax might have been more expeditious than a re-mailing at Halifax.

In the face of the positive neglect in London, which I have pointed out, in regard to trying to find the indorser's address, and the facts that we have not a single precedent that I can find, for adopting such peculiar means of inquiry for a man's address and such postal means of transmission as were adopted here, and of what we know such postal interruption means, in handling and re-mailing, I fear it would be going rather far to uphold this notice, without evidence clearly shewing it was the best that could have been done.

Chief Justice Tuck points out that the usual mail route from London to the Province of New Brunswick

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is by way of New York and coupling mail service that way with what is in evidence as to mail direct to Canada there would be four mails each week from London. In view of what transpired in court, when Mr. McLeod was giving his evidence on that point, and that counsel did not object to the learned Chief Justice intimating his right to act upon what was common knowledge to him and to them, I am inclined to think, in view of the silence conceding consent, that he was entitled to use such general knowledge as he possessed, though possibly not strictly, in legal phraseology, "common knowledge." Certainly he was in a better position to know than we. He had some warrant for doing so from what transpired in court. We have none for using what information we can get on the subject.

Without saying that the case of *Muilman* v. *D'Eguino* (1), is no longer law, I may be permitted to remark that a good many changes have taken place in this world since that decision. Its bearing may need reviewing.

The only remaining question is whether or not the first of these four notes has been paid.

The notes were given pursuant to an agreement in writing of 2nd November, 1891, between George K. McLeod and Robinson, Fleming & Co., to whom George K. McLeod's father was indebted in the sum of £1,580 16s. And in consideration of George K. McLeod assuming the debt, Robinson, Fleming & Co. were to advance him £6,000. It was agreed that defendant should become indorser for the notes which were to be given for the entire sum including old debt and

(1) 2 H. Bl. 565.

new advance. The agreement provided for the payments of this entire sum being by £1,000 on or before 30th September, 1892, and four equal payments in each succeeding year thereafter.

Owing to a fire destroying part of the security, which the agreement also provided for being given, the proposed advance of £6,000 was cut down to £5,000.

That left a debt of £6,580 18s. to be paid and the four notes now in question of £1,625 each were given therefor on 30th January, 1893.

I observe they would not exactly cover it, but also observe that no explanation is given and no point made of the fact. Some allowance in the way of rebate or interest between the date of agreement and advance is probably the explanation of this discrepancy.

The defendant was, beyond all question, a surety. He was entitled, as surety, to have the moneys derived from any securities his principal gave for the debt, applied to the payment of what he had become surety for, and to be thereby discharged.

To secure these debts, the principal mortgaged vessels, and other property, and in compliance with the agreement, insured vessels so mortgaged. The result was the receipt by appellants of $6,801.79, £423 9s. of which was received 22nd April, 1894, and £960 of it, 25th May, 1894.

I venture to hold, notwithstanding Mr. John Fleming's sworn interpretation of clause 13 of the agreement, that this money, as well as that received later, was applicable to, and only to, the payment of the said note which was the only one then past due, saving any question of appropriation for interest on the

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whole, which the agreement, by paragraph 5, provides is to be paid at 5 per cent. every six months.

After this, in the same spring of 1895, another property known as the Kouchibouguac property, applicable in the same way, was sold for $3,250. Though not a cash sale, I think, as between parties to this suit, it must be treated as if cash, as the appellants took for the credit part of it an interest-bearing mortgage to themselves.

In this way it is clear that, even if out of the moneys thus realized the interest on the debt is taken every six months, there were balances which, applied to the first note, as I think they must be, fully extinguished it.

Evidently by the appellants' advances to George K. McLeod, later on or in some other way, which had no relation to the agreement so far as this phase of it is concerned, they became his creditors for other large sums remaining unpaid, besides those secured by defendant's indorsement.

It seems as if they had felt entitled to treat all their claims as if on the same footing.

The second clause of the agreement seems as clear as the English language can make it that this was not so.

It reads:

> 2. For the better securing to Messrs. Robinson, Fleming & Co. the *repayment of the said advance of* £6,000 *and said past due debt* of £1,580 16s, George K. McLeod agrees to give, etc., etc.

Then the above and other securities are specified. Whatever may have transpired between appellants and George K. McLeod after these securities were thus

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specifically hypothecated for the purposes of the debts now in question herein, there could not be anything done by them to the detriment of the surety, now respondent herein.

The only possible question that could have arisen up to the spring of 1895, as to appropriation of payments received from these securities, on account of the principal, would be as between the first and second notes.

The facts here present no such difficulty for the creditors did not seek to prefer in the way of appropriation the second note to the first, so far as the evidence before us shews.

Nor do I think it ever was open, as against the surety, for the creditors here under this agreement, to appropriate in any other way than according to the order of time of same having fallen due.

The case of *Kinnaird* v. *Webster*(1), presents an application of the principles to be observed in such cases, so far as I have proceeded.

The result of adhering to the terms of the agreement in question, and the observance of the principles applicable, render the result to my mind clear. Had the progress of events been somewhat different, one can easily see some interesting questions regarding a surety's right in regard to appropriation of payments, as likely to have arisen.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I concur in the opinion of Mr. Justice Davies.

(1) 10 Ch. D. 139.

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Duff J.

DUFF J. (dissenting).—I concur in the opinion of Mr. Justice Idington.

Appeal allowed with costs.

Solicitor for the appellant: *C. J. Coster.*

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

WILLIAM H. LOGAN (DEFENDANT) ... APPELLANT

AND

FRANK LEE (PLAINTIFF) ..... RESPONDENT.

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*Oct. 3, 4.
*Oct. 3, 17.

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

Evidence—Provincial laws in Canada—Judicial notice—Conflict of laws—Negligence—Common employment—Construction of statute—3 Edw. VII. c. 11, s. 2, s.-s. 3 (N.B.)— "Longshoreman" —"Workman."

As an appellate tribunal for the Dominion of Canada, the Supreme Court of Canada requires no evidence of the laws in force in any of the provinces or territories of Canada. It is bound to take judicial notice of the statutory or other laws prevailing in every province or territory in Canada, even where they may not have been proved in the courts below, or although the opinion of the judges of the Supreme Court of Canada may differ from the evidence adduced upon those points in the courts below. *Cooper* v. *Cooper* (13 App. Cas. 88) followed(*a*).

The plaintiff, a longshoreman, was engaged by the defendant, in Montreal, to act as foreman on his contracts as a stevedore at the port of St. John, N.B. While in the performance of his work, the plaintiff went into the hold to re-arrange a part of the cargo in a vessel, in the port of St. John, and, in assisting the labourers, stood under an open hatchway where he was injured by a heavy weight falling upon him on account of the negligence of the winchman in passing it across the upper deck. The winchman had attempted to remove the article which fell, without any order from his foreman, the plaintiff, and with improperly adjusted tackle. In an action for damages instituted in the Superior Court, at Montreal,

Held, that the plaintiff was entitled to recover either under the law of the Province of Quebec or under the provisions of the New Brunswick Act, 3 Edw. VII. ch. 11, as he came within the class

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

(*a*) NOTE: Cf. R.S.C. (1906) ch. 145, sec. 17.

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of persons therein mentioned to whom the law of the latter province relating to the doctrine of common employment does not apply.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment of the Superior Court, District of Montreal, (Charbonneau J. dissenting), whereby the plaintiff's action was maintained with costs.

The action was instituted in the Superior Court, at Montreal, for recovery of damages for injuries sustained by the plaintiff while in the discharge of the duties of his employment as a foreman or "walking boss" on the steamship "Evangeline," in the port of St. John, in the Province of New Brunswick, under an engagement by the defendant, a contracting stevedore, alleged to have been made at Montreal.

One of the grounds of defence in respect of which an issue was raised on the appeal was that, if the damages claimed had resulted from negligence by one of the plaintiff's fellow-servants, in the service of the defendant at the time of the accident, the law applicable to the obligations and rights of the parties was the law of the place where the *délit* or *quasi-délit* occurred, viz., the law of the Province of New Brunswick, by which the defendant would be relieved from liability towards the plaintiff under the doctrine known as that of common employment. In order to prove the law of New Brunswick, the evidence of legal counsel of that province was received at the trial.

Atwater K.C., for the appellant, during the argument proceeded to discuss the question upon the evidence thus adduced. He was interrupted by the court and the following decision was delivered by

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THE CHIEF JUSTICE.—I think it proper that I should here announce, after having consulted with my brother judges, that this court, constituted as an appellate tribunal for the whole Dominion of Canada, requires no evidence as to what laws may be in force in any of the provinces or territories of Canada. This court is bound to follow the rule laid down by the House of Lords in the case of *Cooper* v. *Cooper*(1), in 1888, and to take judicial notice of the statutory or other laws prevailing in every province and territory in Canada, *suo motû*, even in cases where such statutes or laws may not have been proved in evidence in the courts below, and although it might happen that the views as to what the law might be, as entertained by the members of this court, might be in absolute contradiction of any evidence upon those points adduced in the courts below.

The argument then proceeded upon the other issues in question on the appeal.

At the trial in the Superior Court at Montreal, Mr. Justice Curran found that the plaintiff, a longshoreman, had entered into a contract with the defendant, a stevedore, at the City of Montreal, to act as chief foreman in the loading and unloading of vessels at the ports of Montreal and St. John, N.B.; that he sustained the injuries complained of on account of the negligence of a fellow workman in unloading a heavy barrel which fell upon him through an open hatchway while he was assisting the ship-labourers in re-arranging part of the cargo in the hold; that he

(13 App. Cas. 88.)

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was not guilty of negligence which contributed to the accident and that the defendant was responsible in damages.

The principal grounds of defence, urged upon the appeal, were that the plaintiff had been guilty of contributory negligence and, consequently that he could not recover under the law, as proved, of the Province of New Brunswick, where the doctrine of common employment prevailed; that the plaintiff was not a person engaged as a "workman" within the meaning of the third sub-section of section 2 of "The Workmen's Compensation for Injuries Act" (3 Edw. VII. ch. 11), of the Province of New Brunswick, where the injury had been sustained, and that, under the law of the Province of Quebec, if applicable, there should be mitigation of damages on account of the contributory negligence of the plaintiff.

The effect of the judgment appealed from was to affirm the judgment entered in favour of the plaintiff.

Atwater K.C. and *Duff* for the appellant.

Lafleur K.C. and *H. U. Paget Aylmer* for the respondent.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. The two courts below find that the accident complained of was caused by the negligent act of a workman in the service of the appellant during the regular course of his employment and, on this finding of fact with which we see no ground for interfering, the appellant would be liable in damages both under the law of New Brunswick and that of Quebec.

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GIROUARD J.—It is not necessary for the determination of this appeal to decide the question of interprovincial law. Whether the responsibility of the appellant is to be decided by the Quebec law or by the law of New Brunswick, the action of the respondent lies, in Quebec under the common law and in New Brunswick under the Workingmen's Compensation Act. This Act, differently worded from the English Act, applies in express terms to "longshoremen," and we have no difficulty in deciding that Lee belonged to that class of workingmen.

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

DAVIES J.—I concur for the reasons stated by His Lordship the Chief Justice.

IDINGTON J.—Whether the law of Quebec or the law of New Brunswick is to prevail in this case the result is the same. I cannot find any evidence of contributory negligence that would, in the one case, deprive the respondent of his right to claim anything, or, in the other reduce the amount of damages he might be entitled to.

On the evidence he is clearly entitled to recover.

His injuries are admitted and the appellant admits that they were the result of the negligence of the appellant's man in charge of a winch, in handling therewith the barrel that fell upon the respondent and produced the injuries in question.

The only hope of escape for appellant from liability seemed to rest in his establishing, first, that the law of New Brunswick should prevail, and next, that "The Workmen's Compensation for Injuries Act" of

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that province did not cover the respondent's case because he was not engaged in manual labour.

I incline to think that the law of New Brunswick should prevail on the facts here. And I have no difficulty in holding that the Act in question clearly covers the respondent as a longshoreman specifically designated in section 2, sub-section 3, of the Act, as one of the class of men who are to be entitled to the benefit of the Act. The test of manual labour is quite beside the question, as I view it.

I concur in the judgment of the Chief Justice during the argument that we must act on the doctrine laid down in *Cooper* v. *Cooper*(1), and acted upon by the House of Lords therein, in our dealing with the conflicts of law that may arise between, or rather the differences of law that may arise for consideration in the different provinces. This is the common forum of all and, though the provincial courts may, of necessity, hear evidence of the laws of another province, we must place our own construction upon that law (which may be foreign law in the provincial court), whenever the case comes here for consideration.

The appeal should be dismissed with costs.

MACLENNAN J.—I agree in the opinion stated by Mr. Justice Girouard.

DUFF J.—It is unnecessary to consider whether the law of Quebec or the law of New Brunswick furnishes the rule of decision in this case; if the former, it is not disputed that the plaintiff is entitled to succeed; if the latter, the statute relied upon clearly, I

(1) 13 App. Cas. 88.

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LOGAN v. LEE.

Duff J.

think, applies and confers upon him a right to relief. I do not enter upon an examination of the views of the learned gentlemen who gave evidence in the court below as to the state of the law of New Brunswick. Upon that question we are bound, I think, to apply the rule acted upon by the House of Lords in *Cooper* v. *Cooper*(1) and to give effect to our own views.

Appeal dismissed with costs.

Solicitors for the appellant: *Heneker & Duff.*

Solicitors for the respondent: *McLennan, Howard & Aylmer.*

(1) 13 App. Cas. 88.

1907

*Oct. 9.
*Oct. 17.

EDGAR MILL McDOUGALL AND OTHERS (OPPOSANTS) ..... } APPELLANTS;

AND

LA BANQUE D'HOCHELAGA (CONTESTANT) ..... } RESPONDENT.

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

Liquidation of insolvent corporation—Distribution and collocation—Privileged claim—Expenses for preservation of estate—Fire insurance premiums—Practice—Ex parte inscription—Notice—Arts. 371, 373, 419, 1043-1046, 1201, 1994, 1996, 2001, 2009 *C.C.*

M. acquired the factory and plant of an insolvent company which had been sold under execution by the sheriff and, pending litigation during the winding-up of the company, operated and maintained the factory as a going concern. The sheriff's sale was set aside and M. then abandoned the property to the curator of the estate, and filed a claim, as a privileged creditor, for necessary and useful expenses incurred by him in preserving the property for the general benefit of the mass of the creditors, including therein charges for moneys paid as premiums on policies of fire insurance effected in his own name during the time he had held possession.

Held, that, in the absence of evidence to shew that such insurances had been so effected otherwise than for his own exclusive interest, he could not be collocated by special privilege, on the distribution of the proceeds of the estate, for the amount of the premiums.

When the appeal first came on for hearing upon inscription *ex parte*, on suggestion by one of the creditors, not made a party to the appeal, the court ordered the postponement of the hearing in order that all interested parties might be notified.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, whereby the judgment of Mr. Justice Lemieux in the Superior Court, Dis-

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

trict of St. Francis, dismissing the contestation of the respondent without costs, was affirmed, Charbonneau J. dissenting.

The appellants are the representatives of John McDougall who, in 1883, through a series of conveyances, acquired certain lands and the factory, with its running plant and appurtenances, of the insolvent Pioneer Beet-root Sugar Company under a sheriff's sale at the instance of creditors at the time that the company was placed in liquidation. John McDougall thereupon went into possession and continued to operate the factory for his own benefit, and maintained the plant in order. He disposed of certain unnecessary or worn out material and, for a number of years, carried insurances against fire thereon, the policies of insurance being made payable to him personally. A number of suits were pending at the time of the purchase of the factory by him and other suits were instituted and numerous appeals asserted, some of which were prosecuted to final decisions in the Privy Council. After considerable litigation, the sheriff's sale, under which McDougall claimed title, was finally set aside and he abandoned the property to the curator of the estate of the company in liquidation. The property which had thus been preserved by him was sold for the benefit of the creditors generally, and McDougall filed a privileged claim, on the moneys realized, under the provisions of the Civil Code, for necessary and useful expenses alleged to have been incurred by him in the preservation of the property for the creditors generally. This claim was composed of items paid for school and municipal taxes, the expense of guarding the property and keeping it in repair, and also the sum of $10,765.03 paid for the insurance premiums, the whole amounting to $33,373.31.

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McDOUGALL v. LA BANQUE D'HOCHELAGA.

The effect of the judgment appealed from was that the present appellants, as representatives of John McDougall, were ordered to be collocated by privilege out of the proceeds of the estate of the company for $22,610.28 from which were deducted sums received on sales of portions of the machinery and plant sold by McDougall, leaving a balance of $5,343.16 as the amount to be collocated to the appellants on their opposition, and their claim for the moneys paid out as premiums for the insurances was disallowed. On an appeal by the present appellants this decision was affirmed by the judgment now appealed from.

The appeal to the Supreme Court of Canada was inscribed *ex parte,* no factum having been filed by the contestant, La Banque d'Hochelaga, and first came on for hearing on the 15th May, 1907. On the case being called, *Mr. Atwater K.C.,* on behalf of the Eastern Townships Bank (not a party, but a creditor of the insolvent company) by permission of the court suggested that, as the interests of the mass of the company's creditors would be involved in the result of this appeal, on the hearing *ex parte* there should be some protection afforded in respect to the unrepresented creditors who might be entitled to share in the distribution of the assets. *Mr. Brosseau K.C.,* for the appellants, explained that the Banque d'Hochelaga alone had prosecuted the contestation of the opposition to the report of distribution in the courts below and, although notified of the present appeal, had not filed a factum or appeared at the hearing.

The court ordered that the hearing of the appeal should be postponed until the October session and that, in the meantime, the appellants should have an opportunity of serving proper notices of the present appeal upon all interested parties.

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On 9th October, 1907, the appeal again came on for hearing *ex parte* after all interested persons had been duly notified.

Brosseau K.C., for the appellants. The insurances were both necessary and useful expenses, and the premiums were paid under the obligations resulting from the care required of a prudent administrator. The appellants should be collocated by special privilege for the amounts thus expended. Had the insurance been paid and turned in to the estate, there could not be any question as to a privileged charge. The position is not altered by the fact that the insurances ceased when McDougall ceased to pay the premiums, nor by the fact that it is not the proceeds of the insurance policies on a fire loss which are now being distributed, but merely the proceeds of a sheriff's sale held at a time when the insurance policies had ceased to be in force. We refer to Marcadé, on art. 1375 C.N.; Massé & Vergé (Zachariæ), vol. 4, p. 5, *n.* 3; Dalloz, Rép. "Obligations," No. 5395; Demolombe, vol. 31, No. 378; Colmet-Santerre, vol. 5, No. 362 (*bis*); Arts. 1994 (1) 1996 and 2001, 2009 (1) C.C.

The judgments of the Superior Court and of the Court of Review should be reversed and the appellants should be restored to the position, both as to rank and amount, given them by the prothonotary in the report of distribution.

The judgment of the court was delivered by

GIROUARD J.—This appeal, which was heard *ex parte*, after due notice being given to all parties interested, should be dismissed with costs.

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Girouard J.

In the first place, there is no legal proof of the insurance having been effected by the late Mr. McDougall, as the policies are not produced, which is the best evidence that could be adduced. The trial judge so found and I quite agree with him. Even if such proof was in the record, can it be contended seriously that at any time the creditors could claim the indemnity either from McDougall or the insurance company? The trial judge was of the opinion that they could not and I think he was right.

If McDougall was not the legal proprietor of the immovable in question, as all the courts ultimately decided, he was admittedly a creditor having an insurable interest, and that alone would be sufficient to prevent the creditors from recovering the amounts of the policies under article 1201 of the Civil Code.

McDougall was so clearly the sole and legal holder of the policies, in his own exclusive interest, that immediately after the setting aside of the judicial sale by the courts in favour of the creditors, the latter could not claim the above policies or the indemnity they covered. Such is also the well settled jurisprudence in France. Sirey, Recueil, 1890, 2, 173, especially note 1.

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

Appeal dismissed with costs.

Solicitors for the appellants: *Brosseau & Holt.*

J. CLEOPHAS LAMOTHE (DEFENDANT) ..... } APPELLANT;

AND

THE NORTH AMERICAN LIFE ASSURANCE COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

1907
*Oct. 7, 8.

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

Life insurance—Wagering policy—Misrepresentation—Questions for jury—Arts. 424, 427, C.P.Q.—Charge to jury.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment entered by Doherty J., in the Superior Court, District of Montreal, on the verdict of the jury, at the trial, maintaining the respondents' action for the cancellation of a policy of life insurance and dismissing the appellant's action to recover the amount of the policy.

The actions were consolidated for trial in the Superior Court and were tried together by His Lordship Mr. Justice Doherty with a jury. The assignments of facts to be submitted to the jury were settled, before the trial, by His Lordship Mr. Justice Taschereau, upon suggestions made by both parties, in conformity with articles 424 and 425 of the Code of Civil Procedure, but were subsequently amended, during the trial, by order of the trial judge, the appellant taking objection to such amendment.

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

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LAMOTHE v. NORTH AMERICAN LIFE ASSURANCE CO.

Upon answers by the jury to the questions submitted judgments were entered in favour of the company in both actions and these judgments were affirmed by the judgment now appealed from. The present appellant appealed to the court below for a judgment in his favour, *non obstante veredicto,* or for a new trial, on grounds of misdirection by the trial judge, verdict being against the weight of evidence and the admission of illegal evidence as well as the irregularity complained of in the amendment of the assignment of facts, and these grounds were again urged on the present appeal. It was argued, on behalf of the appellant, that the trial judge had erred in his charge to the jury on questions as to the wagering character of the policy and as to certain representations made by the assured being materially incorrect and wilful misstatements. The appellant asked for judgments in his favour in both cases or for a new trial.

T. Chase-Casgrain K.C., Aimé Geoffrion K.C. and *Henry J. Elliott,* appeared for the appellant.

Brosseau K.C. and *Holt K.C.* for the respondents.

After hearing the arguments for the appellant by Messrs. *Casgrain* and *Geoffrion,* and without calling upon the respondents' counsel for any argument the appeal was dismissed with costs.

The judgment of the court was delivered by

THE CHIEF JUSTICE (oral).—This appeal is dismissed with costs, and the application for a new trial is refused, on the ground that there was no misdirec-

tion by the judge which occasioned substantial prejudice to the appellant; and, in view of the whole evidence, the jury could, in our opinion, reasonably find the verdict complained of.

Appeal dismissed with costs.

Solicitor for the appellant: *J. C. Lamothe.*

Solicitors for the respondents: *Brosseau & Holt.*

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*Oct. 2, 3.
*Oct. 17.

MONTREAL LIGHT, HEAT AND POWER COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

MARIE LOUISE LAURENCE (PLAINTIFF) ..... } RESPONDENT.

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

Negligence — Electric lighting — Dangerous currents — Trespass — Breach of contract—Surreptitious installations—Liability for damages.

P. obtained electric lighting service for his dwelling only, and signed a contract with the company whereby he agreed to use the supply for that purpose only, to make no new connections without permission and to provide and maintain the house-wiring and appliances "in efficient condition, with proper protective devices, the whole according to Fire Underwriters' requirements." He surreptitiously connected wires with the house-wiring and carried the current into an adjacent building for the purpose of lighting other premises by means of a portable electric lamp. On one occasion, while attempting to use this portable lamp, he sustained an electric shock which caused his death. In an action by his widow to recover damages from the company for negligently allowing dangerous currents of electricity to escape from a defective transformer through which the current was passed into the dwelling:

Held, reversing the judgment appealed from, that there was no duty owing by the company towards deceased in respect of the installation so made by him without their knowledge and in breach of his contract and that, as the accident occurred through contact with the wiring which he had so connected without their permission, the company could not be held liable in damages.

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

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APPEAL from the judgment of the Court of King's Bench, appeal side, whereby the judgment of the Superior Court, District of Montreal, entered by Doherty J., upon the verdict of the jury at the trial, was affirmed and the plaintiff's action maintained with costs.

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

Archer K.C. and *G. H. Montgomery* for the appellants.

Henry J. Elliott and *H. R. Bisaillon* for the respondent.

THE CHIEF JUSTICE.—This appeal must be allowed with costs. I agree in the opinion stated by His Lordship Mr. Justice Girouard.

GIROUARD J.—It seems to me there was an entire misconception of the legal relations existing between the electric company, appellants, and the late Joseph Jean Paquette. The jury and the two courts below found that the company was alone responsible for the accident. Mr. Justice Trenholme, dissenting, saw in the circumstances of the case one of contributory negligence or *faute commune.*

As I understand the evidence, the electric company owed no duty to this man Paquette. It was under no special obligation whatever to him with regard to the wire which caused his death. The company undertook to safely supply him with electric light in his

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residence, being No. 1580 Saint Lawrence Street, but never undertook to do the same thing for the store, No. 1584, next to it, where the accident took place, by touching one of the wires which he had himself surreptitiously placed, by illegally connecting it with the wires in his residence, without notice to the company or their knowledge. In fact, Paquette was a trespasser, to use a mild expression.

In the written contract which he signed, it is expressly stipulated that the electric system put in his residence

> shall be used by the consumer only, upon the said premises only, and for the purposes hereinafter specified only,

and that,

> no new connection shall be made by which the current could be used, except with the written consent of the company.

He finally agreed to

> provide all lines on the premises or connecting same with the point of delivery, and maintain the same in efficient condition, with proper protective devices, the whole according to Fire Underwriters' requirements.

The wires which he put in the back-store and oil-room in the back of his store, No. 1584, and connected with the wires in his residence, No. 1580, it is conceded by the respondent, were not up to the Fire Underwriters' requirements. Had they been, it is probable that the accident could not have happened, as it did not in No. 1580 and fifteen other premises supplied by the same defective transformer.

For these reasons, I would allow the appeal and dismiss the respondent's action with costs.

DAVIES J.—I concur for the reasons stated by His Lordship Mr. Justice Girouard.

IDINGTON J.—The appellants applied electric current for lighting purposes to people in Montreal, where the respondent's husband lived. He asked for a supply. He signed a written application therefor which contained an express undertaking that he would provide

> all lines on the premises or connecting same with the point of delivery and maintain same in efficient condition with proper protective devices, the whole according to Fire Underwriters' requirements.

The application was made for a supply to be delivered to a dwelling house in Montreal known as No. 1580, Saint Lawrence Street.

The installation of the wire and other appliances in the house conformed to the requirements of the condition just quoted. They were inspected and approved of by the company's officers in the usual way before any current was applied. Upon such approval, the current was supplied through these wires, so approved of, to the house. Shortly afterwards, the deceased made, by means of a wire, the connection between these approved wires and a portable lamp he desired to use in the back premises of his shop which adjoined the dwelling and bore another street number. This connection was made without notice to the company or knowledge of the company and did not conform to the condition or provision I have quoted and was used for lighting the shed in rear of the shop. The current thus supplied for the additional portable lamp passed through the meter and, of course, was

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Idington J.

paid for, monthly, along with that which supplied the dwelling house, as if part thereof.

The appellants' transformer became defective. One result of that, coupled as the jury find with the want of a ground-wire, caused a current of a higher tension than the contract provides for entering into the dwelling house. No injury came to any one using the house switches or lamps therein. But the current passed by means of the unauthorized wire connected with the portable lamp to the hand of him who was alone responsible for it being there. As a result the current killed him. The Superior Court of Quebec awarded damages to his widow for the death thus caused of her husband. The Court of King's Bench of the Province of Quebec upheld this judgment and hence this appeal. The jury find that it was by virtue of this contract that contained the provision I have quoted above that anything was done by the appellants.

They find further, however, that the deceased, when he signed the contract containing this provision, did not understand it.

I am quite unable to understand on what principle a claim for damages thus resulting can rest. The only duty the appellants owed the deceased arose from the contract containing this provision that the deceased violated. If he did not understand that contract and any imprudence could be attached to any such misunderstanding the result would be that there was no contract to create any duty.

A duty would arise in the absence of a special contract binding a company supplying electricity to take proper means to do it safely. They could not, however, be bound beyond what they understood they

were doing, the extent of the contract they were executing.

Counsel for the respondent, when the difficulties I have suggested were pointed out to them, sought to avoid the consequences by suggesting that there was a possibility of discarding the part of the contract that the deceased himself misunderstood or misapprehended and that there still remained a common understanding which would be possible to constitute as a contract. No such case was presented to the jury. No such case was made by the pleadings. No such case appears in evidence and, consequently, no such contract has been found as would entitle the respondent to hold the appellants liable under.

The relation of the deceased to the results of what is alleged to have been negligence on the part of the appellants was something entirely of his own creation. He chose to conduct to himself, without any authority from the appellants, the results of what is called their negligence.

I think the appeal should be allowed with costs.

Whether the trial was so conducted as to involve expenses of issues of fact not necessary to be raised in the view we take and issues of fact that are found against the appellants, was not discussed. If there are any such, the appellants should not get costs thereof as against the respondent.

MACLENNAN and DUFF JJ. concurred in the opinion stated by Girouard J.

Appeal allowed with costs.

Solicitors for the appellants: *Montgomery & Lacoste.*
Solicitors for the respondent: *Bisaillon & Brossard.*

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*Oct. 11.
*Oct. 17.

JOSEPH PAQUET (DEFENDANT).....APPELLANT;

AND

JUSTE DUFOUR (PLAINTIFF).....RESPONDENT.

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

Negligence—Dangerous operations—Defective system—Findings of fact—Common fault.

The Supreme Court of Canada affirmed the unanimous judgments of the courts below, whereby it was held that defendant was liable in damages for injuries sustained by the plaintiff through an accident which occurred in consequence of a defective system of blasting rocks with dynamite permitted by his foreman on works where the plaintiff was engaged by him in a dangerous operation. *The Montreal Rolling Mills Co.* v. *Corcoran* (26 Can. S.C.R. 595), and *Tooke* v. *Bergeron* (27 Can. S.C.R. 567) distinguished.

The plaintiff had been guilty of contributory negligence and damages apportioned according to the practice in the Province of Quebec.

APPEAL from the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec, by which the plaintiff's action was maintained with costs.

The plaintiff was a skilled miner employed by the defendant to use dynamite in blasting rock excavations on a contract for the construction of a railway. The place where he was working at the time of the accident being at a distance from the electric battery generally used for igniting the fuses attached to the charges of dynamite to explode them, the system adopted was to ignite these fuses with a red-hot poker

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supplied for that purpose. At the time when the accident occurred, the defendant's foreman permitted the plaintiff to light the fuses by means of torches made of birch bark without protesting against the danger of such a method. When he had lighted one of the fuses, the plaintiff threw the torch away, as he ran off to take shelter and, by this means, another fuse in close proximity became ignited without his knowledge. On his return to set off the charge to which the last fuse was attached, he was injured by a premature explosion.

In an action for damages His Lordship Mr. Justice Langelier found, at the trial, that the accident was the result of common fault; that of the defendant in failing to supply a safe means of carrying on dangerous work and that of the plaintiff by imprudence in negligently using the torch. By the judgment the damages assessed by him were apportioned, the plaintiff being held responsible for a share thereof and the defendant condemned for the amount of the balance, $2,000, with costs. This judgment was affirmed by the judgment appealed from.

L. P. Pelletier K.C. and *Bernier* for the appellant.

Fiset and *Grenier* for the respondent.

THE CHIEF JUSTICE.—In this case the two courts below find that the accident was caused by the negligence of the appellant in respect of the appliances supplied for the purpose of carrying on what was, under the circumstances, a dangerous operation, and I see no sufficient reason to depart from that finding.

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Girouard J.

GIROUARD J.—This case involves questions of fact found by two courts and I think the evidence adduced far from supporting the appellant's view justifies their conclusion.

He contends that the cases of *The Montreal Rolling Mills Co.* v. *Corcoran*(1), and *Tooke* v. *Bergeron* (2), are parallel.

Of course, every case of this kind must be decided according to the proof, whether direct or derived from presumptions. The *Corcoran Case*(1) is certainly not a similar one, for we held, in that case, that the cause of the accident was a mystery and left to mere conjectures.

Likewise it may be said that the *Tooke-Bergeron Case*(2) differs essentially from the present one, as we there held that the negligence of the victim of the accident was the principal and immediate cause of the injury, and that she had acted contrary to the regulations of the establishment.

Here, on the contrary, the work done by the respondent which caused the accident was expressly sanctioned by Tremblay, the foreman of the appellant. True, he denies this, but he is contradicted, not only by the plaintiff, but also by George Gagnon and Adjutor Lavoie. Not only the trial judge but the judges of the court of appeal believed the story of these three men instead of that of Tremblay and we should not interfere with their finding.

Before closing, I wish to point out a *considérant* of the trial judge to which I cannot subscribe:

> Considérant que la dite explosion ayant été causée par de la dynamite dont le défendeur était le propriétaire et dont il avait la

(1) 26 Can. S.C.R. 595. (2) 27 Can. S.C.R. 567.

garde, il doit être tenu responsable des dommages qui en sont résultés pour le demandeur, à moins qu'il n'ait prouvé qu'il lui a été impossible de l'éviter.

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We have so often decided in our court that proof of fault, whether by direct evidence or by presumptions, rests upon the plaintiff, that it is not necessary to quote authorities.

The appeal should be dismissed.

DAVIES J.—I concur in the opinion stated by His Lordship the Chief Justice.

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

DUFF J.—I agree that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Alphonse Bernier.*
Solicitor for the respondent: *L. Philippe Grenier.*

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*Oct. 4.
*Nov. 5.

THE WINDSOR HOTEL COMPANY. (DEFENDANTS) ..... } APPELLANTS;

AND

CHARLES M. ODELL (PLAINTIFF) ... RESPONDENT.

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

Finding of jury—Questions of fact—Duty of appellate court.

Where the question was one of fact, and the jury, on evidence properly submitted to them, accepted the evidence on one side and rejected that adduced upon the other, the Supreme Court of Canada refused to disturb their findings.

APPEAL from the judgment of the Superior Court, sitting in review at Montreal, which affirmed the judgment of His Lordship, Mr. Justice Doherty, entered upon the findings of a special jury at the trial, in favour of the plaintiff, for $11,067, with costs.

The plaintiff was injured in attempting to alight from a passenger elevator in use in the appellants' hotel. He was a guest of the hotel, at the time, and was using the elevator, in the usual manner, to pass from one part of the hotel to another. At the trial, in answer to questions submitted to them, the jury found, among other things, that the accident was not due to any fault of the plaintiff, that it was due to the fault of the defendants, owing to the practice of not closing the door of the elevator before putting it in

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motion, and they assessed the damages at $11,067, for which the judge entered a verdict for the plaintiff with costs.

This judgment was affirmed by the judgment appealed from.

Heneker K.C. and *Maréchal K.C.* for the appellants.

R. C. Smith K.C. and *G. H. Montgomery* for the respondent.

THE CHIEF JUSTICE.—I agree that this appeal should be dismissed with costs. I adopt the reasons given in the court below.

GIROUARD J.—I think this appeal ought to be dismissed with costs.

The question is not whether the verdict is the best one that could have been arrived at, but whether it is one which twelve reasonable men would have rendered.

It is admitted that the appellants were guilty of negligence in moving their elevator before its door was closed. They say, it is true, in answer, that Mr. Odell forced his way out when the elevator boy was in the act of closing the door and moving the elevator down, and there is some evidence to that effect. Mr. Odell swears positively the door was wide open when he attempted to move out. The jury have believed him and I am not prepared to say that their finding is unreasonable.

DAVIES J.—The question before us is not whether the verdict is, in our opinion, a right or just one, under

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Davies J.

the evidence, but simply, whether it is one which a jury could, under all the circumstances, fairly find. While, if acting as a juryman, I might not have agreed with the conclusion reached by the majority of the jury, I am not, sitting here in a court of appeal, able to say that the verdict is one which reasonable men might not fairly, under the evidence, have found.

I agree, therefore, in dismissing the appeal.

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

MACLENNAN J.—I agree to dismiss this appeal with costs.

DUFF J.—The principle which we have to apply here is, for the purposes of this case, aptly put by the language of Lord FitzGerald, delivering the judgment of the Judicial Committee, in *The Commissioner for Railways* v. *Brown*(1) at page 134;—

> Where the question is one of fact and there is evidence on both sides properly submitted to the jury, the verdict of the jury, once found, ought to stand; and the setting aside of such a verdict should be of rare and exceptional occurrence.

There is nothing rare or exceptional about this case; it is the common case of a conflict of evidence which the jury, having the witnesses before them, have resolved by accepting the story of one side and rejecting that of the other.

We could not allow this appeal without disregarding this rule and adopting a principle of decision

(1) 13 App. Cas. 133.

which would open for examination, as *res nova* in a court of appeal, every issue of fact tried and passed upon by a jury.

Appeal dismissed with costs.

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Duff J.

Solicitors for the appellants: *Heneker & Duff.*

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

1907

*Oct. 29.
*Nov. 5.

THE MANITOBA FREE PRESS COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

RACHEL MIRIAM GOMEZ NAGY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Defamation—Printing report of ghost haunting premises—Slander of title—Fair comment—Disparaging property—Special damages—Evidence—Presumption of malice—Right of action.

The reckless publication of a report as to premises being haunted by a ghost raises a presumption of malice sufficient to support an action for damages from depreciation in the value of the property, loss and rent and expenses incurred in consequence of such publication. *Barrett* v. *The Associated Newspapers* (23 Times L.R. 666), distinguished.

The judgment appealed from (16 Man. R. 619) was affirmed, the Chief Justice dissenting.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), reversing the judgment of Macdonald J. at the trial and maintaining the plaintiff's action with costs.

The plaintiff brought the action to recover damages for slander of title, alleging that the defendants recklessly, falsely and maliciously printed and published concerning her property in the City of Winnipeg, in the *"Manitoba Morning Free Press,"* the *"Free Press Evening News Bulletin,"* and the *"Manitoba Weekly Free Press,"* respectively, the words following:—

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

(1) 16 Man. R. 619.

"A NORTH END GHOST."

"There is a ghost in the north end of the city that is causing a lot of trouble to the inhabitants. His chief haunt is in a vacant house on St. John Avenue, near to Main. He appears late at night and performs strange antics, so that timid people give the place a wide berth. A number of men have lately made a stand against ghosts in general, and at night they rendezvous in the basement and close around the haunted house to await his ghostship, but so far he still remains at large."

The house and premises said to be alluded to were untenanted at the time and, after the publication of the article complained of, continued to be untenanted for several months, until the property was sold for a price less than plaintiff had expected from some other purchasers in treaty for the purchase of the property whom she lost through the publication of the report in disparagement of the premises.

The plaintiff claimed damages for depreciation in the value of the property, loss of rent and expenses she was obliged to incur in protecting the premises from being damaged by crowds of persons who, in consequence of the report, nightly congregated about the premises.

At the trial, before Mr. Justice Macdonald, without a jury, there was no evidence adduced to shew actual malice and the action was dismissed with costs, His Lordship holding that the publication complained of was not actionable and that no special damages had been proved to have been suffered by the plaintiff.

By the judgment appealed from, this judgment was reversed, Perdue J. dissenting, and a verdict ordered to be entered for the plaintiff for $1,000 and costs.

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Ewart K.C. and *Hudson* for the appellants. Our grounds of appeal, shortly stated, are (1) that no action could be brought for the slander of real property; (2) the onus was on the plaintiff to establish that the words complained of were false and she failed to establish this; (3) that, if such an action could be brought, malice must be proved, and this was not done; (4) that, in any event, it was necessary to prove special damage arising from the publication in question and from it alone, and that there was no evidence of such special damage; (5) that any damages which could be awarded must be for such loss as might reasonably be apprehended from the publication in question, and that no reasonable person could apprehend any damage from such publication; (6) that the evidence shewed that the plaintiff was not the real owner of the property, and (7) that the court of appeal, in allowing damages, had no jurisdiction to make an order as they did, and that, in any event, the amount of their verdict is a mere guess and cannot be upheld.

We refer to Odgers on Libel and Slander (4 ed.) pages 75 and 102; *Burnett* v. *Tak*(1), and *Pater* v. *Baker*(2), at page 869; Clerk & Lindsell on Torts (last ed.) pages 601, 602; Pollock on Torts (11 ed.) pages 301, 302; *Hasley* v. *Brotherhood*(3), per Jessel M.R. at page 523; and on appeal(4), by Coleridge L.J. at page 388, and Lindley L.J. at page 393; *Ratcliffe* v. *Evans*(5), per Bowen L.J. at page 527; *Alcott* v. *Millar's Karri and Jarrah Forests*(6); and *Barrett* v. *The Associated Newspapers*(7). As to proof of special

(1) 45 L.T. 743.
(2) 3 C.B. 831.
(3) 15 Ch.D. 514.
(4) 19 Ch.D. 386.
(5) [1892] 2 Q.B. 524.
(6) 21 Times L.R. 30.
(7) 23 Times L.R. 666.

damages being necessary, see *Hatchard* v. *Mège* (1); *Evans* v. *Harlow* (2); *White* v. *Mellin* (3); Odgers, Libel and Slander (4 ed.) pages 102, 384 and 560; *Brook* v. *Rawl* (4), per Parke B. at page 524, and *Vicars* v. *Wilcocks* (5), per Ellenborough C.J. at page 3.

The findings of the trial judge on disputed questions of fact should stand, and it is not credible that a probable purchaser, having read the report, should have refused to buy only because it was in the "Free Press," although other newspapers also published it. The plaintiff had the evidence in her own hands, but did not negative a binding contract to sell which might have been enforced. If there was such a contract the defendants should not be held responsible. *Burkett* v. *Griffith* (6); *Brentman* v. *Note* (7).

Mr. Justice Richards and Mr. Justice Phippen admit that there is no evidence enabling them to fix definitely the amount of damages which should be awarded. They merely say that it is evident the plaintiff suffered some damage, that this damage was occasioned in part by the publication in the "Free Press" and they guess the amount to be $1,000. The case of *Williams* v. *Stephenson* (8) is directly in point. There, as here, the evidence was insufficient to enable the trial judge to ascertain the damages, he guessed at the amount and this court allowed the appeal and refused to grant a new trial. There is no evidence of the amount of depreciation in value suffered in consequence of the rumour.

(1) 18 Q.B.D. 771.
(2) 5 Q.B. 624.
(3) [1895] A.C. 154
(4) 4 Ex. 521.
(5) 8 East 1.
(6) 27 Pac. Rep. 527.
(7) 3 N.Y. Supp. 420.
(8) 33 Can. S.C.R. 323.

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It appears that there were mortgages against the property to amounts aggregating nearly its value. The action is for alleged injury to its value and it is submitted that the mortgagees should have been parties to the action, and were in fact the only persons who had a right to sue.

We also rely upon the remarks of Eldon C.J. in *Morris* v. *Langdale*(1), at page 289, and on *Ashley* v. *Harrison*(2).

J. Edward O'Connor for the respondent. The falsity of the report has been proved in evidence, the defendants must have been aware of its falsity at the time, and such reckless publication gives rise to a presumption of malice and a careless disregard of consequences. There cannot be excuse on the ground that they merely intended the article to be humourous. We might cite Æsop's fable of the boys throwing stones at the frogs. We suffered actual damages for their amusement, and they must be held responsible for the consequences of their reckless indifference, their neglect to verify the truth of the rumour before publication, their bad faith and injustifiable, officious and unnecessary meddling in affairs that did not concern them. This is not a case of fair comment on a matter of public interest, but an unwarranted and harmful intrusion into private affairs.

The evidence as to special damages is full and complete. We have an action on the case as designed by the Statute of Westminster (13 Edw. I. ch. 24) to give a remedy where a man suffered a wrong (1 Comyn's Digest, p. 278). It seems to have as wide a scope as articles 1053 and 1054 of the Code Civil of

(1) 2 B. & P. 284. (2) 1 Esp. 47.

Quebec in question in *Cossette* v. *Dun*(1). This action is brought for a false statement made maliciously or negligently or fraudulently of and concerning the real property of the plaintiff and resulting in special damage. See *Green* v. *Button*(2); also remarks by Powys J. in *Ashby* v. *White*(3), at page 248. This objection did not prevail. See also *Chapman* v. *Pickersgill* (4), per Pratt C.J. in answer to the same objection; *Langridge* v. *Levy*(5), at page 522, and on appeal(6); *Pasley* v. *Freeman*(7), at page 63, also in 2 Smith's Leading Cases(8), at page 79, per Ashurst J.; *Allen* v. *Flood*(9), at page 73; *Winsmore* v. *Greenbank*(10), per Willes C.J. at page 581. In all these, and in many other cases which, like this case, were of first impression, this objection had been noticed only to be repelled. And see *Pavesich* v. *New England Life Insurance Co.*(11); *Lynch* v. *Knight*(12); *Smith* v. *Kaye* (13); *Lumley* v. *Gye*(14); *South Wales Miners' Federation* v. *Glamorgan Coal Co.*(15); *Sheppard Publishing Co.* v. *Press Publishing Co.*(16); *Hatchard* v. *Mège*(17); *Alcott* v. *Millar's Karri and Jarrah Forests*(18).

If false and malicious statements as to goods resulting in special damage be actionable, why not false and malicious statements as to land? See *Levet's*

(1) 18 Can. S.C.R. 222.
(2) 2 C.M. & R. 707.
(3) 1 Sm. L.C. (11 ed.) 240 at p. 266.
(4) 2 Wilson 145, at p. 146.
(5) 2 M. & W. 519.
(6) 4 M. & W. 337.
(7) 3 T.R. 51.
(8) 11 ed. 666.
(9) [1898] A.C. 1.
(10) Willes 577.
(11) 69 L.R.A. 101.
(12) 9 H.L. Cas. 577.
(13) 20 Times L.R. 261.
(14) 2 E. & B. 216.
(15) (1903) 2 K.B. 545; (1905) A.C. 239.
(16) 10 Ont. L.R. 243.
(17) 18 Q.B.D. 771.
(18) 21 Times L.R. 30.

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Case(1), quoted by Cave J. in *Allen* v. *Flood*(2), at page 30; *Paull* v. *Halferty*(3); *Bruce* v. *J. M. Smith, Limited*(4); *Barrett* v. *Associated Newspapers*(5); *Bowen* v. *Hall*(6), per Brett L.J. at pages 337 and 338. This action lies as the statement is false, malicious and has occasioned damage. Odger's Libel and Slander (4 ed.) pages 73, 74, 75, 89, 102.

In cases like the present "malicious" need not mean actual malice in the sense of spite or ill-will, but legal malice, or doing, intentionally, the act complained of without just cause or excuse, and also that one is presumed to intend the natural or probable consequences of his own acts. *South Wales Miners' Federation* v. *Glamorgan Coal Co.*(7); Odgers on Libel (4 ed.) pages 319 *et seq.; Wilkinson* v. *Downton* (8); *Ludlow* v. *Batson*(9); *Bromage* v. *Prosser*(10).

The means were at hand for ascertaining the truth, the defendants purposely neglected to avail themselves of it and chose to remain in ignorance when they might have obtained full information. This is evidence of such wilful blindness as amounts to malice. Odgers (4 ed.) pages 323, 331; *Elliott* v. *Garrett*(11); *Gott* v. *Pulsifer*(12); *Green* v. *Miller*(13); *White & Co.* v. *Credit Reform Association*(14); *Plymouth Mutual Co-operative and Industrial Society* v. *Traders' Publishing Association*(15); *Thomas* v. *Bradbury, Agnew & Co.*(16).

(1) 1 Cro. Eliz. 289.
(2) (1898) A.C. 1.
(3) 63 Penn. St. 46.
(4) 1 Ct., Sess. Cas. (5 ser.) 327.
(5) 23 Times L.R. 666.
(6) 6 Q.B.D. 333.
(7) (1905) A.C. 239.
(8) (1897) 2 Q.B. 57.
(9) 5 Ont. L.R. 309.
(10) 4 B. & C. 247.
(11) (1902) 1 K.B. 870.
(12) 122 Mass. 235.
(13) 33 Can. S.C.R. 193.
(14) (1905) 1 K.B. 653.
(15) (1906) 1 K.B. 403.
(16) (1906) 2 K.B. 627.

To constitute actual malice it is not necessary that the defendant should be actuated by any special feeling against plaintiff in particular. He need not even be personally acquainted with him; Odgers (4 ed.) page 322; and it is no excuse for the publication, even of a correct copy of an entry, in the police register or other official document which does not relate to a judicial proceeding, that such register or document is open to the public; *Reiss* v. *Perry*(1); one who makes a statement recklessly, careless whether it be true or false, can have no belief in the truth of what he speaks; per Herschell L.J. in *Derry* v. *Peek*(2).

As to liability on the ground of negligent publication, it is submitted that the defendants owed a duty to the respondent to take at least ordinary care to prevent any article being published in the newspapers owned by it that would or might result in damage to the respondent or her property. Bevan on Negligence (2 ed.) vol. 1, pp. 97, 100; *Vaughan* v. *Menlove* (3). The doer of a negligent act is responsible for the consequences flowing from it, in fact, even though antecedently the consequences that do flow from it seemed neither natural nor probable. Bevan, vol. 1, 97; vol. 2, 1601; *Vaughan v. Taff Vale Railway Co.* (4); *Dulieu* v. *White & Sons*(5).

As to damages. Special damage was proved in the loss of the sale as a result of reading the article in question, and, as an actual injury has followed the slander, it is no answer to shew that the third person would probably have acted in the same way had the

(1) 11 Times L.R. 373.
(2) 14 App. Cas. 337, at pp. 374-375.
(3) 3 Bing. N.C. 468.
(4) 5 H. & N. 679, at p. 688.
(5) [1901] 2 K.B. 669.

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slander not been used; *Knight* v. *Gibbs*(1). It is the same, also, as to the expense of protecting the house and of moving into it for that purpose.

If this action lies for a negligent publication special damage is not necessary to constitute a cause of action.

THE CHIEF JUSTICE dissented from the judgment dismissing the appeal.

DAVIES J.—The only doubt I had at the close of the argument in this case was one on the question of the sufficiency of the proof of the ingredient of malice.

A more careful examination of the authorities and of the evidence has removed that doubt. The wrong complained of was the publication by appellants of an untruth respecting the plaintiff's property calculated to depreciate and which did as a fact depreciate its value.

The plaintiff was bound to prove malice. But malice in this connection is a question of *mala fides* or *bona fides*. If the absence of *bona fides* is shewn or may fairly and reasonably be inferred from the facts proved then I take it that the ingredient of malice is sufficiently proved. It is laid down by Mr. Pollock in his work on Torts, page 301, that in actions of this kind

> the wrong is a malicious one in the only proper sense of the word, that is, the absence of good faith is an essential condition of liability.

(1) 1 Ad. & E. 43.

As put by Lord Coleridge in *Hasley* v. *Brotherhood*(1), at page 388, speaking of the publications which sustain actions

> besides its untruth and besides its injury *express malice must be proved, that is to say, want of bona fides* or the *presence of mala fides.*

The question of honesty or dishonesty in the publication so far from being immaterial may be the determining factor as to whether the action lies. The very essence of the case is the falsity of the publication complained of and the want of good faith in publishing it.

As said by Baron Parke in *Brook* v. *Rawl*(2) :

> To support this action it ought to be shewn that the false statement is made *malâ fide* and that the special damage ensues from it.

See also *Wren* v. *Weild*(3), approved in the case of *Hasley* v. *Brotherhood*(1), above cited.

Given therefore the three ingredients of the publication of a false statement respecting plaintiff's property, the absence of *bona fides* in the publication and special damage following as the result I cannot doubt that an action lies.

In the case at bar I think the evidence only admits of one conclusion and that is that the article complained of was false and was published by defendant recklessly without regard to consequences, and that in this may be found the absence of good faith which imports the malice which is an essential condition of liability.

Actual malice in the sense of a predetermined in-

(1) 19 Ch.D. 386. (2) 4 Ex. 521 at p. 524.
(3) L.R. 4 Q.B. 730.

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tention to injure plaintiff or his property cannot be necessary to be proved. If it was there would be practically no restraint upon false publications by newspapers, causing the most serious damages to the property of others. The reckless publication by a defendant of an untruth respecting the complainant's property the natural result of which is to produce and where it does produce actual damage is sufficient evidence of the absence of *bona fides* and of the malice required by law.

Some remarks made by the Master of the Rolls in the late case of *Barrett* v. *The Associated Newspapers* (1), at page 667, were relied upon by the appellants as shewing that actual malice must be proved in actions such as this. I do not think, however, the language of the learned Master of the Rolls justifies the inference sought to be drawn from it. The judgment there proceeded upon the ground of the absense of proof of any special damage; and the Master of the Rolls who delivered the judgment of the court said that

> it was not necessary to consider the more difficult question of malice,

but that his impression was the appellant was right on that point also. In the case before him that may well have been so. There the newspaper sought to be held liable only purported to publish a statement of what a tenant, who had abandoned his occupancy, made as to his reasons for doing so, which were the hearing and seeing of certain noises, appearances and movements in the house leading to the conclusion it was haunted by ghosts. It did not appear that anything

(1) 23 Times L.R. 666.

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was added to the tenant's statement of what he and his family supposed or believed they had seen and heard. It might well be that under the peculiar facts of that case the court if compelled to determine the point might have declined to imply the absence of good faith. They might well be unable there to find the reckless publication of an untruth which in the case at bar we have no difficulty in finding.

The appeal should be dismissed with costs.

IDINGTON J.—The Court of Appeal for Manitoba, on appeal from the trial judge who had dismissed this action, determined that a publication appearing in the respective morning and evening and weekly editions of the appellants' newspaper, was defamatory of the respondent's property named therein and adjudged appellants should pay $1,000 for damages.

The publication was as follows:

A NORTH END GHOST.

There is a ghost in the north end of the city that is causing a lot of trouble to the inhabitants. His chief haunt is in a vacant house on St. John Avenue, near to Main (meaning thereby the property of the plaintiff so described as aforesaid). He appears late at night and performs strange antics, so that timid people give the place a wide berth. A number of men have lately made a stand against ghosts in general, and at night they rendevous in the basement and close around the haunted house (meaning thereby the said property of the plaintiff so described as aforesaid) to await his ghostship, but so far he still remains at large.

I think it proven beyond doubt that an actual sale of the property had been so far negotiated that but for this publication it would have been sold.

I think it was further proven that within the principle upon which the decision in the case of *Ratcliffe*

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v. *Evans* (1) proceeds, the property in question had become less saleable than it had been and thus depreciated in value.

I do not think a person owning property, and suffering from such depreciation as results from disparaging publications such as this, bound to sell the property in order to fix the damages. They can be established by general evidence of the character put before the court here.

The falsity of the publication is proven so far as that can be shewn in any such case. The witnesses who were present on the nights between the first and last publication give enough of evidence to satisfy the requirements of the law on that phase of the case.

Was there such malice as the law requires to be shewn to found such an action? There was not shewn that malice that would be implied in satisfying the demands of a vindictive or wicked spirit solely bent on the specific work of destroying the value of the plaintiff's property. There is abundant evidence of almost every kind of malice short of that.

An entry in a book kept in a Winnipeg police station for the guidance of the police is made the basis of the publication.

Its entry was manifestly designed to suggest that the officers on duty should dissuade people from assembling at the property in question.

To pervert its purpose and contrary thereto promote the assembling of crowds at the place in question was evidently what was likely to flow from its publication.

No man possessed of right feelings towards his

(1) (1892) 2 K.B. 524, at p. 527.

neighbours should have entertained for a moment any thought of its publication.

Yet the appellants' servants and managers for whom it is responsible, regardless of those decent feelings that should have restrained them, dressed up the original entry in such a way as to distort the statements it contained, by making them positive instead of being colourless as they stood, and by expanding, and adding to them so as to render the publication more attractive, more sensational, and more damaging,—and then published it.

I am, with every respect for those who see otherwise, unable to think that such a case needs under our law more than a bare statement of fact.

In the recklessness and indifference these facts display, I find furnished abundant evidence of malice and hence a legal remedy for such a palpable wrong.

I think the appeal should be dismissed with costs.

MACLENNAN J. agreed that the appeal should be dismissed with costs.

DUFF J.—I concur in the opinion of Mr. Justice Davies.

Appeal dismissed with costs.

Solicitors for the appellants: *Hudson, Howell, Ormond & Marlatt.*

Solicitors for the respondent: *Morice & O'Connor.*

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*Oct. 18, 21.
*Nov. 5.

SAMUEL NEWSWANDER (PLAINTIFF) ..... } APPELLANT;

AND

HENRY GIEGERICH (DEFENDANT) ... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Champerty—Maintenance—Malicious motive—Cause of action—Costs of unsuccessful defence—Damages.

A defendant against whom a lawsuit has been successfully prosecuted cannot recover the costs incurred for his defence as damages for the unlawful maintenance of the suit by a third party who has not thereby been guilty of maliciously prosecuting unnecessary litigation. *Bradlaugh* v. *Newdegate* (11 Q.B.D. 1) distinguished; *Giegerich* v. *Fleutot* (35 Can. S.C.R. 327) referred to. Judgment appealed from (12 B.C. Rep. 272) affirmed.

APPEAL from the judgment of the Supreme Court of British Columbia(1) reversing the judgment of His Lordship Mr. Justice Duff, at the trial(2) and dismissing the plaintiff's action with costs.

The plaintiff, appellant, was the defendant in the case of *Briggs* v. *Newswander*(3), in which, by the judgment of the Supreme Court of Canada, on an appeal from the Supreme Court of British Columbia, the plaintiff's action was maintained with costs in all the courts. Subsequently the appellant, Newswander,

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

(1) 12 B.C. Rep. 272. (2) 12 B.C. Rep., at p. 274.
(3) 32 Can. S.C.R. 405.

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brought an action against the respondent, Giegerich, to recover from him the cost of his unsuccessful defence, as damages, on the ground that the respondent had unlawfully, for champertous considerations, maintained and assisted Briggs in the prosecution of the above mentioned suit.

At the trial of the appellant's action questions were submitted to the jury and, upon the answers given, the trial judge ordered that judgment should be entered in favour of the appellant for the amount so claimed, with costs. This judgment was reversed on an appeal to the Supreme Court of British Columbia by the judgment from which the present appeal is asserted.

The material circumstances of the case and questions at issue on this appeal sufficiently appear from the judgments now reported.

Davis K.C. for the appellant.

Lewis (*Smellie* with him) for the respondent.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. I concur in the opinion stated by His Lordship Mr. Justice Davies.

GIROUARD J. agreed that the appeal should be dismissed with costs.

DAVIES J.—This is an appeal from a judgment of the Supreme Court of British Columbia dismissing an action of maintenance brought by appellant against respondent for having assisted one Briggs, a

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poor and improvident man, in bringing and maintaining an action against him (appellant) for the recovery of a fourth interest in a mining claim. Briggs's action was ultimately successful, this court having held him entitled to the one-fourth interest and awarded him the costs in all the courts(1).

The present respondent after the successful termination of the proceedings in Briggs's suit against Newswander, attempted to enforce an agreement he had made with Briggs for an interest in the fruits of the litigation but, the claim being resisted, it was properly held that such an agreement was champertous and that the courts would not lend their aid to enforce it. That case came also by way of appeal to this court *sub nom. Giegerich* v. *Fleutot*(2), and, in delivering the judgment, Mr. Justice Killam said that

> Newswander had a right of action against Giegerich for maintenance. The transaction was wrongful towards him.

Afterwards Newswander brought his action and claimed as damages all the costs he had been made liable for between party and party of the suit he had wrongfully and unsuccessfully defended and also those between solicitor and client in the same suit.

The jury found in answer to questions put to them that respondent did supply funds to enable Briggs to carry on his action against Newswander and also his appeal to this court; that Briggs agreed to give him a share in the property recovered, and that Giegerich supplied funds to Briggs in accordance with the agreement. In answer to the further question,

> Was Briggs *induced* to carry on the action by his agreement with Giegerich and the assistance supplied by him?

(1) 32 Can. S.C.R. 405. (2) 35 Can. S.C.R. 327.

the jury ignored the question of inducement and answered:

Briggs was enabled to bring action through the financial assistance of Giegerich.

They further answered that Giegerich *did not enter into the litigation for the purpose of stirring up strife and litigation;* and that he did not solicit Briggs to enter into any agreement to commence or carry on the action and appeals; and that Briggs would not have sued Newswander or prosecuted the appeals but for the agreement and assistance referred to *unless he was able to obtain financial assistance from other sources.*

The last answer as I construe it simply means that Briggs was too poor a man financially to have been able successfully to maintain his legal rights against Newswander in the courts unless Giegerich or some other rich person had aided him.

The result of the other answers to my mind is to negative malice or officious interference or desire to stir up strife or litigation.

The question arises right on the threshold of the argument whether under such findings of fact an unsuccessful litigant who has improperly withheld property, moneys or rights of any kind from a person entitled to them, but who was unable without extrinsic assistance to vindicate his legal rights in the courts can if the necessary financial assistance is rendered to enable a suit to be prosecuted with effect after judgment in the highest court of the land compelling him to do what the law said was his duty and obligation to have done without suit, turn round and recover from the person assisting the successful liti-

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gant as damages not only the costs of the suit which the courts have ordered him to pay because of his own wrong but also all other costs he may have incurred in connection with the litigation.

It does seem to me that there can be only one answer to such a question, and that a negative one.

Much reliance was placed upon the general statement of Killam J. before referred to, but apart from the statement being obiter only it will be observed that nothing was said about the damages recoverable and the whole assumed that which I think has been negatived by the findings of the jury in the case before us now. The only question argued in that appeal was whether the agreement was a champertous one and the court held that it was. Nothing was ever suggested on the argument as to the right of the present appellant who was not a party to that appeal, to recover back from Giegerich the costs he had been condemned to pay as a consequence of the wrongful withholding by him of Briggs's interest in the mining claims, and the judgment was not intended to determine the point.

The law on the subject is formulated in Pollock on Torts (6 ed.) pages 321-2, and Addison on Torts (8 ed.) page 30, as follows:

Mr. Pollock says, page 321:

> The wrong of maintenance or aiding a party in litigation without either interest in the suit or lawful cause of kindred affection or charity for aiding him *is likewise akin to malicious prosecutions* and other abuses of legal process * * * . Actions for maintenance are in modern times rare though possible, and the decision of the Court of Appeal that mere charity with or without reasonable ground is an excuse for maintaining the suit of a stranger does not tend to encourage them.

And Addison states the law to be that:

If one person from motives which the law does not approve induces and assists another, who is to his knowledge insolvent and unable to pay costs, to prosecute an action without reasonable or probable cause against a third person, that person, if he gets an award of costs *in his favour* and cannot recover them from the insolvent plaintiff in the action, may recover them against the promoter in an action of maintenance * * * . But the notice must be *malicious* or the action does not lie. A man may maintain a suit of his near kinsman, servant or poor neighbour out of charity and compassion, *with impunity*, and a common interest in the matter of the suit *negatives malice.*

But neither text book or decision can be found supporting the proposition contended for by appellant that without malice, and without any desire to stir up strife or litigation, or officiously to interfere in the business of others, a man who assists another to recover his legal rights and is successful in doing so can be punished by being compelled to pay back as damages to the unsuccessful litigant the very costs the courts compelled him to pay for the wrongful withholding of his neighbour's rights.

That costs of defending a suit which has been *improperly* maintained may be recovered in an action of maintenance is true; *Alabaster* v. *Harness*(1); but that the costs of such a suit as has been *properly* maintained can be so recovered is without authority.

So far back as the year 1843, Lord Abinger C.B., in the case of *Findon* v. *Parker*(2), at page 682, in delivering judgment said:

The law of maintenance, as I understand it upon the modern constructions, is *confined to cases* where a man *improperly and for the purpose of stirring up litigation and strife* encourages others to bring actions or to make defences which they have no right to make.

(1) [1895] 1 Q.B. 339. (2) 11 M. & W. 675.

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In 1860 the Judicial Committee of the Privy Council in delivering judgment in the case of *Fischer* v. *Kamala Naicher*(1), said, at page 187, with reference to the qualities attributed to champerty or maintenance by the English law:

> it must be something against good policy and justice, *something tending to promote unnecessary litigation*, something that in a legal sense is immoral and to the constitution of which a bad motive in the same sense is necessary.

In the later case of *The Metropolitan Bank* v. *Pooley*(2), Lord Chancellor Selborne says, at page 218:

> I apprehend it to be clear that the civil action for maintenance would not lie except against a person who was guilty of the criminal act.

Surely in the "criminal act," the *mens rea* must be found before the accused is adjudged guilty. In the face of the facts of this case and the findings of the jury is it conceivable that the appellant could be found guilty of the criminal Act? I think not.

It may well be that so far as the agreement in the case at bar to share in the fruits of the litigation, if successful, was concerned, that was against *good policy,* and our courts so held and refused to enforce it. But where was the "something tending to promote *unnecessary* litigation" and as I understand the judgment of the Privy Council, the something that in a legal sense was immoral, and to the constitution of which a bad motive was necessary.

There can be but one answer. The litigation complained of was held by this court to have been *just,*

(1) 8 Moo. Ind. App. 170. (2) 10 App. Cas. 210.

proper and necessary, and the jury's answers in the present case which I have before quoted remove any doubt as to the existence of malice or the desire to stir up litigation or strife on the part of the respondent.

The only authority outside the dictum of Killam J. before referred to relied upon by the appellant was the judgment of Lord Coleridge sitting as trial judge in *Bradlaugh* v. *Newdegate*(1). That judgment is not when examined a controlling authority in support of this appeal. It is the judgment of a single judge only. Before that judgment was delivered the House of Lords had on appeal dismissed with costs the several actions brought in the name of Clarke and maintained by Newdegate, and the judgment of Lord Coleridge awarding as damages to Bradlaugh practically the costs of the suits for penalties he had been improperly compelled to defend as well between party and party as between solicitor and client may be defensible on the ground that the House of Lords having finally disposed of the maintained suits and dismissed them, the action before Lord Coleridge could be disposed of and the damages awarded as if such final disposition had been made before the suit began against Newdegate instead of before judgment was delivered. The judge seems to have taken judicial notice of the House of Lords judgment and acted upon it. Inasmuch as he explicitly says on page 12 in referring to the judgment of Abinger C.B., in *Findon* v. *Parker*(2), that:

> It is full of the strong sense characteristic of Lord Abinger, and I venture to adopt the language of Lord Blackburn in *Hubley* v. *Hubley*(3) and say that I incline to agree with and to adopt every word of it.

(1) 11 Q.B.D. 1. (2) 11 M. & W. 675.
(3) L.R. 8 Q.B. 112.

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And with reference to the judgment of the Privy Council which I have quoted that

> he, at least, was not prepared to say that he should hold the conduct or the *motives of Mr. Newdegate as proved before him* to be such as within the words of that judgment taken even in the sense contended for to relieve him from the character of a maintainer,

it seems to me his judgment must be based on the conclusion at least that the maintainor's motives in bringing the action were bad within the meaning of the phrase as used in the judgment of the Privy Council, even if it was not upon the conclusion that the litigation complained of had been finally disposed of adversely to the maintainor.

The case is entirely different from the present and the above quotation shews that Lord Coleridge was not prepared to dissent from the statements of the Judicial Committee as to the essential elements of maintenance while he explicitly stood by every word of Lord Abinger's judgment on the point. Clarke was a mere puppet put forward by Newdegate to bring the action for statutory penalties and indemnified by him for doing so. The latter's motives were bad within the meaning of the rule.

It would indeed at the present day be a startling proposition to put forward that every one was guilty of the crime of maintenance who assisted another in bringing or maintaining an action, irrespective of the results or merits of such action and whether the courts sustained it or not. Many grasping, rich men and soulless corporations would greedily welcome such a determination of the law, because it would enable them successfully to ignore and refuse the claims of every poor man who had not sufficient means

himself to prosecute his case in the courts, conscious that if any third person except from charity gave the necessary financial assistance to have justice enforced, as soon as it was enforced the denier of justice could turn round and compel the good Samaritan to pay him all the costs he had incurred in attempting to defeat justice.

Such a condition of things is repugnant to our common sense and the courts have from time to time found it necessary to engraft exceptions upon the law of maintenance making such things and relations as kindred affection or charity, with or without reasonable ground, a lawful excuse for maintaining an action and confining the law to cases where a man *improperly* and for the purpose of stirring up litigation and strife encourages others to bring actions or to make defences which they had no right to bring or make.

Under these circumstances I have no hesitation in dismissing the appeal with costs, basing my judgment upon both grounds, the absence of essential ingredients necessary to maintain the action, and the absence of any evidence of damage necessarily sustained by plaintiff as a result of the maintenance found.

IDINGTON J.—The appellant sued in the Supreme Court of British Columbia to recover damages alleged to have been suffered by him by reason of the respondent having (wrongfully moved by champertous considerations) maintained an action brought by one Briggs against him, the appellant. Briggs succeeded in his action and the appellant was adjudged to pay costs.

Assuming the offences of champerty and mainten-

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ance rightly charged against the respondent, I am unable to see how he can be held liable in a form of action in which damages, in law, must, as an essential element for success, be shewn to have been wrongfully suffered by him who brings the action.

The damages he complains of flowed, not from the wrongful act of the respondent but from what must be assumed to have been the righteous judgment of this court.

We cannot assume, even if that would help the appellant, that, if the respondent had not intermeddled, the man Briggs would have failed to get that justice with costs. Nor does the answer of the jury to a question bearing on this point help much.

I think the appeal must be dismissed with costs.

MACLENNAN J. agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Davis, Marshall & Macneill.*

Solicitors for the respondent: *Taylor & O'Shea.*

THE ROYAL PAPER MILLS COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

MARION L. CAMERON (PLAINTIFF) .. RESPONDENT.

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*Oct. 1, 2.
*Nov. 5.

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

Negligence—Employer and employee—Dangerous machinery—Want of proper protection—Voluntary exposure—Findings of jury—Charge of judge—Assignment of facts—Practice—Assessment of damages.

An experienced master mechanic, who was familiar with the machinery in his charge and had instructions to take the necessary precautions for the protection of dangerous places, in attempting to perform some necessary work, lost his balance and fell upon an unprotected gearing which crushed him to death. In an action by his widow for damages, questions were submitted to the jury without objection by the parties and no objection was raised to the judge's charge, at the trial. The jury were not asked to specify the particular negligence which caused the injury and, by their answers, found that deceased was acting under the instruction and guidance of the company's officers, who were his superiors at the time of the accident; that he had control of the work to be done but had not full charge, control and management of the machinery generally; that there was fault on the part of the company, and that he had not unnecessarily or negligently asumed any risk.

Held, affirming the judgment appealed from, Davies J. dissenting, that as there was evidence from which the jury could reasonably draw inferences and come to these conclusions, as to the facts, and, as no objection was made to the questions put to them and to the charge of the judge, at the trial, their findings ought not to be interfered with on appeal.

APPEAL from the judgment of the Superior Court, sitting in review, at the City of Montreal (Taschereau J. dissenting), by which the judgment in favour of

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

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the plaintiff entered by Hutchinson J., on the findings of the jury, at the trial, was affirmed with costs.

The plaintiff brought the action, in her own name and as tutrix to her two minor children, to recover damages from the company, appellants, in consequence of the death of her husband which was alleged to have been caused by their negligent omission to protect dangerous machinery in their paper mill, at East Angus, Que.

The material circumstances of the case are stated and the questions at issue on this appeal are discussed in the judgments now reported.

J. E. Martin K.C. and *Fraser K.C.* (*Howard* with them) for the appellants.

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

THE CHIEF JUSTICE.—The deceased Cameron, husband of the respondent, was employed by the appellants in their mill at East Angus, Que., as master mechanic continuously for over fifteen years previous to the happenings complained of.

On the 10th of January, 1905, Cameron was ordered, owing to a shortage of water, to disconnect one of the water-wheels and remove it from the wheel-pit, a work of some danger when carried out while the mill was in operation. This work had been done by Cameron many times during his long period of service and he had the choice of his assistants, etc., and was perfectly familiar with all the risks which he assumed. It was apparently his invariable practice to do some preliminary work such as to prepare ropes, blocks and other tackle required to lift the wheel

before shutting down the mill and thus save time. On the occasion in question he followed his usual custom, and after the preliminary work was almost completed, Cameron, in attempting to reach a rope being let down from the ceiling by one of his assistants, lost his balance, fell over on the shaft and thence was thrown on the rapidly revolving crown-gear and crushed to death.

The negligence complained of is that the crown-gear was improperly left uncovered and it is charged that if the defendants had done their duty in this respect the accident would not have happened. On the other hand the appellants allege that the deceased was an experienced, highly paid mechanic, who had complete control of all the machinery in the mill; that it was his duty to take such precautions as in his judgment might have been necessary to protect the machinery at this place; that he was familiar with the work in the doing of which he had the choice of his assistants; that it was within his power to stop the mill at any time, and that he negligently and unnecessarily assumed a risk which resulted in the accident.

The issues of fact were found by a jury on questions which were not objected to or complained of so far as the record shews, and no objection appears to have been made to the summing up, and in answer to these questions the jury found:

1st. That the deceased was acting under the instructions and guidance of officers of the company who were superior to him at the time of the accident;

2ndly. That while he had control as to the manner in which the work was to be done he had not full charge, control and management of the gearings, shafts and machinery generally;

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3rdly. That the death was due to the fault and negligence of the company (appellants) and that Cameron had not unnecessarily or negligently assumed any risk.

The jury should, in my opinion, in such a case as this have been asked specifically what the negligence of the plaintiffs was which caused the injury. But this was not apparently suggested by either party. On the facts as proved the jury came to the conclusion that negligence ought to be inferred and that all reasonable precautions had not been taken; *Metropolitan Railway Co.* v. *Jackson*(1); *Mader* v. *Halifax Electric Tramway Co.*(2); and I am not prepared to say that the verdict is one which the jury viewing the whole of the evidence could not reasonably find. There was some evidence to justify it. In my opinion the law applicable is well expressed in Dal. Jur. Gén. 1884, 2, 89:

> Ainsi, il a été admis jusqu'à ce jour que le patron n'est pas responsable de l'accident survenu à son ouvrier quand celui-ci, *laissé maître de ses déterminations*, a entrepris, imprudemment et sans y être obligé, un travail dangereux, dans des conditions ou avec des moyens qui n'offrent pas de suffisantes garanties pour sa sécurité, ou lorsque le travail présentant des risques inévitables que l'ouvrier a dû prévoir, celui-ci vient à être blessé dans l'exécution par suite d'un cas fortuit ou de sa propre négligence. Les risques qu'il court en ces divers cas ne peuvent être couverts que par un contrat d'assurance; la responsabilité du patron ne saurait alors être invoquée, parce qu'il n'a commis aucune faute. (V. Jur. Gén., vo. "Ouvriers," nos. 93 et suiv.; 103 et suiv.; Aubry et Rau, Droit civil français, 4 édit. t. 4, par. 446, p. 755; Req. 15 nov., 1881, D.P. 83, 1. 159; Req. 13 févr., 1882, D.P. 82, 1. 419).

In view of the finding of the jury that there was no negligence on the part of Cameron, and that the gearings and shafts at the place where the accident occur-

(1) 3 App. Cas. 193. (2) 37 Can. S.C.R. 94.

red were negligently left unguarded and in a dangerous condition by the company, we must conclude that possibly the employers did not do all their duty towards the deceased.

Dal. Jur. Gén. 1870, 3, 63. Under this *arrêt* there is the following note:

> Toutefois, cette règle ne doit pas être poussée à l'extrême; et dans l'arrêt précité, la cour de Metz ajoute avec raison: "A la vérité, la responsabilité du chef de l'usine est toujours engagée pour le cas où l'accident aurait été causé par sa faute, c'est-à-dire, s'il était prouvé qu'au danger inséparable de l'œuvre il eut ajouté une autre cause de danger résultant de son propre fait." Il faut aller plus loin, croyons-nous, et *imposer au patron, avec le présent jugement, l'obligation de recourir, pour atténuer ce danger, à toutes les précautions conseillées par la pratique et par la science.* A cet égard, le patron ne doit pas s'en rapporter à l'usage, ni attendre que ces précautions soient déclarées obligatoires par des règlements. C'est ce qu'ont décidé un arrêt de la cour de Paris du 12 mai, 1866, et un jugement du tribunal de Mulhouse du 18 janv., 1867, reproduits l'un et l'autre Jur. gén., *v.* "Ouvriers," no. 96.

Some reference was made to insurance received by respondent. I would adopt the rule laid down in *Grand Trunk Railway Co.* v. *Jennings*(1), at page 803.

There is authority for the opinion expressed by Mr. Justice Mathieu in the Court of Review, that the amount of the insurance should not have been deducted from the amount of the damages. *Grand Trunk Railway Co.* v. *Beckett*(2); Laurent, vol. 20, No. 580. But that question is not before us in this appeal.

GIROUARD J. agreed that the appeal should be dismissed with costs.

(1) 13 App. Cas. 800.

(2) 16 Can. S.C.R. 713.

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DAVIES J. (dissenting).—If the decision of this case rested solely upon the question as to whether or not the deceased, who was the master mechanic of the appellants' paper mills, was the "author of his own wrong," and whether his death was occasioned by his own fault, negligence and unnecessary assumption of risk, in reaching out as he did to catch the rope depending from the floor above, I should have felt great diffidence in dissenting from the view which prevailed with the majority of the court, supported as it is by the finding of the jury and the judgment of the majority of the court below.

In the view I take of the case, however, it is not necessary for me to argue the point at length because I am of the opinion that the deceased came to his death by his own fault and negligence in failing to carry out the explicit instructions given to him by the general manager of the defendants' mills. These instructions were given to Cameron by the general manager at a time when the former was the master mechanic of the paper mill in which he afterwards met his death. They were given to him after an accident had happened to one of the workmen employed in one of the appellants' mills adjoining that of which Cameron was the master mechanic. They were given to him personally by the general manager of the company's mills in the presence of the company's secretary and were to the effect

> that he was to go over all the machinery in the mill and make everything safe.

The instructions are sworn to specifically by the general manager and by the secretary. They stand uncontradicted and the only possible doubt which

could be raised regarding them was suggested by Mr. Lafleur as arising out of a single answer, said to be of doubtful meaning, given by the general manager to a question put to him in cross-examination. I think the answer referred to, when read in connection with the witness's other answers, means that while the witness could not swear to every identical word he used in giving the instructions, he did instruct him clearly and definitely to go over the machinery and see that everything was made safe. But Mr. Palmer's evidence, the general secretary, unattacked and uncontradicted, makes everything relating to those instructions plain and clear. The attention of the jury does not seem to have been specifically directed, as it ought to have been, to this point, nor was any question asked them concerning it.

I think the case comes within the principle of the decision of this court in the case of *Davidson* v. *Stuart* (1), where it was held, as I think properly, that there was no breach of duty on the part of defendant towards deceased, who had undertaken to remedy the very defects which caused his death and the failure to discover them or provide against them must be attributed to him.

At the worst there should be a new trial in order that this crucial point might be submitted to and passed upon by the jury.

I would, therefore, allow the appeal.

IDINGTON J.—The appellants have been condemned by the Superior Court in Quebec to pay damages caused by their neglect to safeguard their machinery

(1) 34 Can. S.C.R. 215.

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whereby the husband of the plaintiff, now respondent, met his death, whilst in the employment of the appellants as a master mechanic.

The Court of Review confirmed this judgment, and hence this appeal.

The case was tried with a jury and all their findings of fact are against the appellants.

It is not, I think, seriously contended at this stage, that the machinery was properly safeguarded as required by "The Quebec Factories Act"(1) which contains the following general provision:

> 3021. The industrial establishments mentioned in the preceding article must be built and kept in such manner as to secure the safety of all employed in them; and, in those which contain mechanical apparatus, the machinery, mechanism, gearing, tools and engines shall be so placed and kept as to afford every possible security for the employees.

As has been pointed out by my brother Girouard, in more than one case, section 3053(*a*) of the same Act which is as follows:

> 3053(*a*). The provisions of the civil laws of this province, concerning the responsibility of the employer towards his employees, are in no manner considered as being modified or changed by the provisions of this Act,

may reduce this section 3021 to being part of a police regulation.

Nevertheless, this section 3021 may yet, as Mr. Lafleur argued, be an embodiment of the law which bound appellants in their relations with the deceased in the absence of an express contracting out of the law.

Without deciding that or going quite as far as the

(1) As amended by 57 Vict. ch. 30, sec. 1.

last words of section 3021, that is "to afford every possible security for the employees" and keeping well within what I gather from the decisions in Quebec to be the jurisprudence of that province on the subject, I think it was fairly open to the jury to find as they have done, in this case, that leaving the machinery in question without being safeguarded, either by hand-rail or by covering, as suggested by some of the witnesses, was a fault within the meaning of the article 1053 of the Civil Code.

It seems to me impossible to hold that the law in Quebec in this regard, as laid down in many cases, was complied with by the appellants. It seems equally impossible to me, to hold, in this case, that if the safeguarding required—I do not say by the statute just cited, but within the comprehensive language of the Code—had been observed, that the accident in question could have happened.

It is said, however, that the deceased, by virtue of his employment as a master mechanic, had cast upon him the duty of providing that safeguarding required.

It seems to me that this contention is quite unfounded. There is not implied in the words "master mechanic" any such duty. Nor is there in the evidence of those witnesses attempting to define his duties or to give a history of his conduct in such employment anything to permit us to infer that such duty was cast upon him.

The design of the proprietors in the whole planning and construction of their mills evidently was to have the machinery in question exposed.

When the deceased was employed as master mechanic, it was to run and superintend the running of the machinery thus intentionally designed, and not to

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re-construct, as was evidently needed—at least in part—or to add to the structural arrangements he thus found completed.

It cannot be said that the word "repairs," even if he had much wider authority in that behalf than I think he had, could be extended to cover such additional expense in a mill that was new when he came to it to discharge the duties assigned him.

It is said, however, that at one time, just after an accident, six or seven years before the one now in question, the deceased was told to see that all steps needed to safeguard the machinery should be taken.

The evidence of this is, to my mind, most unsatisfactory.

Was anything done in pursuance of such direction? It would seem not. Was any explanation ever asked, any report ever requested, any further regard had to it, by him who is alleged to have given such loose sort of directions as sworn to? It seems not. Surely, he could not have imagined his mill was perfect, and if he did not, he, in default of hearing anything or seeing anything done, would surely have reverted again to the subject. And yet, he never breathes another word, so far as I can see, on the subject, and cannot tell us what language he used so that we may judge the true import of it.

The new manager in charge, when the accident now in question occurred, had gone through the form of re-engaging each employee, including deceased, and I think it may well be that this new engagement put an end in law to all that had preceded it.

The jury, however, have, I think, rightly found against the contention and thus put an end to it as far as we are concerned, unless we meddle in a way this

court has repeatedly refused to do as in the case of *The George Matthews Co.* v. *Bouchard*(1), and go far beyond what it did in the case of *Dominion Cartridge Co.* v. *McArthur*(2), when its interference with a jury's verdict was set aside by the Privy Council.

Mere knowledge by the employed of the conditions, unless coupled with something more, will not of itself relieve the employer.

The appellants claim, however, that because the deceased was engaged at the time of the accident in that which was, as the jury have found, wholly entrusted to him, he must be held to have assumed the risk or at all events, contributed to his own destruction in such a way as to deprive his widow of any right in law to complain.

The order was given him to disconnect a waterwheel.

There seems a confusion of ideas in the argument at this stage. The appellants' counsel allege he should have stopped the mill. No one pretends he was going to execute this order without stopping the mill. No one pretends in giving evidence, whatever counsel may argue, that he would have acted properly in stopping the mill whilst he was engaged in the mere preliminary work of getting things ready to execute this order. It would have been most improper for him to have stopped the mill at any time during these preparations up to the moment before the accident, when as he expressed it,

> we won't attempt to do any more before the wheel is stopped, before the wheel is closed.

Even if he should have stopped the mill whilst so engaged, the preparatory work was successfully ac-

(1) 28 Can. S.C.R. 580. (2) 31 Can. S.C.R. 392; [1905] A.C. 72.

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complished and no evil results flowed therefrom or from anything authorized by the deceased to be done in that regard.

One of the men, on a floor above deceased, for some reason, I cannot quite clearly understand, just at this juncture, let a rope drop down and it seemed in danger of going into the machinery. The man was not told by the deceased to do this and he, evidently fearing some one blundered, reached out to grasp the rope and save ill results. In his effort, he tried to do what a taller man could have done successfully, but proved beyond him and for want of a hand rail or cover protecting the place, he stepped to destruction.

The impulsive act was natural and in line of his duty which was, amongst other things, to avert injury to the machinery or those about it. It was not a wise thing to do. He erred in judgment. Was he negligent in doing it? Fidelity to his employers was the basis of his act. I am not surprised that the jury have concluded he was not negligent. I will not disturb their finding and help to impose upon men similarly situated a legal duty to sacrifice others and take care of themselves, without an effort to save.

Some question was raised as to the form of the question put to the jury, as to whether the death of the late John E. Cameron was due to the fault and negligence of the company defendant.

It was alleged that the question was a mixed one of law and of fact and improper for the jury to be called on to answer.

It is not a model to be followed, but as there was only one kind of negligence imputed to the defendants by the plaintiffs, and it is to be presumed, in the absence of any objection to the learned trial judge's

charge, that, as to the element of law involved in the question, he properly directed the jury and they, thus guided, dealt with the facts only.

Moreover, no objection so far as can be seen, was taken by the defendants at the proper time to the form of question.

It would never do to have in such a state of things trials and verdicts set aside on such a ground alone.

We must remember that for centuries juries had, when confined to a general verdict properly directed as to the law, to deal with the law and the facts in much more complex cases and issues than the very simple one here.

At the trial everybody seems to have been satisfied with the charge, the verdict, and the judgment, and no one objected to the charge or objects now, nor did they to the verdict, until they appealed.

I think the appeal should be dismissed with costs.

MACLENNAN J. agreed to dismiss the appeal with costs.

DUFF J.—I agree that, as regards the form in which the issues of fact were submitted to the jury, no question is before us. The sole point, consequently, is whether the appellant company has successfully impugned the verdict as against the weight of evidence. On this point I agree with the reasoning of the learned Chief Justice and have nothing to add to it.

Appeal dismissed with costs.

Solicitors for the appellants: *Hurd, Fraser, Macdonald & Rugg.*

Solicitors for the respondent: *Cate, Wells & White.*

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*Oct. 16-18.
*Nov. 20.

CHARLES W. McMEEKIN (PLAINTIFF) AND LEOPOLD J. BOSCOWITZ (DEFENDANT) ..... APPELLANTS;

AND

IRA FURRY, ADMINISTRATOR OF THE ESTATE OF OLIVER FURRY, DECEASED, AND THOMAS T. TURNER, JOSEPH BOSCOWITZ, D. A. BOSCOWITZ AND F. M. LEONARD (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Location of mineral claims—Construction of contract—Fictitious signature—Unauthorized use of a firm name—Transfer by bare trustee—Statute of Frauds—R.S.B.C. (1897), *c.* 135, *ss.* 50, 130.

Where B., acting as principal and for himself only, signed a document containing the following provision: "We hereby agree to give F. one-half (½) non-assessable interest in the following claims" (describing three located mineral claims), in the name of "J. B. & Sons," without authority from the locatees of two of the claims which had been staked in the names of other persons, and without their knowledge or consent.

Held, affirming the judgment appealed from (13 B.C. Rep. 20) that, although no such firm existed and notwithstanding that two of the claims had been located in the names of the other persons, who, while disclaiming any interest therein, had afterwards transferred them to B., the latter was personally bound by the agreement in respect to all three claims and F. was entitled to the half interest therein.

A subsequent agreement for the reduction of the interest of F. from one-half to one-fifth, which had been drawn up in writing, but was not signed by F., was held void under the Statute of Frauds.

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

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MCMEEKIN v. FURRY.

APPEAL from the judgment of the Supreme Court of British Columbia(1) which allowed, with costs, an appeal from the judgment of Hunter C.J., at the trial(2), and ordered that the said judgment should be varied.

The action was brought by the appellant, McMeekin, against the other parties to this appeal, for a declaration of the interests of all parties to certain mineral claims, known as the "Empress," the "Victoria," the "Queen" and the "Barbara Fraction," and for the partition and sale of the same. It was tried before His Lordship Chief Justice Hunter, who rendered a judgment declaring that the defendant, appellant, Leopold J. Boscowitz, was the owner of the said claims and that the other parties were interested only in the net proceeds thereof, to wit, the plaintiff to 17½%, the defendant Furry (administrator of the estate of Oliver Furry, deceased), to 20%, the defendant Thomas T. Turner, to 12½%, the defendant D. A. Boscowitz to 20%, and the defendant F. M. Leonard, to 17½%, respectively.

From this judgment the defendant Furry appealed to the full court where his appeal was allowed with costs by the majority of that court, Martin J. dissenting, and it was declared that the defendant Furry, as administrator of the deceased Oliver Furry, was entitled to a one-half interest in the "Empress," "Victoria," and "Queen" mineral claims. From this judgment the present appeal is asserted by the plaintiff and the defendant Leopold J. Boscowitz.

The questions in issue on this appeal are stated in the judgment of His Lordship Mr. Justice Idington, now reported.

(1) 13 B.C. Rep. 20. (2) 13 B.C. Rep. 21.

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The Chief Justice.

Davis K.C. for the appellants.

Jos. Martin K.C. for the respondents.

THE CHIEF JUSTICE agreed that the appeal should be dismissed with costs.

GIROUARD J. also agreed that the appeal should be dismissed with costs.

DAVIES J.—I agree that the appeal should be dismissed with costs for the reasons stated by His Lordship Mr. Justice Idington.

IDINGTON J.—The late Oliver Furry located three several mining claims under the "Mineral Act," as follows: one called "The Queen" in the name of Joseph Boscowitz, the father of Leopold J. Boscowitz and D. A. Boscowitz and two others called "The Empress" and "The Victoria" respectively in each of the names of these two sons. This was done by Furry and without the knowledge of any of these parties. And the claims were recorded on the 30th of September, 1898.

He could not have them entered by law in his own name and they could have entered only one in each of their names as he did.

These locations were made at the instance of Turner, a fur trader, who was in the employment of the elder Boscowitz and paid for recording and surveying them but the labour of locating was done by Furry.

He had performed similar service for Turner previously on the basis of a fifty per cent. non-assessable

interest being his own by way of compensation for his labour, skill and knowledge, and the remainder being Turner's, as his share for advancing the moneys for these fees and promotion of sale or development.

I infer that when Furry at Turner's request made these locations in question herein he did so on the understanding that he would be given the same terms by the locatees named or whoever should assume their ownership or accept the fruits of his labour.

No one did so except Leopold Boscowitz.

Neither the father nor David would for themselves have anything to do with them. Leopold makes it quite clear that they did not accept and that he alone intended to accept for all these results of Turner's effort for their welfare and adopt Furry's labours in accordance therewith.

It would manifestly be a gross wrong to deprive Furry's heirs or representatives of what was at one time so clearly intended to have been his.

The substance of the transaction is that Leopold having deliberately accepted and adopted the three locations as his own dealt with Oliver Furry on that basis, and intending to bind himself in such form as would best carry out this purpose and secure to Furry the fifty per cent. he was entitled to as the reward of his labour, first signed, to carry out this purpose, and gave on the 10th November, 1898, the following:—

VANCOUVER, B.C., November 10th, 1898.

We, J. Boscowitz & Sons, do give to Oliver Furry one-half (½) non-assessable interest in any or all claims which he has or may locate for us.

J. Boscowitz & Sons.

and on the 20th May, 1899, gave the following:—

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We hereby agree to give to Oliver Furry one-half (½) non-assessable interest in the following claims on Howe Sound, known as "Queen," "Empress," and "Victoria."

J. Boscowitz & Sons.

The first document was never recorded and save to throw light on the intention of the parties in the second, which was recorded, is now of no avail.

The first question raised is that this recorded document is not in compliance with the Statute of Frauds.

The agreement between the parties, apart from this document, was that the benefit of these locations should, to the extent of a half interest therein, belong to Oliver Furry whose money and labour had secured them.

The father was a fur trader and though wealthy never took part in such a business as mining or speculation in mining.

Leopold had done so. David, I infer, had not, and at all events expressly says in his evidence as follows:—

Q. And subsequently you conveyed them to Leopold? A. Yes.

Q. *And all the time the claims were his, from the start?* A. *Yes.*

Q. You never had any interest in them, and so far as you know, your father had not? A. *He gave him* 20%.

Q. I am speaking of up to the declaration of trust was made. That is the time you claim? A. Yes.

Q. July 11th, 1900.

It was necessary that some one should represent all these interests and become bound to Furry and Leopold was willing to stand good for them all and so adopted this crude method. Ignorant of it when location effected he says he ratified it when he came to know of it.

Is his undertaking in this form good?

He admits that he adopted this firm name and was

in fact the "J. Boscowitz & Sons" who signed intending to be bound for the purposes of this transaction. And this is reiterated time and again in the following evidence:—

Q. Where was it you signed the papers? A. For what?

Q. This paper, "A." A. He came to me—Turner—and said, "You sign this paper for Furry, and you get these claims."

Q. It is not signed by you? A. Certainly, that is my writing.

* * * * * *

Q. And all the arrangements between Furry and Turner, which were afterwards adopted by you, were with regard to you alone? A. Only me.

Q. And although Turner worked for your father, any mining deals he had with regard to either the "Britannia," or the "Empress" were entirely with you? A. Absolutely all mine.

Q. So when you signed J. Boscowitz & Sons to these documents, "A" and "B" you intended it for your own signature? A. Yes; Furry wanted it that way.

Q. You intended that for your own signature? A. Yes; they would not go in.

* * * * * *

Q. About having signed "A" (J. Boscowitz & Sons) at the instance of Furry? A. I don't say that I am wrong.

Q. I mean, so far as Furry himself was concerned, it may have been at Turner's instance. A. No, he came to me and said, "That is what Furry wants." As I told you before, Turner did all this.

Q. Furry could not have told you that? A. Turner told me.

Q. In Vancouver, before you went up there. And Turner understood, of course, you were binding yourself, only, by that? A. That is right.

* * * * * *

Q. But the difficulty, Mr. Boscowitz, is in knowing what impression to accept? A. I am very sorry, my lord, but Turner can explain that to you very much better than I.

Q. (Mr. Martin). Here is question 72;

That signature "J. Boscowitz & Sons" was your signature, and was intended to be you only? A. That is all. My father never had an interest.

* * * * * *

Q. How was it that you came to execute the second document, exhibit "B" of May 20th, '99? A. I don't know, except that he wanted it that way. Furry wanted it that way.

Q. Why? A. To shew his partnership with me.

Q. To shew that he was in partnership with you? A. Yes.

Q. The original document shewed that, didn't it? A. That was practically the original, wasn't it?

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Q. Exhibit "A" executed on the 10th of November?

Court. Shew him the document.

Mr. Martin. Exhibit "A." That shewed you were in partnership, that each was to have half? A. Yes.

Q. Then it could not have been for that reason that he wanted "B" executed? I mean by "B" the document of the 20th of May, '99? A. You see those names do not appear there. I suppose he wanted those three names.

* * * * * *

Q. Under the original arrangement between Furry and you, shewn in these two documents, signed "J. Boscowitz & Sons," he was not to go to any expense at all? A. No.

Q. No. The expenses in the way of surveying the ground, granting commissions to brokers, and everything of that kind, were to be paid by you. A. All fell on me.

Q. And he was to get one-half. So, naturally, when it came to making a survey you were—you employed McGregor? A. I did.

* * * * * *

Q. He found those three claims? A. Yes.

Q. And the bargain between you was he would give you a half interest if you would pay all the costs of the survey? A. Of the three claims.

Q. That was part of the consideration on which you got the claims. A. Yes; I had to keep them up; I didn't have to keep them up, I could let them run out, if I wanted to, and could have had them re-staked.

Q. You think that would have been honest? A. No; that would not have been a square deal.

* * * * * *

Q. Signed "J. Boscowitz & Sons." My learned friend made this statement to you, although in the form of a question, but you intended that "J. Boscowitz & Sons," merely for your own signature, and you said yes. Will you explain what you meant when you told him you intended that, that is, J. Boscowitz & Sons, merely for your own signature? A. Because I was the only one that was doing the business, they hadn't any interest in mining, and they didn't want any.

Q. What did you mean by the signature? A. As my own signature.

* * * * * *

Mr. Martin (to witness). The "J. Boscowitz & Sons" which is at the foot of these documents, "A" and "B," you know those documents, one of the 10th of November, '98, and the other of the 20th of May, '99. Whose signature did you intend that for? A. I intended it for my own.

Mr. Davis. What did you mean by that? A. Because he wanted the name of J. Boscowitz & Sons. I said, "There you are; I will sign it."

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Q. That is not your signature? A. No, that is not mine.

Q. What did you mean by saying you intended it as your signature? A. Because he wanted it that way.

Q. When you say "sign" you mean "write"? A. Yes, he wanted it that way, and I wrote it that way."

Assuming a firm name, though in fact it represents only one man, is much too common a device in use for business purposes to say that a man cannot be bound by any such name he chooses to adopt.

Usually the man doing so carries on for a longer or shorter period as the case may be his business in that way. But is length of time in the use thereof the measure of its efficacy in binding him who uses such a business name?

Yet we are asked to discard the manifest purpose of the parties and hold that this adopted name cannot in any way bind him who used it, and cannot bind him at all events as to two of the parcels of property that were in the minds of the parties from the inception as, and formed, part of the basis of their bargain. And why? They evidently both intended the bargain to cover all three parcels.

They as clearly expected the father and brother of him who was thus binding himself to surrender to him and that he was to acquire whatever legal interest they or either had and make it as completely subject to the domination of him who signed as was that he had already over one parcel.

It is said, however, that two of these interests stood in the names of others and that we must look at them as respectively owning them and that agency must be shewn on Leopold's part to enable him to thus bind their several interests even when they come to his hands.

But is that so? They made no claim to them, on

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the contrary disclaimed any and transferred to Leopold. They stood as respective trustees of them. True the trust as such was possibly not enforceable.

Even if they could not be looked upon as holding property purchased by Furry and procured by him to be conveyed to each of them for him in such a way that they were bound to account to him as in case of a resulting trust, and that they could not for want of a declaration in writing be held to an execution of the trust were they bound by law to commit a fraud?

If they did not choose to do so but had conveyed to Leopold (at his request and in good faith desiring to execute the purpose of his undertaking) the next day after the execution of this document of the 20th of May, '99, for the express purpose of carrying out the intention of Furry and himself could Leopold have refused to implement the undertaking it stands for?

It would rather shock one to find that such a thing could be argued as possible. Yet every argument adduced in support of this contention of the bearing of the Statute of Frauds on this part of the case is just as complete and strong in the case I put as in that.

Now what did happen is that, after a longer time than a day the property became absolutely vested in Leopold and whilst it was so vested, the document was registered. It does not seem to me that all the happenings between the 20th May, 1899, and the 10th of April, 1901, when the registration took place affected or could affect the neat legal point of whether or not Leopold was bound by virtue of the document to carry out his bargain so far as he could.

It was his duty to acquire with reasonable effort

the legal title that would enable him to carry it out. It was he who was bound. It was he who undertook to hold for or to give Furry the specified interest.

The statute requires that the

> agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party *to be charged therewith*, etc., etc.

Leopold was the only party to be charged therewith. He admits it. He was enabled by what had transpired and which clearly (apart from the unexplained dealings) was within the contemplation of himself and Furry, as likely to transpire, to discharge the duty cast upon him. What right has he to say "I was not possessed when I signed though I am now of the entire title or enough to answer my obligation to Furry?" It is not the case of selling a pretended title in violation of a statute. No such thing is pleaded. Nor is it the case of having by acquisition for valuable consideration another's interest that he is by law entitled to set up as beyond the purview of his agreement.

The objection is taken that the registration was, for want of the written authority of the principals required by section 50 of "The Mineral Act," void.

In the view I have just expressed, that it is not a case of agency at all but of one man using as his own a firm name, this objection falls to the ground.

The claim is made that this interest of one-half was reduced to twenty per cent. by a later agreement.

The objection is taken that this agreement for a reduction of this interest from one-half to one-fifth is not evidenced by the necessary writing under the Statute of Frauds. I agree that the objection is fatal to this claim.

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A clear case may be made by oral evidence of accord and satisfaction or even of a substituted agreement in some such cases. I cannot find either here.

Elaborate and able argument on either side has left so far as I am concerned the deepest distrust. I am glad there was a small writing, however unsatisfactory in some respects, to guide us in the part of the case I have been thus far enabled to form an opinion upon.

It would serve no good purpose now to analyse the mass of contradictions and improbabilities on either side and shew why I am unable to form an opinion; much less one that I ought to feel clearly established before giving effect to it as against the admitted writing.

A deeper cut than either party chose to take might have opened up a satisfactory solution.

One cannot help suspecting the whole trouble arose from evading the mining regulations of the statute but this was not set up and is not perhaps so apparent as to render it incumbent on us to notice it. I have treated the case as if nothing prevented Furry putting each of these properties in the names respectively of three separate persons and that two of them recognized themselves as trustees for him and the other one chose to accept the terms on which Furry had so placed his properties.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I also agree in the opinion delivered by His Lordship Mr. Justice Idington.

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Appeal dismissed with costs.

Solicitors for the appellant, McMeekin; *Davis, Marshall & McNeill.*

Solicitors for the appellant, Leopold J. Boscowitz; *Bowser, Reid & Wallbridge.*

Solicitors for the respondents; *Martin, Craig & Bourne.*

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*Oct. 14, 15.
*Nov. 20.

THE RED MOUNTAIN RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

LOUIS BLUE AND JOSEPH S. DESCHAMPS, TRADING TOGETHER UNDER THE NAME AND STYLE OF BLUE & DESCHAMPS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Operation of railway—Unnecessary combustibles left on right of way—"Railway Act, 1903" *secs.* 118(*j*) *and* 239—*R.S.C.* (1906) *ch.* 37, *secs.* 151(*j*) *and* 297—*Damages by fire—Point of origin —Charge by judge—Finding by jury—New trial—Practice—New evidence on appeal—Supreme Court Act, secs.* 51 *and* 73.

The question for the jury was, whether or not the place of the origin of the fire which caused the damages was within the limits of the "right of way" which the defendants were, by the "Railway Act, 1903," obliged to keep free from unnecessary combustible matter, and their finding was that it did, but the charge of the judge was calculated to leave the impression that any space where trees had been cut, under the powers conferred by sec. 118(*j*) of that Act, might be treated as included within the "right of way," and, in effect, made a direction, on issues not raised by the pleadings or at the trial, as to negligent exercise of the privilege conferred by that section.

Held, that, in consequence of the want of more explicit directions to the jury on the question of law and the misdirection as to the issues, the defendants were entitled to a new trial.

The court refused an application by the respondents, on the hearing of the appeal, for leave to supplement the appeal case by the production of plans of the right of way which had not been produced at the trial, as being contrary to the established course of the court.

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

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APPEAL from the judgment of the Supreme Court of British Columbia(1), affirming the judgment of Morrison J., at the trial, by which the plaintiffs' action was maintained with costs.

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

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

Nesbitt K.C. and *C. R. Hamilton K.C.* for the respondents.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Duff, although with some hesitation. I wish at the same time to express my regret that it is not possible for us to entertain the application of the respondent to add to the case on appeal a map or plan of the completed railway and of the land taken or obtained for the use thereof, deposited, as alleged, with the Department of Railways and Canals pursuant to the "Railway Act of 1888," 51 Vict. ch. 29, sec. 134.

The jurisprudence of the court is well settled by a long line of decisions that an appeal to the Supreme Court must be decided solely upon the evidence contained in the case certified to the registrar by the clerk of the court appealed from. *Providence Washington Ins. Co.* v. *Gerow*(2); *Ætna Ins. Co.* v. *Brodie* (3); *Confederation Life Association* v. *O'Donnell* (4); *Exchange Bank* v. *Gilman*(5); *City of Montreal* v.

(1) 12 B.C. Rep. 460.
(2) 14 Can. S.C.R. 731.
(3) Cass. Dig. (2 ed.) 673; Cout. Dig. 1099.
(4) 10 Can. S.C.R. 92
(5) 17 Can. S.C.R. 108.

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The Chief Justice.

Hogan(1). In the Privy Council, Macqueen's Practice, page 765; *Banco de Portugal* v. *Waddell* (2).

In addition to the above cases I have had the registrar look up the papers in an unreported decision of the court in 1893, in a case of *Ross* v. *Ross,* in which I was engaged. This was a petition to the court asking to have added to the case on appeal four certain deeds which the petitioners claimed they had discovered since the judgment given by the court of appeal, and which had, it was claimed, an important bearing upon the matters in controversy. After reserving judgment, the motion having been referred to the full court by the Honourable Mr. Justice Fournier, to whom the application was first made, the court, without calling upon counsel to shew cause against the application, refused to make the order asked for.

This jurisprudence is based upon the provisions of section 73 of the "Supreme Court Act," which reads in part as follows:—

> The appeal shall be upon a case to be stated by the parties, or, in the event of difference, to be settled by the court appealed from or a judge thereof.

Section 51 of the Act provides that the Supreme Court may

> give the judgment and award the process or other proceedings which the court, whose decision is appealed against, should have given or awarded.

This section contemplates that the case in the Supreme Court shall be the same case as was under consideration in the court appealed from, for how, otherwise,

(1) 31 Can. S.C.R. 1. (2) 5 App. Cas. 161.

could this court reverse the court below on the ground that it should have given the judgment which is ultimately given by the Supreme Court, when the court below had not before it the material upon which the judgment of the Supreme Court is founded?

I do not wish to express any opinion as to the bearing the plan might have upon the case; but I wish to express my regret that we have no authority to receive the plan because it is conceivable that, on the statements made by counsel, both parties might be saved the trouble and expense of another trial. This, however, must be accepted as an expression of opinion personal to myself.

DAVIES J.—I agree in the opinion stated by Mr. Justice Duff.

IDINGTON J.—I concur in the judgment of my brother Mr. Justice Duff.

As to the motion to admit plans, they could not properly help us here and, therefore, the motion ought not to be acceded to, even if we had the power which, it is said, has been denied. But, upon that question, I express no opinion.

MACLENNAN J.—I agree with my brother Mr. Justice Duff.

DUFF J.—I find myself after the careful consideration of the whole of this case unable to resist the conclusion that the appellant company is entitled to a new trial.

The plaintiff's claim is a claim for damages caused by a fire which is alleged to have originated on the

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defendant company's right of way near Rossland, B.C.; and the liability of the defendant company (if any) rests upon this—that the fire in question is attributable to the failure of the company to perform its statutory duty to keep its right of way clear of combustible materials.

The enactment imposing this duty(1) (section 297 of the "Railway Act") is in the following words:—

> 297. The company shall at all times maintain and keep its right of way free from dead or dry grass, weeds and other unnecessary combustible matter.

The plaintiffs alleged in their pleadings and at the trial assumed the burden of proving that the fire had its origin in the ignition of some such combustible material on the defendant company's right of way. In regard to this point the controversy turned upon the question whether or not a place ascertained as the place of origin of the fire, is within the limits of the right of way. This question is obviously in part—in so far, that is to say, as it involves a definition of the term the "right of way" as used in the enactment quoted—a question of law; and upon that the jury were entitled to the guidance of the court. The learned judge did not explain to the jury the meaning of this term; but told them that if the defendants felled trees on the land adjoining their line and left them or other materials there in a combustible state that would be evidence of negligence. The defendants had by virtue of the enactment corresponding to section 151(*j*)(2) the right to fell trees standing within 100 feet of either side of their right of way

(1) R.S. [1906] ch. 37; and see "Railway Act, 1903," sec. 239.

(2) "Railway Act, 1903," sec. 118(*j*).

for the protection of their line; and this the jury was told by the learned judge at the request of the counsel for the defendant company. But the observations of the learned judge at that point in his charge could, I think, leave in the minds of the jury no room for doubt, that if, in exercising this statutory power the defendants left material which was likely to become and which afterwards became ignited by sparks emitted from their locomotives, that would be evidence of actionable negligence to which they might give effect by a verdict in this action for the plaintiff.

I should not in the least disagree with this statement of the law; but it had no application to the case which the learned judge and the jury were engaged in trying. The plaintiff's action is based, as I have said, upon the allegation that the fire had its commencement in combustible material left by the company (in breach of the statutory duty referred to) within the limits of its right of way; and the issue raised by that allegation was the issue to which the evidence was directed. The defendants were not called upon to meet and made no effort to meet a case of negligent exercise of their powers under section 151 (*j*). In effect, therefore, the learned trial judge left to the jury a case which was not raised by the pleadings and not tried; while upon the real issue of fact upon the determination of which the plaintiff's case rested the jury were not given the necessary assistance to enable them properly to appreciate what the question was which they were called upon to decide.

There was evidence, unquestionably, from which the jury might have found that the defendant company had cleared a continuous strip of land in which they had placed their road-bed and track; and it would

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I think have been a proper direction that if the jury found that this strip was occupied or appropriated by the defendant company as its way or part of its way then they should, in the absence of better evidence, for the purposes of this action treat it as included within the limits of the defendant company's right of way within the meaning of the enactment I have quoted. But the defendants were clearly, I think, entitled to have the jury pass upon the question whether in point of fact there was a strip so cleared as to lead to the inference that it was occupied or appropriated as a way of the company's railway. And it was their clear right also to have the opinion of the jury whether or not, given such a strip, the place where the fire commenced was within it. In effect the jury were directed that if the fire originated in combustible material left by the defendant company in any space cut or slashed by them whether as part of their way or otherwise they are in this action responsible for the ensuing damage.

There is, it is true, in answer to a question put to the jury an express finding that the fire originated within the right of way. But the charge was, I think, calculated to convey to the minds of the jury the impression that any space so cut or slashed might properly be, for the purpose of arriving at an answer to that question, treated as included within the right of way; and thus the very point which it was essential that they should determine in order intelligently to answer the question—the limit of the right of way in relation to a place where the fire originated—was in effect withdrawn from them. The defendant company was not only entitled to a finding upon that question; it was entitled to such a finding arrived at under a proper direction.

If one could on the evidence as it stands for one's self come to the conclusion that there was a strip of such a character that in the absence of better evidence of the extent of the right of way the defendant company ought to be held to have appropriated it as such, and that the fire originated within that strip, that would, I think, be a sufficient ground for holding that, there being no substantial prejudice to the appellant, a new trial should be refused; but while the first of these questions would to me present no difficulty, I am unable upon this record to reach a conclusion in favour of the plaintiff on the second. I do not mean to suggest that there is such a lack of evidence as to the exact position of the point of origin of the fire as would have justified the trial judge withdrawing the case from the jury; but in the evidence disclosed by the record I am not able to find sufficient material to enable me to reach a conclusion upon it. In these circumstances the defendant company is, I think, entitled to have the issues in the action submitted to another jury.

The appeal should be allowed with costs of the appeal to this court and the full court. The costs of the abortive trial should abide the event of a new trial.

Appeal allowed with costs.

Solicitor for the appellants: *A. H. MacNeill.*
Solicitor for the respondents: *C. R. Hamilton.*

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*Nov. 12.
*Nov. 13.

JOHN HARRIS (PLAINTIFF).....APPELLANT;

AND

THE LONDON STREET RAILWAY COMPANY (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Street Railway Co.—Rules—Contributory negligence—Motorman.

Rule 212 of the rules of the London St. Ry. Co. provides that "when the power leaves the line the controller must be shut off, the overhead switch thrown and the car brought to a stop * *." A car on which the lights had been weak and intermittent for some little time passed a point on the line at which there was a circuit breaker when the power ceased to operate. The motorman shut off the controller but, instead of applying the brakes, allowed the car to proceed by the momentum it had acquired and it collided with a stationary car on the line ahead of it. In an action by the motorman claiming damages for injuries received through such collision,

Held, that the accident was due to the motorman's disregard of the above rule and he could not recover.

APPEAL from a decision of the Court of Appeal for Ontario setting aside a verdict for the plaintiff at the trial and dismissing the action.

The action was brought by a motorman to recover compensation for injuries he received in consequence of the car which he was driving coming into collision with another that was at rest on the track owing to failure of the power. The power on plaintiff's car had been weak for some time and when he passed a point on the line where there was a circuit breaker it failed

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

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entirely. He shut off the controller but did not apply the brakes, and the car went on until the collision occurred, though it was admitted that it could have been stopped in time to prevent it.

Rule 212 of the company's rules requires the motorman to bring the car to a stop when the power leaves the line, and the plaintiff admitted that he would have done so if he had had any idea there was a car in front of him.

The trial judge left the questions of negligence of the defendant company and contributory negligence of the plaintiff to the jury, who found in favour of the plaintiff on both grounds and a verdict was entered accordingly with damages assessed by the jury at $1,500. The Court of Appeal set the verdict aside and dismissed the action on the ground that the accident was entirely due to the plaintiff's failure to stop the car when the power failed as provided by the rule. The plaintiff appealed to the Supreme Court from the latter decision.

Blackstock K.C. for the appellant.

Hellmuth K.C. and *Ivey* for the respondents were not called upon.

The judgment of the court was delivered by

MACLENNAN J.—This is an appeal from the judgment of the Court of Appeal for Ontario, reversing a judgment at the trial for the plaintiff, in an accident case.

The plaintiff was the motorman in charge of a car of the defendants, which ran into another car standing upon the track, whereby the plaintiff was injured.

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Maclennan J.

We agree with the Court of Appeal that, upon the plaintiff's own evidence, the accident was due to his own disregard of a rule of the company, which it was his duty to observe, and that the case should have been withdrawn from the jury, at the trial, and the action dismissed.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Thomas Wells.*

Solicitors for the respondents: *Ivey & Dromgole.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF HALIFAX.

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*Nov. 27.

WILLIAM ROCHE (RESPONDENT).....APPELLANT;

AND

FREDERIC W. HETHERINGTON (PETITIONER)..... } RESPONDENT.

MICHEAL CARNEY (RESPONDENT)....APPELLANT;

AND

FREDERIC W. HETHERINGTON (PETITIONER)..... } RESPONDENT.

ON APPEAL FROM THE DECISION OF TOWNSHEND AND RUSSELL JJ.

Controverted election—Appeal—Fixing time for trial.

No appeal lies to the Supreme Court of Canada from an order of the judges assigned to try an election petition fixing the date for such trial.

APPEALS from orders of the judges assigned to try the petitions against the return of members of the House of Commons for the County of Halifax fixing the date for the trial of such petitions.

In 1906 the time for commencing the trial of the petitions in these cases was extended to the 14th of July, and an order was made by the Supreme Court of Nova Scotia fixing the 17th of July as the date of

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

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trial. When it came before the trial judges they held that such order was void as fixing the time beyond the extended period which was a date at which the trial could not be entered upon. An appeal was taken to the Supreme Court of Canada from this decision and it was there reversed and the judges were directed to proceed with the trial(1). On application of the petitioners an order was made by the trial judges fixing September 3rd, 1907, as the time for commencing the trial from which order an appeal was taken to the Supreme Court of Canada by the respondents to the petition, who claimed that by the effect of the former order of the latter court the trial had been commenced on July 17th, 1906, and as it must proceed from day to day there was no machinery for continuing, also that the petitioners had been guilty of laches in delaying the proceedings so long.

On the appeals being called Mr. Justice Girouard, who presided over the court in the absence of the Chief Justice made an announcement as follows:

"I observe that these appeals have been placed at the foot of the Maritime List and understand from the registrar that it was done by consent of counsel. Since I have had the honour of a seat on this bench, election cases have invariably been placed by the registrar at the top of the list. In such cases the convenience of counsel alone is not to be considered. The electorate is also interested and this very case shews that counsel for the parties, even for the petitioner, care very little for the public. Speaking for the court, and with the sanction of the Chief Justice, I wish it understood that in the future, as in the

(1) 37 Can. S.C.R. 601.

past, no election appeal is to be placed anywhere except at the top of the whole list unless otherwise specially ordered by the court or a judge."

W. B. A. Ritchie K.C. for the respondents moved to quash the appeals.

Mellish K.C. for the appellants *contra.*

The judgment of the court was delivered by

DAVIES J.—These appeals are from interlocutory orders of the trial judges setting down the cases for trial on a particular day. There had been a previous appeal to this court in each of the cases from a judgment or decision of the trial judges, after the hearing had been begun in each case, to the effect that their jurisdiction had come to an end and that they had no power to proceed further with the trials. The result practically was to dismiss the petition. This court held that the jurisdiction of the trial judges had not come to an end and remitted the petitions back with instructions that the trials should be resumed at the stage where they had been stopped.

It is from the orders made setting down a day for so resuming the trials of these election petitions that these appeals are taken.

It seems to me perfectly plain that no such appeals lie.

The only appeals provided for to this court by the statute outside of those on preliminary objections, are appeals

from the judgment or decision on any question of law or of fact of the judges who have tried the petition.

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In the cases before us no such state of facts as required by the statute exists. The petition has not been tried. The former order of this court that the trial should be resumed and gone on with has not yet been complied with. I do not think it is open to serious argument that every decision given by the trial judges either before or during the progress of the trial is at once and before the end of the trial appealable. Such a conclusion would defeat the object of the statute absolutely, and make election trials a farce.

We are all of the opinion that we have no jurisdiction to hear these appeals and that they should both be quashed with costs.

I fully concur in the remarks of Girouard J. as to the necessity for the strict observance of the rule of this court that all appeals in election cases should be placed at the head of the docket or list of appeals and heard first and before other appeals, unless the court on satisfactory cause shewn, makes an order changing the place on the docket of such appeals.

The public is interested in the speedy hearing and disposition of these appeals and this court will not assent to any delay in such hearing unless for good cause shewn.

Appeals quashed with costs.

Solicitor for the appellants: *G. Fred. Pearson.*

Solicitor for the respondents: *John A. McKinnon.*

THE CANADIAN PACIFIC RAILWAY COMPANY, (PLAINTIFFS) .. } APPELLANTS;

AND

THE OTTAWA FIRE INSURANCE COMPANY, (DEFENDANTS) ..... } RESPONDENTS.

1906
*Nov. 7, 8.

1907
**June 3-5.
**Dec. 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Constitutional law—Provincial companies' powers—Operations beyond province—Insurance against fire—Property insured—Standing timber—Return of premiums—B.N.A. Act, 1867, s. 92(11).

Held, per Idington, Maclennan and Duff JJ., Fitzpatrick C.J. and Davies J. *contra*:—That a company incorporated under the authority of a provincial legislature to carry on the business of fire insurance is not inherently incapable of entering outside the boundaries of its province of origin into a valid contract of insurance relating to property also outside of those limits.

Per Fitzpatrick C.J. and Davies J.—Sub-sec. 11 of sec. 92, B.N.A. Act, 1867, empowering a legislature to incorporate "companies for provincial objects," not only creates a limitation as to the objects of a company so incorporated but confines its operations within the geographical area of the province creating it. And the possession by the company of a license from the Dominion Government under 51 Vict. ch. 28 (R.S. 1906, ch. 34, sec. 4) authorizing it to do business throughout Canada is of no avail for the purpose.

Girouard J. expressed no opinion on this question.

An Insurance Company incorporated under the laws of Ontario insured a railway company, a part of whose line ran through the State of Maine, "against loss or damage caused by locomotives

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

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

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to property located in the State of Maine not including that of the assured." By a statute in that state the railway company is made liable for injury so caused and is given an insurable interest in property along its line for which it is so responsible.

Held, affirming the judgment of the Court of Appeal (11 Ont. L.R. 465) which maintained the verdict at the trial (9 Ont. L.R. 493) that the policy did not cover standing timber along the line of railway which the charter of the insurance company did not permit it to insure.

Held, also, Fitzpatrick C.J. and Davies J. dissenting, that the policy was not on that account of no effect as there was other property covered by it in which the railway company had an insurable interest; therefore the latter was not entitled to recover back the premiums it had paid.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the verdict at the trial(2), in favour of the defendants.

The Ottawa Fire Insurance Co. is incorporated under "The Ontario Insurance Act." It issued a policy to the Canadian Pacific Railway Co. insuring the latter in the following terms. "On all claims for loss or damage caused by locomotives to property located in the State of Maine not including that of the assured or upon land owned, leased or operated by the assured." The Railway Co., a portion of whose line ran through the State of Maine, had by the law of the state an insurable interest in property along its line for loss of which, by fire from its locomotives, it might be liable.

The railway company sued on this policy to recover the amount it had been obliged to pay for loss of standing timber on its line in Maine through fire from its locomotives, claiming, in the alternative, a return of the premiums paid if it was held that the insurance company had no power

(1) 11 Ont. L.R. 465. (2) 9 Ont. L.R. 493.

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to insure standing timber. The defendant company pleaded, and the courts below held, that, under its charter, it could not insure standing timber and that the plaintiff could not recover the amount paid for premiums as the policy covered other property in which it had an insurable interest. The plaintiff company appealed to the Supreme Court from the decision of the Court of Appeal to this effect.

Ewart K.C. and *MacMurchy,* for the appellants. This is not the usual case of insurance on property but is a guarantee or contract of indemnity against liability to property owners.

If it is an insurance on property it covers standing timber. See *London* v. *Southwell College*(1); *Hamilton Mfg. Co.* v. *Massachusetts*(2).

The statute law of the State of Maine does not assist the defendants as the insurance effected was not that contemplated by the statute. See *North British & Mercantile Ins. Co.* v. *Liverpool, London & Globe Ins. Co.*(3), at pages 581 and 584.

Standing timber was what the plaintiffs intended to insure and if it is not covered by the policy the parties were never *ad idem* and the consideration for the contract fails. Therefore the premiums should be returned. See Chand on Consent, pp. 1 and 2; *Wilding* v. *Sanderson*(4); Pollock on Contracts, 7 ed. p. 486; *Burson* v. *German Union Ins. Co.*(5).

Shepley K.C. and *F. A. Magee,* for the respondents. The word "property" used in the policy must be construed with regard to the statutory powers of the

(1) Hobart 303.
(2) 6 Wall. 632.
(3) 5 Ch.D. 569.
(4) [1897] 2 Ch. 534.
(5) 10 Ont. L.R. 238.

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respondents, which do not authorize the insurance of standing timber.

The policy covered other property in which appellants had an insurable interest and the premiums were earned. See *Moran, Galloway & Co.* v. *Uzielli* (1); Bunyon on Fire Insurance, 4 ed. p. 13.

The court reserved judgment and, in the following term (19th Feb., 1907), made an announcement in the following terms:—

"The argument in this case at bar raised some important questions as to the power of the provincial legislatures to incorporate companies and as to what, if any, limitations upon that power are contained in the words "provincial objects" in sub-section 11 of section 92 of the British North America Act.

"It also raises other questions of public importance as to the effect and meaning of the existing Dominion legislation authorizing licenses to be issued permitting provincial insurance companies to carry on their business throughout Canada.

"As these questions involve the powers alike of the Dominion Parliament and provincial legislatures to legislate, we think that the case upon these points should be re-argued and that the Attorney-General of the Dominion and the Attorneys-General of the several provinces should be notified so that such of them as desired might be heard upon the question of the powers of the respective Governments they represent.

"The questions to be specially argued are:

"1st. Is every charter issued by virtue of provincial legislation to be read subject to a constitutional limi-

(1) [1905] 2 K.B. 555.

tation that it is prohibited to the company to carry on business beyond the limits of the province within which it is incorporated?

"2nd. Can an insurance company incorporated by letters patent issued under the authority of a provincial Act carry on extra-provincial or universal insurance business, *i.e.*, make contracts and insure property outside of the province or make contracts within to insure property situate beyond?

"3rd. Has a province power to prohibit or impose conditions and restrictions upon extra-provincial insurance companies which transact business within its limits?

"4th. Has Parliament authority to authorize the Governor in Council to permit a company locally incorporated to transact business throughout the Dominion or in foreign countries?"

Pursuant to such direction the case was re-argued in the ensuing May term, counsel appearing as follows:—

Ewart K.C. and *J. D. Spence* for the appellants.

Shepley K.C. and *F. A. Magee* for the respondents.

Newcombe K.C., Deputy Minister of Justice, for the Dominion of Canada.

Nesbitt K.C., *C. H. Ritchie K.C.* and *Mulvey K.C.* for the Province of Ontario.

Lanctot K.C., Assistant Attorney-General, and *Gervais K.C.* for the Province of Quebec.

Jones K.C., Solicitor-General, for the Province of New Brunswick.

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Nesbitt K.C. for the Province of Manitoba.

Mulvey K.C. for the Province of Saskatchewan.

Before any of the counsel were heard, Mr. Justice Girouard stated that as he had not heard the previous argument on the issues between the original parties to the appeal he did not think he should sit unless the whole case was re-opened and the hearing not be confined to the constitutional questions propounded by the court. He was informed by the Chief Justice, that the whole case was open on the present hearing and remained on the bench.

By direction of the court the constitutional questions involved in the questions propounded were first argued, counsel for the Dominion of Canada being directed to begin.

Newcombe K.C. By the construction which the decisions of the Judicial Committee of the Privy Council have placed on sections 91 and 92 of "The British North America Act, 1867," the legislative powers of a province, being restricted to matters of a local and private nature within such province, cannot I submit, extend to legislation the operation of which goes outside of its geographical limits. See *Attorney-General of Ontario* v. *Attorney-General for Canada*(1), at pages 359 *et seq.; Citizens Ins. Co.* v. *Parsons*(2), at pages 116-7; *Dobie* v. *Temporalities Board*(3), at pages 151-2; *Colonial Building & Investment Association* v. *Attorney-General of Quebec*(4), at page 165. The first question should, therefore, be

(1) [1896] A.C. 348.
(2) 7 App. Cas. 96.
(3) 7 App. Cas. 136.
(4) 9 App. Cas. 157.

answered in the affirmative and the second in the negative.

In view of the decisions I would answer the third question in the affirmative, subject to the qualification that the conditions and restrictions do not affect the trade or business of such companies beyond the limits of the province which would be an interference with the powers of Parliament to regulate trade and commerce between provinces, or generally throughout Canada. See *Attorney-General of Ontario* v. *Attorney-General for Canada*(1).

The fourth question should be answered affirmatively.

C. H. Ritchie K.C. for the Province of Ontario. By section 92 of sub-section 11 of "The British North America Act, 1867," the legislature of a province may incorporate companies with "provincial objects." The latter words do not constitute a limitation within the geographical area of the province as is contended by counsel for the Dominion and for the appellants, but gives the legislature power to incorporate companies for purposes not assigned to the federal Parliament.

Moreover the objects of the companies are not, necessarily, to be "provincial" only. If a company has provincial objects within the scope of its operations this provision of the Act is complied with though other objects may be included. See *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*(2); *Boyle* v. *Victoria Yukon Trading Co.*(3); *Duff* v. *Canadian Ins. Co.*(4).

(1) [1896] A.C. at p. 363.
(2) Q.R. 19 S.C. 434; 11 K. B. 251; [1903] A.C. 59.
(3) 9 B.C. Rep. 213.
(4) 27 Gr. 391; 6 Ont. App. R. 238.

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It is submitted, therefore, that the questions propounded should be answered in favour of the power of provincial companies to do business outside the Province in which they are incorporated.

Nesbitt K.C. is heard for the Province of Manitoba.

Mulvey K.C. is heard for the Province of Saskatchewan.

Ewart K.C. is heard for the appellants.

Shepley K.C. for the respondents.

Newcombe K.C. in reply.

THE CHIEF JUSTICE (dissenting). — I agree with Sir Louis Davies. The jurisdiction of the legislature by whose authority the company respondent was brought into existence is limited as to subjects and area. The subjects with respect to which it can legislate are enumerated in section 92 of "The British North America Act, 1867," and the area of its legislative jurisdiction is confined to the Province of Ontario. By paragraph 11 of section 92, a provincial legislature is authorized to incorporate companies but not all companies, only those with provincial objects, *i.e.*, such objects as are within the legislative jurisdiction of a province to effect. A company can take no power from the legislature to which it owes its existence which it is not in the power of that legislature to grant. Admittedly the Dominion Parliament has the right to create a corporation to carry on business

throughout the Dominion and it appears to me impossible to maintain that a provincial legislature, if it can deal with the incorporation of insurance companies at all, can create a company with powers coextensive with those conferred by the Dominion on a company incorporated for the purpose of carrying on the business of insurance, and this appears to me the necessary logical result of the submission of the provincial Attorneys-General. The Dominion Parliament and the provincial legislature cannot both occupy the same legislative field at the same time.

Mr. Blake, when Minister of Justice, in his report on "The Act of Incorporation" of the Merchants Marine Insurance Co. said (page 261, Hodgin's Provincial and Dominion Legislation) :—

> By the second section it is provided that the company shall have power to make with any person or persons contracts of insurance connected with marine risks against loss or damages either by fire or by peril of navigation of or to any vessel, etc., either sea-going or navigating upon the lakes, rivers, or navigable waters. It appears to the undersigned that under the express language of the clause, it is attempted to give the company power to do an insurance business with persons not residents of the province in respect of risks on vessels not touching provincial ports, in a word to do a universal insurance business. The power of provincial legislatures to incorporate insurance companies is to be found, if at all, in the 11th sub-section of the 92nd section of the British North America Act, 1867, which gives to the local legislatures authority to make laws for the incorporation of companies with provincial objects. It appears to the undersigned that the powers attempted to be conferred upon this company are beyond any fair construction of these words, and he recommends that the attention of Prince Edward Island be called to the Act with a view of its amendment by such limitation of the powers of the company as may obviate this objection.

Subsequently, Sir Oliver Mowat, when Minister of Justice, page 33, Provincial Legislation, 1896-1898, reporting on the status of the Mississquash Marine Company, a company incorporated for the purpose of

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carrying on certain operations in Nova Scotia, New Brunswick and elsewhere, said:—

The undersigned construes this authority (that is the incorporation of companies with provincial objects) to mean objects provincial as to the province creating the corporation.

Sir Oliver Mowat, at page 17 of the volume just quoted, said:—

The powers which, in regard to the business of fire and marine insurance, this Act purports to confer upon this company are practically unlimited; and with regard to marine insurance the company is expressly empowered to insure property in any part of the world. The jurisdiction of a provincial legislature to incorporate companies is in the British North America Act expressed to be to incorporate "companies" with provincial objects, and this has been construed to mean objects located within the province and to be locally carried on by such companies within the province. In this connection the undersigned begs leave to refer to the remarks of the Honourable Edward Blake upon certain statutes of the Province of Nova Scotia, 38 Victoria, chapters 76, 77, 78 and 79, and upon a statute of the Province of Quebec, intituled "An Act to incorporate the Atlantic Insurance Company of Montreal," 38 Vict. ch. 61; also to the observations of the Right Honourable Sir John Thompson upon a statute of the Province of Nova Scotia, intituled "An Act to incorporate the Fisherman's Insurance Company of Lunenburg, Limited," 56 Vict. ch. 167 (approved reports of the Ministers of Justice of 25th October, 1875, 19th September, 1876, and 27th January, 1894, volume of reports upon provincial legislation, 1867-1895, at pages 263, 264, 265, 491 and 635).

A statute of Nova Scotia incorporating a company for the purpose of running steamers on the coast of the province and elsewhere was disallowed upon the recommendation of the late Mr. Justice Fournier, when Minister of Justice, because there was no limit to the operations of the company within the province, and because of the word "elsewhere." (See his approved report 31st March, 1875, on page 488 of the volume of Dominion and provincial legislation.)

The question, however, not being free from doubt, the undersigned is not prepared to recommend the disallowance of the Act now under consideration, but recommends that a copy of this report, if approved, be transmitted to the Lieutenant-Governor of the province.

A careful examination of the reports made by the Ministers of Justice since Confederation shews that the unanimous opinion held and many times ex-

pressed by them was that a provincial legislature has no power to create a company with authority to do business outside of the limits of the incorporating province. I refer to those reports not as authorities binding in any sense on this court but as expressing the opinions of men familiar with the working of our constitution, and more particularly to shew that the attempt made at different times by the provinces to usurp jurisdiction with respect to the incorporation of companies has been resisted by the Dominion authorities, and that there has been no acquiescence in the construction alleged to have been put by the provinces on the words "provincial objects."

Dealing with the last question:—

Has Parliament authority to authorize the Governor in Council to permit a company locally incorporated to transact business throughout the Dominion or in foreign countries?

If a company is within the exclusive jurisdiction of a province, then the Dominion Parliament cannot interfere to extend or limit its powers so long as it remains a provincial company. I concede that the Dominion might make the company a Dominion company; but so long as a company is subject to the provincial legislature the Dominion has no authority or power to extend or restrict. The Dominion cannot enlarge the constitution of an Ontario company or limit the powers locally conferred. The same company cannot be subject at the same time to the legislative jurisdiction of the Dominion and of a provincial legislature with respect to its corporate powers.

I would allow the appeal.

GIROUARD J.—I agree with the respondent that this is not a case where the great constitutional ques-

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tions raised by the order for re-hearing can be fairly determined by this court. I do not propose to go over the authorities bearing upon the point which is one more of substantial justice than of procedure; they are all collected by Mr. Shepley K.C. in his factum and his exhaustive re-argument, and it would serve no practical purpose to repeat them here.

They satisfy my mind at least that the *ultra vires* questions cannot be fully considered without proper issues and trial, so as to have definite statements of facts and of law involved in the case, which interest the provincial governments of the Dominion and commercial corporations and the public at large to such an enormous extent that we cannot fully realize the consequences. I quite understand that evidence might be essential with regard to the place of the completion of the policy, whether in Montreal or Ottawa, and also as to the Canadian license which, although not in issue, it is admitted was granted by the Dominion Government, and such other matters as parties might advise.

I thought first that the record could be remitted to the trial court for the purpose of making amendments, adducing additional evidence and taking such other proceedings as might be necessary to avoid surprise and secure a final adjudication, as was done by the Privy Council in *Connolly* v. *The Consumers Cordage Company* and other cases. I am afraid that by so doing we would authorize a fresh and totally different action, and for that reason I believe we have nothing else to do but to dismiss the appeal purely and simply with costs, reserving to the plaintiff such further recourse as he may have in the premises.

DAVIES J. (dissenting).—The respondent company (defendant) is an Insurance Company incorporated

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by Letters Patent issued under the provisions of "The Ontario Insurance Act," R.S.O. (1897), ch. 203, under which letters patent it is declared to be capable of exercising all the functions of an incorporated company

for the transaction of such insurance (fire) as if incorporated by a special Act of the Legislature of Ontario.

The Canadian Pacific Railway Company is incorporated under the laws of the Dominion of Canada, and a portion of its line of railway between Montreal and St. John, N.B., passes through the State of Maine.

The policy of insurance on which this action was brought purported to have been signed by the president and general manager of the company and to have had its corporate seal affixed at Ottawa, Ontario, and to have been countersigned by Carson Bros., the chief agents of the defendant company at Montreal, in the Province of Quebec.

The property or risk insured was stated in the policy to be as follows:—

On property as per wording hereto attached Canadian Pacific Railway Company $75,000. On all claims for loss or damage caused by locomotives to property located in the State of Maine not including that of the assured or upon land owned, leased or operated by the assured.

The plaintiffs' claim was in the alternative for the recovery of $4,698.94, being the value of certain timber burnt upon lands adjoining the railway by fire caused by locomotive sparks, or in the event of the policy being held invalid as a guarantee policy only and not an insurance policy, a return of all the premiums of insurance they had paid as upon an entire failure of consideration.

The defendants contended that the only property in question, the loss of which the plaintiffs had paid

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for or incurred was standing timber and that their statutory powers of insurance and their policy issued thereunder did not extend to nor cover standing timber and so they were not liable.

I agree with the judgment of the Court of Appeal for Ontario confirming that of the trial judge that so far as the questions raised before those courts are concerned the action must be dismissed. I do not think it necessary to add any reasons to those given by Mr. Justice Osler speaking for the Court of Appeal on the points there raised.

On appeal to this court some quite new and important questions were raised for the first time by the appellants and I confess they have raised doubts and difficulties not by any means easy of solution.

The points substantially taken by Mr. Ewart were that this Insurance Company was one incorporated by the Province of Ontario; that there was a constitutional limitation in the British North America Act, 1867, upon the powers of legislation assigned in the 92nd section to the provinces of the Dominion, and that the words of the 11th sub.-sec. of that sec. 92

> the incorporation of companies with provincial objects,

meant a territorial limitation co-extensive with the the territory of the province incorporating the company; that this statutory and constitutional limitation confined the powers and operations of the company to insurance on property in Ontario, and that as this policy sued on covered only property located in the State of Maine, United States of America, it was *extra vires* of the company quite irrespective of the question whether the policy was held to have been executed in Ontario the "home" or habitat of the company, or in Montreal, Province of Quebec, the insur-

ance intended to be effected never attached, the policy being void *ab initio,* and the premiums paid being without any consideration could be recovered back by the railway company. He accompanied his argument with the admission that the insurance company had at the time of its issuance of the policy in question a license from the Dominion Government to carry on the business of fire insurance throughout Canada, but contended that this license and the statute under which it issued in no way validated the policy.

A question as to the right of the company to raise such a question as this for the first time in this court was raised, but we were of the opinion that as the question was one of law which involved the validity of the contract sued on and sufficiently appeared upon the face of the record and was accompanied by the admission of the Dominion license to carry on its business throughout Canada, so that the defendant could not be prejudiced, the appellant was within his rights, even though the point had not been explicitly argued in the courts below. *Devine* v. *Holloway*(1); *McKelvey* v. *The Le Roi Mining Co.*(2).

With respect to the legal effect to be given to the Dominion license granted to the defendant insurance company under the Dominion statute, 49 Vict. ch. 45, intituled "An Act respecting Insurance" as amended by 51 Vict. ch. 28, it is necessary to see just what the Parliament of Canada professed to do. The 3rd section of the "Insurance Act" above referred to, as amended, enacted that its provisions should not apply *inter alia*:—

(*c*) To any company incorporated by an Act of the legislature of the late Province of Canada, or by an Act of the legislature of any

(1) 14 Moo. P.C. 290. (2) 32 Can. S.C.R. 664.

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province now forming part of Canada, which carries on the business of insurance, wholly within the limits of that province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province; but any such company may, by leave of the Governor in Council, on complying with the provisions of this Act, avail itself of the provisions of this Act, and if it so avails itself, the provisions of this Act shall thereafter apply to it, and such company shall have the power of transacting its business of insurance throughout Canada.

The questions to be determined by us therefore are, first, what, if any, are the constitutional limitations upon the powers of the Provincial Legislatures to incorporate companies? And next, are these limitations, if territorial or provincial, removed in the cases of companies so incorporated, which have obtained licenses to carry on business throughout Canada under the Dominion Statute, so as to enable them to carry on such business throughout Canada? And thirdly, if so, can a provincial company, acting under its provincial charter and its Dominion license, carry on business in foreign countries by or under the comity of nations, in the same way and to the same extent as a company incorporated without limitations as to area?

At the conclusion of the argument, it being apparent that important constitutional points were involved, and would probably have to be determined in order to reach a decision upon the questions raised, the court ordered that a re-argument should be had, and that the Attorney-General of the Dominion and the Attorneys-General of the several provinces should be notified of such re-argument, and invited to discuss the questions following, should they desire to be heard upon them:—

1. Is every charter issued by virtue of provincial legislation to be read subject to a constitutional limitation that it is prohibited to

the company to carry on business beyond the limits of the province within which it is incorporated?

2. Can an insurance company incorporated by letters patent issued under the authority of a provincial Act, carry on extra-provincial or universal insurance business, *i.e.*, make contracts and insure property outside of the province or make contracts within to insure property situate beyond?

3. Has a province power to prohibit or impose conditions and restrictions upon extra-provincial insurance companies which transact business within its limits?

The Attorney-General of the Dominion as well as counsel representing the Attorneys-General of most of the provinces, appeared and argued these questions exhaustively. Counsel for the several parties to the cause were also again heard.

The distribution of legislative powers between the Dominion Parliament on the one hand and the Provincial Legislatures on the other by "The British North America Act" is referred to in the judgment of the Privy Council in *Citizens Ins. Co. of Canada* v. *Parsons*(1), at page 116, as follows:—

> In the first place it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power (Trade and Commerce in section 91). The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislature being the "incorporation of companies with provincial objects" it follows that the incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada. But it by no means follows * * * that because the Dominion Parliament has alone the right to create a corporation to carry on business throughout the Dominion, that it alone has the right to regulate its contracts in each of the provinces.

In the subsequent case of *Colonial Building and Investment Association* v. *Attorney-General of Quebec*(2), their Lordships referring to the case of *Citi-*

(1) 7 App. Cas. 96. (2) 9 App. Cas. 157.

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zens Insurance Company v. *Parsons*(1), at page 165 say:—

> Their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and provincial legislatures in regard to the incorporation of companies.

Now in what sense did their Lordships use the word "provincial" in the above extract I have made from their judgment? Did they use it in a territorial sense as embracing the area of the province, or did they use it in a legislative sense as embracing the "subject matters" assigned to the exclusive jurisdiction of the provincial legislatures, irrespective of territorial area? Or did they use it in the double sense of being alike a territorial and a legislative limitation? Reading their judgment as a whole carefully, I should have little hesitation in concluding that they intended to use the word "provincial" in a territorial sense and as opposed to Dominion in the same sense. If, however, it is held that notwithstanding the observations quoted from the judgment of the Judicial Committee the question of the true meaning of the limitation embodied in the words "provincial objects" is still open, my opinion would be that the only reasonable meaning to give to them is a territorial limitation.

The constitutional Act itself in which the words are used, which creates a Dominion out of a union of many scattered provinces and divides or apportions complete legislative power between that Dominion and the several provinces, and the section where the words are found specifically assigning to the provinces the subject matters on which they can exclusively legislate, and defining those subject matters,

(1) 7 App. Cas. 96.

leaving the residuum of legislative power not so assigned with the Dominion, the fact that the phrase used by way of limitation "provincial objects" was used in the assignment of subject matters to the provinces, to distinguish it from Dominion objects which latter were embodied in the phrase "peace, order and good government" of Canada, generally, combine with the plain natural meaning of the words to convince me that the Imperial Parliament intended to assign to the provincial government the exclusive right to incorporate companies to carry on or out, business or objects within the province only, and no others. The addition of the word "only" or the words "no others" would not, it seems to me, alter or change the nature or extent of the limitation. The power is an exclusive one. The limitation is as to area. It must be provincial as distinguished from Dominion or general, and as the *residue* of legislative power is given to the Dominion, and this power to legislate for provincial objects is exclusive, it seems to follow that it must mean for provincial objects only, or for provincial objects and no others. This view is much strengthened by a critical examination of the 16th sub-section of section 92 assigning legislative powers to the provinces. These several subject matters are either so clearly provincial as not to require additional words of limitation, or in those cases where not so clearly provincial, have the necessary words of limitation "within the province" or "in the province" attached to them. The one case before us, sub-sec. 11, was of a class in which these words of limitation used in the other sub-sections would not suffice. The incorporation of companies "within" or "in the province" would not have made the limitation sufficiently clear. They would leave the meaning ambiguous and

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doubtful, and so the draftsman properly introduced other and more definite words, "companies for provincial objects," not companies for provincial subjects which would be meaningless, or companies on subjects within its legislative jurisdiction, which was not intended, but companies for provincial objects only, as I construe it. If the limitation has not a territorial meaning what does it mean? Two suggestions were made, one that it was merely surplusage and meant substantially nothing. The other that it meant provincial subject matters or matters which have been exclusively assigned to the provincial legislatures as their own, within and over which they alone could legislate, and that this limitation of provincial subject matters had nothing to do with territorial area.

Now the first thing which strikes one with reference to this suggestion is that if the framers and draftsmen of the Act had any such intention as is ascribed to them, they would have used apt language to express it.

Alike in section 91 as in section 92, the phrase "classes of subjects" is used several times over. If it was intended that the incorporation of companies should be limited to the "classes of subjects" assigned to the provinces one would have imagined that so favourite a phrase would have been repeated and all doubt set at rest.

Mr. Nesbitt in supporting the substitution of the phrases, provincial subjects or subjects over which the province had legislative jurisdiction, for "provincial objects" invoked the specific power given in the 15th sub-section of section 91 to the Dominion Parliament to incorporate banks, as authority in support of the argument that by assigning to the Dominion Par-

liament the power to incorporate banks under sub-section 15 of section 91, but not any other kind of company or corporation, it must be assumed that it was intended to give the provincial legislatures the power to incorporate all other companies under the 13th sub-section of section 92 "Property and civil rights in the province," leaving to the Dominion the power to incorporate companies under the peace, order and good government clause of section 91 alone.

But the obvious reason why the incorporation of banks was assigned to the Dominion and not left with the provinces was that the whole subject of banking and its adjuncts was being assigned to the Dominion, and if the provinces were allowed to incorporate provincial banks with the right properly and necessarily belonging to a bank the whole subject of banking would have been left in inextricable confusion. And so far from having a national banking system to-day of which we are justly proud, we would have a series of systems some conservative and others more in accordance with what western ideas are popularly supposed to advocate. So far from affording weight to the argument for the most extended provincial jurisdiction, I am inclined to think that the assignment to the Dominion of the power to incorporate all banks, Dominion as well as provincial in their object or character, is evidence that with regard to all other provincial companies or companies limited in the object or business to the province, the jurisdiction of the province is exclusive. And so with respect to the very next subject of savings banks, the exclusive power to incorporate provincial saving banks remains intact with the provinces, while the general jurisdiction over saving banks remains with the Dominion.

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Then again this object-subject theory so strenuously pressed by Mr. Nesbitt, is open to the serious objection that it would, if adopted, open the sluice gates to doubt and confusion.

If the dividing line between the two legislative jurisdictions was well marked so that, as Mr. Ewart put it in his argument, the subject matter of legislation could in each case, as it arose, be assigned to one or the other, the difficulties would not be so great. We know, however, that this is not so, that the jurisdiction of Parliament trenches upon that of the provinces and *vice versâ*, so that we have what counsel aptly called a checker-board constitution.

A subject matter that in some aspects and for some purposes comes under Dominion legislation, in other aspects and for other purposes comes under provincial. I need not elaborate the point. I think the contention called the object-subject theory, if adopted, calculated to introduce endless trouble and confusion.

The powers granted the Dominion and the provinces are frequently found to interweave and overlap and one need only read the carefully considered and acute analysis of the two sections 91 and 92 of "The British North America Act" to be found in the judgment of the Judicial Committee delivered by Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(1), to satisfy himself how uncertain and unstable would be the results if this object-subject theory was adopted.

Mr. Nesbitt argued that inasmuch as the older provinces before joining in Confederation had an absolute unlimited right to create an artificial person or corporation, so after Confederation these rights

(1) [1896] A.C. 348, at p. 355.

remained intact except upon such subject matters as were expressly assigned to the Dominion Parliament. And as the only subject matter relating to the incorporation of companies expressly assigned to the Dominion was that of banks, and the special classes of works and undertakings connecting one province with another or with a foreign country or extending beyond the limits of a province or declared by the Parliament of Canada to be for the general advantage of Canada or two or more provinces as specified in the exceptions to sub-section 10 of section 92, the field was left clear for provincial legislation to take possession of.

With the subject of banks I have already dealt, and I was quite unable to follow Mr. Nesbitt in his argument arising out of the place in the Act where these exceptions to sub-section 10 of section 92 are found. I think the true answer was given to his argument on this point by Mr. Ewart who called our attention to the fact that these three exceptions attached to sub-section 10 of section 92 were placed in the "Quebec Resolutions," if we might look at them in construing the Act, amongst the subject matters specifically assigned to the legislative jurisdiction of the Dominion Parliament and that their transfer from their original place in these resolutions to their present place as exceptions to sub-section 10 of section 92 by no means altered their character or meaning. It was really a bit of inartistic drafting made doubtless with the object of removing doubts as to whether a work or undertaking lying beyond a province or, if wholly situate within a province were declared by the Parliament of Canada at any time to be for the general advantage of Canada, might not be contended nevertheless to be or continue to be a provincial work.

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With regard to the questions as to the place where this contract of insurance was made, whether in the Province of Quebec or in the Province of Ontario, I do not think it of any importance on the questions before us, if the view I have already presented of the meaning of the limitation contained in the words "provincial objects" is correct. If the defendant company had no power at all to enter into an insurance contract with respect to property in the State of Maine, it matters little whether their contract was made in Ontario or Quebec.

I understood it to be conceded at the argument that it made no difference whatever whether the limitation upon the powers of the company was contained in the charter of the company or in the constitution or powers of legislation of the legislature granting the charter. And of course that is obviously so. Once the position is reached that the limitation contained in the words "provincial objects" is geographical or territorial, then it must be given effect to just the same if contained in the constitution of the province which grants the charter as if expressly incorporated in the charter itself. That being so, I take it that it is not open to argument since the decision by the House of Lords in the case of *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1), that a company incorporated by special Act of Parliament or under a "General Companies Act," is not thereby created a corporation with inherent common law rights, but is controlled and limited by and within the express powers granted and those necessary and incidental powers which flow from them, and that a contract made by such a company upon a matter not within

(1) L.R. 7 H.L. 653.

its powers is not binding upon the company nor can it be rendered so binding, though afterwards expressly assented to at a general meeting of shareholders. The question is not one as to the legality of the contract but as to the power and competency of the company to make it. As Mr. Justice Blackburn said in the judgment there appealed from, quoted with approval by Lord Chancellor Cairns, and which saying Lord Cairns observed "sums up and exhausts the whole case":—

> I do not entertain any doubt that if upon the true construction of a statute creating a corporation it appears to me to be the intention of the legislature expressed or implied that the corporation shall not enter into a particular contract, every court, whether of law or equity is bound to treat a contract entered into contrary to the enactment as illegal and therefore wholly void, and to hold that a contract wholly void cannot be ratified.

And Lord Selborne in his speech says:—

> I only repeat what Lord Cransworth, in *Hawkes* v. *Eastern Counties Railway Company*(1), (when moving the judgment of this House) stated to be settled law, when I say that a statutory corporation, created by Act of Parliament for a particular purpose, is limited, as to all its powers, by the purposes of its incorporation as defined in that Act. The present and all other companies incorporated by virtue of the "Companies Act of 1862," appears to me to be statutory corporations within this principle.

And again at page 694:—

> I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association, are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do.

If therefore my conclusion as to the meaning of the limitation "provincial objects" is correct, if the

(1) 5 H.L. Cas. 331.

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legislature of Ontario could only incorporate companies to do insurance business within the province, it seems to me to follow as a consequence that any contract made by them insuring property out of the province was wholly void, and that neither the place where the contract was made nor the ratification of the shareholders, had such been given, nor any comity or consent or license given by any foreign state or province could inject vitality into that which in its substance and essence was void and dead.

A great deal was said about the comity of nations and the right of a company to do business in a foreign state by virtue of that comity. But it does not to me seem arguable that any comity of nations could enlarge the powers of a limited corporation or enable such corporation to do that abroad which would be illegal and *ultra vires* if done at home, or extend the area within which even unlimited powers were to be exercised.

The true rule with respect to a company created by the legislature of one country attempting to carry on the business for which its charter created it in another country is that while acting within the scope of its statutory powers it may by the permission or comity of the state where it attempts to do business legally carry on such business. Its right to do so does not depend upon the law of the state creating the corporation, but on the extent to which the foreign country chooses to recognize the law creating the corporation. (See Lindley's Law of Companies, (6 ed.) Appendix No. 1, page 1222).

But I take it no permission or comity of any foreign state would enable a corporation specifically limited in its powers either with regard to the nature or class of business it may carry on or otherwise, to

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carry on business or enter into contracts which were either expressly prohibited or by implication necessarily prohibited by its charter. Such increase of power would require legislative authority, and practically amount to the creation of a new charter. Mere permission or comity certainly could not suffice to invest the company with powers beyond those of its charter.

It by no means follows from this, however, that everything the company does beyond the area of the province within which it is limited to do business, in furtherance of or ancillary or incidental to its main objects or purposes, is necessarily *ultra vires*. On the contrary applying the principles frequently stated by the Judicial Committee of the Privy Council to the question, it would seem to me that while the objects and purposes of the company must be confined to the province, things might be legally done outside of the province strictly in furtherance of those objects. For instance, a company chartered for the manufacture of any article, cotton, tobacco, woollen goods, iron, steel, etc., might well, in order to carry out the very purpose for which it was chartered, purchase outside of the province in England or elsewhere, the machinery necessary to enable it so to manufacture, and it may be, though it is not necessary for me to express an opinion on the point, that for the same purpose it might be alike necessary and legal for it to purchase abroad its raw material required to manufacture the articles for which it was incorporated. I put it upon the principle that everything necessary to enable a company to carry out properly and efficiently the purposes for which it was incorporated is impliedly granted to them, and that if it is necessary for a provincial company in order fully

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and effectively to carry out the object and purposes for which it was incorporated, to purchase abroad the machinery or other articles necessary to enable it to manufacture, including in such the raw material, it could legally do so. But I squarely challenge the proposition that a provincial manufacturing or trading or insurance company has the world for its market or business or that it can carry on its business at all beyond the province excepting to the extent and for the legitimate purpose of enabling it efficiently to carry out the functional purposes of its incorporation within the province by which it was incorporated.

A good deal was said at the bar as to the general practice which has prevailed since Confederation and the general construction put upon the statute by provincial authorities, and acted upon by the commercial and financial communities in taking out provincial charters, and the evils which may follow if it was to be held that these provincial charters limited the companies chartered by them in the exercise of their functional powers to the areas of the province. From much of what was said I dissent. My experience in the House of Commons for many years led me to form quite other impressions as to what the general belief and practice was, and I am confirmed in these impressions by the continuous and practically unbroken series of opinions officially expressed by a long line of Ministers of Justice when reporting year by year upon the legislation of the several provinces. The plain, obvious and simple course, if I am right in my construction of the Act, is for a corporation desirous of carrying on its business outside of the province and throughout the Dominion and elsewhere, to obtain its charter from the Dominion.

There remains yet to be considered the effect of the license obtained by the defendant company under the Dominion Statute, 51 Vict. ch. 28, which authorizes provincial companies by leave of the Governor in Council and on complying with certain provisions of the Act

to have the power of transacting its business throughout Canada.

So far as the Dominion is concerned it must be considered in some respects at least, with respect to the provinces, as a foreign state. I am quite unable to understand where the Dominion Parliament obtains its power to add to, or supplement, or take from the powers granted to any company incorporated by any province. Such legislation is practically either an amendment of the charter of the provincial company extending its powers far beyond those given to it by the province, or a legislative declaration of the extent to which it desires to extend what is known as the comity of nations. I cannot see how, or by what authority, the Dominion Parliament could alter, extend or abridge a provincial company's charter. "The Imperial Act" divides legislative power between the Parliament of the Dominion and the legislatures of the provinces. Whatever powers the latter have are exclusive. The Dominion Parliament cannot amend that Imperial statute, and without amending it I cannot see how they can add to the powers or objects of a provincial company which have been defined and circumscribed by the Imperial statute. It seems to me that only by the creation of a new entity or corporation could the object sought for be achieved. Comity cannot extend the circumscribed powers of an incorporated company, nor can a foreign legislature by any legislation or system of licensing enlarge

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such powers or make that legal which the charter did not warrant or authorize. It would not be argued that assuming the powers of this company to be confined to the Province of Ontario that the State of Maine could by any possible legislation enlarge those powers short of creating a new company. Nor can I see how the Dominion Parliament has any other or greater power to enlarge a provincial company's charter than one of the States of the United States would have.

Lastly, it was submitted by Mr. Shepley with great force that it was not open to the plaintiff company to recover back the premiums it had paid, on the ground that the policy was void, because outside of the contention that the point was not now open to them with which I have previously dealt, the contract was one already completed and performed at the time the action was brought and so the case was brought within the principle of the decision of *Lowry* v. *Bourdieu* (1) that it was not open to an insured party "after the risk had been completely run" to use the words of Mr. Justice Buller, to recover back premiums paid on the ground that the policy was void. It does not seem to me that this case comes within that principle. This was a continuing policy on certain property in the State of Maine renewed from time to time, and at the time the action was brought the risk was not completely run, but was then actually running. So far from the event or contingency having happened, which would, if the policy insured upon had been a valid one, have created a liability, the contention of the defendants, and on which they succeeded in the court below, was not that

(1) 2 Doug. 468.

the risk had never attached, or that the risk had once attached and had at the time of the loss ceased to do so, but that while the risk or contingency insured against was a continuous one at the time of the alleged loss it did not attach to the particular kind of property lost. In other words, that the contract was an executory not an executed one, but the special event or risk insured against had not occurred. Under no circumstances can I understand how the contract could be said to be an executed contract so far as the year or period is concerned when the fire took place and which period was covered by the premium paid. In my opinion the rule appealed to in order to prevent the plaintiff recovering back the premiums paid cannot be held to apply. On the assumption that I am correct in my holding that there never was any binding contract between the parties, that the contract entered into was *ultra vires,* then under those assumptions there never was anything done by the insurance company or any liability incurred by them under it, and the event contemplated on which the moneys insured might become payable, never did happen and never could happen. *Hermann* v. *Charlesworth* (1).

This case stands just as if the plaintiff company had not sued to recover for a loss upon the property at all, but had sued alone on the alternative claim made by it for the recovery back of the premiums while the policy, if it had been good, was actually running.

The appeal, therefore should be allowed and judgment entered for the plaintiff on its alternative claim for the premiums paid on the policy.

(1) [1905] 2 K.B. 123.

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IDINGTON J.—I accept the reasoning of Mr. Justice Osler on all the questions argued herein, in the Court of Appeal for Ontario. Nothing need be added thereto. However, for the first time in the case, counsel for appellants formulated and claimed the benefit of, the proposition of law, that no insurance company, only incorporated, as this one, by virtue of provincial legislative authority can insure against risks beyond, or enter into a contract therefor beyond the limits of the province incorporating it. I fear we erred in allowing this ground to be argued on such pleadings as appear, but in view of all the circumstances, including our direction for a re-argument, I reluctantly conclude the effect thereof to be as if we had under section 54 of "The Supreme Court Act" given leave to amend.

As to this new ground, I assume the contract to have been entered into by the insurance company at Ottawa, where the insurance company had its head office, and its chief officers, and where its seal was kept, and affixed to the contract, which was also signed there by these executive officers.

Even if the counter-signing in Quebec were void, which I do not think, that would not so impair the contract as to render it a nullity and thereby entitle appellants to claim as here a return of the premiums. If insured and insurer had both been domiciled in the same province, the question raised, would not, I think, have been open to appellants. But the head-office of the insured being here in one province, whilst the contract was executed in another province, entitles the appellants to have the broader question raised squarely decided, if considered at all.

I therefore deal with the issues thus raised in their widest sense.

As such, they turn upon the interpretation of "The British North America Act." I do not think we must, in disposing of them, look only at sub-section 11 of section 92 thereof, and try to determine the exact grammatical meaning of the words thereof which are as follows:—"11. The incorporation of companies with provincial objects."

It is conceded on all hands that this phrase was not intended to apply to, or have any relation to the executive powers of the government, or of the institutions relative to the carrying on of the government of the province, as distinct from the usual commercial or industrial business of the inhabitants of the province.

Yet what can the words "provincial objects" in their strict grammatical sense, mean, if not of that first class? Coupled with the word "companies" they can, as is properly conceded, mean nothing of the kind.

It is thus shewn to be an ambiguous phrase, that cannot be properly construed here, by what is the strictly grammatical rule of construction.

We are driven by that to look at the whole purview of the Act. We are, in order to properly comprehend that, again driven to resort to the history that preceded this legislation, in order that we may be placed just where we can, as nearly as possible, look at it from the like point of view that its framers had to consider it from.

Moreover, we must never forget what kind of instrument this is which we are called upon to interpret.

In trying to do so, I would like ever to abide by the following language, attributed to Vattel, as quoted with approval by the late Chief Justice Spragge in

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the case of *The Queen* v. *Hodge*(1), at page 253, as follows:—

> He says, Book 2, ch. 17, secs. 285, 6: The most important rule in cases of this nature, is that a constitution of government does not and cannot, from its nature, depend in any great degree upon verbal criticism, or upon the import of single words. Such criticism may not be wholly without use; it may sometimes illustrate or unfold the appropriate sense; but unless it stand well with the context and subject matters it must yield to the latter. While then we may well resort to the meaning of single words to assist our inquiries, we should never forget that it is an instrument of government we are to construe; and as has been already stated, that must be the truest exposition which best harmonizes with its designs, its objects, and its general structure.

The present Province of Ontario, when named Upper Canada, had by virtue of the simple words "peace, welfare and good government" from 1792 to 1840 the power to incorporate for any purpose that any of its citizens might desire to venture upon.

That power was, from the year 1840 to the coming into effect in 1867, of the Act now under consideration, merged in the united power of Upper and Lower Canada, but existent in the joint legislature of these provinces, under and by virtue of the same comprehensive words "peace, welfare and good government."

A similar history was true of the powers of the Province of Quebec in that regard. I need not dwell on details. I need not enlarge as to the Maritime Provinces respecting which the details differ from those.

Confederation was begotten of the intense desire, perhaps need, of Upper and Lower Canada, for provincial autonomy.

Under such conditions it is hardly likely, that representatives of either intended lightly to surrender

(1) 7 Ont. App. R. 246.

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the right to incorporate any of their citizens, for any purpose that incorporation might serve.

What reason is there to suppose it was intended to exclude from any legislative treatment by a provincial legislature of any of the subject matters assigned to the provinces, the right to use in such treatment the power or any part of the power of incorporation so far as hitherto enjoyed and so far as the exercise of that power might by any of the provinces be deemed expedient?

This contention, if it means anything, means that the provincial corporate bodies cannot, if of farmers, carry their crops across a line to market them; or if of merchants, step across the line to buy; or if of miners, import their machinery; or export their ores, for refining them; or if of manufacturers, send abroad their agents to buy, any of the raw materials they need; and that if they or any of them venture in any such case to do so, their securities as creditors or debtors would be worthless.

I cannot believe that such paralysing isolation was ever dreamt of by those who framed this Act.

Nor can I conceive that they intended, as within the scope and purpose of such a decentralizing scheme, of the functions of government, as this federal conception implies, that each and all of those possible corporate bodies I have mentioned, and all others of a like kind, should seek for their authority something emanating from the Dominion Parliament, to give them that capacity and efficiency the like bodies had before then enjoyed. Moreover, how can anything to recreate or to help them emanate from that Parliament when the whole subject matter is by being exclusively assigned elsewhere excluded from the jurisdiction of the Dominion?

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To those who reply "it matters not what was intended or may reasonably be supposed to have been intended it is not expressed" I venture to say it is clearly expressed. It is only, I respectfully submit, by trying to extract, from an ambiguous phrase, something even it won't bear, and discarding all else in the Act that this clear expression is missed.

Blot sub-section 11, I have quoted, out of section 92, is the language that remains not quite as comprehensive as and effective for conferring the power of incorporation in relation to anything pertaining to any of the several subject matters exclusively assigned to the provinces and in regard to which such a power might be appropriately and serviceably exercised, as had been the simple words "peace, welfare and good government" that had hitherto alone endowed the respective legislatures therewith in regard to the more numerous subject matters?

We have this exemplified in many ways in the Act. Sub-section 8 of section 92 merely reads "municipal institutions in the province."

We do not find anything in the Act referring to the incorporation of any such institutions.

Sub-section 11 only relates to "companies" and obviously has no relation to municipal corporations.

It may be said that of necessity municipal institutions must be corporations. I answer, not at all. municipal institutions might be conducted by a province, or by means devised by a province, other than by means of a corporation. Indeed their management by commissioners is now advocated in many quarters. Ontario boards of health are possessed of wide municipal powers yet once were not and, possibly, still are not corporations. But if it be that the nature of the subject matter thus assigned implies the power

of incorporation, I say then that illustrates and emphasizes my argument. For if the assignment of property and civil rights is to be the basis of the measure of the power there surely then must be an end to the contention.

Again, section 98 gives, save in one thing, exclusive control of education to the provinces by using language quite as remote from touching upon the power to incorporate as can well be. Yet does anyone for a moment suppose that the common every day creations by provincial legislative authority of corporations, to carry out the "laws in relation to education," are unauthorized? If either municipal or school corporations, directly authorized, as they respectively are, by the Ontario Legislature, to buy supplies (without any direction where) claim by virtue thereof to cross a street, a river, or a line, into a foreign State to contract respectively for these big and little things, can we deny them the right to do so? Why? What foundation can there be for distinguishing any of them from other corporations in regard to the right to buy where they choose?

Why should these corporations be discriminated against? Why should they be restricted in the marketing of their securities for borrowed money or buying supplies?

Again, hospitals, asylums, charities and eleemosynary institutions in and for the province, other than marine hospitals, are assigned to the exclusive jurisdiction of the provinces. Nothing is said of their incorporation.

Yet knowing how many of them stood in need of and got incorporation before, are we to suppose that mode of dealing ceased at Confederation? Were such corporations, if created at all, thereafter to be crip-

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ples? Why should these incorporated institutions not get supplies abroad? Were any of these corporations intended to be confined for the supply of their respective needs within the limits of a province? They or some of them daily go beyond the province of their domicile for some such purpose. Have they erred in law? Are they liable when so persistently offending to have their charter attacked for violating the law of their being? Must they limp along with their usefulness impaired? Or must they become re-incorporated by the Dominion. And how can that be done for they and all concerning them are exclusively assigned to the legislative authority of the province?

Sub-section 11, I repeat, has nothing to do with municipal or public school or public charitable corporations; neither endows nor restricts them.

If by virtue only of these several texts relating respectively to each of these subjects, this right of contracting abroad must be conceded to each of such corporations, what of the corporation that the business men require?

Is it not part and parcel of the ordinary civil rights of men to form such alliances? Could incorporating power necessary therefor springing from the exclusive control "of property and civil rights in the province" not have been exercised, if sub-section 11 of section 92 had never existed?

Blot all direct references to incorporating powers out of the Act and what would be the proper interpretation of it in this regard?

Can any one deny that it would when bereft of any such express authority, still carry in it ample power and authority to incorporate? Can anyone suppose that where authority over a subject matter was exclusively assigned to one or other legislative author-

ity, that the plenary corporating power in relation to everything within that subject matter, did not inherently exist also there? Without a word expressing it? Without a word restricting it? It is or would be clearly implied. It is part and parcel of the power granted by exclusive authority.

The constitution of the United States of America never gave the Federal Government express authority to incorporate or any wider power than the words "exclusive authority over" * * * "property and civil rights in the province" import. Yet the corporations created by that power have developed extensively. The language of Chief Justice Marshall in the case of *McCulloch* v. *State of Maryland*(1), is so apposite thereto and to what we have in hand that I cannot forbear quoting it:—

> The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. * * * * The power of creating a corporation, though appertaining to sovereignty, is not like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but means by which their objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is therefore perceived why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

(1) 4 Wheaton, 316, at pp. 410, 411.

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The range of authority of a provincial legislature was said in the case of *Hodge* v. *The Queen* (1), at page 132, to be within the limits prescribed by the statute which created it

> an authority as plenary and as ample * * * as the Imperial Parliament in the plentitude of its power possessed and could bestow.

This language is quoted with approval in the recent case of *The Attorney-General of Canada* v. *Cain* (2), at page 547.

This striking language uttered in 1883 and reiterated in 1906 seems to apply to such cases of trading corporations as must be admitted to fall within the lines of the subject matters assigned exclusively to the provinces.

Can effect be given to such language by the creation of a lot of low grade corporations? Is not the very idea that such limited creations were intended, repugnant to this language and the principle it enunciates?

If the Act, without sub-section 11, would have carried with each of the other sub-sections of section 92, where and when needed the power of incorporating, if and so far as corporations might serve any purpose in relation thereto, is there anything in sub-section 11 to restrict that power in the manner now claimed?

I have shewn that the phrase "provincial objects" cannot relate to, or be confined within what its strict literal meaning might require.

It seems difficult and I would have said impossible, but for the contention here set up and heed given to it, to extract from such a phrase any restric-

(1) 9 App. Cas. 117. (2) (1906) A.C. 542.

tive meaning save that involved in distinguishing the subjects exclusively assigned to the provinces, from those assigned to the Dominion as the line of incorporating power given. That restriction may reasonably be found in the phrase. It may even have been one of the purposes of using it, to save possibility of conflict with or embarrassment, in that regard, in the Dominion's exercise of the power of incorporating.

In view of the civil rights and property (which are the essential elements to be controlled in creating any company) within the provinces being *exclusively* assigned to the provinces it might have been but for sub-section 11 said that the Dominion had to look to the provinces for incorporating power to subserve its exercise of its powers.

The exclusive legislative control over property and civil rights in the province is of such a sweeping and comprehensive character that even the final part of section 91 might not have sufficed for its restrictive purpose unless the corporating power of section 92 were thus restricted by something to indicate that when the province undertook to incorporate it should keep to that field that was provincial in its character.

But how does that affect the question of the quality of power inherent in a corporation? Sub-section 11 clearly was pointed at something in the nature of a partition of the sovereign legislative powers between the Dominion and the provinces.

But how could that help in regard to a power that neither of them possessed, neither of them could acquire, neither of them modify, but which either of them might without consulting the other exclude from their corporate creatures the right to exercise? I refer to the power to enjoy rights given by virtue of the comity of nations which I refer to hereafter.

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Such restriction as I have indicated of subject matter is, however, an entirely different thing from a restriction upon the kind of incorporating power that is assigned to the province to give. Why should the provinces be restrained thus in regard to trading corporations needing the use of such power, and in dealing with others of the subject matters assigned to it be not restricted though less urgently needing the power? The phrase is presented by the argument of the appellants' counsel as restricting all provincial corporations to acts within the province. It is said, if I understand the argument, because a province implies a certain territorial area, therefore its objects must be confined within that area, therefore the concerns of any of its people when they become incorporated as a company must not relate to anything of a mercantile or contractual nature that can by any possibility extend beyond the confines of the province. The province has to go abroad to borrow. It may so contract. But none of its creatures dare venture to do so. Its corporate creatures must be of a kind rarely met in the business world, and of little use therein, to their corporators or to anybody else. And no one discovered that restrictive meaning hidden in these words until forty years after their adoption and first use, when the hard necessities of this appeal has arisen. And to be consistent, saving banks, marine hospitals and other corporations for subject matters exclusively assigned to the Dominion, save banks, etc., in sub-section 15 of section 91, may, it is argued, if confined within a province be incorporated by it. I cannot assent to these propositions. To state them is to refute them.

Much as sub-section 11 of section 92 has been dwelt upon in argument, I have come to the conclu-

sion that it is for present purposes after all, if not the least, at all events, not the most important part, of the two sections calling for consideration in the adjudication of this case. The substance of what gives vitality to the incorporating power in question must be sought elsewhere in section 92 and this sub-section 11 is but the confirmation thereof, and an index finger that points the way where we can find the limits of that power.

Some of the other sub-sections might without sub-section 11 confer the incorporating power, but sub-section 11 alone would be hopelessly ineffective in a statute that did not otherwise assign exclusive powers of legislation to a province.

The phrase "provincial objects" as an apt substitute for the old one of "peace, welfare and good government," may, I submit, comprehend the well being of each inhabitant of the province; the promotion of the business prosperity of the inhabitants, or of any number or class of such inhabitants, as a means to the end of that well being; the incorporation of any two or more of such inhabitants, to carry on business, and thus become conducive to the successful development of such desired business prosperity, and hence also, the business of fire insurance. How does all that, however, confer the power on a provincial corporation of contracting abroad? It does not. It merely shews that there are things within the scope of the phrase in one of its natural meanings that so far from restricting the corporate power in the way contended for, demand, if possible, its widest operation. If there is no restriction by virtue of this phrase, there is no doubt of the right of a provincial corporation to contract abroad.

What happens, once the corporation is thus

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created, is, that other provinces and foreign states either by the comity of nations, or perchance, in case of treaty, by force thereof, recognize the existence of such a corporate body as a legal entity, doing the like kind of business for the carrying on of which it was created.

Its contracts are thus recognized, when made beyond, or in relation to property beyond, the bounds of its parent province. It may plead and be impleaded beyond such bounds, as effectually as in its home.

It may, however, by the laws of the foreign province, or state, where it attempts to carry on business, be prohibited in whole, or in part, or conditionally.

The organic law which brings it into being, may also prohibit it from contracting abroad, or impose any limits desired; restricting its power of contracting abroad.

Such limits of a restrictive nature imposed by the parent province or state must be observed. That province or state may, in this regard, disable, but cannot enable. Its express enactment, to enable its corporate creation to carry on business abroad, would be futile.

Once incorporation, for some specific purpose, within the field or sphere of subjects assigned to the exclusive jurisdiction of a province, has been effected, the comity of nations may and generally does all that is required, beyond the province.

This doctrine of the comity of nations, carrying with it, subject to those limitations I have mentioned, this recognition of a foreign corporation, is as firmly embedded in, and an ever growing part of, international law as anything can well be.

Short of treaties, securing a more definite basis, these legal entities, of the greatest nation, and the

humblest province, stand on the same level, and receive but the same sort of recognition from a foreign state.

This comity is but an extension of the earlier recognition of the individual foreigner.

The corporation is but a combination of individuals.

The recognition abroad of either the individual or the corporation, is begotten of the needs of civilized men. The alien individual or corporation formerly had no rights abroad.

The lines upon which recognition now proceeds, doubtless differentiate in the details, applicable to individuals and corporations respectively. Yet, we must never forget, in trying to ascertain the law, in relation to the rights either may have, springing out of what is contracted for, or suffered abroad, and the remedies properly applicable for enforcing such rights that this recognition is subject to many and varying limitations, which have arisen from the needs I have referred to; and grown with the growth thereof.

The lines within which it had, in 1867 or has since become operative, may not be so apparent, as to be easy of definition in every case that arises, and the policy of some states may be backward in that regard. The United States are not. The United Kingdom is not.

Lest it may be said that the present prevalent recognition by a foreign state of the corporate creations of another state did not obtain at the time of the passing of "The British North America Act," I would refer to the case of *Howe Machine Co.* v. *Walker*(1), wherein is to be found the able and exhaustive

(1) 35 U.C.Q.B. 37.

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judgment of the first Chief Justice of this court, then Chief Justice of the Court of Queen's Bench in Ontario.

The judgment was delivered in 1873. It contains a review of all the leading authorities, including that of *Bank of Augusta* v. *Earle*(1), which stands prominently forth in the historical development of the principle, and had been decided in the Supreme Court of the United States in the year 1839.

Principles as well recognized (long before, and immediately after, the enactment of "The British North America Act") as these cases and the respective authorities upon which they rest shew, must have formed part of the common knowledge of the statesmen who framed the Act in question, and the language used must be read in light thereof.

Are we to impute to these men the intention of prohibiting the operation of this principle in regard to provincial corporations? If we can conceive them possessed of such an intention, so fraught with the absurdities I have pointed out, then we must suppose them to have been stricken with a strange poverty of the power of expression.

Assuredly we do not find such intention in the words. The legal implications are all against it.

I venture to add that so much has been done ever since, both by legislators and representative men of business, on the faith of the power of provincial corporations to assert their right to act upon the principle, that if the expression be doubtful in this regard, which I deny, we ought not to accept lightly such disturbing propositions as are here presented to us.

(1) 13 Peters 519.

A distinction was sought to be drawn between the powers of the Dominion Parliament and the provincial legislature, in regard to this status of their corporate creations abroad.

I have not been able to find any reason for such distinction, save that which may spring from the nature of the subject matter over which their respective powers may have such control as to enable either to form a corporate body in respect thereof.

The Dominion Parliament has, by virtue of its exclusive powers, and reservation to it of all powers not expressly conceded to the provinces, impliedly the power of creating corporations within such sphere of action. Many of those possible creations may be extra-provincial or inter-provincial, and thus of necessity, requiring a wider scope than it would be possible for any legislature of a province to confer upon a corporation, even of a like character. Railway and telegraph and ferry company charters exemplify these cases very well, and as each is intra or extra-provincial, so may be their respective powers.

That does not, however, confer, or necessarily imply, relatively greater power beyond the confines of the Dominion, as part of the domain of the Dominion Parliament, in contradistinction to the jurisdiction of the legislature of a province.

Either Dominion or provincial corporation stands upon the same footing in a foreign state.

The proposition of distinction when it goes beyond this, is, I am convinced, destitute not only of judicial authority but also of legal principle to support it.

That which is assigned exclusively either to the domain of the Dominion or province, must in the last resort be measured by the powers of the Dominion or the province respectively over the subject matter so

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assigned, and can only receive recognition to the extent of such respective limitations and not beyond.

Along the line of the history of the comity of nations, ever since the contractual rights of corporations abroad have been recognized, I have not been able to find a single instance in a country where the doctrine prevailed, that any question was raised of the nature of the constating power that created the corporation claiming recognition.

The sole questions are; is it a corporation? Was it given power to carry on this kind of business; to form this kind of contract in question? If so, and given it at home then it is always presumed to be implied as given elsewhere, wherever the comity of nations prevails.

Nor has the recognition abroad and force of that recognition depended on a provision, express or implied, in the charter or Act creating the corporation anticipating its going abroad to do business.

It simply depends on the kind of business it was incorporated to do. If that business can be done abroad as well as at home in addition to or as part of the home business, the right is inherent in the corporation to go there to do it unless recognition there is denied it.

The very word corporation implies and implied in England at the passing of "The British North America Act," a right to trade abroad for the purposes for which the corporation was created, unless restricted, just as much as the words "free citizen" implies in modern times his right to go abroad.

It is not that the comity adds to the power of the corporation as some seem to suggest this theory implies.

It is that any state creating a corporation without restricting its power is supposed to know as a matter of international law that the same kind of business it enables it to do can then legally be done abroad by this creation, in states that choose to accord it recognition.

When statesmen frame a law, its language must be read in light of that international law and unless clearly repugnant thereto or expressly excluding its operation both must be read together.

It becomes more imperative to do so in the case of a piece of legislation that itself is in its fundamental nature akin to what is commonly known as international law. An instrument such as "The British North America Act" is essentially of this character. In attempting as it does to define the relations of former independent provinces, and the relations of these thenceforward, to the inhabitants thereof, and those of each of the others, and of all to the common central power being created, regard ought to be had, and I venture to think, was had, to the former relations between each provincial legislature and the people of its province and the manifold relations of every kind then had with foreign neighbours whether as individuals or as states.

The assignment of residual power to the Dominion instead of to the provinces as in the United States federation suggested the argument that therefore the corporations created by the former have more inherent capacity for foreign business than those created by the provinces.

Yet strangely enough the converse case of the United States has never suggested to any one that the corporate creation of a State had greater power in this regard than the Federal Government.

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In conclusion, I think, that the lowly origin of a provincial corporation is of itself no more reason in law for excluding it from the benefits of international trade than for distinguishing between the rights in the same regard of a Liliputian and a Brobdingnagian freeman and discriminating against the former.

I have tried to confine my reasoning to the single issue of the presumptive right of a provincial corporation, properly constituted, for the purpose of endowing it with the right to execute any one or more of the purposes comprehended in the several subject matters assigned by "The British North America Act" to the exclusive legislative jurisdiction of each of the provinces, to go abroad to do that kind of business it was incorporated to do, so far as permitted by a foreign state.

I am not oblivious of the possibility of many more or less intricate questions arising, before the relations of the Dominion and the provinces and they with each other are finally settled; as to the rights of the corporate creation of either.

I desire to abstain from going further than I think absolutely necessary.

In this case there was no law of Quebec relied upon as prohibitive of its people or corporations contracting in the way these appellants contracted. Invited as their counsel were to press such a point if open, they refrained from doing so.

Nevertheless the contract being as stated already between two corporations domiciled in different provinces, it seems to me it raises the broad issue I have discussed, just as much as if the appellant company had entirely belonged to a foreign State where there existed no prohibitive law against such a contract.

In the 91st number of The Law Quarterly Review at page 296 *et seq.* is to be found the most complete collection I have seen of decisions bearing upon the position of foreign juridical persons in England.

Besides bearing out what I have urged as the law, I notice also the significant statement that to provide for the fulfilment of the several conventions concluded by England with almost every power in Europe for the mutual admission of commercial associations to civil rights, no legislation had been found necessary in England.

The spontaneous operation thus evinced of English law, confirms my impression and argument of there being presumed to be inherent in every corporation created under that law, a capacity to do such business abroad as consistent with the purposes of its creation.

"The British North America Act" ought, therefore, to be interpreted in the light of that and the nature of a corporation to be created thereunder be viewed in accord therewith unless expressly restricted.

I think the appeal should be dismissed with all the costs incurred not only by the respondents, but by the Dominion and provinces taking part in the second argument.

MACLENNAN J.—On the merits of this case as presented and argued in the court below, I agree with the reasons and conclusions of Mr. Justice Osler, delivering the judgment of the Court of Appeal.

When the case came before us an additional argument was made, viz.: that the defendants as a company incorporated under a provincial statute, could

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not insure against a risk on property in the State of Maine, inasmuch as the power of the provincial legislature to incorporate companies is confined to companies with provincial objects. "British North America Act," section 92 (11).

I do not find this objection mentioned or referred to in the courts below, either in the pleadings or proceedings, or in the judgment at the trial, or in the reasons of appeal, or in the judgment of the Court of Appeal, and it is not mentioned or referred to in the appellant's factum in this court.

On the contrary the action is founded on the policy and it is pleaded and relied upon, from first to last, as a valid instrument, and as an instrument which in terms insured the plaintiffs in respect of their losses upon property, in the State of Maine.

It is true that the plaintiffs did plead and contend that if the policy was, as the defendants contended, confined to buildings, etc., and did not cover standing timber, it ought to be held invalid, on the ground of mutual mistake, and that they were in that case entitled to recover the premiums which they had paid. But that is a very different thing from pleading that the policy was void in toto, as *ultra vires,* by reason of "The British North America Act," and of the insured property being in a foreign country.

This new contention is inconsistent with the record, and with all subsequent proceedings down to the argument before us, and for that reason cannot in my opinion have effect given to it, even if we thought it well founded. *The Queen* v. *Poirier* (1), at pages 38-9, and other cases cited in Coutlee's Digest, at pages 118, 119; Cameron's Supreme Court Practice, pages 310-18.

(1) 30 Can. S.C.R. 36.

But if this point be regarded as open, I am of opinion that it cannot prevail.

If the construction contended for of the words "provincial objects" is well founded, then it follows that while an individual or a partnership in Ontario may contract to do many things in a foreign country, a provincial corporation could do none of them; as for instance, the making of promissory notes, or the acceptance of bills of exchange payable in England or France, or in another Canadian province. A business corporation in Ottawa, on that interpretation, could not, unless incorporated by Parliament, make a valid contract for the purchase of goods in Montreal, or Hull; or give promissory notes for the price, payable in either place.

I think such a result as that never could have been intended, and that the words used do not require or admit of such a construction.

I think all that was intended was that as between the Dominion and the provinces the powers of the latter in incorporating companies should be analogous to those of independent countries; and that if a corporation desired to acquire extraordinary rights or powers of any kind, to be exercised in more than one province, those rights and powers must be obtained from Parliament, instead of from the other province or provinces, as would be required to be done in the case of independent countries.

I think the expression *provincial objects* is used in contradistinction to *Dominion objects,* and means no more than this: that just as Parliament in incorporating companies must confine itself to Dominion objects as between the Dominion and other countries, so each province not only as between itself and other countries, but between itself and the provinces, must

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confine itself to provincial objects; and as Parliament cannot empower a company to go into another country and there construct a railway or canal or a telegraph or telephone line, so neither can a provincial legislature confer any such powers on a company incorporated by it. And as a Dominion company, desiring to exercise such powers in Maine or Michigan, must obtain them from those states, so a company desiring to exercise such powers in more than one province must be incorporated by Parliament, instead of being first incorporated by a province and then applying for the required powers to the other province or provinces.

It is not questioned that the defendants were lawfully incorporated, and capable of making lawful and valid contracts of insurance, and their charter contains no limitation or restriction as to the locality or situs of the property to be insured. That being so, I do not see what possible difference it can make where the subject to which the contract relates was situated.

At common law an individual or a partnership could make such contracts, and in such cases it must be clear that the situs of the property is altogether immaterial.

In insuring property in Maine the defendants were not assuming any power or jurisdiction in that country. They simply made a contract with the plaintiffs to pay them a sum of money on a certain event.

The confusion arises from treating the property to which the contract relates as the subject of it, whereas the subject of the contract is the risk, or more exactly, the possible loss, which the assured may happen to suffer by injury to his property by fire. More than a century and a half ago Lord Hardwicke said:

It cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage.

Sadlers Co. v. *Badcock*(1).

And in *Rayner* v. *Preston*(2), Cotton L.J. said the contract of insurance was not a contract, in the event of a fire, to repair the insured buildings, but a contract, in that event, to pay a sum of money which the assured might apply as they thought fit.

At common law, in my opinion, an individual, or a company of individuals, in one country, could insure a person in another country, against loss by fire to property in a third country, and in the absence of legislation, to property anywhere in the world. And I think there is nothing in "The British North America Act" which would prevent an individual or a partnership in any province of the Dominion from making insurance contracts with the same freedom and scope as before, and it would be a strange thing if it were enacted that a company incorporated by a province simply for doing such business should be restricted to property within the province while individuals and partnerships were left free.

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

DUFF J.—The question to be determined on this appeal is whether or not a company incorporated under the authority of a provincial legislature to carry on the business of fire insurance is inherently incapacitated from entering into, outside the boundaries of its province of origin, a valid contract of insurance relating to property also outside those

(1) 2 Atk. 554.

(2) 18 Ch. D. 1 at p. 6.

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limits. For the reasons I shall presently mention I think the answer to this question depends upon the construction of sub-section 11 of section 92 of "The British North America Act" which is in these words: "The incorporation of companies with provincial objects." Admittedly, indeed, the appellant company cannot succeed unless it can make good its contention that no company is within the description "companies with provincial objects" whose constitution permits it to enter into such contracts.

In this sub-section the word "objects" seems to be used in the sense in which it is commonly used in relation to the subject dealt with—the incorporation of companies; the sense in which, for example, it is used in "The Companies Act of 1862" (Imperial); and to denote the purposes for which a company is established, or its undertaking as defined by its constitution. The substantial controversy turns therefore upon the meaning of the word "provincial."

As we are, I think, relieved from the examination of some points elaborately discussed during the argument by a decision of the Judicial Committee, (*Colonial Building and Investment Association* v. *Attorney-General of Quebec*(1)), it will be convenient first to state what I conceive to be the effect of that decision. In the discussion of that topic a preliminary observation or two on the enactments of section 92, relating to the subject of the creation of corporations will, I think, be conducive to clearness. Sub-section 11 of that section, which I have already quoted does not, it is obvious, define exhaustively the legislative authority of the provinces in relation to that

(1) 9 App. Cas. 157.

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subject. The power to create corporations of a special character is plainly, I think, conferred upon them by sub-sections 7 and 8; *Attorney-General of Ontario* v. *Attorney-General of Canada*(1), at page 364. To them is also committed (with certain exceptions) by sub-section 10, legislative control over local works and undertakings; and although not expressly, it may be that—I express no opinion upon it—by a necessary implication, the provinces derive from the sub-section last mentioned (independently of any other provision of section 92) authority to constitute corporations for the purposes of such works and undertakings—including the authority to endow such corporations with such powers as may be necessary or incidental to such purposes. The authority to create corporations for educational purposes is also, I think, implied in the enactments of sec. 93. See *Re Christian Brothers' Schools*(2).

But sub-section 11 professes to deal with the subject of the incorporation of *companies* generally; and in so far as that subject—the creation of that species of corporations which the enactment describes as "companies"—is not encroached upon by the sub-sections (7, 8 and 10) to which I have just referred, nor by sec. 93, sub-section 11 must, I think, be taken to define the powers of the local legislatures in relation to it. There may be other classes of corporations—not within the scope of sub-sections 7, 8 and 10 or of sec. 93—which, as not within the term "companies," are also outside the scope of sub-section 11; ecclesiastical corporations sole for example. With regard to such corporations the province must resort for its legislative authority to sub-section

(1) [1896] A.C. 348.

(2) Cout. Cas. 1.

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13 of section 92 relating to property and civil rights generally, or to sub-section 16 of that section, relating to matters merely local and private within the province. But with respect to the creation of corporations which are "companies" within the meaning of sub-section 11 these last mentioned sub-sections cannot, I think, be resorted to. The authority in relation to the creation of such corporations having been made by the legislature the subject of a special provision of section 92, it would, I think, be a departure from elementary principles of statutory construction, to hold that in relation to that subject, a broader authority is conferred by other more general provisions of the same section.

It is not open to dispute that the defendant company does not belong to any of the classes of corporations assigned to the legislative control of the Dominion, by the enumerative clauses of section 91, or that it is a company of the class which is the subject of legislation in sub-section 11; and consequently, if the view I have just expressed be correct, the measure of legislative authority of the province respecting its status and powers must be found in that sub-section. Of the corporations under discussion in *The Colonial Building and Investment Association* v. *Attorney-General of Quebec*(1) and in the earlier decision therein referred to (*The Citizens Insurance Co.* v. *Parsons*(2)), it may also be said that they were corporations of the species which the Act—in that sub-section—describes as companies; it is to such companies that the observations I shall quote from these cases must I think be taken to be confined, and it is in that sense that I wish the

(1) 9 App. Cas. 157. (2) 7 App. Cas. 96.

word "company," when used in what follows, to be understood.

To come then to *The Colonial Building and Investment Association* v. *Attorney-General of Quebec*(1); the appeal which led to that decision arose out of an action brought in the Province of Quebec in the name of the Attorney-General of that province praying a declaration that the defendant company's "Act of Incorporation" was *ultra vires* of the Dominion Parliament. That Act professes to incorporate the company for the purpose of carrying on various kinds of business and provides (*inter alia*) section 11.

That the chief office of the association shall be in the City of Montreal, and that branch offices or agencies may be established in London, England, in New York, in United States of America, and in any city or town in the Dominion of Canada, for such purposes as the directors may determine, in accordance with the Act, and that bonds, coupons, dividends or other payments of the association may be made payable at any of the said offices or agencies.

Sir Montague E. Smith delivering the judgment of the Judicial Committee said, at page 164:—

Their Lordships cannot doubt that the majority of the court was right in refusing to hold that the association was not lawfully incorporated. Although the observations of this Board in *The Citizens Insurance Co. of Canada* v. *Parsons*, referred to by the Chief Justice, put a hypothetical case by way of illustration only, and cannot be regarded as a decision on the case there supposed, their Lordships adhere to the view then entertained by them as to the respective powers of the Dominion and provincial legislatures in regard to the incorporation of companies.

And at page 165:—

The company was incorporated with powers to carry on its business consisting of various kinds throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers.

(1) 9 App. Cas. 157.

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The observations of the Board in *Citizens Ins. Co.* v. *Parsons*(1), thus made a part of its judgment in *The Colonial Building and Investment Association* v. *Attorney-General of Quebec*(2), indicated very clearly the ground upon which it was held that the incorporation of such a society is within the legislative powers of the Dominion.

> The authority would belong to it (it is said) by its general power over all matters not coming within the class of its subjects assigned exclusively to the legislatures of the provinces and the only subject on this head assigned to the provincial legislatures being the incorporation of companies with provincial objects, it follows that the incorporation of provincial companies for objects other than provincial falls within the general powers of the Parliament of Canada.

This decision then would appear to establish that the words "provincial objects" imply a territorial restriction; and that, by reason of that restriction, incorporated companies (of the species under consideration) which derive their corporate status and powers from a provincial legislature under the authority of sub-section 11 of section 92, are constitutionally incapable of "carrying on their business" (in the sense in which Sir M. E. Smith uses the words) "throughout the Dominion."

This view of the effect of *The Colonial Building and Investment Association* v. *Attorney-General of Quebec*(1) was during the argument assailed on two grounds. First, it was said that the passage I have quoted from the judgment of the Board was a dictum only. This objection is I think without foundation. The subject of the appeal before their Lordships was a judgment of the Court of Queen's Bench containing a declaration that the defendant company had no legal right to act as a cor-

(1) 7 App. Cas. 96 (2) 9 App. Cas. 157.

poration in the Province of Quebec in respect of any of the kinds of business which by its "Act of Incorporation" it was authorized to engage in; a judgment pronounced upon a petition claiming (*inter alia*) a declaration that the "Act of Incorporation" was a nullity as being *ultra vires* of the legislature which had enacted it. Their Lordships allowed the appeal and reversed the judgment. This would hardly have been possible if their Lordships held the view that the legislation was *ultra vires*. It was necessary to consider, and their Lordships accordingly did consider—as a question to be determined for the purpose of arriving at their decision—whether the Dominion Parliament had power to incorporate such a company. They proceeded on a well-settled principle that if the incorporation of such a company were not within the power of the provincial legislatures it must be within the powers of Parliament, and their conclusion was the necessary result of the opinion they expressed that the legislative authority of the provinces does not include the power to incorporate a company endowed with such powers. The judicial committee having selected this as the principle of their judgment, it would hardly seem to be doubtful that we are not entitled to disregard that principle as unnecessary to their decision.

The second ground of attack is that the decision has no bearing upon any question of corporate capacity; that, in other words, the scope of the decision in-so-far as it affects provincial corporations is limited to this—that the law of its province cannot *ex proprio vigore* confer upon a provincial corporation a corporate status or any civil right outside the limits of the province. It is true that the judgment of the Quebec court, while denying it

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the legal right to exercise its corporate powers in that province, acknowledged the legal existence of the corporation. But the judgment of the Judicial Committee, as we have seen, is based expressly upon the proposition that "The Act of Incorporation," which is treated by the Committee as in its essence an Act conferring certain corporate capacities, was *intra vires* of the Dominion Parliament because it was of such a character as to be *ultra vires* of a province. This "Act of Incorporation," so held to be beyond the legislative powers of a province, is thus described in the judgment, at page 166:—

> What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz.: throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of Incorporation gives it capacity to do so.

Hence I conclude that the last mentioned objection is untenable also.

It is, however, important not to attribute to the language of the Judicial Committee a meaning more far reaching than that which it fairly conveys. And I do not think we can deduce from the judgment any broader principle than this—that a company authorized by its constitution to establish itself in any or all of the provinces of the Dominion, and in any of those provinces to carry on the whole of its business or as much of it as it shall see fit, is not a company of the class to which the authority of the provincial legislatures, under the sub-section referred to, (No. 11), can be held to extend. The company, whose Act of Incorporation was

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under consideration, was, as we have seen, endowed with just such powers, and it was with reference to those powers that the expressions were used which I have quoted from the judgment. Those expressions must therefore be read and construed with reference to that circumstance. We are not to seize upon the statement that only companies incorporated by the Parliament of Canada have the capacity to carry on their business throughout the Dominion, detach it from its context, from the subject matter under discussion, and imputing to it the broadest signification which it will bear, give effect to it in that sense as expounding a binding rule of law. Some observations made by Lord Herschell in the course of the argument in *Attorney-General of Ontario* v. *Attorney-General of Canada* (1), are so apt here that (although not authoritative) I take the liberty of quoting them.

> The language that this Board used is used *secundum subjectam materiem*, and to detach a phrase that in a concrete case is used with reference to a particular matter, and which it may be perfectly proper to treat in that way, as a sort of phrase that determines something with reference to another matter, I rather protest against.

(See the stenographer's note of the argument on the "Liquor Prohibition Appeal," page 239.)

It would, I think, be a misapplication of the passages I have quoted from their Lordships' judgment to treat them as decisive of the question whether an insurance company incorporated by a provincial legislature can by an agent enter into a valid contract of insurance outside the boundaries of its province. Their Lordships had before them no such question. The actual decision was that Parliament only can endow a company with capacity to carry on its busi-

(1) [1896] A.C. 348.

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ness throughout the Dominion in the unlimited way I have just described. And it is in that sense and in that sense only, I think, that the phrase "carry on its business" is used by Sir M. E. Smith in the passages I have quoted.

It may be material to observe that the use of that phrase with reference to a given area as implying the maintenance of a fixed place of business within that area is a use very familiar to lawyers. It is commonly said, for example, that corporations carrying on business in England are subject to service of process as persons within the jurisdiction. Eminent judges have said that in such cases the test of liability to service is the answer to the question; Does it carry on its business in England? (See *Haggin* v. *Comptoir D'Escompte De Paris*(1), at page 522, per Cotton L.J.; *L'Honeux, Limon & Co.* v. *Hong Kong and Shanghai Banking Corporation* (2), at page 448, per Bacon V. C.)

Everybody knows that by this language is meant, that the liability to service depends upon the result of the inquiry whether the corporation is resident, in the only way in which it can be resident, by having within the jurisdiction a fixed place at which it carries on its own business. See *"La Bourgogne"*(3). And in a case recently decided in this court an Ontario company which consigned its goods to a dealer in Halifax who, under his agreement had the sole right to sell them as the agent of the company and did sell them as such, but did this in the course of carrying on his own business and as a part of it, was held not thereby to be "doing busi-

(1) 23 Q.B.D. 519. (2) 33 Ch. D. 446.
(3) [1899] A.C. 431.

ness" in Halifax within the meaning of the statute authorizing the Municipal Council to impose license fees. See *City of Halifax* v. *McLaughlin Carriage Co.* (1).

The company whose powers are in question on this appeal was incorporated under the authority of the Legislature of Ontario, and is not by its constitution expressly empowered or forbidden to engage in business beyond the boundaries of that province; and it is therefore subject in that regard only to the disabilities affecting it, *ipso facto,* as a corporation owing its existence to a provincial legislature.

To support the validity of the contract in question it is not necessary to maintain the view that such a company is permitted to carry on business throughout the Dominion in the manner authorized by the constitution of The Colonial Building Society; it is not even necessary to hold that such a company may maintain any fixed place of business without the Province of Ontario or in any manner establish itself outside that province. It is sufficient if, given that as a provincial corporation it is disabled from so carrying on its business or maintaining any such fixed place of business, and that as such a corporation it is, as to its local habitation, confined to the province where it originated—it is sufficient if such a corporation so disabled and confined may nevertheless be empowered to enter into such a contract of insurance abroad without thereby becoming excluded from the class of corporations described by sub-section 11 as "company with provincial objects."

The characteristic "provincial" which is to mark the objects of such a company is not necessarily, I

(1) 39 Can. S.C.R. 174.

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think, to be found in every act or transaction of the company—but in the undertaking of the company viewed as a whole. If the company is one formed for gain, then the "objects of the company" is only another expression for the business of the company—the business by means of which the company, under its constitution, is permitted to acquire that gain; and the question;—Are such and such objects—regarded as the objects of a "company" as these words are used in sub-section 11—"provincial objects" ? is another form of the question;—Would the business of a company constituted with such objects, regarded as a whole, fairly come within the description "provincial"? If, taken as a whole, a given undertaking would fall within the description "provincial," I do not know on what ground one could challenge the competence of the legislature to constitute a company having such an undertaking, or to invest its creature with such capacities and faculties as it should see fit—not of course incompatible with the character of its undertaking as a provincial undertaking.

There is I think a very real distinction between a company whose undertaking is limited in the manner I have indicated and a Dominion company having power to establish itself and conduct its business to any extent in any one or more of the provinces it may select. And the distinction is important in two aspects. It affects not only the company and the shareholders or corporators of it. The constitution and powers of such a corporation might well be regarded as constituting a single subject of Dominion concern which would be fitly reserved as a subject of legislation to the Dominion. It may well too have been thought that the legislative control of Canadian com-

panies having authority without restriction to carry on business abroad, should for the same reason be a single control vested in the Dominion. Not only is the undertaking of such a company outside the description "provincial" in the territorial sense, but I find it difficult to fasten upon any characteristic of such a company appertaining to its corporate capacity which permits the application of that description.

On the other hand, the constitution and powers of a corporation restricted as to its residence or places of business to one province are mainly the concern of that province; and it seems impossible to find any ground upon which to deny the character "provincial" to such a company, confined in its administration and as to its residence to the province of its origin; elsewhere always a foreigner and a non-resident foreigner; whose business in fact originates in that province and as an organization must always be in substance a "provincial" undertaking—and such a company seems, consequently, to satisfy the description "company with provincial objects."

If I am right in this view, it is plain that the power to incorporate such a company resides in the province; and it is a question for the legislature creating it whether any and what restrictions shall be imposed upon it respecting the places where its contracts may be entered into. Sub-section 11 does not in terms touch that subject; and to read the word "provincial" as imposing a limitation respecting it is I think unnecessarily, and therefore wrongly, to enlarge the application of that word.

The opposite view—which Mr. Ewart in his supplementary factum abandoned—the view that a provincial company cannot in the prosecution of its undertaking enter into contracts abroad leads to results

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which I think it is most unlikely that the framers of "The Confederation Act" could have contemplated. As regards a very numerous class of such companies, hitherto in Canada, in the vast majority of cases, incorporated under the authority of provincial legislatures—companies I mean engaged in mercantile business—the results may fairly be summed by saying that this view would, for practical purposes, so curtail the powers of the provinces with respect to the incorporation of such companies as to deprive the exercise of that power almost wholly of any practical utility. The charter of a mercantile company handicapped by its incapacity to contract abroad either for buying or selling would, I should think, seldom be worth the cost of obtaining it. Certainly any form of association known to result in such disabilities would rarely be resorted to by persons engaging in mercantile enterprises. In point of fact it is well known that a very considerable part of the internal trade of the Dominion is carried on by companies organized under "The General Companies Acts" of the various provinces; and when one considers the circumstances in which "The Confederation Act" was passed it is difficult to believe that this is contrary to the intentions of the authors of that Act. It is to be remembered that that Act provided not only for the union of the four original provinces but for the entry into the Union of British Columbia, Prince Edward Island and Newfoundland. Having regard to the remote situation of the first and last of those colonies with the relation to the seat of the Government of the Dominion and recalling the imperfect means of communication it seems unlikely that Parliament intended, while conferring the power to create companies,

to deprive the legislatures of provinces so situated of authority to constitute corporations having full power to carry on business of an ordinary mercantile or commercial character in the ordinary way. If that authority was withheld, one naturally asks why a power which it was thought worth while to confer upon the provinces in any degree was so limited as to be for practical purposes so largely futile?

For the reasons I have given I do not think that the language of the clause in question effects such a limitation.

Nor do I think there is any sufficient reason for holding that a provincial insurance company is inherently incapable of engaging in contracts of insurance relating to extra provincial property. The contract of fire insurance is a contract of indemnity under which one party assumes an obligation to pay a sum of money on the happening of a specified event. The fact that the event so specified in some of the contracts of such a corporation will happen if it happen at all outside the province where its business is carried on is a circumstance which does not, I think, for the purpose in hand, determine the essential character of that business—the character, that is to say, of the objects of the corporation as "provincial" or non-provincial within the meaning of subsection 11. To test the point let us assume a corporation empowered to make contracts of insurance within the province of its origin only. That this is a fair test is not denied. Indeed on the second argument it was candidly conceded by Mr. Ewart that he must in order to succeed on this branch of his argument maintain that such a contract, wherever made, is *ultra vires* of a provincial company. Now it seems to me too clear for argument that the business of such a cor-

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poration is aptly described as provincial. Can it be said that such a business suffers a loss of its provincial character in cases where by the constitution of the corporation such contracts may relate to property not within the province? If so it must be upon the principle that in determining the character of a company's undertaking for this purpose you are to ascertain as the governing factor in the inquiry whether the company may in the prosecution of its undertaking engage in contracts under which its rights or its liabilities depend upon the happening of an event outside the province; for it is obvious that no sensible distinction can in this regard be drawn between rights and liabilities. That I cannot accept because, as I have already said, you are for this purpose to look at the character of the undertaking as a whole. And the practical results of this view, I think, condemn it. Consistently with it, no provincial life insurance company could insure against a death, no accident company against an accident occurring outside the province; a similar disability would attach to companies carrying on the business of marine insurance. In effect no provincial company could engage in the business of life, accident or marine insurance except upon conditions which would in practice make it impossible or almost impossible for it to obtain any business to do. The results become more startling still when one attempts to apply such a rule to companies engaged in trading, shipping or financial business.

The contention has, moreover, no support from authority. In the case of *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*(1), an insurance company incor-

(1) (1903) A.C. 59.

porated under the legislation of the Province of Quebec, sought to resist a claim under one of its policies relating to property in Toronto on the ground that such a policy was *ultra vires*. The Court of Queen's Bench, though dismissing the action on another ground, rejected this defence. On appeal to the Privy Council, where the plaintiffs succeeded, the defence does not appear to have been abandoned; but is referred to apparently in the judgment of the Privy Council as one of a number of defences not "seriously argued at the bar." Conceding that this case ought not upon this point to be regarded as a decision of the Privy Council, it would at least seem that the eminent counsel who appeared for the insurance company did not think it worth while seriously to challenge the view of the Quebec courts upon it; and it is obvious that the action must have been dismissed if the defence could have been maintained. This seems to be the only case in which the point has ever been raised.

Appeal dismissed with costs.

Solicitor for the appellants: *Angus MacMurchy.*

Solicitors for the respondents: *Hogg & Magee.*

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*Oct. 23.
*Dec. 13.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS). } APPELLANTS;

AND

HIS MAJESTY THE KING, EX REL. EDWARD JOHN KEAYS..... } RESPONDENT.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS).. } APPELLANTS;

AND

HIS MAJESTY THE KING, EX REL. T. R. D. BOTTELEY..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Railways—Constitutional law—Legislative jurisdiction—Application of statute—"The Prairie Fires Ordinance"—Con. Ord. N.W.T. (1898) *c.* 87, *s.* 2—*N.W.T. Ord.* 1903, *c.* 25 (1*st sess.*) *and c.* 30 (2*nd sess.*)—*Works controlled by Parliament—Operation of Dominion Railway.*

The provisions of section 2, sub-section (2), of chapter 87, Con. Ord. N.W.T. (1898), as amended by the N.W.T. Ordinances, chapter 25 (1st sess.) and chapter 30 (2nd sess.) of 1903, in so far as they relate to fires caused by the escape of sparks, etc., from railway locomotives, constitute "railway legislation," strictly so-called, and, as such, are beyond the competence of the Legislature of the North-West Territories. *The Canadian Pacific Railway Co.* v. *The Parish of Notre Dame de Bonsecours* ([1899] A.C. 367) and *Madden* v. *The Nelson and Fort Sheppard Railway Co.* ([1899] A.C. 626) referred to.

The judgments appealed from were reversed, Idington J. dissenting.

APPEALS from judgments of the Supreme Court of the North-West Territories, discharging orders *nisi* for writs of certiorari to remove and quash convic-

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

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tions against the railway company for unlawfully kindling prairie fires, at or near Mortlach and Ernfold, respectively, in the Province of Saskatchewan, contrary to the provisions of "The Prairie Fires Ordinance" as amended.

The principal questions at issue on the appeals were as to the application of the provisions of "The Prairie Fires Ordinance," in respect to kindling fires on prairies and the construction of fire-guards, to railways subject to the control of the Parliament of Canada.

Wallace Nesbitt K.C. and *Beattie* for the appellants.

Ford K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—The subjects of these appeals are judgments of the Supreme Court of the North-West Territories discharging two rules *nisi* for writs of certiorari for the purpose of quashing convictions against the appellant company under section 2 of chapter 87 of the "Consolidated Ordinances" of those Territories as amended in the year 1903. This section so amended enacts as follows:

> 2. Any person who shall either directly or indirectly, personally or through any servant, employee or agent—
>
> (*a*) Kindle a fire and let it run at large on any land not his own property;
>
> * * * *
>
> shall be guilty of an offence and shall on summary conviction thereof be liable to a penalty of not less than $25 and not more than $200 and in addition to such penalty shall be liable to civil action for damages at the suit of any person whose property has been injured or destroyed by any such fire.

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(2) If a fire shall be caused by the escape of sparks or any other matter from any engine or other thing it shall be deemed to have been kindled by the person in charge or who should be in charge of such engine or other thing but such person or his employer shall not be liable to the penalties imposed by this section, if, in the case of stationary engines, the precautions required by section 12 have been complied with and there has been no negligence in any other respect, or in the case of railway or other locomotive engines such engine is equipped with a suitable smoke stack netting and ash pan netting in good repair and kept closed and in proper place and in the case of railway engines where the line of railway passes through prairie country there is maintained for a distance of at least three miles continuously in each direction from the point at which the fire starts on each side of such line of railway and not less than two hundred or more than four hundred feet therefrom a good and sufficient fire-guard of ploughed land not less than sixteen feet in width kept free from weeds and other inflammable matter and the space between such fire-guard and such line of railway is kept burned or otherwise freed from the danger of spreading fire and there has been no negligence in any other respect.

(3) For the purpose of ploughing any fire-guard as in the next preceding sub-section provided and of freeing from inflammable matter the land between such fire-guard and the line of railway any railway company is hereby authorized to enter upon any uncultivated or unoccupied land without incurring any liability therefor provided that no unnecessary damage shall be done.

An objection in the nature of an objection *in limine* which was raised on behalf of the Crown can be more conveniently dealt with after discussing the substantial question presented by the appeal.

That question is: Was the Legislature of the North-West Territories competent to pass the enactments of sub-section 2 in so far as they relate to fires caused by the escape of sparks from railway locomotives?

It must, I think, be answered in a sense favourable to the contention of the appellant company on the short ground that the enactment of legislation professing to regulate a Dominion railway *quâ* railway was *ultra vires* of a Legislature, whose powers, it is conceded, were not greater than those of the legislature of a province. That such legislation is by

the combined effect of sub-section 29, of section 91, and of sub-section 10, of section 92, of the "British North America Act, 1867," *ultra vires* of a province is, I conceive, not open to dispute. In *The Canadian Pacific Railway Co.* v. *The Parish of Notre Dame de Bonsecours*(1), at pages 372 and 373, Lord Watson, speaking for the Judicial Committee, used these words:

> The British North America Act whilst it gives the legislative control of the appellants' railway *quâ* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive rights to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so-called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament. It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers.

The principle thus enunciated was applied by the Judicial Committee in the subsequent case of *Madden* v. *Nelson and Fort Sheppard Railway Co.*(2), at page 628.

The real controversy is, therefore, whether or not the legislation in question falls within the category of "railway legislation" strictly so-called. It is argued that as the aim of the ordinance is not the regulation of railways, but the preven-

(1) [1899] A.C. 367.

(2) [1899] A.C. 626.

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tion of prairie fires, it cannot justly be described as "railway legislation." Having regard to the immediate purpose and effect of the enactment it is, I think, not very profitable to dwell upon the ultimate aim of the legislature in passing it. Obviously those parts of it which especially apply to railways—those that is to say with which we are here concerned—were designed with the object of preventing the spread of fire in consequence of the emission of sparks from locomotive engines. But if the legislature has sought to attain this end by passing measures applicable to Dominion railways, which if effective would in substance be "railway legislation," that was plainly, under the authorities referred to, in excess of its powers.

It cannot be disputed that the sub-section in question was intended to and does apply to Dominion railways. The legislative authority of the Legislature of the North-West Territories relating to railways, as such, extended to no railways but street railways and tramways, and having regard to the objects of the ordinance, it is plain that the scope of the term "railways" as used in it cannot be so narrowed as to exclude railways outside those classes.

What then is it that the legislature has enacted respecting Dominion railways?

The section quoted creates an offence which is made up of two elements; the kindling a fire and the letting it run at large on land not the property of the person kindling it. Whether, to constitute the offence, the kindling must be upon such land is immaterial. It is at all events clear that the offence is constituted if it is upon such land that the kindling and the letting the fire run at large both take place. Then the

section proceeds to enact in effect that where a fire is caused by the escape of sparks from a locomotive engine it shall be deemed to be kindled by the person in charge or who should have been in charge of the locomotive; that is to say (where the locomotive is on a railway), by the railway company. The net result of these provisions as they effect a Dominion railway company is, that if by the escape of sparks from a locomotive on its line a fire is caused on land not its own and it allows that fire to run at large upon such land, such a company is guilty of an offence, punishable in the manner prescribed by the ordinance.

But the ordinance proceeds to provide a possible defence for railway companies; and it declares that no railway company shall, although a fire has been caused by such an escape of sparks, be subject to any of the penalties imposed by the section if such company shall shew that the locomotive was supplied with certain specified appliances; that (where the fire has occurred in a "prairie country") the land adjoining the railway line was protected by fire-guards of a prescribed character on both sides of the line at a prescribed distance from it; and that there was no other negligence.

Now it will not, I suppose, be doubted that in the absence of negligence or the breach of some specific duty the fact that a fire is caused by the escape of sparks from a locomotive engine in the course of the normal operation of a railway under the authority of Parliament does not render those responsible for the operation of it liable to legal proceedings as for a wrongful or unlawful act.

They are in such circumstances not so liable because they have done nothing wrongful or unlawful;

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and in the case of a fire so caused occurring upon land which is not their property there can plainly, apart from some special enactment, be no duty incumbent upon them to prevent it running at large. Since there is no Dominion enactment imposing such a duty upon companies operating railways under the legislative control of the Dominion it would appear to follow that legislation by a province professing (in the absence of negligence or the breach of some duty imposed by competent authority) to subject such companies to an obligation to prevent the spread of such fires is, as plainly repugnant to the law of Canada permitting the use of steam locomotives upon such railways, *ultra vires*. And, subject to the effect of the provisions relating to the defences which I have just mentioned, that seems very clearly to be what, on its fair construction, the ordinance in question enacts.

What then is the effect of these last mentioned provisions? Obviously a company having failed to prevent such a fire, occurring in a prairie country, from running at large could not under those provisions escape the penalty imposed by satisfying the tribunal of the faultlessness of its equipment or even by going further and satisfying the tribunal of the entire absence of all negligence in the operation of its line; it must, in order to avail itself of the defence afforded by the ordinance, having shewn these things, still shew, in addition, that it had maintained fire-guards of the character described.

In effect, that is to say, the failure to maintain such fire-guards coupled with the failure to do something which the legislature was incompetent to require it to do is made (in the case of a fire arising without blame on the part of the company from the lawful use of equipments sanctioned by law) to consti-

tute on its part a punishable offence. I own that such an enactment appears very plainly to me to be an enactment prescribing the maintenance of such fire-guards as adjuncts to Dominion railway lines as a condition of the lawful operation of them in the localities to which it applies; and, therefore, to be an enactment professing to regulate the working (if not the construction) of such lines; and, consequently, to be within Lord Watson's words "railway legislation strictly so-called" as used by him in the passage I have quoted.

The provision relating to appliances for locomotives is, I think, affected by the same vice; and an examination of the provision relating to "other negligence" is, I think, unnecessary. The ordinance authorizes a single defence comprising three elements. It is impossible to eliminate from that defence the requirements relating to fire-guards or to the equipment of locomotives without wholly altering the character of the defence and substituting for that authorized by the legislature one which the legislature has not authorized. That is in effect to substitute for the enactment which the legislature has passed something to which it has not given its sanction and to give effect to this latter as the law of the land—not, I think, a course which a court of law can legitimately take.

These considerations would seem also to meet the objection mentioned at the outset. In substance it was argued that, eliminating as *ultra vires* the provisions of the ordinance prescribing regulations upon the subjects of locomotives and fire-guards, the remains of the enactment (that is of sub-section 2), are sufficient to support the conviction. In the view I have just expressed this objection must obviously fail. Another possible objection not taken before us or in

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the court below, ought perhaps to be noticed. The conviction, being a conviction under the leading enactment of section 2, does not, it might be argued, at all depend upon sub-section 2 for its validity; and cannot, therefore, be invalidated as a result of the conclusion that the provisions of that sub-section relating to railways are inoperative. Since, however, there is an entire absence of the particularity required by law from both the information and the conviction, *Smith* v. *Moody* (1), we must, I think, before giving effect to such an objection, look at the proceedings to ascertain whether there was before the magistrate any charge or any evidence of an offence of which the appellants could be legally convicted. He could not legally convict them of an offence or legally try them upon a charge under an *ultra vires* enactment; and, the proceedings shew plainly, that not only there was no evidence of an offence other than an offence under sub-section 2, but, that, otherwise than under it, no charge was, in point of fact, either tried or preferred.

IDINGTON J. (dissenting).—These are two appeals from the judgments of the Supreme Court of the North-West Territories, dismissing motions to make absolute rules *nisi* for writs of certiorari for the purpose of quashing convictions of the appellants for breaches of the Prairie Fires Ordinance of the said Territories as amended by the addition of sub-section 2, in the first session of 1903, and sub-section 3, in the second session of the same year, and of which the material parts are set out below.

By section 39 of the "Supreme Court Act," we are given jurisdiction to hear an appeal from the

(1) (1903) 1 K.B. 56.

judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari,* etc. * * * not arising out of a criminal charge.

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I assume, for the reasons hereafter appearing as incident to the main argument, the nature of these regulations is such that they are not an invasion of the field of criminal law.

The writ of certiorari issues, unless when applied for by the Crown, only in the discretion of the court. If the writ has been refused in the exercise of the judicial discretion of the court section 45 of the same Act denies the right of appeal.

If we assume that the judgment was not an exercise of judicial discretion, though it might be said of necessity to be such, and then proceed to consider the appeal, we are confined to ascertaining whether or not on the law and facts the magistrate had jurisdiction to convict. If *ultra vires* legislation has been found side by side with that *intra vires* and the latter suffice to maintain, on the facts, jurisdiction, we cannot because erroneous views were put before the magistrates, or the court below needlessly gave a wrong reason, quash the conviction. This is not the possible case of a magistrate failing to weigh the evidence because of his sole reliance on an *ultra vires* provision.

The judgment of the court below is right (though some reasons may or may not be erroneous) if the magistrates had jurisdiction to try the charge. The case of *The Colonial Bank of Australasia* v. *Willan* (1), has long been the ruling case upon the subject. Assuming the law to be as expressed at pages 442 *et seq.* thereof, or even going so far as in the Ontario cases cited to us, to look at the evidence to find if any in support of the conviction, we are confined here to very narrow ground.

(1) L.R. 5 P.C. 417.

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If we can conclude as a matter of law that a railway company incorporated by the Dominion Parliament, pursuant to the powers about to be referred to, is entirely free from liability to submit to anything a local legislature by its enactments may prohibit, and fix a penalty for breach of, then the objection to the magistrate's jurisdiction, involved in these motions, may be arguable.

The real questions the appellants desire us to solve may not be involved in this proposition, but they can only be solved in the appellants' favour on this appeal, in case we can so determine.

I propose therefore to consider the case from that fundamental point of view. The ordinances in question are as follows, and the information is laid, and conviction is, under the original section 2, though argument was addressed to us as to the amendments only:

2. Any person who shall either directly or indirectly, personally or through any servant, employee or agent—(*a*) kindle a fire and let it run at large on any land not his own property; * * * shall, be guilty of an offence and shall on summary conviction thereof be liable to a penalty of not less than $25 and not more than $200 and in addition to such penalty shall be liable to civil action for damages at the suit of any person whose property has been injured or destroyed by such fire.

(2) If a fire shall be caused by the escape of sparks or any other matter from an engine or other thing it shall be deemed to have been kindled by the person in charge or who should be in charge of such engine or other thing but such person or his employee shall not be liable to the penalties imposed by this section if in the case of stationary engines the precautions required by section 12 have been complied with and there has been no negligence in any other respect, or in the case of railway or other locomotive engines such engine is equipped with a suitable smoke stack netting and ash pan netting in good repair and kept closed and in proper place and in the case of railway engines where the line of railway passes through prairie country there is maintained for a distance of at least three miles continuously in each direction from the point at which the fire starts on each side of such line of railway and not less than two hundred nor more than four hundred feet therefrom a good

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and sufficient fire-guard of ploughed land not less than sixteen feet in width kept free from weeds and other inflammable matter and the space between such fire-guards and such line of railway is kept burned or otherwise freed from the danger of spreading fire and there has been no negligence in any other respect.

(3) For the purpose of ploughing any fire-guard as in the next preceding sub-section provided and of freeing from inflammable matter the land between such fire-guard and the line of railway any railway company is hereby authorized to enter upon any uncultivated or unoccupied land without incurring any liability therefor provided that no unnecessary damage shall be done.

The first question raised by these enactments is as to the power of a local legislature to impose such penalties as are provided for by section 2 as it originally stood.

This power, if it exist, rests upon section 92, sub-section 15, of the "British North America Act, 1867," operating within the scope of sub-section 16.

If anything in physical conditions confined to or peculiar to a province constitutes any matter, one of a local nature, within the meaning of this sub-section 16, then the danger from prairie fires, (so destructive and so little understood elsewhere in Canada, than in the prairie provinces), surely is one of and needs the application of some legal provisions of a local character, to provide and protect against such dangers.

This was not in itself questioned in argument. It was argued, however, in general terms that this legislation was *ultra vires*. In section 2 as it stood originally there would seem to have been, unless (for the present at all events assumed not to be), trenching upon criminal jurisdiction, an unassailable enactment; and the amending sub-sections 2 and 3, if properly applied and limited to such acts and parties as would be amenable to provincial legislation seem equally unassailable.

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It was contended, however, that the appellants were, by reason of their incorporation, within the exclusive powers of the Dominion, by virtue of sub-section (*a*) of sub-section 10, of section 92, and section 91, sub-section 29, of the said Act to build and run a line of railway propelled by steam power, freed from any obligation to observe any legislation, on the part of the local legislature, upon the subject of prairie fires.

Is this broad proposition tenable? If not how far is such a railway company free from anything a local legislature can enact?

It cannot disregard any of the license laws of a province, or by-laws of a municipality created by, and so empowered by, a province to pass such by-laws. At least none of such companies have tried to do so, as yet.

Can it disregard, so as to endanger the existence of towns or of great cities, the ordinary fire limits by-laws thereof, prohibiting the erection, within such limits, of buildings, of forbidden inflammable materials?

Can it refuse to submit to the inspection by municipal or provincial authorities, acting within the meaning of mere municipal regulations in that regard, of the chimneys in its buildings?

Can it refuse to conform to the public health requirements demanded by pressing need, to prevent the spread of disease merely because these requirements have been enacted, as they usually are, by local legislatures or some local body constituted by a local legislature for the purpose?

In a word, can it, in the negligent doing of the work of building and running or both, befoul the streams, pollute the air, endanger life and property

and destroy everything in its path, regardless of all those local regulations that bind every person and every other corporate body in a province?

Is it a sufficient plea, in answer to such acts and breaches of local regulations, that it has had conferred upon it by the Dominion the corporate power to build a line of railway?

Could an individual, so empowered, so escape? It is quite competent for the Dominion Parliament to confer upon a single individual the power of building any such railways as in question. What greater rights than any one else could he have, apart from those he might be specifically endowed with, for that purpose? What exemptions from the common burthens can his property, when he has thus acquired it, have, or he from the duties of citizenship, incidental to such ownership, unless such exceptions are expressly given or are necessarily incidental to the due exercise of the powers given him?

If a person or corporation so authorized to construct and run a railway can do none of these several, locally forbidden, things, how can he or it rightfully kindle fire by means of improperly running an engine that is built and run, quite regardless of any care in structure or handling, to provide against such escape of fire, and kindling of fire, as must inevitably follow its use in such a way?

If he or it run a road in such a manner surely the power the Dominion has conferred has been exceeded.

Can it be said, in the absence of any regulation of the Dominion, express or implied, that one so far exceeding the express powers given and so acting has, in some implied way, the high authority of the Dominion Parliament to sanction such acts?

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In the absence of such sanction how can it be said that such conduct, when carried on within a province, is entirely beyond its legislative control? That without legislative sanction of any sort, such a person or such a corporation, merely by reason of a limited authority given, can run riot and do that which no one else can do is rather a broad proposition.

It seems to me, all to resolve itself into a question of the right of the local legislature to enact laws, tending to protect property against the dangers of a local nature, arising from that negligence which the Dominion Parliament never sanctioned nor intended to sanction nor legislated as to.

Can it be said that because the Dominion has entirely omitted (and I think its delegation of power in that regard until acted on leaves it omitted) any provision in the way of regulating such a mode of exercise of power, it has conferred a right to indulge in unqualified recklessness? Or can it be said that though it has not done so, yet there never can be any legislative effort made elsewhere to prevent such wrong?

Must it be taken that the right of action each sufferer may or must as a legal result have for the damages sustained be the only legal remedy against such a state of things?

I think not, and that unquestionably the acts of a local legislature properly providing due and reasonable means for the preservation of property, in the province, from fire, are within the scope of sub-section 16, and in the absence of any legislation by the Dominion Parliament, are enforceable to punish offenders, personal or corporate, that may by his or its, *unauthorized acts,* endanger such property.

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The negligent setting of fire on the part of a railway run by Dominion authority and *letting it run at large,* which is the gist of the offence, would be in excess of its power and thus unlawful and has not any colour of Dominion sanction.

The accused in order to meet these charges had only to come into court and say that what was done, and is charged, was done by virtue of this high authority, and acting within it, and prove such fact and claim discharge.

Do the recognized exceptions of the ordinance attempt to prevent that? To my mind clearly not.

The issues raised were much and needlessly obscured by confusing the validity of the legislation itself which may be *intra vires* as to almost every line of it properly applied; with the persons or corporations to which it might be applicable in given circumstances, and the different ways in which they might come within its range so far as to render them respectively amenable to the several provisions.

I think section 2 as it originally stood is quite wide enough, when due regard is had to the word "indirectly" (and so reading it as necessarily including negligently), to cover such an offence as is charged against the appellants herein.

The word "indirectly" can indeed hardly have any meaning here unless so read.

It comes then, thus looked at, to a question of the onus of proof at the trial. Can we say that such onus is by any general principle of law made to rest upon him who accuses a railway company of a breach of law to shew that it was beyond all peradventure of excuse or justification, and anticipate the defence possibly existing under the same or another Act, or

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must not the matter stand as in all other cases that where men *primâ facie* are made to appear, to have offended against law, they must plead and prove such justification or excuse as law and fact may give.

It seems to me the *primâ facie* case was made when the company's servant in the course of his employment dropped the coal or hot cinders that kindled the fire which was neglected and that by neglect was let run at large on land not the company's own; and it then devolved on the company to excuse or justify.

And I am of opinion that, whilst it may be optional for a Dominion railway company to avail itself of the exculpatory part of the amending sub-sections and the powers given thereby, there is nothing in them commanding this Dominion railway company or any other railway company to rely for its justification or exculpation on these sub-sections or any of them.

To imply otherwise, as to these sub-sections, is to read into them what is not expressed and what would not be imputed to them if used by a sovereign legislature whose powers were unlimited upon trial of a charge laid thereunder for breach thereof.

Try to frame an indictment on such a supposed Act, and charge that the accused had run an engine without a smoke stack equipped as mentioned; and another count that the company had not constructed fire-guards yet had run engines on its road; and another count combining both such offences.

Could such an indictment escape being quashed as to every count?

Or try an indictment thereon for setting a fire by means of so running an engine without a proper smoke stack and without fire-guard and without other negligence.

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The combination would be fatal.

Assuming an indictment on such a statute, maintainable by alleging the substance of the offence, and accompanying that with an allegation of such a specific act of negligence as the defective smoke stack or want of fire-guard how could it be claimed that in the absence of offence in regard to defective smoke stacks or want of fire-guard, the accusation of some other offence, for some form of negligence, other than and in the absence of either of these, would not lie? Thus we are brought back face to face with and cannot escape the broad question of negligence.

That negligence which I find within section 2 remains also within sub-section 2 as well, when, as here and thus, the moot questions are eliminated.

A by-law may be attacked by impeaching a conviction thereunder, but because some of its provisions are *ultra vires* that would not render the whole void, or conviction bad, if a severable part applicable to the offence could be upheld.

Revenue laws have been found impracticable of uniform application, when sometimes some persons or things and not others, come within their respective range, as the cases of *Thomson* v. *Advocate General* (1842) (1); *Blackwood* v. *The Queen* (1882) (2), and others cited in Hardcastle's chapter on "Territorial effect of Statutes," illustrate.

In English law we cannot easily find many apt illustrations arising from the need of differentiating in this way so as to apply distributively the words of a statute to meet varying conditions of person or things or places.

(1) 12 Cl. & F. 1. (2) 8 App. Cas. 82.

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Sutherland on Statutory Construction (2 ed.), in chapter 9, on "Statutes void in part" is replete with that class, of American cases, forming partial illustrations and some strikingly in point as at pages 584 *et seq.*

English law when extended to a colony and superseding some local law of the colony no doubt would raise the same sort of question which also must continually arise under the "British North America Act, 1867," as interpreted in the case of *The Attorney-General of Ontario* v. *The Attorney-General for Canada.*(1)

What may be *intra vires* to-day may in its application to or range of objects, be found in whole or in part inoperative to-morrow.

I therefore think even if we assume, without deciding, the smoke stack provision, as an enactment, (though merely a superfluous substitution for, and mere repetition of the common law) to be void, and the fire-guard provision to be also void, and thus discarded, that their elimination of law or fact, from the case only renders the case of negligence the clearer.

There are many operations of Dominion companies, either a steam railway, or banking, or shipping, or ferry, or interurban and interprovincial, company, as well as use of a smoke stack or engine, by the first, that may render the wrongful setting of fire and its spread a subject for local legislation.

In either of the ways I have suggested the ordinance should be read, and treated, unless I can say as I cannot, that there was no evidence of negligence and hence no jurisdiction, the appeal should fail. The "Ernfold" case is, I assume, so entirely within this

(1) [1896] A.C. 348.

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view of negligence that the court below is unanimous, though, in the way Mr. Justice Wetmore puts it, needlessly resting the onus on the requirements of the ordinance as to smoke stack. The common law required independently of this ordinance an engine of the sort in question to have, as matter of reasonable care,

> suitable smoke stack netting and ash pan netting in good repair and in proper place.

I hardly see how unauthorized enactments can change the common law so as to entitle a railway company to dispense with a proper smoke stack, etc. The onus rested upon the company to meet the *primâ facie* case of negligence.

I confess, however, that the want of knowledge of the localities and points referred to in the evidence in this "Ernfold" case renders it to me less clear than it evidently was to those in the court below. I would not, however, interfere as apart from the reason given, resting upon ordinance instead of common law, as to negligence, there seems in substance no ground of complaint.

There seems, at first blush, by reason of the way the matter has been treated, more in the "Mortlach" case, to reduce that case to a question of the right to impose upon a Dominion railway company the duty of making fire-guards. But, on the evidence the appellants' servants for twenty minutes or half an hour saw the smoke yet failed to move, until the fire kindled in a neglected spot of dry grass on the right of way had spread for half a mile, on other than the company's land and the terror stricken people had gathered to extinguish it.

Assuming it optional with the company to disregard the provisions for fire-guards, the doing so ren-

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dered it all the more incumbent upon it to have the section men on the watch, for the setting of fire which sometimes, it is said, is inevitable with the most carefully constructed and managed engine.

I cannot assent to the suggestion that when fire escapes in such a case and kindles the grass on the company's own ground and spreads therefrom through neglect it cannot be made amenable, in the absence of Dominion legislation, to local legislation, for such neglect.

No attack is made upon the form of conviction, in either case, in the grounds taken by the rule *nisi*, or in argument, and no argument was made on the facts that would enable me to say that the evident negligence was not in either case sufficient in itself, if negligence ever can be the basis of local prohibition in relation to anything a Dominion corporation can do. That it could be so seemed strenuously denied. Indeed that is to my mind the sole issue here.

I am inclined to hold the opinion that some cases have shewn an undesirable tendency on the part of superior courts, in discharging their duty of keeping, by virtue of the writ of certiorari, magistrates within their jurisdiction, to act as an appellate court.

We ought not, I conceive, to encourage such a tendency.

We ought only to entertain an appeal of this kind upon the plainest error of the court below, indeed a something clearly indicating usurpation of authority by the magistrate, upheld by the superior court of a province.

There are or can be brought about, with a little patience, much ampler means of effectively and authoritatively defining the constitutional limitations

of provincial legislative authority than generally lies within the scope afforded for quashing a conviction upon the return of a writ of certiorari. The issue attempted to be raised by the denial of any power of legislative prohibition, by a local legislature, on the subject of negligence that might include what a Dominion company may be guilty of, is far more important than it seems at first sight.

The fire-guard provision, treated as optional, may be of a beneficent nature, especially in view of section 298 of "The Railway Act," and not objectionable as an attempt at widening the powers of a Dominion corporation to acquire real estate. Possibly, though repudiated in this argument, Dominion companies may have the right, in common with others, to avail themselves of local regulations to even pull down neighbouring buildings to protect their own from spread of fire.

I refrain from expressing any unnecessary opinions upon these or other points of law presented for solution, further than that which appears in my dissent from the broad proposition I have set forth above and combatted throughout.

I call attention to *The Canada Southern Railway Company* v. *Jackson*(1), in which this court upheld the "Workmen's Compensation Act" of Ontario as binding upon Dominion railway companies as well as other parties in respect of acts of negligence, for which they had not been theretofore liable.

I have assumed that the exercise of the penalizing power that is given the provinces by the "British North America Act, 1867," is applicable, in proper cases, to negligence, and that it is no greater stretch

(1) 17 Can. S.C.R. 316.

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of authority to apply it to companies deriving their corporate existence from the Dominion Parliament, than to apply the civil remedy acted upon in that case.

The exercise of any such power must not exceed any of the recognized limitations, such as criminal law, or come in conflict with the Dominion legislation properly and authoritatively enacted.

The Bonsecours Case(1) also lends countenance to this way of looking at the matter.

The Madden Case(2), when the legislation there in question is examined closely, has nothing I can see to do with the matter. It was an attempt to conflict with Dominion legislation and enforce fence building where impliedly, if not expressly, this latter had freed the company from so doing.

The appeals should be dismissed with costs.

Appeals allowed with costs.

Solicitor for the appellants: *J. A. Allan.*

Solicitor for the respondent: *Frank Ford.*

(1) (1899) A.C. 367. (2) [1899] A.C. 626.

HERBERT LEWIS HILDRETH (PLAINTIFF) ..... } APPELLANT;

AND

THE McCORMICK MANUFACTURING COMPANY, LIMITED (DEFENDANTS) ..... } RESPONDENTS.

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*May 29, 30.
*Dec. 13.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent law—Canadian Patent Act—R.S.C. 1906, *c.* 69, *s.* 38—*Manufacture—Sale—Lease or license.*

Under the Canadian Patent Act the holder of a patent is obliged, after the expiration of two years from its date, or an authorized extension of that period, to sell his invention to any person desiring to obtain it and cannot claim the right merely to lease it or license its use.

Judgment of the Exchequer Court (10 Ex. C.R. 378) affirmed.

APPEAL and CROSS-APPEAL from the judgment of the Exchequer Court of Canada(1), holding the plaintiff's patent void for non-manufacture and sale as required by "The Patent Act."

The plaintiff patented an invention for pulling candy and brought an action against defendants for infringement. The defence to the action was that plaintiff had, after the expiration of two years from the date of the patent, refused to sell the patented machine, and claimed the right only to lease it or license its use. This defence was maintained by the judgment of the Exchequer Court and the patent de-

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

(1) 10 Ex. C.R. 378.

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clared void, but the court gave judgment for the plaintiff for infringement during the two years the patent was in force, assessing the damages at $125. Both parties appealed to this court.

On the case being called counsel for both parties agreed that the cross-appeal should stand over and only the main appeal be argued at this time.

Walter Cassels K.C. and *Anglin* for the appellant.

Gibbons K.C. and *Haverson K.C.* for the respondents.

THE CHIEF JUSTICE and DAVIES J. concurred with the reasons stated by Maclennan J.

IDINGTON J.—The only question raised by this appeal is whether or not a patentee has, under and by virtue of section 38 of "The Patent Act," forfeited his patent by a refusal to sell any one of his machines made in accordance with his patent.

This depends upon the interpretation of sections 21 and 38, sub-section (*a*), of "The Patent Act," which read as follows:—

21. Every patent granted under this Act shall contain the title or name of the invention, with a reference to the specification, and shall grant to the patentee and his legal representatives for the term therein mentioned, from the granting of the same, the exclusive *right*, privilege and liberty of *making*, constructing and *using* and *vending to others to be used*, the said invention, subject to adjudication in respect thereof before any court of competent jurisdiction.

2. In cases of joint applications, the patents shall be granted in the names of all the applicants.

38. Every patent shall, unless otherwise ordered by the commissioner as hereinafter provided, be subject, and expressed to be subject, to the following conditions:—

(*a*) Such patent and all the rights and privileges thereby granted shall cease and determine, and the patent shall be null and void at

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the end of two years from the date thereof, unless the patentee or his legal representatives, within that period or an authorized extension thereof, commence, and after such commencement, continuously carry on in Canada, the construction or manufacture of the invention patented, in such a manner that any person desiring *to use it may obtain it, or cause it to be made for him at a reasonable price,* at some manufactory or establishment for making or constructing it in Canada.

It is contended that the patentee having

the exclusive right, privilege and liberty of making, constructing and using, and vending to others to be used, the said invention

would, by selling the machine, transfer that absolute dominion over it that would enable his vendee to re-sell the same, and by virtue thereof, carry with such re-sale, the right to the use of the same as patented.

Is that necessarily so?

If the patentee has the *exclusive* right of "vending to others to be used," is there, on the sale of the article, to comply with section 38, not a right to reserve, in the event of a re-sale of the article, the use of the invention?

The article may, for what it is worth for any other purpose than to serve the use of the invention as a piece of, say metal or other chattel property, be re-salable, without a transfer of the invention.

I do not pass any opinion upon this, more than to say, it is, I think, a fairly arguable question.

I merely refer to the question for the purpose of indicating that a sale may not mean more than a property in the article plus the right to use it as long as the vendee from the patentee should retain it, absolutely as to the material, qualified perhaps as to the quality of usefulness derived from the invention.

Another consideration occurs to me and that is, it may well be intended within the purview of the statute that the patentee may have a right to adjust

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the price according as he sells in the one way or in the other.

Subject to this, in construing the 38th section, I am unable to come to any other conclusion than that it requires, on the part of the patentee, something more than a mere license to use the invention or mere hiring of a machine made in accordance with the invention to fulfil the terms of the section.

I cannot read the section as if the words *"or cause it to be made for him"* were out of it. And I cannot see how we can, without putting on them an unusual meaning, give effect to them save as meaning a sale; especially when it is to be observed that it is *"to be made for him at a reasonable price."*

Needless to repeat that the meaning to be given ought not to be an unusual one but the plain ordinary meaning, unless we are constrained by the context to do otherwise.

Nor do I see that the words

> any person desiring to use *it* may obtain *it* * * * at a reasonable price

are, in their plain ordinary sense, to be interpreted otherwise than as implying a sale.

It is the article that is to be obtained and not merely *its use,* if we read this in the strictly grammatical sense.

Then, turning to section 21, there is provided therein

> the exclusive right * * * of making * * * and *using* and *vending* to others to be used.

To vend means to sell and, except in a strained sense, cannot be made to refer to a licensing or hiring.

The using may easily be referred to the personal use or use by a substitute.

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The "vending to others to be used" are words that lend themselves to the purpose I have indicated as within the scope of section 38.

And, when I read the whole, apart from this perhaps too minute and needless dissection of sentences, I cannot help arriving at the same conclusion, that a sale is clearly contemplated by the statute.

If one wished an illustration of the need of such provision, it is pretty clearly furnished by the exorbitant rental demanded in this instance.

Obviously an ownership whereby a man could use or refrain from using, from time to time, just as his will and circumstances or either, free from the inconvenience of a possibly harrassing over-lord's demands for royalty, might require, is what the scope and purpose of these sections and all in the statute aiding in their interpretation required.

I think the appeal should be dismissed with costs.

MACLENNAN J.—This is an appeal by the plaintiff, and a cross-appeal by the defendant, from a judgment of the Exchequer Court, in an action for the infringement of a patent.

It was, however, agreed by counsel that the argument should be restricted to the appeal.

The defendant denied the validity of the patent, and pleaded that, if originally valid, it had become null and void, at the end of two years from its date, by virtue of section 37 of the former "Patent Act," R.S.C. 1886, ch. 61, afterwards 3 Edw. VII. ch. 46, sec. 4(*a*), and now R.S.C. 1906, ch. 69, sec. 38(*a*), because the plaintiff refused to sell the invention, and was willing only to lease it.

The learned judge upheld the original validity of

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the patent; but found infringement by the defendant within two years from its date, and for the infringement he assessed the plaintiff's damages at $125.

The learned judge, however, found that the plaintiff refused to sell the patented machine, which was a machine for pulling candy, at any price, thinking he was not bound to do so, but was only bound to lease it; and he declared that the patent had become null and void at the end of two years from its date.

The plaintiff now appeals, contending that according to the true construction of the section 37, now section 38, R.S.C. ch. 69, when read in connection with section 20, now section 21, R.S.C. 1906, ch. 69, a patentee is not bound to sell the invention out and out, but only to sell the use of it, or in other words, to lease it.

I think, however, the language of the two sections does not admit of such a construction.

The patent, according to section 20, gives the patentee the exclusive right of making and using, and "vending to others to be used, the said invention."

Then section 37 declares that every patent is subject to a condition to be null and void at the end of two years, unless the patentee

> within that period or any extension thereof, commence and carry on in Canada, the manufacture of the invention, so that any person desiring to use it may obtain it, or cause it to be made for him, at a reasonable price, at some manufactory or establishment for making or constructing it in Canada.

The patented article in question here was a machine for pulling candy.

I think it is too plain for argument that the obligation here imposed is an obligation to sell, if required, and that the right given to the public is to buy, to acquire the absolute property in the invention.

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Maclennan J.

Of course, if any one is content to take a lease, he may, but his right is to acquire the article for his own use, and as his absolute property.

Mr. Cassels asked how the sections could upon that construction be made to apply to a patent for a process. I see no difficulty even in that case, for even there the person desiring to use the invention, is entitled to acquire it absolutely, and not merely to take a lease of it.

I therefore think the plaintiff's appeal fails and must be dismissed with costs.

DUFF J.—I concur in the opinion of Mr. Justice Idington.

Appeal dismissed with costs.

Solicitors for the appellant: *Blake, Lash* and *Cassels.*

Solicitors for the respondents: *Gibbons, Harper* and *Gibbons.*

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*Oct. 28, 29.
*Dec. 13.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA..... } APPELLANTS;

AND

W. N. ROBERTSON.....RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Grand Trunk Railway of Canada—Passenger tolls—Third-class fares—Construction of statutes—Repeal—16 Vict. c. 37, s. 3 (Can.)—Amendments by subsequent railway legislation.

The legislation by the late Province of Canada and the Parliament of Canada since the enactment of section 3 of the statute of Canada, 16 Vict. ch. 37, in 1852, has not expressly or by implication repealed the provisions of that section requiring third-class passenger carriages to be run every day upon the line of the Grand Trunk Railway of Canada, between Toronto and Montreal, on which the fare or charge for each third-class passenger shall not exceed one penny currency for each mile travelled.

APPEAL from an order of the Board of Railway Commissioners for Canada directing that the Grand Trunk Railway Company of Canada should run every day throughout the length of its line, between the City of Toronto, in the Province of Ontario, and the City of Montreal, in the Province of Quebec, at least one passenger train having in it third-class carriages for passenger traffic, and that the fare or charge for each third-class passenger by such train on said portion of the company's railway should not exceed two cents for each mile travelled, and that the company should,

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

forthwith, file passenger tariffs for that portion of its railway embodying said rate.

Special leave for the appeal was granted, in the order appealed from, by the Board of Railway Commissioners.

The circumstances of the case are fully stated by the learned Chief Commissioner Killam in his judgment delivered at the time of the making of the order appealed from, as follows:

THE CHIEF COMMISSIONER.—"This is an application for an order directing the Grand Trunk Railway Company of Canada to issue third-class tickets at the rate of one penny per mile for each mile travelled, and directing the company to provide at least one train having in it third-class carriages which shall run every day throughout the length of its line.

"The application is based upon a clause in the original Act of incorporation of the Grand Trunk Railway Company of Canada, 16 Vict. ch. 37, passed by the Parliament of the Province of Canada in the year 1852. Section 3 of that Act was as follows:

> 3. And be it enacted, that the gauge of the said railway shall be five feet six inches and the fare or charge for each first-class passenger by any train on the said railway, shall not exceed two pence currency for each mile travelled, the fare or charge for each second-class passenger by any train on the said railway shall not exceed one penny and one half penny currency for each mile travelled, and the fare or charge for each third-class passenger by any train on the said railway, shall not exceed one penny currency for each mile travelled, and that, at least, one train having in it third-class carriages shall run every day throughout the length of the line.

"The portion dealing with the gauge of the railway was repealed by Act of the Parliament of Canada, 36 Vict. ch. 18, sec. 23. None of the remainder of the section has ever been expressly repealed; and, if it

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still remains in force, the Board is bound, under the general jurisdiction given by section 26 of 'The Railway Act,' to order and require a railway company to do any act, matter or thing which such company is or may be required to do under its special Act, to make the order applied for.

"The contention on the part of the company is that the provisions in question have been impliedly repealed by subsequent legislation. Section 2 of the special Act was as follows:

> And be it enacted, That the several clauses of the "Railway Clauses' Consolidation Act," with respect to the first, second, third and fourth clauses thereof, and also the several clauses of the said Act with respect to "Interpretation," "Incorporation," "Powers," "Plans and Surveys," "Lands and their valuation," "Highways and Bridges," "Fences," "Tolls," "General Meetings," "Directors—their Election and Duties," "Shares and their Transfer," "Municipalities," "Shareholders," "Actions for indemnity and fines and penalties and their prosecutions," "Working of the Railway," and "General Provisions," shall be incorporated in this Act with the following modification for the ninth provision in the clause of the said Act, with respect to "Plans and Surveys" * * * and with the further exception of any enactments in the said clauses which may be inconsistent with the express provisions and enactments of this Act, in like matters: And the expression "this Act" when used herein shall be understood to include all the clauses of "The Railway Clauses' Consolidation Act" which are incorporated with this Act.

"The clauses with respect to 'tolls' in the 'Railway Clauses' Consolidation Act,' 14 & 15 Vict. ch. 51, were contained in section 14 of that Act, and were, so far as of present importance, as follows:

> Tolls shall be from time to time fixed and regulated by the by-laws of the company or by the directors if thereunto authorized by the by-laws or by the shareholders at any general meeting, and shall and may be demanded and received for all passengers and goods transported upon the railway or in the steam vessels to the undertaking belonging * * * "And all or any of the said tolls may by any by-law be lowered and reduced and again raised as often as it shall be deemed necessary for the interests of the undertaking: Provided that the same tolls shall be payable at the same

time and under the same circumstances upon all goods and persons so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-laws relating to the tolls." * * * No tolls shall be levied or taken until approved of by the Governor in Council nor till after two weekly publications in the *Canada Gazette* of the by-law establishing such tolls and of the Order in Council approving thereof. * * * Every by-law fixing and regulating tolls shall be subject to revision by the Governor in Council from time to time after approval thereof as aforesaid.

"The same provisions respecting tolls appeared in the Consolidated Statutes of Canada, ch. 66; and by section 2 of that Act,

when not otherwise expressed, this and the following sections to the one hundred and twenty-fifth shall apply to every railway authorized to be constructed by any Act passed since the thirtieth day of August, 1851; * * * and this Act shall be incorporated with every such Act, and all the clauses and provisions of this Act, unless they are expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby so far as applicable to the undertaking and shall, as well as the clauses and provisions of every other Act incorporated with such Act, form part of such Act and be construed together therewith as forming one Act.

"This legislation of the Province of Canada remained in force until the formation of the Dominion of Canada.

"In 1868, in the first session of the first Parliament of the Dominion, was passed 'The Railway Act, 1868,' in section 12 of which were embodied the provisions just mentioned respecting tolls, with the following addition:

12. No by-law of any railway company by which any tolls are to be imposed or altered, or by which any party other than the members, officers and servants of the company are intended to be bound, shall have any force or effect until the same has been approved and sanctioned by the Governor in Council.

"The last mentioned Act did not in terms repeal the previous railway legislation of the Province of Canada, and it does not appear to have had any appli-

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cation to the Grand Trunk Railway, as the clauses dealing with its application made it apply to railways thereafter to be constructed under the authority of any Act passed by the Parliament of Canada.

"The Act of 1868 remained in force until 1879, when it was replaced by 'The Consolidated Railway Act, 1879.' That Act provided that the provisions of the Act from section 5 to section 34, both inclusive, should

> apply to every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada, and shall, so far as they are applicable to the undertaking, and, unless they are expressly varied or excepted by the special Act, be incorporated with the special Act, form part thereof, and be construed therewith as forming one Act.

"By section 102 of the Act of 1879, the 'Railway Act, 1868,' and various Acts amending it, were expressly repealed; but, again, no mention was made of the Act contained in the Consolidated Statutes of Canada.

"In section 17 of the Act of 1879 were again embodied the before mentioned provisions respecting tolls, including the addition made in 1868. By subsection 6,

> All or any of the tolls may, by any by-law, be reduced and again raised as often as deemed necessary for the interests of the undertaking; but the same tolls shall be payable at the same time and under the same circumstances upon all goods and by all persons, so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by any by-law relating to the tolls.

"By the Act of 1883, 46 Vict. ch. 24, sec. 12, subsection 6 of section 17, of 'The Consolidated Railway Act, 1879,' was repealed and the following substituted therefor:

> And whereas, it is expedient that a railway company should be enabled to vary the tolls upon the railway so as to accommodate

them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular persons, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular persons, therefore it shall be lawful for the company, subject to the provisions and limitations herein and in their special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway as they shall think fit: provided that all such tolls be, at all times and under the same circumstances, charged equally to all persons, and after the same rate, whether per ton, per mile or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway.

"While section 6 of the Act of 1883 declared certain lines of railway, among others the Grand Trunk Railway, to be works for the general advantage of Canada, and provided that:

3. Railway companies by this Act brought within the legislative authority of Parliament shall have one year from the passing hereof within which to comply with the provisions of sub-section 5, section 15 of "The Consolidated Railway Act, 1879."

and section 1 of the Act of 1883, made sections 48 and 49 of 'Consolidated Railway Act, 1879,' applicable

to every railway (except Government railways) and railway company subject to the legislative authority of the Parliament of Canada.

the Act of 1879 was not otherwise made generally applicable to the Grand Trunk Railway or to railways constructed under authority of the Parliament of Canada.

"In 1886, upon the coming into force of the Revised Statutes of Canada, another Act, chapter 109, known as 'The Railway Act,' was substituted for the

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previous general railway Acts of the Dominion. By section 3 of that Act, part one, containing the sections numbered from 4 to 39 inclusive, was made applicable

to every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada.

part two was made applicable

to all railway companies and railways within the legislative authority of the Parliament of Canada, except Government railways;

and part three

to all railway companies operating a line or lines of railway in Canada, whether otherwise within the legislative authority of the Parliament of Canada or not.

"In section 16 (included in part one) of that Act were embodied the previous provisions respecting tolls, with the amendment made by the Act of 1883. The general railway Act of the Province of Canada (1) was not among the Acts repealed upon the coming into force of the revised statutes.

"In 1888 another Act, known as 'The Railway Act,' 51 Vict. ch. 29, was substituted for R.S.C. ch. 109, which was then repealed. By section 2, subsection (*t*), the expression "Special Act" means any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, and includes all such Acts.

"By section 3:

This Act, subject to any express provisions of the special Act, and to the exception hereinafter mentioned, applies to all persons, companies and railways within the legislative authority of the Parliament of Canada, except Government railways.

"By section 6:

(1) C.S.C. ch. 66.

If in any special Act it is provided that any provisions of any general Railway Act in force at the time of the passing of the special Act is excepted from incorporation therewith, or if the application of any such provision is extended, limited or qualified, the corresponding provision of this Act shall be excepted, extended, limited or qualified in like manner.

"By section 223:

Subject to the provisions and restrictions in this and in the special Act contained, the company may, by by-laws, or the directors, if thereunto authorized by the by-laws, may from time to time, fix and regulate the tolls to be demanded and taken for all passengers and goods transported upon the railway, or in steam vessels belonging to the company.

"By section 227:

No tolls shall be levied or taken until the by-law fixing such tolls has been approved of by the Governor in Council, nor until after two weekly publications in the *Canada Gazette* of such by-law and of the Order in Council approving thereof; nor shall any company levy or collect any money for services as a common carrier except subject to the provisions of this Act.

"By section 228:

Every by-law fixing and regulating tolls shall be subject to revision by the Governor in Council, from time to time, after approval thereof; and after an Order in Council altering the tolls fixed and regulated by any by-law, has been twice published in the *Canada Gazette*, the tolls mentioned in such Order in Council shall be substituted for those mentioned in the by-law, so long as the Order in Council remains unrevoked.

"The Act of 1888 was repealed upon the coming into force of the 'Railway Act, 1903,' which substituted the Board of Railway Commissioners for the Governor General in Council as the authority having jurisdiction to approve and revise the tolls of railway companies, and which made important changes in regard to railway tariffs. The following provisions of that Act are important:

3. This Act shall apply to all persons, companies and railways (other than Government railways) within the legislative authority

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of the Parliament of Canada, and shall be incorporated and construed, as one Act, with the special Act subject as herein provided.

4. Any section of this Act may, by any special Act passed by the Parliament of Canada, be excepted from incorporation therewith, or may thereby be extended, limited or qualified. It shall be sufficient, for the purposes of this section, to refer to any section of this Act by its number merely.

5. If in any special Act heretofore passed by the Parliament of Canada it is enacted that any provision of the general railway Act in force at the time of the passing of such special Act, is excepted from incorporation therewith, or if the application of any such provision is, by such special Act, extended, limited or qualified, the corresponding provision of this Act shall be taken to be excepted, extended, limited or qualified in like manner; and, unless otherwise expressly provided in this Act, where the provisions of this Act and of any special Act passed by the Parliament of Canada relate to the same subject-matter, the provisions of the special Act shall be taken to override the provisions of this Act in so far as is necessary to give effect to such special Act.

6. Where any railway, the construction or operation of which is authorized by a special Act passed by the legislature of any province, is declared, by any special Act of the Parliament of Canada, to be a work for the general advantage of Canada, this Act shall apply to such railway, and to the company constructing or operating the same, to the exclusion of such of the provisions of the special Act of the provincial legislature as are inconsistent with this Act, and in lieu of any general railway Act of the province.

251. The company or the directors of the company, by by-law, or any such officer or officers of the company as are thereunto authorized by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged, as hereinafter provided, for all traffic carried by the company upon the railway, or in vessels, and may specify the persons to whom, the place where, and the manner in which, such tolls shall be paid.

2. All such by-laws shall be submitted to and approved by the Board.

3. The Board may approve such by-laws in whole or in part, or may change, alter or vary any of the provisions therein.

4. No tolls shall be charged by the company until a by-law authorizing the preparation and issue of tariffs of such tolls has been approved by the Board, nor shall the company charge, levy or collect any money for any services as a common carrier, except under the provisions of this Act.

256. All tariff by-laws and tariffs of tolls shall be in such form, size and style, and give such information, particulars and details, as the Board may, by regulation, or in any case, prescribe.

257. The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed, and may designate the date at which any tariff shall come into force.

2. Any tariff in force (except standard tariffs, hereinafter mentioned) may, subject to disallowance or change by the Board, be amended or supplemented by the company, by tariffs, in accordance with the provisions of this Act.

263. The tariffs of tolls which the company shall be authorized to issue under this Act for the carriage of passengers between points on the railway shall be divided into two classes, namely:

The maximum mileage tariff, herein referred to as the "Standard Passenger Tariff";

And reduced passenger tariffs, herein referred to as "Special Passenger Tariffs."

2. The "Standard Passenger Tariff" shall specify the maximum mileage tolls to be charged for passengers for all distances covered by the company's railway; such distances may be expressed in like manner as provided herein in respect of "Standard Freight Tariffs."

3. "Special Passenger Tariffs" shall specify the toll or tolls to be charged by the company for passengers in every case where such tolls are lower than the tolls specified in the company's "Standard Passenger Tariff."

264. A "Standard Passenger Tariff" shall be filed, approved and published in the same manner as required by this Act in the case of a "Freight Standard Tariff."

2. Until the company files its "Standard Passenger Tariff" and such tariff is so approved and published in the *Canada Gazette*, no tolls shall be charged by the company.

3. When the provisions of this section have been complied with, and except in the case of special passenger tariffs, the tolls in the "Standard Passenger Tariff" shall be the only tolls which the company is authorized to charge for the carriage of passengers.

265. All special passenger tariffs shall be filed by the company with the Board, and published as required by section 274, three days before any such tariff is intended to take effect, or within such time, or in such manner as the Board, owing to the exigencies of competition or otherwise, may require.

The date of the issue and the date on which, and the period, if any, during which, any such tariff is intended to take effect, shall be specified thereon.

2. Upon any such tariff being so duly filed the company shall until such tariff is superseded or is disallowed by the Board, charge the toll or tolls as specified therein, and such tariff shall supersede

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any preceding tariff or tariffs, or any portion or portions thereof, in so far as it reduces or advances the tolls therein, but until such tariff is so duly filed, no such toll or tolls shall be charged by the company.

"Section 214 required every railway company to furnish adequate and suitable accommodation for receiving, loading, carrying, unloading and delivering traffic, and to furnish and use all proper appliances, accommodation and means necessary therefor; and section 253 required it to afford to all persons all reasonable and proper facilities for the receiving, forwarding and delivering of traffic. Section 14, also, gave to the Board power, where the required accommodation was not furnished, to order the company to furnish the same; and an amending Act, passed in 1906, 6 Edw. VII. ch. 42, sec. 23, gave the Board power to order that specific works be constructed or carried on, or specified steps, systems, or methods taken. Section 212, sub-section 2, of the Act of 1903, empowered the Board to make regulations

> providing for the protection and safety of the public, of property, and of the employees of the company with respect to the running and operation of trains by the company,

which provision was amended by the Act of 1906, sec. 18, so as to authorize the Board to make regulations

> generally for the protection of property and the protection, safety, accommodation and comfort of the public and the employees of the company in the running and operation of trains by the company.

"All of the before mentioned provisions of the Act of 1903, with the amendments, are embodied in the present 'Railway Act,' R.S.C. ch. 37.

"It appears to me that neither the Act of 1868, nor that of 1879, nor part one of the Act in the revised statutes, nor the amendments of either (except in

some particulars not material to the present application) applied to the Grand Trunk Railway Company. By the terms of the principal Acts, they were to apply only to railways constructed under the authority of an Act passed by the Parliament of Canada; and I agree with Mr. Nesbitt's contention that the Parliament of the former Province of Canada was not included. Some amendments extended the application of particular provisions. See 38 Vict. ch. 24, sec. 4 (1875), and 46 Vict. ch. 24, sec. 12 (1883). This view appears to be supported by the decisions in *Scott* v. *Great Western Railway Co.*(1); *Allan* v. *Great Western Railway Co.* (2); *Re St. Catharines and Niagara Central Railway Co.* v. *Barbeau*(3); *Toronto Belt Line Railway Co.* v. *Lauder*(4); and by the language of Burton J., in *Bowen* v. *Canada Southern Railway Co.* (5).

"The Act of 1888, was, by its terms, applicable to all persons, companies, and railways within the legislative authority of the Parliament of Canada, except Government railways. These terms clearly included the Grand Trunk Railway Company and its lines of railway; but this was 'subject to any express provisions of the special Act'; and section 6 further indicated that the special Act was to govern. Further, section 223, which authorized the company or the directors to fix and regulate the tolls, did so 'subject to the provisions and restrictions in this and in the special Act contained.'

"What I have said is sufficient to dispose of the contention that the amending Act of 1883 affected the limitation imposed by the company's special Act, but

(1) 23 U.C.C.P. 182.
(2) 33 U.C.Q.B. 483.
(3) 15 O.R. 583.
(4) 19 O.R. 607.
(5) 14 Ont. App. R. 1.

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it is to be noticed that the powers of the company were, under that Act, to be exercised

subject to the provisions and limitation hereinafter and in their special Act contained.

"While not material to the construction of the amendment, it is interesting to note that, as shewn by the Hansard report of the discussion in Parliament, the amendment of 1883 was introduced by Mr. McCarthy, M.P., for the purpose of making the provision against discrimination more clear. See Hansard, vol. 13, pp. 141, 558 *et seq.*

"In my opinion, therefore, the clause requiring the running of third-class carriages and limiting third-class fares was not affected by any legislation prior to the Act of 1903.

"As has been said, the provisions of the special Act have not been expressly repealed. None of the enactments in 'The Railway Act, 1903,' or in the present 'Railway Act,' are explicitly inconsistent with those provisions. The contention on the part of the railway company is that, in effect, those enactments, and particularly the portions relating to tolls and those giving the Board jurisdiction respecting the accommodation, etc., to be furnished by the company, are so inconsistent as impliedly to repeal the provisions of the special Act.

If two inconsistent Acts be passed at different times, the last is to be obeyed; and if obedience cannot be observed without derogating from the first, it is the first which must give way.

"Per Lord Langdale, M.R., in *Dean and Chapter of Ely* v. *Bliss*(1), at page 582. But a 'repeal by implication is never to be favoured.' Per Field J. in *Dobbs* v. *Grand Junction Waterworks Co.*(2), at page 158.

(1) 5 Beav. 574.

(2) 9 Q.B.D. 151.

We ought not to hold a sufficient Act repealed, not expressly as it might have been, but by implication, without some strong reason.

"Per Lord Bramwell, in *Great Western Railway Co.* v. *Swindon and Cheltenham Extension Railway Co.* (1), at page 809.

A later Act of Parliament hath never been construed to repeal a prior Act, without words of repeal, unless there be a contrariety and repugnancy between them, or at least some notice taken of the former law in the subsequent one, so as to indicate an intention in the law-makers to repeal it.

"Per Lord Hardwicke L.C. in *Middleton* v. *Crofts*(2).

The court must be satisfied that the two enactments are inconsistent before they can from the language of the later imply a repeal of an express prior enactment.

"Per Byles J. in *Conservators of the River Thames* v. *Hall*(3), at page 419; and in the same case Keating J. said (at page 420):

I entirely agree with my brother Byles, that, before we come to that conclusion, we are bound to satisfy ourselves that it is a necessary implication.

When the repeal is not express, the burden is on those who assert that there is an implied repeal to shew that the two statutes cannot stand consistently the one with the other.

"Per Chitty J. in *Lybbe* v. *Hart*(4).

The intention to repeal must appear even more strongly where the first provision is contained in a statute of a private or special nature, in which case the maxim *generalia specialibus non derogant* usually prevails.

A later statute in the affirmative shall not take away a former Act, and *eo potius* if the former be particular and the latter be general.

"*Gregory's Case*(5).

(1) 9 App. Cas. 787.
(2) 2 Atk. 650, at p. 675.
(3) L.R. 3 C.P. 415.
(4) 29 Ch.D. 8, at p. 15.
(5) 6 Rep. 19b.

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The law will not allow the exposition to revoke or alter, by construction of *general* words, any *particular* statute, where the words may have their proper operation without it.

"*Lyn* v. *Wyn*(1).

The general principle * * * is that a *general* Act is not to be construed to repeal a previous *particular* Act unless there is some express reference to the previous legislation on the subject or unless there is a necessary inconsistency in the two Acts standing together.

"Per Bovill C.J. in *Thorpe* v. *Adams*(2), at page 135.

Unless two Acts are so plainly repugnant to each other than effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together.

"Per A. L. Smith J. in *Kutner* v. *Phillips*(3).

It is a fundamental rule in the construction of statutes that a subsequent statute in general terms is not to be construed to repeal a previous particular statute unless there are express words to indicate that such is the intention, or unless such an intention appears by necessary implication.

"Per Bovill C.J. in *The Queen* v. *Champneys*(4), at page 394.

In order to shew that a particular Act is repealed by a general Act by implication, it is not enough to shew * * * that the particular Act may have become useless or futile, that is to say, that the subject-matter of the particular Act comes within the terms of the general Act; it must be shewn, as it seems to me, that there are enactments in the general Act, when rightly construed, inconsistent with the maintenance of the particular Act.

"Per Brett J. in *The Queen* v. *Champneys*(4), at page 404.

Now, if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely

(1) Bridg. (O.) C.P. 122, at p. 127.
(2) L.R. 6 C.P. 125.
(3) (1891) 2 Q.B. 267, at p. 272.
(4) L.R. 6 C.P. 384.

by force of such general words, without any indication of a particular intention to do so.

"Per Lord Selborne L.C. in *Seward* v. *The "Vera Cruz"* (1), at page 68.

"See also, the enunciation of similar principles by Sir W. Page Wood V.C., *Fitzgerald* v. *Champneys* (2), at pages 53-61.

"But all of these statements admit that, if the intention of Parliament to that effect sufficiently appears, the later Act should be construed as repealing or varying the former Act, whether special or general, and several cases have been cited in which the courts have adopted such construction. In most of these the circumstances and the nature of the enactments vary so much from those with which we have now to deal, that they do not appear to afford us any material assistance.

"In these cases the principles before stated are not contravened; in some they are expressly acceded to. Usually, the decisions turned upon the view taken by the court of particular language or of the scope and intention of the legislation as understood by the court. I will cite from but two of them. In *Daw* v. *Metropolitan Board of Works* (3), Willes J. said:

The rule of construction of Acts of Parliament as laid down by Vice-Chancellor Wood in *The London and Blackwall Railway Company* v. *Board of Works for the Limehouse District* (4), is no doubt a very wholesome one. A subsequent general enactment will not derogate from a prior special enactment. When, as the learned judge says, the legislature has had a special case in view, and has specially legislated upon it the inference necessary is that it does not intend by a subsequent general enactment not referring to the former to deal with those matters which have already been specially provided for. The rule *generalia specialibus non derogant* is properly appli-

(1) 10 App. Cas. 59.
(2) 2 J. & H. 31.
(3) 12 C.B.N.S. 161, at pp. 178, 179.
(4) 26 L.J. Ch. 164.

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cable to such a case. * * * In the present case, however, the rule cannot apply. * * * The powers conferred by the two (Acts) are substantially, if not strictly, the same. So soon as you find that the legislature is dealing with the same subject-matter in both Acts, so far as the later statute derogates from and is inconsistent with the earlier one, you are under the necessity of saying that the legislature did intend in the latter statute to deal with the very case to which the former statute applied.

"And in *Great Central Gas Consumers' Company* v. *Clarke*(1), Keating J. said:

I agree that, where we find in an Act of Parliament a prohibition against a public company exacting more than a prescribed rate, we should require a very clear enactment in a subsequent Act to remove the restriction. But it is equally clear, that if we find in a later Act of Parliament provisions which are utterly inconsistent with those of an earlier Act, we are bound to give effect to the later provisions.

"And in the same case, in error, (2), Pollock C.B. said:

Although that section is not in terms repealed, yet it becomes a clause in a private Act of Parliament quite inconsistent with a clause in a subsequent public Act. That is sufficient to get rid of the clause in the private Act. Looking at the 19th section of the general Act, we think it is impossible to read it otherwise than as repealing the 24th section of the private Act. We are bound as well by the plain words of the Act as by the general scope and object of it, and also by the justice of the case.

"By section 3 of the Act of 1903, that Act was to be incorporated with and construed as one Act with the special Act, subject as in the general Act provided; and by section 5, in the event of inconsistency between the general Act and any special Act passed by the Parliament of Canada relating to the same subject-matter, the provisions of the special Act were to be taken to override the provisions of the general Act in so far as should be necessary to give effect to the special Act. These provisions are combined in section 3 of the present 'Railway Act.' This would settle

(1) 11 C.B.N.S. 814, at p. 841. (2) 13 C.B.N.S. 838.

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the matter if the special Act had been one passed by the Parliament of Canada, in which case, although earlier than the general Acts, the provisions of the special Act would prevail. But the portion of the Grand Trunk Railway to which the present application refers was constructed under a special Act of the late Parliament of Canada. I have some doubt whether section 6 of the Act of 1903, and the similar section of the present 'Railway Act,' under which the general Act is to apply to the exclusion of such of the provisions of a special Act of a provincial legislature as are inconsistent with the general Act, were intended to cover the case of a special Act passed by a Parliament of a province before the Union. The definition of the terms 'Legislature of any Province,' and 'Provincial Legislature,' in section 2, sub-section (*r*) of the Act of 1903, and section 2, sub-section 20, of the present Act, is probably wide enough to include such Parliaments; and the Grand Trunk Railway was declared by an Act of the Parliament of Canada to be a work for the general advantage of Canada. That declaration was included in an Act amending the general railway Act, which, though referring specifically to the Grand Trunk Railway and other named railways, may not come within the definition of a 'Special Act.' The Grand Trunk Railway was a railway connecting one province with another, and thus became *ipso facto,* upon the formation of the Dominion, subject to the legislative authority of the Parliament of Canada without a declaration that it was a work for the general advantage of Canada. Section 6 was probably intended to apply to railways constructed under special Acts of provincial legislatures passed after Confederation.

"Possibly, however, this may not be important,

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since section 6 embodies the most important of the before-mentioned principles, that the prior special Act is repealed or affected by the general Act only where there is inconsistency between them; and I take it that, under either view, the burden is upon the party asserting it to point out the inconsistency, and that this should be made clear.

"The clause in the special Act is two-fold; it limits the fares for different classes of passengers, and it requires the running of third-class carriages. Necessarily, under the latter portion, there was some obligation upon the company to furnish reasonable accommodation; some obligation to give some attention to the comfort and convenience of third-class passengers, even though this accommodation and attention should not be of the same character as required for the other classes. The legislation requiring the furnishing of adequate and suitable accommodation, and the affording of reasonable and proper facilities, could certainly not effect a repeal of the provision for running third-class carriages, nor, in my opinion, can the legislation empowering the Board of Railway Commissioners to make regulations providing for the protection, safety, accommodation and comfort of the public. Whatever the obligations under the present Act or the former Acts, these could not satisfactorily be enforced by the ordinary methods in the ordinary tribunals. The Board of Railway Commissioners was created to be the tribunal for the settling of these and other matters affecting railways and railway companies. It does not appear to me that the creation of such a tribunal was in any way inconsistent with the continuance of the obligation imposed by the special Act, or could effect its repeal or evidence an intention

of Parliament that the obligation should be no longer effective.

"Under the 'Railway Clauses Consolidation Act' and all the succeeding legislation, down to the Act of 1903, railway tolls were subject to the approval of, and to be altered by, the Governor in Council. This limitation upon the company's powers was embodied in the special Act by reference to the general Act. The jurisdiction of the Governor in Council could exist, therefore, consistently with the limitation as to fares imposed by the special Act, and it does not appear to me that the substitution of the Board of Railway Commissioners as the body which is to approve, and which has the jurisdiction to alter, railway tolls, makes any change in this respect. Under the former legislation, all the railway tolls required the approval of the Governor in Council; under the present, it is only the standard or maximum tariffs which must be approved by the Board; and railway companies are authorized to make special tariffs imposing tolls lower than those in the standard tariffs. The practice has been for the companies to obtain approval of standard passenger tariffs, not distinguishing between classes, and to provide for second-class fares by special tariffs. Third-class fares could be provided for in the same way. I do not think that the provisions authorizing special tariffs are necessarily inconsistent with the limitations imposed by the special Act or that they are sufficient to indicate the intention of Parliament that the company, in framing special tariffs, was to be free from such limitations.

"I am not informed whether the third-class carriages were at any time used upon the company's railway. To my mind it is clear that the obligation to

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use them, and to carry at fares limited as in the special Act, continued up to the coming into force of the Act of 1903. I am unable to find in the subsequent legislation any sufficient indication of the intention of Parliament to abolish the system originally imposed upon the company, as having become obsolete or unnecessary.

"The imposition of this system was one of the terms and conditions upon which the company was granted its franchise, and it should not readily be presumed that Parliament intended to relieve the company from such terms and conditions.

"The application is limited to the portion of the Grand Trunk Railway between Toronto and Montreal, and it is unnecessary to consider whether the obligation ever extended to any other portion of the company's lines.

"In my opinion there should be an order requiring the company to run every day, throughout the length of its line between Montreal and Toronto, at least one train having in it third-class carriages, and forbidding it to charge third-class passenger fares at more than two cents per mile, and directing it to amend its special tariffs accordingly.

"The operation of this order, however, should be stayed a sufficient time to enable the company to appeal."

Wallace Nesbitt K.C. and *D. L. McCarthy* for the appellants. We submit that section 3 of 16 Vict. ch. 37, has been repealed by 46 Vict. ch. 24, sec. 12, which substitues a new provision in the place of sub-section 6, of section 17, of "The Consolidated Railway Act, 1879," expressly authorizing the alteration and varia-

tion of the tolls by the special Act authorized to be taken. The words "subject to the provisions and limitations in the special Act contained" evidently refer to the requirements of the special Act relating to machinery. They cannot refer to the tolls themselves, as otherwise they would nullify the whole section. Quite apart from the section the railway company could have varied their tolls within the range set by the special Act. The only object of the section must have been to enlarge this range. The learned Chief Commissioner suggests that the Act of 1879 does not apply to the appellants and that, consequently, 46 Vict. ch. 24, sec. 12, being an amendment to that Act, likewise failed of such application. Section 2 of the Act of 1879, provided that, amongst others, the section amended by this section (12) should apply to every railway constructed "under the authority of any Act passed by the Parliament of Canada," which may, perhaps, be said to exclude the appellants, but, by section 6 of the same Act, their railway was declared to be a work for the general advantage of Canada, and sub-section 2 of this section goes somewhat farther and seems to amount to an enactment bringing the railways mentioned in sub-section 1 within the railway legislation of the Dominion. Sub-section 3 of the section certainly bears out that conclusion and is difficult to explain on any other basis. See also 47 Vict. (D.) ch. 11, sec. 1.

The sections which then follow relate to a large number of details of the general railway legislation, and amend a number of the sections of the "Consolidated Railway Act, 1879," which originally applied only to railways "constructed or to be constructed under the authority of any Act passed by the Parliament of Canada"; so that, apparently, the understand-

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ing of the Dominion Parliament, in 1884, was that the application of these sections had then become extended to include all railways within the legislative authority of the Dominion. It is true that the section introduced in 1883 by 46 Vict. (D.) ch. 24, sec. 12, was modified and its application changed. But if the effect of 16 Vict. ch. 37, sec. 3, was thus annulled, the repeal of the later statute would not again give effect to the earlier one. Hardcastle on Statutes (3 ed.), p. 319, and R.S.C. (1906), ch. 1, sec. 19.

In the second place we contend that the operation of 16 Vict. ch. 37, sec. 3, is excluded by the operation of section 6 of the present "Railway Act"(1).

The appellants' railway is declared to be a work for the general advantage of Canada by 46 Vict. ch. 24, sec. 6. As to 16 Vict. ch. 37, being a "special Act," see R.S.C. (1906), ch. 37, sec. 2, sub-sec. 28, and as to its being passed by the legislature of a province, see R.S.C. (1906), ch. 37, sec. 2, sub-sec. 20. To see the full force of section 6, R.S.C. (1906), ch. 37, compare it with section 3 of the same Act, under which where the railway is incorporated by special Act of the Parliament of Canada, precisely the contrary rule is to prevail.

In the third place we contend that the operation of 16 Vict. ch. 37, sec. 3, is likewise excluded by the operation of the present "Railway Act," taken as a whole; that, in other words, there is a repeal by implication of the provisions of the earlier special Act by those of the later general Act.

For the authorities bearing on the question of the repeal of a special Act by implication, see *Bramston*

(1) R.S.C. 1906, ch. 37.

v. *The Mayor of Colchester*(1); *Great Central Gas Co.* v. *Clarke*(2); *Daw* v. *Metropolitan Board of Works*(3); *Duncan* v. *Scottish North Eastern Ry. Co.* (4); *Charnock* v. *Merchant*(5); *In re The Duke of Marlborough's Parliamentary Estates*(6); *Brown* v. *McMillan*(7); *Luckraft* v. *Pridham*(8); *Re Cuckfield Burial Board*(9); *Stuart* v. *Jones*(10); *Reg.* v. *Bridge*(11); *Goodwin* v. *Sheffield Corporation*(12); *Parry* v. *Croydon Commercial Gas Co.* (13); *Mersey Docks and Harbour Board* v. *Lucas*(14), at page 116.

When the present "Railway Act," is examined, provisions are found quite inconsistent with the provisions of the earlier statute. An elaborate scheme for the regulation of the tolls of all railways is set forth in sections 314 to 339. Sections 269 and 284 also provide for the regulation of the accommodation to passengers. Sections 26 and 30 amongst others give the widest powers to the Board to enforce the provisions of the Act. We find in the Act a general uniform system of regulation of tolls and accommodation and complete machinery provided for enforcing the same. This is surely inconsistent in intention and in fact with the rigid special requirements of 16 Vict. ch. 37, sec. 3. We submit most strongly that the present case falls within the principle of the authorities above cited and that the earlier special Act must be taken to be impliedly repealed by the later general provisions.

(1) 6 E. & B. 246.
(2) 13 C.B. (N.S.) 838.
(3) 31 L.J.C.P. 223.
(4) L.R. 2 H.L. Sc. 20.
(5) (1900) 1 Q.B. 474.
(6) 8 Times L.R. 179.
(7) 7 M. & W. 196.
(8) 6 Ch.D. 205.
(9) 19 Beav. 153.
(10) 1 E. & B. 22.
(11) 24 Q.B.D. 609.
(12) (1902) 1 K.B. 629.
(13) 15 C.B. (N.S.) 568.
(14) 51 L.J.Q.B. 114.

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As regards the requirement in 16 Vict. ch. 37, sec. 3, with regard to the running of third-class carriages, it is to be observed that, if the requirement as to tolls falls, the requirement as to third-class carriages necessarily falls also. The classes are distinguishable, under the statute, only by the tolls. There is nothing in the statute requiring them to be labelled in any particular way. It is quite open to the appellants, once the difficulty as to tolls is removed, to say: "We regard our 'Pullman' cars as first-class, our first-class as second-class, and our second-class or our smokers as third-class carriages."

We submit that that portion of 16 Vict. ch. 37, sec. 3, is no longer in force, which requires that the fare or charge for each third-class passenger by any train on our railway shall not exceed one penny currency for each mile travelled and that at least one train having in it third-class carriages shall run every day throughout the length of the line of the said railway; and that the decision of the Board of Railway Commissioners for Canada is wrong and should be set aside.

Curry K.C. for the respondent, and *Bayly K.C.* for the Attorney-General of Ontario.

The portion of section 3 of 16 Vict. ch. 37, dealing with the gauge of the railway was expressly repealed by Act of the Parliament of Canada, 36 Vict. ch. 18, sec. 23. The remainder of the section has never been expressly repealed, and it still remains in force, and it has not been impliedly repealed by the provisions of 46 Vict. ch. 24, sec. 12.

The clauses with respect to "tolls" in the "Rail-

way Clauses' Consolidation Act," 14 & 15 Vict. ch. 51, were, by section 2 of the special Act made a part of that Act, and the learned Chief Commissioner finds that the clause requiring the running of third-class carriages and limiting third-class fares, was not affected by any legislation prior to the Act of 1903.

The contentions that the operation of 16 Vict. ch. 37, sec. 3, is excluded by the operation of section 6 of the present "Railway Act," and by the operation of that Act, taken as a whole, and that there is a repeal by implication of the provisions of the earlier special Act by those of the later general Act are fully answered by the learned Chief Commissioner.

We therefore submit that that portion of 16 Vict. ch. 37, sec. 3, which requires that the fare or charge for each third-class passenger by any train on the railway of the appellants shall not exceed one penny currency for each mile travelled, and that at least one train having in it third-class carriages shall run every day throughout the length of the line of railway is still in force.

THE CHIEF JUSTICE.—This appeal is dismissed for the reasons given by Chief Commissioner Killam in the judgment appealed from.

GIROUARD J. concurred in the dismissal of the appeal.

IDINGTON J.—I agree with the reasoning of the learned Chief Commissioner. It seems to me impregnable. I desire only to add one or two observations arising out of new ground taken by the appellants.

It is claimed before us that the statute, 18 Vict.

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ch. 33, of the late Province of Canada, and not 16 Vict. ch. 37, is to be looked to as the incorporating Act of the appellant company. It is said, section 4 of that incorporated the "Railway Clauses' Consolidation Act" as part and parcel of the Act of this later incorporation and, thus, the special tariff of passenger tolls fixed by 16 Vict. ch. 37, sec. 3, is got rid of.

A careful consideration of the whole of 18 Vict. ch. 33, and even section four thereof relied on itself, does not support this contention.

The general scope and purpose of that Act was to amalgamate a great many lines with that of the main Grand Trunk line, now in question, and the respective companies owning them with the Grand Trunk Railway Company of Canada, incorporated by 16 Vict. ch. 37, and all are to be called The Grand Trunk Railway Company of Canada.

The old order of things remains, in all other respects, unchanged. There is the old corporate body, the old corporate name, the old main line extended, and all under the same old charter with some new powers and properties, but with the old right to provincial subsidy and the corresponding duty to discharge which was imposed as consideration for granting the subsidy.

Again, it is contended here that the Board of Railway Commissioners have, by virtue of the "Railway Act of 1903," obtained greater powers over the tolls than had the Governor in Council, under the "General Railway Clauses' Consolidation Act," 14 & 15 Vict. ch. 15, in force when the appellants became incorporated.

I think a comparison of sub-section 5, of section 14, of that Act with section 251 of the Act of 1903

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will shew there is not much ground for this contention.

Even if clearly so, as I think it is not, what would there be in such a state of things so inconsistent with as to repeal the obligations created by 16 Vict. ch. 37, sec. 3, on which the Board has proceeded to make the order complained of?

Still less argument, if possible, as against the order in question, is there in the new powers of the Board over the kind of cars and accommodation generally to be furnished by the company in operating its lines. Is it to be supposed that the company, if free from any supervision whatsoever, would have persisted to the present hour in using only tallow dips, such as obtainable in A.D. 1852, and insisted in depriving third-class cars of all the decencies and utilities for preserving some of the decencies of life, in travelling?

If such be held by the company to be part of its inalienable right, I fear it cannot maintain that precious right in face of this new statute, but, all the same, I have no doubt the Commissioners can and will, if it become clearly part of their duty to give directions as to third-class cars, properly discriminate between the several classes of cars each class of fare may entitle a passenger to enter. They may possibly improve them all a bit as compared with 1852 without hurting any one or even the company.

I think the appeal should be dismissed with costs.

MACLENNAN J.—After a very full and careful consideration of the legislation enacted during the many years which have elapsed since the passing of the special Act of 1852, and the reasons and arguments which

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were addressed to us on behalf of the appellants, I am of opinion that the appellants have failed to shew that the enactment in question has been repealed either expressly or by implication.

I agree with the statement of reasons for judgment given by the Chief Commissioner of the Railway Board, and cannot usefully add anything thereto.

I would dismiss the appeal with costs.

DUFF J. concurred in the reasons stated by Chief Commissioner Killam for the judgment appealed from.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Biggar.*

Solicitor for the respondent: *James W. Curry.*

THE DOMINION FENCE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

THE CLINTON WIRE CLOTH COMPANY, AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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*Oct. 30; Nov. 5, 6.

*Dec. 13.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patent of invention—Novelty—Combination of known elements—Infringement—Mechanical equivalents.

A device resulting in the first useful and successful application of certain known arts and processes in a new combination for manufacturing purposes is not unpatentable for want of novelty merely because some of the elements so combined have been previously used with other manufacturing devices.

Judgment appealed from (11 Ex. C.R. 103) affirmed.

APPEAL from the judgment of the Exchequer Court of Canada (1), maintaining the plaintiffs' action with costs.

The action was brought for infringement of letters patent of invention granted to one Perry for making electrically welded wire fabric, such as is commonly used for fencing, which the defendants were alleged to have infringed, and claimed an injunction and damages. The defendants had caused to be made for themselves and had used a machine for making wire fences, the wires being automatically welded at their

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

(1) 11 Ex. C.R. 103.

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intersections by electric currents. In a number of details, this machine was different from the machine described in the plaintiffs' patent, but it produced the same products in a similar manner with devices of a similar character.

By the judgment appealed from, it was held that, giving a broad construction to the plaintiffs' patent as being the first in which a successful method was devised and pointed out for the manufacture of wire fences and other like products in the manner described therein, the defendants had been guilty of infringement, and an order was granted for the injunction and the confiscation of the machine used in the infringement.

J. B. Clarke K.C. for the appellants. In addition to the cases cited in the report of the case in the court below, we refer to *Harrison* v. *The Anderston Foundry Co.*(1); Tyrell on Patents (4 ed.), 284-6; *Bunge* v. *Higginbottom*(2). As to what constitutes invention, see 22 Am. & Eng. Encyc. of Law (2 ed.), pages 279 to 281. Simple and obvious modification of a former device is not invention, 22 Am. & Eng. Encyc. of Law, page 303. As to what constitutes novelty, see same volume at page 306, and, as to mechanical equivalents, see same volume, pages 289, 291 and 292.

A patent must be construed with reference to the prior state of the art to which the invention belongs and limited to that which is new: Am. & Eng. Encyc. of Law, pages 300 and 410.

Walter Cassels K.C. and *A. W. Anglin* for the respondents. There is no difference in substance be-

(1) 1 App. Cas. 574. (2) 18 Cut. Pat. Cas. 201.

tween the two claims, a machine responding to one necessarily responds to the other, and, inasmuch as the defendants' machine embodies claim 35 of their patent, it likewise embodies and infringes claim 40 of the plaintiffs' patent.

It is clear that no anticipation of the plaintiffs' patent has been shewn; there are vital differences between it and the previously patented machines, all of which proved inoperative and were never put in practice for manufactures such as are now in question. No skilled mechanic could, in view of the previous patents, have manufactured such products without invention.

We refer to *Smith* v. *Goldie*(1); *Proctor* v. *Bennis* (2). As to what constitutes a combination, see *Harrison* v. *Anderston Foundry Co.*(3), at pages 574-577; *Proctor* v. *Bennis*(2). Novelty is defined by Lord Hatherly in *Cannington* v. *Nuttall*(4), at page 216. See also *Saxby* v. *Gloucester Waggon Co.*(5), and *Bischoff* v. *Wethered* (6).

A prior inoperative patent, one which does not disclose a practical machine, and which has never been brought into actual operation cannot anticipate or invalidate a subsequent patent: *Betts* v. *Menzies* (7); *Patterson* v. *Gaslight and Coke Co.*(8), at page 823; *The General Engineering Co.* v. *The Dominion Cotton Mills Co.*(9).

(1) 9 Can. S.C.R. 46; 7 Ont. App. R. 628, at p. 631.
(2) 36 Ch.D. 740.
(3) 1 App. Cas. 574.
(4) L.R. 5 H.L. 205.
(5) 7 Q.B.D. 305.
(6) 9 Wall. 812.
(7) 10 H.L. Cas. 117.
(8) 2 Ch.D. 812.
(9) 6 Ex. C.R. 306.

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Idington J.

The judgment of the court was delivered by

IDINGTON J.—The appellants seek relief from a judgment of the Exchequer Court declaring they had infringed a number of claims in a patent and restraining further like infringement.

It seems that the patentee under whom respondents' claim had invented and patented in the United States a wire fence of longitudinal wires crossed at right angles by stay wires at regular distances apart and that these crossing wires had been welded by some electric process of welding at each of the crossing intersections.

This product never was, even if in itself patentable, patented in Canada and hence cannot be claimed as covered here by any patent.

Some time afterwards the same patentee constructed and had patented a machine for making the said wire fence.

It is urged that it must be inferred that this was disclosed by the product in question.

I cannot see how that necessarily follows. The original product may have been the result of the use of one or more crude appliances that implied nothing requiring inventive faculties to produce.

Nothing is disclosed to shew that anything at all like the machine now in question was used in making that product.

Then the patented machine, now in question and under which respondents claim, is attacked here, on the grounds that Perry the patentee was not the true inventor, that there was no novelty in it, that it was not useful, and that there was no invention or subject matter.

The mode of attack is this. It is shewn that many of the parts of the machine were, in some other ways, used as machines or parts of machines used in welding processes. It is not pretended that any of them ever were used to construct such a wire fence as that produced by this machine. It is not pretended that they ever were all combined to form any single machine for any purpose. Nor can I find that any such combination of the major or substantial parts were ever before combined for any similar process of any kind.

It is urged, however, that each part having been in use and well known to ordinary men skilled in electric welding as having been in use for some purpose or other therefore any such man having his attention turned that way by seeing the wire fence product would have been able to and without any further knowledge could have framed such a machine as that now in question.

It is not at all self-evident or even probable to my mind that such is the case.

It may have been quite susceptible of proof by some such ordinary man saying so, but none has said so.

Mr. Bain, the only witness for the defence, says a great deal, but does not touch this point or vouch his belief that looking at the matter as an ordinary man might he could construct such a machine. This seems fatal to the contention.

Moreover, it is pretty evident that even Mr. Perry, who does not seem to have been an ordinary man, did not find it quite so easy a task as the argument implies, or he would have done so long before.

The grounds of the objection taken seem on this

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evidence utterly to fail. The specifications and claims do not in words specifically claim the invention, as a combination, but as at present advised I think enough is expressed to shew that such is the nature of the invention.

It is not pleaded that the specification or claims therein were insufficient, and besides there are some things that enter into this combination that I am not quite clear were anticipated in any prior invention.

I think the attack on the respondents' patent has upon the evidence and within the pleadings before us failed.

As to the appellants' machine, it seems on the evidence to be as a whole substantially the same as that of the respondents. It seems rather an unsuccessful attempt to differentiate but only, unfortunately for the attempt, by means of mechanical equivalents.

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

Appeal dismissed with costs.

Solicitors for the appellants: *Clarke, Bowes & Swabey.*

Solicitors for the respondents: *Blake, Lash & Cassels.*

THOMAS LOCKHART (DEFENDANT) . . APPELLANT.

AND

ALBERT J. WILSON (PLAINTIFF) . . . . RESPONDENT.

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*Nov. 6-8.
*Dec. 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Fraud in procuring—Discount—Good faith—Evidence.

L. and others signed promissory notes each for the amount of ten shares in a company formed to manufacture rotary engines under an invention of the payee who fraudulently misrepresented to them the prospects and intentions of such company. At the same time each maker signed an application for ten shares. The payee and T., the assignee of his patent of invention, induced W. to discount these notes and received a portion of the proceeds, part being retained by W. in payment of debts due him from these two parties. On the trial of actions by W. on the notes the evidence of T., who had absconded, was taken under commission and he swore that the form of application signed by the respective defendants had been shewn to W. before the notes were discounted. W. denied this and swore that he had been told that the notes were given in payment of stock held by the payee.

Held, that the evidence of W., on whom the onus of proof rested, could not be accepted; that the whole testimony and attendant circumstances shewed that W. suspected that the proceeds of the notes belonged to the company; and, having discounted them without inquiry as to the right of the payee and T. to receive these proceeds, he was not in good faith and could not recover.

APPEAL from decisions of the Court of Appeal for Ontario reversing the judgment at the trial by which the plaintiff's several actions were dismissed.

The plaintiff took action on eleven promissory

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

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notes procured and discounted as stated in the above head note. The trial judge dismissed all the actions and in every case but one his judgment was reversed by the Court of Appeal. Each of the other ten defendants appealed to the Supreme Court of Canada.

Blackstock K.C. and *McMullen* for the appellant.

Shepley K.C. and *Peter McDonald* for the respondents.

The judgment of the court was delivered by

IDINGTON J.—The respondent brought eleven actions, each founded upon a promissory note of one thousand dollars, or several such notes to that amount, made by the respective defendants and indorsed by one Tree, the payee, to the respondent, who claimed to have thus become the holder in due course within the meaning of section 56 of the "Bills of Exchange Act."

The defendants respectively set up the several defences that the notes were obtained by fraud, and upon an agreement or agreements in fraud of which they were negotiated and, that the respondent had notice or knowledge thereof, and, indeed, was a party to the fraud, and that he was not a *bonâ fide* holder for value.

These actions were all tried together and Mr. Justice Clute, the learned trial judge, found the alleged fraud, and that the notes obtained thereby were put off in fraud of the understanding upon which they had been made.

The learned trial judge expressly finds he could

not give credit to the evidence of the respondent; and, not having other evidence on which to rely for the proof of respondent's good faith necessary to support his actions, dismissed them.

The Court of Appeal for Ontario, by a majority from whom Mr. Justice Meredith dissented, reversed this latter finding of the learned judge, but did not disturb the findings of fraud, and allowed the appeals, except in one case. The other defendants have each appealed and these appeals were heard together.

The counsel for the appellants was stopped by this court from fully elaborating his argument as to the fraud, counsel for respondent conceding that it seemed hopeless to expect to reverse the findings of the courts below in this regard, though reserving his right to make some remarks upon that branch of the case in his argument, as I understood him, necessarily incidental to the questions of notice and of good faith.

I am content to say, therefore, in that regard, that I have not heard or read anything to shake the findings of the learned trial judge on the first branch of the case.

I think the results arrived at by the learned trial judge on the other branch are also correct and the conclusions of the Court of Appeal erroneous.

Tree, the payee, held patents as the inventor of a rotary engine or improvements thereon or both and induced, in 1897, or thereabouts, the appellants and the respondent, with numerous others, to join him in forming an incorporated company, of which respondent was the vice-president, to experiment with and place on the market, if possible, the engine manufactured in accordance with these patents. The venture failed hopelessly. Notwithstanding this, in March,

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1901, a Dr. Taylor, seemingly impressed with the future possibilities of these patents, anticipating their acquisition from the company and the formation of a new company, agreed with the respondent that if he would help him by advancing him $900, he would return on or before the 1st of May, then next, or so soon thereafter as certain parties or a company to be formed had acquired said Tree patents, $1,800 to him, Wilson. As part of this agreement, Taylor also agreed to secure the re-payment of two certain notes made by said Tree to Wilson, due in October, 1898, for $200 and $1,000, with interest thereon *at the time of transference of the said "Tree patents" to said parties.*

This is interesting as part of the history of the dealings in question and of the light it sheds on the respondent's relations with Tree and Taylor, when consideration has to be directed to the question of good faith and the price paid them for the notes, of which price a goodly part springs out of this agreement.

On the 9th October, 1901, by another agreement of that date, purporting to be between Taylor of the first part and the several persons whose names were subscribed thereto, being directors in the Tree Rotary Engine Company, of the second part, but only executed by Taylor, and respondent signing as vice-president, there seems anticipated some exchanging of stock in the old company for some in the expected new company. And Dr. Taylor agrees to pay $500 at the expiration of two months and $15,500 within a year from date, with interest at 6% until paid. The Tree Company wanted but could not get security from Taylor and, as their secretary puts it, to make best

of a bad bargain, were content to take his own notes. Perhaps the best evidence of his financial standing was the enormous price he agreed to pay for an advance of $900 as shewn above. The secretary swears he was worthless. I infer that if the patents were no good, no one expected him to pay. If the patents were any good he could easily pay. Wilson throughout these dealings shews his gambling spirit in pursuit of gain.

A new company, named the Imperial Engine Company, with Dr. Taylor as president, was incorporated shortly after this, and had a secretary and head office or seat at Brantford. Its alleged capital was $600,000. A good deal of this was given to Tree and Taylor, or Tree, for nothing, unless I assume the interest in the patents. There were other generous allotments or donations of stock that left stock of the company to the amount of $185,000 to be disposed of to get cash to carry on business with, if any one would buy. I cannot find that any one did so though canvassing therefor had taken place. One thousand shares of this stock for disposal were in the hands of the company's solicitor in Brantford as trustee for the company. He, quite properly, drew up a form of application to be used in canvassing purchasers for such shares.

Then Tree and Taylor, being directors, after this state of helplessness had continued for four years, got some of these forms supplied by the solicitor and, without authority, ventured amongst the farmers of Oxford, near to the Village of Tavistock, and, on the one hand, it is said, tried to sell stock, and, on the other hand, it is said, made these forms of sale a blind to procure notes by fraud, but, in either cases, in doing so, made the statements and proposals found

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false and fraudulent upon which and by means of which the notes in question were got.

The notes of Rowe, T. Pearson, S. Pearson, Bollert, and Palliser, for a total of $5,000, were supposed, theoretically, to have been given, and if given at all, on any basis of honest business, so far as respondent is concerned, were given for stock in the Imperial Engine Company to be issued by the company to them in response to the following form of application:—

> Nov. 29th, 1905.—I hereby apply for ten shares of stock of the Imperial Engine Company, Limited, of a par value of $100 each, at $100 per share.
>
> I hereby agree to accept the shares and to pay for them as follows:—A promissory note dated Nov. 29th, 1905, payable four months after date for $1,000.
>
> I hereby appoint W. H. Hammond of Brantford, Ont., my attorney to subscribe my name in the stock book of said company and to accept the shares which may be allotted to me and to register me therein as holder of such shares.

It is alleged by appellants, however, that this application was, in each case, a something that followed a giving of the note which was supposed to be for entirely another purpose.

I assume, however, for the present, for the sake of argument so far as this respondent's good faith is concerned, each note founded on this form of application and the obvious design of the instruments.

These five thousand dollars' worth of promissory notes of absolutely solvent men, well known to and old neighbours of respondent, were, on the evening of the 1st of December, 1905, a day or two after their dates, taken by Tree and Taylor to respondent and offered by Tree to him for sale. At first he demurred by saying he had no money. But when Tree suggested to him he could keep out of the proceeds part of the old indebtedness of Tree and Taylor, due to him, his

cupidity induced him to entertain the proposal and stretch a point. They agreed on the basis of $2,000 cash and the balance of $3,000 made up of old notes or credits on old notes and agreements for which Tree or Taylor or both were liable, and $250 discount charged on $5,000 for four months. The greater part of this old stuff was absolutely worthless. As to the other part of it, the securities may have been good in part or indifferent. If good, one is disposed to ask, why so long lying uncollected, overdue in the hands of a gentleman who seems to have had a proper appreciation of the earning power of money? Noting that, I pass to what happened anent the basis upon which the new notes rested.

The above set out form of application for stock, drawn by the company's solicitor, was shewn to the respondent who understood that the notes were given for such stock or sales of stock. He made the remark that, having seen the notes with the other information Mr. Tree had given him, his position was different than if he had seen the notes only.

It is quite clear that men selling as agents of the company, stock to be issued by the company, were bound to account to the company, and had no right to sell the notes given for such stock as if it had been their own, and, if any shadow of authority existed by reason of their directorship to realize on the notes for the company, they had no colour of right to appropriate the notes to pay their own debts. The transaction, on its face, was such as no honest man should have or, unless unusually dense, could have entertained for a moment. Even the respondent squirmed at it.

It seems idle to talk of good faith in such a con-

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nection. We are invited to accept his denial as conclusive or to suppose that the man Tree, in reply to his observation, said: "Oh, well, it is of no consequence for we (Tree and Taylor) have stock of our own allotted to us from which we can satisfy them, and will, and the form of application is a matter of no consequence from that point of view."

There is not a tittle of evidence directly to support this supposition. The respondent and his solicitor, by their evidence, have swept away any respectable chance to rest on such a work of imagination, if one felt inclined to do it. There appears, speaking of the first batch of notes, in one of respondent's examinations for discovery, the following:—

80. Q.—What did he say? A.—He asked me if I would discount all these notes. I told him I had not enough money to discount all these notes, at the time. He talked on; he told me these people had been in Cassel and he had a Tree engine running there and they were pleased with the way it worked and *that they had taken stock in the Imperial Engine Co.* As a matter of fact, he said he sold them part of his stock which he had acquired from the engine company and he told me these notes were given in payment of stock.

81. Q.—Did you make any inquiry yourself; did you ask him any questions? A.—No. I did not. He simply told me these people gave these notes in payment of some stock.

82. Q.—From first to last, during your negotiations with Tree for the purchase of these eleven notes, did you make any inquiry as to the circumstances under which the notes were given? A.—No. I did not.

83. Q.—From any person? A.—No.

In another examination for discovery, the following appears, relative to the first batch of notes:—

94. Q.—Did Taylor shew you any papers? A.—No.

95. Q.—Did you see any applications for stock? A.—No.

96. Q.—What did they tell you? You were a little suspicious about the notes and asked him how he came to get them? A.—I

don't know whether I asked them. *It strikes me I asked them if these people owed this money and they said they did.*

* * * * *

140. Q.—Did you ask them if these men owed Tree the money? A.—I think I asked them *if they had been selling these people some stock.* That is the recollection I have of it;—*if they had been selling some more stock;—I don't just remember the exact words.*

141. Q.—Apart from that, did you make any further inquiry in regard to these notes; this second batch of notes on the 18th? A.—No.

And in the same examination, is the following:—

289. Q.—You understood the proceeds of the $11,000 of notes was not to go in the company? A.—*I didn't know where it was going.*

On the trial he said, as follows:—

Q.—Did you know what steps were being taken in regard to the stock of the Imperial Engine Company, in December, 1905?

A.—No. I had no knowledge of the stock of the Imperial Engine Company.

* * * * *

Q.—What did you say when he shewed you these notes?

A.—I looked at them and came to the conclusion that these people had been investing some money in the engine, and I asked him if they had, and he told me that they had, that they had bought some stock in the company—some of his stock—and these notes were given in payment of it; that is about the extent of it.

And, as to the second batch:—

Q.—When you and Tree and Taylor went up, what did you do?

A.—He produced the notes and I looked at them, and he told me he was agreeable to discount them as he had others—practically the same thing; I asked him if these people had been buying stock, or if he had been disposing of some stock, and he said that he had, and that these people had given him the notes to pay for it.

Is it possible to draw any inference such as we are asked from these varied statements? If he never heard of nor saw any certificates of stock or application therefor, how does he, instinctively, as it were, bend his statements as to whose stock was being sold? Passing meantime this from Wilson to that from

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Taylor, and let us see which of them is telling the truth.

Of course, the question of the credibility of Taylor and of Taylor's story are vital points here. Counsel for the respondent wisely abstained from any general attack on him.

So far as one can judge from reading the depositions, Taylor, though possibly to be looked on as if (whether so or not in fact), a fugitive from justice, in his manner of speech, even making due allowance for the educated man's greater power than the other of discriminating expression seems to be inherently a more truthful witness than the respondent.

Taylor was examined under a commission in New York and his story is that, on the 1st December, 1905. a form of application for a stock certificate, amongst other things, was exhibited by Tree to Wilson, of which the

> original form was prepared by Mr. Sweet of Harley & Sweet, Brantford, the form of which that one was a copy.

Can there be any mistake on such a point? One man says there was nothing said relative to the stock business but mere loose expressions about selling stock or taking stock. The other says this was thus explained.

His examination was led on after that for a page or so by the counsel to the next day's happenings in the solicitor, Mr. McDonald's office, when the witness was asked, in reference to Wilson being present, and the following takes place:—

> Q.—Who spoke first; who was talking; what did Mr. Wilson, the plaintiff, say? A.—Well, *in order to understand that, it would be necessary to go back to the evening before.*
>
> Q.—As to something the plaintiff said? A.—*As to something the plaintiff said, because that was the object of my being there.*

Q.—Let us hear what he said then? A.—That, having seen the notes, with the other information Mr. Tree had given him, his position was different than if he had seen the notes only.

Q.—That was said on the night of the 1st? A.—*The night of the 1st. "Now then, Mr. Wilson said, it would be necessary to have proper applications which would be legally holding on the parties making the notes."*

The witness may be right or wrong as to Wilson being present on the 2nd of December, in Mr. McDonald's office. He may be right or wrong as to the date when there. In this sense the Court of Appeal is clearly right, I think, in treating this sort of discrepancies as of no consequence.

But there is a significant part of this story interjected, so to speak, which I have underlined above, that is of the very utmost importance. Yet, I say with respect, the Court of Appeal overlooked it and that was the source of radical error in that court.

"As to something the plaintiff said *because that was the object of my being there*"—means what? It means, as clearly as noon-day can make it, that what took them to Mr. McDonald's office was the remark of respondent the night before, when he pointed out the unfortunate mistake he, Tree, had made, in using a form that clearly implied he was selling stock for the company and not his own stock. It is impossible, on the evidence before us, to find any plausible reason for going to Mr. McDonald, or any one else, at that time anent the form of the application, unless what sprang from respondent, or from the conversation with him, on the evening of the 1st of December. The solicitor, McDonald, on his evidence says, as follows:

Q.—Did they both come to see you—Tree and Taylor?
A.—Yes.

Q.—What did Tree say to you? A.—That he wanted me to draw up some applications for stock, and laid a blank form before me and asked me what I thought of that. I said "I think this is an

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application for stock in the Imperial Engine Company." Then he said, "Is it right?" and I said "It is all right as an application to the Imperial Engine Company." He said, "Is it all right for me?" I said, "What have you to do with it? I understood you were in the Tree Engine Company," and he told me that the Imperial had taken the place of the old Tree Rotary Engine Company, and also told me he was selling his own stock in the Imperial Engine Company.

Every word of this bears the mark of a recent impression that had dawned on Tree. How did it come to him, if not in the way Taylor's story tells? Taylor does not try to account for it or attach importance to it. Yet it is there. And how does Taylor come to tell it? Counsel did not seem to see the import of it at the moment. Nor had it the import then that it came to have months later, when McDonald swore to that which fitted into it exactly as if made to do so and thus confirms this story of Taylor. Yet Taylor is not a prophet. The impression he had of Wilson being present when the document was laid before McDonald is possibly correct. It matters, in one way, little whether so or not, but there is this to be observed, that, if he is, as Wilson and McDonald positively swear, in error, then there is removed the last vestige of reason for supposing that he can have imported into his story what Wilson said in McDonald's office and confused what happened after the dealing was completed with what had happened before in Wilson's house.

The incident of consulting on the very point, and at the very time noted, a new solicitor on such a point is confirmatory of Taylor's story and must stay so till some explanation not yet forthcoming is found.

The story of respondent has, interjected into it twice, an alternative or amended form so as to represent Tree as saying he was selling his own stock.

By the time respondent is thus reciting these variorum editions of the story, he had, I infer, no doubt learned what was done anent the change of form and supposed ratification of what was done under the first form.

In light of a knowledge of that curious history one can see reasons for the changes of expression used by respondent in his evidence.

If the story had been the simple one of Tree selling his own stock and getting notes for the price thereof what need for the use of a form of application? All he had to say was,—here is a transfer of my certificate of stock.

If that in truth had been all that ever was presented to the respondent's mind as the fact, then his amended and amending mode of expression would not have appeared. The many ways it is expressed are, I conclude, but ways of getting away from what he had found an uncomfortable mental position.

It was because the story had not the native simplicity he would have us believe that his mind and expression thereof vary so very much.

It might need an application form, for use in selling stock to be issued by a company, but if a man only offered his own stock for sale to such well-known, absolutely solvent people as in question, it puzzles one to know its honest use. Tree and Taylor had the actual power to command the present issue to them out of that allotted to themselves.

If Wilson for whose benefit, at least in part, the supposed ratification was done knew of it, so much the worse for him.

It was one thing to subscribe for stock and pay therefor money that would find, if not stolen in pass-

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ing, its way into the treasury of a company to erect a factory or promote its business, and quite another to pay for wind or water, money that would inevitably go into the pockets of Tree or Taylor or Wilson.

It is not of the slightest consequence whether the meeting leading up to this took place on the 2nd or on the 6th December, nor of who paid or was charged the fee.

Can one, in face of these facts and this train of reasoning, find it possible to say that what Wilson, on whom, as is conceded, the onus of proof rests, has said, satisfies or ought to satisfy us that he acted in good faith?

Can we believe him when he swears or tries to swear or lead us to believe that the unsecured debts of Tree and Taylor were of any substantial value? Can we believe that he who held between $6,000 and $7,000 against such financially worthless people did not constantly keep an eye on their exploiting the engine business on which his only hopes of recovery depended? Can we believe that he who put up $900, 12th March, 1901, and took an agreement from Taylor for that consideration to have returned to him $3,000 (and interest on part of that in arrear for years before) lost all interest in the hopes he had of receiving the balance of this $3,000 (on which only $400 paid at expected time), and interest, so completely, that he was as ignorant of the fortunes of the rotary machine and its patrons, corporate or otherwise, as he would lead us to believe, though his entire hopes in regard to the balance of that $3,000 and interest as well as other large sums clearly rested on their efforts to make a success of the engine?

His call on Tree, in London, at Easter, 1905, was

not followed up but is indicative of some interest in him and his engine. Parson's case also gave him reason to be reminded.

Can anybody believe his pretence of faith, in 1905, in the engine as a successful piece of mechanism, apart from faith in it as a basis for the flotation of stock? His own language on seeing the first notes expresses the source of his hopes. If he believed in the engine company, why did he not subscribe for stock? What became of the anticipatory provision for such being allotted him and fellow directors is not clear.

Then, it is said, that if he did see the application and say what Taylor imputes to him, how can one suppose he would discount the notes? How can any one say he would not? How can any one imagine he would be stayed thereby? It all depended upon the chances of gain, and the amount of gain, proportioned to the risk; and that loomed large in his eye, whilst this seemed trifling; especially if he knew of the plan of ratification, and had faith in it.

If his oath is worth anything, he could not suppose he ran any legal risk. He might not care to have the old neighbours know he was getting for himself their money or credit, that was to have built a factory. Indeed, when he did refer later to the subject, he said to one of them he had paid $10,000 for these notes, when he had only paid $5,000. As to his notions of the law on the subject, this is what he says:—

229. Q.—You knew a man in purchasing notes, although he might give value, unless he dealt in good faith could not acquire a good title to the notes as against people who had been defrauded?

A.—*I didn't know that.*

230. Q.—You thought if you gave value for the notes it didn't matter whether you took them in good faith or not? A.—*That is the impression I had.*

* * * * *

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317. Q.—Your idea of the law was that it didn't matter what you gave for these notes as long as you bought them and paid something for them? A.—No. I didn't know; I had no idea of the law; I supposed that, when I bought these notes and paid for them, they were mine.

318. Q.—It didn't matter what you gave for them? A.—I didn't know as I had that in my head.

318. Q.—You never gave that a thought at all? A.—Just a question as between myself and Tree what I paid for them.

319. Q.—The question of amount had nothing to do with the nature of the transaction? A.—It didn't strike me that way.

Not much trouble for one holding such opinions to go far astray.

It occurred to me as possible that the second and third transactions might be severable from the first. I cannot, on consideration, see how.

The law is laid down in *London Joint Stock Bank* v. *Simmons* (1), as follows:—

> Of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction, the case would be different, the existence of such suspicion or doubt would be inconsistent with good faith. And, if no inquiry were made, or if, on inquiry, the doubt were not removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting.

The suspicion once aroused, remained unremoved, I have no doubt, and respondent's eyes and ears shut, did not prevent the suspicion from continuing. The remarkable exclusion of all knowledge entering his mind on the subject may, under the circumstances, be attributable to a recognition of its danger even though he asserts, as he does, as to his idea of the law.

There have been a good many things pressed upon us to shew the remarkable conduct of the respondent in this regard. Some of them were of trifling import,

(1) [1892] A.C. 201, at p. 223.

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some of none at all, but others and a great many taken together form an unpleasant picture of a man bent on getting gain, no matter at whose expense, and constitute some proof that he purposely abstained from making inquiry.

I think the appeals should be all allowed with costs, here and in the court below, of each to the respective appellants, and the learned trial judge's judgments dismissing the actions with costs be restored.

Appeals allowed with costs.

Solicitor for the appellant: *W. T. McMullen.*

Solicitor for the respondents: *Peter McDonald.*

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*Nov. 11, 12.
*Dec. 13.

THE CANADIAN CASUALTY AND BOILER INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

BOULTER, DAVIES AND COMPANY (PLAINTIFFS) ..... RESPONDENTS.

THE CANADIAN CASUALTY AND BOILER INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

D. D. HAWTHORNE AND COMPANY (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Insurance —Sprinkler system—Damage from leakage or discharge—Injury from frost—Application—Interim receipt.

A policy of insurance covered loss by leakage or discharge from a sprinkler system for protection against fire but provided that it would not cover injury resulting, *inter alia*, from freezing. The water in a pipe connected with the system froze and, the pipe having burst, damage was caused by the consequent escape of water.

Held, affirming the judgment of the Court of Appeal (14 Ont. L.R. 166) Davies J. dissenting, that the damage did not result from freezing and the insured could recover on the policy.

In the Hawthorne case the majority of the court dismissed the appeal on the same grounds. The policy in that case was sent to the brokers who had applied for it on behalf of the assured shortly before, and the latter did not see it until the loss occurred.

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

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Held, per Davies J. that the contract of insurance was not contained in the policy, which the assured had no opportunity to accept, but in what took place between the brokers and the agent of the insurers on applying for it and, as the latter informed the brokers that damage by frost was insured against, the insured could recover.

APPEALS from the decisions of the Court of Appeal for Ontario (1) affirming the judgments at the trial in favour of the plaintiffs in each case.

BOULTER CASE.

The plaintiffs, Boulter, Davies & Co., applied for and obtained a policy insuring property in their business premises as follows:—

"The Canadian Casualty and Boiler Insurance Company does insure Boulter, Davies & Co. * * * against all immediate loss or damage to the property of the assured * * * situate in that part of the premises occupied by the assured as described hereafter and caused during the term of this insurance by the accidental discharge or leakage of water from the automatic sprinkler system now erected in or upon the entire building at 24 Front Street West, Toronto, occupied by the assured."

Among the conditions of the policy was the following:—

"This policy of insurance does not cover loss or damage resulting from the explosion, rupture, collapse or leakage of steam pipes or steam boilers; nor resulting from any interruption of business or stoppage of any work or plant, nor resulting from freezing."

The plaintiffs claimed for a loss under this policy resulting from the discharge of water from a pipe

(1) 14 Ont. L.R. 166.

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connected with the sprinkler system which had burst after the water in it had frozen. The sole question to be decided on this appeal was whether or not the loss had resulted "from freezing" under the above condition. The trial judge held that it did not, and the Court of Appeal was of opinion that the exception as to freezing was not expressed in terms clear enough to relieve the insurers from liability.

Watson K.C. for the appellants. Both clauses of the policy must be given effect to if possible and there is certainly no repugnancy. See *German Fire Ins. Co.* v. *Roost*(1).

The loss clearly resulted from freezing within the terms of the condition. *German Fire Ins. Co.* v. *Roost*(1); *Cole* v. *Accident Ins. Co.*(2).

Blackstock K.C. and *Rose* for the respondents.

The judgment of the court was delivered by:—

MACLENNAN J.—I think this appeal must be dismissed for the reasons given in my judgment in the appeal of the same company against Hawthorne(3).

DAVIES J. (dissenting).—At the close of the argument of this case I was strongly of the opinion that the appeal should be allowed, the true construction of the contract of insurance upon which the action was brought being that damage resulting from frost causing the bursting of the pipes was not insured against. I agree in the conclusions of Mr. Justice Maclaren of the Appeal Court and in his reasons for them.

As I understood my view was not in accordance

(1) 45 N.E. Rep. 1097. (2) 5 Times L.R. 736.
(3) Page 565.

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with that of the majority of the court, I have gone carefully over the policy and considered its meaning from every standpoint presented by the judgment appealed from and by counsel at bar. The result has been strongly to confirm my first impressions. I shall state very shortly the reasons.

The policy in its formal or insuring part professes to insure the plaintiffs against

all *immediate loss or damage* to the property of the assured and described in the schedule herein given * * * and caused during the term of this insurance by the accidental discharge or leakage of water from the automatic sprinkler system now erected in or upon, etc.

If these words formed the contract without limitations I should not suppose any one would entertain a doubt that they covered losses occasioned by the accidental discharge of water from the sprinkler system whether resulting from frost or otherwise.

There, however, follow a number of "conditions and agreements" which are as much a part of the policy and the contract as the insuring clause quoted above.

The one material to this appeal reads:—

This policy of insurance does not cover loss or damage resulting from the explosion, rupture, collapse or leakage of steam pipes or steam boilers, *nor resulting from freezing*, etc., etc.

The construction put upon the policy by the court below seems to me to add to the words of the insuring part of the policy

loss or damage caused by the accidental discharge or leakage of water from the automatic sprinkler system

the words *"whether caused by freezing or otherwise"* instead of reading into such insuring clause the very words of the condition itself

this policy does not cover loss or damage resulting from freezing.

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If the words of the condition relating to freezing are transferred bodily from the conditions where they appear to the insuring clause of the policy and read with it as in order to construe it properly must be done there would seem to be less danger of going astray as to the real meaning.

To my mind the construction adopted places a liability upon the company which they have expressly contracted against. How it can be held that the loss or damage to plaintiffs' goods did not "result from freezing" where it is admitted that the bursting of the pipes and the consequent discharge of water upon the goods was directly caused by frost is more than I can understand.

It was urged, I thought somewhat faintly, that the provision

> this policy does not cover loss or damage * * * resulting from freezing

was ambiguous and might be intended to provide against loss or damage not caused to the goods insured by the accidental discharge or leakage of water from the sprinkler system as expressed in the policy but which might be caused subsequently to the goods in the contingency of the water freezing on them after they had been soaked by the accidental discharge or leakage insured against.

Such a construction does not commend itself to my mind as a reasonable, fair or just one, but seems somewhat forced and unreasonable.

It was not the extent or character of the damage which might be caused by the accidental discharge of the water which the provision in the condition contemplated but the exclusion of any liability arising from frost: "This policy shall not cover loss or damage

resulting from freezing." The policy itself expressly provided in its insuring clause only for the *immediate loss or damage* to the property insured. Not for any remote loss caused by the happening of some subsequent event and which had no necessary relation to the accident insured against. When it said the policy did not cover loss or damage resulting from freezing I understand it to mean that while it did cover all immediate damages or loss caused by any accidental discharge or leakage of water it did not cover any damage or loss caused by such discharge or leakage if such discharge or leakage was the result of frost. The insurance was against the accidental bursting of the pipes. They were to be liable for all damages caused by that unless such accidental bursting was caused by frost. If so caused the company was not to be liable.

To hold that the words of this exemption exclusively apply to some additional damage which frost might cause to the wetted goods after they had been so wetted by the accidental discharge of water from the pipes and that they do not apply to frost causing such accidental discharge does not commend itself to my mind as a fair, reasonable construction of the contract or one which the parties to it contemplated.

I would allow the appeal and dismiss the action with costs.

Appeal dismissed with costs.

HAWTHORNE CASE.

In this case a policy issued similar to that in the former appeal and a claim was made for a loss resulting from the same accident. The policy, however, which was procured through a broker, was not de-

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livered to Hawthorne & Co. until after the loss, though the broker had received it before, and the former claimed that they were not bound by its terms and relied on a verbal contract with the agent of the defendant company when the insurance was applied for.

The broker instructed to procure the insurance went to the head office of the company where he found in charge the accountant to whom he made the application. He asked the accountant if the policy would cover "frost damage" and was told that it would. The accountant gave him an interim receipt in the following terms:—

No. 3568. Premium, $30.00.

SPRINKLER LEAKAGE INSURANCE INTERIM RECEIPT OF THE CANADIAN CASUALTY AND BOILER INSURANCE COMPANY, HEAD OFFICE, TORONTO, CANADA.

Received from D. D. Hawthorne & Co., of Toronto, the sum of thirty dollars, being the premium for 12 months from date, for Insurance to the extent of five thousand dollars on merchandise,.... .....dollars on machinery, ...dollars on buildings at 24 Front St. West, Toronto, against loss or damage to the property of the assured in consequence of the accidental discharge or leakage of water from the Automatic Sprinkler system erected in or upon the premises above named.

The application for this insurance is subject to the approval of the Directors, and if same be rejected the above premium will be returned to the address given on the application, less the proportion for the time the risk has been in force.

Dated twenty-third day of December, 1905.

Countersigned by J. M. GOUINLOCK, Acct.

A. G. C. DINNICK, Managing Director.

The formal application was delayed for some days but the policy was eventually issued though it did not reach the plaintiffs until after the loss.

At the trial judgment was given for the plaintiffs. The Court of Appeal affirmed such judgment and held that the plaintiffs could recover on the verbal contract. The defendants appealed.

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Davies J.

Watson K.C. for the appellants.

Blackstock K.C. and *Rose* for the respondents.

GIROUARD J.—I would dismiss the appeal.

DAVIES J.—In this case I agree that the contract of insurance is to be found in the verbal application of the plaintiffs and the receipt issued in pursuance thereof to them. The policy containing the clause exempting the company from liability for damages resulting from frost was not in accordance with the terms of the application and receipt. Under the circumstances in which the policy came to the hands of the plaintiffs just before the loss occurred, I agree that they cannot be held as having accepted it or as being bound by its terms. I concur in dismissing the appeal.

IDINGTON J. concurred with Maclennan J.

MACLENNAN J.—I am of opinion that this appeal fails.

I agree with the judgment of the Court of Appeal on the question of the payment of the premium.

In my opinion the policy ought to be construed according to the contention of the respondents.

The operative part of the policy and the condition must be read together.

The insurance is against all *immediate damage* to the property of the assured, whether their own or in trust, in a certain warehouse, caused by the accidental discharge or leakage of water from the sprinkler system.

It is clear that the damage which occurred is expressly within this language. It was caused by water

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Maclennan J.

resulting from accidental discharge or leakage from the system. That discharge or leakage of water was the immediate cause of the damage.

Then the condition declares that the policy is not to cover damage, that is, having regard to the operative words, *immediate* damage, resulting from various things, and among others resulting from freezing. Now while in a certain sense the damage did result from freezing, the immediate damage arose, not from freezing at all but from the accidental discharge or leakage of water. There was no *immediate* damage to the goods from freezing. The freezing was a remote, not the immediate cause of the damage to the goods. The frost congealed the water in the pipe leading to the sprinklers. The expansion of the water at the moment of freezing opened the seam of the pipe, and allowed the discharge or leakage of the water which did the damage, but the frost or ice never came near the goods and did them no immediate damage. The only *immediate* damage done by the frost was the bursting of the pipe.

In expressing this opinion, I do not desire to be understood as dissenting from the other grounds upon which the judgment is rested in the Court of Appeal.

The appeal should, in my opinion, be dismissed with costs.

DUFF J. concurred with Maclennan J.

Appeal dismissed with costs.

Solicitors for the appellants: *Watson, Smoke & Smith.*

Solicitors for the respondents: *Beatty, Blackstock & Fasken.*

THE DESCHENES ELECTRIC COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THE ROYAL TRUST COMPANY, ADMINISTRATORS OF THE LATE F. X. ST. JACQUES, DECEASED, (DEFENDANTS) ..... } RESPONDENTS.

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*Nov. 13.
*Dec. 13.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Supply of electric light—Cancellation of contract—Condition for terminating service—Interest in premises ceasing—"Heirs"—"Assigns."

The electric company and S. entered into an agreement for the supply of electric lighting in a hotel for ten years from 1st May, 1902, and it was provided that either party might cancel the agreement by notice in writing, if, after the expiration of five years, neither S. nor his heirs, executors, administrators or assigns should be owner, tenant or occupier of the hotel, alone or with other persons. The lease to S. extended only until 1st May, 1907; it gave him no right to a renewal, and he had no other interest in the building. He sold a half interest in the lease to two persons with whom he formed a partnership in the hotel business, which was carried on till 1904, when the partnership terminated by his death, and the defendants were appointed administrators of his intestate estate. The affairs of the partnership were settled between the defendants and the surviving partners who became transferees of the business, exclusive owners of the lease and sole occupants of the hotel for the unexpired term. The defendants gave notice to the plaintiffs to cancel the agreement on 1st May, 1907, and, on that date, the surviving partners obtained a new lease of the premises from the owners of the building under which they continued in occupation and possession.

Held, that, after 1st May, 1907, the new tenants of the hotel were not assigns of S. and, consequently, the defendants were entitled to cancel the agreement for electric lighting by notice according to the proviso.

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

R.

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APPEAL from the judgment of the Court of Appeal for Ontario which, in the result, affirmed the judgment by Anglin J., at the trial, dismissing the plaintiffs' action with costs.

The action was for damages for anticipatory breach of a contract entered into between the plaintiffs and the late F. X. St. Jacques, (in his lifetime the lessee of the "Russell House" in the City of Ottawa), providing for the supply of electric light and power to that hotel, the respondents being sued as his administrators. The agreement in question is dated May 10th, 1902, and provides for a supply of electrical energy for ten years. A clause of the agreement was as follows:—

"Provided that if after the expiration of five years from the first day of May, 1902, the said party of the second part (St. Jacques) his heirs, executors, administrators or assigns is neither owner nor tenant nor occupier of the said hotel whether by himself or together with another or others, then either party shall be at liberty to cancel this contract by giving notice in writing to the other party."

On 1st March, 1904, St. Jacques entered into partnership with two persons named Mulligan, under the firm name of "St. Jacques & Mulligan," and assigned to his two co-partners a one-half interest in his lease of the hotel, his liquor license, and the furniture, supplies and tenant's fixtures in the hotel. No assignment of the lighting contract was made to the partnership, but the electric company continued to supply electricity to the "Russell House," and the rental therefor was paid by the partnership until St. Jacques's death, and for some time afterwards by the Mulligans. On 21st December, 1904, St. Jacques died,

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and the respondents were appointed administrators of his estate. The partnership between St. Jacques and the Mulligans terminated with St. Jacques's death, and the winding up of the partnership affairs resulted in litigation and an arbitration between his administrators and the Mulligans; but all matters in dispute between them were settled by an agreement dated the 16th May, 1906.

On the 5th June, 1906, respondents, as administrators, gave notice to the electric company, in accordance with the proviso for cancellation contained in the lighting contract, to cancel the contract at the expiration of the five years from the 1st May, 1902, (*i.e.*, on the 1st May, 1907).

The lease of the hotel expired on 1st May, 1907, and the Mulligans obtained a new lease to themselves from the owners of the building.

The result of the appeal depended upon whether or not the Mulligans were "assigns" within the meaning of the clause quoted, as the respondents, claiming that they were not, assumed to cancel the agreement at the expiration of the five years. The appellants claimed that they were entitled to have the agreement run on for its full period of ten years, or to have damages equivalent to their loss of profit for the latter five years.

Geo. F. Henderson for the appellants. The word "assigns" must have one of three meanings:—(*a*) Assigns of the business generally; (*b*) or of the lease; (*c*) or of the lighting agreement. The appellants contend that the Mulligans were and are "assigns" of the agreement. It was a business asset of St. Jacques, and a very important one, and when

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the Mulligans paid him for a half interest in his business, they clearly purchased one-half of all his business assets.

The word "assigns" comprehends all those who take either immediately or remotely from or under the assignor in whatever manner. It includes the assignee of an assignee *in perpetuum,* the heir of an assignee or the assignee of an heir. It also includes executors and administrators. Am. and Eng. Ency. (2 ed.) vol. 3, tit. "Assigns." It follows, therefore, that even if St. Jacques did not himself assign an interest in the agreement to the Mulligans, the assignment to them by his administrators made them his "assigns."

The attempted partial assignment by the administrators is ineffective to cut down the rights of the appellants for two reasons. In the first place the contract is not a separable one, and in the second place, the intention being frankly to endeavour to evade the lighting agreement, it was in fraud of the rights of the appellants and to that extent ineffective. *De Mattos* v. *Gibson*(1).

The agreement in question makes no attempt to discriminate between assigns of the whole agreement and assigns of a part of it. The Mulligans are certainly assigns of the agreement, whether in whole or in part. They became entitled to all its benefits, and incurred all its liabilities, though they protected themselves as to the disputed five years by taking an indemnity from the respondents. It seems obvious that if the parties had contemplated the possibility of St. Jacques being able to cancel the contract by executing a partial assignment of it, their purpose might have been set out in much more simple language. All that would

(1) 4 DeG. & J. 276.

have been necessary would be a contract between the appellants and St. Jacques personally, without reference to his personal representatives or his assigns.

J. F. Orde and *Powell* for the respondents. There are only two possible constructions to be placed on the word "assigns" in the clause in question; either (*a*) "assigns" of the lighting contract and of St. Jacques's rights thereunder; or (*b*) of the term granted by the lease to St. Jacques of the "Russell House." The judges of the courts below all agree that, in either case, the respondents were entitled to cancel the lighting agreement at the expiration of five years from 1st May, 1902.

The Mulligans are not and never were "assigns" of the lighting contract within the strict meaning of the term. *Friary Holroyd and Healey's Breweries* v. *Singleton*(1); *Grove* v. *Portal*(2); *Bryant* v. *Hancock*(3); *South of England Dairies* v. *Baker*(4); *Leys* v. *Fiskin*(5).

Even if, prior to the 1st May, 1907, they might be regarded as "assigns," the assignment to them was only of a partial interest, and after that date they ceased to be "assigns," having no further interest whatever in the contract. If the word "assigns" refers to the lease, then, since the 1st May, 1907, no "assigns" of St. Jacques are tenants of the hotel. His lease expired on the 1st May, 1907, and the Mulligans occupy the hotel under a new lease.

The judgment of the court was delivered by

(1) (1899) 1 Ch. 86; 2 Ch. 261.
(2) (1902) 1 Ch. 727.
(3) (1898) 1 Q.B. 716; (1899) A.C. 442.
(4) (1906) 2 Ch. 631.
(5) 12 U.C.Q.B. 604.

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Maclennan J.

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

I think the reasons for judgment of Mr. Justice Osler admit of no answer.

The appellants had an agreement with St. Jacques, lessee of the "Russell House," to supply him with electric lighting and power for use by him in the "Russell House," for ten years from the 1st of May, 1902.

St. Jacques's lease extended only to the first of May, 1907, and he had no right of renewal, or any interest in the hotel beyond that period. And unless he, or his heirs, executors, administrators or assigns, acquired some further interest in the hotel, either in fee or for a term subsequent to the 1st of May, 1907, the lighting agreement would, after that date, be a burden, instead of a benefit, to him or his estate.

To meet that contingency, a proviso was inserted in the agreement, that if, after the expiration of five years from the first of May, 1902, that is after the expiration of the St. Jacques lease, which was to expire on that day, St. Jacques, his heirs, executors, administrators or assigns, is neither owner nor tenant nor occupier of the hotel, by himself or together with another or others, then either party might cancel the agreement by a notice in writing.

St. Jacques might have purchased the hotel in fee, or he might have got a new term; and, in either case, might have held it or might have sold or assigned it, or in the event of his death, his heirs or executors or administrators might have taken possession of the hotel or have assigned it. In any one of these cases, St. Jacques, or his heirs, executors, administrators or assigns, might have been owner, tenant or occupier after the expiration of five years.

None of those things happened. St. Jacques sold a half interest in his lease, and the whole, with a small exception, of the hotel furniture, to two persons named Mulligan, and formed a partnership with them in the hotel business, which was carried on until 1904, when St. Jacques died intestate, and the respondents were appointed administrators of his estate.

The death of St. Jacques terminated the partnership, and its affairs were all settled between the Messrs. Mulligan and the defendants, the Messrs. Mulligan becoming the exclusive owners of the lease and the sole occupants of the hotel, for the remainder of St. Jacques's term.

The St. Jacques lease expired on the 1st day of May, 1907, when the Messrs. Mulligan, in their own names, and for their own sole benefit, obtained a new lease from the owners of the hotel, and have continued the occupation and possession thereof ever since.

The argument for the appellant is that the Messrs. Mulligan are in possession since the 1st of May, 1907, as the *assigns* of St. Jacques, within the meaning of the proviso.

To me it seems too clear for any argument that this is not so.

They are tenants and occupiers after the 1st of May, 1907, but by a title entirely independent of St. Jacques, or his heirs, executors, administrators or assigns, and not otherwise.

Some observations were made upon the use of the word *heirs* in the proviso, as being useless or inappropriate. But I think the word was neither useless nor inappropriate. St. Jacques might have purchased the hotel absolutely, before the expiration of his term, and in that case he or his *heirs* or executors, admin-

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istrators or assigns might have been in possession at the expiration of five years from the first of May, 1902, in which case the notice terminating the agreement could not have been given.

I think the use of the word *heirs* makes the meaning of the proviso absolutely clear, in the sense which I have attributed to it.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *MacCraken, Henderson, McDougal & Greene.*

Solicitors for the respondents: *Gormully, Orde & Powell.*

JOHN C. CORBIN (DEFENDANT).....APPELLANT;

AND

EVAN THOMPSON, ANDREW P. HORNE AND CHARLOTTE G. MUSGRAVE (PLAINTIFFS) ..... RESPONDENTS.

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*Nov. 20.
*Dec. 13.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Breach of contract—Measure of damages—Notice of special circumstances—Collateral enterprises—Loss of primary and secondary profits—Costs.

The plaintiffs sold defendant a boiler to be used in a mill to be set up in connection with his lumbering operations and guaranteed its efficiency for that purpose. When delivered, it proved inefficient, and, while necessary alterations and repairs were being made, two months elapsed during which the defendant was deprived of the use of his mill, was obliged to keep a gang of men idle and under expense for wages and board, and, in unsuccessfully attempting to carry on his operations, temporarily hired another boiler. On being sued for the price of the boiler, the defendant counterclaimed for damages and, at the trial, was awarded $427.11, being $277.11 for wages, board and expenses incurred in consequence of the failure of the boiler to satisfy the guarantee, and also $150 for damages for the "loss of the use of the mill." By the judgment appealed from the first item for wages, etc., was rejected and the item for "loss of the use of the mill" only allowed.

Held, per Fitzpatrick C.J. and Davies and Maclennan JJ., Idington J. *contra*, that, as the loss of primary profits directly resulting from the breach of the contract only should have been allowed, the item of $150 for loss of anticipated profits should be rejected as being merely secondary, speculative and uncertain; but that the item assessed by the trial judge in respect of the wages, board and other expenses should be allowed, as they were direct and immediate results of such breach.

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

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Duff J. was of the opinion that the appeal should be allowed and the judgment by the trial judge restored.

The judgment appealed from was reversed with costs and the judgment at the trial restored to the extent of $277.11, but, in the special circumstances of the case, no costs were allowed in respect of the appeal to the court below.

APPEAL from the judgment of the Supreme Court of Nova Scotia which varied the judgment at the trial and ordered judgment to be entered in favour of the plaintiffs for the balance of their claim, after setting off certain damages, with costs.

The special circumstances of the case, in so far as they are material on this appeal, are stated in the judgments now reported.

Mellish K.C. for the appellant.

W. B. A. Ritchie K.C. for the respondents.

THE CHIEF JUSTICE concurred with Davies J.

DAVIES J.—The dispute in this appeal arises out of a certain claim for damages made by the defendant. He had bought an engine and boiler from plaintiffs with a guarantee or assurance that they should be complete and in running order for the purpose of cutting lath-wood at his camp in the woods a few miles from one of the stations of the Intercolonial Railway.

It is admitted that the engine as delivered was out of repair and unfit for use when delivered, and the sole question is the measure of damages for the breach of the contract.

It seems clear that the plaintiffs knew the purposes for which the defendant wanted the engine and

boiler, and also clear that a suitable engine could at any time have been hired by defendant to take the place of the unsuitable engine delivered at from $40 to $50 a month.

About the 16th November when the engine and boiler were set up it was found that the engine would not work and some time afterwards plaintiffs were informed of the fact, and, later on, the engine was sent by plaintiffs' instructions to Truro, N.S., to be repaired. It was not returned to defendant so as to enable him to have it set up and running until the 16th January. The exact dates of these events, with the exception of the last one, are not, in the circumstances, important. Soon after the defendant found the engine would not work he temporarily hired a second-hand engine from one Crease at $20 a month. This did not work satisfactorily either, being too large for the boiler, and was returned by defendant on the 20th. When the plaintiffs instructed defendant to send the engine to Truro for repairs, they were at the same time (5th December) informed by defendant of the hiring by him of the Crease engine. Defendant says:

> I went to Halifax the next morning to tell Musgrave about it. I saw Mr. Musgrave. I told him exactly what happened, and I also told him *in order to get to work that I had hired an engine from Crease to fill my orders and to get my mill to work.* He made the remark that there will be no hurry about getting our engine in repair. I said, "Yes there is, because I have hired this engine and I want to get her returned as soon as I can."

The plaintiffs told defendant that their Truro workmen had informed them the engine would be repaired in three or four days, and the expectation of getting the engine back every few days is submitted by defendants as good grounds for their not hiring

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Davies J.

another engine and for keeping on the gang of men at the camp.

The trial judge allowed him "$150 for the loss of the use of his mill" owing to the non-delivery of the engine contracted for, and in addition to that $277 for wages paid by him to his men whom he retained in camp, for part of the time so retained, and board for the remainder of such time, with sundry other small expenditures, making in all $427.00.

The Supreme Court of Nova Scotia, Russell J. dissenting, reduced these damages to $150 for the loss of the use of the mill rejecting the $277 for wages and board of the men and other disbursements. Russell J. held that the 150 allowed for the "loss of the use of the mill" by the trial judge was recoverable if allowed on the ground that it was a

> fair estimate of the profits which would have been derived from the use of the machinery,

and that they could be added to the outlay required to produce these profits, but if it was put as a correct assessment of the damages for "the loss of the use of the mill" there could not possibly be any other damages awarded. He, however, awarded them, as fair profits, together with the outlay required to produce them and so sustained the trial judge's findings as to the amount of the damages.

All the difficulties of the case arose from the special facts. I agree fully with Russell J. that if the plaintiffs could have hired another engine at $40 or $50 a month and *should have done so* that expense would have been the full amount of the damages he should be awarded.

I think, however, the statements made to defendant by the plaintiffs justified the former in assuming that

the engine would be returned to him complete and efficient almost any day after the three or four days he was told it would take to repair, and that, therefore, he was fully entitled to keep his gang of men on awaiting such return ready to proceed with his work, instead of discharging them and leaving himself in the awkward position of being without men for his camp if and when the engine came back.

It seems under the circumstances a reasonable and proper thing to have done, and, if I am right, I can not see any ground on which the necessary expenses of doing it should be disallowed. They were reasonable and fair damages resulting directly from defendant's breach of contract and their subsequent representations as to when they would have repaired that breach. They were really the damages he actually and directly sustained from the loss of the use of his mill arising out of plaintiffs' breach of contract.

My doubts however have been as to allowing the $150 additional. I am not satisfied that this is a case where loss of anticipated profits can be allowed. If the trial judge had found under the peculiar circumstances of this case the full sum he awarded of $427 as damages for the loss of the use of the mill, I should not have been disposed, in the light of the language used by Blackburn J. in *Elbinger Actien-Gesellschafft, etc.* v. *Armstrong*(1) at page 477, to quarrel with the finding as a reasonable compensation for the loss of the use of the mill. But I am not able to follow him when he finds $150 as such compensation, and then adds to it the actual expenses of wages and board of the men. The damages whatever they were found to be for the "loss of the use of the mill" covered everything recoverable.

(1) L.R. 9 Q.B. 473.

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Nor am I able to follow Russell J. in allowing these damages as anticipated profits. Such profits are only recoverable when they can be held to be what are called primary profits, such as would have occurred and grown out of the contract itself as the direct and immediate result of its fulfilment. Then they are part and parcel of the contract itself and must have been in contemplation of the parties when the agreement was entered into. But if they are such as would have been realized from other independent and collateral undertakings although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as part of the damages occasioned by the breach of the contract in suit, unless indeed the defaulting contractor has expressly contracted to be bound for such consequences or the special circumstances are such that he may be held to have impliedly contracted to be so bound.

See per Bigelow J. in *Fox* v. *Harding* in 1851(1).

See also *British Columbia Saw Mill Co.* v. *Nettleship* in 1868(2); *Horne* v. *Midland Ry. Co.*(3).

In determining the question of liability to pay anticipated or probable profits as damages the distinction between primary and secondary profits must always be borne in mind. In Mayne on Damages (6 ed.) pages 55-56 there is a discussion of the cases and the author cites the judgment in the case of *Masterton & Smith* v. *Mayor of Brooklyn*(4) as furnishing the key to the English cases in which profits have been admitted and rejected as an element in the damages allowed.

(1) 7 Cush. 516.
(2) L.R. 3 C.P. 499.
(3) L.R. 7 C.P. 583.
(4) 7 Hill 61, at pp. 68-69.

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Nelson C.J. in delivering the judgment of the court said:

> When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. * * * But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made and formed, perhaps the only inducement to the arrangement.

In all the circumstances of this case I would disallow those $150 of anticipated profits because they are secondary and not primary damages within the meaning of the rule and as being too speculative and uncertain and not in contemplation of the parties when making the contract or such as the plaintiffs may be held to have impliedly contracted to be bound for in case of breach of their contract. As I have rejected the "fair rental" rule because of the misleading character of the information given to defendant as to when the repaired engine would be furnished him, I conclude that the remaining damages, as found by the trial judge, $277.11, should be approved as the reasonable compensation for the loss of the use of the mill and judgment entered accordingly, for that amount with costs of this appeal, but, under the circumstances, neither party to have costs of the appeal to the Supreme Court of Nova Scotia; the respective judgments for the plaintiffs and defendant for debt, damages and costs to be subject to set-off and costs in the trial court to be apportioned as awarded by the trial judge.

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Idington J.

IDINGTON J. (dissenting).—This is an unsatisfactory sort of case. The learned trial judge, in my opinion, erred in the amount of damages he allowed even though the principle he adopted had been right. It seems to me, moreover, that the principles of allowing for full rental of a good engine to supply the place for the full time of the one bought and sent to the shop for repairs and also the damages for men being kept idle as well as for loss of profits was quite erroneous. I cannot reconcile or harmonize the findings as Mr. Justice Russell attempts to do.

On appeal to the Supreme Court of Nova Scotia this assessment is rightly, as I view the case, set aside and only the amount of the estimated rental of a good substitute for the one in question whilst it was being repaired,—and some item for incidentals that may be properly added are allowed. But the evidence of another engine fitted for the boiler power being used, being available for appellant, is by no means as clear as I would like. There is evidence however, left unnoticed in cross-examination and I cannot see how we can discard it.

When we look further into the law and the facts we find that neither party stood upon his strict legal rights but each in a sense seemed to act in a reasonable way up to a certain point, and paradoxical as it may seem, the very doing so renders it more difficult to assess the damages.

We cannot assess them satisfactorily by a strict adherence to the usual rules that would be applicable if the respondents had ignored the complaints of the appellant entirely.

Then when we find that the respondents properly took, on hearing the complaints of the appellants that

the engine had not come up to the standard guaranteed, possession of the engine with the consent of appellant and undertook its repair, and the engine was replaced by the appellant getting one of his own choice and on his own terms we see there cannot be the usual damages assessed in the usual way for breach of a warranty.

We turn to the agreements that followed the breach and have to ask: Has there been any breach of such agreements or of any of them? They are all set out in the pleadings and the default in each also but in regard to each so set out we have not the full particulars of dates, times, and exactly what done, or might have been done that would enable us to assess in detail for breach of each of these subsidiary agreements in any satisfactory manner.

We have, covering them all, the fact that before the guaranteed engine in question was removed to be repaired, the respondents were told by the appellant on the 5th December, that in order to get to work he had hired an engine from Crease.

This substituted engine was got and set up and kept by the appellant till the 19th or 20th of December. Meantime acting on the reasonable option given them, respondents took or caused to be taken, the engine they had guaranteed, away to the repair shop.

Being told of this hired engine led them no doubt to so take the other and at the same time in giving instructions for repair to rest on the assurance the mill was going, and not make, at a possible extra expense, provision for such strenuous efforts for expeditious return of engine from repair shop, as they otherwise might have done and certainly it would not, on such a state of facts, be within the reasonable

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contemplation of the parties as to this subsidiary agreement that the Crease engine would fail, and the mill of appellant stop for want of it.

Yet there came a time when respondents were told it did fail and I incline to think somewhat greater energy induced by extra pay might have been used after that in getting it out of the repair shop. I see, however, no evidence, in this regard, on which I could, satisfactorily, assess damages.

Besides I cannot say that respondents even then neglected anything or that what happened, or the results thereof, could have been within the reasonable contemplation of the parties either at the making of the original or the subsidiary agreements.

Nor can I see that the loss of profits if any were of such a character as to render that loss a proper element to enter into the assessment of damages in this case.

And yet one cannot help feeling but that the appellant has suffered more than he has been allowed.

My difficulty is to bring that suffering within the rules by which damages must be measured and allow for it on a legal basis.

The allowances about to be made here as the result of this appeal exceed, I think, that permissible within such lines. Even if I thought them so based on principle I would not allow to that extent. Moreover, I feel that I should not disregard the finding of the court below for such absolute trifles without the clearest warrant for so doing. In short, I do not feel that, in fixing the sum of $150, the court was so clearly wrong, even if the absolutely correct rules had been followed, that I ought to interfere. The rental basis adopted, to the extent it is, does not appear

clearly right but the gross sum allowed may after all be almost, if not altogether, so near right that it better stand. I do not think we should, unless upon the clearest ground, reverse only to change by a trifling increase or reduction of damages respecting which, even when applying correct rules of law, men might reasonably differ in their estimate of the facts. This is not the case of a fixed sum in respect of which the court has, if at all, gone wrong.

I therefore think the appeal should be dismissed.

MACLENNAN J. concurred in the opinion stated by Davies J.

DUFF J.—I agree with the views expressed in the judgment of Russell J. in the court below, and I would, consequently, allow the appeal and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitor for the appellant: *T. J. N. Meagher.*
Solicitor for the respondents: *Henry C. Borden.*

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*Nov. 20.
*Dec. 13.

THE TOWN OF NEW GLASGOW (PLAINTIFF) ..... } APPELLANT;

AND

DAVID P. BROWN AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Sale of corporate property—Committee of council—Authority to sell—Ratification.

A committee of a municipal council cannot, unless authorized by the council, sell corporate property and if they do an action lies against them by the corporation for any loss incurred thereby. Such illegal sale cannot be ratified by resolution of the council carried by the votes of the members of the committee.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the plaintiffs and dismissing the action.

This action was brought by the plaintiff, the Town of New Glasgow, against the defendants, to recover damages for the wrongful conversion by the defendants, of 37 tons, 875 pounds, of water pipe and also for a declaration that the defendants (respondents) had no right or authority to convert or sell the same.

At the time of the conversion and sale the defendants were members of the council of the plaintiff town, and three of them, namely, Brown, Jackson and Murray, were members of the Water Committee of the said council.

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

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On or about the 5th day of December, the four defendants, without authority of the town council, and without submission of the question to the town council, and acting independently of the council, undertook to sell, and did sell, the 37 tons, 875 pounds, of water pipe, the property of the said town, to William Cooke, of Glace Bay, N.S.

The pipe in question was acquired by the Town of New Glasgow under the authority of a special Act of the Legislature of Nova Scotia—chap. 114, Acts of 1903—by which the Town of New Glasgow was empowered to borrow $40,000 for the purpose of improving, repairing and extending the water system of the town and "for laying a new 12-inch main pipe from the pumping station to the reservoir."

The pipe was part of the 12-inch pipe bought for the purpose of laying a new main from the pumping station to the reservoir and was not required for that purpose.

Seven days after the sale the question of the sale of the pipe was for the first time brought before the town council and a resolution purporting to ratify the sale was introduced by the defendant Brown. The mayor refusing to put the resolution, it was put by the defendant Brown and declared by him carried, the defendants alone voting for it, the remaining two councillors voting against it and the mayor declaring it unconstitutional.

Subsequently this action was entered by the town under authority of a resolution of the town council claiming the difference between the price received and the actual value of the pipe. The action was tried at Pictou before Mr. Justice Meagher, who found for the plaintiff appellants, holding that the defendants had

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no authority to sell the pipe, and that the subsequent attempt to ratify the sale by Brown's resolution was of no effect.

An appeal was asserted from this judgment to the Supreme Court of Nova Scotia, and was heard by a court composed of Townshend, Graham, Russell and Longley JJ. Mr. Justice Russell read an opinion allowing the appeal with which opinion Mr. Justice Graham concurred. Mr. Justice Townshend, with some doubt, concurred in the opinion of Mr. Justice Russell, and Mr. Justice Longley dissented, holding that the defendants had no right to sell the pipe.

The plaintiffs appealed to the Supreme Court of Canada.

C. E. Gregory K.C. and *Mellish K.C.* for the appellants.

The defendants had no authority to sell the pipe in question and could not lawfully do so: *Pictou School Trustees* v. *Cameron*(1); and, necessarily, they could not themselves ratify the sale.

The town corporation has only the powers given it by the charter and the sale of personal property is not one of them. See *Attorney-General* v. *Great Eastern Railway Co.*(2); *Ashbury Railway Carriage and Iron Co.* v. *Riche*(3).

W. B. A. Ritchie K.C. for the respondents. The sale in question was incidental to the construction of water works authorized by statute and so within the powers of the council. See *Liverpool and Milton*

(1) 2 Can. S.C.R. 690. (2) 5 App. Cas. 473, at p. 481.
(3) L.R. 7 H.L. 653.

Railway Co. v. *Town of Liverpool*(1). Brice on Ultra Vires (3 ed.), pp. 117-8.

THE CHIEF JUSTICE concurred with Maclennan J.

DAVIES J. concurred with Idington J.

IDINGTON J.—The appellants are, as the name indicates, a municipal corporation. The Legislature of Nova Scotia passed an Act enabling this corporation to construct water works.

In the course of some months after works begun thereunder it became apparent that there was more pipe on hand than the corporation had ready money to make immediate use of.

The respondents were members of the council of the said corporation. Three of them constituted a committee which, I infer from its name and references to it in the evidence, had charge of this work.

It is not pretended, however, that they ever had any authority to sell or dispose of any of the pipe in question. Neither the mayor, nor the council, so far as appears, had ever considered the question of what should be done with what had become, for the present moment, pipe that we may for argument's sake call surplus pipe.

Whether it would be a wise thing to sell it, if the power existed to do so, or retain it awaiting future developments was clearly a question for consideration by the whole council, at a meeting properly constituted for the consideration of such business.

This seems so clear that one is at a loss to comprehend the frame of mind of those who, unauthorized

(1) 33 Can. S.C.R. 180.

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and quite unwarranted in any way, took the steps the respondents did to sell this part of the town property.

Brown, who was chairman of the committee I have referred to, tells how, as a result of his meeting with one Cooke, a contractor at Glace Bay, the negotiations came about, and then says:—

> This is how the sale originated. The pipe was shipped under the instructions of the four of us to Cooke. That is all the authority we had at that time.

I may suggest that he might as well have added to the last sentence "or any other time" and completed the story.

Eight or nine days later at a meeting of the council when, on these facts, this very cause of action now before us had arisen in appellants' favour and all four respondents were liable to be adjudged in a suit for, and in trial of suit for, such cause of action as Mr. Justice Meagher, the learned trial judge, afterwards did adjudge them liable, to pay the town over twelve hundred dollars, they ask the mayor to submit to the council meeting the resolution I am about to quote, and on his refusal they had it put by themselves, and voted for by themselves, and entered on the minutes duly signed by themselves, as follows:—

> Resolved, that the sale of 37 tons, 875 pounds of water pipe to Wm. Cooke, contractor, Glace Bay, at the rate of $31.00 (thirty-one dollars) per ton of 2,000 lbs. f.o.b., New Glasgow, be confirmed, and that the proceeds be placed to the credit of the "water construction account."
>
> (Sgd.) DAVID P. BROWN.
> " G. S. JACKSON.
> " H. MURRAY.
> " JOHN J. GRANT.
>
> New Glasgow, Dec. 12, 1905.

Resolution *re* sale of pipe voted on.

> After which Councillor Brown put the resolution to a vote of the council and passed on the following vote, viz.: For resolution—

Councillors Grant, Murray, Brown and Jackson. Against resolution—Councillors Fraser and Glendenning.

Minute book, page 165.

Nobody ventured to assist them or countenance their proceeding.

What could they expect to gain legally by such a proceeding?

I am not surprised that counsel have failed to find precedent to fit such a case.

The legal principles that do fit it are old and are just as much in force to-day as when first applied.

When men are named as committee men on behalf of a municipal council or any other body of men, they are but agents of, with such authority as, those nominating them choose (acting within and no further than their legal power of such nomination may extend) to give.

No one acting on or as such committee exceeding the limits of such agency or authority can ratify his own wrongful act, and make it legally right or effective or release himself from the consequence of his own wrong.

It seems idle to discuss the statutory authority, of the town to sell, when the town never did sell.

It may not be out of place to refer to what was pointed out by eminent judges such as the late Chief Justice Hagarty in the case of *Baird* v. *The Village of Almonte*(1), at p. 419, and the late Chief Justice Harrison at pp. 424 *et seq.*, followed by Mr. Justice Osler, now of the Court of Appeal for Ontario, in the case of *Vashon* v. *Township of East Hawkesbury*(2), at pp. 202 and 203, in cases where statutory prohibition existed against municipal representatives, who are trus-

(1) 41 U.C.Q.B. 415. (2) 30 U.C.C.P. 194.

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tees for the public, acting when their interest and duty came in conflict. It appears from them that apart from the statutory prohibition there existed no right to act.

Of course we express no opinion on the need of assent by the Lieutenant-Governor to a sale.

I think the appeal should be allowed with costs here and in the court below and the judgment of Mr. Justice Meagher restored.

MACLENNAN J.—I am of opinion that, quite irrespective of the statute requiring the consent of the Governor in Council, to a sale of property by the municipality, the respondents had no power, without the previous authority of the municipal council, to make the sale in question.

They not only made a contract of sale, but actually shipped the pipes to the purchaser at Glace Bay; acts which constituted a conversion of the property, and gave rise to a good cause of action on the part of the municipality.

The appeal should, in my opinion, be allowed with costs here and below.

DUFF J. concurred with Idington J.

Appeal allowed with costs.

Solicitor for the appellant: *H. K. Fitzpatrick.*

Solicitor for the respondent: *H. C. Borden.*

ELIZABETH McMULLIN AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE NOVA SCOTIA STEEL AND COAL COMPANY (DEFENDANTS). } RESPONDENTS.

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*Nov. 20, 21.
*Dec. 13.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Negligence—Railway—Breach of statutory duty—Common employment—Nova Scotia Ry. Act, R.S.N.S. (1900) *c.* 99, *s.* 251—*Employers' Liability Act—Fatal Injuries Act.*

Section 251 of the Railway Act of Nova Scotia provides that when a train is moving reversely in a city, town or village the company shall station a person on the last car to warn persons standing on or crossing the track, of its approach and provides a penalty for violation of such provision.

Held, that this enactment is for the protection of servants of the company standing on or crossing the track as well as of other persons.

M. was killed by a train, consisting of an engine and coal car, which was moving reversely in North Sydney. No person was stationed on the last car to give warning of its approach and as the bell was encrusted with snow and ice it could not be heard. Evidence was given that on a train of the kind the conductor was supposed to act as brakesman and would have to be on the rear of the coal-car to work the brakes but when the car struck M., who was engaged at the time in keeping the track clear of snow, the conductor was in the cab of the engine.

Held, Idington J. dissenting, that an absolute duty was cast on the company by the statute to station a person on the last car to warn workmen, as well as other persons, on the track which, under the facts proved, they had neglected to discharge. The defence under the doctrine of common employment was,

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therefore, not open to them. *Groves* v. *Wimborne*, ([1898] 2 Q.B. 402), followed (*a*).

Held, per Idington J., that the evidence shewed the only failure of the company to comply with the statutory provision to have been through the acts and omissions of the fellow-servants of deceased; that the company, therefore, could not be held liable for the consequences under the "Fatal Injuries Act"; that it is, therefore, unnecessary to determine the applicability of the said section of the "Railway Act," as the fellow-servants were guilty of common law negligence which rendered the company liable but only by virtue of and within the limits of the "Employers' Liability Act." (*a*).

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the plaintiffs.

The facts of the case are sufficiently stated in the above head-note and in the judgments published herewith.

The trial judge gave judgment for the plaintiffs and assessed the damages at $3,800. The court *en banc* reversed his judgment and dismissed the action holding that plaintiffs could not recover under "The Railway Act" as the negligence causing the accident was that of a fellow servant of the deceased and that the statement of claim did not cover common law negligence. The plaintiffs appealed to this court.

Mellish K.C. for the appellants. An absolute duty is cast upon the company by section 251 of "The Railway Act" and they cannot escape liability by transferring to their employees on the train the obligation of performing it. *Curran* v. *Grand Trunk*

(*a*) These holdings were settled by Davies and Idington JJ. respectively.

Railway Co.(1); *LeMay* v. *Canadian Pacific Railway Co.*(2).

And plaintiffs are entitled to succeed under "The Employers' Liability Act" which recognizes Lord Campbell's Act and excludes the doctrine of common employment.

The statement of claim sufficiently sets up this ground of negligence. See Ruegg on Employers' Liability (5 ed.) p. 121 and form at pp. 362-3. And it may be joined with another or an alternative claim. Ruegg, p. 362; *Curran* v. *Grand Trunk Railway Co.* (1).

Newcombe K.C. for the respondents. The deceased was guilty of contributory negligence. He knew that the train might be expected at any moment and the engineer was justified in assuming that he would be on his guard. See *Aerkfetz* v. *Humphreys* (3); *Crowe* v. *New York Central and Hudson River Railway Co.*(4); *Dominion Iron & Steel Co.* v. *Oliver* (5).

Section 251 of "The Railway Act" does not apply to the case of a company injuring one of its own employees. See Labatt, Master and Servant, secs. 637-8. Even if it does we can invoke the doctrine of common employment. Labatt, sec. 638. Smith, Master and Servant, ed. 1904, p. 225.

THE CHIEF JUSTICE agreed with Davies J.

GIROUARD J. concurred in the judgment allowing the appeal.

(1) 25 Ont. App. R. 407.
(2) 17 Ont. App. R. 293.
(3) 145 U.S.R. 418.
(4) 70 Hun. 37.
(5) 35 Can. S.C.R. 517.

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DAVIES J.—This action was one brought under what is known as "Lord Campbell's Act" by the widow and infant children of one John McMullin, an employee of the defendant company, to recover damages arising out of the death of the said employee while engaged at his work on the railway track of the company.

The defendant company owns and operates a railway between their works at Sydney Mines and their shipping piers at North Sydney, N.S., and such railway runs through the town of North Sydney.

The railway being entirely a provincial one is governed as to its construction, management and operation by the provincial statute, R.S.N.S. ch. 99, intituled "The Nova Scotia Railway Act."

The 251st section of that Act is as follows:—

> Whenever any train of cars is moving reversely in any city, town or village, the locomotive and tender being in the rear of such train, the company shall station on the last car in the train a person who shall warn persons standing on or crossing the track of such railway, of the approach of such engine, tender and train; and for any violation of any of the provisions of this section, or of any of the three sections next preceding, the company shall be liable to a penalty of one hundred dollars.

Section 280 of the same Act is as follows:—

> Every company * * * causing or permitting to be done, any matter, act or thing contrary to the provisions of this chapter * * * or omitting to do any matter, act or thing required to be done on the part of any such company * * * is liable to any person injured thereby for the full amount of damages sustained by such act or omission * * * .

The main and substantial question raised and argued before us was as to the true construction of section 251.

The trial judge held that the section did apply to railway servants as well as others not being so, and

cast an absolute duty upon the company for damages arising from the non-performance of which the company was liable.

The Supreme Court of Nova Scotia reversed the judgment of the trial judge, holding that even

> assuming the moving of the cars through the town in reverse order, stationing a man on the last car is analogous to and is governed by the same principle as the failure of a defendant to supply some permanent protection to machinery, such as the fence or guard required by statute in such a case as *Groves* v. *Wimborne* (1)

still in the case at bar,

> all the negligent omissions, including the stationing of a man on the forward car to give the necessary warning, were those of fellow workmen of the deceased, and even if the company would be liable on proof of a system on their part of running their trains without these necessary precautions * * * there is nothing in the least degree approaching the proof that would be required to support such a case.

I am quite unable to agree with the conclusions reached by the court below, either as to the application of the doctrine of "common employment" or as to the proper inferences to be derived from the very meagre evidence given at the trial.

With respect to the proper construction to be given to section 251, I am unable to agree with the contention that the section only applies to persons *not* railway servants, and, as to them only "while standing on or crossing the track of the railway" *at a highway crossing.*

There does not appear to me to be any justification arising either from the language of the section itself or from its position in the Act and its relation to its context which would justify the courts in importing such limitations into it. Nothing is said in the section with respect to a "highway crossing."

(1) [1898] 2 Q.B. 402.

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What is said is that "persons standing on or crossing the track of such railway" within the limits of a town, city or village, shall be entitled, so far as trains moving reversely are concerned, to have a certain specified precaution and warning observed. It does seem to be an arbitrary and unreasonable construction to exclude workmen from the benefit of such a prudent and beneficial section as this. In fact, it would seem rather more necessary for the workman's protection than for that of the outside public. Business might occasionally, no doubt, take some of the general public on or across these railway tracks within cities, towns or villages, but, apart from public highways, the presence of any of the general public would be a rare occurrence on these tracks.

On the other hand, the duties of many of the workmen, trackmen, switchmen, etc., require them to be "on or crossing the track" frequently, and it would seem reasonable to conclude that the section was enacted as much, if not more, for their benefit than for the benefit of the small section of the general public who would legally go "on or across the track." Of course, the section is not for the benefit of trespassers and they, I assume, not to be within it.

The section applies in terms to any and all parts of the company's track within the city or town, and I see as little reason for excluding from the section the grounds of the company itself within such city as the workmen of the company.

The section is general in its terms. Its object evidently was the protection of "persons on or crossing the track" within the town's limits from the damages arising from a train of cars running reversely, and I entirely fail to find any justification for confining its

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protection to persons crossing the tracks at a highway and excluding others who legally and properly are on or crossing the track for business or other purposes, even within the company's own grounds, or others who, being the company's workmen, are on or crossing the track in discharge of their duty.

That being so, what are the facts proved here?

The deceased was a switchman and was engaged, at the time of his death, in the midst of a snow storm, in keeping the switch clear of snow and ice. He was run down and killed by a train of cars running reversely. Not a scintilla of evidence is given as to any contributory negligence on his part, and it is admitted that no person was on the last car ahead of the engine to warn persons of its approach. That being so, the statutory duty of the company was violated.

No evidence whatever was called for the company. No attempt to shew that, as a company, it had tried to discharge its duty by "stationing a man on this last car."

The fireman stated:—"We had no book of rules at that time that I know of." And this evidence is neither contradicted nor explained, but we are asked to assume, from a casual statement of the same man, that

> the conductor (who as a fact was in the cab), is supposed to be on the car ahead of the engine;

that the conductor's orders and the system under which the railway was operated required him to be there.

I am not able to draw from this casual statement, the conclusion that the company had, in the words

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of the statute, "stationed a man on the last car on the train." As a fact, no man was so stationed. If the company desired to raise the defence of common employment, they would be bound, in my judgment, to prove either that the man was stationed there to warn people and by his own carelessness and negligence had failed to do so, or, at least, that it was, by their rules or orders, the duty of some one to have been there to carry out the statutory duty, and that his absence was not in any way owing to their negligence or default, but to the deliberate breach of duty of some workman charged with such duty.

Then, if they desired to rely upon the qualifying words, which Williams L.J. added to his concurrence with the other members of the appeal court in the judgment of *Groves* v. *Wimborne*(1), they would stand in a position at any rate to urge the application of the doctrine so qualified to the special facts proved.

As for me, I think the law as laid down by the appeal court in *Groves* v. *Wimborne*(1), applicable to this case and binding. The section being applicable to the place where the man was killed and to the man, he being within the class of persons intended to be protected, although a workman of the company, there arose under it a statutory obligation imposed upon the company in the interests of the workmen's safety which they failed to discharge and for the consequences of which failure they are liable. Under the facts as proved it was not open to them to invoke the doctrine of common employment, even if such a doctrine could, in any case, be invoked to relieve a company from the consequences following the failure to

(1) [1898] 2 Q.B. 402.

observe or conform to a statutory obligation towards a party injured.

These conclusions relieve me of any necessity of considering the other branch of the case, namely, the plaintiff's right to recover under "The Employers' Liability Act." As nothing was said respecting the amount of the damages awarded by the trial judge, I have assumed them to be right.

The appeal should be allowed with costs and the judgment of the trial judge restored.

IDINGTON J.—I agree that this appeal should be allowed but concur in the opinion of the court below that the action, so far as rested on "The Fatal Injuries Act" alone, is not maintainable. It needs also the support of "The Employers' Liability Act." There was common law negligence, and hence, in my view of the evidence, I cannot find that it is necessary to pass any opinion on the question of the appellants' right to rely only or at all upon the statutory provisions invoked from "The Nova Scotia Railway Act." My reason for that is that I infer from the evidence that the men in charge of the train neglected what had been their accustomed observance of the statutory duties, and that I cannot impute the breaches thereof to the respondents, as part of their system, or at all, except through the misconduct of their servants, who were also the fellow servants of the deceased.

The driver of the engine says:—

> The conductor was both brakesman and conductor * * * . The brake on the car at that time was on its rear and there is where he would likely be.
>
> To the Court.—If it had been a fine day, the brakeman would have been there. He was not there because it was storming too badly.

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Boutiler says:—

> The conductor was in the cab * * * . The conductor is supposed to be on the car ahead of the engine * * * .
>
> A man would require to be on the car to operate its brake on that occasion. There was no man on the car that day up to the time of the accident. If we had a brakesman that day, his position would have been on the coal car. We could only stop the car through stopping the engine. We had no book of rules at that time I knew of.

And, in cross-examination;

> It was a shunting engine. At that time the crew usually consisted of three and the conductor handled the brakes.

And, on this occasion, the three men were there, but evidently the conductor-brakesman, though he had only one car to look after, neglected his duty as such. He had died before the trial and hence above only evidence obtainable, of the sphere of duties assigned, unless the respondents' manager and secretary had been brought to prove such from by-laws or otherwise expressly. Such, certainly, has not been the practice at trials of this sort and was not, in face of the foregoing evidence, in my opinion, incumbent on the respondents here.

At first, I was disposed to attach some importance to the statement as to want of a book of rules as indicating a neglect of duty on the part of the company. The statement, as appears above, cannot, however, I think, fairly be so read as to imply of necessity that the company never had delivered the men such rules, or given proper instruction or ever sanctioned the neglect of duty such as is apparent on this occasion. Their man was there to comply with the statute as was also the bell, and, even if the statute can be interpreted so as to enure to the benefit of the appellants, it cannot, in this view, get rid, under the circumstances, of the doctrine of common employment.

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The action cannot, therefore, in my opinion, be maintained without the support that "The Employers' Liability Act" gives. It is urged by the respondents that this cannot be given effect to in this action, and so the court below seems to have assumed and held for reasons I fail to find sufficient.

As to the statement of claim, I see no insuperable difficulty. Paragraph four seems framed as if intended to cover the cases under section three of "The Employers' Liability Act," and paragraph five seems framed as if intended to meet the case of an action resting upon a breach or breaches of the statute there invoked, and which might, if the evidence got the case past the difficulty of the common employment doctrine, support an action under "The Fatal Injuries Act" itself without regard to what precedes.

Such are the cardinal features of this statement of claim. On its face are presented two cases. Then this becomes clearer when we consider the statement of claim in its first three paragraphs and find that it shews the deceased to have been a servant of the respondents in the very same service as those whose negligence is complained of in the fourth paragraph.

How could any one read such a statement of claim and not see thus suggested a claim that must rest on "The Employers' Liability Act" for support?

The pleading, in that regard, is neither lucid nor precise nor concise, but it must mean nothing if it does not point to an intention to found the first part of the statement of claim on that Act. It, indeed, jumbles together the provisions thereof by using, in a very undesirable way, some of the language used in each of the three later sub-sections of section three.

The statement of claim, as a whole, covers at least

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quite enough to prevent us from holding that it so absolutely fails to disclose any case within "The Employers' Liability Act," that the trial judge would have erred if he had found, on the facts, such a case and entered judgment thereunder.

I think that is a fair test of the possible meaning of the statement of claim here. If, down to the trial, respondents could pretend they were misled, and, therefore, did not plead want of notice, a motion to amend and set up alternative claims was made and allowed. This amendment could mean nothing short of claiming, as the meaning of the pleading, what I have suggested above as its intention and possible meaning. The learned trial judge might well have refused this amendment unless and until the whole pleading had been put in less embarrassing form.

The refusal of the learned trial judge to put plaintiff to an election, confirms my opinion, not only that it was possible either case might be shewn or appear, but that the case proceeded with everybody concerned understanding that the case might be found in either way as the facts and law applicable should disclose later.

The necessity for particulars of claim (so much relied on below) is just as great under the one Act as under the other—only there is there prescribed a slightly different mode of evincing them.

I cannot see that either was adopted in this suit. Mere forms these are in either case; and can be supplied at any time by amendment as can also the pleadings. No one should be driven to another action for any of these things.

The questions of the cause of the death, the legal

relations of the parties concerned in that and the consequences thereof were all threshed out at the trial.

There is nothing to prevent us from acting on section 54 of "The Supreme Court Act" and so amending, within that and other sections, as the court below also could have done, and giving judgment accordingly, unless we should see that the respondents are entitled to say they were misled and now are, therefore, entitled to plead want of notice and claim a new trial.

I think the fair inference, from the correspondence produced, is that notice was given and I infer that all objections to it, if any possible, were waived; and, upon some features, the correspondence presents, but which I need not enlarge upon, there existed good reasons for the waiver.

I think, therefore, the appellants entitled to have the case maintained and disposed of on the merits; and claim upheld by whatever law it can be rested upon.

Now as to the merits of the appellants' case; the habitual compliance with the enactments requiring outlook and ringing of bell; even if such statutes are not such as appellants' action can rest upon; when habitually observed, as I have inferred they were, and as, in law, they may fairly be presumed to have been so observed, created a condition of things that the deceased was entitled to have relied on, as likely to continue.

The view of such a matter has been so well presented by Lord Esher, in *Smith* v. *The South Eastern Railway Co.*(1) in appeal at pages 182 *et seq.*, that I refer thereto and adopt his reasoning as applicable, and rely on it here.

More than that, I am prepared to hold, and do

(1) [1896] 1 Q.B. 178.

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hold, that an engine merely used for shunting in a railway yard, such as this was, and especially running reversely, requires in its management a high degree of care, and that, when the ringing of a bell or keeping of an outlook or possibly either on such occasions, as reason and due regard to the safety of those in the yard may reasonably require, has been abandoned, he, who being in charge or control, has thus abandoned such safeguards, without adopting some equivalent, quite as efficient, has been guilty of that sort of negligence that section 3, sub-section (*e*) of the "Employers' Liability Act" refers to.

Such was, I take it, too clear for argument, the case disclosed by the facts before us.

This opinion of the law, apart from statute, is clearly in accord with the principle of the common law and what was given expression to by Sir Henry Strong, the Chief Justice of this court, in the case of *The Canada Atlantic Railway Co.* v. *Henderson*(1), at page 636, where he said:—

> Further I think it right to say that on this evidence (that the bell did not ring, that the speed was over six miles an hour, and that a flagman, stationed there, did not give warning), we should be justified in holding that there was common law negligence, as in the case of *The St. Lawrence and Ottawa Railway Co.* v. *Lett*(2)

and, as on the same occasion, the late Mr. Justice Gwynne also said:—

> I am of opinion that if the ringing of the bell would prevent an accident to a person crossing a highway, there is an obligation, at common law, to ring it,

and, with what the late Chief Justice of Ontario, Sir George Burton, said, in the case of *Hollinger* v. *The Canadian Pacific Railway Co.*(3).

(1) 29 Can. S.C.R. 632. (2) 11 Can. S.C.R. 422.
(3) 20 Ont. App. R. 244.

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Thus I find, besides the case of the *Canada Southern Railway Co.* v. *Jackson*(1), not cited, but itself quite sufficient to meet the allegation of contributory negligence, the element of expectation, on the part of the deceased, that he might ring the bell or see the outlook, when relied upon by Mr. Justice Meagher, in connection with the question of contributory negligence, was fully justified. And thus I find further the amplest legal ground for maintaining the action and giving damages for $1,500, without relying on the Nova Scotia Railway statute, as enuring to the appellants' benefit. And as I have already said, the breaches of that statute, not being shewn to be the direct act of the company, or of a system adopted by it, but arising from clear neglect of duty, on the part of a fellow servant, can give no higher right that I indicate here.

I would allow the appeal with costs of appeal and costs of suit in all courts below, save so much thereof as may have been occasioned by the striving of the appellants to maintain their right to damages exceeding the limit of $1,500, and enter judgment for that sum to be properly apportioned, but, as the majority of the court take another view, say nothing further anent the same.

DUFF J. agreed with Davies J.

Appeal allowed with costs.

Solicitor for the appellants: *D. L. McPhee.*

Solicitor for the respondents: *R. H. Butts.*

(1) 17 Can. S.C.R. 316.

1907

*Nov. 21, 22.
*Dec. 31.

ALEXANDER McNEIL (DEFENDANT). APPELLANT;

AND

PATRICK E. CORBETT (PLAINTIFF).. RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to land—Trust—Interest in mining areas—Sale by trustee—Recovery of proceeds of sale—Agreement in writing—Statute of Frauds—R.S.N.S. (1900), *c.* 141, *ss.* 4 *and* 7—*Part performance —Acts referable to contract—Evidence—Pleading.*

M. transferred to C. a portion of an interest in mining areas which he claimed was held in trust for him by the defendant. In an action by C. claiming a share in the proceeds of the sale thereof, no deed or note in writing of the assignment was produced as required by the fourth section of the Nova Scotia Statute of Frauds, and there was no evidence that, prior to the assignment, there had been such a conversion of the interest as would take away its character as real estate.

Held, that the subject of the alleged assignment was an interest in lands within the meaning of the Statute of Frauds and not merely an interest in the proceeds of the sale as distinguished from an interest in the areas themselves, and, consequently, that the plaintiff could not recover on account of failure to comply with that statute.

It was shewn that, on settling with interested parties, the defendant had given M. a bond for $500, as his share of what he had received on the sale of the areas.

Held, that, as this act was not unequivocally and in its own nature referable to some dealing with the mining areas alleged to have been the subject of the agreement, it could not have the effect of taking the case out of the operation of the Statute of Frauds. *Maddison* v. *Alderson* (8 App. Cas. 467) referred to.

Judgment appealed from (41 N.S. Rep. 110) reversed.

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

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MCNEIL v. CORBETT.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1), affirming the judgment at the trial, by which the plaintiff's action was maintained. with costs.

The plaintiff brought his action against the appellant and one McDonald claiming an interest in the proceeds of the sale of certain mining areas sold by the defendant, McNeil, to the Port Hood Coal Company. It was alleged that the interest so claimed had been assigned to the plaintiff by McDonald in whose favour the trial judge found that the defendant had made a declaration of trust in respect of the areas, but no written note of the assignment was produced. At the trial, oral testimony was admitted to shew that the alleged assignment was in the form of a receipt from McDonald to the plaintiff for $300, stating that the money had been paid for one-fourth of McDonald's interest in the areas and purporting to be signed by the assignor, but his signature to the lost receipt was not proved.

The appeal was from the judgment of the Supreme Court of Nova Scotia, affirming the judgment by Russell J., at the trial, by which it was ordered that the plaintiff should recover against the defendant, McNeil, the sum of $668.56, with costs.

Bell for the appellant. As to contract for benefit of a third party not being enforceable at law see *Burris* v. *Rhind* (2). The contract cannot be supported on the ground of voluntary trust. *Antrobus* v. *Smith*(3). We refer also to Underhill on Torts, (8 ed.), page 54; *Maddison* v. *Alderson*(4).

(1) 41 N.S. Rep. 110.
(2) 29 Can. S.C.R. 498.
(3) 12 Ves. 39; 8 Rev. Rep. 278.
(4) 8 App. Cas. 467.

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Mellish K.C. for the respondent. The agreement was ratified: *Phosphate of Lime Co.* v. *Green*(1), per Willes J. at pages 56, 57. The Statute of Frauds is not pleaded and, in any event, is satisfied by the receipt from McDonald to Corbett stating that the money had been paid and accepted for the interest in question; see Warren on Choses in Action, p. 352. The other grounds raised by the appellant have been already disposed of in the case of *McNeill* v. *Fultz* (2) which had reference to the same areas and transactions between the parties.

The judgment of the court was delivered by

DUFF J.—The plaintiff fails, I think, for non-compliance with the Statute of Frauds.

The agreement which he alleges in his statement of claim is an agreement with the defendant McDonald for the purchase of an interest in certain coal mining licenses—admittedly an interest in lands within the meaning of that statute.

I am unable to agree with the court below that, upon the evidence, the plaintiff can succeed as upon an agreement for the purchase of an interest in the proceeds of the sale of the licenses as distinguished from an interest in the licenses themselves. The oral agreement proved was an agreement for the purchase of an interest in the licenses. And there is no sufficient evidence that prior to the agreement there had been such a conversion of that interest as would take away its character as real estate.

No memorandum in writing was produced. As regards the lost receipt referred to, there was no

(1) L.R. 7 C.P. 43. (2) 38 Can. S.C.R. 198.

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finding of the learned trial judge regarding the nature of its contents; and, considering the unsatisfactory character of the evidence and the evident hesitation of the court below upon the point, I think one ought to give effect to one's view that the contents of and McDonald's signature to the document have not been sufficiently proved.

With great respect, moreover, I must disagree with the view of the court below that the plaintiff has made out a case enabling him to take advantage of the doctrine known as the doctrine of part performance. A condition of the application of that doctrine is thus stated by Lord Selborne, in *Maddison* v. *Alderson*(1), at page 479:

> All the authorities shew that the acts relied upon must be unequivocally, and in their own nature, referable to some such agreement as that alleged;

i.e. to an agreement respecting the lands themselves; and, as further explained in that case, a plaintiff who relies upon acts of part performance to excuse the non-production of a note or memorandum under the Statute of Frauds, should first prove the acts relied upon; it is only after such acts unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued upon have been proved that evidence of the oral agreement becomes admissible for the purpose of explaining those acts. It is for this reason that a payment of purchase money alone can never be a sufficient act of performance within the rule.

Here there is nothing in the nature of the acts proved which bears any necessary relation to the interest in land said to have been the subject of the

(1) 8 App. Cas. 467.

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agreement in question. A sale and purchase of the stock and bonds actually transferred would suffice to explain them.

A further point remains to be noticed. It is said that McNeil cannot avail himself of the statute. I do not see why.

The fourth section of the Nova Scotia Statute of Frauds provides that

> no interest in land shall be assigned * * * except by deed or note in writing signed by the party assigning * * * the same or by his agent thereunto authorized by writing or by operation of law.

It is not suggested that there was any deed or note in writing in compliance with this enactment; the plaintiff was, therefore, compelled to base his action and did in fact base it upon the allegation of an agreement by McDonald to sell to him the interest referred to. But section seven of the statute provides that no action shall be brought upon a contract of sale of land or any interest therein unless the contract or some memorandum or note thereof is in writing signed by the person sought to be charged. Such a contract in the absence of such a note or memorandum or acts of part performance, being non-enforceable, could not, it seems to me clear, be held to vest by its own operation in the purchaser such an interest in the subject matter of the agreement as would entitle him to maintain an action in respect of it. If the purchaser were entitled to maintain an action to compel the execution of an assignment of the subject matter of the agreement he would in equity be treated as having such an assignment; but I know of no principle under which a purchaser of an interest in land under an oral agreement for sale non-enforceable by reason of non-compliance with the Statute of Frauds can be held by virtue of the non-enforceable agreement

alone to have vested in him any interest in the subject matter of it.

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Duff J.

It is true the statute was not pleaded originally; but I think that, having regard to the course taken at the trial respecting the defendant's application for leave to amend and in the actual conduct of the trial itself, the respondents could not now resist such an application.

Appeal allowed with costs.

Solicitor for the appellant: *James Terrell.*

Solicitor for the respondent: *W. H. Fulton.*

1907

*Nov. 22, 25.
*Dec. 13.

MEREDITH ROUNTREE (DEFENDANT) ..... APPELLANT;

AND

THE SYDNEY LAND AND LOAN COMPANY (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Trust—Company law—Extra remuneration—Ultra vires act of directors—Ratification—Recovery of moneys illegally paid—Mistake of law.

By a resolution of the directors, the secretary of the company had been authorized to sell the company's bonds, for which he was to be paid a commission at the rate of 5 per cent. on the amounts received. Subsequently, at a time when they had no authority to do so, the directors converted the preferred stock held by certain shareholders into bonds, and paid the secretary for his services in making the conversion at the rate of 5 per cent. on the amount of bonds thus disposed of. In an action to recover back from the secretary the moneys so received by him as commission.

Held, that, although the secretary had received the commissions under mistake of law, yet, as he must be assumed to have had knowledge of the illegality of the transaction, the moneys could be recovered back by the company.

Subsequently the scheme of conversion was approved of by a resolution of the shareholders, but it did not appear that they had been fully informed as to the arrangement for the payment of a commission to the secretary in that respect, in addition to his regular salary.

Held, that the resolution of the shareholders had not the effect of ratifying the payment of the commissions.

APPEAL from the judgment of the Supreme Court of Nova Scotia affirming the judgment at the trial whereby the plaintiffs' action for the recovery back

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

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of the moneys claimed to have been illegally paid was affirmed with costs.

The circumstances of the case are stated by Idington J. in his judgment now reported.

The action was to recover money received by the defendant as commission on the conversion of preferred stock of the plaintiff company into bonds. The defendant, who was manager and secretary of the company at the time the services were performed, counterclaimed for damages for wrongful dismissal.

The trial judge, Russell J., entered judgment for the plaintiffs for the amount paid defendant, holding the contract to be *ultra vires*. He also found that there was no evidence of bad faith on his part, nor of any conduct that would warrant his dismissal, and awarded him, as damages on the counterclaim, the amount of his salary during five months, the unexpired portion of his year.

By the judgment appealed from this decision was affirmed, in so far as it related to the plaintiffs' claim, but the amount awarded to the defendant on his counterclaim was increased to $750, the full amount of six months' salary at the rate of his engagement.

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

W. B. A. Ritchie K.C. for the respondents.

THE CHIEF JUSTICE agreed with Idington J.

GIROUARD J. concurred in the dismissal of the appeal.

DAVIES J.—In this case some questions were raised in the Supreme Court of Nova Scotia on the

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counterclaim of the appellant (defendant) and decided by that court.

No appeal was taken to this court from that decision.

This appeal related entirely to the right of the respondent company to recover back from its manager and secretary, Rountree, certain moneys alleged to have been improperly and illegally paid to him by the officers of the company, he himself being one of the signers of the cheques on which the moneys were obtained.

For the reasons given by Mr. Justice Meagher, in delivering the judgment of the Supreme Court of Nova Scotia, I am of opinion that these moneys were recoverable back and that this appeal should be dismissed with costs.

IDINGTON J.—The respondent company was promoted by the appellant and incorporated for dealing in land and loaning money and he became the secretary and also under the powers of that office, I think, manager.

The following section of the company's by-laws defined his duties:—

> Section 9. The secretary shall also be manager of the company and attend all meetings of the shareholders and board of directors. He shall keep all accounts fully and accurately, as well of *the company as between the company and its shareholders, have the custody of the records and seal, and issue all notices on the order of the president or vice-president; sign all certificates of shares and agency appointments, and have the general management of the company. He shall present to the directors at each meeting a statement of monies received and disbursed during the preceding months, and shall also perform such other duties as may be assigned to him by the board of directors.*

Section 7 of the same by-laws also shews he was required to countersign cheques.

Section 7. *The funds of the company shall be deposited in a chartered bank of Canada* to be selected by the directors, and shall so remain until drawn therefrom by cheque or drafts, signed by the president, *or in his absence, the vice-president and manager.*

The company were to allow him under a written agreement between it and him a stated salary and 2½ per cent. for selling stock of the company.

Sometime later the company decided upon issuing bonds and passed a resolution authorizing appellant to sell the same to the amount of $150,000 and allowing him a commission of 5 per cent. on such sales upon the amounts paid for such bonds.

Later on and at a time when the company was evidently falling behind the directors conceived the scheme of converting the preferred stock, that was to bear 8 per cent. interest, and was previously sold, into bonds of the issue just now mentioned. The appellant had been allowed for sales of this preferred stock and for the additional trouble of canvassing for its conversion desired 5 per cent. more.

The company had no power, however, to make this conversion.

The president asked the secretary to look after this business and the appellant said he supposed he would get the 5 per cent. commission on such conversion as he might get agreed to. He says the president assented to this and also that later on the other directors also assented to it. No resolution of that kind was passed. It may be observed that the rate seems excessive as compared with 2½ per cent. for canvassing for original subscriptions for stock. It suggests the assent so far as got may have been through mistake.

The entire arrangement for conversion was so obviously *ultra vires* one is surprised to see it ventured on.

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Idington J.

The secretary made claim for the 5 per cent. commission for conversion, and got paid in great part by cheques countersigned under the above by-law by himself and the company now sue to recover back the commission thus paid and the learned trial judge adjudged appellant do pay this claim and on appeal the Supreme Court of Nova Scotia dismissed his appeal and now he appeals here.

It was urged in support of this appeal that the company had no right to recover, as moneys so paid could not be recovered, and, even if in law it ever could be held that such a recovery was possible, the company had ratified and adopted the secretary's services and became thereby so bound that recovery should not be allowed.

I think one holding such relations as this secretary did to the company cannot claim to hold such commission for legal services and that he either had or should have had knowledge of the illegality and when he ventured to countersign cheques to himself for such commissions he was bound to inquire for the legal authority for the act he was pretending to do, professedly as such secretary.

There could never be any safeguard for a company if one entrusted with such duties did them with so little regard so the law or what the law might be as this appellant evinced under the facts of this case.

There was no ratification as I view the facts.

There may have been culpable negligence on the part of the directors also but the two blacks could not make a white.

Each official in such place of trust must inquire for himself.

The last part or balance of this commission ac-

count was not paid by such cheques as appellant countersigned but by other officers, but I think that does not place such later payments in a better position in law for the appellant's case. Had he not neglected his duty in regard to the first payments he never would have applied for the later ones.

I think also that the duty devolved on the appellant to have explained more fully to the shareholders and directors than he did the nature of his claim and especially that he ought to have seen they each knew at their meetings that the auditor's written refusal to sanction the first payments, was read and the nature of the auditor's objection made quite plain. And more than that; when, if ever, he was unable to have brought all that could possibly have arisen thereout home to the minds of shareholders and directors, beyond all doubt, he should have refrained from touching the pen, to countersign the cheque, or the money it brought, if by accident he had countersigned.

When a man occupies any position of trust and it so happens as it sometimes almost unavoidably does that he is made to appear as acting where his duty and his interest conflict he should as he regards his own honour, to say nothing of the law, see that his conduct in the premises is thoroughly well understood by those entitled to know and that he, if acting, is but obeying their command and desires and not his own mere volition.

Secretaries having as this appellant had to sign or countersign cheques for or to themselves should, by thus clearing things up as far as possible reduce the act of doing so, when it enures directly to their own benefit, to the mere needful mechanical duty.

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ROUNTREE v. SYDNEY LAND AND LOAN CO.

Idington J.

Companies might do well to provide for such cases so that even the appearance of acting the dual part need not exist.

I think the appeal should be dismissed with costs.

DUFF J. agreed with Idington J.

Appeal dismissed with costs.

Solicitors for the appellant: *Burchell & McIntyre.*

Solicitor for the respondents: *Joseph A. Gillies.*

THE HAMBURG-AMERICAN PACKET COMPANY (SUPPLIANTS) } APPELLANTS;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

1907
*June 12.
*Dec. 28.

ON APPEAL FROM THE REGISTRAR IN CHAMBERS.

Taxing costs to the Crown—Fees to counsel and solicitor—Salaried officer representing the Crown.

As the statutes of Canada defining the duties and salaries of the Attorney-General and his deputy deny additional compensation for services rendered by them in connection with litigation affecting the Crown, it is improper to allow counsel fees or solicitor's fees in respect of services rendered in such capacities by either of these officers on the taxation of costs awarded in favour of the Crown. *Jarvis* v. *The Great Western Railway Co.* (8 U.C.C.P. 280), and *The Charlevoix Election Case* (Cout. Dig. 388) followed.

APPEAL from an order of the Registrar in Chambers, on taxation of the costs awarded to the respondent on an appeal to the Supreme Court of Canada(1).

The judgment in question was taken on appeal to the Judicial Committee of the Privy Council, pursuant to leave granted on 22nd July, 1903(2), and subsequently(3) the order granting leave to appeal was rescinded and the appeal dismissed by the Board.

On the taxation of the costs awarded to the Crown, the Registrar, in Chambers, allowed counsel fees to the Attorney-General of Canada and the deputy Minis-

*PRESENT:—His Lordship Mr. Justice Maclennan, in Chambers.

(1) 33 Can. S.C.R. 252.
(2) 41 Can. Gaz. 415.
(3) 28th July, 1906; see p. vii., *ante*.

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ter of Justice, who argued the appeal on behalf of the Crown. On behalf of the appellants, an appeal from this order was taken and heard in chambers before Maclennan J.

Burbidge appeared for the appellants.

Pownell for the respondent.

MACLENNAN J.—This is an appeal by the company from the taxation of the costs awarded to the Crown on the dismissal of the appeal, as noted in the Supreme Court reports(1), in 1902.

The registrar has taxed counsel fees to the Attorney-General and the deputy minister of justice, who argued the appeal on behalf of the Crown, and it is objected that those fees cannot be allowed inasmuch as both the Attorney-General and the deputy minister are salaried officers of the Crown and must be regarded as having acted officially in conducting the appeal.

The statute, R.S.C. (1906) ch. 4, fixes the salary of the Minister of Justice, and the Act, R.S.C. (1906) ch. 21, sec. 2(2), declares that the Minister of Justice shall be ex officio Attorney-General; sec. 53 of R.S.C. (1906) ch. 16, "The Civil Service Act," fixes the salary of the deputy Minister of Justice; and sub-secs. 2 and 3 of sec. 59, of that Act are as follows:—

(2) He (the deputy head) shall give his full time to the public service, and shall discharge all duties required by the head of the department, or by the Governor in Council, whether such duties are in his own department or not.

(3) No deputy head shall receive any pay, fee or allowance in any form in excess of the amount of the salary hereinbefore authorized to be paid to him.

(1) 33 Can. S.C.R. 252.

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I am of opinion that counsel fees ought not to be taxed either to the Attorney-General or the deputy minister, or rather to the Crown, in respect of fees paid to either of those officers.

So far as the Attorney-General is concerned, he represented the Crown in this litigation. He might have employed other counsel, but, instead of doing so, he chose to act himself. In doing so he was performing one of the ordinary functions of his office; and, if the Crown had been unsuccessful and had not been awarded costs, it is not conceivable that he would, or could legally claim or receive any compensation for his service, other than, or in addition to, the salary prescribed by statute.

The costs awarded are not the costs of the counsel or solicitor, but the costs of the client, incurred by him, independently of the result of the litigation, and if the client has not incurred or is not liable for costs, or any particular item or fee, he cannot recover them as costs of the litigation.

I think, therefore, that the fees taxed as paid to the Attorney-General ought not to have been allowed.

And it is, *a fortiori,* as to the deputy minister, for he is required to give his full time to the public service, etc., and is not to receive any pay, fee or allowance in any form in excess of his fixed salary.

No English authority was cited to me, which may be accounted for by the fact that, except as prescribed by different statutes, the Crown in England neither pays nor receives costs of litigation; *The King* v. *The Archbishop of Canterbury*(1) at pages 569, 571.

The point here in question was decided in the Province of Ontario, nearly fifty years ago, in *Jarvis* v.

(1) (1902) 2 K.B. 503.

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HAMBURG-AMERICAN PACKET CO. v. THE KING.

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The Great Western Railway Co.(1), a decision which has been followed ever since in the courts of that province.

In that case, the company's solicitor was employed at a salary, and it was held that the company, not having incurred any costs in the litigation, so far as it was conducted by their solicitor, could recover nothing in respect of his services, upon a judgment in their favour with an award of costs.

The same point was decided in this court, in 1880, Fournier and Henry JJ. dissenting, in *The Charlevoix Election Case; Valin* v. *Langlois*(2).

In that case, the respondent, an advocate, argued the appeal in person, and it was held that a counsel fee could not be taxed to him.

The appeal should, therefore, in my opinion, be allowed with costs.

Appeal allowed with costs.

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(1) 8 U.C.C.P. 280.

(2) Cass. Dig. (2 ed.) 677; Cout. Dig. 388; Cass. S.C. Prac. (2 ed.) 140; Masters S.C. Prac. 167.

THE UNION INVESTMENT COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

MARTIN W. J. WELLS AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

1907
*Oct. 24, 25.
1908
*Feb. 18.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Bills and notes—Instalments of interest—Transfer after default to pay interest—"Overdue" bill—Notice—Holder in good faith—Bills of Exchange Act—Common law rule.

Where interest is made payable periodically during the currency of a promissory note, payable at a certain time after date, the note does not become overdue within the meaning of sections 56 and 70 of the "Bills of Exchange Act," merely by default in the payment of an instalment of such interest.

The doctrine of constructive notice is not applicable to bills and notes transferred for value.

Judgment appealed from reversed, Idington and Maclennan JJ. dissenting.

APPEAL *per saltum* from the judgment of Macdonald J., at the trial, in the Court of King's Bench for Manitoba, dismissing the plaintiffs' action with costs.

The action was brought by the appellants, the holders of a note made by the defendants, respondents, in favour of a firm of horse-dealers, of Columbus, Ohio, doing business there under the name and style of McLaughlin Bros., for part of the price of a stallion sold to the defendants by an agent named

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

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Hitchcock, and indorsed by the payees to the plaintiffs. The note was dated 5th March, 1903, and made payable on 1st March, 1905, with interest at the rate of six per cent. per annum, such interest being payable annually. At the time of the transfer of the note to the plaintiffs, a short time before the principal would become due, there was an instalment of the interest past due and unpaid, but there was no evidence that the note had been presented for payment of such interest when it fell due at the end of the first year after the date of the note. The defendants, by their pleadings, contended that Hitchcock had obtained the note by fraud, that the stallion was not sound and fit according to warranty and that the plaintiffs took the note, at the time of the indorsement, with knowledge of the fact that it had become dishonoured by default in payment of the overdue instalment of interest and subject to equities.

The appeal was brought direct to the Supreme Court of Canada, from the decision of the trial judge, by consent of the parties, and the questions at issue thereon are fully discussed in the judgments now reported.

Ewart K.C. for the appellants.

Hudson for the respondents.

The judgment of the court was delivered by

DUFF J.—The substantial question which this appeal presents for decision is whether or not the promissory note upon which the action was brought was, at the time it was transferred to the appellants, who

were the plaintiffs in the action, an overdue note within the meaning of sections 56 and 70 of the "Bills of Exchange Act."

The note in question was dated the 5th March, 1903, and by it the respondents, who were the defendants in the action, promised to pay to McLaughlin Bros., or order, at the Canadian Bank of Commerce, Gilbert Plains, Man., on the 1st March, 1905, the sum of $875.00 with interest annually at 6%. After the first of the periodical payments of interest, thus provided for, had fallen due, the note was transferred to the appellants. There is no evidence that it was presented for the payment of this sum, which in fact was never paid.

The learned trial judge held that the respondent's signature to the instrument was obtained through the fraud of the payee, and I see no sufficient reason to disturb this finding. I think, however, that the plaintiffs, who acquired the note for value in the usual course of business, have satisfied the onus upon them to shew that in taking it they acted in good faith.

Moreover, there was no evidence that the plaintiffs had any knowledge of the fact that the interest had not been paid, and assuming that the note had been dishonoured within the meaning of section 72 of the "Bills of Exchange Act" (which even admitting that default in the payment of interest alone would constitute such dishonour does not on the evidence appear since there is nothing to shew that the note, which as we have seen was payable at a particular place, was ever presented there or at all, for the payment of interest), the appellants, therefore, could not be said, in acquiring it, to have taken a dishonoured note with notice of its character. It follows

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that, subject to the answer to be given to the question I have stated, the title of the appellants as that of holders in due course is not affected by the fraud of their transferor.

To come then to the question whether this note, in the circumstances, was an overdue note, within the meaning of the "Bills of Exchange Act," when it came into the hands of the appellants.

The literal truth is, of course, that a single payment of interest reserved by the note was overdue, while in respect of the principal and the remaining payment of interest the note was not overdue. And the question is which of these circumstances is to determine the category into which the instrument falls—that of instruments which are "overdue" within the meaning of the Act or that of current instruments?

The Act itself furnishes no express definition of term "overdue"; but it contains expressions and even enactments not easily to be reconciled with the view that the circumstance alone of a payment of interest being in default is a sufficient ground for referring the instrument by which it is payable to the class comprised within that description. Section 23 (2) enacts that

> where a bill is accepted or indorsed when it is overdue it shall as regards the acceptor who so accepts or any indorser who so indorses it, be deemed a bill payable on demand.

The legislature could not have intended that after default in respect of a single payment of interest and before the maturity of the principal payable under it the indorsement of a bill should have the effect as regards the principal or as regards interest not yet payable of changing the character of the bill into that

of a bill payable on demand. Section 142 also leads to singular results upon the respondents' reading of the words in question. But regarding the question as one of statutory construction merely the most formidable obstacle in the respondents' way appears to be the language of sections 70 and 71—the sections in which the legislature has expressly defined the legal characteristics of "overdue" bills and notes. In these sections the term "overdue" seems to be used as convertible with "after maturity." Now it is true that as the legislature has not expressly defined the meaning of the term "overdue" so neither has it defined the equivalent expression; but construing the words in the ordinary sense I do not think the phrase "after maturity" is applicable to the state of the note in question here. In the ordinary sense of the words a mercantile document providing for the payment of principal and interest in respect of which the time for the payment of the principal should not have arrived would not be said to be "at maturity." And I do not think there is any special mercantile sense of the words—known at all events to the law—in which that description would fit such a state of such an instrument. See *United States* v. *Pacific Ry. Co.*(1). As a question of statutory interpretation then, if one were obliged to determine the question upon the words of the Act alone I should have a great difficulty in adopting the view advanced by the respondents. But I do not think the question is one of statutory construction only. Section 10 provides that:

> The rules of the common law of England including the law merchant save in so far as they are inconsistent with the express provisions of this Act shall apply to bills of exchange, promissory notes and cheques.

(1) 91 U.S.R. 72.

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The express provisions of the Act do not in my judgment afford a clear guide upon the question; and it is I think one of the questions for the determination of which this section directs us to have recourse to the common law of England.

The learned trial judge following what he considered to be the decision of the full court of Manitoba in *Moore* v. *Scott*(1) has held that the circumstance that default had been made in respect of a payment of interest at the time the note was acquired by the appellants was sufficient to bring it within the class of "overdue" instruments. It is conceded that—if we except the decision referred to, which it will be necessary to notice particularly later—there is no English decision and no Canadian decision of a superior court which is directly in point. One must consequently reach one's conclusion through an examination of the principles of the common law applicable to circumstances of the case, and it is, I think, very necessary that from the outset we should keep in mind some of the most elementary of those principles.

The characteristics which the law recognizes as marking negotiable instruments are, first, such instruments when payable to bearer or indorsed in blank are transferable from hand to hand so that the right to maintain an action upon the instrument passes by delivery of the instrument only, and secondly, a person taking such an instrument in good faith and for value acquires a title to it and that which it represents as against the whole world. (See, *e.g.*, *London Joint Stock Bank* v. *Simmons*

(1) 16 Man. R. 492.

(1), *per* Lord Halsbury at page 207 citing Bowen L.J. (2), and *per* Lord Herschell, at page 221 and in *Bechuanaland Exploration Co.* v. *London Trading Bank*(3), at page 666, *per* Kennedy J.; *Foster* v. *Pearson*(4), at page 855, *per* Parke B.)

These attributes the courts have always recognized as indispensable to instruments forming part of the commercial currency. "The true reason" (why money cannot be followed), said Lord Mansfield in *Miller* v. *Race*(5),

> is on account of the currency of it; it cannot be recovered after it has passed into currency; * * * the true owner cannot recover it after it has been paid away on a *bonâ fide* and valuable consideration.

Therefore because bank notes

> are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind which gives them the credit and currency of money to all intents and purposes,

he held it to be necessary

> for the purposes of commerce that their currency should be established and secured

and that the owner from whom they had been stolen could not follow bank notes into the hands of a *bonâ fide* holder for value. So in *Wookey* v. *Pole*(6), it was held that Exchequer bills in which the blank for the name of the payee was not filled up were subject to the same rule. In the course of an elaborate judgment Holroyd J. emphasizing the distinction between money and securities representing money and other forms of property, said, at page 9:

> In *Peacock* v. *Rhodes*(7), Lord Mansfield says, "The holder of a bill of exchange or promissory note is not to be considered

(1) [1892] A.C. 201.
(2) (1891) 1 Ch. 270, at p. 294.
(3) (1898) 2 Q.B. 658.
(4) 1 C.M. & R. 849.
(5) 1 Burr. 457.
(6) 4 B. & Ald. 1.
(7) Douglas 636.

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in the light of an assignee of the payee. An assignee must take the thing assigned subject to all the equity to which the original party was subject. If this rule applies to bills and promissory notes it would stop their currency." * * * * These authorities shew that not only money itself may pass and the right to it may arise by currency alone but further that these mercantile instruments which entitle the bearer of them to money may also pass, and the right to them may arise in the like manner by currency or delivery. These decisions proceed upon the nature of the property (viz. money) to which such instruments give the right and which is itself current; and give to the holders merely as such the right to receive the money or specify them as the person entitled to recover it.

Now the rule governing "overdue" instruments, namely, that such an instrument

can be negotiated subject only to any defect of title affecting it at its maturity and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it (sec. 10),

—though seemingly an exception to the rule governing currency of negotiable instruments, grew naturally out of the application to overdue instruments of the custom of merchants upon which the rules of the law merchant relating to negotiable instruments were originally based—rules which, to quote the language of Cockburn C.J. in *Goodwin* v. *Robarts*(1),

are neither more nor less than the usages of merchants * * * * ratified by the decisions of courts of law, which upon such usages being proved before them have adopted them as settled law with a view to the interests of trade and public convenience.

The rule in question was originally a rule of evidence only. See *Taylor* v. *Mather*(2), and the argument of Erskine in *Boehm* v. *Sterling*(3) in 1797, at page 427. The first reported case in which it was enunciated as a rule of law was *Brown* v. *Davies*(4), decided shortly

(1) L.R. 10 Ex. 76; 1 App. Cas. 476.
(2) 3 T.R. 83 (*n*).
(3) 7 T.R. 423.
(4) 3 T.R. 80.

after the retirement of Lord Mansfield. The grounds of that decision are thus stated in the judgment of Buller J. at pages 82 and 83:

There is this distinction between bills indorsed before and after they become due. If a note *indorsed be not due* at the time it carries no suspicion whatever on the face of it, and the party receives it on its own intrinsic credit but if it is overdue, though I do not say that by law it is not negotiable yet certainly it is out of the common course of dealing, and does give rise to suspicion. Still stronger ought that suspicion to be when it appears on the face of the note to have been noted for non-payment; which was the case here. But generally when a note is due, the party receiving it takes it on the credit of the person who gives it to him. Upon this ground it was that, in the case in Cornwall, I held that the defendant, who was the maker, was entitled to set up the same defence that he might have done against the original payee; and the same doctrine has often been ruled at Guildhall. A fair indorsee can never be injured by this rule; for if the transaction be a fair one, he will be still entitled to recover. But it may be a useful rule to detect fraud whenever that has been practised (upon Lord Kenyon's appearing to dissent from the generality of the doctrine held by Mr. Justice Buller, he proceeded to observe) my Lord thinks I have gone rather too far in something that I have said, but it is to be observed that I am speaking of cases where the note has been indorsed before it became due, when I consider it as a note newly drawn by the person indorsing it.

And in the very latest judicial statement of it which has come under my notice the rule is put upon the precise grounds upon which it was rested by Buller J. in 1789.

In *London and County Banking Co.* v. *Groome* (1) in 1881, at page 292, Lord Field (then Field J.) said:

That the holder of an overdue bill or note payable at a fixed date (appearing of course upon it) is in the position suggested is established beyond all doubt; and the reason of the rule is that inasmuch as these instruments are usually current only during the period before they become payable, and their negotiation after that period is out of the usual and ordinary course of dealing, that circumstance is sufficient of itself to excite so much suspicion that, as

(1) 8 Q.B.D. 288.

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a rule of law, the indorsee must take it on the credit of and can stand in no better position than the indorser: *Brown* v. *Davies*(1).

That, I think, with great respect, is an entirely accurate statement of the grounds upon which the rule is based.

Is this case then within the principle of this rule?

It will not do to say that the rule applies to all bills and notes which in any sense of the word may be described as "overdue." We must test each case by the answer to the question whether the instrument is such an instrument as the principle of the rule applies to and whether it is "overdue" in the sense in which the term is used in the decisions upon which the rule is founded. A case which is not within the principle of a decision is not governed by it, and we certainly have no authority by extending the principle of the decisions, to impose fresh restrictions upon the currency of negotiable instruments. The rule is based on the fact that by the custom of merchants certain instruments do not after maturity pass as mercantile currency; and, in form, it is put as expressing a conclusive presumption that a person taking such an instrument after maturity takes it with a suspicion concerning the title of the person from whom he receives it; and, consequently, cannot, of course, claim the rights of a *bonâ fide* holder. That is only bringing the law relating to such instruments into conformity with the mercantile usage upon which the negotiability of them originally rested. But such a principle obviously fails of application to instruments which are of such a character and in such a state that, in respect of them, no such presumption can generally arise; and, that, in

(1) 3 T.R. 80.

respect of them also, it could not be generally affirmed that the negotiation of them as a part of the currency of the country is outside the usual course of dealing.

First, then, is there, in the case of the negotiation of such instruments as those in question here, after default in the payment of interest and before maturity of the principal, any ground upon which such a presumption can, in the absence of any notice of such a default, be based?

The instruments which were the subjects of the observations in the cases referred to are there said to carry suspicion on the face of them because a bill which on the face of it is overdue and consequently ought not to be in circulation comes to an intended taker tainted with suspicion. But a bill not on its face overdue carries no suspicion because intending indorsees cannot from the face of the bill alone know that it ought not to be in circulation. This is the substance of the observation of Parke B., at page 165, in *Cripps* v. *Davis*(1):

> The reason why the party who takes an overdue bill or note takes it with all its equities, is because, on the face of it, it carries suspicion; that does not apply to the case of a bill or note payable on demand.

Now it is not argued here that the fact of the time fixed for the payment of interest being passed when the note was negotiated was in itself a circumstance of suspicion within this principle; that would lead to a conclusion which nobody accepts, viz.: that whether the interest be in default or not in default the moment the date fixed for such payment is past the instrument is overdue within the rule. What then is the

(1) 12 M. & W. 159.

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circumstance of suspicion? The failure to meet the obligation to pay? But that does not appear on the face of the instrument. And obviously the failure to pay the interest can be regarded as such a circumstance only on the hypothesis that the law imposes upon the person taking such an instrument after the time for such a payment is passed, the duty to inquire whether the payment has been made; and not only that, but to ascertain at his peril whether it has been made. I own it seems to one to be abundantly clear that an instrument the negotiation of which is regulated by such a rule of law is not in the full sense of the term a negotiable instrument—that is to say, it is not negotiable as the commercial currency of the country is generally; and in particular, it is not negotiable as bills of exchange and promissory notes before maturity are negotiable. Consider the position, in this view, of an intending taker. If there has been a default he can acquire only such a title as his transferor can give him; and if (as must often happen) it should be impossible to ascertain this with certainty he would (obviously) be put upon an investigation of the title of his transferor. But it is the absence of the necessity of such an investigation which is the very thing that distinguishes current negotiable instruments from other classes of personal property; a distinction, as we have seen, the result of commercial necessity which requires that such instruments when taken in the ordinary course of business may, as regards title, be taken with absolute confidence and without any of the doubt and suspicion which must follow the adoption of the rule contended for in cases to which it applies.

In *London Joint Stock Co.* v. *Simmons*(1) Lord Herschell said, at page 221:

> One word I would say upon the question of notice and being put upon inquiry. I should be sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments.

Again are there any satisfactory grounds upon which one can affirm that the negotiation of such instruments in such circumstances, to use the words of Buller J.,

> is out of the ordinary course of dealing and does give rise to suspicion?

Given the absence of notice of default on the face of the instrument I do not know on what ground that can be maintained.

Municipal and other debentures so framed as to be promissory notes and nothing but promissory notes bearing interest periodically do, as everybody knows, so circulate. Nor do I suppose it has ever been suggested that everybody taking such a debenture is put at his peril upon the inquiry whether there is in point of fact an instalment of interest overdue and unpaid; and still less whether there has ever been in the history of the instrument a day's default in the payment of such an instalment. And it is to be observed that this last mentioned inquiry is that which the proposed rule would impose upon an intending taker; for it could hardly be argued that the character of such instruments — as negotiable or non-negotiable — is changed from time to time according as interest is paid or in arrear. An instrument once stamped with the character "overdue" must, I think, retain that character; it is obvious that any other principle

(1) [1892] A.C. 201.

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would lead to unspeakable confusion. And it is hardly, I think, open to question that in the case of instruments of the character referred to, any rule imposing the burden of inquiry into the circumstances of every preceding payment of interest would in practice destroy the commercial currency of them. In point of fact when payable to bearer or indorsed in blank, to use the language of Malins V.C. in *Re Imperial Land Co.*(1), at page 487, "They pass as freely as bank notes."

It would appear, therefore, that the application of the rule in the manner proposed cannot be justified upon the grounds upon which the rule itself is based.

I come now to those decisions that are precisely in point; and it will be convenient first to deal with the decisions of the American courts. It is here again to be observed that we are applying the law merchant. And while it is true that we have to administer the law merchant which is a part of the law of England, and have no authority to administer anything but the law of England, yet it is also true that, as in its broad features, the law merchant was much the same in all commercial countries, it is the practice of English judges when the point for decision is a question arising upon the law merchant and is also one upon which English authority is wanting, to have recourse to the law of other commercial countries. Examples may be found in Lord Mansfield's judgment in *Luke* v. *Lyde*(2), and in the judgment of Mr. Justice Willes in *Dakin* v. *Oxley* (3). The weight to be attached to a rule of law of a

(1) L.R. 11 Eq. 478. (2) 2 Burr. 883.
(3) 15 C.B.N.S. 646.

foreign country is increased when the principles of the law there administered upon the subject in question are professedly (as the decisions of the Supreme Court of the United States on this subject are) a development of the law merchant, as recognized by the common law of England.

There are some branches of the law merchant in which the American courts have professedly departed from the common law and in such cases their decisions cannot afford us a guide; but where that is not so, unless at all events it appears to proceed upon principles at variance with the accepted principles upon which courts administering the law of England are accustomed to act, one must, of course, regard a decision of the Supreme Court of the United States upon a point of commercial law not covered by authority in England or Canada as no small evidence of the soundness of the conclusion at which one has one's self arrived.

Although the decisions of the American courts are, of course, not binding on us yet the sound and enlightened views of American lawyers in the administration and development of the law,—

said Cockburn C.J. in the course of a judgment in *Scaramanga & Co.* v. *Stamp*(1), at page 303, dealing with a question of Maritime law

—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle those decisions to the utmost respect and confidence on our part.

The doctrine which is affirmed uniformly in the decisions of the Supreme Court of the United States on the question before us is that a negotiable instru-

(1) 5 C.P.D. 295.

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ment reserving periodical payments of interest is not, within the rule of commercial law, regarded as overdue merely because default has been made in respect of such a payment.

This doctrine is thus stated in one of the latest of the cases, *Morgan* v. *United States*(1), at pages 500 and 502:

> The title of the purchaser of overdue negotiable paper, such as a bill of exchange or a promissory note, stands on the same footing as if it had been dishonoured by a refusal to accept or pay and had been put under protest. When transferred after it has become due, although not reduced to the rank of an ordinary chose in action, the legal title to which cannot pass by assignment or delivery, it carries on its face the presumption which discredits it and deprives it of that immunity which, while the time for payment was still running, was secured to it in favour of a *bonâ fide* purchaser for value without actual notice of any defect, either in the obligation or the title. This was put by Mr. Justice Buller in *Brown* v. *Davies*(2), on the ground that to take an overdue note or bill was "out of the common course of dealing." Ordinarily a note or bill when due becomes *functus officio*, because it was made to be paid at maturity, and if it fails of its intended operation and effect, the presumption is that it is owing to some defect which has furnished a sufficient reason to the party apparently chargeable for not having punctually performed his obligation. In the strong language of Lord Ellenborough in *Tinson* v. *Francis*(3), "after a bill or note is due it comes disgraced to the indorsee." No such presumption, in our opinion, arises to affect the title of a holder of the bonds of the United States, such as those now in question, acquired by a *bonâ fide* purchaser for value prior to the date fixed in the bonds themselves for their ultimate payment;
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> * * * * * * *
>
> While it has been held that a note, the principal of which is payable by instalments, is overdue when the first instalment is overdue and unpaid and is thereby subject to all equities between the original parties, *Vinton* v. *King*(4), yet it is said by the Supreme Judicial Court of Massachusetts in *National Bank* v. *Kirby*(5) "we are referred to no case in which it has been held that failure to pay interest, standing alone, is to be regarded sufficient in law to throw such discredit upon the principal security upon which it is due as

(1) 113 U.S.R. 476; L.C.P. Book 28, pp. 1044 *et seq.*
(2) 3 T.R. 80.
(3) 1 Camp. 19.
(4) 4 Allen (Mass.) 562.
(5) 108 Mass. 497-501.

to subject the holder, to the full extent of the security, to antecedent equities."

"To hold otherwise," said this court in *Cromwell* v. *County of Sac* (1) "would throw discredit upon a large class of securities issued by municipal and private corporations having years to run, with interest payable annually or semi-annually." And the doctrine was re-affirmed in *Railway Co.* v. *Sprague* (2).

It is quite true that the opposite appears to have been held in New York and Minnesota at an early date; that is to say, it has been held that notice of default in the payment of interest is equivalent to notice of dishonour. But I do not know that it has been held that default in payment of interest alone imparts to the instrument in respect of which it occurs the character of an overdue instrument; and in any case it is plain that these decisions run counter to the main stream of American authority; *Long Island Loan & Trust Co.* v. *Columbus, Chicago & Indiana Central Rway. Co.* (3) in 1895, at page 457.

It is argued, however, that the decisions of the Supreme Court of the United States are expressly based upon principles and reasoning which a court administering the law of England cannot adopt.

It is said first that the decisions proceed upon the principle that interest is a mere incident of the principal while the settled doctrine of the English law is that interest reserved by a contract always constitutes a debt distinct from and independent of the principal.

And, secondly, that broadly speaking the law administered by the Supreme Court of the United States in relation to the incidents of negotiability differs so widely from the law of England that the decisions of that court cannot be safely resorted to for assistance

(1) 96 U.S.R. 51. (2) 103 U.S.R. 756.
(3) 65 Fed. R. 455.

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in the determination of questions arising upon such instruments. In support of these contentions the respondents rely upon the judgments of Howell C.J., and Perdue J., in *Moore* v. *Scott*(1), a case which (while it is unnecessary to say that the judgments referred to deserve the most attentive examination) cannot be regarded as an authority upon the point in question by reason of the fact that two out of four judges who took part in the decision expressly declined to give an opinion upon it.

To take the second of these contentions first. The learned Chief Justice of Manitoba in the case referred to, at page 501, put it thus:

> That case (*Cromwell* v. *County of Sac*(2) shews how widely the American differs from the English law on this subject. In speaking of the rights of a holder in due course the learned judge uses the following language, "Mere suspicion that there may be a defect of title in its holder or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part." This cannot be the law under the English and Canadian codes.

Now it is to be observed that the learned judge [in *Cromwell* v. *Sac Co.*(2)] is stating a rule of law, not a proposition compounded of a rule of law and an inference of fact. And he states the law to be that in the case he puts the existence in fact of good faith or bad faith is the test that is to be applied; and the "suspicion" which is the subject of his observation is on the face of it a suspicion not inconsistent with the existence of good faith. So under the "Bills of Exchange Act" in England or Canada, as under the common law the rule of law is absolute that the question in every such case is the question of fact—did the

(1) 16 Man. R. 492. (2) 96 U.S.R. 51.

taker acquire the instrument in good faith or bad faith? Given facts exciting suspicion, *i.e.*, actual suspicion arising from facts known or believed to exist and either an absence of inquiry or an inquiry which does not remove the suspicion and you have a state of facts which is obviously incompatible with good faith; but it would be going a long way to lay down as a proposition of law that "mere suspicion"—a speculative surmise that something might be wrong without any objective basis—could never in any circumstances be consistent with honesty. And, even so, that is a somewhat narrow ground on which to rest the opinion that the American law on this subject has departed widely from the law of England. Had the point been material I have no doubt that Field J. would have agreed with the observation of Lord Herschell in *London Joint Stock Bank* v. *Simmons*(1), at page 221.

> If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry.

To come then to the contention that the decisions of the Supreme Court of the United States upon this question proceed upon views of the legal nature of the contracts under which interest is reserved in such instruments that are radically at variance with the principles of English law on the subject. Now it is quite true the judgment of Field J. in *Cromwell* v. *County of Sac*(2) contains this observation,

> The interest stipulated for was a mere incident of the debt.

But it is a mistake to suppose as appears to have been assumed by some of the learned judges in

(1) (1892) A.C. 201. (2) 96 U.S.R. 51.

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Moore v. *Scott*(1) that this observation implies any such identification of the debt arising from the contract for the payment of interest with that arising from the contract respecting the principal as would prevent a separate action for the interest or postpone the commencement of the period of prescription in respect of the interest until the maturity of the principal. On both these points the law had long before, in that court, been settled in the opposite sense in respect of the class of instruments in dispute in the case then under consideration, *Clark* v. *Iowa City*(2). In truth the observation was directed not to any contention that in such cases the two contracts are independent, but on the contrary to a contention that the instrument in question contained but one promise embracing the principal and interest; that in law the debt was a single entire debt; and that anything which dishonours any of the parts of the instrument dishonours the whole(3). This somewhat technical reasoning was in substance that upon which the American decisions were based in which it was held that default in payment of a single instalment of the principal payable by the terms of a promissory note impresses the note with the character of an "overdue" instrument: *Vinton* v. *King*(4); *Newell* v. *Gregg*(5); and see *per* Parke B. in *Oridge* v. *Sherborne*(6), at page 378; and the purpose of the argument was to bring the case of a default in respect of a payment of interest within the principle of those decisions. For the rejection of the technical argument ample justifi-

(1) 16 Man. R. 492.
(2) 87 U.S.R. 583.
(3) 96 U.S.R. 51, at p. 58.
(4) 4 Allen (Mass.) 562.
(5) 51 Barb. 263.
(6) 11 M. & W. 374.

cation on technical grounds is to be found in the decisions in *Rudder* v. *Price*(1), at page 555; *Herries* v. *Jamieson*(2), at p. 556; *Dickenson* v. *Harrison*(3), and *Attwood* v. *Taylor*(4). And it would be entirely at variance with the views of English lawyers from the time of Lord Mansfield to the time of Lord Halsbury broadly to affirm that (where by the same instrument payment of both principal and interest is provided for) the obligation in respect of the interest is always to be attributed to a contract wholly independent of the contract respecting the principal. What the relation is between the obligation for the payment of principal and that for the payment of interest is always on the last resort a question of the construction of the particular document out of which the obligations arise; *Economic Life Assurance Society* v. *Usborne*(5), at p. 149; and upon the terms of the document it is to be determined whether, for a given purpose, the two obligations are to be regarded as wholly independent or as integral parts of a single obligation or as bearing to one another the relation of principal and accessory. In the absence of special words the course of the decisions in England prior to the decision of the House of Lords in *Economic Life Assurance Society* v. *Usborne*(5), was to regard the contract for interest as for many purposes "ancillary," "subsidiary," "incidental"; as "following the nature" of the principal; *Hollis* v. *Palmer*(6), *per* Tindal C.J., at pp. 267 and 268, *per* Vaughan J., at p. 270, and in Bingham's report of the same case, *per* Bosanquet J.(7), at page 718; *Clark* v. *Alexander*(8),

(1) 1 H Bl. 547.
(2) 5 T.R. 553.
(3) 4 Price 282.
(4) 1 M. & G. 279.
(5) (1902) A.C. 147.
(6) 3 Scott 265.
(7) 2 Bing. N.C. 713.
(8) 8 Scott N.R. 147.

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per Tindal C.J., at page 165; *Florence* v. *Drayson* (1), *per* Cockburn C.J. and Cresswell J., at pages 589 and 590; *Florence* v. *Jenings* (2); *Lowry* v. *Williams* (3), *per* FitzGibbon L.J., at pages 282 and 283; *Ex parte Fewings* (4). If then for the purpose of fixing the character of a commercial instrument—in respect of being overdue or current within the commercial rule—one be obliged, disregarding broader considerations, to determine as between the contract for principal and that for the payment of interest contained in it which the law regards as the principal and which the accessory; if one be compelled to resort to such artificial tests; then although law of England furnishes no positive rule applicable to the case yet the weight of argument would seem to incline in favour of the view that the character of the instrument should be determined by reference to that which, for many other purposes, is commonly regarded as the principal obligation. And this appears to have been the view of Field J.

For these reasons I think the criticisms referred to miss their aim. But the true answer is that the decisions in question rest on much broader grounds. The true ratio of them is indicated in the passage already quoted from the judgment in *Morgan* v. *United States* (5); and will be found, on a careful examination, to be simply this: that inasmuch as the grounds upon which the rule relating to overdue instruments is founded do not justify the application of it by reason only of a default in respect of a periodical payment of interest, so to apply it, would in effect

(1) 1 C.B.N.S. 584.
(2) 2 C.B.N.S. 454.
(3) (1895) 1 I.R. Ch. 274.
(4) 25 Ch.D. 338.
(5) 113 U.S.R. 476.

be to introduce a new rule restricting the currency of negotiable instruments which would greatly impair—if it would not entirely destroy—the negotiable character of a large class of such instruments now universally regarded and treated as a part of the commercial currency of the country. For the reasons I have given these grounds seem to me to be sound grounds—in conformity with the principles acted upon by English courts for over a century.

Of the views expressed in the judgments in *Moore* v. *Scott*(1), to which I have already referred at some length, and in an admirably clear and forcible judgment of the late Judge McDougall, of the York County Court, in *Jennings* v. *Napanee Brush Co.*(2), it is perhaps sufficient to say that my reasons for thinking that these views should not be accepted will, without a more systematic discussion of them, be apparent from the foregoing; although I wish to be understood distinctly as neither approving nor disapproving the actual decision in either of those cases.

There remains the question whether, as regards the unpaid interest itself, the note should for the purposes of the rule in question be regarded as an overdue note. Against the affirmative of these views there is a strong *primâ facie* case in the obvious inconvenience and confusion to which the adoption of it would in practice give rise. And although in strict theory there is something to be said in favour of it, I think it must be rejected.

"The object of the law merchant," said Byles J. in *Swan* v. *North British Australasian Co.*(3),

(1) 16 Man. R. 492. (2) 4 Can. L.T. 595.
(3) 2 H. & C. 175, at p. 184.

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as regards bills and notes made or become payable to bearer is to secure their circulation: therefore honest acquisition confers title. To this despotic but necessary principle the ordinary rules of the common law are made to bend.

So the governing factor in the consideration of this question is that the instrument is a current negotiable instrument up to the time of the maturity of the principal; and it would, I think, be incompatible with the full recognition of this character of the instrument to hold that the title to interest not paid when due does not follow the title to the instrument itself.

For the purpose of clearness I will attempt to summarize the ground upon which I think this case ought to be decided.

The doctrine of constructive notice is not applicable to current bills and notes transferred for value, but in all cases when the good faith of the holder is in issue the question is a question of fact to be determined on the circumstances of the particular case; and on the evidence here the plaintiffs should be held to be holders for value in good faith.

Upon the question whether the note sued upon was overdue when it was acquired by the plaintiffs, as a clear rule upon that question cannot be gathered from the express provisions of the "Bills of Exchange Act" we must under section 10 of that Act have recourse to the common law for the purpose of arriving at the rule to be applied. The grounds upon which those decisions are based in which the rule limiting the currency of overdue instruments has been enunciated and applied do not in my judgment justify the application of the rule to a bill or note in respect of which the principal is not yet due, merely because a payment of interest is in default.

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Moreover, for the reasons given, the plaintiffs cannot in taking the note sued upon be said to have taken a dishonoured note with notice of its dishonour.

IDINGTON J. (dissenting).—This is an appeal *per saltum,* by leave of Mr. Justice Mathers, from the trial judge who dismissed the action to recover the amount of a promissory note he had found on the facts to have been obtained by fraud.

It is conceded the appellants are holders for value.

The note was given in the following form:

$875.00 GILBERT PLAINS, Man., March 5th, 1903.

March 1st, 1905, after date, for value received, we jointly and severally promise to pay McLAUGHLIN BROS., or order, Eight Hundred and Seventy-Five Dollars at the Canadian Bank of Commerce, with interest at six per cent. per annum, interest payable annually.

for the price of a stallion alleged to have been sold to a syndicate of whom twelve signed.

It was concluded by us all at the close of the argument of the appellant's counsel that the circumstances were such that the payees if suing could not recover.

The question remains whether or not the appellants can hold any higher position.

They took it on the 11th of February, 1905, knowing only that the business of payees was that of horse dealers and assuming therefrom that the note represented some dealing in horses.

It appears that they made no inquiries. The interest for the first year was then and had been past due for nearly a year. They sue for this interest as well as the principal and interest for the time since the end of the first year.

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It is claimed that, the interest being for the first year overdue and unpaid when the appellants took, they cannot claim to have taken in due course, so as to deprive the makers of the right to set up all the equities attached to the note, that they might have set up if payees had been suing. Can it be said that, the yearly interest being overdue for nearly a year, the note is overdue within the meaning of sections 56 and 70 of the "Bills of Exchange Act?"

I do not think that the codification of the law in that Act was of such a nature as to either extend or restrict the meaning of the word "overdue" in this connection.

Nor do I find any help from a comparison of the use of the word "overdue" in these sections and in other parts of the Act or from a reference to the use of the word "interest" where it occurs in the Act.

At first I was disposed to think the use of the words "interest payable annually" unwarranted by the defining section 28 which seems to imply that the interest is to be the whole interest. But I think it must be taken when severed as in this note into annual payments of interest as if of annual instalments and, if need be to maintain the necessary quality of being for a sum certain, be treated as an instalment.

No case in England and only the cases of *Moore* v. *Scott*(1), and *Jennings* v. *Napanee Brush Co.*(2), in Canada, deal with the point. The decisions in both these cases are against the appellants' view. The matter is well reasoned out in each. The first is from the appellate court of Manitoba. The second is by the late Judge McDougall, of the County Court of the

(1) 16 Man. 492.

(2) 4 Can. L.T. 595.

County of York, in Ontario, whose opinions were always worthy of great consideration. As usual with him, he referred to and presented fully the opinion he combatted and then proceeded with his own exposition of the law.

I prefer his reasoning to that which proceeds as some American cases do upon the basis of the interest being but an incident of the contract.

It is as I have already found an instalment.

Is an overdue and unpaid instalment enough to bring a bill or note within the meaning of "overdue" in the Act and in the law as it stood before it was codified by this Act?

I think it is. It seems to contain all the elements that formed the foundation for the rule.

Brown v. *Davies*(1) is one of the earliest reported cases on the subject.

In 1789, Kenyon C.J. being of opinion that unless knowledge was brought home to the plaintiff the defence of its previous payment as against a payee could not be put up as against the indorser.

It was stated in argument of that case that Mr. Justice Buller had in another case *Banks* v. *Colwell* said that it had been repeatedly ruled at Guildhall that wherever it appears that a bill or note has been indorsed over, some time after it is due, *which is out of the usual course of trade, that circumstance* throws such a suspicion upon it that the indorsee must take it upon the credit of the indorser and must stand in the situation of the person to whom it was payable. In his judgment in the case just argued, Buller J. stated:

(1) 3 T.R. 80.

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But if it is overdue though I do not say that by law it is not negotiable yet certainly it is out of the common course of dealing and does give rise to suspicion.

Again he says:

A fair endorsee can never be injured by the rule; for if the transaction be a fair one he will be entitled to recover. But it may be a useful rule to detect fraud whenever that has been practised.

In a foot-note there is a case of *Taylor* v. *Mather* (1) mentioned.

In this Buller J. said:

I have always left it to the jury upon the slightest circumstance to presume that the indorsee was acquainted with the fraud.

As Lord Ellenborough put it in the case of *Tinson* v. *Francis* (2),

After a bill or note is due it comes disgraced to the indorsee.

This language is just as applicable to a bill or note of which one or more instalments is due as if the whole were due. Especially is this so whenever as here the indorsee buys the overdue interest as part of his purchase. His suing for it surely entitles us in the absence of explanation to assume the appellant did so.

It is a broken contract.

It could be presented and protested. It could be sued upon and judgment be recovered for that which is due. See the case of *Oridge* v. *Sherborne* (3).

If suit were brought by the payee and a defence of fraud set up that defence would when adjudicated upon determine conclusively the same question between the same parties as to the rest of the note. See *Black River Savings Bank* v. *Edwards* (4).

(1) 3 T.R. 83*n*.
(2) 1 Camp. 19.
(3) 11 M. & W. 374.
(4) 10 Gray 387.

In the case of *Vinton* v. *King*(1) a Massachusetts Supreme Court decision, it was expressly held that an instalment of principal having fallen due and remained unpaid the note was overdue, and taken by a later indorsee subject to all the equities attaching to the note. Indeed, Mr. Daniels' work on Negotiable Securities (5 ed.), p. 781, broadly lays it down that an overdue instalment of a bill or note renders it an overdue bill or note within the rule.

This principle has been applied elsewhere. Indeed, I cannot find it has been very seriously questioned.

An overdue instalment is universally held in, and I think the preponderance of authority in the United States is that default in payment of interest is just as effective to constitute the instrument an overdue bill or note as is default as to both principal and interest maturing on the same date.

The distinction made between instalments of principal and instalments of interest is I think essentially unsound.

It proceeds upon undue stress being laid upon what is said as to interest being only an incident of the debt.

I agree to the fullest extent with the reasoning of the late Judge McDougall in the *Jennings Case*(2) cited above.

To say that an instalment of one hundred dollars being overdue is fatal, but one of a thousand dollars of interest of no effect, seems to me trying to make a distinction without a difference, when we have regard to the reason for the rule.

(1) 4 Allen (Mass.) 562. (2) 4 Can. L.T. 595.

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The radical error is in treating the interest as something incidental to and not part of the contract.

It arises, I suspect, from the radical difference of the point of view interest is looked upon in the United States as distinguished from that obtaining in England.

Sedgwick deals with this at page 430, Vol I., of the 8th edition of his work on Damages as follows:

> Sec. 292: Difference between English and American law.
>
> In the American courts interest is allowed as damages more liberally than in England. The leading difference seems to grow out of a different consideration of the nature of money. The American cases look upon the interest as the necessary incident, the natural growth of the money, and therefore incline to give it with the principal, which the English courts treat it as something distinct and independent, and only to be had by virtue *of some positive agreement* or statute.

Adopting the English point of view as we ought I see no difficulty in treating interest as any other instalment overdue.

No point seemed to be made of the presumption or inference relative to the knowledge or want of knowledge of the appellants, when taking the note, of the non-payment of the year's interest which I find was overdue and unpaid.

I have considered it and concluded that in the absence of any explanation the suing for it must be attributable to some knowledge or assumption of knowledge that cannot now be denied by the appellants.

One thing we must always bear in mind in dealing with questions such as this arising upon negotiable securities and the promissory note form especially; and it is this that the transferability of the original contract, so operating as to defeat the rights of the

original parties to the contract, by creating a new contract as it were with a third party unknown, is an invasion by the law merchant, and the statutes extending the same, of the general law of contract and ought not to be extended further than well recognized authority or custom or statute carries it.

A curious condition of things is accidentally disclosed by seeking for authority amongst American cases. It is that in the case of *First National Bank of St Paul* v. *County Commissioners of Scott County* (1) it appears the courts of the state where the note, in question here, was transferred, have treated overdue interest as if principal.

I suppose I am debarred on principle from recognizing this foreign law as a fact whilst asked to consider it as a means of general instruction. It only adds one more to the many unexplained things that appear. It shews how things in a law suit are left to chance, without the application of that industry that ought to be supplied to minimize perchance the realm of chance.

Having our attention called to debentures and their coupons as analogous negotiable instruments and the conflicting decisions anent the same, I desire to say that there may be a distinction between them and bills or notes arising from their respective differences of origins and the different modes of commercial handling of the same or the custom of their markets, and hence I would desire to be understood as reserving any opinion anent the same till the occasion arise. For example, the coupons are often severed from the contract for principal.

I cannot find under the circumstances of this case

(1) 14 Minn. 77.

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authority or reason to warrant me in adding, to the point of overdue interest, any weight arising from the suspicions, if any, caused by the alteration of the rate of interest on the note.

The note was admitted and that must be taken to cover the need for explanation of the alteration, and leave the note in that regard as "regular on the face of it." At least that is my present impression. Perhaps I am mistaken and it should be held to fail in this regard to get any support from the Act.

Is the pencil indorsement of the horse being returned such evidence of that fact as should be held to impeach the good faith of the appellants? Is it to be inferred that this had been indorsed before coming to appellants?

In the view I have taken of the case it is unnecessary for me to decide. Indeed, if I felt this should be decided I would be inclined under all the circumstances to grant a new trial to ascertain the fact with costs to abide the event of such issue.

Having regard to the foundation upon which the rule as to overdue notes rests, the current of such authority as there is, on the point, the probable conformity thereto in practice, and the undesirability of disturbing the same, I think the appeal fails and should be dismissed with costs.

MACLENNAN J (dissenting).—I agree in the opinion of Mr. Justice Idington.

Appeal allowed with costs.

Solicitors for the appellants: *Fisher, Wilson & Ewart.*
Solicitors for the respondents: *Hudson, Howell, Ormond & Marlatt.*

ROBERT L. MACILREITH (DEFENDANT) ..... APPELLANT;

AND

GEORGE W. HART AND ANOTHER, EXECUTORS OF R. I. HART (PLAINTIFFS) ..... RESPONDENTS.

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*Nov. 26, 27.
1908
*Feb. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Illegal expenditure—Action by ratepayer—Intervention of Attorney-General—Validating Act—Right of appeal.

Prior to the passing of the Act of the Legislature of Nova Scotia, 7 Edw. VII. ch. 61, the City Council of Halifax had no authority to pay the expenses of the mayor in attending a convention of the Union of Canadian Municipalities.

Where a municipal council illegally pays away money of the municipality to one of its officers an action to recover it back may, if the council refuses to allow its name to be used, be brought by a ratepayer suing on behalf of all the ratepayers and need not be in the name of the Attorney-General.

Pending such an action the legislature passed an Act authorizing payment by the council of any sums for principal, interest and costs incurred by the defendant "in the event of judgment being finally recovered by the plaintiff."

Held per FITZPATRICK C.J. and MACLENNAN J., that the meaning of the words quoted was that the action might proceed to a finality, including any competent appeal, and that they did not put an end to the appeal to this court.

Per FITZPATRICK C.J. and MACLENNAN J.—*Quære.* Should not the action have been brought on behalf of all the ratepayers *and inhabitants* of the municipality?

Judgment appealed from (41 N.S. Rep. 351) affirmed.

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

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APPEAL from a decision of the Supreme Court of Nova Scotia(1) reversing the judgment at the trial by which the action was dismissed.

The action was originally brought by Rueben I. Hart, a ratepayer of the City of Halifax, on behalf of all the ratepayers, to recover from the defendant, mayor of the city, a sum of money paid him out of civic funds in reimbursement of his expenses in attending a convention of the Union of Canadian Municipalities at Winnipeg. The plaintiff claimed that such payment was beyond the powers of the city council and, on refusal of the latter to allow its name to be used, that he was entitled to bring the action. On his death the suit was revived by his executors, the present respondents.

The trial judge dismissed the action holding that it could only be brought in the name of the Attorney-General. His judgment was reversed by the full court and judgment entered for the plaintiff. The defendant appealed to the Supreme Court of Canada.

Pending the action an Act was passed by the legislature of the province legalizing such payments for the future and empowering the City Council of Halifax "in the event of judgment being finally recovered by the plaintiff" in this case to pay all or any sums for principal, interest and costs incurred by the defendant. 7 Edw. VII. ch. 61, sec. 17.

Allison for the respondent took the preliminary objection that the above mentioned Act having legalized such expenditure for the future and empowered the city council to pay any sum recovered by the

(1) 41 N.S. Rep. 351.

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plaintiffs nothing but costs was involved in the appeal and the court should not entertain it. He relied on *Moir* v. *Village of Huntingdon*(1); *McKay* v. *Township of Hinchinbrooke*(2); *Fraser* v. *Tupper* (3).

The court directed that the hearing of the appeal should proceed on the merits.

F. H. Bell for the appellant. The payment to the defendant by the city council was not *ultra vires* being made as incidental to, and by virtue of, its general statutory powers. *Attorney-General* v. *North-Eastern Railway Co.*(4); *Attorney-General* v. *Manchester Corporation*(5); *Attorney-General* v. *Mersey Railway Co.*(6).

Even if the payment was illegal the contract to pay having been executed the money cannot be recovered back. Leake on Contracts (5 ed.), p. 553; *Hermann* v. *Charlesworth*(7).

In any case the action could only be brought by the Attorney-General. *Evan* v. *Corporation of Avon* (8); *Attorney-General* v. *DeWinton*(9); *Kilbourne* v. *St. John*(10).

Allison for the respondents. A municipal corporation can only exercise the powers expressly granted to it or powers necessarily incidental thereto or essential to its declared objects and purposes. Dillon on Municipal Corporations (4 ed.), vol. 1, p. 87.

(1) 19 Can. S.C.R. 363.
(2) 24 Can. S.C.R. 55.
(3) Cout. Dig. 104.
(4) [1906] 1 Ch. 310.
(5) [1906] 1 Ch. 643.
(6) [1906] 1 Ch. 811; [1907] 1 Ch. 81.
(7) [1905] 2 K.B. 123, at p. 131.
(8) 29 Beav. 144.
(9) [1906] 2 Ch. 106.
(10) 59 N.Y. 21.

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The payment to the respondent in this case was not incidental nor essential to the objects and purposes of the corporation and was *ultra vires*. *Waters* v. *Bonvouloir*(1).

The Attorney-General was not a necessary party to the action. See *Attorney-General* v. *Wilson*(2); *Patterson* v. *Bowes*(3); *Armstrong* v. *Church Society* (4); *Prestney* v. *Mayor, etc., of Colchester*(5).

THE CHIEF JUSTICE agreed with Maclennan J.

DAVIES J.—This action was brought by the respondent, Hart, as one of the residents and ratepayers of the City of Halifax, on behalf of himself and the other ratepayers, praying for a declaration that a certain payment of $231, made to the defendant, appellant, when mayor of the said city, out of the funds of the city, might be declared illegal and void and re-paid by him into such funds.

The defendant contested the suit upon several grounds.

First: That the payment was not *ultra vires* of the corporation, but within their powers;

Secondly: That, even if *ultra vires,* the payment was made for work which the defendant had been requested by the council to do and constituted a completed contract so that neither the city nor any one else on its behalf could recover it back, and

Thirdly: That the transaction impeached was complained of as being an improper and illegal diversion

(1) 172 Mass. 286.
(2) 1 Cr. & Ph. 1.
(3) 4 Gr. 170.
(4) 13 Gr. 552.
(5) 21 Ch.D. 111.

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of the city funds and that the only person who could take the proceedings for the recovery of the money was the Attorney-General, with or without a relator.

We were all of the opinion, after hearing the argument, that the trial judge and the majority of the court of appeal were right in holding the payments complained of to have been *ultra vires* of the corporation, and, having been so, could have been recovered back in a suit by the City of Halifax corporation.

The city having, however, refused to allow its name to be so used, the main question argued before us remained:—Could, in such a case, a ratepayer and resident, suing as the plaintiff has done here and making the city a defendant in his suit, successfully claim the declaration he prayed for, or must such a suit be brought in the name of the Attorney-General.

The trial judge, holding that the Attorney-General was a necessary party, dismissed the action, and the court of appeal in Nova Scotia unanimously reversed that decision and held that the action, as brought, could be maintained.

We think it is not open to doubt that granting the payment impeached to have been *ultra vires,* and made to an officer of the corporation such as the mayor, the action could have been maintained in the corporate name of the city against him for its money, and that, in such case, the Attorney-General need not have been a party. The fact that it was money and not other property of the city that was in question could not make any difference in the right of the city corporation to sue, and I did not understand Mr. Bell, in his very able argument at bar, to contend that it did.

The sole point, therefore, that remains for con-

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sideration is whether, in a case where the municipal authorities refuse to allow the corporation name to be used to test the legality of the payment of municipal funds proposed to be made or already made, or the legality of the appropriation of other property of the municipality made or to be made, questions which seem to me to stand practically on the same footing, the action to test the question must be brought in the name of the Attorney-General, with or without relators, and cannot be brought in that of the resident ratepayers who are members of the corporation.

Many years ago, that important question was decided in Ontario in the case of *Paterson* v. *Bowes*(1), in favour of the right of the ratepayers to sue in the circumstances suggested. That case has been consistently followed in that province ever since and may now be considered as the settled rule of law and practice there.

The decision of the Supreme Court of Nova Scotia in the case now under review, reversing that of the trial judge, follows on the same line, while in Prince Edward Island, Hodgson M.R., in *Tanton* v. *The City of Charlottetown*(2), after a lengthy review of the English cases, holds that the Attorney-General must be a party plaintiff.

The necessity of the Attorney-General being a party to *any action* against corporations which involve only public rights or interests, or for the protection, in any way, of public interests, as such, and as distinct from cases where there is a distinct private injury arising from the act complained of, is admitted.

What is contended by the respondent is that where the act complained of is *ultra vires* of the corporation,

(1) 4 Gr. 170.

(2) 1 East. L.R. 282.

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and works a distinct private injury separable from the wrong to the public, the private individual or individuals may, in cases where the user of the name of the corporation is refused, sue for his own protection in his own name without the Attorney-General.

In the case of *Boyce* v. *Paddington Borough Council*(1), Buckley J. held that a plaintiff can sue without joining the Attorney-General, in two cases, (*a*) where an interference with a public right involves interference with some private right of the plaintiff, and (*b*) where no private right of the plaintiff is interfered with but he, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

Does the principle involved in the second proposition of Buckley J., and on which it necessarily rests, apply to the facts of this case?

Assuming, as we have already decided and on which assumption alone the question arises, that there has been an interference with a public right by the misappropriation of the moneys of the municipality to purposes outside of its powers, can it fairly be said that the plaintiffs have suffered damage peculiar to themselves *quâ* ratepayers.

The public right, interference with which justifies the intervention of the Attorney-General is, I take it, the application of moneys devoted by the terms of the incorporation Act of the municipality to certain specified purposes, to purposes other and different from these, in other words, to purposes *ultra vires* of the municipality.

The peculiar damage sustained by the ratepayers as the result of such misappropriation, arises out of

(1) [1903] 1 Ch. 109.

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the increased rates which they will have to pay by reason of the misappropriation of the moneys of the corporation. It matters not whether the damage be great or small, unless indeed the whole transaction was so trivial that the court would refuse to interfere on that ground. But the broad contention is put forward that even where personal misappropriation of the corporate funds by the officers of the municipality is shewn, coupled with the refusal by the controlling officials of the use of the corporate name to enable the wrong to be rectified, the ratepayers are helpless unless and until they can get the Attorney-General to intervene; and that any special damage which the plaintiffs individually or as a special class will sustain cannot and does not give them a right to sue.

The misappropriation here complained of is only $270. If it was $2,700, it should not make any difference in the determination of the right of the injured class to sue for their own protection. As ratepayers, they seem to me to have suffered special and peculiar damage to themselves distinct from the public damage which the Attorney-General has the sole right to represent, and, as a result of such special and peculiar damage, have a right to sue in their own name, in equity, to have the wrong rectified or proposed wrong enjoined, where their trustee, (the municipality), refuses to allow the corporate name to be used for the purpose.

I quite concede, alike on principle as on authority, that where the general right of His Majesty's subjects alone is involved, and with respect to any interference with that right, the Attorney-General is the only and proper person, with or without relators, to sue. The relator only came in for the purpose of costs. *At-*

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torney-General v. *Logan*(1). The Attorney-General comes in as the officer of the King, who, as *parens patriæ,* by his proper officer, files his information to see that right is done to his subjects who are incompetent to act for themselves. But it does not seem reasonable or consistent with principle to apply the rule to cases where persons or a class, being members of municipal corporations, complain of the action of officials, having control for the time being of the corporation, diverting or appropriating its money or property for purposes *ultra vires* of the corporation so as to work a special injury to such persons or class of persons and refusing to allow the corporation name to be used to test the legality of the action complained of.

In the latest case I have been able to find, *The Attorney-General, (on the relation of the Spalding Union Rural District Council)*, and *The Spalding Union Rural District Council* v. *Garner*(2), where the beneficial right of pasturage along a certain road was in question, Channell J. held, that this right was vested in the *Parish Council* and not in the *Rural District Council* and that

> the Attorney-General could only interfere to protect the rights of the community in general and not the rights of a limited portion thereof, especially when that limited portion could have brought the action alone, and that, therefore, the Attorney-General had no right to bring the action.

The learned judge reviews many of the decided cases and admits that he had reached his conclusion "not without considerable doubt."

The right of the Attorney-General alone to interfere in cases where incorporated companies, by their officials, attempt to misuse their statutory powers or

(1) [1891] 2 Q.B. 100. (2) 23 Times L.R. 563.

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divert or misappropriate the company's funds, irrespective of special damage to the complainant, is neither raised nor questioned here, nor do I seek to cast any shadow of doubt upon such right.

Chief Justice Dillon, in his book, (4 ed.) on Municipal Corporations, so often cited as authority, in discussing the question now under review, concludes strongly in favour of the right of ratepayers, without joining the Attorney-General, to maintain such actions as the present; sections 914 to 922. By pertinent and cogent reasoning, which is satisfactory to me at any rate, he establishes the distinction which should prevail, that

> where the duty about to be violated or the action sought to be enjoined is public in its nature and affects all the inhabitants alike, one not suffering any special injury cannot, in his own name, or by uniting with others, maintain a bill, but that, in the case of a ratepayer sustaining special damage, he may bring his action for relief.

In *Crampton* v. *Zabriskie*(1), in 1879, the Supreme Court of the United States added the weighty sanction of their authority to the conclusions which Mr. Dillon had reached and upheld

> the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay.

I do not propose to review the great array of authorities more or less applicable which were cited to us by learned counsel in their able arguments. The case of *Watson* v. *The Mayor, etc., of Hythe*(2), was relied upon by the appellant for the proposition that, for the purposes and practice we are discussing, muni-

(1) 101 U.S.R. 601. (2) 22 Times L.R. 245.

cipal and commercial corporations stood on different footings. The case is very meagrely reported and the decision is that of a single judge. In maintaining the objection to the maintenance of the action, he laid stress upon the fact that the wrong complained of was one by a public body and *not causing damage to an individual* and that such wrong could only be restrained by action of the Attorney-General. In substance (he says), the plaintiffs were seeking to restrain not the council, but the corporation from exercising its public functions in a manner which was not pleasing to the plaintiff.

The ratio of his decision appears to have been the absence of special damage to the individual suing and the substitution by the plaintiff of his displeasure for his damage. Nor does it clearly appear from the report of that case that the act complained of was *ultra vires.*

The case of *Evan* v. *The Corporation of Avon*(1) was much replied upon by the appellants. I do not think that when properly examined it can be said to be an authority for their contentions. In the first place, the plaintiff there sued by himself without the Attorney-General, and not even on behalf of the rest of the burgesses or of the inhabitants. Yet the bill was not dismissed upon these grounds but because the *corporation* was absolutely entitled to the property claimed, and the plaintiff had failed to shew a title in the freemen under the reservation comprised in the second section of the Municipal Corporations Act of 1835. There was no question there of payments of the corporation funds for purposes beyond their powers. The prayer of the bill was to restrain the corporation

(1) 29 Beav. 144.

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from selling the market property and other property remaining in them and for an account of such property as they had sold, and the holding of the M.R. was, that the corporation admittedly not being within "The Municipal Corporations Act,"

had full power to dispose of all its property like any private individual,

and that no private trust was sufficiently alleged on the face of the bill to support it. When read together with the subsequent case of *Prestney* v. *The Mayor and Corporation of Colchester & The Attorney-General*(1), I do not think it can be held to be an authority for the appellants' contentions in this suit.

On the whole and admitting that there is some conflict of authority, I conclude that the balance alike of authority and reason, to say nothing of convenience, are in favour of such an action as the present being maintainable.

I would, therefore, dismiss the appeal with costs.

IDINGTON J.—I agree with Mr. Justice Graham that there is no English authority that conflicts with the law as upheld in *Paterson* v. *Bowes*(2), which followed *Bromley* v. *Smith*(3), and has been in turn followed by a stream of cases for fifty years in Ontario, that a ratepayer has a right of action where moneys have been, as here, unlawfully taken, or diverted from the municipal treasury to which his taxes go and that the Attorney-General is not a necessary party.

As against these authorities we have three recent

(1) 21 Ch.D. 111. (2) 4 Gr. 170.
(3) 1 Slm. 8.

cases in New Brunswick and Prince Edward Island, all within the last twenty years.

The law must be the same in all these three provinces, as well as in Nova Scotia.

It would seem as if expediency, as well as what seems in principle good law, should drive us to follow the law as maintained in Ontario, and in this case in Nova Scotia.

I see no possible legal defence in the way of justification for the appellant and the argument in his favour, derived from the alleged rule that moneys paid *ultra vires* cannot be recovered, is not applicable to one standing, as he did, in relation to the depleted fund.

The appeal should be dismissed with costs.

MACLENNAN J.—I agree with the judgment that the payment in question to the appellant, MacIlreith, was one which the defendant corporation could not legally make; and that, in that respect, it stands on a different footing from the payment to the defendant Doane.

I am also of opinion that the judgment is right on the question raised upon the form of the action.

I confess I feel no difficulty whatever upon that question. It is a mere question of proper parties to a suit in a court of equity. That question, in the very form in which it arises here, was fully discussed and reasoned out in Ontario, in the case of *Paterson* v. *Bowes*(1), by two of the ablest equity judges of that province; and I am unable to see any flaw in their reasoning.

(1) 4 Gr. 170.

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The right of the inhabitants to compel the city corporation, that is the city council, as a body, to do its duty, rests on this:—That the corporation is a trustee for the inhabitants.

That was declared in the same case of *Bowes* v. *City of Toronto*(1), by L.J. Knight Bruce, in these words:—

> The (city) council was, in effect and substance, a body of trustees for the inhabitants of Toronto.

The only difference between that case, in its initial stage, when the question of pleading was decided, and the present, is that in that case the plaintiff sued on behalf of himself and all the other inhabitants, and not, as here, the other ratepayers.

The city corporation is composed of all the inhabitants and not merely of the ratepayers, and I think the better form of action would be on behalf of both the inhabitants and ratepayers; but I think it good enough in its present form, as on behalf of the ratepayers, for, whether inhabitants or not, all the ratepayers are also *cestuis que trustent* of the city corporation.

As between the ratepayers and other inhabitants, the former have the greater interest in the recovery of money of the corporation, which has been misapplied, for they must pay an equivalent sum again, unless it is recovered, while the other inhabitants are free from that obligation.

It was said that as the statement of claim now stands the inhabitants who are not ratepayers, and who have an important interest, ought to be but are not before the court. But I think they are before the

(1) 11 Moo. P.C. 463, at p. 524.

court sufficiently, being represented by the city corporation, and will be bound by the judgment, whatever it may be. But, if that were doubtful, it would be proper to allow an amendment by alleging that the plaintiff sued on behalf both of the ratepayers and inhabitants(1).

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It was also urged that, while the plaintiff might have been a ratepayer in 1905, when the money in question was misapplied, he might have ceased to be so in 1906, when he brought his action. But it is distinctly alleged in the statement of claim, and expressly admitted in the statement of defence, that the plaintiff was a resident ratepayer when the money was misapplied and continued so to be at the time of pleading.

I am unable to see any good reason why, on a mere question of parties, and of the form of action, there should be any distinction whatever between business corporations and those numerous bodies, small and great, other than charitable, which we have in all the provinces of Canada, and which are authorized to act as corporations.

I express no opinion on the question whether the Attorney-General of the province could, having regard to decided cases, or could not, have sued in this case, with or without a relator.

At the opening of the argument, it was objected by the respondents' counsel that the statute of Nova Scotia, ch. 61, sec. 17, (1906), had put an end to the appeal, and the argument proceeded subject to that objection.

I do not think there is anything whatever in the objection.

(1) R.S.C. [1906] ch. 139, secs. 54, 55.

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The authority given by the statute to the city council is only

in the event of judgment being finally recovered by the plaintiff.

I think that language contemplates that the action might proceed to a finality, including any competent appeal or appeals, which the parties or either of them might be advised to resort to.

I think the appeal should be dismissed.

DUFF J. concurred with DAVIES J.

Appeal dismissed with costs.

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

Solicitor for the respondents: *Edmund P. Allison.*

THE HAMILTON STREET RAILWAY CO. 1906

v. *Nov. 27. *Dec. 26.

THE CITY OF HAMILTON.

Tramway—Contract with municipality—Limited tickets—Specific performance—Injunction—Right of action—Parties.

APPEAL from the judgment of the Court of Appeal for Ontario(1), affirming the judgment at the trial (2) in favour of the respondent.

The action was to enforce specific performance of certain agreements entered into by the appellants in virtue of by-laws of the corporation of the City of Hamilton, and for a mandamus or mandatory injunction to compel the defendants to provide and keep for sale on their tramcars, operated in the city, limited transportation tickets, called "workmen's tickets," good for the payment of passenger fares on the tramway during certain fixed hours of each day.

At the trial Street J. held that the respondent, plaintiff, was entitled to succeed in the action and made an order restraining the defendants, appellants, from operating tram-cars in which they did not have such limited tickets for sale. By the judgment appealed from, this decision was affirmed and it was held that the agreement of which the enforcement was sought was *intra vires;* that the defendants were

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

(1) 10 Ont. L.R. 594. (2) 8 Ont. L.R. 642.

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obliged to sell the tickets in question and to receive them from all persons tendering the same in payment of passenger fares during the specified hours of each day; that the action could be maintained without the aid of the Attorney-General of the province, and that specific performance of the contract could be enforced by injunction.

After hearing counsel on behalf of the parties, on the appeal, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs. The only written notes of the reasons for judgment were those delivered, as follows, by

IDINGTON J.—The respondents' right to the injunction granted herein by the late Mr. Justice Street is maintainable for the reasons appearing in the judgment of that learned judge and in the judgments of the Court of Appeal.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Wallace Nesbitt K.C. and *Armour K.C.* for the appellants.

Blackstock K.C. and *Rose* for the respondent.

ROSS v. GANNON ET AL. 1906

*Dec. 13, 14, 15.

Promissory note—Illegal consideration—Smuggling transaction—Burden of proof—Findings of trial judge.

APPEAL from the judgment of the Supreme Court of Nova Scotia(1), by which the judgment at the trial was affirmed.

The action was brought by the appellant on certain promissory notes and, at the trial, was dismissed by Graham J., on the grounds that the original note, of which those sued upon had been given in part renewal, was either given without consideration or in connection with smuggling transactions. The learned trial judge considered the evidence unsatisfactory, as the plaintiff did not produce the books of account shewing how the consideration for the note was made up, and as there was evidence to support the plea of illegality. The appeal to the Supreme Court of Nova Scotia, *in banc,* was heard before five judges, but, at the time the judgment appealed from was rendered, one of these judges had resigned and there was an equal division of opinion among the remaining judges who had heard the appeal. The appeal, therefore, stood dismissed without costs, and the plaintiff appealed to the Supreme Court of Canada.

Newcombe K.C. and *Mellish K.C.* for the appellant.

Harris K.C. and *Lovett* for the respondents.

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

(1) 39 N.S. Rep. 65.

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The judgment of the court was delivered by

DAVIES J.—I am of opinion that this appeal should be dismissed and the judgment of Graham J., the trial judge, confirmed. An appeal to the Supreme Court of Nova Scotia against that judgment resulted in an equal division of that court, the Chief Justice Weatherbe, and Longley J. being of opinion that the trial judge who dismissed the action should be reversed and judgment entered for the plaintiff for the amount claimed, while Townshend and Russell JJ. were for confirming the judgment.

The action was one brought upon a note of hand signed by the defendants in plaintiff's favour, for $568.68. That note was one of several renewals of a note originally signed by the defendants in favour of one McKenzie for $960.

The defence was that Ross was the son-in-law and clerk of McKenzie, the payee of the $960 and came to the defendants' house and personally induced them to sign this note and also another one for $409.70 as an accommodation for him. McKenzie subsequently became insolvent and Ross purchased his estate and debts. When the $409.70 came due, Ross claimed that they should pay it because it really represented the aggregate amounts of several store accounts which Gannon and his sons, one of whom was dead, had incurred at McKenzie's store. On being satisfied that this was correct, and a statement being rendered of the several accounts, the Gannons paid this $409.70 note.

With regard to the other note for $960, they repudiated any liability on the ground that they never had received any consideration for it and that it was

expressly signed by them for Ross and at his request as an accommodation merely. Ross contended that it too represented a debt which the deceased son Dan Gannon owed McKenzie and of which he had become the assignee.

Joseph Gannon, the father of the three boys and one of the defendants, gave this evidence:

I remember the transaction about note of $960 and different renewals. Mr. Ross came in to me and asked if I would put my name to a note of that amount, and I said, "No"; and he said, "You might, your son Dan always accommodated me"; and I said, "It is too big, and I won't sign it." Ross said, "There is a vessel down in the dock that I want to buy"; and I said, "Supposing you would die?"; and he said "My wife will look after it." I said I would not sign it, and my son asked me then to put my name to it, and he said that Captain Carlin and himself will put our names to it, and you will never hear of it again; and I did. When the note came due, I came to Ross, and said, "What about the note?" and he said, "Your son Dan owed me more than that." I said, "Didn't you promise I would not be troubled about it?"; and he said, "Your son Dan owed me." I said "If my son owed you anything, and you bring an honest bill, I will pay you"; and *he said he could not bring an honest bill because it was smuggling;* and I said, "If you say anything more about it I will put you behind the bars." I never had any dealings with Ross. The first time he spoke to me about my son Dan owing him anything was when the first note came due. I asked him what my son owed him for, and he said, "We were into the smuggling, and it was my money that went into it"; and I said, "I know nothing about that."

John Gannon, defendant, and Pius Gannon, another son, who was present at the time of the signing of the note, corroborated the old man Joseph that Ross had induced the father and son to sign the note as an accommodation for him merely representing that he, Ross, would protect the note when it fell due and they would not be called upon for it.

When Ross was called he denied that the note was signed as an accommodation for him and contended

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it was for a debt which the deceased son Dan owed McKenzie.

He did not deny, however, in any way the sworn statement of the old man that when the note fell due he had come to Ross and asked what about the note, and that his only reply was, "Your son Dan owed me more than that," and that when taxed by Gannon with having promised when the note was signed that he, Gannon, would not be troubled about it he had only replied, "Your son Dan owed me," or the further statement, "If my son owed you anything and you bring an honest bill I will pay you," and his reply that *he could not bring an honest bill because it was smuggling.*

These statements remained uncontradicted, and were believed by the trial judge. The only book Ross produced of the Gannon's dealings with McKenzie was a ledger shewing accounts due by the several members of the Gannon family including the deceased Dan, amounting in the aggregate to the $409.70 note which they had paid.

Ross contended that there was another book of McKenzie's either a day book or ledger, containing other accounts between McKenzie and the deceased Dan, but his story as to this book was, as the trial judge said, unsatisfactory, and I fully agree with him. There was no pretence of there having been any consideration for the note other than the alleged account due by the deceased boy Dan to McKenzie which Ross himself in the uncontradicted evidence stated was for *smuggling.*

On the whole evidence I think the findings of the trial judge fully sustained by the evidence, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

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Solicitor for the appellant: *D. L. McPhee.*

Solicitor for the respondents: *R. H. Butts.*

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*March 6, 7.
*May 7.

THE LAURENTIDE MICA CO. ET AL.

v.

FORTIN ET AL.

Boundary—Order for bornage—Evidence—Existing posts and blazing—Injunction—Expertise—Reference to surveyors—Reports and plans—Costs in action en bornage.

APPEAL from the judgment of the Court of King's Bench (1) affirming, with a slight variation, the judgment of the Superior Court, District of Ottawa, which ordered the appointment of surveyors to proceed to the bounding and delimitation of the contiguous lands of the parties, according to a line of division between them from certain posts, said to be in existence at the southerly and northerly boundaries of the lots of land, by following blazed trees between the said posts, directing a plan and report to be made, and rejecting certain objections to the reception of evidence, taken by the appellants, plaintiffs, with costs against the said appellants. By the judgment appealed from, it was held, that oral testimony as to a former *bornage* by a surveyor, with the production of his field notes, as to the existence of posts at either end of the division line and blazings along said line, and of eighteen years' possession by one of the owners in conformity therewith, was admissible and sufficient to establish a settlement of the boundaries, in the absence of an

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

(1) Q.R. 15 K.B. 432.

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LAURENTIDE MICA CO. v. FORTIN.

official statement or authentic proces-verbal thereof; and, further, that the award of costs to the successful party had been properly given, in the action *en bornage*, which was governed by the usual rules as to costs of litigation.

After hearing counsel on behalf of the parties, on the appeal, the Supreme Court of Canada dismissed the appeal with costs, for the reasons given in the court below.

Appeal dismissed with costs.

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

Foran K.C. and *McDougall K.C.* for the respondents.

1907

*June 7, 8.
*June 24.

DEGALINDEZ ET AL. v. THE KING.

Railway aid—Provincial subsidy—Construction of statute—60 V. c. 4, s. 12 (Que.)—54 V. c. 88, s. 1 (j) (Que.)—Breach of conditions—Compromise by Crown officers—Obligation binding on the Crown—Right of action—Application of subsidy to extension of line of railway.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of Routhier C.J. in the Superior Court, District of Quebec, dismissing the appellants' petition of right with costs.

By their petition of right, the appellants, as transferees of The Atlantic and Lake Superior Railway Co. and of The Baie des Chaleurs Railway Co., claimed $155,000, as the unpaid balance of subsidy granted in aid of the construction, completion and equipment of the Baie des Chaleurs Railway.

The appellants claimed that, under the statutes of the Province of Quebec, 54 Vict. ch. 88, sec. 1, sub-sec. (*j*), and 60 Vict. ch. 4, sec. 12, the subsidy was attributable to the first eighty miles of the railway beginning at Metapedia and extending towards Gaspe Basin; that the land subsidy was of a special character subject only to the conditions enumerated in the second part of said sub-section (*j*), and that, as the Lieutenant-Governor in Council had exercised the discretion of making cash payments in lieu of the land

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

(1) Q.R. 15 K.B. 320.

subsidy given by the statute and effected a compromise for the payment of the last thirty-five cents per acre, at the rate agreed upon by the compromise, the Provincial Government was bound by the terms of that transaction.

It was contended by the respondent that the subsidy was attributable to the eighty miles of the railway beyond the first one hundred miles of the line, viz., the part extending from Paspebiac to Gaspé Basin; that payment was conditional on the completion of the works to Gaspé Basin, which condition had not been fulfilled, and that, in any event, such payment was a matter of grace and was not obligatory upon the Crown.

In the courts below, the petition of right was dismissed and it was held that the subsidy applied to the eighty miles of the railway which terminated at or near Gaspé Basin, and that a different construction placed upon the statute by the officers of the Crown, in effecting a compromise and making part payment of the subsidy in money, gave the appellants no right to recover the balance claimed from the Crown.

After hearing counsel on behalf of the parties, on the appeal, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs for the reasons given in the court below.

Appeal dismissed with costs.

T. Chase-Casgrain K.C. for the appellants.
Charles Lanctot K.C. for the respondent.

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ing business in the City of Halifax" and a case was stated and submitted to the Supreme Court of Nova Scotia for an opinion as to such liability. On appeal from the decision of the said court to the Supreme Court of Canada council for the City of Halifax contended that the proceedings were really an appeal against an assessment under the city charter, that no appeal lay therefrom to the Supreme Court of the province and therefore, and because the proceedings did not originate in a superior court, the appeal to the Supreme Court of Canada did not lie. *Held, per* Fitzpatrick C.J. and Duff J., that as the appeal was from the final judgment of the court of last resort in the Province, this court had jurisdiction under the provisions of the Supreme Court Act and it could not be taken away by provincial legislation.—*Per* Davies J.—Provincial legislation cannot impair the jurisdiction conferred on this court by the Supreme Court Act. In this case the Supreme Court of Nova Scotia had jurisdiction under Order XXXIII., Rule 1 of the Judicature Act. *Per* Idington J.—If the case was stated under the Judicature Act Rules the appeal would lie but not if it was a submission under the charter for a reference to a judge at request of a ratepayer.—By section 313 of the said charter (54 V. c. 58) as amended by 60 V. c. 44, "Every insurance company or association, accident and guarantee company, established in the City of Halifax, or having any branch office, office or agency therein shall * * * pay an annual license fee as hereinafter mentioned * * * Every other company, corporation, association or agency doing business in the City of Halifax (banks, insurance companies or associations, etc., excepted) shall * * * pay an annual license fee of one hundred dollars." *Held*, that the words "every other company" in the last clause were not subject to the operation of the *ejusdem generis* rule but applied to any company doing business in the city. Judgment appealed from overruled on this point.—A carriage company agreed with a dealer in Halifax to supply him with their goods and give him the sole right to sell the same, in a territory named, on commission, all monies and securities given on any sale to be the property of the company and goods not sold within a certain time to

be returned. The goods were supplied and the dealer assessed for the same as his personal property. *Held,* Davies and Maclennan JJ. dissenting, that the company was not "doing business in the City of Halifax" within the meaning of section 313 of the charter and not liable for the license fee of one hundred dollars thereunder. Judgment of the Supreme Court of Nova Scotia (39 N.S. Rep. 403) affirmed, but reasons overruled. CITY OF HALIFAX *v.* MCLAUGHLIN CARRIAGE CO. 174

3——*Municipal Act—Vote on by-law — Local option — Division into wards — Single or multiple voting—3 Edw. VII. c. 19, s. 355.*] Section 355 of the Ontario Municipal Act, 3 Edw. VII. c. 19, providing that "when a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to enable him to vote on the by-law" does not apply to the vote on a local option by-law required by section 141 of the Liquor License Act (R.S.O. [1897] c. 245). Judgment of the Court of Appeal (13 Ont. L.R. 447) affirming that of the Divisional Court (12 Ont. L.R. 488) affirmed. SINCLAIR *v.* TOWN OF OWEN SOUND. 236

4——*Sale of corporate property—Committee of council—Authority to sell — Ratification.*] A committee of a municipal council cannot, unless authorized by the council, sell corporate property and if they do an action lies against them by the corporation for any loss incurred thereby. Such illegal sale cannot be ratified by resolution of the council carried by the votes of the members of the committee. TOWN OF NEW GLASGOW *v.* BROWN 586

5——*Municipal council—Illegal expenditure—Action by ratepayer—Intervention of Attorney-General—Validating Act — Right of appeal.*] Prior to the passing of the Act of the Legislature of Nova Scotia, 7 Edw. VII. c. 61, the City Council of Halifax had no authority to pay the expenses of the mayor in attending a convention of the Union of Canadian Municipalities.—Where a municipal council illegally pays away money of the municipality to one of its officers an action to recover it back may, if the council refuses to allow its name to be used,

Held, that this enactment is for the protection of servants of the company standing on or crossing the track as well as of other persons. M. was killed by a train, consisting of an engine and coal car, which was moving reversely in North Sydney. No person was stationed on the last car to give warning of its approach and as the bell was encrusted with snow and ice it could not be heard. Evidence was given that on a train of the kind the conductor was supposed to act as brakesman and would have to be on the rear of the coal-car to work the brakes but when the car struck M., who was engaged at the time in keeping the track clear of snow, the conductor was in the cab of the engine. *Held,* Idington J. dissenting, that an absolute duty was cast on the company by the statute to station a person on the last car to warn workmen, as well as other persons, on the track, which, under the facts proved, they had neglected to discharge. The defence under the doctrine of common employment was, therefore, not open to them. *Groves* v. *Wimborne,* ([1898] 2 Q.B. 402), followed. *Held, per* Idington J., that the evidence shewed the only failure of the company to comply with the statutory provision to have been through the acts and omissions of the fellow-servants of deceased; that the company, therefore, could not be held liable for the consequences under the "Fatal Injuries Act"; that it is, therefore unnecessary to determine the applicability of the said section of the "Railway Act," as the fellow-servants were guilty of common law negligence which rendered the company liable but only by virtue of and within the limits of the "Employers' Liability Act." MCMULLIN *v.* NOVA SCOTIA STEEL AND COAL CO 593

14——*Powers of municipal council — Illegal expenditure—Action by ratepayer — Intervention of Attorney-General — Right of action—Validating Act.*] Pending the action the Legislature of Nova Scotia passed an Act authorizing payment by the council of the City of Halifax of any sums for principal, interest and costs incurred by the defendant "in the event of judgment being finally recovered by the plaintiff." *Held, per* Fitzpatrick C.J. and Maclennan J., that the meaning of the words quoted was

that the action might proceed to a finality including any competent appeal and that they did not put an end to the appeal to this court. *Per* Fitzpatrick C.J. and Maclennan J.—Judgment appealed from (41 N.S. Rep. 351) affirmed. MACILREITH *v.* HART. 657

AND *see* MUNICIPAL CORPORATION 5.

15—— *Construction of statute—Insolvency—Preferential transfer of cheque—Deposit in private bank—Application of funds to debt due banker—Sinister intention—Payment to creditor — R.S.O.* (1897) *c.* 147, *s.* 3(1). 281

See ASSIGNMENT 2.

16——*Constitutional law — Provincial companies' powers — Operations beyond province—Insurance against fire — Property insured—Standing timber—Return of premiums—B.N.A. Act,* 1867, *s.* 92 (11) 405

See INSURANCE, FIRE 1.

17——*Taxing costs to Crown—Fees to counsel and solicitor—Salaried officer representing the Crown.* 621

See COSTS 4.

18——*Railway aid—Provincial subsidy—Construction of statute*—60 *V. c.* 4, *s.* 12 (*Que.*)—54 *V. c.* 88, *s.* 1 (*j*), (*Que.*)—*Breach of condition — Compromise by Crown officers—Obligation binding on the Crown—Right of action—Application of subsidy to extension of line of railway.*] DEGALINDEZ *v.* THE KING. . . . 682

STATUTE OF FRAUDS — *Location of mineral claims — Construction of contract—Fictitious signature — Unauthorized use of a firm name—Transfer by bare trustee — Statute of Frauds — R.S.B.C.* (1897) *c.* 135, *ss.* 50, 130.] Where B., acting as principal and for himself only, signed a document containing the following provisions,—"We hereby agree to give F. one-half (½) non-assessable interest in the following claims" (describing three located mineral claims), in the name of "J. B. & Sons," without authority from the locatees of two of the claims which had been staked in the names of other persons, without their knowledge or consent. *Held,* af-

TITLE TO LAND—*Promise of sale—Entry in land-register—Tenant by sufferance—Squatter's rights—Possession in good faith—Eviction—Possessory action — Compensation for improvements — Rents, issues and profits—Set-off—Tender of deed—Restrictive conditions—Evidence—Commencement de preuve par écrit—Pleading and practice—Arts.* 411, 412, 417, 419, 1204, 1233, 1476, 1478 *C. C.*] The appellants, plaintiffs, are the grantees of the lands in question, part of the Seigniory of Metapediac, the former proprietors of which had an agent resident in the seigniory, who administered their affairs there. It had been customary, on applications by intending settlers for the purchase of their wild lands, for this agent to take memoranda of their names and permit them to enter upon the lands, and this was done in respect to the lots in question and the applicants were allowed to hold possession and make improvements thereon without notice of any special conditions limiting the titles which might, subsequently, be granted to them by the owners. The defendants, respondents, acquired the rights of these applicants and, when the plaintiffs tendered deeds of the said lots to them, they refused to accept them on the ground that conditions were inserted which had not been stipulated for at the time of the original entries upon the lots and of which no notice had been given. In actions, *au pétitoire*, the defendants pleaded that their possession had been in good faith in expectation of eventually receiving titles without such restrictive conditions as were sought to be imposed and that, in the event of eviction, they were entitled to full compensation for the value of all necessary improvements made on the lands without deductions in respect of rents, issues and profits. *Held*, affirming the judgment appealed from (Q.R. 16 K.B. 127) the Chief Justice and Duff J. dissenting, (1) that the memoranda made by the agent were *commencements de preuve par écrit* and, having been followed by possession of the lots, were equivalent to a binding promise of sale without unusual conditions in limitation of any titles which might be granted; (2) that the entries made upon the lands, the possession thereof held by the defendants and their *auteurs* and the works done by them thereon could not be held to be in bad faith nor with knowledge of defective

TITLE TO LAND—*Continued.*

title; (3) that, under the circumstances and notwithstanding that the defendants had actual notice of prior title, the plaintiffs could not maintain actions *au pétitiore*, although they might be entitled to declarations in confirmation of the deeds tendered, if approved, and to recover the price of the lots; and (4) that the defendants could not be evicted without compensation for the full value of the necessary and useful improvements so made upon the lands with the knowledge and consent of the agent, and subject to being retained by the proprietors, without any deductions in respect of the rents, issues and profits derivable from the lands. *Price* v. *Neault* (12 App. Cas. 110) followed; *Lajoie* v. *Dean* (3 Dor. Q.B. 69) discussed. *Per* Fitzpatrick C. J.—Under article 412 of the Civil Code of Lower Canada, the good faith of a possessor of land is dependent upon a grant sufficient to convey real estate or transmit an interest therein. SAINT LAWRENCE TERMINAL CO. *v.* HALLÉ; SAINT LAWRENCE TERMINAL CO. *v.* RIOUX. 47

2——*Specific performance — Tender for land—Agreement for tender—One party to acquire and divide with other—Division by plan—Reservation of portion of land from grant.*] By agreement through correspondence the G.T.R. Co. was to tender for a triangular piece of land offered for sale by the Ontario Government containing 19 acres and convey half to the C.P.R. Co., which would not tender. The division was to be made according to a plan of the block of land with a line drawn through the centre from east to west. the C.P.R. Co. to have the northern half. The G.T.R. Co. acquired the land but the Government reserved from the grant two acres in the northern half. In an action by the C.P.R. Co. for specific performance of the agreement: *Held*, affirming the judgment of the court of appeal (14 Ont. L.R. 41) Maclennan and Duff JJ. dissenting, that the C.P.R. Co. was entitled to one half of the land actually acquired by the G.T.R. Co. and not only to the balance of the northern half as marked on the plan.—The Court of Appeal directed a reference to the Master in case the parties could not agree on the mode of division. *Held*, that such reference was unnecessary and the judg-