REPORTS

OF THE

SUPREME COURT

OF

CANADA

REPORTER

C. H. MASTERS, K.C.

CIVIL LAW REPORTER AND ASSISTANT REPORTER

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

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

" John Idington J.

" Lyman Poore Duff J.

" Francis Alexander Anglin J.

" Louis Philippe Brodeur J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA :

The Hon. Charles Joseph Doherty K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA :

The Hon. Arthur Meighen K.C.

ERRATA ET ADDENDA.

Errors and omissions in Cases Cited have been corrected in the Table of Cases Cited.

Page 450, line 22—Add, in head-note, *Letourneux* v. *The Queen*, (33 Can. S.C.R. 335), overruled.

Page 618, line 14—For "Doran" read "Daude."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOLUME 52 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Cornwall, Township of, v. *New York and Ottawa Railway Co.* (52 Can. S.C.R. 466). Leave to appeal to Privy Council granted 27th July, 1916.

Gibb et al. v. *The King* (52 Can. S.C.R. 402). Leave to appeal to Privy Council granted, 7th July, 1916.

Hay v. *Coste* (not reported). Leave to appeal to Privy Council refused, 25th July, 1916.

Mallory v. *Winnipeg Joint Terminals* (53 Can. S.C.R. 323). Leave to appeal to Privy Council refused, 11th Dec., 1916.

Paulson v. *The King* (52 Can. S.C.R. 317). Leave to appeal to Privy Council granted, 11th Dec., 1916.

Rainboth v. *O'Brien* (not reported). Leave to appeal to Privy Council refused, 27th July, 1916.

Smith v. *Rural Municipality of Vermilion Hills* (49 Can. S.C.R. 563). Appeal to Privy Council dismissed with costs, 26th July, 1916. ((1916) 2 A.C. 596).

Snell v. *Brickles* (49 Can. S.C.R. 360). The Privy Council reversed the decree of the Supreme Court of Canada and restored that of the Supreme Court of Ontario, dated 18th March, 1913. ((1916) 2 A.C. 599).

Southern Alberta Land Co. v. *Rural Municipality of McLean* (53 Can. S.C.R. 151). Leave to appeal to the Privy Council was refused, 30th Oct., 1916.

Toronto Eastern Railway Co. v. *Ruddy* (not reported). Leave to appeal to Privy Council refused, 13th Dec., 1916.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

JAMES MARWICK AND SIMPSON R. MITCHELL (DEFENDANTS) ..... } APPELLANTS;

AND

DAVID S. KERR (PLAINTIFF) ..... RESPONDENT.

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*Nov. 30.

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

Partnership—Shares in business—Associating third person—Good-will—Accounting between partners—Art. 1853 *C.C.*

For a number of years the defendants had carried on, in partnership, the business of accountants and, as their operations expanded, they engaged assistants, who were called "junior partners," remunerating them by salaries and percentage rates on yearly profits and, in some years, with bonus additions. With the approval of the "junior partners," the defendants associated P. in a one-fourth share of the business and the firm name was changed for the new organization which was carried on according to terms mentioned in an agreement which recited that it had been agreed between the defendants "that those at present constituting the firm" and "those for the time being con-

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

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stituting the firm of W. B. P. & Co." should arrange a partnership, etc. Upon making this arrangement the defendants received £20,000 from P. and, some time afterwards, in similar circumstances, £1,000 was received by them from G. The defendants retained these sums, as their own, and did not inform the "junior partners" that they had been paid. In an action by a "junior partner" for an account and a proportionate share of this £21,000:—

Held, affirming the judgment appealed from (Q.R. 24 K.B. 321), that the moneys so received by the defendants were not paid for a share in the business to be taken wholly from their individual interests therein, but for a share in the assets and goodwill of the business itself; consequently, the plaintiff had an interest in the moneys so paid and was entitled to an account and a proportionate share thereof.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of Panneton J., in the Superior Court, District of Montreal, maintaining the plaintiff's action with costs.

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

R. C. Smith K.C. and *F. H. Markey K.C* for the appellants.

Gordon MacDougall K.C. and *Adrian K. Hugesson* for the respondent.

THE CHIEF JUSTICE.—I can find no grounds for holding that the large sums paid to the defendants Marwick and Mitchell on what was practically the admission of fresh partners to the firm of Marwick, Mitchell & Co., of which they were the senior partners, were moneys to which they were entitled to the exclusion of the other partners in the firm. The presump-

(1) Q.R. 24 K.B. 321.

tion, it seems to me, is that these moneys were paid for an interest in the business and not in so much of the business as would be represented by the proportion of the interests of these two partners, large though that was. Indeed, I think, it was this largeness of their interest that must have led these two partners into the mistaken belief that the business was really their own and that they could make such dispositions as they pleased without being accountable to the junior partners in the concern.

The unfortunate secrecy which the two defendants preserved as to the moneys received by them prevented any possible acquiescence of the other partners in the arrangements made.

I think the appeal should be dismissed.

IDINGTON J.—The respondent sued appellants for an account of moneys received by them under circumstances which it is claimed rendered the moneys so received the property of the partnership of which they were all members.

The courts below have maintained a judgment for $6,950.73 in default of the accounting claimed.

The appellants carried on business at New York as chartered accountants, and prospered therein so much that they needed numerous assistants. Some of these assistants were encouraged to be zealous in their work by being called partners in the business and receiving a percentage of the profits and occasionally a handsome bonus in prosperous years.

In this way many were induced to join them not only in New York, but in many other places. The respondent acted in Montreal, for example, as a member of the firm.

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Yet it is said there never was, until the events I am about to refer to, any written agreement evidencing the terms of what constituted the partnership.

Considering the magnitude of the business, this single fact is a tribute to the trustworthy character of the mode in which they dealt with each other and also a significant measure of the trust reposed in the appellants by those they thus came in contact with.

This state of things with increasing prosperity continued until August, 1911.

But for the single fact that all concerned seemed agreed to call this arrangement a partnership and, throughout the transactions we have to consider, did so in a manner that renders it impossible herein to hold the business otherwise than as one of a partnership, I should have been disposed to hold that there never was, in fact, a partnership between the appellants and the respondent and those others like him allied with them.

It was quite competent for the appellants to have carried on their business in the firm name they adopted and, as between themselves and junior partners, to have engaged such juniors on salary, or salary plus a percentage of the profits, and even to have added thereto encouraging grants by way of bonuses and yet not to have given rise to the claim that in law there was any partnership or any right to any such accounting as claimed herein.

The business originally was that of appellants and they may have felt it always remained so.

Indeed, but for the terms of the documentary evidence I am about to refer to, it might have been arguable that it had continued as a business owned by appellants up to and including the months of August,

September and early part of October, which, in point of time, cover the events that must determine the right of the parties herein.

Had the business at the time first mentioned and in question been that of appellants it would have been quite competent for them to have sold out an interest therein to a third person.

That, however, is not the case.

In August, 1911, the appellants contracted with W. B. Peat & Co. by a written agreement, not on their own behalf, but on behalf of themselves and those then constituting the firm of Marwick, Mitchell & Co. to arrange a partnership on the terms mentioned therein. One of these was that

W. B. Peat & Co. acquire one-fourth interest in the business and goodwill of Marwick, Mitchell & Co.

Another was that the firm should thereafter be known as that of Marwick, Mitchell, Peat & Co., and yet another that W. B. Peat & Co. were to find one-fourth of the capital of Marwick, Mitchell, Peat & Co., which was to be $250,000, of which W. B. Peat & Co. were to provide $62,500.

It transpired that the appellants received from W. B. Peat & Co. £20,000 as the price paid for such share of the goodwill in said business over and above the said sum of $62,500 contributed by W. B. Peat & Co. It is pretended that this sum, clandestinely paid appellants, was in respect of this share in the firm of Marwick, Mitchell & Co.

The conclusive answer to such contention is contained in the first clause of this memorandum of agreement, which reads as follows:—

It is agreed between James Marwick and Simpson Roger Mitchell that those at present constituting the firm of Marwick, Mitchell &

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Co. on the one part and those for the time being constituting the firm of W. B. Peat & Co. on the other part to arrange a partnership on the following terms.

It is impossible properly to hold that such an express agreement can be cut down by anything Mr. Marwick may have said so as to read as if he and Mitchell were only dealing with and selling their own interest in the business.

It is very suggestive also that the price of the sale is not mentioned in the memorandum and that every clause thereof proceeds upon the basis of a dealing for and in respect of the entire business and its continuation for a period of ten years and with the contemplated extension thereof elsewhere, as well as in the United States and Canada where it had been previously carried on and was to be continued.

The agreement, so drawn up as to conceal the fact of appellants being paid anything, was submitted by the appellants to their partners, including the respondent, and made the basis upon which was framed, in October, articles of partnership between all the old partners and the new.

It is urged on behalf of the appellants that this new partnership agreement so modified the terms of the partnership that had hitherto prevailed as to give respondent and some of the junior partners an increased share in the profits, and diminished correspondingly the shares of appellants in the profits.

And it is further urged, with his usual force and ability, by counsel for appellants, that the new partnership agreement shews that this feature of it had, in effect if not in express terms, provided for the taking, of the quarter interest of the whole which Peat & Co. were to get, out of the seventy-five per cent.

share of the profits which previously appellants had enjoyed.

The argument is, however, on examination of the facts, more plausible than sound.

Experience teaches us that the junior partners, if men of merit, generally deserve and get as the years go on an increasing share of the profits and especially so in the cases of this kind where the prosperity of the business must depend almost entirely upon the mental and moral qualities and energy of the members of the firm, and is not much dependent upon the financial capital they possess.

In partnerships of the kind where the accumulations of capital held by the senior or other members are of necessity the dominant power or force in relation to which the division of profits is likely to take place the feature of experience I have just alluded to may not be so much in evidence.

Even there, however, the lessening vitality or deterioration of the older men, and growing power and influence of the younger men, often accounts for the changes found in the relative share of profits.

Again, this new term of partnership was to last for ten years and some of the elements that had entered into the division of profits enuring to the juniors were cut out.

It is impossible for us to say what the respondent and others might have done had they been dealt with frankly.

The respondent, and others in their position, were in law, and according to the principles of fidelity that must ever obtain between partners, entitled to a full disclosure of the bargain appellants made ostensibly

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on behalf of all the members of the old firm, and to share in the profits thereof.

There was another transaction of a similar nature in respect of which we did not hear much in argument, but which seems to require the same sort of relief for respondent as is applied by the judgment to both causes of action.

Some argument was made as to the basis upon which the sum named in the judgment was founded.

It seems this sum is only a maximum sum liable to be reduced upon a taking of accounts with which we have at present no concern. I think, therefore, we should not express any opinion at the present time in regard thereto.

The case as presented is not ripe for any such expression of opinion.

The appeal should be dismissed with costs.

DUFF J.—The appellants' contention is that the moneys received from Peat were received in payment of the purchase price of the fraction of their own interest in the partnership business, moneys consequently for which they would not be accountable to their partners, and the real question of substance on the appeal is whether, on the evidence before us, the proper conclusion is that the appellants are entitled, as against the respondent, to say that the arrangement between themselves and Peat was that Peat should purchase from them a share of their interest and that Peat, in fact, entered the firm and became a partner as the holder of the share so purchased and that no part of the interests of any of the junior partners contributed to make up the interest acquired by

Peat. I have come to a conclusion which is adverse to the appellants upon this question. My reason is this. The arrangement between the appellants and Peat was followed by the execution of the document which, on the face of it, professed to be a record of an agreement between Marwick, Mitchell & Co. and Peat & Co. for a partnership. The document declares among other things that Peat & Co. acquire a one-fourth share in the business of Marwick, Mitchell & Co. The agreement was necessarily provisional in this sense, that it was a transaction of a kind in respect of which Marwick and Mitchell would have no authority to bind the other members of their firm and before becoming legally effectual it required legal ratification by these other members. This document was, however, placed before the other members of the firm shortly after its execution and a fresh arrangement was made among the partners of Marwick, Mitchell & Co. embodied in the document, dated the 1st of October, in which the residue of the business, after allowing for the one-quarter interest acquired by Peat & Co. was dealt with, and the shares of the various partners in that residue declared.

Now, I do not think anybody would dispute—I did not understand Mr. Smith to dispute it—and, indeed, I think it would be hopeless to do so, that, on the natural reading of these documents, they provide, first, that Peat & Co. acquire a one-fourth interest in the business of Marwick, Mitchell & Co., not from Marwick and Mitchell but from the firm, and that the residue, the remaining seventy-five per cent., is held by the partners of the old firm of Marwick, Mitchell & Co., in the proportion stated. In other words, the

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agreement which Marwick and Mitchell professed to make with Peat on behalf of the firm is ratified by the firm by the transaction entered into on their behalf and that transaction, so ratified, is by the instruments in fact declared to be a vesting in Peat & Co. of a one-fourth interest in the business of Marwick, Mitchell & Co.

It seems to me that as the new agreement, embodied in the document of October, was an agreement made on the footing of the transaction with Peat being such as I have described, that transaction must be conclusively taken, as between the parties to this litigation, to have been of that character. It does not appear to me to be necessary to resort to the doctrine of common law lawyers known by the name of estoppel. In fact, by the document of August, Peat did acquire from the partnership a one-fourth interest in the partnership business subject to ratification by the partners. The transaction ratified by them was the transaction embodied in the document and it seems to be hopeless now to suggest that, apart from that transaction, there was another and a different transaction by which Peat acquired a one-fourth interest not from the firm but from Marwick and Mitchell.

ANGLIN J.—The sole question in this case, at its present stage, is whether it should be held that the one-fourth interest which Peat & Co. acquired in the business of Marwick, Mitchell & Co. was taken wholly from the individual interests in that firm of Messrs. Mitchell and Marwick, as they contend, or was contributed to by all the partners in the firm of Marwick, Mitchell & Co. as the plaintiff maintains.

I say "it should be held" advisedly, because owing to the secretive conduct of the defendants—admittedly a mistake if nothing worse—it is now extremely difficult, if not impossible, to learn with certainty the fact itself. For that the defendants are to blame and they have themselves to thank for having created a situation in which all presumptions must be made against them. The learned trial judge held that the proper conclusion from all the evidence was that the purchase of Peat & Co. was in fact from the firm and not from Messrs. Marwick & Mitchell as individual members of it. The documents submitted to and accepted by the plaintiff and the other junior partners as containing the basis upon which Peat & Co. entered into the new partnership and on which they themselves assented to the redistribution of shares then made certainly give the impression that it was a share in the business of the firm, its assets and goodwill, and not in Messrs. Marwick and Mitchell's individual interests therein that Messrs Marwick & Mitchell had agreed that Peat & Co. should acquire, and that it was from the firm, that is, from all the partners, that they should acquire that share. It is impossible now to say that the junior partners would have accepted the new partnership arrangement on any other basis.

The fact that under the new arrangement the proportionate share of the junior partners in the profits was increased and that of Messrs Marwick and Mitchell was decreased by an amount sufficient to cover the interest acquired by Peat & Co. might, at first blush, be taken to shew that Messrs. Marwick and Mitchell were the sole contributors to the 25% assigned to Peat & Co. But any such inference is un-

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warranted. It is impossible now to say what would have been the future interest of the junior partners in the firm had Peat & Co. not been taken in. It is equally impossible to say what would have been the attitude of the junior partners to the proposal actualy carried out had they been made aware of the payment of £20,000 by Peat & Co. to Messrs Marwick and Mitchell. Under these circumstances, notwithstanding the explicit evidence of Mr. Marwick as to the true nature of the consideration for which he received the £20,000 from Peat & Co. (which may be strictly true) I am not prepared to hold that the conclusion reached by the provincial courts, that that sum should now be regarded as money received by Messrs. Marwick and Mitchell for a share of a business, assets and goodwill in which the plaintiff and the other junior partners were interested, is erroneous. The same considerations apply to the payment of £1,000 made by Percy Garratt.

All questions as to what should be the *quantum* of the plaintiff's recovery remain open upon the accounting directed by the judgment appealed from. It is only in default of such accounting by the defendants that the sum claimed by the plaintiff has been awarded to him. The order for an accounting fully protects the defendants and they are not, in my opinion, entitled to have the court now enter upon the accounting which would be the only method of ascertaining whether the sum claimed by the plaintiff is or is not too large.

I would, for these reasons, dismiss this appeal.

BRODEUR J.—The appellants, the respondent and the *mis en cause* were carrying on business in co-

partnership as accountants in Canada and the United States. The appellants, Marwick and Mitchell, had started that business several years ago and acquired a large clientèle. The respondent was at first in their employ, but he was given, in 1905, outside of his salary an interest in the business to the extent of two and one-half per cent. on the profits.

In the summer of 1911, the profits of that business were then divided on the basis of 77½% to Marwick and Mitchell, the senior partners, and 22½% to their former employees and now called junior partners. As may be very easily understood, the affairs of the partnership were carried on under the management and control of the senior partners.

On going over to England, in the summer of 1911, Mr. Marwick met Sir William Peat, the head of the firm of W. P. Peat & Co., who were carrying on, in England, in the United States and in Canada, a similar and competitive business of chartered accountants.

They agreed to amalgamate their American business and a new partnership was to be formed comprising all the members of the two firms of Marwick, Mitchell & Co. and of W. B. Peat & Co.

The goodwill of Marwick, Mitchell & Co. was evidently more extensive since W. B. Peat & Co. agreed to pay, outside of their *mise de fonds,* a sum of £20,000. That sum of money was handed over to Marwick and Mitchell, the appellants. They failed to disclose that payment to their junior partners and now the respondent claims a share of that sum, and also of a sum of £1,000 that was paid by a junior partner, by the name of Percy Garratt, under almost similar circumstances.

The appellants plead that that money was given to

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them as a consideration for a part of the individual interest owned by Marwick and Mitchell.

The written evidence, however, and the new contract of partnership disclose on the contrary that what was acquired by W. B. Peat & Co. was one-fourth interest in the business and goodwill of Marwick, Mitchell & Co.

It is admitted by the appellants that Kerr, the respondent, was a member of the firm of Marwick, Mitchell & Co.

As such he was entitled to his share in the goodwill of that firm.

The appellants having disposed of a part of that goodwill for a sum of £21,000 they were bound not only to disclose that agreement to their co-partners, but to account to them for their share in that sum.

The action *en reddition de compte* is well founded and the judgment *a quo* having maintained it should be confirmed.

The appellants are ordered to render an account within a certain time and in default of doing it they are condemned to pay the respondent the sum of $6,980.73.

The latter figure is evidently based upon a calculation made by the respondent of his share in the business of Marwick, Mitchell & Co.

I have not considered at all the question whether this calculation is correct. That matter will have to be disposed of on the account itself when it is rendered.

Appeal dismissed with costs.

Solicitors for the appellants: *Smith, Markey, Skinner, Pugsley & Hyde.*

Solicitors for the respondent: *Lafleur, MacDougall, Macfarlane & Pope.*

HARRY M. HILLMAN (DEFENDANT) . . APPELLANT;

AND

THE IMPERIAL ELEVATOR AND LUMBER COMPANY (PLAINTIFFS) . . . . . RESPONDENTS.

1915
*Dec. 7.

1916
*Feb. 1.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Appeal—Jurisdiction—Matter originating in inferior court—Transfer to superior court—Extension of time for appealing—Special leave—"Supreme Court Act," ss. 37c, 71.

An action commenced in the District Court was, by consent of the parties, transferred to and subsequently carried on in the Supreme Court of Saskatchewan as if a new writ had been issued therein; the statement of claim, pleadings and proceedings being all filed and taken in the latter court.

Held, that, although the proceedings, after the issue of the writ, had all been carried on in the court of superior jurisdiction, yet as the cause originated in a court of inferior jurisdiction, an appeal *de plano* would not lie to the Supreme Court of Canada. *Tucker* v. *Young* (30 Can. S.C.R. 185) followed.

An order in the Supreme Court of Saskatchewan was made extending the time for appealing beyond the sixty days limited for bringing the appeal by the "Supreme Court Act," under sec. 71. On an application, under section 37 (*c*) of the "Supreme Court Act," for special leave to appeal,—

Held, also, following *Goodison Thresher Co.* v. *Township of McNab* (42 Can. S.C.R. 694), that, notwithstanding the order extending the time for appealing made in the court appealed from, the Supreme Court of Canada had no jurisdiction to grant special leave for an appeal after the expiration of the sixty days limited for bringing appeals by section 69 of the "Supreme Court Act."

MOTION for special leave to appeal to the Supreme Court of Canada from the judgment of the Supreme

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

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HILLMAN v. IMPERIAL ELEVATOR AND LUMBER CO.

Court of Saskatchewan (1), affirming the judgment of Newlands J., at the trial, maintaining the plaintiffs' action with costs.

The motion was made, *ex parte,* on written consent filed, in the circumstances stated in the judgment now reported.

Chrysler K.C. for the motion, on behalf of the appellant.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is a motion for leave to appeal from the judgment of the Supreme Court of Saskatchewan, under section 37*c* of the "Supreme Court Act" which gives an appeal by leave of the Supreme Court of Canada from a judgment in an action, suit, etc., not originating in a superior court. If there is power to grant leave the case is eminently one for granting it. The writ was issued in the District Court for the purpose of enforcing a mechanic's lien. The appellant's proceedings in that court were not continued but, instead of issuing a new writ, by consent of the parties the proceedings were transferred to the Supreme Court of Saskatchewan, and the statement of claim, pleadings and proceedings have all been in that court, the intention between the parties being that the plaintiff should be in the same position as if he had issued a new writ. Unfortunately, according to *Tucker* v. *Young* (2) it did not have that effect. It was held in that case that an action begun in the County Court, in Ontario, and removed under the

(1) 8 Sask. L.R. 91. (2) 30 Can. S.C.R. 185.

provisions of the "Judicature Act" into the High Court was not appealable to the Supreme Court of Canada as the action had not originated in a superior court.

When the case first came to this court, Mr. Lafleur having doubts as to this court's jurisdiction, had the case struck from the list. The plaintiff then applied to the Chief Justice of Saskatchewan, with the consent of the defendants, and obtained an order, professedly under section 71 of the "Supreme Court Act," which gives to the court below the power to allow an appeal, although the same was not brought within the sixty days prescribed by section 69. Section 37, however, does not give the court below power to grant leave to appeal in a case of this kind, and it has been held by this court in *The John Goodison Thresher Co.* v. *The Township of McNab* (1), that section 71 does not authorize the court below to extend the time for bringing an appeal so as to confer power on this court to grant leave to appeal where the application to this court for leave to appeal is made under section 48*e*.

I do not see how it is possible to distinguish this case from the *Goodison Case* (1) so as to hold that the order of the Chief Justice of Saskatchewan will authorize this court, after the sixty days, to grant leave to appeal.

Motion refused with costs.

(1) 42 Can. S.C.R. 694.

1915
*Nov. 4.
1916
*Feb. 14.

WILLIAM ROCHE (DEFENDANT).....APPELLANT;

AND

SARAH FRANCES JOHNSON (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Sale—Payment in company stock—Unorganized company —Time for delivery.

J. agreed, by contract in writing, to sell certain coal areas to R., a promoter of a mining company which, it was expected, would eventually take them over. The price was to be paid partly in cash and the balance in stock of the company to be delivered within six months. The promoters were unable to secure the necessary capital and the company has never been organized. In an action claiming damages for breach of the contract to deliver the stock.

Held, Duff J. expressing no opinion, that the time limit in the contract and circumstances disclosed at the trial, shewed that the parties intended that the stock to be delivered was that of a fully organized company.

Per Fitzpatrick C.J. and Davies J., that both parties knew when the contract was made that no such stock existed; and as it never came into existence, for which R. was not to blame, the contract could not be enforced. Idington and Anglin JJ. contra.

Per Davies J.—The contract to deliver the stock was not an unqualified one, but was dependent upon the successful floatation of the bonds in the market.

Per Duff J.—The stipulation as to time in the contract was not of its essence, but R. was to have a reasonable time, the nature of the business he was engaged in being considered, for delivery of the stock; some time before the action J. abandoned his claim to the stock and demanded its value in money as damages, but up to that time there had been no breach on R.'s part and he had done nothing to entitle J. to claim that the contract was rescinded.

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

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ROCHE
v.
JOHNSON.

Per Idington and Anglin JJ.—The contract was absolute for delivery of the shares within six months or a reasonable time thereafter; the Court cannot import into it the condition of successful floatation; R. has not fulfilled his part and J. is entitled to substantial damages for the breach.

Judgment of the Supreme Court of Nova Scotia (49 N.S. Rep. 12), reversed, Idington and Anglin JJ. dissenting.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), varying the judgment in favour of the plaintiff at the trial by awarding substantial in lieu of nominal damages.

The plaintiff's action is on a contract in writing made between her husband W. H. Johnson and the defendant which is as follows:—

"It is hereby agreed by and between William H. Johnson, of Halifax, in the County of Halifax, of the first part and William Roche, of Halifax, aforesaid of the second part: That the party of the first part agrees to sell and the party of the second part agrees to purchase four square miles of coal lands at Chimney Corner in the County of Inverness, Nova Scotia, now held by the party of the first part under leases Nos. 222, 223, 224, and 225 from the Government of Nova Scotia and which were recently under option of purchase to Mr. E. L. Thorne and in part held by the party of the first part under option of purchase from S. George Cook at present of Sydney for the price of eleven thousand dollars in cash and seventeen thousand dollars of common stock of the Margaree Coal and Railway Company, Limited, said stock to be delivered within six months from the date hereof. The cash to be paid on the delivery of the good and sufficient transfers for said coal areas and leases from the

(1) 49 N.S. Rep. 12.

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party of the first part and his co-owner S. G. Cook to the party of the second part."

The cash required to be paid under this agreement was paid on the delivery of the transfer for the four coal areas mentioned. The action is for damages for the non-delivery of the fourteen thousand dollars of the common stock of the Margaree Coal and Railway Co., the remaining three thousand of the capital stock having been assigned by Johnson to one Cook, who is not a party to the action.

W. H. Johnson, one of the parties to the contract, made an assignment to the official assignee for the benefit of his creditors, on May 18th, 1910, which assignment included any rights Johnson might have under this contract and on January 23rd, 1911, the assignee sold the rights under the contract to W. H. Johnson's wife, the present plaintiff for the sum of $100.

At the date the contract with the defendant was entered into by W. H. Johnson, the Margaree Coal and Railway Co. was not carrying on business and had no property nor assets, and no stock of the company had been subscribed or issued, and up to the present time the company has not acquired any property or assets, and no stock has been issued, except a few shares to the provisional directors, and under its charter the company never had authority to commence operations, as none of its stock has been subscribed, it being a condition in the charter that 25% of its stock must be subscribed and 10% paid up before operations could be commenced.

Johnson was offered the requisite number of shares before the six months expired, but refused them because the company had not been organized.

The trial judge held that there was a breach of contract by defendant in not delivering the stock within the six months or within a reasonable time thereafter. He also found that the shares which it was proposed to issue to Johnson were not the shares called for by the contract.

As to damages he found that the burden of proof was on the plaintiff to satisfy him that any damages have been sustained by the plaintiff, and that he was not satisfied from the evidence that the plaintiff had sustained any damages by the non-delivery of the stock other than nominal damages, because the shares were not and never had been of any value.

From this decision the plaintiff appealed to the Supreme Court of Nova Scotia *en banc* on the question of damages only, and the defendant cross-appealed claiming that the action should have been dismissed with costs.

The Court of Appeal decided by a majority (Townshend C.J., Graham and Russell JJ.) that the cross-appeal should be dismissed and that larger damages should be awarded the plaintiff and that new evidence might be taken before a referee to assess such damages. Drysdale J., with whom Longley J. concurred, decided that the trial judge was right in awarding only nominal damages because no value could be placed upon the stock under the evidence as given at the trial. He, however, deferred to the majority of the court as to the order which should be made, namely, that further evidence should be taken as to the question of the value of the stock and a reference ordered for that purpose.

The defendant now appeals to the Supreme Court

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of Canada claiming that the action should be dismissed, or in the alternative that the trial judge was right in deciding that only nominal damages should be awarded.

Rogers K.C. and *Ralston K.C.* for the appellant. By the company's charter the provisional directors had power to allot stock and respondent's shares could have been delivered at any time.

As to the obligation to deliver see *Field* v. *Pierce* (1).

The shares never had any market value and substantial damages could not be recovered. *Gibson* v. *Whip Publishing Co.*(2); *Barnes* v. *Brown*(3).

Mellish K.C. and *Allison K.C.* for the respondent. The market value is not the test in a case of this kind. *Elbinger Actien-Gesellschafft Für Fabrication von Eisenbahn Materiel* v. *Armstrong*(4); *Chaplin* v. *Hicks*(5).

Kirschmann v. *Lediard* (6) is very much in point. And see *Huse and Loomis Ice and Transportation Co.* v. *Heinze*(7); *Henry* v. *North American Railway Construction Co.*(8).

THE CHIEF JUSTICE.—The plaintiff in the action claimed $16,000 damages for failure to deliver $17,000 of common stock of the Margaree Coal and Railway Co. Ltd. pursuant to an agreement dated 5th Novem-

(1) 102 Mass. 253.
(2) 28 Mo. App. 450.
(3) 130 N.Y. 372.
(4) L.R. 9 Q.B. 473, at p. 476.
(5) [1911] 2 K.B. 786.
(6) 61 Barb. 573.
(7) 102 Mo. 245.
(8) 158 Fed. R. 79.

ber, 1909. To the knowledge of the parties there was no such stock in existence. It may be supposed that they expected the company would shortly be in a position to issue it; difficulties however arose in raising the necessary capital and the company has never been organized.

A careful examination of the record has convinced me that it must be assumed the parties to the agreement declared upon only intended to bind themselves on the condition that the company would be completely organized and the defendant placed in a position to deliver the stock. I am satisfied that Roche never intended to bind himself personally and that Johnson never expected or intended that he should.

It is well known that there can be no sale of goods which have not at least a potential existence at the time of the contract of sale. Shares in a company are not goods, but rather in the nature of choses in action. I do not think, however, this can make any difference.

Can the respondent claim damages for breach of a contract to deliver such non-existent shares which it is obviously impossible for the appellant to do?

The case is different from that of a contract to deliver so many goods of a particular kind where no specific goods are to be sold, for then the contractor may be made liable in damages for breach of his contract. But in *Taylor* v. *Caldwell*(1), it was held that:—

> Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract ar-

(1) 3 B. & S. 826.

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

If in cases where the particular specified thing is in existence at the time when the contract is made, a condition is to be implied that it must continue to exist at the date for fulfilment much more must such a condition be implied where the thing is not in existence at the date of the contract and both parties know that unless and until it does come into existence the contract will be impossible of performance.

Taylor v. *Caldwell*(1) has been followed in later cases and notably in that of *Howell* v. *Coupland*(2), where the specific thing contracted for was not in existence at the date of the contract and it was pointed out by Lord Justice Mellish that this could make no difference in the application of the principle that if the thing perishes before the time for performance the vendor is excused from performance by the delivery of the thing contracted for.

If a party to a contract is relieved of his obligation to deliver where the goods, though existing at the time of the contract, have been subsequently destroyed or where though non-existent at the time of the contract they have subsequently come into existence and been destroyed, much more it would seem is he entitled to relief if the goods never come into existence at all. It seems indeed almost necessary in such case to imply

(1) 3 B. & S. 826. (2) 1 Q.B.D. 258.

a condition in the contract that the goods must come into existence, for no man could be supposed to bind himself to such an impossibility as the delivery of a non-existent thing.

The trafficking in shares of a company which has no existence seems a highly undesirable practice and one which I think may well be limited as far as possible certainly to the extent of not holding the contractor liable in damages for failure to deliver a particular specified thing which to the knowledge of both parties must be impossible at least until the thing comes into existence.

I think this disposes of the only point raised in the action, though it may leave open certain questions between the parties arising out of the transaction to which it relates; these cannot be properly disposed of here.

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

DAVIES J.—This appeal is from a judgment of the Supreme Court of Nova Scotia varying the judgment of the trial judge who had awarded plaintiff nominal damages and remitting the case back to a referee for the assessment of such damages as the plaintiff might by further evidence be shewn to have sustained by reason of the breach of the defendants' obligation under the contract to deliver the plaintiff certain shares in a coal company to be organized.

Drysdale and Longley JJ. dissented on the ground that no evidence had been given as to the value of the stock for failure to deliver which the action was brought and no attempt was made to put a value upon

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it and that the trial judge was right under these circumstances in awarding nominal damages only, but at the same time yielded their opinion to that of the majority and agreed to the reference.

The contract upon which the action was brought reads as follows: (see pages 19 *et seq., ante*).

The right of the plaintiff to maintain the action depends upon the true construction of this agreement. If it was an absolute and unconditional contract to deliver the stock as the learned trial judge held and the Court *en banc* confirmed and there was a breach of it on defendant's part, the only question remaining would be whether the Court *en banc* was right in remitting the case back to a referee to take further evidence and assess the damages.

In the view I take of the whole case and the proper construction to be put upon the contract, it is not necessary to discuss the reference back for assessment upon further evidence to be taken on the question of damages.

I am of the opinion that the contract is not an absolute and unqualified one and that the defendant's obligation to deliver the stock was one dependent upon the coming into existence of a fact anticipated and hoped for by both parties, namely, the success of the Margaree Company in organizing and financing its undertaking in England or elsewhere and in floating its bonds for £40,000 on the market.

The learned trial judge said:—

I have before me a contract absolutely clean cut, plain and simple on its face and without any ambiguity or room for conjecture or doubt as to its meaning. I must be guided by the plain, literal meaning of the words used, and I cannot go counter to them, even though I may think it very likely that both parties at the time

contemplated the delivery of the stock when the company was on its feet.

But with the greatest possible respect, I think the learned judge had before him much more than that. He had matter and facts which made it essentially necessary to be considered in determining what was the real contractual obligation of the defendant, what it was the parties were contracting about, and what they each had full knowledge of and what under such considerations was the real intention of the parties as expressed. The substance and reality of the matter being dealt with and the real nature of the transaction have to be considered before the meaning of the defendant's obligation can be fairly determined.

The evidence shewed conclusively that the promoters of the Margaree Coal and Railway Company, Ltd., had been negotiating for months in England for the financing of their undertaking; and the sale of their bonds to the extent of £40,000, sterling, was to enable them to operate their mines and to construct a railway from their coal lands to tide water, and the necessary terminals and that the floating of these bonds was known by both parties to the contract to be a vital and essential necessity for the success of the undertaking.

Johnson, the plaintiff, it is true, says substantially that when he signed the contract both defendant and Morrison, the active promoter of the company, told him that the stock had been actually underwritten.

The defendant and Morrison positively denied that anything of the sort had been told Johnson and the trial judge accepted their testimony.

That testimony was to the effect that negotiations for the financing of the company were proceeding

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satisfactorily in London and that it was hoped they would be successful.

Under the facts as found by the trial judge I cannot believe that any such absolute contract as was contended for ever was intended or that the contract entered into was such.

Such a construction really amounted to a guarantee on Roche's part that the £40,000 required would be forthcoming within the six months and the evidence satisfies me that no such intention ever existed or was thought to exist between the parties.

I agree with the trial judge and the court *en banc* that the shares which it was proposed at one time to issue to Johnson were not the shares the contract called for and that both parties intended. In the literal construction, however, which is sought to be put upon the contract, but which I do not accept, there is much to be said in favour of the view that these shares offered to Johnson were a fulfilment of Roche's contractual obligation.

Johnson, however, from the first objected and refused to accept any shares other than those in a fully organized company which had been financed so as effectively to carry out its undertaking.

If he had an unqualified contractual right to such shares then I think he had a right to substantial and not nominal damages and that the judgment below was right.

Holding the view, however, of the proper construction of the contract I have above expressed I do not think the plaintiff has succeeded in proving any cause of action.

The conditions which he himself says governed and

controlled the issue of the shares he was to receive never came into existence. No fault was or could be imputed to the defendant for this and Roche's contractual obligation was not therefore broken.

Any remedy the plaintiff may have under the contract (on a return of the $11,000 cash paid to him) to have his interest in the coal areas restored him are not affected by this judgment.

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

IDINGTON J. (dissenting).—The appellant agreed with the respondent's husband to buy four square miles of coal lands for the price of eleven thousand dollars in cash and seventeen thousand dollars of common stock of the Margaree Coal and Railway Company, Limited, to be delivered within six months from the date of the agreement.

This agreement was so far fulfilled that the lands were transferred to appellant and the cash paid, but the stock has never been delivered. The respondent later on acquired the title to this agreement and right to sue for its breach.

I shall not enter upon the wide field of what is the correct measure of damages the appellant should pay. I am quite clear the court below is right in holding that the damages are more than nominal and entitled to refer the assessment thereof to a referee.

Notwithstanding a most elaborate argument well presented, there is really nothing more in this appeal.

I may be permitted respectfully to say, however, that after paying the closest attention to the argument it seemed to me a setting up men of straw to knock them down.

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The fact that the respondent's husband may have seemed to imagine he was entitled to have the common shares of a company which had not only got organized, but also been so far successful in its operations as to float an issue of bonds, seems beside what we have to deal with.

The referee may have to consider all that, in order to determine whether or not in light of the surrounding circumstances the contract, so far as relative to the kind of common stock to be given, by implication reached so far and whether in assessing damages for its breach he can hold them, if assessable at all, properly based on such implications and thus to have been within the contemplation of the contracting parties.

So far as we are concerned that is not the question before us.

All we have to deal with involves only the question of whether or not such stock as offered, being that of an unorganized company issuing so much paper of doubtful legality and no value, can reasonably be said to have been an offering of what was within the contemplation of the contracting parties.

I have no hesitation in answering it was not. If it had been, there was no possible meaning in providing six months for the issuing and delivery thereof.

Between that extreme and the other which appellant may claim, there is a wide field for the referee to deal with.

The court below might well, if it had seen fit, have defined the proper measure of damages, but how can we say, in face of the judgment of this court in the recent case of *Wood* v. *The Grand Valley Railway Co.*

(1), that an imperative duty in law rested upon that court to have laid down the limits within which the referee should proceed ?

That case presents an entirely different state of facts from this, but the principles of law applicable thereto are closely analogous to if not absolutely identical with those which must govern the referee in proceeding herein.

In that case, I felt that the divisional appellate court for Ontario, in order to save needless expenses and avoid the possibility of a miscarriage in the conduct of the reference, might have been well advised in more accurately defining the legal grounds upon which the referee should proceed and the limits of the damages to be allowed.

Unfortunately I stood alone and must now bow to the decision of the court and say that so long as there is a case of damages to be considered by a referee there is no error in the judgment now appealed from.

There is something which might be said relative to the attitude of Johnson in the demands he made upon appellant in its bearing upon this respondent's right to recover. If it had appeared that he, so clearly in his own right or in right of what he was authorized by respondent as assignee, had presented his or her demands, in such clear-cut shape as to absolve appellant from proffering anything but what he did in discharge of his obligation then he was thereby released from further attempts to satisfy the claim.

The whole evidence bearing upon such an issue when fairly read does not justify such a contention.

Indeed, such contention is not pleaded, yet it was

(1) 51 Can. S.C.R. 283.

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only, if resting thereon, that the evidence referred to on the subject could be made to serve the defendant in law.

The appeal should be dismissed with costs.

DUFF J.—The litigation which led to this appeal was instituted by the respondent for the purpose of enforcing a certain agreement, dated November 5th, 1909, between her husband and the appellant, under which certain coal areas in the County of Inverness, N.S., were to be transferred to the appellant in consideration of a present payment of $11,000 and

$17,000 of the common stock of the Margaree Coal & Railway Company, Limited, said stock to be delivered within six months from the date hereof.

The Margaree Company was incorporated in the year 1903-1904, with a nominal capital of £500,000 and with power to incur indebtedness to the extent of £600,000. The plan of the promoters was that the company should acquire certain coal areas in Inverness, 48 in number, to develop and work these areas and for that purpose to construct a railway about 50 miles in length connected with the Intercolonial Railway and with shipping points. It was intended that in the usual way the property should be paid for partly in cash and partly by the transfer of fully paid up shares, the necessary capital being procured for the purchase of the areas and for construction and development by sales of bonds and shares.

The appellant, who appears to have been the moving spirit in the enterprise, obtained an option from Johnson on his four areas in 1907. Shortly after that the persons interested in the areas, the promoters, pooled their interests, a trustee being appointed and

options and transfers in escrow of the leases being given to the trustee. The option on Johnson's areas was extended from time to time until, in 1909, Johnson, being pressed for money, urged the respondent to take over his areas at a cash price and eventually the agreement above mentioned was arrived at. In 1910, before the expiration of the six months within which the shares were to be delivered, under the literal terms of the agreement, Johnson made an assignment for the general benefit of creditors and some months afterwards the assignee with the assent of Johnson's principal creditors transferred Johnson's rights under the agreement to Mrs. Johnson, the respondent, for the consideration of $100. Johnson's estate appears to have been hopelessly involved and it is quite evident, I think, that his rights under the agreement were not regarded by the competent businessmen, who at that time considered the matter, as having any present realizable value. The efforts of the promoters to obtain capital in England and France from time to time appeared to them to be on the point of succeeding and in the summer of 1911 Mr. Morrison, one of the promoters, went to England in the full expectation of succeeding in obtaining the necessary capital; he did not succeed and at the time of the trial the efforts of the appellant and his associates to obtain adequate capital had produced no result.

In the meantime Johnson on behalf of his wife had called upon the respondent to perform his agreement by delivering shares, the first demand having been made in the beinning of 1911 about eight months after Johnson's assignment to the trustee for creditors. There were several interviews between Johnson

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and the respondent and between Johnson and Mr. Morrison on the subject at which Johnson appears to have been informed that shares would be allotted and transferred to him if he insisted upon it. Johnson always, however, assumed the attitude that under the agreement he was entitled to shares in a company furnished with capital for carrying on its operations. There is considerable variety in the form of expression used, but I think according to the fair reading of Johnson's own evidence that is the view of his rights under the agreement which he was putting forward and insisting upon at that time. He says explicitly he would not have accepted shares without being satisfied that the company was properly organized and financed. A correspondence ensued between the appellant and Mr. Allison, the respondent's solicitor, in which a demand was made on behalf of the respondent for payment in money of the amount of the face value of the shares and the action followed.

The controversy reduces itself to two questions or rather falls into two divisions. First it is necessary to consider the legal effect of the agreement of the 5th November, 1909. Several views have been put forward. On the part of the respondent it is contended, and the contention seems to have been accepted by the learned Chief Justice in the court below, that the appellant's undertaking was something more than an undertaking that could be satisfied by the delivery of the paid-up shares in the Margaree Company validly allotted and issued. The parties, it is said, did not contemplate the allotment of the shares in the payment of the purchase price of any of the 48 areas, the titles to which had been pooled, until the company had procured the necessary capital to enable it to purchase

the areas under the terms of the pooling agreements and to enable it to develop the properties and put the whole undertaking into operation. That is, no doubt, the view though he somewhat crudely expressed it, which Johnson had in his mind when he refused to accept the shares offered by the appellant and that is, no doubt, the view intended to be expressed in the letter of the 31st of July, 1911, written on behalf of the respondent by the gentleman who was then acting as her solicitor.

On behalf of the appellant alternative constructions are advanced. First, that if the view just outlined correctly interprets the agreement, that can only be upon the theory that the real nature of the arrangement between Johnson and the appellant was that Johnson in addition to the sum of $11,000 cash was to share in the fruits of the promotion of the company in the ratio of $17,000 to the par value of the aggregate of shares allotted to the proprietors according to the terms of the pooling arrangements. And one result of this is said to be that the obligation to deliver must be subject to a condition that the promotion of the company should be brought to a successful issue. The alternative construction is that the "$17,000 of the common stock" of the Margaree Company is a description which is fully answered by shares of the par value of $17,000 validly allotted and fully paid up; but that the agreement being an agreement for the sale of the land the stipulation as to time is not of its essence and that a term should be implied to the effect that delivery of the shares should be exigible only after the lapse of a reasonable time for completing the contemplated purchase by the company of the property of the promoters.

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There are arguments in favour of every one of these rival constructions of considerable plausibility; but having weighed them all I have not had much difficulty in concluding that on the whole the balance is definitely against the first.

There are three circumstances to consider in testing these constructions. First, there was no legal obstacle in the way of allotting fully paid up shares in exchange for the payment in cash of their full value at the time the agreement was entered into or at any time down to the trial; and consequently whether capital was obtained or not, sufficient for the purchase of the properties and the working of the company's enterprise, the agreement was at all times capable of being performed according to its literal terms.

Secondly, the appellant no doubt as well as Johnson fully expected that the efforts of the promoters to obtain capital would be successful within the period named in the agreement, six months from the date; and this delay, it may be assumed, was intended for the protection of the appellant in order to avoid the embarrassment certain to arise in connection with the issue of the shares and the transfer of them in payment for one of the properties while the promotion of the enterprise remained incomplete.

Thirdly, the sale was brought about by the appellant's desire to accommodate Johnson, who was pressed for money.

In these circumstances is there any justification for implying a term, as in the respondent's proposed construction, by which the appellant warranted that sufficient capital would be obtained within the time mentioned or indeed at any time? The principles

upon which in transactions of this kind the courts act in implying a term not found expressed in a contract have been stated in various ways. It has been said, for example, that the law will imply a term obviously intended by the parties and necessary to make the contract effectual, that is to say, where the written contract as expressed in writing would otherwise be futile; *per* Bowen L.J. in *Oriental Steamship Co.* v. *Tylor*(1), at page 527. Lord Watson has put the matter thus (and it is perhaps the most practical way of stating it) in *Dahl* v. *Nelson, Donkin & Co.* (2), at page 59:—

> I have always understood, that, when the parties to a mercantile contract such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

It is necessary to add, however, a reference to the warning of Lord Esher in *Hamlyn & Co.* v. *Wood & Co.*(3) at p. 491; the effect of which is that it is not sufficient that the suggested stipulation should appear to be reasonable or that it should appear to

(1) [1893] 2 K.B. 518. (2) 6 App. Cas. 38.
(3) [1891] 2 Q.B. 488.

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be reasonable to imply such a stipulation; the court must be satisfied that the implication is a necessary one, that is to say, that it must be presumed that both parties, if the matter had been brought to their attention would, as reasonable men, have insisted upon it.

I am by no means convinced that if the point had been raised Johnson would have insisted upon any warranty, indeed, I think it highly improbable in view of the fact that the appellant was buying Johnson's property at Johnson's solicitation and mainly for Johnson's accommodation, that Johnson would have thought of exacting such a stipulation. He knew that the appellant's interest in the promotion was much greater than his and that no effort would be wanting on the appellant's part; and I see not the slightest ground for inferring that he would have called upon the appellant to warrant by contract the success of his efforts. As to the appellant, there was nothing in the circumstances likely to suggest to any reasonable man in his position (inconveniencing himself to do Johnson a favour) that he ought to undertake the burden of such a stipulation.

There is, I think, more plausibility in the contention that both parties to the agreement in question contemplated a transfer to Johnson of shares allotted to the appellant by the company in payment of the purchase price of Johnson's areas in accordance with the terms of the pooling arrangement; a transfer which could only take place when the property as a whole had been taken over by the company. That is what the parties unquestionably had in view. And if the contention on behalf of the respondent, that I have just been examining, were to be accepted it

would seem to follow almost as a corollary that the appellant's undertaking to transfer should not be exigible until the property had been taken over by the company. On that footing the case would be well within the settled principle that where from the nature of the contract and surrounding circumstances it is clear that the contract is based upon the assumption by both parties that some condition or state of things going to the root of the contract and essential to its performance should be in existence, the non-existence of such condition or state of things when the time for fulfilment has arrived affords in general an answer to an action upon the contract. (*Taylor* v. *Caldwell*(1); *Krell* v. *Henry*(2); *Chandler* v. *Webster*(3); *In re Hull and Lady Meux*(4); and cf. *Herne Bay Steamboat Co.* v. *Hutton*(5).

I do not find it necessary to decide definitely whether or not this is the right view of the agreement before us. I have come to the conclusion that whether this view of the agreement or the second of the alternative constructions presented on part of the appellant be accepted, the respondent must fail in her action.

The stipulation as to delivery within six months is obviously not of the essence of this contract. Both sides have pressed the contention that the contract contemplates a transfer of shares allotted in payment of coal properties to be taken over by the company. Having regard to the circumstances already adverted to and to the subsequent conduct of the parties which

(1) 3 B.&S. 826; 32 L.J.Q.B. 164.
(2) [1903] 2 K.B. 740; 72 L.J.K.B. 794.
(3) [1904] 1 K.B. 493, at pp. 499, 501; 73 L.J.K.B. 401.
(4) [1905] 1 K.B. 588; 74 L.J.K.B. 252.
(5) [1903] 2 K.B. 683; 72 L.J.K.B. 879.

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may, I think, be looked to for assistance in interpreting the contract, the proper conclusion is that both parties must have intended that the appellant was to have a reasonable time with reference to the nature of the business he was engaged in before being called upon to deliver the shares and that the parties were contracting upon that footing.

Accepting this construction of the agreement, then, has there been any breach of which the respondent is entitled to complain? The facts I am about to state are, I think, sufficient to shew that down to the time when, some months prior to the commencement of the action, the respondent through her solicitor demanded money in lieu of shares, there had been no breach on part of the appellant and nothing entitling the respondent to declare that by reason of the appellant's conduct the contract was rescinded.

The primary facts are really not in dispute, but it is necessary to notice them at some length in order to consider the legal consequence of them. I have already mentioned that the respondent through her husband had again and again declared that she would not accept shares in the coal company, even although fully paid up until it appeared that sufficient capital had been raised to set the company in operation. That position was reiterated by the respondent's husband in his evidence given at the trial in which he explicitly declared more than once with slight variations of phraseology that he would not have accepted shares until that condition had been satisfied. It is necessary, however, to refer to some communications which passed between Mr. Allison, the respondent's solicitor, and the appellant. In August, 1911, Mr. Allison

called upon the appellant and Mr. Morrison and made then, as he says, an unconditional demand upon the appellant for the delivery of the shares which, by a letter of the 27th July, 1911, addressed to the gentleman who was then acting as her solicitor, the appellant had offered her. This demand was not pressed Mr. Allison being informed by the appellant and Mr. Morrison of Mr. Morrison's contemplated visit to Europe and the expectation of both of them that a successful floatation would result. Mr. Allison was informed that the shares would be delivered if he insisted upon it, but that this would be a source of embarrassment; and for this reason the demand was not pressed, the respondent agreeing to await the event of Mr. Morrison's efforts.

One is entitled here, I think, to infer (it is not in the least inconsistent with the general effect of Mr. Allison's evidence), that the respondent acted in consenting to wait, with a view to her own rather obvious interest that the prospects of a successful floatation should not be impaired as the result of her importunities. The respondent did not move again until the 19th of February, 1912, when a letter was written by Mr. Allison demanding not the shares but the face value of the shares in money. This letter was followed by a letter of the 29th of February in which the respondent explicitly refused to accept shares and reiterated her demand to be paid the face value of the shares as damages. The conclusion to which I have come is that after the interview of August, 1911, considering all the circumstances, the respondent was not entitled without some further intimation to the appellant to treat a failure to deliver upon some particular date as a breach of contract on part of the appellant

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entitling her to treat the contract as rescinded; and in any view the attitude assumed by the respondent in the letters of the 19th February, 29th February, 2nd of March and 8th of June and at the trial absolves the appellant from anything like a formal tender of the shares or the production of the shares in court.

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

ANGLIN J. (dissenting).—This action is brought upon the following agreement: (see pages 19 *et seq., ante*).

The coal areas covered by this agreement were, immediately upon its execution, conveyed by W. H. Johnson to the defendant, and the $11,000 cash was thereupon paid to Johnson. The shares have not been delivered. The floatation of the Margaree Coal Company has not yet been effected, difficulties hitherto insurmountable having been encountered in making the financial arrangements deemed necessary, and at the present time there appears to be no prospect of a successful floatation of the company. The plaintiff, who is the wife of W. H. Johnson, purchased from his assignee for creditors his interests under the agreement with the defendant.

After several extensions of the time for delivery of the shares had been assented to, the plaintiff finally called upon the defendant to carry out his agreement; and she brings this action for damages for his failure to make delivery of the $17,000 of shares.

In order to determine the rights of the parties it is essential to ascertain what their bargain was. Two questions arise as to the meaning and effect of the writing to which they committed it. The first question

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is: What kind of shares did W. H. Johnson stipulate for and William Roche undertake to deliver—shares in a company merely chartered, without capital or property, and with no prospect of being in a position to commence operations within any reasonable time, or shares in an organized company with sufficient capital provided for the development and prosecution of its undertaking and having its operations already begun, or being in a position immediately, or practically so, to commence operations? The second question is: When was delivery of the shares made exigible —at, or within a reasonable time after, the expiry of the six months named in the writing, or only if and when the defendant and his associates should succeed in financing the company and putting it in a position to commence active operations?

By the judgment at the trial it was determined that the shares contracted for were shares in a company "on its feet"—adequately financed and ready to prosecute its undertaking—that the defendant had contracted to deliver such shares not if and when floatation should take place, but within six months or a reasonable time thereafter, and that there had been a breach of this contract by the defendant entitling the plaintiff to damages. But because he deemed the evidence insufficient to enable him to assess such damages the learned trial judge held that the plaintiff could recover only nominal damages. On appeal by the plaintiff the full court held him entitled to substantial damages, indicated the basis on which they should be assessed and directed a reference to fix the amount. From that judgment the defendant appeals.

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In order to know what the parties intended respectively to stipulate for and to undertake, all the terms of the writing, the circumstances under which they contracted and the interpretation which their conduct shews that they themselves put upon their agreement must be taken into account.

The plaintiff alleges that the intention of the parties was that her husband should receive shares in a company sufficiently financed to be ready to begin active operations and that the defendant undertook to deliver such shares to him within six months. By his plea the defendant asserts that delivery of the shares was to be made only upon completion of the financial arrangements of the company and when it should be ready to begin operations and alternatively that if the plaintiff was entitled to the delivery of any shares before the completion of financial arrangements and before the company was ready to commence operations, her only right was to receive shares issued under section 10 of the incorporating statute that she refused to take such shares when offered to her, but that he is still ready and willing to bring them into court; and he submits to such order as the court may see fit to make in respect to them.

The evidence seems to establish that the plaintiff and her husband were more than once informed that they could have shares of the kind last mentioned. They always took the position that they would not accept such shares as they were not what they were entitled to. If shares in a company possessed neither of the money nor of the property requisite for its enterprise were what the plaintiff's husband had agreed to take, the defendant might properly ask that this action should be dismissed upon his carrying out the

offer of delivery made in his statement of defence. When the plaintiff and her husband refused to accept such shares, however, the defendant did not take the stand that they were not entitled to anything else. On the contrary he urged that they should allow further time for the financing in order that shares in a company ready to operate might be available. There was more than one extension of the time for delivery agreed to under these circumstances.

But the terms of the contract themselves perhaps furnish an argument even more cogent in support of the view that the parties were bargaining for shares in a company adequately financed and ready to prosecute its undertaking. Else why the stipulation for six months within which to make delivery ? Shares such as had been offered to the plaintiff and her husband more than once before action, and of which the offer is repeated in the defendant's plea, were immediately available when the agreement was made. There would be no reason for providing that their delivery should be withheld for six months. Shares answering the other description were not immediately available, but it was understood that the financial arrangements of the company were about complete and that it would undoubtedly be in operation well within the six months stipulated for. Indeed, so great was the expectation of an almost immediate floatation of the company's bonds and stocks, that the plaintiff's husband understood (as the trial judge has found), though erroneously, that the stock of the company had been actually underwritten. The learned Judge says:—

There is an issue of fact between Mr. Johnson on the one side, and the defendant and Mr. Morrison and the other side. Mr. Johnson

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says that Mr. Morrison and the defendant, both being present at the same time, told him that the stock in the company had been actually underwritten, this is denied by the defendant and Mr. Morrison, and I accept their testimony. I do not impute intentional untruthfulness to Mr. Johnson, and I have no doubt that words of strong expectation were used, which, after the lapse of time, Mr. Johnson may now think were representations of an actual existing state of affairs.

To quote another passage from the opinion of the learned judge:—

At the time when the contract was made, the defendant, I have no doubt, expected that before the six months elapsed, money would be raised in England to float the company, in which event the company would have been organized and the stock issued and delivered. This, I have no doubt, was what the defendant thought and intended to do.

There is abundant evidence to support these findings and I can see no reason why they should be disturbed.

As already stated the first position taken by the defendant himself is that his obligation was to deliver the shares only after the floatation of the company—that, as it is put in his factum,

the period of six months mentioned in the agreement * * * had reference merely to the probable time necessary to finance the company and were words of expectation only.

As to the soundness of this interpretation of the agreement I shall have something to say presently. I refer to it now because it makes it practically certain that it was shares in a company completely floated and ready to prosecute its undertaking—a fact otherwise tolerably well established—that the parties had in view. The suggestion that the defendant's obligation could be satisfied by the delivery of shares in a company without indispensable capital paid, or even subscribed, and with no prospect of attaining a position

in which it would be ready to commence operations, issued under such a provision as section 10 of the "Incorporating Act," was the veriest afterthought.

But what as to the obligation to deliver within six months, which I regard as the really crucial question in the case? In the first place without distortion of plain language an unqualified undertaking to deliver shares within six months cannot be read as providing for delivery only when the company should be floated and as relieving from all obligation to deliver if floatation should be found impossible. An analysis of the exhaustive argument for the appellant on this branch of the case discloses that it rests wholly and solely upon the unlikelihood of the appellant having bound himself absolutely to make delivery. But if he meant that his obligation should be contingent on floatation how easy it would have been to express that idea! Why stipulate for six months? No doubt, in the light of subsequent events, it may seem astonishing that the defendant should not have anticipated the possibility of difficulties in the financing of his company. But the evidence makes it abundantly clear that at the time the agreement was made the expectation of everybody—of the defendant and his friends and advisers as well as of the plaintiff's husband—was that the floatation was already for all practical purposes, an accomplished fact, and that in undertaking to make delivery within six months the defendant was in reality not assuming any risk. It was in this frame of mind that he made his bargain. Why should we now import into it an element of contingency for which he did not provide and against which, had it been suggested to him at that time, he

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would probably have deemed it an excess of caution to guard? Moreover, having regard to Johnson's attitude—his refusal to renew options, his insistence on an out and out purchase of his areas, his determination to secure in some satisfactory form his price of $28,000—what justification is there for assuming that he was prepared to take, and did in fact take, the risk of failure of a floatation which was wholly in the hands of the defendant and his associates? No doubt under pressure of straitened circumstances he reduced his cash payment from $14,000 to $11,000, increasing the stock payment for $14,000 to $17,000—but on doing so he obtained from a man known to be in a financial position which made him capable of implementing it, an unconditional promise for the delivery of $17,000 of shares in a company which I think it has been conclusively shewn was to be a company financed and floated upon the basis which all parties then had in mind and regarded as practically an accomplished fact. With great respect for those who hold the contrary view, I cannot, because of any supposed hardship on the defendant—which I cannot but think is more apparent than real (for after all, be obtained the coal areas which we must assume he thought worth $28,000, or he would not as a promoter of the Margaree Coal Company have made the bargain he did)—introduce into that bargain a condition to which the parties did not make it subject and to which upon the whole evidence I see no reason to think they intended that it should be subject. *Hamlyn & Co.* v. *Wood & Co.*(1), at pages 491, 494-5.

I agree with the learned trial judge and the learned

(1) [1891] 2 Q.B. 488.

judges of the appellate court that the arrangement made with Mr. Thorn was not, and was not intended to be, a discharge of the defendant's contractual obligation.

The defendant further complains of the judgment in appeal because it allows the plaintiff on a reference to supplement evidence as to damages which the trial judge found to be insufficient to warrant a recovery of more than nominal damages. It is only upon this point, as I understand their judgment, that there was any difference of opinion amongst the judges of the provincial courts. There was, in my opinion, evidence which shewed that the plaintiff was entitled to recover substantial damages, though probably not all that might be furnished to enable the court to satisfactorily fix the amount which should be awarded. The attainment of precision or certainty in the ascertainment of the amount of actual loss is not essential to the assessment of damages in cases such as this. *Chaplin* v. *Hicks* (1). I am fully alive to the danger of allowing a plaintiff to supplement his proof either upon a new trial or on a reference such as the court *en banc* has directed. But there can be no doubt of the power of the court in a proper case to make such an order. The exercise of that power is necessarily from its very nature largely discretionary and should not be lightly interfered with on a further appeal. The question to be determined in the present action is: What would have been the probable value of shares in the common stock of the defendant company had it been successfully floated within six months of the making of the agreement or within any extension of that time

(1) [1911] 2 K.B. 786.

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assented to by the plaintiff? On such a question there is perhaps not the same danger in allowing further investigation as ordinarily attends the ordering of re-hearings on questions of fact. Moreover, I am not satisfied that all the aspects in which the question of damages should be considered in a case such as this were present to the mind of the learned trial judge. Many elements which must be considered in estimating what would have been the probable value of the shares have been suggested in the judgment of the present learned Chief Justice of Nova Scotia. For the view that, in a case in which the damages are difficult of ascertainment and largely of a contingent character and the evidence adduced at the trial, where the question of damages was gone into, shews that substantial damages have been sustained, but is insufficient to enable the court to determine the amount which should be awarded, it is not an improper exercise of discretion to direct a reference such as has been ordered in the present case, there is the authority of the recent decision of the Ontario Appellate Division in *Wood* v. *Grand Valley Railway Co.*(1), affirmed on appeal by this court(2).

I am for these reasons of the opinion that this appeal should be dismissed.

Appeal allowed with costs.

Solicitor for the appellant: *J. L. Ralston.*

Solicitor for the respondent: *E. P. Allison.*

(1) 30 Ont. L.R. 44.

(2) 51 Can. S.C.R. 283.

WILLIAM A. WOOD.....APPELLANT; 1915

AND *Dec. 9.

JOHN GORDON GAULD AND OTHERS. RESPONDENTS. 1916

*Feb. 21

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

Partnership—Dissolution — Death of partner — Survivor's right to purchase share—Good-will—Annual balance sheet.

If the intention that a surviving partner should have a right to take over the interest of a deceased partner clearly appears from the terms of the partnership agreement, though it is not formally expressed, that right exists. Brodeur J. dissented. Idington J. dissented on the ground that such intention was not clearly manifested.

The parnership articles provided that at the end of each partnership year an account should be taken of the stock, liabilities and assets of the business and a balance sheet struck for that year; that in case one partner died the co-partnership should continue to the end of the current financial year or, at the option of the survivor, for not more than twelve months from such death; that for twelve months from the death of his partner the survivor should not be required to pay over any part of the latter's capital in the business; and that any dispute between the survivor and representatives of the deceased as to the amount of debits against or credits to either in the balance sheet or the valuation of the assets should be referred to arbitration.

Held, Duff J. dissenting, that the value of the interest of the deceased partner was not to be determined by the account taken and balance sheet struck at the end of the financial year following his death, but the assets should be valued in the ordinary way.

Held, also, Davies and Duff JJ. dissenting, that the goodwill of the business was to be included in said assets, though it had never formed a part of them in the annual balance sheets struck since the co-partnership began.

Judgment of the Appellate Division (34 Ont. L.R. 278) reversed in part.

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

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), varying the decision on the hearing on an originating notice.

The facts on which the questions of law for decision depend are sufficiently stated in the above headnote.

Tilley K.C. and *Washington K.C.* for the appellant.

E. F. B. Johnston K.C. for the respondents.

DAVIES J.—I agree with the conclusions reached by Mr. Justice Middleton who heard this case in the first instance and am not able to agree with the First Appellate Division in the variations made by them in those conclusions.

The reasons given by Mr. Justice Middleton are quite satisfactory to me and I do not think I could hope to state them more clearly than he has done. I therefore concur in his judgment and in his reasons for the same.

In agreeing with his conclusion that the good will of the business is not to be taken into account in ascertaining the amount to be paid by Wood to the executors of Vallance, I am influenced largely by the decision reached in *Steuart* v. *Gladstone* (2) in 1879 That case was decided by a very strong Court of Appeal, Jessel M.R. and James and Bramwell, L.JJ. Of course the facts are not identical with those of the case before us, but reading the observations made by these learned judges in giving their judgments and applying the principle on which they acted to the facts of the case before us, I am forced to the conclu-

(1) 34 Ont. L.R. 278, *sub nom.* *Re Wood Vallance & Co.*

(2) 10 Ch. D. 626.

sion that it never was intended by the parties to this partnership that in the event which has happened of the death of one of the partners during the term of 5 years for which the partnership was entered into, and the purchase by the surviving partner of his deceased partner's interest the intangible and uncertain asset called good will should be valued and paid for.

The articles of partnership are not only silent with respect to good will, but the balance sheets of the partnership business and assets made during the years 1911-12 and 1913, when both partners were alive, do not include anything of the kind. In these balance sheets the partners gave their own meaning to the word "capital" as used in the partnership articles. "Capital" was the balancing item. It was the difference between the total assets and the total liabilities. The share of each partner in the net assets was shewn by that balancing item. Construing the somewhat ambiguous language of these partnership articles in the light of the very short term of five years during which the partnership was to last and all the other facts and the conduct of both partners I conclude on the authority of the case referred to that good will should not be included in ascertaining the amount which the surviving partner should pay.

IDINGTON J. (dissenting).—The rule 605 of the Consolidated Rules of Practice in Ontario, upon which the proceedings herein in question are founded, reads:—

605. (1) Where the rights of the parties depend—

(*a*) Upon the construction of any contract or agreement and there are no material facts in dispute;

(*b*) Upon undisputed facts and the proper inference from such facts;

Such rights may be determined upon originating notice.

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(2) A contract or agreement may be construed before there has been a breach thereof. (*New*).

Regard, however, may have to be had to the Rules Nos. 604 and 606 in case the proceedings, taken under the Rule 605, just quoted, give rise to the application of either or both.

I cannot find within the scope of the questions submitted and the admitted facts relevant thereto, any clear warrant for the court making such declarations as are to be found in the 2nd sub-section of clause No. 2 of the formal judgment appealed from. It seems to pass upon a question that is not presented in the submission.

It may well be that the parties when before that court desired its opinion on the question involved in the answer made. At present I see no reason why they might not have been well advised in thus enlarging the scope of the submission, if they did so, but for us having to pass thereon or pass it by, when no record is made of the fact, is, to say the least, embarrassing.

As a step in the reasoning involved in the construction of the document I can also understand the application of the proposition involved in the declaration, but am unable in that case to see why it should form part of the answers to the submission.

There is nothing in the opinion judgment explaining how it comes to be dealt with except as having been argued before that court; or in the factum of either party dealing with this adjudication. I think we must, under such circumstances, rigidly observe the questions submitted and the undisputed facts and inferences from such facts and answer accordingly. I,

therefore, express no opinion relative to this matter seeming to me beyond such questions.

By the notice of motion the following are the questions upon which the advice and order of the court are desired.

1. Whether William Augustus Wood, surviving partner of Wood, Vallance & Co., is entitled to take over the interest of the William Vallance Estate in the said co-partnership assets by paying to his estate the amount of his capital with interest and profits.

2. Whether the goodwill of the business of Wood, Vallance & Co. enures to the benefit of the estate of the said William Vallance, as well as to the surviving partner, the said William A. Wood.

3. Whether on a valuation of the assets of Wood, Vallance & Co. the value appearing in the balance sheet of 31st January, 1913, is binding on the executors of William Vallance, or whether the actual value of such assets is to be ascertained.

To answer correctly these questions we must consider the articles of partnership, which are admitted, and so far as ambiguous must have regard to the undisputed surrounding facts and circumstances, and if any assistance to be gained thereby also the conduct of the parties immediately after the time when the said articles became operative.

William A. Wood, the appellant, and William Vallance, who died on the 28th November, 1913, had been members of an old firm composed of themselves and the late George Vallance and George Denman Wood, carrying on a hardware business in Hamilton, under the name of Wood, Vallance & Co.

On the 31st January, 1910, said appellant and the late William Vallance agreed to enter into co-partnership for the purpose of continuing the said business and bound themselves by articles of partnership to do so for five years from that date.

By the said articles they agreed to take over and assume all the liabilities of the said firm and transfer

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to the new firm all their respective interests in the old firm. I assume, as seems throughout to have been assumed, that there were other transfers got from those representing the other members of the old firm, and the title completed as is implied in what is submitted herein.

The parties then by said articles declare they are respectively interested in the capital and assets as follows: That is to say, Wood to the extent of $577,524 and Vallance to the extent of $479,243.

Clause No. 5 provided for interest on capital of each partner being allowed at 6% per annum and that being paid or credited to him at the end of each succeeding year.

Clause No. 6 provided after payment of such interest that the profits should be apportioned equally.

Clause No. 7 that each should devote his time and attention to the business in the manner specified.

Clause No. 8 is as follows:—

> 8. At the expiration of each succeeding year of the partnership an account shall be taken of the stock-in-trade, assets and liabilities of the partnership, and an annual balance sheet shall then be made out to the thirty-first day of January in each year, which shall be attested by each of the parties hereto.

It is upon this clause and what followed it in way of its observance that the answer to the third question must turn. There were statements made out each year which were probably intended to comply, so far as they went, with the terms of this clause, but none of them were signed by either partner.

The form of attesting is not provided for. I assume a signing or other deliberate act of approval such as could reasonably be said to fall within the word "attest" as used in such connection should be held

sufficient. The mere tacit assent cannot be held as a compliance with the peculiar terms of this clause.

The existence of the statement and the fact that each partner was engaged actively in the business, and says nothing in way of objecting thereto, is very cogent evidence of assent, but falls short of what is expressly demanded. No one can ever be quite sure what the partner, so acting and refraining from acting, had in his mind. He may have desired to avoid needlessly doing anything to provoke a quarrel; or he may have been so anxiously desirous of peace that he was afraid to state his objections lest the doing so might lead to a quarrel, or rouse more or less of animosity either open or concealed; and to have recognized that so long as he had not "attested" the balance sheet, his rights of rectification would be preserved.

The fact, if it be a fact, that interest on capital was drawn on under such a basis and profits adjusted on such basis, may render it almost impossible to him acting in such a way, or his representatives, to dispute the correctness thereof, but as matter of law or inference of fact I cannot say so.

The results of payment and adjustment of profits may all need reconsideration. Except in one specified way, not followed, I fail to find undisputed fact.

The answer to the first part of the question then seems to me very obvious, but the alternative query of

> whether the actual value of such assets is to be ascertained,

in the view I take in answering the other questions, seems to need no further consideration.

When it is held as the Appellate Division held that

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appellant had no option to buy there obviously must be an ascertainment of the actual value of the estate.

I have come to the conclusion, contrary to impressions I had at the close of the argument, that the surviving partner is not entitled to take over the assets of the firm. There are certainly some contingencies provided for in clauses 9 and 10 of the articles which look as if it had been contemplated that the survivor was expected to do so. But in construing any agreement we must look at it as a whole and see that consistently with the whole, each provision therein is, if at all possible, given at least some due operative effect.

Let us look at clauses 9 and 10 and see if and how such effect can be given the provisions therein.

It is to be observed that there is no obligation imposed upon the survivor to take over the assets and pay therefor to the executors of the deceased his or their share of the value of same.

It was so easy to have provided either for that or the contingency of his electing to do so that the omission is not to be lightly supplied. Was such a palpable consideration of their situation not disposed of, designedly, in the way we find it?

We must find an intention to provide finally for one or other of such contingencies, as sure to arise upon the happening of events within their view, as being implied in these articles, before we can give effect either to an obligation or alternative option to take over and pay.

Clause 9 is as follows:—

9. In the event of the death of any partner before the expiration of the term of these articles of partnership, the co-partnership hereby created shall not be dissolved or wound up, but shall be continued by the survivor during the current or financial year, that is until the thirty-first day of January following the date at which the

death of any partner occurs, or at the option of the surviving partner during a period not exceeding twelve months from the date of the death of any deceased partner. The surviving partner shall not be required to pay to the representative or representatives of any deceased partner any portion of his capital in the partnership until the expiration of twelve months from the decease of such partner. The capital of any deceased partner shall in the meantime remain in the business and shall bear interest at the rate of six per cent. per annum to the date of payment and the person or persons interested in such capital shall also receive the same share of the profits of the business up to the end of the current or financial year, that is until the 31st day of January following the date at which the death of such partner occurs as would be paid to such partner so dying as aforesaid, if he were still living.

There is herein an obligation to continue the business at least to the end of its financial year. All in that clause relative to doing so is clearly a merely prudent provision that would enable the parties concerned to ascertain definitely in the usual appropriate way at the end of the financial year, the condition of the business with regard to which ulterior steps of some kind must of necessity be taken.

Now in the option given the survivor to extend that period, is there any more implied ? I think there is evidently this much, that it seemed to be a thing not unlikely to happen that the survivor might desire to buy and be given every opportunity to arrange for his doing so, as what would probably best accord with the interests of those representing the deceased as well as the survivor. But can it be said the provisions of this clause go further ?

Giving thus due operative effect to all in the clause, relative to such probable contingencies does not seem necessarily to leave anything unfulfilled.

The provisions of the clause would be most helpful indeed to facilitate the parties in determining either to wind up the business or sell it out or in arranging that either or both should continue the business.

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That the year allowed to executors to wind up the estate would probably run concurrently with the year provided for by the clause in a certain event herein may also have been present to the minds of the partners. It seems to me they never intended to go further than make the suitable, but merely, tentative provisions I have indicated. It was because they could not that they omitted to provide any further.

And incidentally we see how he dying first had looked at the matter. His doing so, of course, should not affect our opinion of the true construction of the instrument, beyond making us pause to think before deciding.

Clause 10 is as follows:—

10. Should any dispute or difference arise between the said partners or between the surviving partner and the representatives of any deceased partner as to the amount which either partner is entitled to be credited with, or liable to be charged with, in making up any annual balance sheet of the co-partnership, or as to the valuation of any of the assets of the co-partnership, such dispute shall be referred to an arbitrator mutually chosen by the parties, or in the event of their failing to agree upon an arbitrator then to such arbitrator as a judge of the High Court shall, upon application of either of the parties, on one week's notice, in writing, to the other, appoint, and the award or decision in writing of the arbitrator so chosen or appointed shall be binding upon all the parties interested.

It is this clause that Mr. Justice Middleton found (and I was for a time much inclined to hold correctly so) the item that conclusively points to the taking over by the surviving partner of the business.

Let us read this clause carefully and there is absolutely nothing to be found in

the valuation of any of the assets of the co-partnership

being made a subject of reference as between the surviving partner and the representatives of the deceased

which is inconsistent with a denial of the surviving partner's claim as of right to take over the business.

That reference fits into the very case of stock-taking that existed in January, 1914; and indeed inevitably must fit into some January stock-taking following a death in the firm. The one stock-taking which of all the series it was most important to have accurately done was that following the death of a partner.

Indeed, as already suggested, it was the chief reason for postponing absolutely the dissolution of the firm till that had taken place.

I conclude that the appellant is not entitled to take over the business.

I agree that the goodwill is an asset of the business. And already I have expressed my opinion that the balance sheet of January, 1913, does not bind.

The appeal should be dismissed. Nothing was said in argument in regard to costs.

I doubt the propriety of encouraging, at the expense of any estate, appeals here, by making, even if we can, the costs of such an appeal payable out of the estate. In the peculiar circumstances and, having regard to the insignificance in the difference in the ultimate result of whether the costs come out of the estate or each pay his own, I think each should be left to pay his own costs of this appeal.

DUFF J.—I think there is sufficient in the articles of the partnership to evidence clearly the intention of the parties to the agreement that in the event of the death of one of the parties during the partnership term, the representatives of the deceased partner should be entitled to require the surviving partner to pay them

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a sum of money equivalent to the value of his interest in the business and that the correlative right of requiring them to accept such payment should be enjoyed by the surviving partner. The effect of the provisions of the partnership agreement touching the ascertainment of this sum I shall discuss in a moment.

The general effect of the contract in so far as it relates to the reciprocal rights of the surviving partner and the representatives of the deceased partner in the event mentioned is that a sum equivalent to the value of the deceased partner's interest (ascertained in the manner provided for in the deed) is treated, as between the parties (at the election of either of them) as a liability of the firm on payment of which the interest of the deceased partner's estate in the assets of the partnership is extinguished.

As to the mode of ascertainment, I think the effect of the deed is this; the partnership is deemed to have continued to the end of the financial year in which the death occurs (first sentence article 9); by the operation of article 8 an account and a balance sheet *as annual account and balance sheet* are then to be prepared (arbitration being provided for under article 10 in case of difference) and from this account and balance sheet the value of the interest of the deceased partner is to be determined.

This appears to me to be the effect of the deed. I am, however, unable, to see how for practical purposes the acceptance of Mr. Tilley's contention would affect the rights of the parties, that contention being that for the purpose of ascertaining the value of the interest you are to start with the account taken at the end of the last preceding year, derive from that the value of the deceased's partner's share at the date of

his death and add the profits for the year in which the death occurred. I cannot see the difference in practical effect because the profits for the last year could only be ascertained by striking a balance between the value of the net assets at the beginning and at the end of the financial year; and for the purpose of ascertaining the profits you must, therefore, value the net assets as at the end of the financial year, and in either case in the event of difference resort must be had to arbitration.

If the final account, of course, were to be treated as an account of a species different from the annual account under article 8 the point of construction might be of some importance; and (accepting Mr. Tilley's contention) the question would still remain open for consideration whether profits for the purpose of the final adjustment are necessarily to be computed upon the same principle as profits for the purpose of the annual account.

The point of substance is ultimately reducible to this: Is the account on the one construction to be taken or are the profits on the other construction to be determined on the same principle at the expiration of the last financial year for the purposes of the final settlement as during the previous years for the purpose of the annual accounting under article 8 ?

I think the question must be answered in the affirmative for this reason, namely, the method exclusively ordained by the articles for ascertaining the value of the interest of each for any of the purposes of the deed, for the purpose, for example, of computing interest payable under article 5 is to be found in article 8, which provides for an account and balance sheet made up through the co-operation of the parties

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at the end of each year, with a reference to arbitration in the event of disagreement, and it must, I think, be assumed that it is with reference to this provision that article 9 was framed.

The result is that for the purpose of ascertaining whether or not goodwill is to be valued as an asset for the partnership we must consider the effect of article 8. I think the evidence before us is conclusive against the respondent's contention as to the effect of this article. The accounts made up annually by the partners cannot be presumed to have been made up in total disregard of the effect of them in relation to a possible settlement under article 9 and the omission of goodwill conclusively shews, in my view, that the partners did not regard it as one of the subjects constituting the partnership "assets" for the purposes of article 8.

ANGLIN J.—With great respect for the learned judges of the Appellate Division, I am of the opinion that the partnership agreement makes it clear that it was intended that the surviving partner should have the option to continue the business of the firm and to become the purchaser of the interest of his deceased partner. The clause providing for retention of the deceased partner's capital in the business for one year and the provision for a valuation by arbitration of assets as between the surviving partner and the representatives of the deceased partner are, I think, inexplicable on any other assumption. They make it clear—at all events they raise a case of necessary implication within the meaning of the dicta of Esher M.R., and Kay L.J., in *Hamlyn & Co.* v. *Wood & Co.*

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(1), at pages 491, 494—that the surviving partner should have an option to acquire the interest of a deceased partner, and that, as Mr. Tilley conceded, upon the surviving partner exercising his declared right to retain the capital of the deceased partner for a year after his death, the option to purchase became an obligation. To this extent I would allow this appeal, but upon the other questions I think it should fail.

There is nothing in the agreement which limits the interest of the deceased partner to such assets as the partners had seen fit for other purposes to treat as items of capital in their annual balance sheets. The agreement provides for a continuation of the partnership until the 31st January following the death of either partner. During the intervening period the deceased partner's estate is to receive interest under clause 5, by virtue of the continuation of the partnership, on the basis of the share of the deceased partner in the capital as ascertained and defined by the annual balance sheet made at the beginning of the financial year, and in addition, a share of profits on the same basis as the deceased partner would have received them had he been living. But, the partnership continuing, a new account of the stock in trade, assets and liabilities of the partnership and a new balance sheet were due under clause 8 of the agreement at the expiration of the partnership year on the 31st January, 1914. If the taking of that account and the making of that balance sheet should occasion disagreement, clause 10 provides for an adjustment by arbitration and, *inter alia,* for the valuation of the

(1) [1891] 2 Q.B. 488.

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assets of the co-partnership. For what purpose? For none that I can believe the parties would have thus provided for, if it was intended that the value of the share of the deceased partner was for all purposes, including the fixing of his interest in the assets on dissolution, to be determined by the amount stated to have been his share of the capital in the last balance sheet prepared during his life time. I think it is clear that, from the 31st January, 1914, it was the surviving partner's capital as of that date, to be ascertained by agreement or by arbitration, involving a valuation of all the partnership assets, including goodwill as well as everything else which could be deemed an asset, which should thereafter bear interest at 6% and should be payable at the expiry of the year from the death of the deceased partner by the survivor to the representative of such deceased partner as the purchase price of his interest in the partnership. I find nothing in the agreement which warrants an inference that it was the intention of the parties that the survivor should receive as a present from the estate of his deceased partner the share of the latter in an asset such as the goodwill of the business with which we are dealing would seem to be, or in any other asset omitted from the balance sheet of 1913, which was prepared chiefly, if not solely, for the purpose of determining the basis upon which interest should be computed for the ensuing year under clause 5 of the agreement.

In view of the divided success there should be no costs of this appeal.

BRODEUR J. (dissenting).—The most important point we have to determine in this case is whether

the appellant, who is surviving partner of Wood, Vallance & Co., is entitled to take over the interest of his late partner, William Vallance, in the said partnership assets.

Mr. Justice Middleton, in the Supreme Court, held that the survivor was entitled to exercise that right of pre-emption. The first appellate division, however, held a contrary view.

The co-partnership agreement was made on the 31st of January, 1910, for a period of five years for the purpose of continuing the hardware business of Wood, Vallance & Co. The capital put in by Mr. Wood was $577,524.21, and the capital of the late Mr. William Vallance $479,243.32. Each partner was allowed interest upon the amount of capital from time to time at his credit in the books of the firm and the profits were apportioned equally between the partners. It was provided that an annual balance sheet should be made on the 31st of January each year which should be attested by each of the partners.

There is no provision as to the amount which could be paid weekly or monthly to the partners; but it is presumed that they were drawing money as they liked, affecting even to a certain extent their capital, since in the balance sheet of each year their capital was different, as appears by the following table:—

CAPITAL.

	Wm. Wood.	Wm. Vallance.
31st January, 1910	$577,524.21	$479,243.32
31st January, 1911	514,433.78	329,334.79
31st January, 1912	230,662.19	259,350.58
31st January, 1913	260,019.11	292,175.97

It is a rule of law that the capital put in by the partners should not be impaired. However, the figures which I have just given shew conclusively that

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the partners were drawing money out of their capital, and I may add also that the right to withdraw was implied from clause 5 of the partnership agreement which stated that

> each of the partners shall be allowed interest at the rate of six per cent. per annum upon the amount of capital which may from time to time be at his credit in the books of the said firm. * * *

The answer to the question which has been enunciated above turns mostly on the construction of clauses 9 and 10 of the partnership agreement.

In clause 9 it was provided that

> in the event of death of any partner the co-partnership hereby created shall not be thereby dissolved or wound up, but shall be continued by the survivor during the current or financial year, that is, until the thirty-first day of January following the date at which the death of any partner occurs, or at the option of the surviving partner during a period not exceeding twelve months from the date of the death of any deceased partner. The surviving partner shall not be required to pay to the representative or representatives of any deceased partner any portion of his capital in the partnership until the expiration of twelve months from the decease of such partner. The capital of any deceased partner shall in the meantime remain in the business and shall bear interest at the rate of six per cent. per annum to the date of payment. * * *

By clause 10 it was provided that if a dispute arose between the partners or between one partner and the representatives of any deceased partner as to the amount to which each partner was entitled or as to the valuation of any assets, said dispute should be referred to an arbitrator.

It seems to me that if the partner had intended to give to the other partner a right of pre-emption, there should have been a formal stipulation to that effect. But no such stipulation is contained in the contract and then the question arises as to whether there is an implied right for the surviving partner to take over the assets of the firm.

Lord Esher in *Hamlyn & Co.* v. *Wood & Co.*(1), at page 491, stated as to when and how terms not expressed in a contract may be implied:—

> I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation unless on considering the terms of the contract in a reasonable and business-like manner an implication *necessarily* arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.

In this case, what is simply provided for is, according to my construction of the partnership agreement, that at the death of one of the partners the partnership should continue to exist until the 31st January then next, each partner being entitled to the same share of the profits and to the same interest on their respective capital. There is no allowance provided for in favour of the surviving partner. The latter, however, is empowered to have the partnership continued for a further period not exceeding a year from the date of the death of the deceased. In such a case, however, the profits would belong exclusively to the surviving partner and he would be bound to pay only the interest on the capital of the deceased.

The following provision in clause 9, which declares that

> the surviving partner shall not be required to pay to the representative or representatives of any deceased partner any portion of his capital

should not be construed as meaning that the surviving partner has the right to purchase the assets of the firm, but that during the period of a year the representatives of the deceased partner would not be en-

(1) [1891] 2 Q.B. 488.

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titled to draw, as used to be done formerly, any money out of the capital.

To construe this provision as creating a right of pre-emption would, according to my opinion, create an implication which would not necessarily arise. Those words have been put there simply for the purpose of preventing the representatives of the deceased from drawing on their capital the same as used to be done during the life of the two partners and that the capital should remain intact during that period. The parties had likely in contemplation hard times and they provided that the success of the business should not be impaired by any reduction of capital.

We are asked also to state whether the good will of the partnership would be considered as an asset.

This question does not become very important in view of the conclusion I have reached on the first question. If the surviving partner has no right of pre-emption, then it is very indifferent for both of them whether the good will should be included or not in the assets of the partnership. Clause 2 of the agreement defined what the capital of the partnership would be and they stated that it included their interest in the stock, trade, book debts and other assets.

Now, in the balance sheet which was prepared each year no mention is made of the good will. The good will is all the same an asset and sometimes a very good asset of the business. When you take a company like this one, which has been in existence for more than 60 years, it must be a very valuable asset. It is true that in their annual statement they were not including that good will and I understand it is not usually done in the inventory made by business firms. It is all the same an asset which could be disposed of when the winding-up took place.

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Another question was whether in the valuation of the assets the value appearing on the balance sheet of the 31st January, 1913, is binding on the executors of William Vallance or whether the actual value of such assets is to be ascertained.

This balance sheet was evidently prepared every year with the concurrence and assent of both partners. It is true that it was not signed by them, but it was always considered as binding, since interest had to be paid on the capital shewn by that balance sheet. But when the business of the partnership is wound up, the assets have to be ascertained in the ordinary way.

The appeal should be dismissed with costs.

Appeal allowed in part without costs.

Solicitor for the appellant: *S. F. Washington.*
Solicitor for the respondents: *C. V. Langs.*

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*Nov. 24-26.
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*March 3.

GEORGES A. VANDRY; THE GUARDIAN ASSURANCE COMPANY; THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY; THE PHOENIX ASSURANCE COMPANY OF LONDON, AND THE QUEEN INSURANCE COMPANY OF AMERICA (PLAINTIFFS) ..... APPELLANTS;

AND

THE QUEBEC RAILWAY, LIGHT, HEAT AND POWER COMPANY (DEFENDANTS) ..... RESPONDENTS.

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

Electric transmission—Statutory authority—Special Act—Negligence—Character of installations—System of operation—Grounding transformers — Defective fittings — Vis major — Responsibility without fault—Art. 1054 C. C.

After heavy rains, in cold weather, had coated trees and electric wires with icicles, a violent wind tore a branch from a tree, growing on private grounds, and blew it a distance of 33 feet on to a highway where it fell across the defendants' electric transmission wire, causing a high-tension current to escape to secondary house-supply wires, used only for low-tension currents, and resulting in the destruction of the buildings by fire. The high-tension current, 2,200 volts, was stepped down from the primary wire to about 110 volts on the secondary wires by means of a transformer which was not grounded, owing to doubts ther existing as to doing so being safe practice. The secondary wires were used by the defend-

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

(NOTE.—Leave to appeal to Privy Council granted, 9th May, 1916.)

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ants to supply electric light to consumers, the owners of the buildings destroyed, but these buildings were not fitted with "modern" installations for electric lighting nor with cut-offs to intercept high-tension currents.—V's action was to recover damages for the destruction of his building, alleged to have been occasioned by the defendants' defective system. The insurance companies, being subrogated in the rights of owners of buildings insured by them, brought actions to recover the amounts of the policies which had been paid.

Held, per Idington, Anglin and Brodeur JJ. (Davies and Duff JJ. *contra.*) Under the provisions of article 1054 of the Civil Code, the defendants were liable for the damages claimed as they had failed to establish that they were unable, in the circumstances, to prevent the escape of the high-tension electric current, a dangerous thing under their care, which had been the cause of the injuries, or that the injuries thus caused had resulted from the fault of the owners of the buildings themselves. The defence of *vis major* was not open as the circumstances in which the injuries occurred could have been foreseen and provided against by the installation of a safer system for transmission of electricity.

Judgment appealed from (Q. R. 24 K. B. 214), reversed, Davies and Duff JJ. dissenting.

Per Anglin and Brodeur JJ.—As the special Acts under which the defendants carried on their operations provide that the company shall be "responsible for all damages which its agents, servants, or workmen cause to individuals or property in carrying out or maintaining any of its said works "(58 & 59 Vict. (D.) ch. 59, sec. 13), and that the company "shall be responsible for all damages which it may cause in carrying out its works" (44 & 45 Vict. (Que.) ch. 71, sec. 2), they are liable for damages resulting from the operation of their constructed works, without regard to any consideration of fault or negligence on their part.

Per Davies and Duff JJ., dissenting.—Under article 1054 of the Civil Code, the onus lies upon the plaintiff to prove that the injury complained of resulted from the fault of the thing which the defendant had under his care; in the absence of such proof there is no liability on the part of the defendant. In the circumstances of the case the defendants are entitled to succeed on the ground that the damages were the result of *vis major*. *Canadian Pacific Railway Co.* v. *Roy* ((1902) A. C. 220); *Dumphy* v. *Montreal Light, Heat and Power Co.* ((1907) A. C. 454); *McArthur* v. *Dominion Cartridge Co.* ((1905) A. C. 72); *Shawinigan Carbide Co.* v. *Doucet* (Can. S. C. R. 281; Q. R. 18 K. B. 271); and *Canadian Pacific Railway Co.* v. *Dionne* (14 Rev. de Jur. 474), referred to.

APPEALS from the judgments of the Court of King's Bench, appeal side(1) reversing the judgments of

(1) Q.K. 24 K.B. 214.

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Dorion J, in the Superior Court, District of Quebec, and dismissing the actions with costs.

The circumstances in which the actions were instituted are stated in the head-note and the questions in issue on the present appeals are discussed in the judgments now reported.

L. A. Taschereau K.C. and *Cannon K.C.* for the appellants.

G. G. Stuart K.C. for the respondents.

DAVIES J. (dissenting). — Notwithstanding the enormous mass of testimony which appears to have been given in these cases and the great number of points raised by the plaintiffs on which it is contended that the defendants should be held liable, it seems to me that the real substantial questions are reduced to very few.—First, whether there was evidence of negligence on the part of the defendant company in not grounding their transformer secondary wires, or other negligence which was an effective cause of the damages complained of, and next whether the company is liable for these damages irrespective of proof of negligence under the statute 58 & 59 Vict., ch. 13, under which they were carrying on their operations and under articles 1053 and 1054 of the Civil Code of Quebec.

The case of the plaintiff Vandry and the four other appeals, by insurance companies which are suing as having been subrogated to the rights of the parties whose houses they had insured, depend upon the same facts and are the result of fires which took place on the 19th and 20th of December, 1912, which the appellants contend, as I think rightly, were caused by an electric current supplied by the respondents for the lighting of the burnt buildings.

As to the contention that, without proof of fault or negligence, absolute liability of the company is established under article 1054 C.C. upon its being proved that the damage sued for was caused by a "thing which it had under its care" or because, as contended, the company failed to prove that it was unable to prevent the act which caused the damage, I am in full accord with the judgment of the court of appeal which, as I understand it, is that fault or negligence causing or contributing to the accident on the part of the defendant company not having been proved, they are not liable for damages.

The question, to my mind, resolves itself into this: —Whether the respondent company can be held responsible for damages resulting from the exercise of its statutory powers where no negligence on its part is proved.

In the case of *Canadian Pacific Railway Co.* v. *Roy*(1), it was held by the Judicial Committee of the Privy Council that:

> A railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway; or, in other words, by the proper execution of the power conferred by the statute.
>
> The previous state of the common law imposing liability cannot render inoperative the positive enactment of a statute. Neither the Civil Code of Lower Canada, art. 356, nor the Dominion "Railway Act," ss. 92, 288, on their true construction, contemplates the liability of a railway company acting within its statutory powers:—
>
> So *held*, where the respondent had suffered damage caused by sparks escaping from one of the appellant's locomotive engines while employed in the ordinary use of its railway.

Later, in the case of *Dumphy* v. *Montreal Light, Heat and Power Co.*(2), the Judicial Committee held

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

(2) [1907] A. C. 454.

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that the respondents, being authorized by Quebec Act, 1 Edw. VII. ch. 66, sec. 10, in the alternative, to place their wires either overhead or underground, were not guilty of negligence in adopting one alternative rather than the other, or in neglecting to insulate or guard the wires in the absence of evidence that such precaution would have been effectual to avert the accident.

Each of these decisions was based on the ground that proof of negligence or fault causing the injuries complained of was essential to entitle a person injured to recover damages caused by the exercise by a company of its statutory powers.

The current of decisions in this court has, I think, been uniform to the same effect and no decision that I am aware of can be found to the contrary, supporting the proposition now contended for under article 1054 of the Civil Code.

There must be evidence proving the existence of fault on the part of the defendant, or, at any rate, since the decision of the Privy Council in the case *McArthur* v. *Dominion Cartridge Company*(1), from which the tribunal may reasonably and fairly infer both the existence of the fault and its connection with the injury complained of.

Then, as to the contention that sub-section (*e*) of section 13 of the Dominion Act incorporating the company and under which it was operating declared the company should be

> responsible for all damages which its agents, servants or workmen caused to individuals or property in carrying out or maintaining any of its said works,

I would apply the language used by The Lord Chancellor in delivering the judgment of the Privy Council in the case of *Canadian Pacific Railway Co.* v. *Roy*(2) at page 231.

(1) (1905) A. C. 72.

(2) [1902] A. C. 220.

Section 288 (of the "Railway Act" of 1888) is more plausibly argued to have maintained the liability of the company, notwithstanding the statutory permission to use the railway; but if one looks at * * * the great variety of provisions which give ample materials for the operation of that section, it would be straining the words unduly to give it a construction which would make it repugnant, and authorize in one part of the statute what is made an actionable wrong in another. *It would reduce the legislation to an absurdity,* and their Lordships are of opinion that it cannot be so construed.

But whatever may be the meaning of the language of this clause (*e*) it cannot, in my opinion, be construed so as to embrace or cover such an accident as we have proved in this case, one caused by *force majeure* and without negligence on the part of the respondent company.

The substantial, if not the only ground on which the plaintiffs could hope to establish negligence on the part of the company was the non-grounding of the transformer secondary wires.

The company, in erecting its poles along the roadside and supplying electricity to light the houses whose owners or occupants desired to have it, was admittedly doing so in the exercise of a statutory power authorizing it to carry electricity on wires attached to poles on any public road in the vicinity of Quebec.

In the operation which it was so carrying on, it was doing that which the statute authorized.

The trial judge distinctly found that, with the above exception of this non-grounding, none of the complaints made against the condition of the line were well founded.

The company's contention was, and it seems to me to be proved, that its wires were strung along poles placed on the St. Foy Road, on the highway, and were in good order and condition, that on the night on which appellant's house was destroyed a large branch of a tree growing on the property of Victor Chateau-

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vert, one of the parties insured and whose rights became subrogated to the Queen Insurance Company, one of the plaintiffs, was, as the result of a great wind and sleet storm, blown off the tree and carried out to the highway upon the respondents' wires bringing the primary wire, with its high-tension current, into contact with the secondary. The tree was approximately 90 feet high and the branch which broke was at a measured distance of 63 feet from the ground. It was a branch growing upwards in a westerly direction and at the time it broke was covered with a thick coating of ice and driven by a wind which attained a speed of 38 miles an hour. The respondent defendants further contended that if the wiring of the house had been properly done and efficiently maintained, instead of being as it was most defective, no injury probably would have resulted even if the high-tension current had been introduced into the house.

It was also proved that the defendants (respondents), were in no way responsible for the house wiring. That was a matter entirely within the duty of the plaintiffs (appellants).

The primary wires, three in number, were strung from pole to pole upon cross-bars, and the secondary wires, two in number, were strung some distance beneath them on other cross-bars.

The tree on Chateauvert's property from which the branch broke off was in a field at a distance of 22 feet 6 inches from the road-fence and a few feet further from the centre of the pole line. To reach the primary wires it was contended the branch must have been carried a distance of 33 feet 6 inches and this could only be done by an extremely violent wind and by the broken branch sliding along the lower branches of the tree, all of which were heavily coated with ice.

The tree and the branch were shewn to have been sound, without any visible weakness and defect, and the branch, some 9 feet in length, was one of the exhibits in the case produced before this court.

The majority of the court of appeal was of the opinion that nothing was shewn to have existed which should have caused any one to anticipate the occurrence of such an accident as happened, that it was one for which respondent defendants were in no way responsible and that, in view of the proved defective condition of the interior wiring of the burnt buildings for which the respondents were not responsible, the grounding of the transformer would instead of being a protection have been rather an added danger.

After hearing the argument at bar and reading the evidence of the different experts and engineers on the point of this grounding and the correspondence between the defendants' manager, and Mr. Bennett, in December, 1911, on the same question, I have reached the same conclusion as the court of appeal, namely, that while electrical expert opinion is strongly in favour of the grounding of the transformer secondary wires as a protection and safeguard against accidents happening from the possible contact of the primary wire with the secondary wires in cases where the inside wiring of the houses is good, such grounding would not be a safeguard or protection with respect to houses the inside wiring of which was as bad and defective as it was shewn to have been in this case.

Being of the opinion, therefore, that the respondents, in the exercise of their statutory powers, were not responsible in damages for injuries not caused by negligence on their part; that no such negligence was or could be found on the facts of this case; that the accident which happened and brought the primary

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and secondary wires into contact and carried the high-tension current of the former into the houses was caused by the branch of a tree being blown off and carried, by force of a high wind in a sleet storm, some distance out to the highway and on to the wires and was an accident which they could not have anticipated and for which they should not be held responsible, and against which no precaution has been suggested which they could or ought to have taken; and that the injuries caused to the plaintiff might have been avoided if the inside wiring of his house had not been bad and defective, a condition for which he alone is responsible, I would dismiss this and the other appeals with costs.

IDINGTON J.—Notwithstanding the voluminous material of law and fact presented for consideration herein, and over two days of argument spent in enlightening us as to the bearing thereof, I think that to be decided in the case is within a very narrow compass, when we accept as proven that which every fair-minded person seems to have assumed, and eliminate that which is either irrelevant or immaterial.

Yet, as will presently appear, from my point of view there are some things relevant to what has to be decided which one should have desired to know more about than is presented in evidence or has been dealt with in argument.

Passing meantime these considerations it seems abundantly clear that the property in question was destroyed by the force of an electric current of 2,200 volts passing into the premises in question which no one could ever have imagined had been prepared to receive and resist the ill effects of more than a cur-

rent of one hundred and eight to one hundred and fifty volts of electric current.

It is equally clear that this was produced by reason of a large branch of a tree breaking and being blown by the wind upon the wire of respondent. The danger of such a thing happening was so well recognized by those engaged in the business that experts, including respondent's witness Mr. Herdt, hereinafter quoted on other points, tell us without hesitation or contradiction that those so engaged out of necessity for safety seek to have the trees near to their wires removed or so trimmed as to avert or ameliorate such damages.

Everything, therefore, urged in law or in fact as an impediment to the application of such means of safety rendered it the more incumbent upon the respondent to secure, by other means, the protection of life and property where it carried on its operations.

The freezing of rain falling upon the trees at certain seasons in Canada and consequent destruction of their branches by force of wind operating upon them when so laden is too frequent an occurrence to escape the attention of any intelligent person.

The possibility of the branches being in such circumstances carried from tall trees a much greater distance than anything involved herein should be so obvious to any Canadian, keeping his eyes open, that it is hardly necessary to dilate upon that incidental feature appearing in this case and becoming a subject of grave argument.

In short, the case is reduced to the consideration of a few facts and the law bearing thereon.

The respondent is engaged in the business of lighting by means of electricity. It produces electric current for distribution. In order to divide the current generated therefor it uses transformers whereby the main

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electric force is reduced to such fractions thereof as may be conducted with safety into houses or other places to be lighted by means of lamps it supplies for the purpose. These fractional currents, if I may so speak, are conducted by one wire, or set of wires, whilst the main or primary current is carried upon another wire. Both wires are carried overhead by means of same set of poles and cross-arms and should be so far apart as to avoid the dangers of induction of current from one to the other.

It is alleged and, I incline to think, supported by some evidence that the respondent's primary and secondary wires were strung too close together. In my view of the case I have not found it necessary to reach a definite opinion upon that disputed fact. I therefore eliminate it from what is necessary to be considered.

The naked facts are that the branch of a tree (which might, under the circumstances I have adverted to, be so expected to fall and, hence, had to be guarded against) falling upon these wires, caused in the absence of the use of a grounding at the transformer, the current of 2,200 volts to be carried in the primary wire to pass into the secondary wire and thereby to the houses only prepared or supposed to be only prepared to resist, or rather receive with safety, a current of one hundred and eight volts.

The result in each house in question herein was a fire and destruction of property.

The appellant Vandry was indemnified for part of his loss by the insurance companies which, in turn, were subrogated for him in respect of so much thereof as so paid, and they sue by virtue of such subrogations.

Other companies claim in subrogation of the other sufferers.

Nothing turns upon the question of subrogation beyond one or two points of procedure and costs to be referred to hereafter.

The learned trial judge held the respondent liable mainly, if not entirely, upon the ground that there was a means well known to the respondent which it ought to have adopted, but did not adopt, to provide for just such probable contingencies as happened, and, for the reasons I already have given, were likely to happen.

That means was the grounding at the transformer of the secondary wire whereby the augmented current therein caused by the accident would have been conducted to earth instead of into the houses in question.

The means of insuring safety by grounding secondary wires at the transformer is thus referred to by Mr. Herdt, one of the respondent's scientific expert witnesses, as follows:—

Q. You also add that this practice has been carried into effect very generally by most large operating companies?

A. Yes, sir.

Q. That was to your personal knowledge?

A. Yes, to my personal knowledge.

Q. For how many years prior to this letter, had this practice been carried into effect by the large operating companies, as stated by you in your letter?

A. Some of the large operating companies have started grounding transformer secondaries early in 1900, 1902 or 1903, but it has taken them years to carry that out.

Q. But the grounding of transformers was being put into effect by large operating companies ten years prior to your letter?

A. Ten years; hardly ten years.

Q. That is what you have said. You have said twelve years even?

A. It was started.

Q. It was started in or about 1900?

A. In 1902 or 1903.

Q. So, for ten years that had been going on?

A. For ten years that had been going on.

The results are testified to by same witness as follows:—

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A. Do I personally know of any case where the inside wiring is good and the transformer grounded?

Q. Yes?

A. No, I do not know of any case.

Q. So in all the cases that you are aware of, or that come to your knowledge, when the transformer was grounded and the inside wiring being good, no fire started?

A. No. If I know of any case?

Q. Yes?

A. No, I do not.

The only answer made thereto which seems worth a moment's consideration is that in the case of a defectively wired house there would be a possibility of increasing thereby the danger to life and property therein.

It was further alleged that the houses in question were of the defectively wired class. But how is that an answer? Had the respondent any right to venture to supply light to such a house? Where in its charter or in law can it find justification for doing so? The means for determining whether or not a house is of that character is referred to by Mr. Herdt, its own witness, as follows:

Q. I am very sorry to say that all that happened. Now I understand that there are some special instruments to test the wiring in a private dwelling?

A. Yes.

A. Are they expensive instruments?

Counsel for defendant objects to this question.

A. No.

Q. These tests may be easily made by the electrical company?

Q. Very easily.

Q. Easily made?

A. Easily made.

Q. And it is a perfectly safe test?

A. Perfectly safe test.

Q. If the wiring will hold that test, then the transformer can be grounded without any trouble?

A. Well, the different companies may have different methods of testing, different requirements of testing; but generally speaking, the insulation resistance test is not a difficult one to make.

Q. So as an electrical engineer, you know of not only one method of testing, but of several good methods of testing?

A. Yes.

Q. And if the wiring will pass that test, why, you can recommend the grounding of the transformer?

A. Yes, sir.

Q. As a safety device for life and fire?

A. Yes, sir."

And Mr. Wilson, another of its witnesses, says

Q. It is quite easy for the electrical company to test the wiring of the houses as you do in Montreal?

A. Yes, they can test to find out if there is ground, easy enough.

Q. And your practice in Montreal is to refuse current to any house that will not stand the test?

A. Well, we have to cut them off.

Q. So that good wiring won't suffer for the bad?

A. We exact now a certificate from the Fire Underwriters to connect the thing.

And this condition of things had prevailed in Montreal, he tells us, since 1909, about four years before this accident.

Surely the distance between Montreal and Quebec is not so great as to have prevented the intelligence of what was known at the former place to have reached the understanding of those in the latter place conducting a business wherein it became their bounden duty in law to recognize the advancement of scientific knowledge and the results of experience in order that they might exercise due care and have some regard to the protection of the lives and property of others.

Mr. Wilson tells us that previous to 1905 they had been so unfortunate as to have had two or three people killed by primaries and secondaries coming into contact.

Suppose there had been someone killed instead of only a fire occasioned by the neglect of duty on the part of the respondent's management, and the manager had been placed on trial for manslaughter and the evidence herein, and especially of his perversity, spread out in his correspondence with Mr. Bennett

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appealing to him for a change of methods and practice, had been adduced, I am puzzled to know what answer he could have made to such a charge. Yet substantially the question here involved and that in the case I put are the same. The only difference is that one depends on the interpretation to be put upon two articles of the Code designed to secure a remedy for those suffering from the neglect of others and in the Criminal Code is expressed in sections 247 and 262 combined in slightly different language.

I can understand the case of a man in the situation of Vandry having contracted himself out of any recourse against the respondent. That, however, is not pretended here. All we can infer from what appears is that there must have been a contractual relation between the respondent and someone to light, by means of electricity, the premises in question in each case.

It was the duty of respondent to have seen to it when applied to for such a service that it could perform the service with something like reasonable safety for life and property.

Was this appellant Vandry or his tenant the Hunt Club the applicant for the service herein? So far as the printed case goes I am unable to discover. He had bought the property from the club in February, 1912, and agreed to lease it to the club. He had apparently been a member of the club when, in 1909, the work was done of installing electrical appliances therein, and I gather had been on a committee having to do with letting that contract.

If the relations between the parties had been more accurately and definitely put in evidence it would have been more satisfactory.

In many cases of negligence the legal relationship between the parties concerned must be examined with

care. The nature and quality of the act or omission called negligence can only in many such cases be determined as result of such examination.

The relation between a company like the respondent and a tenant can hardly as of course and of necessity explain away all the rights of the owner seeking relief against negligent conduct of the company towards him such as in evidence herein.

If the tenant and company were both found to have entered, without his permission, into any enterprise endangering the premises, that would not of itself answer the claim of the owner.

As this phase of the matter was not presented in argument and the evidence is far from clear, the only use I wish to make of it is by way of illustration of how little there is, when one comes to consider the respondent's pretentions in the answer it makes, relative to the failure to protect by grounding the wire.

In such a case as I put, and as possibly in fact exists herein, there could be found no excuse for attempting to supply electric current without testing to see if the fixtures were sufficient to ensure safety when protected by means of grounding. If so found it could and should protect by grounding. Otherwise it should, out of regard to the lives and property of others, refuse to turn its dangerous machine's destructive forces upon the property.

It seems, from the evidence, clearly established that when this course is pursued there is practically no danger of fire or loss to any one; save in the possible loss to the company of the possible profits derivable from an undesirable customer. It should never be forgotten that in such case the safety of adjacent properties either not using electric lights, or using

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them with the very best electrical fixtures available, are all jeopardized by following any other course.

I think the duty was the same in the case of any one applying as owner for lighting to be done, unless the owner contracted to assume the risk.

The owner's ignorance is generally as great, when he contracts for such service, as if he had never been consulted, as in the case I put of a tenant doing so behind his back as it were. But even in such a case what right has the respondent or any like company to endanger adjacent properties of others? The franchise given by its charter never was intended to permit such a course of conduct.

Again in the case of any one being applied to, who is supposed to possess skill in his business, to undertake anything for someone relying upon his skill, he is not generally supposed to presume that the man he is to serve knows as much as he. If he neglects to inform him of the risks he runs he is negligent of his duty in the premises.

How much more must that be implied in the case of one who has to answer for his conduct under article 1054 of the Civil Code?

Again, it has been well pointed out by Mr. Justice Carroll (if he is right in assuming the rules appearing in the case apply to respondent's contract), one of the rules it requires to be observed is:—

> The consumer is not permitted to make additions or alteration in his installation without receiving the written consent of the company.

This seems to pre-suppose an inspection and a contract in relation to the existing features as the basis of acting.

Assuming, for argument's sake, the answer made which I have been considering to present something arguable, I am far from accepting the view presented

by counsel for respondent relative to the facts as bearing out his argument.

The report of Morissette looks as if many things had to be rectified, but that was a year before the fire and what happened meantime I cannot assume to have been complete neglect of the report and its requirements and I cannot find it satisfactorily explained in a way to support the contention.

Nor does the evidence seem to bear out the suggestion of its construction being old, as it seems to have been done over in 1909 under a contract intended to satisfy the underwriter.

In my view, however, this does not matter for it certainly, even if all that is claimed by respondent, would not prove that the best wiring would have prevented a fire with a current of 2,200 volts which it seems to be admitted entered the house as result of the accident.

I, however, do not find the respondent excused thereby. I think it might well be found guilty of negligence under article 1053 C.C. But, at all events, under article 1054 C.C. it clearly was negligent and has not upon the evidence been excused in any way.

I see no difficulty in the pleading which is comprehensive enough to cover either case the evidence fits.

I think article 1054 C.C. fits the pleading and the proof. And both pleading and facts adduced in proof thereof peculiarly fit the case for which article 1054 was framed.

I am not disposed to fritter away the effect which should be given and I think was intended to be given respectively to the admirable and comprehensive articles 1053 and 1054 C.C. for the respective situations to which each is applicable.

The respondent failed in its obvious duty under the

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then well known results of experience and the advancement of scientific knowledge, to take proper precautions.

It had no right in law to attempt to shift, as it did, long before this accident now in question, the responsibility devolving upon it under the law in such circumstance or await the result of a public prosecution by way of indictment for continuing a public nuisance.

It should have refused to undertake anything so easily discoverable as likely to endanger the property of others and constitute an indictable nuisance and must be assumed to have run the risk of negligently so proceeding.

To appeal to *force majeure* as a defence under such circumstances seems an idle confusion of thought.

The judgment in the case of *The Canadian Pacific Railway Company* v. *Roy*(1), relied on by respondent, at foot of page 230 and top of page 231, disposes, in the following sentence, of all that rests therein:—

> The permission, of course, does not authorize the thing to be done negligently or even unnecessarily to cause damage to others.

This was, if ever there was, an unnecessarily causing of damage.

The appeal should be allowed with costs here and in the court of appeal and the judgment of the trial judge be restored.

The question of procedure invoked by the respondent is one with which we never interfere unless something more than costs is involved and that is all that seems to me in that regard involved herein.

DUFF J. (dissenting).—I have throughout used the word "appellants" as if the actions had been brought

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

on behalf of the owners of the property and that it was the owners who are now appealing to this court.

The first question to be decided turns upon the effect of certain statutory provisions upon which the appellants rely. The principal Act of the respondent company is ch. 59, of 58 & 59 Vict. (1895), in which the undertaking of the company (then known as the Quebec Montmorency and Charlevoix Railway Company) was declared to be a work for the general advantage of Canada and by which it was further declared that that Act and the "Railway Act" of Canada should apply to the company and its undertaking instead of certain statutes of Quebec. The statute of 1895 was amended by chap. 85 of 62 & 63 Vict. (1899), and by this statute the name of the company was changed to the name which it now bears. By the Act of 1895 the company was authorized to "construct, work and maintain" a railway in, among other places, the streets of Quebec and telegraph and telephone lines; and extensive compulsory powers were granted for these purposes. By section 2 of the Act of 1899 the company was authorized to:—

(A) "manufacture, furnish, use and sell or lease in the city and district of Quebec, light, heat and motive power, generated from electricity, and construct, acquire, work and carry on any lines of wires, tubes or other apparatus for conducting electricity either by land or water;

(B) "acquire lands, water powers and watercourses, and erect, use and manage works, machinery and plant for the generation, transmission and distribution of electrical power and energy;

(C) "build power houses and stations for the development of electrical force and energy, and acquire the factories or stations of other like companies, or lease their works, equipments, appurtenances and power;

(D) "acquire any exclusive rights in letters patent, franchises or patent rights for the purposes of the works and undertakings hereby authorized, and again dispose of such rights."

For the first time apparently, the appellants raised the point in this court that section 13(*e*) of the Act of

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1895 has the effect of imposing upon the respondent company an absolute responsibility for harm arising from the working of the company's undertaking. I quote section 13 in full:

Section 13:—With the consent of the municipal council or other authority having jurisdiction over the roads and streets of any city, town, municipality or district, the company may, by its servants, agents or workmen enter upon any public road, highway, street, bridge, watercourse, navigable or non-navigable water or other such places in any city, incorporated town, village, county, municipality, district, or other place, for the purpose of constructing, erecting, equipping, working and maintaining its lines of telegraph and telephone and lines for the conveyance of electric power upon, along, across, over and under the same; and may erect, equip and maintain such and so many poles or other works and devices as the company deems necessary for making, completing and supporting, using, working and maintaining the system of communication by telegraph and telephone and for supplying power; and may stretch wires and other electrical contrivances, thereon; and, as often as the company, its agents, officers or workmen think proper, may break up and open any part whatsoever of the said public roads, highways, streets, bridges, watercourses, navigable and non-navigable waters and other like places subject, however, to the following provisions, that is to say:

(*a*) The company shall not, in the construction or operation of its lines, interfere with the public right of travelling on or using such public roads, highways, streets, bridges or watercourses, and other like places, and shall not do any unnecessary damage, nor in any way obstruct the entrance to any door or gateway or free access to any building erected in the vicinity;

(*b*) The company shall not affix any telegraph or telephone wires less than 22 feet above the surface of the street or road, nor erect, without the consent of the municipal council having jurisdiction over the roads or streets of the municipality, more than one line of poles along any street or road;

(*c*) In all municipalities the poles shall be as nearly as possible straight and perpendicular, and shall, in cities, be painted, if so required by any by-law of the council;

(*d*) Whenever, in case of fire, it becomes necessary for its extinction or for the preservation of property, that the poles or wires should be cut, the cutting under such circumstances of the poles or any of the wires of the company, under the direction of the chief engineer or other officer in charge of the fire brigade, shall not entitle the company to demand or to claim compensation for any damage thereby incurred;

(*e*) The company shall be responsible for all damage which its agents, servants or workmen cause to individuals or property in carrying out or maintaining any of its said works;

(*f*) The company shall not cut down or mutilate any shade, fruit or ornamental tree;

(*g*) In all municipalities the opening up of streets for the erection of poles, or for carrying the wires underground, shall be subject to the supervision of such engineer or other person as the council appoints for that purpose, and shall be done in such manner as the council directs: the council may also direct and designate the places where the poles are to be erected in such municipality; and the surface of the streets shall in all cases be restored as far as possible to its former condition by and at the expense of the company.

(*h*) No Act of Parliament requiring the company in case efficient means are devised for carrying telegraph or telephone wires under ground, to adopt such means, and abrogating the right given by this section to continue carrying lines on poles through cities, towns or incorporated villages, shall be deemed an infringement of the privileges granted by this Act, and the company shall not be entitled to damages therefor;

(*i*) No person shall labour upon the work of erecting or repairing any line or instrument of the company, without having conspicuously attached to his dress a medal or badge on which shall be legibly inscribed the name of the company and a number by which he can be readily identified;

(*j*) Nothing in this Act contained shall be deemed to authorize the company, its servants, workmen or agents, to enter upon any private property for the purpose of erecting, maintaining or repairing any of its wires without the previous assent of the owner or occupant of the property for the time being;

(*k*) If in the removal of buildings or in the exercise of the public right of travelling on, or using any public road, highway or street, it becomes necessary that the said wires be temporarily removed by cutting or otherwise, it shall be the duty of the company at its own expense, upon reasonable notice in writing, from any person requiring the same, to remove such wires or poles, and in default of the company so doing it shall be lawful for any such person to remove the same at the expense of the company, doing no unnecessary damage thereby; and such notice may be given either at the office of the company or to any agent or officer of the company in the municipality wherein such wires or poles are required to be removed, or in the case of a municipality wherein there is no such agent or officer of the company, then either at the head office or to any agent or officer of the company in the nearest or any adjoining municipality to that in which such wires or poles require to be removed.

The French version of sub-section (*e*), to which it may be convenient to refer, is as follows:—

"La compagnie sera responsable de tous dommages que ses agents, employés et ouvriers causeront aux particuliers ou aux propriétés en *exécutant ou entretenant quelqu'un de ses dits ouvrages.*"

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This provision has not in my judgment the effect contended for; Lord Halsbury's language in *Shelfer* v. *City of London Electric Lighting Co.*(1), at page 310, is applicable.

> When one considers how frequently the distinction between the execution of the works and the use of them when executed had been the subject of comment and discussion, I think it must be taken that the language used has been deliberately chosen by the legislature as pointing to a distinction, now well recognized, between the construction of works and the user of them when constructed.

A reference to other provisions of the Act shows that this distinction was not overlooked. See section 7*b*, section 8, section 9*a* and *b*, section 10, and subsections 2 and 3, section 12 and sub-section 2, the whole of the substantive part of section 13 and subsec. *a*.

These provisions also suggest that the distinction between the user and maintenance was not unobserved. It may be noticed also that the collocation of words in sub-sec. *e* "damage caused by the agent's servants or workmen of the company" when read with subsection (*j*) would indicate that the section contemplates such operations only as those specifically authorized in the substantive part of section 13,

> entry upon any public road, highway, street, bridge, watercourse, navigable or non-navigable water or other such places * * * * erecting, equipping and maintaining.

of poles and other works and devices; the stretching wires and other electrical contrivances thereon; breaking up, opening public highways, watercourses and other like places; and not to the acts of the "agents, servants or workmen" of the company in the working of its railway, for example, in the running of its cars.

The provision, of course, ought to be read with

(1) [1895] 1 Ch.

section 92 of the Dominion "Railway Act" then in force (51 Vict. ch. 29). Section 92 has always been held in itself to give only a right to compensation under the special provisions of the "Railway Act" for lands taken or injuriously affected and this right has always been held to be available in those cases only in which lands are taken for the exercise of some legal right annexed to the ownership of the land, the right of access, for example, which is or is to be directly prejudiced by the construction or the operation of the railway. It is sufficiently obvious that section 13*e* may be given a considerable scope outside of the operation of section 92 of the "Railway Act" without adopting the sweeping construction advanced on behalf of the appellants.

I think the language of the section cannot properly be held to extend to damages resulting from the non-negligent exercise of powers declared by the statute to be lawfully exercisable in the working of the company's undertaking (as distinguished from the construction or maintenance of its works), as, for example, the running of its cars in the streets of Quebec and in the working of its electric light plant.

Decisions upon one statute ought, of course, to be applied very cautiously in the construction of another statute, but I think it right to say that when one considers the manner in which sections 92 and 288 of the "Railway Act" in force in 1895 and 1899 were construed and applied in *Canadian Pacific Railway Co.* v. *Roy*(1) (see particularly page 231), and the manner in which the provisions of the Quebec statute 1 Edw. VII., chap. 66, and especially the provisions of section 10 (only quoted in part in the judgment), were applied in *Dumphy* v. *Montreal Light, Heat and*

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

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Power Co.(1), one is not disposed to charge oneself with rashness in rejecting the construction proposed by the appellants.

Some of my learned brethren think that the plaintiffs are entitled to recover under a provision found in the last sentence of section two of chapter 71, 44 & 45 Vict. (Que.) incorporating the Electric Light Company of Quebec and Levis, which apparently became the Montmorency Power Co., the words relied upon being:—

> La compagnie sera responsable de tous les dommages qu'elle pourra causer dans l'execution de ses travaux.

I observe, in passing, that there is sufficient evidence in the language of the Act, section 6 for example, to show that "travaux" is used in the sense of, to quote Lord Atkinson's expression in *The City of Montreal* v. *The Montreal Street Railway Co.*(2) of "physical things not services" and any contention founded upon this provision is properly subject to the observation made above as to the distinction between the "execution" of works and the use or operation of such works when executed, a distinction which was plainly not overlooked by the authors of this statute.

But the fatal objection against resorting to this provision as ground of relief is that there is nothing before us entitling us to hold that the damage complained of in this case was the result of the exercise of any of the powers conferred by the statute in which it is contained. Section 2 of the Act of 1899, quoted above, gives ample authority for the establishment and operation of a system of electric lighting for the City and District of Quebec, and I do not know on what

(1) (1907) A. C. 454. (2) (1912) A. C. 333.

ground this court could judicially say, the matter not having been touched in the evidence and no point having been made of it by the parties, that the works in question here were constructed or are operated under the provisions of the Quebec Act. Section 15 of the Act of 1895 authorized the purchase of the "works, buildings and machinery" of the Montmorency Electric Power Co. There is nothing in section 2 of the Act of 1895 which imports the provision relied upon as a qualification of the powers thereby given. The Dominion Parliament, of course, did not assume in section 3 to legislate with regard to the works of the Montmorency Electric Power Co. as an undertaking established and carried on under the authority of the Legislature of Quebec. It necessarily (otherwise there would be no jurisdiction) treated these works as part of the undertaking of the Dominion company whose undertaking had been, by the statute of 1895, declared to be a work for the general advantage of Canada. The "franchise powers and privileges" referred to in section 3 as those enjoyed by the Montmorency Electric Power Co. "in virtue of its charter" which it is declared the Dominion company "may in future exercise and enjoy" must be read as "franchise powers and privileges" granted by the Dominion Parliament. I think it is questionable whether one is entitled to treat that as importing a provision of the local Act relating o the responsibility of the Montmorency Electric Power Co. in view of the fact that the works authorized by the local Act are being brought into and made part of a larger undertaking under the control of the Dominion and governed by different statutory provisions. At all events until adequate grounds are shewn against it the respondent company is entitled to justify under the general

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provisions of the Acts of 1895 and 1899 including section 2 of the Act of 1899. There are other difficulties in the appellants' way on this branch of his appeal. First,—Does a provision of this kind, construed as relating to the operations of the companies' undertaking, govern the legal relation between the company and its customers to whom it supplies electric light or power? The appellants must maintain the affirmative. The language is not apt for the purpose of making the company insurer of its customers against accidents in operation not attributable to negligence. But I pass that. It is quite too late now, in the state of the record, in view of the considerations above mentioned to base any relief upon this statutory provision which was not relied upon at the trial or mentioned in the pleadings.

Secondly. Assuming the appellants to be right in their construction of the provisions I have been discussing and assuming the second of the provisions to be applicable, there is still, I think, an insuperable difficulty in the way of giving effect to the appellants' claim to relief in so far as it rests upon these provisions if the finding of the court of appeal be accepted, and I think it ought to be accepted, that the diversion of the electric current from the primary to the secondary wire was the result of *vis major*. Accepting that finding it results, I think, that on no admissible construction of these provisions can the company or the agents, servants and workmen of the company he held to have "caused" the damage for which reparation is claimed.

Lord Moulton in delivering the judgment of the Privy Council in *Rickards* v. *Lothian*(1), at page 278 said:—

(1) (1913) A. C. 263

Their Lordships are of the opinion that all that there is laid down as to a case where the escape is due to "*vis major* or the King's enemies" applies equally to a case where it is due to the malicious act of a third person, if indeed that case is not actually included in the above phrase. To follow the language of the judgment just recited—a defendant cannot, in their Lordship's opinion, be properly said to have *caused or allowed* the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant.

A passage in the judgment of Lord Sumner in *Charing Cross Euston and Hampstead Rway. Co.* v. *Boots*(1), was relied on in the argument as authority for the proposition that the "cause" in the juridical sense was the generation of electricity and the transmission of it through the company's wires, which was the work of the company's agents, employees and workmen; but the passage in question has obviously no reference to a case where *vis major* or the independent volition of a third person has intervened. An authority perhaps more directly in point is the judgment of the Privy Council delivered by Lord Robertson in *Dumphy's Case*(2). The injury complained of was the result of a derrick used by a building contractor being brought into contact with the overhead wires of the Montreal Street Railway Company, the current of electricity thereby diverted having killed the plaintiff's husband. Speaking for their Lordships, Lord Robertson says:

on the face of the case it is manifest that the *causa causans* of the casualty was the act of the person using the derrick.

The generation of the electricity by the respondent company which would have been harmless but for the interposition of a *novus actus interveniens* (*vis major*) ought not any more than the storing of water to be

(1) (1909) 2 K. B. 640.

(2) (1907) A. C. 454.

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regarded as the cause of the resulting harm for the purpose of assigning responsibility.

A little consideration makes it plain that no distinction can for this purpose be drawn between the case of water stored for the storer's purposes and electricity generated for his purposes. If a mischievous person opens the outlet of a storage basin, or the confining barrier is destroyed or rendered useless by some accident of nature not foreseeable amounting to *vis major*, the storer is not responsible for the ensuing damage because, as Lord Moulton says, he has neither caused the water to escape nor allowed the water to escape although it was he who constructed the storage basin and collected there water which on escaping was certain to become a destructive agency. So if he constructs a flume to carry water from his dam to his power-house and somebody breaks down his flume at a place where the water, under a high head, escaping becomes an instrument of harm, or if this happens through some operation of nature which he could not be expected to foresee or to provide against he is not responsible in absence of negligence because he has neither caused nor allowed the water to escape; so also the energy of the water flowing through his conduits operating on the machinery of his power-house having become converted into electric energy which solely by reason of the mischievous interference of a third person, or of the operation of *vis major*, escapes control, this is a result which, for juridical purposes, cannot in general be properly ascribed to the measures he has taken for the purpose of and resulting in the conversion of mechanical energy into electrical energy but must be ascribed to the agency to which its escape is immediately due.

Strictly, of course, what I have said upon this

point postulates a correspondence of meaning between "cause" as used in the provisions under consideration and "cause" as used by Lord Moulton in the passage quoted above. I think this is a legitimate reading; any broader reading of the word "cause" would, on the proposed construction subject the company affected by these provisions to a stricter responsiblity than that which would arise from the unfettered operation of the doctrine of *Rylands* v. *Fletcher*(1).

In the result the rule governing the responsibliity of the defendant company in respect of the operation of its electric lighting system, apart from special provisions in its statutes, which have no application here, is that, generally speaking, they are responsible for harm caused by negligence and not otherwise—the rule applied in *Dumphy's Case*(2) and *Roy's Case*(3).

But the important question arises:—Is the status of the appellants *vis-à-vis* the respondent company either as regards the rules governing the burden of proof, or as regards the rules governing their substantive rights, affected by the circumstance that they were customers of the respondent company; and that the injury in respect of which reparation is claimed was an injury that would not have occurred but for the connection, at their instance or by their consent, between their houses and the respondent company's system by service wires put in place for their accommodation? Dealing with the question, apart from articles 1053, 1054, 1055 C.C., I should have no difficulty in holding that the company's duty arising out of the situation, except in so far as it is modified by contract, is a duty to take proper care to protect the appellants

(1) L. R. 3 H. L. 330. (2) [1907] A. C. 454.
(3) [1902] A. C. 220.

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and their property, and proper care involves, where the consequences of neglect may in the ordinary course be expected to be very serious, the use of a high degree of knowledge, skill and diligence. That is the view which has been taken in a number of cases in Canada and the United States in which the question has come up, *Royal Electric Co.* v. *Hévé*(1); Joyce, "Electric Law," paragraph 445 *d* and *e*; and I think it is conformable to the legal principle according to which persons undertaking to perform services for others involving risk of harm from want of skill and from accidents beyond prevention by the highest skill are held generally not to be insurers but to warrant the execution of the undertaking with knowledge, skill and diligence commensurate with the gravity of the risk. The doctrine of *Rylands* v. *Fletcher*(2) is inapplicable because, apart from the effect of the statute, the risk arising from the connection between the customer's premises and the lighting company's system is a risk due to a situation created with the consent and for the benefit of the customer as well as of the company, and that risk, so long as it is not augmented by the company's negligence, is a risk which he assumes just as a passenger on a street-car assumes the risk of accident not avoidable by the exercise of proper care by the carrier. A risk arising from a situation created by common consent for the common benefit is not within the contemplation of *Rylands* v. *Fletcher*(2); *Carstairs* v. *Taylor*(3), *Blake* v. *Woolf*(4).

But the learned judges in both courts below have taken the view, and I understand the majority of the members of this court also take the view, that the

(1) 32 Can. S. C. R. 462.
(2) L. R. 3 H. L. 330.
(3) L. R. 6 Ex. 217.
(4) [1898] 2 Q. B. 426.

effect of articles 1053, 1054, 1055 C.C., is to create a presumption of fault which is a presumption of law capable of being repelled by the respondent company only by establishing that the fire in question was not due to any want of care on its part, the effect of these articles being, according to this view, that once it is shewn that the fire is the result of the escape of electricity from the respondent company's system the burden of establishing that the escape was not due to negligence on his part is cast *by law* upon the company.

Although such cannot, in view of the decisions I have mentioned, be held to be the operation of article 1054 C.C. as between a member of the public having no special relation with the company carrying on a statutory undertaking, *e. g.* a way-farer struck by a street-car, I am not aware of any decision that excludes the application of article 1054 C.C., according to whatever be the proper construction of it, for determining the reciprocal obligations and rights of the company and persons taking advantage of its services, although it would appear strange to find a rule of law putting upon a railway company the burden of proof in the issue of negligence or no negligence between it and a passenger and leaving the incidence of the burden upon a farmer whose crop is destroyed by fire resulting from the escape of sparks from an engine. I shall point out what seems to me to be a conclusive reason against the application of articles 1053, 1054, 1055 C.C. according to the appellants' construction of them to this case; but first I shall briefly discuss the appellants' contention as to the effect of them. Before going into articles 1053, 1054, 1055, C.C. it is perhaps desirable to point out in a word or two the difference in practical effect between the view, which I think is the right view, as touching

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the onus of proof resting on the appellants and the view in relation to the subject which has prevailed with the majority of the judges who have been called upon to pass upon the appellants' claims. The appellants' claims being, I repeat, according to my view, necessarily based upon an allegation that they were injured by the respondent company's negligence in respect of the custody of the electricity in their system, the burden of the affirmative of that issue is a burden which remains upon the appellants to the end; the question put to itself by the tribunal of fact at the conclusion of the whole case is,—taking all the evidence together—have the appellants established by an adequate preponderance in the weight of evidence the affirmative of the issue negligence or no negligence? The situation is well explained in the judgment of Brett, M. R. in *Abrath* v. *North Eastern Rly. Co.*(1). The subject of the burden of proof in this aspect of it is discussed in the treatise on "Evidence" in Halsbury's Laws of England, vol. 13, pp. 433 to 436, and, in a very illuminating way, in ch. 9 of Thayer's Preliminary Treatise on the Law of Evidence.

This is not to say, however, that the burden of proof, in another sense, did not shift from the appellants to the respondent company during the course of the trial. The moment the appellants established a *primâ facie* case the burden of proof was cast upon the respondent company in the sense that if no further evidence were given there would have been judgment for the appellants. The *primâ facie* case shifts the burden of proof in this sense although it does not affect the burden of establishing the issue which remains with the appellants to the end.

The appellants, as I have said, made out a *primâ*

(1) 11 Q. B. D. 440, at p. 452.

facie case the moment they proved that the fire was due to a current of excessive voltage. So to hold is entirely in conformity with authority and long practice. In *Great Western Railway Company* v. *Braid*(1), a passenger injured in a railway accident due to an embankment giving way was held to have made out a *primâ facie* case of negligence on proof of the fact that the embankment had given way; so the fact of the collision of trains constitutes a *primâ facie* case of negligence. The sufficiency of facts proved to constitute a *primâ facie* case is not determined by any rule of law of general application. The doctrine of the *primâ facie* case rests upon this—that the facts proved taken together with the failure on the part of the defendant to give any explanation justifies the inference of negligence. The doctrine of *res ipsa loquitur* rests upon that.

But the appellants having given evidence constituting a *primâ facie* case the respondent company could meet that case by proving facts which, while not establishing the non-existence of negligence, should destroy the preponderance of evidence in favour of the plaintiff. The practical effect as regards this appeal is, as I have already indicated, that the question to be determined is whether or not, on the whole of the evidence, the appellants have shewn that the fire in question was due to the negligence of the respondent company.

The other view is this: Article 1054 C.C. declares that where one person suffers harm from something in the care of another the law presumes that the harm is due to the fault of the person having care of the thing which has caused the harm, the practical consequence being, as regards the case before us, that the burden of

(1) 1 Moo. P. C. N. S. 101.

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establishing the negative of the issue negligence or no negligence is cast by law upon the respondent company the moment the origin of the fire is proved; and that at the conclusion of the case the appellants must succeed unless the tribunal is satisfied that the respondent company has established the non-existence of negligence leading to the escape of electricity.

In *Shawinigan Carbide Co.* v. *Doucet*(1), I have given my reasons in support of the view above indicated as to the construction and effect of articles 1053, 1054, 1055 C.C. which is that, except in the particular cases specified in those articles where *faute délictuelle* is the ground of the action, it must be proved and that the legal presumption of fault for harm caused by "things under one's care" arises only in those specific cases.

There appears to be very little room for dispute that such was the French common law. Admittedly this view of the effect of articles 1382, 1383, 1384, and 1385, C.N. was accepted without dissent or suggestion of dissent both by *la Doctrine* and by *la Jurisprudence* in France down to 1870.

I quote from an article by M. Saleilles (10 Rev. Trimestrielle p. 38):

> si l'on se place au point de vue de l'interprétation originaire du droit français, il est absolument certain que jusqu'aux approches des années 1861 et 1866, époque de la préparation et de la promulgation du Code Civil canadien, tout le monde admettait en France, sur l'article 1384, doctrine et jurisprudence, que la responsabilité des accidents de travail était réglée exclusivement par l'article 1382. On admettait, à tort ou à raison, que l'article 1384, en parlant des "choses que l'on a sous sa garde," n'avait fait que poser un principe qui devait trouver son application explicite dans les dispositions subséquentes des articles 1385 et 1386. C'était une pierre d'attente. M. Esmein l'a admirablement établi, et M. Planiol aussi. La doctrine de M. Esmein et de M. Planiol, justifiée ou non, est celle qui avait cours avant 1870, ce n'est pas douteux. Comment donc le législateur canadien, qui nous empruntait le texte, à peu près intégral, de notre article 1384,

(1) 42 Can. S. C. R. 281.

l'aurait-il entendu autrement qu'on l'entendait en France à ses débuts? Donc la doctrine et la jurisprudence française ne peuvent avoir de valeur pour l'interpretation du texte canadien correspondant à notre article 1384, que s'il s'agit de celles qui avaient cours avant 1870.

I also quote from MM. Colin et Capitant (Cours Elémentaire de Droit Civil Français, Vol. 2, p. 390):—

Supposons un dommage causé par une chose autre qu'un animal ou un bâtiment, par exemple, par un terrain non construit (effondrement d'une marnière, éboulement, etc.), ou par un objet mobilier (explosion de machine, chute d'un pot de fleurs, etc.). Par quelle régle va être gouvernée la responsabilité du propriétaire de ces objets?

Pendant longtemps, la jurisprudence et la doctrine se sont accordées pour déclarer qu'il y avait lieu ici à application pure et simple des principes du droit commun. Le propriétaire n'était donc passible de dommages-intérêts, que si l'on pouvait faire la démonstration d'une faute qu'il eut commise aux termes des articles 1382 et 1383 (Civ., 19 juillet 1870, D.P. 70, 1. 361, S. 71. 1. 9). Cette solution, avec la différence qui en résultait entre les conséquences de la propriété d'un animal ou d'un bâtiment d'une part, et, d'autre part, celle de la propriété d'une chose inanimée en général, paraissait d'ailleurs équitable. Et en effet, si l'on comprend l'établissement d'une présomption de faute pour les animaux, lesquels exigent une surveillance constante, ou pour les bâtiments, dont la ruine possible est particulièrement dangereuse et exige d'attentives mesures de prudence, il n'y a pas de raison de se montrer aussi sévère pour le propriétaire d'objets inanimés. Par lui-même, l'objet inanimé n'est pas susceptible de causer un dommage; il faut supposer, pour que le fait se produise, une faute de la victime, un défaut d'entretien du propriétaire, ou enfin un de ces cas fortuits qui défient la prudence humaine. Dès lors, il serait peu équitable d'attribuer *à priori* à la faute du propriétaire des accidents dont la plupart auront une autre cause.

Les choses étaient à ce point, lorsque se produisit le mouvement doctrinal, dont nous avons parlé, en faveur d'une responsabilité purement objective. C'est surtout sur le terrain des dommages causés par le fait des choses inanimés, en particulier de l'outillage industriel (et si l'on comprend l'acuité du problème à une époque où aucune législation spéciale n'existait en matière d'accidents du travail), que se porta l'effort de la doctrine nouvelle.

It was not until 1908 that the Cour de Cassation departed from the traditional French view. In this country the Quebec court of appeal (Taschereau, C. J., Bossé, Trenholme, Lavergne, Cross, JJ.) in *Canadian Pacific Railway Co.* v. *Dionne*(1), decided in 1908, expressly and formally declared as follows:—

(1) 14 Rev. de Jur. 474.

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The fact of the injury alleged having been caused by a thing under the control of the defendant, has not in law of itself the effect of placing upon the defendant the burden of proving that the injury was caused without fault on the part of the defendant or his servants.

A declaration in harmony with decisions of the same court pronounced in great numbers during the preceding 40 years.

And in the Supreme Court of Canada, in 1906, in *Paquet* v. *Dufour*(1), Mr. Justice Girourard referred to the course of the decisions in this court in the following language:—

Before closing, I wish (says the learned judge), 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 garde, il doit êtr tenu responsable des dommages qui en sont résultés pour le demandeur, à moins qu'il n'ait preuvé qu'il lui a été impossible de l'éviter."

We have so often decided in our court that proof of fault, whether by direct evidence or by presumption, rests upon the plaintiff, that it is not necessary to quote authorities.

Without entering upon an analysis of the language of the articles 1053, 1054, 1055 C.C. for which I may refer to my judgment in *Shawinigan Carbide Co.* v. *Doucet*(2), I quote two paragraphs from that judgment touching the effect of the legislation by which the Civil Code was formally declared to be law in the Province of Quebec.

A far stronger reason against excluding the pre-existing law from consideration is afforded by the terms of the enactments under the authority of which the Code came into force as law which evince very plainly the intention to declare, in articles 1053, 1054, 1055 the law as it then stood. There was first an Act of the Province of Canada (20 Vict. ch. 43) authorizing the appointment of Commissioners and directing that they should embody in the Code to be framed by them, to be called the Civil Code of Lower Canada, such provisions as they should hold to be then actually in force, giving the authorities on which their views should be based, but stating separately any proposed amendment.

(1) 39 Can. S. C. R. 332. (2) 42 Can. S.C.R. 281.

Then (the commissioners having in due course framed their report and laid it before Parliament), there was another Act (29 Vict. ch. 41) declaring a certain roll attested in the manner described in the Act to be the original of the Civil Code reported by the Commissioners as containing the existing law without amendments; directing the Commissioners to incorporate in this roll certain specified amendments eliminating and altering the provisions of it only so far as should be necessary to give effect to these amendments; and providing that the Code so altered, should, on proclamation by the Governor, have the force of law.

It hardly seems necessary to comment on the effect of this legislation. It very manifestly exhibits the intention of the legislature that the provisions found in the roll referred to were not, excepting in so far as they should be affected by the amendments specified, to effect any substantial alteration in the law then actually in force in Lower Canada. Among the provisions contained in this roll (and untouched by the amendments sanctioned), are articles 1053, 1054, 1055 C. C.; and in construing them we have therefore this clear and important guide to the intention of the legislature.

The view of the effect of article 1054 C.C. which appears to have been taken by the majority of the court below, namely, that it creates a presumption of law that harm arising from things under one's care, whether in their nature dangerous or not, is due to one's fault, which presumption can be repelled by proper and sufficient general evidence of the absence of fault. This view has not been accepted in France either in *la doctrine* or in *la jurisprudence*. A very lucid and concise account of the present state of *la doctrine* and *la jurisprudence* on this subject is given by MM. Colon et Capitant at pp. 390-391, vol. 2, of the work already referred to.

In *la doctrine* the weightiest authorities favour the theory known as *faute objective* or *risque professionel* of which the late M. Saleilles was the most eminent protagonist, the doctrine, in a word, that the incidence of responsibility in law depends upon the incidence of risk and that one ought to bear the risk of harm from things one exploits for one's own benefit. In exploiting for one's benefit *choses inanimées* one acts at one's

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peril. The course of la jurisprudence may be described in the language of MM. Colon et Capitant as follows:

On a pu croire un moment que la jurisprudence allait suivre les novateurs dans la voie qu'ils frayaient. Un arrêt de la Chambre civile du 16 juin 1896 (D. P. 97. 1. 433, S. 97. 1. 17) semblait en effet s'y engager, car il affirmait la responsabilité du propriétaire d'une machine, (d'un remarqueur), qui avait fait explosion, bien que cette explosion fut due à un vice de construction auquel il était étranger; et après cette décision autour de laquelle on mena grand bruit, on en rencontre quelques autres encore se rattachant par leurs motifs à la théorie du risque crée (Trib. Seine, 23 janvier 1903, D. P. 1904, 2. 257; Lyon, 18 janvier, 1907, D. P. 1909, 2, 245; Trib. com. Seine, 23 décembre 1911, Gax. Pal. 19 janvier 1912). L'une de ces décisions n'avait-elle pas condamné le propriétaire d'un café à indemniser un consommateur par cé seul motif que le demandeur avait été blessé par l'éclatement d'un siphon?

Mais ce courant peut être considéré aujourd-hui comme définitivement tari. La Cour de Cassation a, par plusieurs arrêts, condamné le nouveau système d'interprétation (Req. 30 mars 1897, D. P. 97. 1. 433, S. 98. 1. 65; Civ. 31 juillet 1905, D. P. 1905. 1. 532, S. 1909. 1. 143).

Neanmoins, si la jurisprudence a refusé de suivre les novateurs dans l'interprétation audacieuse qu'ils proposaient, elle n'en a pas moins subi leur influence. En effet, elle admettait autrefois, nous l'avons vu, que la victime d'un accident causé par un objet inanimé devait prouver la faute commise par le propriétaire de cet objet, ou par celui qui s'en servait. Aujourd'hui, au contraire, elle considère que l'article 1384, al. 1, crée une présomption de faute à l'égard de ce propriétaire, et, en conséquence, elle fait peser sur lui la charge de la preuve.

La jurisprudence, toujours sous la même influence se montre plus sévère; elle applique ici la même solution qu'au propriétaire ou gardien d'animaux. Il ne suffira donc pas au défendeur d'établir qu'il n'a commis ni négligence ni imprudence; il devra prouver que le dommage provient soit de cas fortuit, soit de la force majeure, soit de toute autre cause étrangère, par exemple de la faute de la victime ou de celle d'un tiers, en un mot il faudra qu'il précise le fait générateur du dommage subi par son adversaire (Req. 22 janvier, 1908, D. P. 1908, 1. 217; 25 mars 1908, D. P. 1909. 1. 73, S. 1910, 1.17; Bordeaux, 14 mars, 1911, S. 1913, 2. 257; Pau, 13 janvier, 1913, Gaz. Pal. 2 avril, 1913; Paris, 4 décembre, 1912, D. P. 1913, 2, 80, S, 1913, 2. 164 et Req., 19 janvier, 1914. Gaz Pal. 7 fevrier, 1914.) V. cependent Req. 29 avril 1913, D. P. 1913. 1. 427, exemptant le propriétaire d'un chaine ayant occasionné un accident par sa rupture, motif pris de ce qu'on n'a pu relever aucun vice de construction et "qu'il a été impossible de déterminer la cause d'un évènement qu'il ne dépendait de lui ni de prévoir ni d'éviter.)

From the point of view of verbal interpretation simply there is probably more to be said in favour of these views which have found acceptance in France than can be said for the view adopted by the Quebec Court of Appeal.

I have pointed out in the *Shawinigan Carbide Co.* v. *Doucet*(1), at pages 317 to 320, the impossibility of reading paragraph 6 of article 1054 C.C. as applying to the first paragraph of the article as well as to the particular case mentioned in paragraphs two to five. The English version is conclusively against this application of paragraph six and article 2615 C.C. requires us, where the two differ, to resort to that version which is the more conformable to *le droit commun*. The French theories above referred to both rest upon the hypothesis that the first paragraph of 1384 C.N., while not in itself establishing a principle of responsibility, indicates a principle of responsibility underlying the precise dispositions of articles 1385 and 1386 C.N.; and that, although the framers of the Code Napoleon had no thought of any such principle, it is the legitimate function of the courts to extend by analogy the supposed principle of those dispositions (harmoniously with the *ensemble* of the law in force for the time being) to new conditions as they arise. M. Saleilles in the article to which I have just referred (p. 42) uses these words:—

En réalité, les avocats et les juges n'avaient pas donné de la loi une interprétation inexacte, en l'interprétant jadis autrement qu'on ne l'interpréte aujourd'hui. Ils lui attribuaient alors, et avec raison, le sens qui ressortait des principes généraux admis autrefois par l'ensemble de la législation. Ces principes généraux se sont modifiés aujourd'hui; et, en se modifiant, ils ont influé sur le sens qu'il faut attribuer actuellement aux textes restés sous la dépendance directe de ces

(1) 42 Can. S. C. R. 281.

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mêmes principes juridiques. C'est le sens intime de la loi qui a varié, ce ne sont pas les juges.

And he adds that it is the duty of the courts to act upon their view of what the legislator would have enacted if he had envisaged the conditions of to-day. If this were a legitimate procedure much might be said for the conclusion of M. Saleilles, and much for the theory of *la jurisprudence* in France and much also it may be added for the view of the court of appeal; in truth the want of unanimity as to result (there are other theories current in France), is but the natural consequence of following a procedure which, under the name of judicial interpretation, in reality amounts to explicit judicial amendment of the law. I use this phrase because the process described by M. Saleilles is what we should unquestionably call legislation and there can be no doubt that the abrupt reversal by the Quebec court of appeal in *Doucet* v. *Shawinigan Carbide Co.*(1), of the principle of its previous judgment in *Canadian Pacific Railway Co.* v. *Dionne*(2), pronounced only a very short time before, was the direct result of French influence. I cannot understand on what principle (compatible with proper respect to judicial precedent), this court can now sanction an interpretation of article 1054 C.C. which it has again and again rejected. See *Shawinigan Carbide Co.* v. *Doucet*(3), pp. 309 and 310.

There is, moreover, I think, this complete answer to any claim under article 1054 C.C. Assuming the first paragraph of article 1054 C.C., when read with article 1055, to justify the extension of the dispositions of article 1055 to analogous cases, it is quite clear that

(1) Q. R. 18 K. B. 271. (2) 14 Rev. de Jur. 474.
(3) 42 Can. S. C. R. 281.

there is no analogy between the specific cases therein provided for and the case where as here the risk, incidence of which the plaintiff seeks to make the defendant discharge, arises out of a situation created by the common consent and for the common benefit.

As to the questions of fact, I think the judgments of the learned Chief Justice and Mr. Justice Pelletier shew satisfactorily that the appellants have failed to make out that the fires are ascribable to the negligence of the respondent company. I will add that I do not differ from the finding that the circumstances in which the high-voltage current escaped to the secondary wire constitute a case of *vis major*.

ANGLIN J.—The question for determination in these cases is the liability of the defendant company for damages occasioned by fires caused by a high-tension electric current (approximately 2,200 volts), carried on its primary wires, having passed from them to its secondary or low-voltage wires and thence into buildings of its customers fitted with a system of wiring designed to carry a current not exceeding 108 to 110 volts. It appears to be so well established that it is practically common ground that the immediate cause of connection having been established between the primary and secondary wires was the falling across them of a large branch from a near-by tree, which stood on the adjacent property of one of the defendants' customers.

In this court the plaintiffs rested their claims upon four distinct grounds:—

1st. That by the statute (58 & 59 Vict. (D.) ch. 59, sec. 13) under which they were operating, the defendant company is declared to be

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responsible for all damages which its agents, servants, or workmen cause to individuals or property in carrying out or maintaining any of its said works.

Its original Act of Incorporation (44 & 45 Vict. (Q.), ch. 71, sec. 2), provides that the company

shall be responsible for all damages which it may cause in carrying out its works;

and the works authorized by the section in which this provision is made are, *inter alia*,

to manufacture, furnish, produce, use and sell or lease light, heat and motive power in the city and district of Quebec generated from electricity and to establish, construct, &c., lines of wires, &c.

Under this legislation, it is asserted that the company is liable for damage caused by the electric current which it transmits upon its wires, without regard to any consideration of fault or negligence on its part.

2nd. That without proof of fault or negligence, absolute liability of the company is established under article 1054 C.C. upon its being shewn that the damage sued for was caused by a thing which it had under its care.

3rd. That liability under article 1054 C.C. exists at all events, because the company failed to prove that it "was unable to prevent the act which caused the damage;"

4th. That proof has been given of specific negligence or fault on the part of the company (*a*) in not having taken adequate precautions to guard against the fall of the branch which fell across and broke its wires, (*b*) in not having had its transformers grounded.

I make no allusion to other grounds of fault which were urged, either because they were not alleged in the particulars furnished, or because they were so clearly disproved that they are not open for consideration in this court.

It was so obviously unnecessary to provide expressly for liability of the company in case of fault or negligence that the explicit declarations of responsibility above quoted can scarcely have been inserted to cover that ground. There is nothing in the language of the clause in either statute which requires that it should be so restricted in its application, and it is

a settled canon of construction that a statute ought to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant. The *Queen* v. *Bishop of Oxford* (4 Q.B.D. 245, 271); *Ditcher* v. *Dennison* (11 Moo. P.C. 325, 337).

It would, therefore, seem proper to regard these clauses as intended to declare that, in empowering the company to do what would otherwise be unlawful, both the Legislature and Parliament meant to subject it to liability for injuries which might arise from the carrying out of its undertaking in cases in which the legislative authorization of such undertaking would, but for such provisions, entitled it to claim immunity. *Canadian Pacific Railway Co.* v. *Roy*(1), *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*(2). With similar clauses in legislation conferring special privileges we are not unfamiliar. *Gale* v. *Bureau*(3); *Dumont* v. *Fraser*(4). In conferring such privileges in the present instance the legislature apparently thought it reasonable to provide that its sanction should not be invoked as a shield against responsibility for any injuries to others which the exercise of those privileges might entail.

The injuries sued for were caused in carrying out or maintaining "the works," *i.e.*, the undertaking of the company. This seems to be clear from the terms of

(1) [1902], A. C., 220.
(2) [1902], A. C., 381.
(3) 44 Can. S. C. R., 305.
(4) 48 Can. S. C. R. 137.

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the original Quebec statute, wherein the furnishing of electric current for lighting purposes by means of wires is part of the works authorized by the very section in which the declaration of liability is found. Although the fall of a branch from a tree was, in a certain sense, the cause of the fires, it in reality but created the situation in which the transmission of a high-voltage current by the company, acting through its servants or workmen, along its wires in the course of carrying out its undertaking caused the damage complained of. I have found no reason for confining the effect of the clauses in question to injuries done in the course of constructing or repairing the company's lines or installation. The phrase, "carrying on and maintaining its works," or "carrying out its works," in these statutory provisions, in my opinion, covers operation as well as construction. In this respect the statute differs from 1 Edw. VII., ch. 66, under which the works had been constructed in *Dumphy's Case*(1), and a provision somewhat similar to that above quoted from 44 & 45 Vict. (Que.) ch. 71 does not appear to have been there relied upon.

Neither can I, without frittering away these legislative declarations of responsibility, regard this case as outside their purview merely because the fall of a branch from a tree was the immediate occasion of the existing danger created by the defendant company producing actual injury. On the first ground, therefore, I think the defendant liable.

I assume, that in so far as these actions are brought under article 1053 C.C., it has been rightly held that the burden of proving fault or negligence of the defendants, which rested on the plaintiffs, has not been satisfactorily discharged. They certainly failed to shew

(1) 1907 A. C. 454.

that the defendants' high-tension wires were in too close proximity to its low-tension wires, or that the distance between pins on cross-arms was not sufficiently great, and there was no evidence that these defects, if they existed, had anything to do with the cause of the fires. I am not prepared to say that the Court of King's Bench erred in holding that the plaintiffs had failed to prove actual requirements of the Canadian Fire Underwriters' Association or orders issued by the Public Utilities Commission with which the defendants had not complied, or, upon the evidence as to the safety or advisability of grounding transformers to reverse the finding of the appellate court that it was not affirmatively established that, having regard to the condition of the wiring of the houses in the neighbourhood, it was actionable fault or negligence on the part of the company not to have had its transformers grounded, or that it was negligent in not having foreseen that there was reason to apprehend that the branch which fell across its wires would do so.

The matter last mentioned, though not included in the particulars furnished was fully gone into at the trial. Whether the branch which fell actually overhung (surplombait) the defendant company's wires is a point in dispute. The trial judge apparently thought it did—the appellate judges, that it did not; and the evidence seems to support the latter view. But it appears that branches at a lower level undoubtedly did overhang the wires and it would seem reasonably certain that, when the large branch, which fell, was broken off by the weight of the ice upon it, probably aided by the action of the wind, in falling, again aided in all probability by the high wind, it glided or slid on the icy surface of these lower overhanging branches out

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from the tree towards the defendant's wires and was thus brought over and allowed to fall upon the two outer wires which it broke, the inner wire—that nearest the tree—remaining intact. Whether this occurrence was something which should have been anticipated and guarded against or ought to be regarded as a case of unforeseeable accident, or an "act of God," or the result of *vis major*, against which there is no obligation to provide, is in issue. That the storm, with its accompaniments of sleet and heavy ice formations on trees and wires and high wind, was not in itself so extraordinary that it should be regarded as unforeseeable, or as constituting *force majeure*, so that its ordinary or not improbable consequences would be something which persons in the position of the defendants would not be bound to anticipate and guard against is, I think, quite clear. But whether, having regard to its situation and the surrounding circum stances, the fall of the branch in question across the company's wires should be deemed such a consequence is a debatable point.

As to the other defects in installation suggested at the trial, as Mr. Justice Pelletier points out, the existence of some of them was not shewn, and the causal relation of others, assuming their existence, was not established. Indeed some of these grounds of negligence were raised only when evidence was being given in reply. I proceed, therefore, on the assumption that the plaintiffs failed to establish liability of the defendants under article 1053 C.C.

In considering the case presented under article 1054 C.C. several questions arise. That electricity is a thing within the purview of that article I entertain no doubt. *Sed vide* 3 Rev. Trimestrielle, pp. 1-19.

It is urged that the plaintiffs preferred their claim

only under article 1053, and that, having failed to establish negligence or fault on the part of the defendants by positive evidence, they should not be permitted to fall back upon a presumption of fault under article 1054.

The fourth paragraph of each of the declarations of the several plaintiffs contains a general charge that electric current produced by and under the control of the defendants was, by their negligence, introduced into the plaintiffs' buildings at a very high tension, much in excess of that required for purposes of illumination, and that it caused the fires which occasioned the injuries complained of. In the sixth paragraph of each declaration defective installation of the defendants' system is charged. Upon application particulars were ordered of the defects charged under the latter paragraph; but particulars of the fault or negligence alleged in the fourth paragraph were refused—apparently because that paragraph was regarded by the judge who heard the motion as merely an allegation under Article 1054 C.C. intended to cast upon the defendants the burden of proving that they could not have prevented the act which caused the damage sued for.

Mr. Justice Carroll and the learned trial judge, it is true, have expressed the view that, in making a claim under article 1054, it is sufficient to allege injury and consequent damage caused by a thing under the care of the defendant, without adding an allegation of fault or negligence. But the learned Chief Justice of Quebec, on the contrary, in a somewhat elaborate argument maintains the view that, while proof of fault is not necessary, an allegation of it in the pleadings is required. With very great respect, if a presumption of fault on the part of the defendant arises upon its

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being shewn that the injury complained of was caused by a thing under his care, I cannot understand why it should be necessary to allege more than this latter fact. But if a general allegation of fault is necessary, notwithstanding that the law presumes it, it is furnished by paragraph four, which was probably inserted to prevent difficulty should the view taken by the learned Chief Justice of Quebec prevail. In any case I agree with the learned trial judge that in making the allegation of fault contained in that paragraph the plaintiffs cannot be taken to have abandoned the advantage of their position under article 1054, but were on the contrary seeking to secure it.

While still adhering to the view which I expressed in *Shawinigan Carbide Co.* v. *Doucet*(1), at pages 342, *et seq.*, that, for reasons there stated, the sixth paragraph of article 1054 C.C. probably does not apply to the first paragraph of that article, in the present instance I proceed upon the assumption that either the sixth paragraph applies to the first as well as to the following paragraphs, or that, if not, the first paragraph is subject to a similar qualification, as had been held in regard to the corresponding article (1384) of the Code Napoleon, in which the application of the exculpatory clause, corresponding to the sixth paragraph of article 1054 C.C., to the first paragraph of article 1384 C.N. is clearly excluded. Recueil, Phily, 1909, p. 926, No. 5039.

Assuming then that the defendant company could acquit itself of liability by proving that the introduction of high-voltage current into the plaintiffs' buildings was due to a cause the operation of which it could not prevent (2 Planiol, Droit Civil, Nos. 929–30–31) I

(1) 42 Can. S. C. R. 281.

am of the opinion that it has failed to discharge that burden. While the evidence may be insufficient to enable us to say that it affirmatively establishes fault or negligence, it has, in my opinion, not been shewn that the defendants could not have prevented the occurrence of the fires in question either by grounding their transformers, by taking proper steps to secure the removal of the branch which fell or of the lower overhanging branches, which in this instance seem to have increased the danger, or by employing other means to guard their wires against the fall of the branch which broke them. It has not established that they were wholly free from fault.

Moreover, I am not satisfied that, having regard to the contractual relations between the parties and to the defendants' knowledge of the danger to buildings of their customers attendant upon high-tension wires being carried in proximity to secondary wires connected with house services when their transformers were not grounded, it was not their duty to have disconnected the premises of their customers during a storm such as the witnesses describe, and until danger from its consequences had passed, failure to perform which entails liability for resultant injury.

The defendant company invokes a provision of the contracts under which it alleges electric current was supplied to the injured premises, whereby it was stipulated that

> the company shall not be liable for damages resulting from electric current when its appliances shall have been installed according to the rules of, or approved by, the Board of Fire Underwriters.

Assuming that it has been established that this provision is binding on the plaintiffs, the defendants failed to shew installation approved by, or in conformity with, the rules of the Board of Fire Underwriters.

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While it may be that actual enforcement of the decision of the underwriters to insist upon the grounding of transformers was deferred until after the fires in question had happened, the system of the defendant company was not in conformity with the rules of the Board and its disapproval had several times been brought to the attention of the company, which had promised a year before the date of the fires to improve its installation and to meet the requirements of the underwriters. The term of the contract which the company invokes, therefore, affords no answer to the plaintiff's claim.

I would, for these reasons, allow this appeal with costs in this court and the Court of King's Bench, and would restore the judgment of the learned trial judge.

BRODEUR J.—Nous avons à décider dans ces causes-ci si l'intimée, la Quebec Railway Light Heat and Power Company, doit supporter les dommages résultant de l'incendie des propriétés de l'appelant, M. Vandry, et de M. Chateauvert.

La compagnie intimée fait l'éclairage de la ville de Québec et de ses environs. Elle fournit aux particuliers la lumière dont ils ont besoin pour leurs maisons et en vertu des contrats qu'elle fait avec ses consommateurs elle leur transmet un courant electrique d'environ 110 volts qui n'offre que peu ou point de danger d'incendie ou de chocs violents. L'installation des fils électriques dans les propriétés privées est faite par les propriétaires; mais l'intimée voit elle-même à faire dans les maisons les raccordements avec ses propres fils électriques. Au moyen d'instruments d'une précision remarquable, elle peut s'assurer et déterminer facilement et sans frais si l'installation du propriétaire est suffisante et convenable.

Afin de ne pas fournir à ses consommateurs un courant électrique plus considérable que ne le comportent ses conventions et l'usage, elle installe sur ses poteaux des transformateurs qui réduisent de 2,200 volts à environ 110 volts le courant électrique destiné à ses consommateurs.

Dans la nuit du 19 au 20 décembre, 1912, une branche de peuplier chargée de verglas, qui surplombait la ligne de l'intimée, s'est brisée, est évidemment tombée sur la ligne et a établi une jonction entre le fil qui portait 2,200 volts et celui de 110 volts. Comme résultat de cette jonction, le fil électrique qui conduisait le courant aux maisons de MM. Vandry et Chateauvert s'est trouvé chargé d'un courant de 2,200 et a allumé l'incendie qui les a détruites.

De là l'action en responsabilité par M. Vandry et par les compagnies d'assurance qui ont payé une partie des pertes qui avaient été subies lors de cet incendie.

La preuve qui a été faite dans ces causes, qui ont toutes été réunies dans une seule, est très volumineuse et bien complète et elle offre aux tribunaux l'avantage de pouvoir se prononcer sur tous les faits et les incidents de la cause.

On a tenté de circomscrire le débat et on s'est basé à ce sujet sur des subtilités de procédures et de plaidoiries. On a prétendu, par exemple, que la déclaration des demandeurs devait nécessairement restreindre le débat aux fautes particulières qui ont été spécifiquement alléguées.

Mais on oublie qu'il y a dans cette déclaration des allégations générales de négligence et de faute qui ouvrent la porte à toute preuve de négligence qui puisse être présentée. De plus, comme je viens de le dire, la preuve a été aussi complète que possible, couvre tous les faits et toutes les circonstances et par

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conséquent ce serait bien malheureux maintenant que les parties ont fait valoir tous leurs moyens tant en demande qu'en défense de les restreindre à des allégations plus ou moins spécifiques. S'il y avait nécessité, d'ailleurs, cette cour, avec les pouvoirs qu'elle a d'amender les plaidoiries, devrait le faire afin que justice complète soit rendue aux parties. Mais je considère qu'il n'est pas nécessaire d'avoir recours à cela dans les circonstances.

Voici une compagnie qui ne devait fournir à ses clients, Vandry et Chateauvert, qu'un voltage de 110. A un moment donné, le courant est porté à 2,200 et a causé l'incendie qui a eu lieu et aurait pu également causer la mort de personnes qui, à ce moment là auraient pu venir en contact avec ce courant mortel.

Il est indéniable que l'accident a été causé par un courant électrique dont elle avait la garde et elle a en vertu de l'article 1054 du code civil engagé sa responsabilité, à moins qu'elle ne prouve qu'elle n'a pu empêcher le fait qui a causé les dommages.

Il est du devoir d'une compagnie qui exploite un commerce d'une nature aussi dangereuse de prendre toutes les précautions nécessaires qour empêcher tout accident qui pourrait se produire, ainsi que cette cour l'a décidé dans la cause de *Royal Electric Company* v. *Hévé*(1).

Il est en preuve que les compagnies d'assurance ont déclaré à l'intimé à plusieurs reprises, par une correspondance qui est au dossier, que des incendies très nombreux se produisaient à Québec à raison du fait que son système n'était pas perfectionné. On lui a suggéré naturellement de mettre à ses transforma-

(1) 32 Can. S.C.R. 462,

teurs des fils électriques qui rejoindraient la terre et qui préviendraient dans une très grande mesure, sinon entièrement, ces incendies.

L'intimée a paru, à un moment donné, disposée à se rendre à ces suggestions et au printemps de 1912 elle a déclaré qu'elle n'attendait que le dégel du terrain pour pouvoir faire ces travaux.

Mais le dégel est arrivé, l'été s'est passé, rien n'a été fait; et vers le milieu de décembre, 1912, l'incendie en question était allumé. Il a fallu un ordre de la commission des utilités publiques, l'année suivante, pour forcer l'intimée à faire ces améliorations qui étaient jugées nécessaires.

Mais elle nous dit que cette mise en terre d'un fil électrique n'aurait pas produit le résultat voulu à moins que les consommateurs n'améliorent leur système à l'intérieur. Sur ce point la preuve est loin d'être certaine; mais alors pourquoi n'a-t-elle pas incité ses consommateurs à faire des améliorations voulues si elle croyait que leur système était défectueux. C'était chose facile à faire pour elle que de refuser à ces consommateurs de leur donner le courant s'ils ne voulaient pas faire les améliorations nécessaires ou jugées telles par le bureau des assureurs. C'était d'ailleurs une des conditions de son contrat avec ses consommateurs.

Ces améliorations auraient été dispendieuses et elle a préféré courir les risques d'un accident que de se rendre aux suggestions des compagnies.

Maintenant je considère que l'intimée est également responsable à raison du fait qu'elle est allée passer sa ligne à un endroit où cette dernière était susceptible d'être frappée par des branches d'arbres (art. 1053 C.C.).

Elle a prétexté force majeure.

Cette excuse ne vaut rien. Tous les hivers et plusieurs fois dans nos hivers, nous avons ces pluies

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où l'eau tombe par gouttelettes sur les arbres, s'y congèle et force les arbres à plier et les amène à se briser. C'est un cas d'occurrence si fréquente que l'on ne peut raisonnablement prétendre que les compagnies qui fournissent du pouvoir ne sont pas tenues d'en tenir compte. Laurent, vol. 16, No. 265; 4 Aubry & Rau p. 104, note; 24 Demolombe No. 560.

L'intimée devait donc dans le cas actuel protéger ses fils contre le peuplier dont une branche s'est détachée. Ces arbres, comme on le sait, se brisent facilement; et alors raison de plus pour la compagnie de se protéger contre ce danger qu'elle aurait pu facilement obtenir de faire disparaitre, mais elle n'a pas jugé à propos de le faire.

J'ai eu l'avantage de voir l'opinion de mon collèque Anglin sur la responsabilité statutaire de la compagnie intimée et j'y concours entièrement. La legislature a accordé à la compagnie intimée des pouvoirs considérables, exorbitants même du droit commun. (44 & 45 Vict. ch. 71 et 58 & 59 Vict. ch. 59.) Cette dernière en effet a le droit de venir poser ses poteaux sur les chemins municipaux, qui sont cependant la propriété des municipalités, et ce sans payer d'indemnité. Mais, d'un autre côté, si dans l'exercice de ses pouvoirs ou dans l'exploitation de son industrie si dangereuse elle cause des dommages, le statut déclare, suivant moi, qu'elle engage sa responsabilité, qu'il y ait faute ou non de sa part.

Cette législation n'est pas nouvelle. Nous la relevons dans plusieurs de nos lois. Ainsi, par exemple, le marchand de bois a le droit de se servir de cours d'eaux privés sans payer d'indemnité. Mais s'il cause des dommages par négligence ou non il engage sa responsabilité (art. 2256 S. R. Que., 1909; art. 503 Code Civil; art. 1627 S. R. Que.). *Dumont* v. *Fraser*(1). Les

(1) 48 Can. S. C. R. 137.

compagnies de chemins de fer qui incendiaient des propriétés avoisinant leurs voies étaient d'ordinaire tenues responsables de ces dommages, que leurs locomotives fussent bien ou mal construites. (Beauchamp, Code Civil, par. 175, sous l'art. 1053.) Le Conseil Privé ayant renversé cette jurisprudence et ayant décidé dans la cause de *Canadian Pacific Railway Co.* v. *Roy*(1) qu'une compagnie de chemin de fer qui aurait causé un incendie par des flammèches qui se seraient échappées de l'une de ses locomotives dans l'exploitation ordinaire de son chemin n'était pas responsable des dommages causés, le Parlement est intervenu et a déclaré dans la section 298 de l'Acte des Chemins de fer qu'il y avait responsabilité de la part de la compagnie si ses locomotives causaient un incendie, qu'il y eut négligence ou non.

Alors ce serait, suivant moi, une erreur de dire que la compagnie intimée n'est responsable que dans le cas où une faute est prouvée contre elle. Je suis d'opinion, au contraire, qu'elle est responsable dans tous les cas où elle cause des dommages, quand bien même ces dommages ne résulteraient d'aucun acte de négligence.

Je considère donc que dans les circonstances la compagnie doit être tenue responsable de l'accident qui s'est produit chez le demandeur, M. Vandry, et chez M. Chateauvert, et je considère que le jugement de la cour d'appel, qui a maintenu la défense de l'intimée, est mal fondé et que l'appel doit être maintenu avec dépens.

Appeal allowed with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondents: *Pentland, Stuart, Gravel & Thomson.*

(1) 1902 A.C. 220.

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*Feb. 8.
*March 3.

IN THE MATTER OF THE GREAT NORTHERN CONSTRUCTION COMPANY (IN LIQUIDATION).

JOHN T. ROSS (CONTESTANT).....APPELLANT;

AND

ROSS, BARRY & McRAE (CLAIMANTS).....RESPONDENTS.

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

Appeal—Jurisdiction—Winding-up proceedings—Time for appealing—Amount in controversy—Construction of statute—"Supreme Court Act," R.S.C., 1906, c. 139, ss. 46, 69, 71—"Winding-Up Act," R.S.C., 1906, c 144, ss. 104, 106—Practice—Affirming jurisdiction—Motion in court—Discretionary order by judge.

Per Fitzpatrick C.J. and Idington and Brodeur JJ. (Duff and Anglin JJ. *contra*).—The appeal to the Supreme Court of Canada given by section 106 of the "Winding-Up Act," R.S.C., 1906, ch. 144, must be brought within sixty days from the date of the judgment appealed from, as provided by section 69 of the "Supreme Court Act," R.S.C., 1906, ch. 139. After the expiration of the sixty days so limited neither the Supreme Court of Canada nor a judge thereof can grant leave to appeal. *Goodison Thresher Co.* v. *Township of McNab* (42 Can. S.C.R. 694), and *Hillman* v. *Imperial Elevator and Lumber Co.* (53 Can. S.C.R. 15), followed; *Grand Trunk Railway Co.* v. *Department of Agriculture of Ontario* (42 Can. S.C.R. 557), distinguished.

Per Duff J. (dissenting).—Under section 106 of the "Winding-up Act," the application for leave to appeal may be made after the expiration of sixty days from the date of the judgment from which the appeal is sought and, whether it be made before or after the expiration of the sixty days, lapse of time should be considered by the judge applied to and acted on by him, in the exercise of discretion, according to the circumstances of the case.

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

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Per Anglin J. (dissenting).—On such an application for leave to appeal, the provisions of section 71 of the "Supreme Court Act" apply and an extension of the time for appealing may be obtained thereunder.

Per Idington J.—There is no authority under which an application for an order affirming the jurisdiction of the Supreme Court of Canada to entertain an appeal can be made to the court; the proper and only course is by application to the registrar acting as judge in chambers. *Per* Duff J.—Although not strictly the proper procedure, the objection to such an application may be waived.

Per Duff J.—Section 106 of the "Winding-Up Act" imposes a further condition of the right of appeal over and above those imposed by sections 69 and 71 of the "Supreme Court Act"; an applicant, having obtained leave after the expiration of the time limited for appealing, is still obliged to satisfy a judge of the court appealed from that special circumstances justify an extension of time, and it is the duty of that judge to exercise proper discretion in making such an order on his own responsibility. *Attorney-General* v. *Emerson* (24 Q.B.D. 56), and *Banner* v. *Johnston* (L.R. 5 H.L. 157), referred to.

Per Brodeur J.—In the case of appeals from judgments rendered under the "Winding-Up Act" the jurisdiction of the Supreme Court of Canada is determined by section 106 of the "Winding-Up Act" and is dependent solely upon the amount involved in the judgment appealed from and not upon the amount demanded in the proceedings on which that judgment was rendered.

MOTION for an order affirming the jurisdiction of the Supreme Court of Canada to entertain an appeal from the judgment of the Court of King's Bench, appeal side, varying the judgment of the Superior Court, District of Montreal, in favour of the claimants, by reducing the total amount awarded them to $144,094.

In the course of proceedings taken under the "Winding-Up Act," R.S.C., 1906, ch. 144, for the liquidation of the Great Northern Construction Company, the respondents filed a claim for $149,721.93, which they alleged to be owing to them by the company, for $33,000 of the company's bonds and also for a large amount of common and debenture stock of the

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company. The appellant, being the holder of twenty shares in the company, contested this claim and contended that the claimants were not entitled to any amount whatever nor to rank as creditors. By the judgment of the Superior Court the claimants were awarded, for principal and interest on the first item of their claim, the sum of $102,217 and, in addition, $33,000 for their claim on the bonds, forming together a condemnation for $155,017. On an appeal to the Court of King's Bench, by judgment rendered on the 2nd November, 1915, this judgment was affirmed in respect of the first item and the judgment in regard to the bonds was varied, thus reducing the whole condemnation to $144,094.

On 10th January, 1916, the claimant applied, under the provisions of the 106th section of the "Winding-Up Act," to Mr. Justice Anglin, a judge of the Supreme Court of Canada, in Chambers, for an order granting leave to appeal from the judgment so rendered by the Court of King's Bench, and, on that application, leave to appeal was granted on terms that the usual security for costs should be given within ten days and a motion to affirm the jurisdiction to entertain the appeal brought on for hearing at the then next session of the Supreme Court of Canada. The reasons for the order so made were as follows:—

ANGLIN J. (in Chambers).—The contestant, Ross, applies for leave to appeal from a judgment rendered by the Court of King's Bench, confirming, with a modification, a judgment of the Superior Court in favour of the claimants in the course of a liquidation under the Dominion "Winding-Up Act." Upon the merits I think the issue which the contestant seeks to

raise is of sufficient importance to warrant leave being granted.

The claimants, however, assert that leave cannot be granted because section 69 of the "Supreme Court Act" applies and, the application for leave having been made after the expiry of sixty days from the date of the judgment a judge of this court has not jurisdiction to grant leave. *Goodison Thresher Company* v. *Township of McNab*(1). They also maintain that the interest of the contestant in the judgment for $109,545.10, as a shareholder of the company in liquidation against which it was rendered, is not shewn to amount to $2,000.

I am disposed to think that "the amount involved in" the proposed appeal (section 106 of the "Winding-Up Act") is to be measured by the amount of the judgment against which it is sought to appeal, because, if the appeal be wholly successful, that judgment will be reversed. If this were the only objection to the jurisdiction I should probably make the order asked for.

But the question as to the application of section 69 of the "Supreme Court Act" to appeals in winding-up cases is so important that, if at liberty to do so, I should refer this motion to the full court. That, however, I have not the power to do. I hesitate to make an order which might prove embarrassing to other members of the court who may hereafter have to deal with such applications. Should I refuse the present motion the contestant cannot proceed further in this court, as no appeal would lie from the order, and there is no provision for leave being obtained from the

(1) 42 Can. S.C.R. 694.

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court *a quo* such as is made by section 48(*e*) of the "Supreme Court Act." On the other hand should I grant leave unconditionally, upon the hearing of the appeal the court might, upon application, or *suâ sponte* hold that section 69 applies and precludes an appeal not brought within sixty days from delivery of the judgment appealed from, and the costs of printing would be lost.

Reasons may be suggested why it is desirable that there should be power in winding-up cases to grant leave to appeal after the expiry of sixty days from the pronouncing of the judgment below. The effect of that judgment may not be fully perceived until the winding-up proceedings have further developed. On the other hand it is most desirable that there should be no undue delay in liquidations.

The applicant relies upon the decision of this court in *Grand Trunk Railway Co.* v. *Department of Agriculture*(1), in support of his contention that section 69 of the "Supreme Court Act" does not apply to appeals under the "Winding-Up Act," because the right to appeal is conferred by section 106 of the "Winding-Up Act," and he contends that section 69 of the "Supreme Court Act" should be restricted in its application to cases in which the right of appeal is conferred by the "Supreme Court Act." *Grand Trunk Railway Co.* v. *Department of Agriculture*(1), however, is distinguishable in more than one respect from the case now being dealt with—notably in this, that by virtue of sub-section 7 of section 56 of the "Railway Act," appeals from the Board of Railway Commissioners are subject to the rules and practice governing appeals from the Exchequer Court.

(1) 42 Can. S.C.R. 557.

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In order to give the parties an opportunity to obtain the opinion of the court upon both questions of jurisdiction, I think the proper course will be to make an order granting leave to appeal (without prejudice —if such a saving proviso is not superfluous—to the right of the claimants to contest the jurisdiction of the court) upon the contestant undertaking to put in the usual security for costs within ten days and to launch and bring on before the court at its February sittings a motion to affirm jurisdiction. The question of the applicability of section 69 can be thus finally and satisfactorily disposed of before the expense of printing is incurred.

The costs of the present motion should be costs in the appeal.

On the 1st February, 1916, the required security was taken and acknowledged before Mr. Justice Trenholme, one of the judges of the court appealed from. On the 8th February, 1916, the present application was made to the Supreme Court of Canada.

G. G. Stuart K.C. for the motion, cited *Grand Trunk Railway Co.* v. *The Department of Agriculture of Ontario*(1); *Coté* v. *The James Richardson Co.* (2); *Robinson, Little & Co.* v. *Scott & Son*(3).

R. C. Smith K.C. contra, cited *Flatt* v. *Ferland* (4); *Kinghorn* v. *Larue*(5); *Stephens* v. *Gerth*(6); *Lachance* v. *Société de Prêts et de Placements de Québec*(7); *Toussignant* v. *County of Nicolet*(8); *Fréchette* v. *Simmoneau*(9); *Canada Mutual Loan and Investment Co. v. Lee*(10).

(1) 42 Can. S.C.R. 557.
(2) 38 Can. S.C.R. 41.
(3) 38 Can. S.C.R. 490.
(4) 21 Can. S.C.R. 32.
(5) 22 Can. S.C.R. 347.
(6) 24 Can. S.C.R. 716.
(7) 26 Can. S.C.R. 200.
(8) 32 Can. S.C.R. 353.
(9) 31 Can. S.C.R. 12.
(10) 34 Can. S.C.R. 224.

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The Chief Justice.

THE CHIEF JUSTICE.—I am of opinion that section 104 of the "Winding-Up Act" only applies to appeals referred to in sections 102 and 103 and has no application to appeals to the Supreme Court of Canada provided for by section 106. I have already so held in an application (not reported) before me some time ago under the same Act.

I am also of opinion, an appeal having been given in winding-up cases by virtue of section 43 of the "Supreme Court Act" and the "Winding-Up Act" (R. S.C., 1906, ch. 144), that sections 69 and 71 of the "Supreme Court Act" apply to this case, which sections provide as follows:—

Sec. 69.—Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from.

Sec. 71.—Notwithstanding anything herein contained the court proposed to be appealed from, or any judge thereof, may, under special circumstances, allow an appeal although the same is not brought within the time hereinbefore prescribed in that behalf.

2. In such case, the court or judge shall impose such terms as to security or otherwise as seems proper under the circumstances;

3. The provisions of this section shall not apply to any appeal in the case of an election petition.

In the case of *Goodison Thresher Co.* v. *Township of McNab*(1) it was held that where an application for leave to appeal from the Court of Appeal for Ontario, under section 48, was made, this court had no power to grant leave after 60 days have expired, although the court below had attempted by its order to extend the time for appealing to the Supreme Court. The same view was expressed by this court in the recent case of *Hillman* v. *Imperial Elevator and Lumber Co.*(2), where the leave asked for in this court was under section 37 of the "Supreme Court Act."

(1) 42 Can S.C.R. 694. (2) 53 Can. S.C.R. 15.

I think the principle of these cases must also apply to motions for leave under section 106 of the "Winding-Up Act" and as the application admittedly comes after the sixty days have expired this court has no power to grant the leave asked for.

The motion to affirm jurisdiction should be dismissed with costs.

IDINGTON J.—The appellant seeks an order affirming the jurisdiction of this court. I am unable to find any authority founded on statute, or rule having force of statute, or otherwise governing the practice of this court, or recognized jurisprudence of the court relative to practice, for such a motion being made to the court.

The reason appellant gives for such a course is that the expenses of printing case and proceeding to hearing would be heavy.

To avert that the rules numbers 1 to 5 were passed and I think should have been followed. An application to the registrar is the only means of getting an order affirming the jurisdiction. The application is there thrashed out before a competent officer in such a way that if there is any wish to appeal from his decision the parties come before the full court knowing exactly wherein the respective difficulties lie and we have then the benefit of the registrar's judgment in writing.

An opportunity is thus given each of us before the hearing to understand what is involved. This new method involves, to begin with, a waste of time to ourselves and those concerned in probably more substantial business for our consideration.

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It seems to me for this, if for no other reason, the motion should be dismissed.

There can be no harm done, however, in our expressing an opinion, now that the argument has been heard so long as it is understood the doing so is not to be adopted as a precedent.

Two questions are raised as to the jurisdiction to hear the appeal which is sought against a judgment dismissing an appeal to the Court of King's Bench in Quebec under the "Winding-Up Act."

One is that the "matter in controversy" does not amount to the sum or value of "two thousand dollars."

It seems that the appellant was recognized as having a status to represent the rights of the company in the winding-up proceedings by virtue of his being a shareholder in the company being wound up thereby. By section 85 of the Act a shareholder or creditor is put in the same class as the liquidator for the purpose of contesting claims against the company.

He was not seeking to assert any claim to recovery of his shares or the possible proceeds actually coming to him as result of the winding-up proceedings. Hence the question of the amount of his shares or right by virtue thereof to a dividend of what might become distributable amongst shareholders never was in question. How then can that consequential result of these proceedings ever be considered as a test of what is in controversy?

Nearly all the decisions cited by the respondent are in principle against this contention. Many of them, indeed the greater part of them, are founded upon a distinction between the direct and the consequential results and decide that it is the direct and not the consequential results that must govern.

For the purposes of testing this appellant's right to appeal as representing his company the matter in controversy was the claim made by the contractors against the company which was being wound up and it was resisted by the appellant standing upon the status given him by section 85.

Indeed, no court seems to have considered the question of what amount was likely to come to him.

For aught that may appear he may own the entire shares of the company or a single share.

If the appeal had been made by the contractors certainly they would not want this right of appeal tested in such a way as now contended for by them.

It is the matter in controversy that is in issue, to which we must look. Sometimes that may coincide with what an appellant personally is to reap, but not always.

Suppose the liquidator had appealed instead of this appellant surely it could not be his personal interest that is to be the test.

Yet he and the shareholders and creditors are put by section 85 on the same footing.

The next question is whether the leave to appeal was and by law must be within the sixty days limit fixed by section 69 of the "Supreme Court Act."

Clearly that is *primâ facie* the limit of our power and unless by some clear statutory extension which does not exist in the "Winding-Up Act" must govern us.

I think that the general purview of that part of the "Winding-up Act" bearing upon appeals indicates that the right of appeal must be exercised within the limits of whatever power exists in the court appealed

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to. At all events it has not expressed the contrary and hence we must act upon section 69 I refer to.

The decision of this court in the case of *Grand Trunk Railway Co.* v. *The Department of Agriculture* (1) does not touch the question raised herein.

The questions of law and jurisdiction of the Board in that case were so blended in what was submitted that if we should conclude to answer in the negative, as I did, what was submitted as question of law, then the further question allowed by a judge of this court to be appealed needed no answer.

The Board may have treated as question of law what was also in fact a question of jurisdiction. So long, however, as it chose to submit a question of law though involving a question of jurisdiction I felt we should answer it, for the Board could have so dealt with the matter as to get our opinion.

It was in such view competent for the Board to extend the time for submitting its question of law. It did so and I thought then, as appears from my opinion, they had then placed the matter in such a way as to become entitled to an answer.

In that view it was not necessary to consider the question of our jurisdiction to hear any further appeal allowed in that regard by one of ourselves.

That in fact never was in this aspect passed upon by this court.

I, therefore, conclude appellant was too late in his application to appeal.

I think the motion must be dismissed with costs.

DUFF J. (dissenting).—The proper construction of section 106 of the "Winding-Up Act" (ch. 144, R.

(1) 42 Can. S.C.R. 557.

S.C., 1906), is that it imposes a further condition on the right of appeal to the Supreme Court of Canada over and above the conditions imposed by sections 69 and 71 of the "Supreme Court Act" (ch. 139, R.S.C., 1906). So far I am in agreement with the point of view from which Mr. Smith discussed the effect of the provisions of the two statutes.

But it does not, I think, follow that the right of appeal under section 106 is subject to a time limit deduced from sections 69 and 71 of the "Supreme Court Act." The appellant must conform to the prescriptions of that Act, of course. In addition to that he must obtain leave under section 106. There is nothing expressly, and I can see no ground for holding that there is anything inferentially, imposing any restrictive condition as to the time within which the application for leave must be made. The intending appellant may apply within the sixty days or after the sixty days. Whenever the application is made, the judge is entitled to consider all the circumstances and among them, I must say, he is, I think, entitled to consider the lapse of time. Although the application be made within the sixty days I cannot, with respect, agree that it is not open to the judge to whom the application is made to refuse it on the ground of delay. It would not be easy to exaggerate the importance of expedition in winding-up proceedings and, finding nothing in the statute suggesting it, I will not suppose the legislature to have intended to exclude from the consideration of the judge the very important matter of delay on such an application.

But the intending appellant, having obtained leave, may have still another bridge to cross. If the judge of the Supreme Court has deemed it right to

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give leave after the expiration of sixty days the appellant has still to get his appeal allowed, and, in my judgment, section 71 applies in its entirety. He must satisfy the court to which application is made that there are special circumstances, and, in my judgment, the discretion of the court appealed from in respect of the allowance of the appeal is a discretion which it is its duty to exercise on its own responsibility. *Attorney-General* v. *Emerson*(1), at pages 56, 58, 59.

Where the sixty days has expired, therefore, the intending appellant must first satisfy the discretion of a judge of the Supreme Court of Canada, and having done that, he must satisfy the independent discretion of the court below that special circumstances exist justifying the allowance of the appeal notwithstanding the lapse of time.

On the whole the result is not unsatisfactory. I should have hesitated long before adopting a construction prohibiting an appeal after the expiration of sixty days; on the other hand, it is desirable that an appeal after sixty days should not be an easy thing; it is right there should be real obstacles.

I am unable to concur in Mr. Smith's construction of section 71. *Banner* v. *Johnston*(2) was decided in 1871 and all provisions relating to extension of time must be read in light not only of the decision, but of the observations of the Law Lords made in that case. The language of section 71 would in itself indeed be conclusive against Mr. Smith's contention; there is a multitude of decisions upon section 71 itself supporting that view. See Cameron S.C. Practice, pp. 436 and 437.

(1) 24 Q.B.D. 56. (2) L.R. 5 H.L. 157.

It is clear, however, that the application to have jurisdiction affirmed is premature; the jurisdiction of this court is only consummated when the security has been allowed. If the intended appellant should succeed in satisfying the appropriate court in Quebec that special circumstances exist justifying the allowance of security at this stage, then the important question would still remain whether or not the condition of section 106 that the amount involved in the appeal shall exceed $2,000 is satisfied. The time has not arrived for expressing any opinion on that point.

Strictly, the application to affirm jurisdiction ought to be made to a judge of the Supreme Court or to the registrar exercising the powers of a judge in chambers; that is an objection, however, which in my opinion can be waived and I assume that Mr. Smith does not desire to insist upon it. I think the proper disposition of the motion at present is to direct it to stand over to give Mr. Stuart an opportunity to apply for the allowance of the appeal under section 71.

ANGLIN J. (dissenting).—I understand that a majority of the court takes the view that section 69 of the "Supreme Court Act" is fatal to the right of appeal in this case. While of the opinion that that section applies because the judgment of the court of appeal is appealable under the "Supreme Court Act" as a judgment of the court of last resort in the province in a proceeding instituted in a superior court, subject, of course, to the special conditions imposed by the "Winding-Up Act," I am, for the same reason, of the opinion that section 71 of the "Supreme Court Act" also applies and that an extension of time might be obtained thereunder.

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BRODEUR J.—We have to determine whether section 69 of the "Supreme Court Act" applies to appeals in winding-up cases.

The "Winding-Up Act" contemplates that the procedure in liquidation proceedings should be summary (sec. 133, ch. 144, R.S.C., 1906), and it provides that the appeal from the court of original jurisdiction be restricted to a limited number of cases (sec. 101, ch. 144, R.S.C., 1906). In that respect there is a departure from the right of appeal exercised under the Code of Civil Procedure (arts. 43 and 44, C.P.Q.). Besides it is provided also that the leave of a judge of the court from which there is an appeal has to be secured before a case might be brought before the Court of King's Bench (sec. 101, ch. 144, R.S.C., 1906).

There would be no appeal to the Court of Review because that court is not mentioned in the "Winding-Up Act" as one of the courts to which an appeal shall lie (sec. 102, ch. 144, R.S.C., 1906), though in ordinary cases an appeal would lie to that court from any final judgment of the Superior Court.

In our "Supreme Court Act" there is no specific reference to appeals from orders or proceedings under the "Winding-Up Act."

Section 46 of the "Supreme Court Act" declares that:—

> No appeal shall lie to the Supreme Court from any judgment rendered in the Province of Quebec in any action, suit, cause, matter or other judicial proceeding unless the matter in controversy
>
> (*a*) Involves the question of the validity of an Act * * *
>
> (*b*) Relates to any fee of office, duty, rent revenue or any sum of money payable to His Majesty or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound, or
>
> (*c*) Amounts to the sum or value of $2,000.

The section adds that if the right to appeal depends upon the amount in dispute such amount shall be the amount demanded and not that recovered if they are different.

That is the code of appeals affecting the Province of Quebec. Does it apply in winding-up proceedings? I do not think so because the "Winding-Up Act" has determined, in section 106, the cases in which there would be an appeal to this court. It says:—

An appeal, if the amount involved therein exceeds $2,000 shall by leave of a judge of the Supreme Court of Canada lie to that court from

(*b*) the Court of King's Bench in Quebec.

The differences between appeals in winding-up proceedings and those in the other cases are very numerous. First, there is no appeal *de plano* as in the judgments rendered by the provincial courts. The law requires leave from a judge of this court and, in considering the application, the judge must consider whether the case involves matters of public interest or some important question of law (*Re Montreal Cold Storage and Freezing Co.; Ward* v. *Mullin*(1)).

The amount involved in the appeal and not the amount demanded should determine the jurisdiction of this court.

In cases coming from Ontario the amount involved in the appeal should be $2,000, though in ordinary cases the sum of $1,000 would be sufficient to give us jurisdiction (sec. 48, "Supreme Court Act").

We may then conclude that our jurisdiction concerning cases originating in liquidation proceedings

(1) Cout. Cas., p. 341; Cam. S.C. Prac. (2 ed.).

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should be determined by the "Winding-Up Act" and not by the "Supreme Court Act."

Now the question is raised that this appeal should not be allowed because it was not under the provisions of section 69 of the "Supreme Court Act" brought within 60 days from the date of the judgment appealed from.

We find in the "Winding-Up Act" the first part of section 104 which declares that the appeals should be regulated as far as possible according to the practice in other cases of the court appealed to. Then section 69 of the "Supreme Court Act" applies. It reads as follows:—

> Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from.

As the application for obtaining leave admittedly comes after the 60 days have expired, I come to the conclusion that we have no jurisdiction to entertain this appeal.

The motion to affirm the jurisdiction of this court should be dismissed with costs.

Motion dismissed with costs.

F. J. BATEMAN (PLAINTIFF).....APPELLANT;

AND

CORNELIUS SCOTT AND MARGARET SCOTT (DEFENDANTS).. } RESPONDENTS.

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*Feb. 1.
*March 3.

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

Appeal—Title to land—Fraudulent Conveyance—Statute of Elizabeth.

In an action to set aside a conveyance of land by the defendant to his wife as intended to defeat, hinder or delay creditors, no title to real estate is in question to give the Supreme Court of Canada jurisdiction to entertain an appeal under sec. 48 (*a*) of the Supreme Court Act. Duff and Brodeur JJ. contra.

MOTION to quash for want of jurisdiction an appeal from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial by which the plaintiff's action was dismissed.

The motion to quash an appeal from the judgment of the Appellate Division raised the single question whether or not a creditor's action to set aside a conveyance as fraudulent under the statute of Elizabeth brought in question the title to real estate and so gave the Supreme Court Jurisdiction to entertain the appeal, which in all other respects was admittedly incompetent, under section 48 subsection (*a*) of the Supreme Court Act.

G. F. Henderson K.C. for the motion referred to *Lamothe* v. *Daveluy*(1).

Chrysler K.C. contra.

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

(1) 41 Can. S.C.R. 80.

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THE CHIEF JUSTICE.—I agree with Mr. Justice Idington.

DAVIES J.—The claim of the plaintiff in this case was that a conveyance made to the defendant Margaret Scott, wife of the defendant Cornelius Scott by a third party for an alleged valuable consideration should be declared void as against the plaintiff because made for the purpose of defeating and delaying the plaintiff in the recovery of his claim against the defendant Cornelius and as being in contravention of the Statute of Elizabeth.

The trial judge found

> there was no fraud in the transaction and no intent on the part of either defendant to defeat, delay or hinder any creditor of Cornelius Scott in the recovery of any debt.

That was the real substantial question in controversy between the parties and on this finding of the trial judge he dismissed the action.

On appeal to the Appellate Division of Ontario the judgment of the trial judge was confirmed and the appeal dismissed.

The defendant now moves to quash an appeal to this court from the judgment of the Appellate Division on the ground of want of jurisdiction. The motion is made on the grounds that the claim of the plaintiff is in amount too small in itself to give jurisdiction and that the title to lands is really not directly in question though collaterally and indirectly it may be said to be so.

But the collateral effect or consequences of our judgment are not the test of our jurisdiction and the real substantial question upon which both courts passed and which was the question in controversy between the parties and on which an appeal, if allowed,

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to this court must alone turn would be the existence of a fraudulent intent to defeat creditors of Cornelius Scott by taking a conveyance of certain lands in the name of his wife. *Canadian Mutual Loan and Investment Co.* v. *Lee*(1). See also *Lamothe* v. *Daveluy*(2).

The decisions of the court below on that question of fraudulent intent in the negative settled and determined the action which was thereon properly dismissed.

Under these circumstances I do not think we should affirm our jurisdiction to hear an appeal on the ground that title to land is in question, because it is clearly only so indirectly and collaterally and the real question upon which the result of an appeal must depend is one of fraudulent intent to defeat creditors.

If the conveyance should be set aside, it would only be as against the plaintiff and other creditors of Cornelius Scott; and so far as appears, the claims of Scott's creditors are very much less than $1,000.

IDINGTON J.—I think the motion to quash ought to prevail. It has been decided more than once that these cases merely seeking execution out of lands alleged to have been conveyed to defeat creditors, involve no question of title to land or any interest therein within the meaning of sec. 48 of the "Supreme Court Act," and must exhibit a creditor's interest exceeding one thousand dollars to give this court jurisdiction in such an appeal.

I can conceive of a case founded on a creditor's right to relief, developing in its progress or defence something that in fact raised an issue where title to

(1) 34 Can. S.C.R. 224. (2) 41 Can. S.C.R. 80.

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Duff J.

land might be involved, but that does not appear in this case.

The motion should be allowed with costs.

DUFF J. (dissenting)—On principle it appears to me to be very clear that a question of title to lands arises. The question arises in this way. The action is an action brought for a declaration that the husband, the judgment debtor, had a beneficial interest in the lands, the legal title to which stands in the name of the wife, which interest is available for the satisfaction of the judgment creditor's debt. I am unable to understand on what principle it can be said that such an action does not involve a question of title to land. The analogy is only superficial between such an action and some others; an action by a creditor, for example, to set aside a conveyance of property which was intended by the debtor to pass his beneficial as well as his legal interest on the ground that the conveyance is impeachable under the statutes prohibiting preferences or an action to set aside a voluntary conveyance on the ground that the intention was to benefit the grantee at the expense of the grantor's creditors or an action to set aside a conveyance for consideration on the ground that the real object and intent was to defeat creditors although in point of fact the conveyance was intended between the parties to pass not only the legal but the beneficial title to the grantee. Such actions are not based upon an allegation that the judgment debtor has a title but that the title though vested in the grantee has been acquired by fraud and is held primarily subject to a charge in favour of creditors. A claim that land standing in the name of another is really the property of the judgment debtor stands in my opinion on a different footing.

ANGLIN J.—I concur in the opinion of Mr. Justice Davies.

BRODEUR J. (dissenting)—This is a motion to quash for want of jurisdiction.

The plaintiff asked by his declaration that the property held by the defendant's wife, Mrs. Margaret Scott, had always been the property of the husband, Cornelius Scott.

The question now is whether under section 48 of the "Supreme Court Act" we have jurisdiction to entertain the appeal.

The respondent relies on the case of *Lamothe* v. *Daveluy*(1). That case was an "*actio Pauliana*" brought to set aside the contract for sale of an immovable in Quebec and it was decided that such an action is a personal one and does not relate to a title to land so as to give a right of appeal to this court.

The *actio Pauliana* is peculiar to the Province of Quebec and though there is a great deal of divergence of opinion, it seems to be settled law that this is a personal action and not a real action. That was the basis of the decision in *Lamothe* v. *Daveluy*(1).

In the present case, the matter in controversy is whether the transfer made by the husband to his wife is valid and whether the husband should not be declared to be the absolute owner of the property. It is asked that it be declared that the deed passed between husband and wife was simulated and that virtually she is holding the property as a trustee for her husband.

It is then no more a personal action resulting from a personal right as in the *actio Pauliana;* but it is an

(1) 41 Can. S.C.R. 80.

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action concerning title to real estate and should be considered as falling under the provisions of 48(*a*).

The motion to quash should be dismissed.

Appeal quashed with costs.

Solicitor for the appellant: *E. Traver.*

Solicitors for the respondents: *Meredith & Fisher.*

THE SOUTHERN ALBERTA LAND COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

THE RURAL MUNICIPALITY OF McLEAN (PLAINTIFF)..... } RESPONDENT.

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*Feb. 1, 2.
*May 2.

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

Municipal corporation—Assessment and taxation—Exemptions—Crown lands—Allotment for irrigation purposes—Ungranted concession——Construction of statute—Words and phrases—"Land"—"Owner"—"Occupant"—Constitutional law—"B.N.A. Act, 1867," s. 125—Alberta "Rural Municipality Act," 3 Geo. V., c. 3—"Irrigation Act," R.S.C., 1906, c. 61.

Under sections 249, 250 and 251 of the Alberta "Rural Municipality Act," 3 Geo. V., chap. 3, as amended by section 30 of the statutes of Alberta, 4 Geo. V., chap. 7, a purchaser of lands for irrigation purposes, under the "Irrigation Act," R.S.C., 1906, chap. 61, entitled to possession and to complete the purchase and take title thereof, (such lands remaining in the meantime, Crown lands of the Dominion of Canada,) is an "occupant" of "lands" within the meaning of those terms as defined by the interpretation clauses of the "Rural Municipality Act," and has therein a beneficial and equitable interest in respect of which municipal taxation may be imposed and levied. Such interest is not exempt from taxation under sub-section 1 of section 250 of the "Rural Municipality Act," nor under section 125 of the "British North America Act, 1867." *Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta* (45 Can. S.C.R. 170), and *Smith* v. *Rural Municipality of Vermilion Hills* (49 Can. S.C.R. 563), applied. The Chief Justice and Duff J. dissented.

Per Fitzpatrick C.J.—Sections 250 and 251 of the Alberta "Rural Municipality Act" make no provision for the assessment and taxation of an interest held in lands exempted from taxation.

Per Anglin J.—The provisions of the Alberta "Rural Municipality Act" relating to assessment and taxation which could affect

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

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such lands as those in question deal only with interests therein other than those of the Crown and their value.

Judgment appealed from, 23 D.L.R. 88; 31 West. L.R. 725, affirmed, Fitzpatrick C.J. and Duff J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Harvey C.J. at the trial, by which the plaintiff's action was maintained with costs.

The action was to recover the amount of taxes claimed by the municipality rated upon the assessment of lands held by the company under an agreement with the Minister of The Interior for the Dominion of Canada whereby certain tracts of Dominion Crown lands were, on certain conditions, agreed to be sold to the company for irrigation purposes under the provisions of the "Irrigation Act," R.S.C., 1906, chap. 61. The company expended large sums in irrigation works upon the lands but, at the time of the assessment and the imposition of the taxes sought to be recovered, the works had not been completed according to the conditions of the agreement with the Minister and the lands had not been granted to the company but still remained ungranted Crown lands of the Dominion of Canada, subject to the agreement that they should be granted to the company upon fulfilment of the conditions as to the construction of the irrigation works and the payment of the stipulated price to be paid therefor by the company.

The issues raised on the present appeal are stated in the judgments now reported.

(1) 23 D.L.R. 88; 31 West L.R. 725.

I. C. Rand for the appellants.
Chrysler K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—The respondent, plaintiff in the action, sued the appellant as occupant of certain lands in the municipality for taxes assessed thereon for the year 1913.

The action raises various questions of importance on which I do not desire to express any opinion, confining myself to the single point which I think necessary for the decision of the case.

Chief Justice Harvey, in his reasons for judgment, says:

> It is well settled that the interest of a person in Crown lands may be taxed. It is also perfectly clear by the terms of the "Rural Municipality Act" that it is the intention to tax such interests.

I will assume the first proposition and as to the second I do not know that I am much concerned, the question being, I think, whether the intention, if such there were, has been carried out by the statute.

So far as the particular case is concerned I have come to the conclusion that there is nothing in the statute imposing on the appellant a liability for the taxes sought to be recovered.

The "Rural Municipality Act" (Alberta statutes, 1911–12, chap. 3, sec. 250), provides that in every municipality all land shall be liable to assessment and taxation with the exceptions therein mentioned, the first of these being lands belonging to Canada or to the province. Then section 251, in part:

> the assessor shall assess every person the owner or occupant of land in the municipality and shall prepare an assessment roll in which shall be set out (*a*) the name of the owner and the name of the occupant of each lot or parcel of land in the municipality which is not exempt from taxation; * * *

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The Chief Justice.

(2) Such assessment roll shall be in the form following or to the like effect.

There is nothing in this form concerning lands exempt from assessment and taxation.

It is clear, therefore, that sections 250 and 251 make no provision whatever for the assessment and taxation of exempted lands, their owners or occupants. But then section 251 has been amended by section 30 of chapter 7 of the statutes of 1913 (1st sess.). There is no change except that paragraph (*a*) of subsection 1 is repealed and, in its place, is substituted the following:

> The name of the owner of every lot or parcel of land in the municipality which is not exempt from assessment and the name of the occupant of any lot or parcel of land within the municipality which is exempt from assessment.

What may be the effect of this incongruous direction for the insertion on the assessment roll of the names of occupants of lands exempted from assessment it is unnecessary to inquire; it is sufficient to point out that by itself it is quite incompetent as a law imposing taxation on the occupants of lands which are not liable to assessment or taxation.

Section 250, which is the charging section, imposes no liability on the occupants of exempted lands and section 251 is merely concerned, pursuant to section 249, with directions to the assessor as to the manner of preparing the assessment roll.

In the "Town Act," 1911–12, ch. 2, passed on the same day as the "Rural Municipality Act" there is, in section 266, after a statement of the lands exempt from assessment the following provision:

> 3. If any land mentioned in the two preceding clauses is occupied by any person otherwise than in an official capacity the occupant shall be assessed therefor, but the land itself shall not be liable.

A similar provision to the one in the "Town Act" is to be found in section 82 of the "Village Act," 1913, ch. 5, which was passed on the same day as the Act amending the "Rural Municipality Act."

These provisions are the same as one to be found in the Consolidated Statutes of Upper Canada, ch. 55, section 9, subsection 1.

There is another argument in favour of the above conclusion to be drawn from the fact that the Act contemplates nothing but the levy of taxes upon the assessed value of land, which value is to be its actual cash value (sections 249 and 252). Chief Justice Harvey says that it is well settled that the interest of a person in Crown lands may be taxed. "*May* be taxed,"—but there is not a word in this Act about the taxation of the interest of a person in Crown lands. The interpretation of "occupant" by section 2 is of the widest character and, amongst others, includes

> any person having or enjoying in any way or to any degree or for any purpose whatsoever the use of land exempt from taxation.

If the occupant is taxed at all then no matter what his interest in such lands may be, no matter what the value of such interest may be, he is to be held liable for the full amount assessed on the cash value of the land. Whilst I am not prepared to say that the legislature could not impose such a tax without reference to the value of the taxpayer's interest, I think it would require to be done in plain and unmistakeable language such as we certainly have not got here.

Though couched in rather obscure language there are some directions evident in the "Town Act" for assessing the interest of the occupant as may be seen in section 269 and the form given in section 270.

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In the "Village Act" the difference is clearly recognized in section 84 which provides, in part,

> the secretary-treasurer shall prepare an assessment roll which shall set out (*a*) the name of the owner and in case the land is exempt from taxation under this Act, the name of the occupant thereof and, etc.; (*b*) a brief description of each such lot or parcel of land, the number of acres which it contains, the nature of the interest therein of each person assessed in respect thereof and the assessed value of such interest.

Again it is to be noted that the whole scope of the Act is dealing with the land alone. It provides for the forfeiture of lands for non-payment of taxes. There is no such provision for selling and conveying only the interest of the occupant in Crown lands as we find in the Consolidated Statutes of Upper Canada, ch. 55, sec. 138, continued through intermediate statutes to the "Assessment Act," R.S.O. 1914, ch. 195, sec. 157.

The appeal should be allowed with costs.

Mr. Justice Anglin says:

> It is in regard to lands exempt from taxation only that there is any provision for the assessment of an occupant.

This may be open to question; grammatically the words "the use of land exempt from taxation" at the end of the definition of "occupant" have no reference to the first and second classes of persons mentioned but only to the third and fourth. Section 251 provides that the assessor shall assess any person the owner or *occupier* of land in the municipality and, by the original para. (*a*), the assessor is to set out the name of the owner and the name of the *occupant* of each lot of land not exempt from assessment. It seems possible that the amending Act meant to preserve this provision of section 251 as regards the occupant of lands not exempted.

However that may be, it is clear that in the Act itself there is no express provision for assessing lands

exempted from taxation or the occupiers thereof. Then the only provision regarding such lands is the amended section 251 (*a*) and that, in itself, is quite incompetent to impose any taxation.

But apparently Mr. Justice Anglin would hold that the amendment of section 251 (*a*) necessitates a different reading of all the taxation provisions in the Act and notably section 250 which provides that

> in every municipality all land shall be liable to assessment [except]
> 1.—All lands belonging to Canada or to the province.

Here Mr. Justice Anglin would read land, as defined in section 2, para. 15, to include any estate or interest therein.

This interpretation would have had its application to the section of the Act before the amendment of section 251 (*a*), yet admittedly the Act did not originally tax exempted land, its owner or occupier.

DAVIES J.—The controversy in this appeal raises several questions. One the constitutional validity of those sections of the "Rural Municipality Act" which, it is contended, impose liability for assessment and taxes upon the "occupant," as therein defined, of land exempted from assessment and taxation; and the other whether even if *intra vires* the clauses really authorize the imposition of taxes upon an "occupant" of exempted land; and, assuming they do so, whether the defendant, appellant, is such an "occupant" under the facts stated in the record as makes it liable to be assessed and taxed for them.

Under the interpretation clause of the Act, the "owner" of lands *not exempt* from taxation and the "occupant," within the meaning of that term, of exempted lands are to be so assessed and consequently liable for the assessment.

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"Land" is defined, for the purpose of assessment and taxation, to mean

land or any estate or interest therein exclusive of the buildings or other improvements thereon

and "improvements" to mean

any increase in the value of the land caused by any expenditure of either labour or capital thereon.

Sections 249, 250 and 251 are the sections which, construed in the light of the interpretation sections, relating to the terms "owner," "occupant" and "land," have to determine the questions for our decision.

The scheme of the Act appears to be to make all lands within the province liable to be assessed and taxed at their prairie value, or value without improvements, which, not being exempt from taxation, are held by an "owner" as defined, or, being so exempt, are held or possessed or entitled to be so by an "occupant," as defined, and to make such owner or occupant as the case may be liable for the taxes so assessed.

Section 249 is as follows:

All municipal taxes shall be levied equally upon all ratable land in the municipality according to the assessed value of such land and it shall be the duty of the assessor to make the assessment of such land in the municipality in the manner hereinafter provided.

Section 250: In every municipality all land shall be liable to assessment and taxation subject to the following exemptions:

1. All lands belonging to Canada or to the province.

The other exemptions do not affect this case.

Section 251: As soon as may be in each year, but not later than the first day of July, the assessor shall assess every person the owner or occupant of land in the municipality and shall prepare an assessment roll in which shall be set out as accurately as may be—

(a) The name of the owner of every lot or parcel of land in the municipality which is not exempt from assessment, and the name of the occupant of any lot or parcel of land within the municipality, which is exempt from assesments and post office address, if known, of every such owner or occupant.

(b) A brief description of each such lot or parcel of land, the number of acres which it contains and the assessed value thereof.

(2) Such assessment roll shall be as in the form following or to the like effect or in such form as may be prescribed from time to time by the Minister:

So that by these sections "municipal taxes" are to be levied equally upon "all" *ratable land* in the municipality according to the assessed value of such land

and the assessor is bound to assess every person the owner or occupant of land in the municipality

and to prepare an assessment roll setting out, as accurately as may be, the name of every owner of every lot or parcel of land in the municipality not exempt from assessment and the name of the "occupant" of every lot or parcel which is "exempt."

The appellant company is the assignee of an agreement made, in 1906, between the Minister of the Interior of Canada and one Robins whereby the Crown agreed to sell and Robins agreed to purchase a large tract of land in Alberta at a specified price for irrigation purposes, expenditure on these works approved by the Crown to be credited on the purchase money and balance to be paid in cash.

All available lands in two defined sections were allocated by order-in-council to this agreement and the lands in question in this appeal are within one of these sections. No questions as to selection or availability are involved. At the date of the assessment in dispute about $5,000,000 had been spent by the appellant upon these lands in irrigation works and it was estimated that it would take another $2,000,000 to complete the works. Under clause 7 of this Robins agreement, provision is made entitling the purchaser

to complete the purchase and take title for any part of the lands applied for after not less than $100,000 has been expended in connection with the works.

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The purchase money was made payable in six annual instalments beginning the 1st July, 1910. Clause 10 provided that

any of the lands that remain unsold at the expiration of 15 years from the date of these presents shall revert to the Crown.

Now under the facts of this case as they appear in the record, and of which I have sketched above the merest outline, I do not entertain any doubt that the appellant at the time of the assessment complained of was an "occupant" of these lands within the meaning of that term as interpreted by the statute and to such an extent as to render it liable to be assessed and taxed in respect of them. Its rights under the Robins lease, licence or agreement from the Crown, whatever you may choose to call it, were such as to entitle it to enter upon the lands and make the irrigation improvements. As a fact it did so enter and had made an expenditure of some millions of money for these improvements.

The legal title to the land was it is true still in the Crown but the company's right to extinguish that title and obtain its patent under the agreement was clear as and when it chose to do so.

Beyond any doubt it had an equitable and beneficial interest in these lands capable of being enjoyed and enforced as against the Crown and such an interest as I cannot doubt comes within the very words of the interpretation of "lands" in the Act.

As such it seems to me to come within the decision of this court in *The Calgary and Edmonton Land Company* v. *The Attorney-General of Alberta*(1). The interest of the appellant in these lands was a beneficial one and the facts of the case, I agree with the

(1) 45 Can. S.C.R. 170.

courts below, bring it within the interpretation clause of "occupant" as above set out and within the principle upon which the *Calgary and Edmonton Land Company's Case*(1) was decided by this court. The interest of the Crown, whatever it might have been, could not of course be taxed but the beneficial or equitable title of the appellant was certainly not exempted under the "British North America Act, 1867."

It seems to me, therefore, that the only question open is whether the language of the "Rural Municipality Act" covers such a case as this and such an interest in these lands as under the agreement the defendant appellant had. I have already set out the clauses of the Act and in my judgment these clauses are comprehensive and clear enough to enable that beneficial and equitable interest of the appellant in these lands to be assessed and taxed and to impose upon the company a liability to pay them as found by the judgments appealed from.

For these reasons, I would dismiss the appeal with costs.

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

ANGLIN J.—Two questions are presented on this appeal:—

(*a*) Whether the appellant company is an "occupant" of certain lands within the meaning of the assessment clauses of the Alberta "Rural Municipality Act" of 1911-12 (chap. 3), as amended by chapter 7 of the statutes passed in the first session of 1913:

(1) 45 Can. S.C.R. 170.

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(*b*) Whether the taxation in question offends against section 125 of the "British North America Act," by which it is enacted that

> no land or property belonging to Canada * * * shall be liable to taxation.

By an agreement, made in 1906, under section 51 of the "Irrigation Act" (R.S.C., chap. 61) His Majesty the King, represented by the Minister of the Interior, agreed to sell, and the assignors of the appellant agreed to purchase 380,573 acres of land within a defined tract at the price of $3 an acre, of which $2 might be paid by crediting expenditure to be made by the purchasers on irrigation works approved by the Crown, and the balance in cash. At the instance of the company all available lands in two defined sections were allocated by order-in-council to this agreement and it was provided that the balance of the agreed acreage should be selected by the purchaser from available lands in another section. The lands in question are within one of the two former sections and their availability is not in question. The works were approved and their construction authorized under section 20 of the "Irrigation Act" on the 16th March, 1909, and at the date of the assessment in question about $5,000,000 had been spent on them and it was estimated that a further expenditure of about $2,000,000 would complete them. After the company had spent $100,000, under clause seven of the agreement, it was entitled

> to complete the purchase and take title for any part of the lands applied for.

The purchase money was made payable in six equal annual instalments, of which the first fell due on the 1st July, 1910. All land unsold on the 26th June, 1921, reverts to the Crown. There is no evidence that title to any lands had been acquired

under the seventh clause of the contract, but it is conceded that in the tracts specified there are 412,041 acres of available lands.

The appellant was assessed as "occupant" of the lands under sections 249-251 of the "Rural Municipality Act" of 1911–12, as amended by chapter 7 of the statutes passed at the first session of 1913. The material parts of the legislation, as so amended, are as follows:—

Section 2. In this Act, unless the context otherwise requires, the expression

(8) "Owner" means and includes any person who appears by the records of the Land Titles Office for the land registration district within which such land is situated, to have any right, title or interest in the land within the limits of the municipality other than that of a mortgagee or incumbrancee not exempt from taxation.

(9) "Occupant" includes the inhabitant occupier, or, if there be no inhabitant occupier, the person entitled to an absolute or limited possession; any person holding under a lease, licence, permit or agreement therefor; any person holding under an agreement of sale or any title whatsoever, and any person having or enjoying in any way or to any degree or for any purpose whatsoever, the use of land exempt from taxation. * * * *

(15) "Land" or "property" includes lands, tenements and hereditaments and, for the purpose of assessment and of taxation only, "land" means land or any estate or interest therein exclusive of the value of the buildings or other improvements thereon.

Section 249. All municipal taxes shall be levied equally upon all ratable land in the municipality according to the assessed value of such land and it shall be the duty of the assessor to make the assessment of such land in the municipality in the manner hereinafter provided.

Section 250. In every municipality all land shall be liable to assessment and taxation subject to the following exemptions:

(1) All lands belonging to Canada or to the province.

* * * * * * *

Section 251. As soon as may be in each year but not later than the first day of July the assessor shall assess every person the owner or occupant of land in the municipality and shall prepare an assessment roll in which shall be set out as accurately as may be

(a) the name of the owner of every lot or parcel of land in the municipality which is not exempt from assessment and the name of the occupant of any lot or parcel of land within the municipality which is exempt from assessment and post-office address, if known, of every such owner or occupant;

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(b) a brief description of each such lot or parcel of land, the number of acres which it contains and the assessed value thereof.

Under sub-section 15 of section 7 of the "Interpretation Act," chap. 3 of the Alberta statutes of 1906—the expression "person" includes any body corporate and politic.

The judgment of the learned Chief Justice, who tried the action, rested upon his view that the fact that

the defendant is entitled to become owner of the lands upon compliance with the terms of the purchase agreement" brings it "within the definition of the word 'occupant' in the Act," it being "perfectly clear by the terms of the 'Rural Municipality Act' that it is the intention to tax such interests.

In delivering the judgment of the Appellate Division, Mr. Justice Walsh apparently proceeded upon what he regarded as

a written admission in the record "that the defendant is the holder of the land * * * under and by virtue of the contract in question," the assignment thereof to it and the orders-in-council relating to it.

But the only admission to that effect which I can find in the record is contained in a document entitled

Facts admitted *by the plaintiff* for the purposes of the trial herein.

There is no such admission by or on behalf of the defendant.

In its statement of defence

the defendant denies that it was in 1913, or in any year, the occupant of any of the lands in the statement of claim mentioned,

and, in the document of admissions by the plaintiff, it is stated that "the defendant is not in actual occupation of the lands mentioned."

The first question, therefore, is whether upon the finding of the learned trial judge (which the documents in evidence appear to justify) that at the date of the assessment the defendant was entitled, upon compliance with the terms of its contract of

purchase, to become the owner of the lands in question, as lands definitely allocated thereto, it should be held to be a "person entitled to a limited possession," or a "person holding under an agreement of sale or any title whatsoever," or a "person having or enjoying in any way to any degree or for any purpose whatsoever, the use of land exempt from taxation."

Having regard to the terms in which "owner" is defined in the sub-section immediately preceding, and to the obvious purpose made manifest by the provisions of section 251, I have no difficulty in reading into sub-section 9, defining "occupant," immediately after the words, "absolute or limited possession," the words, "of land exempt from taxation." It is in regard to such lands only that there is any provision for the assessment of an "occupant." [Sec. 251 (*a*).]

The lands which the defendant company is entitled to acquire are within the tract for the improvement of which by irrigation its system of works is designed and approved, as the agreement itself shews and section 51 of the "Irrigation Act" (R.S.C., chap. 61) requires. The defendant company, no doubt, had the right, without taking the expropriation proceedings provided for by sections 28 and 29 of the "Irrigation Act," to enter upon and take possession of any part of the lands in question required for the construction of its works and is thus an occupant within the words of the definition,

> a person having or enjoying in any way or to any degree or for any purpose whatsoever the use of land exempt from taxation;

and also as "a person entitled to a limited possession." Having regard to the definition of "land" as meaning "lands, tenements and hereditaments and any estate or interest therein," the company is likewise a "person holding under an agreement of sale."

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A person may hold though he does not occupy. A tenant of a freehold is a person who holds of another; he does not necessarily occupy. *Rex* v. *Ditcheat* (1).

Two persons may be "holding" the same lands in distinct rights and with distinct interests. *Ward* v. *Const*(2). Under an agreement to purchase land the interest of the purchaser is "held" by him although he should have neither possession nor an immediate and unconditional right to possession; and it is unquestionably an interest in the land. *Williams* v. *Papworth*(3). The courts of Saskatchewan, in my opinion, have rightly held that the appellant was an "occupant" of land exempt from assessment within section 251 of the "Rural Municipality Act" and that its "interest therein" was assessable and liable to taxation, being "ratable land" under section 249, and "land" under section 250.

So long as the assessment is confined to the interest in the land with which the Crown has parted to such an occupant, it neither exceeds the power of

direct taxation within the province in order to the raising of a revenue for provincial purposes

conferred on the province by clause 2 of section 92 of the "British North America Act," nor conflicts with the exemption of "lands or property belonging to Canada" under section 125 of that Act. This court has so held in *Calgary and Edmonton Railway Co* v. *Attorney-General of Alberta*(4), and in *Smith* v. *Rural Municipality of Vermilion Hills*(5).

It was argued, however, that because section 249 directs the levying of taxes

upon all ratable land in the municipality according to the assessed value of such land

(1) 9 B. & C., 176, at p. 183.
(2) 10 B. & C., 635, at p. 647.
(3) [1900] A.C., 563, at p. 568
(4) 45 Can. S.C.R., 170.
(5) 49 Can. S.C.R., 563.

and section 251 (*b*) requires the assessor to state the assessed value of each lot or parcel of land, exempt or not exempt, and section 252 requires that "land shall be assessed at its actual cash value", the subject of assessment and taxation is the land itself and not merely the interest therein of the "occupant." But this construction ignores not only the provision of clause 15 of the interpretation section under which, unless the context otherwise requires, "land" may be read "interest in land," but also the facts that under section 249 only "ratable land" is subjected to taxation, and that the concluding clause of that section directs the assessor to make the assessment "in the manner hereinafter provided." There immediately follows in the charging section (sec. 250), an explicit declaration of the exemption of "all lands belonging to Canada," *i.e.*, of the interest therein of the Crown, and, in section 251, a direction for the entry, in the case of such exempted land, of the name not of the "owner" but of the "occupant" whom the assessor is to "assess" for it. Sections 249 and 251 deal with land not exempt as well as with exempted land, and there is no reason why as to the former, for which the "owner" is to be assessed, "land" should not be read as meaning "lands, tenements and hereditaments," and as to the latter, for which the "occupant" is to be assessed, as meaning an "estate or interest therein," *i.e.*, in the "lands, tenements or hereditaments." Liability is thus imposed on the occupant personally as well as upon his "interest" in the land otherwise exempted. Both are "assessed."

The intention of the legislature to provide only for the assessment of interests liable to taxation, and in nowise to impinge upon the prohibition of section 125, "B.N.A. Act," seems manifest. The statute

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being readily susceptible of a construction which will carry out that intention and thus keep it within the legislative jurisdiction of the province, that construction should certainly be given to it rather than one from which "it would follow as a necessary result that the statute was *ultra vires*." *Macleod* v. *Attorney-General for New South Wales*(1); *Llewellyn* v. *Vale of Glamorgan Railway Co.*(2); *Countess of Rothes* v. *Kirkcaldy and Dysart Water-Work Commissioners*(3).

There is nothing in the record to warrant a finding that the taxes in question have in fact been imposed on anything greater or other than the ratable interest (sec. 249) of the appellant in the land, or that anything other or greater than the assessed value of such interest (sec. 249 and sec. 251 (*b*)), which alone is ratable, the interest of the Crown being expressly declared exempt (sec. 250), has been entered upon the assessment roll. It is with an interest therein other than that of the Crown and its value only, as I read the statute, that the assessor is directed to deal in the case of land belonging to Canada.

I would, for these reasons, dismiss this appeal with costs.

BRODEUR J.—The question in this case is whether the appellant company is an occupant within the meaning of the "Rural Municipality Act" of Alberta (ch. 3, 1911–12, sec. 2).

By that Act the municipality, respondent, is empowered to levy taxes on the owners and occupants of land of that municipality. Lands, however, belonging to the Dominion of Canada are exempt from

(1) [1891] A.C. 455, at p. 459. (2) [1898] 1 Q.B., 473, at p. 478.
(3) 7 App. Cas., 694, at p. 702.

taxation. It is provided, however, that the occupant of land exempt from taxation is liable to be assessed.

The "occupant," says section 2 of that Act as amended in the first session of 1913 by chapter 7,

> includes the inhabitant occupier or if there be no inhabitant occupier the person entitled to an absolute or limited possession; any person holding under a lease, licence, permit or agreement therefor; any person holding under an agreement of sale or any title whatsoever; and any person having or enjoying in any way or to any degree or for any purpose whatsoever, the use of land exempt from taxation.

The appellant is carrying out irrigation works in the Province of Alberta under the provisions of the Dominion "Irrigation Act." The Canadian Government have agreed to sell to that company (at the price of $3 per acre) 380,573 acres within the said tract "hereinbefore described" if that number of acres is available, and if not as many acres in the said tract as are available for such sale and purpose.

In the other clauses of the agreement, the terms of payment, the construction and operation of the irrigation works, the completion of the purchase and the taking of title for any part of the lands upon certain terms are provided for.

Clause 10 provided that any of the said lands that remain unsold at the expiration of 15 years from the date of these presents shall revert to the Crown.

By a subsequent agreement, certain other lands were substituted for those above mentioned but the agreement of substitution was made subject to the same clauses as above described.

It is pretty clear that this agreement binds the Crown to sell and the defendant to buy the available lands. Those lands which are the subject of this agreement are within the area of the Municipality of McLean. The municipality, acting under the provisions of the "Rural Municipality Act," has

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assessed the land in question and claims by the present action the amount of that assessment.

Nobody will dispute the fact that the company appellant has an interest in those lands. They are under its control. It may make irrigation works upon them and can prevent anybody else from exercising that right of occupation. The company has paid instalments on the purchase price and can dispose of them in favour of settlers.

It seems to me then that the company enjoys for those purposes the use of lands which otherwise would be exempt from taxation. But by the fact of that enjoyment, by the fact that it has an agreement for the selling of those lands, it has become an occupant as described in section 2 of the "Rural Municipality Act."

The agreement for sale has vested in the appellant company an estate and property in the land and from that day as owner or occupant it became liable for assessments which could be raised in connection with the land. It got the benefit of municipal institutions and should then pay its share for the maintenance of the municipality.

Those assessments do not affect in any way the rights of the Crown because if the property had to revert to the Crown the taxation could not affect the land and could not be claimed against the Crown. That statute does not assume to impose any taxes upon any such lands as against interest of the Crown. An interest has been granted by the Crown in the lands and taxation of the person holding that interest is not taxation of the property of Canada. A provincial legislature has the right to impose taxation upon individuals by a reference to the value of land occupied by them, even though the land should be

owned by Canada. *Church* v. *Fenton*(1); *Rural Municipality of Cornwallis* v. *Canadian Pacific Railway Co.*(2); *Rural Municipality of South Norfolk* v. *Warren* (3); *Smith* v. *Rural Municipality of Vermilion Hills*(4); *Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta*(5).

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I am of opinion that the assessments claimed from the appellant company have been rightly made and that the judgment condemning them to pay those assessments should be confirmed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Laidlaw, Blanchard & Rand.*
Solicitors for the respondent: *Shepherd, Dunlop & Rice.*

(1) 5 Can S.C.R. 239.
(2) 19 Can. S.C.R. 702.
(3) 8 Man. R. 481
(4) 49 Can. S.C.R 563.
(5) 45 Can. S.C.R. 170.

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*Feb. 2.
*May 2.

THE ATTORNEY-GENERAL FOR CANADA (PLAINTIFF)..... } APPELLANT;

AND.

PIERRE GIROUX (DEFENDANT)..... RESPONDENT;

AND

ONÉSIME BOUCHARD..... MIS-EN-CAUSE.

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

Crown lands—Lands vesting in Crown—Constitutional law—"B.N.A. Act, 1867" ss. 91 (24), 109-117—Title to "Indian lands"—Surrender—Sale by Commissioner—Property of Canada and provinces—Construction of statute—"Indian Act," 39 V. c. 18—R.S.C. 1886, c. 43, s. 42—Words and phrases—"Reserve"—"Person"—"Located Indian"—Evidence—Public document—Legal maxim.

Per curiam.—The "Indian Act," 39 Vict., chap. 18, does not prohibit the sale by the Crown to an "Indian" of public lands which have, on surrender to the Crown, ceased to be part of an Indian "reserve," nor prevent an individual of Indian blood, who is a member of a band or tribe of Indians, from acquiring title in such lands. The use of the word "person" in the provisions of the "Indian Act" (39 Vict., chap. 18, s. 31; R.S.C., 1886, chap. 43, sec. 42), relating to sales of Indian lands, has not the effect of excluding Indians from the class entitled to become purchasers of such lands on account of the definition of that word in the interpretation clauses of the statutes in question.

Per Idington J.—Crown lands of the Province of Canada, situate in Lower Canada, which had not (as provided by the statute 14 and 15 Vict., chap. 106), been surveyed and set apart, as intended to be vested in the Commissioner of Indian Lands for Lower Canada, and appropriated to the use of Indians prior to the 1st July, 1867, do not fall within the definition of "Lands reserved for the Indians" in the 24th item enumerated in section 91 of the "British North America Act, 1867" and, consequently, did not pass under the control of the Government of the Dominion of Canada at the time of Confederation. In regard, therefore, to

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

the lands in question the presumption is that they then became vested in the Crown in the right of the Province of Quebec, and, in the absence of evidence to the contrary, the Attorney-General for Canada cannot now enforce any claim of title to such lands in the right of the Dominion.

Per Duff and Anglin JJ.—The order-in-council of 1869, authorizing the acceptance of a surrender, and the surrender pursuant thereto by the Indians of the "reserve" within which the lands in question are situate are public documents the recitals in which are *primâ facie* evidence of the facts stated therein (*Sturla* v. *Freccia* (5 App. Cas. 623), at pp. 643-4, referred to). Evidence is thereby afforded that the band of Indians occupied the tract of land in question as a "reserve" and the principle "*omnia præsumuntur rite esse acta*" is sufficient to justify, *primâ facie*, the conclusion that the order-in-council of 1853, respecting the constitution of the reserve, was carried out and that the occupation thereof by the Indians was legal. Consequently, the rights acquired by the Indians constituted ownership, the surrender by them to the Crown was validly made and the lands passed under the control of the Government of Canada, at the time of Confederation, in virtue of the provisions as to "Lands reserved for the Indians" in section 91 of the "British North America Act, 1867." *St. Catherine's Milling and Lumber Co.* v. *The Queen* (14 App. Cas. 46), distinguished.

Judgment appealed from (Q.R. 24 K.B. 433), affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side (1) affirming the judgment of Letellier J., in the Superior Court, District of Chicoutimi, dismissing the action.

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

G. G. Stuart K.C. and *L. P. Girard* for the appellant.

L. G. Belley K.C., for the respondent.

THE CHIEF JUSTICE.—The appellant, the Attorney-General for the Dominion of Canada, claims in this suit to have it declared that the Crown is the owner of a certain half-lot of land, being lot No. 3 of the first range, Canton Ouiatchouan, in the Parish of St. Prime and County of Lake St. John.

(1) Q.R. 24 K.B. 433, *sub nom. Doherty* v. *Giroux.*

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The Chief Justice.

In the first paragraph of the amended declaration it is stated that the Crown has always been and still is the owner of the lot No. 3. This, however, is only inaccurate drafting of which there is much in the record. There is no doubt that the claim of the Crown is only to the south-east half of lot No. 3, and it is not disputed that the respondent has a good title to the north-west half of lot No. 3. The respondent has been in possession of the whole of lot No. 3 for upwards of a quarter of a century during which time the Government has taken no effective steps to question his right to any part of the lot.

By an order-in-council, dated August 9–11, 1853, approval was given to a schedule shewing the distribution of land set apart under the statute 14 & 15 Vict., ch. 106, for the benefit of the Indian Tribes in Lower Canada. Included in this schedule was a reservation in favour of the Montagnais of Lake St. John. The half-lot in question was comprised in this reservation.

On the 25th of June, 1869, the Montagnais Band of Indians surrendered to the Crown, for sale, a portion of the reservation including lot No. 3. This land so surrendered was put up for sale and it would appear that on the 21st June, 1873, the north-west half-lot No. 3 was sold to the respondent and, on the 7th May, 1878, the south-east half-lot was sold to one David Philippe.

Under a judgment obtained by the mis-en-cause, O. Bouchard, against D. Philippe the latter's half of lot No. 3 was sold at a sheriff's sale to the respondent on the 7th March, 1889.

The Crown alleges that David Philippe was an Indian, that he was, at the time of the sheriff's sale, in possession of the land on which he had been located

by the Crown and that, consequently, the Crown still held the half-lot as "Indian Lands" and as such liable neither to taxation nor to execution.

The fallacy in this argument is in the statement that David Philippe had been located on the land; it involves the proposition that, whilst all the other lots into which the reserve had been divided were sold outright to their purchasers, this particular half-lot was not sold to the purchaser David Philippe, but that, being an Indian, he was only "located" on the land in the meaning of that term in the "Indian Act."

To shew the impossibility of supporting such a contention it is only necessary to turn to the sections in point in the statute. The Act in force on the 7th May, 1878, the date of the sale to David Philippe, was the "Indian Act, 1876" (39 Vict., ch. 18). Section 3 is as follows:—

3. The following terms contained in this Act shall be held to have the meaning hereinafter assigned to them unless such meaning be repugnant to the subject or inconsistent with the context.

(3) The term "Indian" means:

First, any male person of Indian blood reputed to belong to a particular band * * *

(6) The term "Reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians of which the legal title is in the Crown, but which is unsurrendered. * * *

(8) The term "Indian Lands" means any reserve or portion of a reserve which has been surrendered to the Crown. * * *

(12) The term "person" means an individual other than an Indian, unless the context clearly requires another construction.

By Section 5, the Superintendent-General

may authorize that the whole or any portion of a reserve be subdivided into lots.

Section 6:

6. In a *reserve* or *portion of a reserve* subdivided by survey into lots, no Indian shall be deemed to be lawfully in possession of one or more of such lots, or part of a lot unless he or she has been or shall be located for the same by the band, with the approval of the Superintendent-General.

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Section 7:

7. On the Superintendent-General approving of any location as aforesaid he shall issue in triplicate a ticket granting a location to such Indian.

Section 8:

The conferring of any such location-title as aforesaid shall not have the effect of rendering the land covered thereby subject to seizure under legal process or transferable except to an Indian of the same band.

The statute, it will be observed, makes provision for the conferring of a location-title *only on a reserve*, that is on unsurrendered lands and then by the band, not by the Crown.

Then after sections 25 and following, dealing with surrenders of reserves to the Crown, we have sections 29 and following under the caption "Management and Sale of Indian Lands." There is no suggestion in these sections, or anywhere else in the Act, that Indian lands may not be sold to an Indian.

I suppose it may well be that it would not be a common occurrence for an Indian to be a purchaser at a sale of Indian lands, but it is one thing to say the statute did not contemplate this and quite another to say that it intended to forbid it. I can imagine no reason why an Indian should not purchase such lands; there is no doubt as to his capacity to hold real estate. This is recognized by section 64, which provides that:

No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds real estate under lease or in fee simple, or personal property, outside of the reserve or special reserve, in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate.

This really disposes of the appellant's case but, out of respect for the learned judge of the Court of King's Bench who dissented from the majority of the court and one of whose points is taken up in the appellants' factum, a few words may be added.

The whole ground of the dissenting opinion is really in the following paragraph:

> Les Indiens d'une tribu localisée sur une réserve pourraient se réunir en conseil d'une manière solennelle et décider (si la majorité de la bande le voulait) de remettre tout ou partie de cette réserve à la Couronne et alors la Couronne vendrait ou disposerait de ce qu'elle reçevrait ainsi, dans l'intérêt de la tribu indienne et pour son bénéfice exclusif, mais à la condition—dont la nécessité se voit très bien—de ne jamais vendre une partie quelconque de ces réserves à des sauvages. On a même pris le soin de dire que toute "personne" pourrait devenir acquéreur de ces propriétés mais qu'un sauvage ne pourrait pas être une de ces personnes.

I am myself quite unable to appreciate the necessity or occasion for any such condition as the learned judge suggests but it is unnecessary to discuss this because, as far as I have been able to ascertain, it is purely imaginary. The judge says further on:

> Ce nommé Phillippe était un sauvage, et la loi défendait positivement qu'un sauvage pût acquérir cette propriété.

No reference is given and I know of no such prohibition, positive or otherwise.

The point taken in appellant's factum that a "person," as defined by the "Indian Act," does not include an Indian has reference to the section dealing with certificates of sale which is section 31 of 39 Vict., ch. 18 and section 42 of chapter 43, Revised Statutes of Canada. There seems to be some obscurity about this section because the marginal note which has been carried through all the amendments and revisions of the Act is "Effect of *former* certificates of sale or receipts." The section, however, seems to look to future certificates and, as I apprehend, is designed to meet the inconvenience of delay in the issue of patents. Be that as it may, the section does not provide that any "person" may purchase these lands but that an Indian may not be one of these "persons": all that it does provide is that a certificate of sale or

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receipt for money, duly registered as therein mentioned, shall give the purchaser the same rights as he would have under a patent from the Crown.

The definition of terms is, at the commencement of section 3, said to apply only when not inconsistent with the context and this is emphasized by its special repetition in the 12th item in which the word "person" is defined. I cannot think that such an accidental use of the word "person" for "purchaser" or any other word to indicate him could possibly be held to involve by inference a positive law against an Indian becoming a purchaser for which prohibition there is no other warrant. I think in such case the context would clearly require another construction.

But this is not all; the appellant has assumed that the case is governed by the "Indian Act," chapter 43 of the Revised Statutes of 1886, but this is not so, and when we look at the "Indian Act" of 1876 we find that the word "person" does not occur at all in the extract quoted by the appellant which sets forth what the certificate of sale or receipt for money shall entitle the purchaser to. The word used is "party" shewing conclusively that the legislature had no intention, even by an inference through the interpretation section, to prevent the acquisition by an Indian of Indian lands put up for sale.

The word "party" is several times used when distinctly intended to include both "persons" and "Indians." See sections 12 and 14.

This substitution in the revised statute of the word "person" for the word "party" is an instance of the danger attending such changes in the revision of the statutes. Obviously the revisers had no idea of enacting an important law by the change they made but regarded it simply as a linguistic embellishment;

it has, however, misled two of the judges of the Court of King's Bench into finding a positive law against the sale of Indian lands to an Indian.

At the hearing I was considerably impressed with the argument that, even if there had never been a valid sale to David Philippe, the transactions between Euchère Otis, the local agent of the Superintendent-General, and the respondent constituted a sale to the latter which was also confirmed by the Department of Indian Affairs. If, however, the views that I have previously expressed are correct it is unnecessary to consider this point further. If the sale to David Philippe, in 1878, was good, the Crown had nothing left to grant to Giroux in 1889.

Judge Pelletier, delivering the dissenting judgment in the Court of King's Bench, says that he has endeavoured to find in the record the necessary grounds for confirming the judgment, since such confirmation (if it could be legally given) would seem to him more in accordance with equity. With this view I agree and it is therefore satisfactory to be able to conclude that the judgment is in conformity not only with equity in its most general meaning but also with the law.

The appeal should be dismissed with costs.

IDINGTON J.—The appellant seeks to have the Crown declared the proprietor of part of a lot of land in Quebec and respondent removed therefrom and ordered to account for the fruits thereof for the past twenty-six years.

The circumstances under which the claim is made are peculiar and some novel questions of law are raised. Much diversity of judicial opinion in the courts below seems to exist relative to some of these questions.

To put the matter briefly, the appellant claims that the land in question is part of a tract of land known

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as an "Indian Reserve," which had become vested by virtue of certain legislation in the Crown, in trust for a tribe of Indians; that part of it was thereafter surrendered by the tribe to the Crown for purposes of sale for the benefit of said tribe; that this part of the lot now in question was in course of time sold to an Indian of said tribe; that he paid five 25/100 dollars on account of the purchase; that thereafter, under a judgment got against him, the land was sold by the sheriff to respondent for $500; that thereupon he paid to the Indian Department $164 as the balance of the purchase-money due the Crown, and procured the receipt therefor, which appears hereinafter, from the local sales agent of the Indian Department; that he then went into possession and improved the land and has remained so possessed ever since till, according to assessed values, it has risen from being worth only $500 in 1889, when respondent entered, to be worth $3,200, in 1913, when this litigation was pending; that the Indian purchaser was incapacitated by statute from buying lands in a "Reserve"; and that the sheriff's sale was, as part of the result, null and void and hence that respondent got nothing by his purchase.

To realize the force and effect of these several allegations we must examine the statutes upon which the rights of the Indians rested, their powers of surrender thereunder, and the effect of the "British North America Act" under and by virtue of which the claim of the appellant is asserted.

The Parliament of Old Canada, by 14 & 15 Vict. ch. 106, enacted:

> That tracts of land in Lower Canada, not exceeding in the whole two hundred and thirty thousand acres, may, under orders-in-council to be made in that behalf, be described, surveyed and set out by the Commissioner of Crown Lands, and such tracts of land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian Tribes in Lower Canada, for which they shall be

respectively directed to be set apart in any order-in-council, to be made as aforesaid, and the said tracts of land shall accordingly, by virtue of this Act, and without any price or payment being required therefor, be vested in and managed by the Commissioner of Indian Lands for Lower Canada, under the Act passed in the session held in the thirteenth and fourteenth years of Her Majesty's Reign, and intituled, *An "Act for the better protection of the Lands and Property of the Indians in Lower Canada."*

In the last mentioned Act, chapter 42 of 13 & 14 Vict., there is enacted:

It shall be lawful for the Governor to appoint from time to time a Commissioner of Indian Lands for Lower Canada in whom and in whose successors by the name aforesaid all the lands or property in Lower Canada which are or shall be set apart, or appropriated to or for the use of any tribe or body of Indians, shall be and are hereby vested in trust for such tribe or body and who shall be held in law to be in the occupation and possession of any lands in Lower Canada actually occupied or possessed by any such tribe or body in common or by any chief or member thereof or other party for the use or benefit of such tribe or body and shall be entitled to receive and recover the rents issues and profits of such lands and property, and shall and may, in and by the name aforesaid, be subject to the provisions hereinafter made, exercise and defend all or any of the rights lawfully appertaining to the proprietor, possessor or occupant of such land or property.

In the evidence in the case there is a certified copy of an order-in-council of August, 1853, which reads as follows:—

On the letter from the Honourable Commissioner of Crown Lands, dated 8th June, 1853, submitting for approval a schedule shewing the distribution of the area of land set apart and appropriated under the statute 14 & 15 Vict., ch. 106, for the benefit of the Indian Tribes in Lower Canada.

The Committee humbly advise that the said schedule be approved and that the lands referred to be distributed and appropriated as therein proposed.

This is vouched for by a certificate of the Assistant-Commissioner of Crown Lands, in 1889.

The schedule referred to in the said order-in-council does not appear in evidence. Neither does the letter.

There does, however, appear a schedule in the case, certified by the same Assistant-Commissioner of Crown Lands and of same date as last mentioned certificate. This on its face cannot be the schedule referred to in said order-in-council. It is as follows:—

SCHEDULE

Shewing the distribution of the area of land set apart and appropriated under the Statute 14th and 15th Vict., Ch. 106, for the benefit of Indian Tribes in Lower Canada.

County	Township or Locality.	No. of Acres.	Description of Boundaries.	Names of the Indian Tribes.	Remarks.	
	Peribonca River.	16,000	A tract five miles on the River Peribonca, north of Lake St. John.	Montagnais of Lake St. John and Tadoussac.	Indians having their hunting grounds along the Saguenay and its tributaries.	Surveyed. Exchanged for a tract on the west shore of Lake St. John. Surveyed.
Saguenay	Metabetchouan	4,000	The ranges 1st and C. south of Lake St. John. (And other lands)			

Certified a true copy of the original of record in this Department.

(Sgd.) E. E. TACHÉ,
Assist.-Commissioner,
Department of Crown Lands, Quebec, 30th April, 1889.

Crown Land Department, Toronto, 23rd February, 1858, Ind.
(Sgd.) JOSEPH WAUHEBE, P.L.

I may remark that the marginal note

Surveyed. Exchanged for a tract on the west shore of Lake St. John. Surveyed.

cannot have formed part of an order-in-council in 1853. That note is something evidently written in after the date of the order-in-council and I infer has been a note made by someone in reference to an exchange proposed on 4th September, 1856, to which I am about to refer.

Who wrote it? When was it written? By what authority?

The certificate seems as presented in the case to be placed higher up than the note at left hand side and signed by Mr. Wauhebe. It is probable, however, the certificate was intended to present this note as part of the original record purported to be certified to.

What then does the date signify in this note? It is of February, 1858. Who was Mr. Wauhebe? What office did he fill? What was the purpose of the extract as it left his hands? Was the marginal note part of what he seems to be certifying to?

The importance of a definite answer to these queries and all implied therein becomes apparent when we find that the title of the Crown, as represented by appellant, depends upon the effect to be given the most indefinite terms of an order-in-council of the 4th September, 1856, which is as follows:—

On the application of the Montagnais Tribe of Indians of the Saguenay, thro' David E. Price, Esq'r, M. P. P. for the appointment of Mr. Georges McKenzie as interpreter and to distribute all moneys or goods given to the Tribe; and for the grant of a tract of land on Lake St. John, commencing at the River Ouiatchouanish, to form a township of six miles square; also, that the grant of £50 per annum, may be increased to £100, and continue annually.

The report from the Crown Land Department dated 25th July, 1856, states that the tract of land set apart for the Montagnais Indians, lies in the Township of Metabetchouan, west side of the river of that name and that this land, together with the tract at Peribonca, north

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side of Lake St. John, are still reserved for those Indians, but that as they appear desirous of obtaining a grant of the land at Pointe Bleue, on the western border of Lake St. John, there appears no objection to an exchange.

The Committee recommend that the exchange be effected and the grant made accordingly.

Certified,

(Sgd.) WM. H. LEE,
C. E. C.

To the Supt.-Gen'l Indian Affairs,
etc., etc., etc.

Certified a true copy.
DUNCAN SCOTT.
Deputy Superintendent-General of Indian Affairs

There is nothing in the case to explain what was done pursuant to this order, and when, if anything ever was done. There is nothing in the printed case shewing any definite survey ever was made of the lands thus recommended to be given in exchange for the lands which had been allotted to some Indians.

The Act of 14 & 15 Vict., ch. 106, makes it clear by the above quotation therefrom that orders-in-council setting apart land for the use of Indians should be described, surveyed and set out by the Commissioner of Crown Lands, and that only in such event can such tracts of land be considered as set apart and appropriated for the use of the Indians.

Again, it is clearly intended by the earlier enactment of 13 & 14 Vict. that the lands intended to be vested in the Commissioner of Indian Lands are such as have been set apart or appropriated to the use of Indians. When we consider that the lands to be so vested by virtue of those Acts are to be only lands which have been surveyed and set apart by the Commissioner of Crown Lands, it is very clear that something more than an order-in-council, such as that produced, merely approving of the proposed scheme of exchange, was needed to vest lands at Point Bleue in the Commissioner of Indian Lands.

Yet, strange to say, there is nothing of the kind in the case or anything from which it can be fairly inferred that the necessary steps ever had been taken.

Counsel for the appellant referred to a blue print in the record; and I understood him to suggest it was made in 1866.

Examining it, I can find no date upon it; but I do find another plan purporting to be a survey made by one Dumais, P. L. S., in 1866. Probably it is by reference thereto he fixed the date of the blue print, if I understood him correctly.

This latter plan has stamped upon it the words "Department of Indian Affairs, Ottawa, Canada"; and inside these, set in a circle, are the words "Survey Branch, True, Reduced Copy, W. A. Austin, 18.6.00." I infer that probably the latter plan is but a reduced copy of the former and that both refer to some survey made in 1866.

So far as I can find from the case, or the record from which the case is taken, the foregoing presents all there is entitling appellant to assert a title in the Crown on behalf of the Dominion.

Clearly the order-in-council recommending an exchange, without more, furnishes no evidence of title.

It might be said with some force, but for the constitutional history of Canada involved in the inquiry, that what we do find later on furnishes something from which after such lapse of years some inferences might be drawn. There are two difficulties in the way. All that transpired after the 1st of July, 1867, when the "British North America Act" came into force, can be of no effect unless and until we have established a state of facts, preceding that date, which would enable the "British North America Act" by its operation to

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give control of the said lands to the Crown on behalf of the Dominion.

By section 91, sub-section 24 of said Act, one of the subject matters over which the Dominion Parliament was given exclusive legislative authority was "Indians and Lands reserved for Indians."

The question is thus raised whether or not the lands in question herein fall definitely within the term "Lands reserved for Indians."

The Dominion Parliament, immediately after Confederation, by 31 Vict., ch. 42, asserted its legislative authority over such lands as reserved for Indians.

All that took place afterwards relative to the lands in question can be of no effect in law unless the alleged reserve had been duly constituted on or before the 1st July, 1867.

It seems impossible on such evidence as thus presented to find anything bringing the lands in question within the scope of and under the operation of the "British North America Act."

But there is another difficulty created by the enactment, in 1860, by the Parliament of Old Canada of 23 Vict., ch. 151, sec. 4, which provides as follows:—

> 4. No release or surrender of lands reserved for the use of Indians, or of any tribe or band of Indians, shall be valid or binding except on the following conditions.

This is followed by two sub-sections which specify the steps which must be taken to enable a surrender to be made. It is to be observed that this was passed within three years and ten months from the order-in-council recommending the exchange made of the lands on the Peribonca and Metabetchouan rivers held as reserves for the Indians in question.

If the survey and setting apart contemplated by the proposed exchange was not made and fully com-

pleted by the 30th June, 1860, when the bill, which had been reserved by the Governor in May, was assented to, the completion of that exchange would require the due observance by the Indians of the form of surrender imperatively required by the last mentioned Act.

There is nothing to indicate this ever was complied with. Hence surveys made in 1866, or any time after 30th June, 1860, cannot help without evidence of such compliance.

There is no evidence of any Indians in fact having been found on the Pointe Bleue reservation before the year 1869.

If one had to speculate he might infer something took place between 1866 and 1869. But we are not at liberty do do so, or found a judgment herein for appellant, without evidence or only upon the merest scintilla thereof.

The appeal therefore fails in my opinion. I think the distinction claimed by Mr. Stewart to exist between reserves duly constituted under the Acts above referred to, whereby the land became vested in commissioners in trust, and such reserves as involved in the case of *St. Catherine's Milling and Lumber Company* v. *The Queen*(1), and some other cases referred to, was well taken.

But, as this case stands, there being no evidence of the land having been duly vested before 1st July, 1867, in commissioners in trust, or otherwise falling within the operation of the "British North America Act," section 91, sub-section 24, the presumption is in favour of the land being vested in the Crown on behalf of Quebec.

(1) 14 App. Cas. 46.

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Assuming, for argument's sake, that there is any evidence upon which to find the land vested in the Crown on behalf of the Dominion and that there is evidence of a sale by the Crown to David Phillippe, upon which he paid only five 25/100 dollars, how does that help the appellant?

Admitting the invalidity of the sale and nullity of the sheriff's sale, and discarding both as null, there is evidence which goes far to establish the recognition by the Crown of the respondent as the purchaser. The local agent gave respondent the following receipt:—

Roberval, Pointe Bleue,
22 juin, 1889.

$164.32.

Reçu de M. Pierre Giroux la somme de cent soixant et quatre piastres et 32 cents, en payement du ½ lot S. E. No. Rang 1er. du Township Ouiatchouan suivant instruction de Dep. et avec contrat de Vente pour le dit ½ lot.

L. E. OTIS, A.S.

And the Department of Indian Affairs, at Ottawa, set down in its books a recognition of respondent as purchaser.

It would have been, I incline to think, quite competent for the Crown under all the circumstances, and without any detriment either to the trust or anything else, to have taken the position in 1889, as may be inferred was done, that the said receipt and entry in the books should stand forever as a final disposition of the affair.

The reasons against such a course of action being taken by the Crown were of rather a technical character; even assuming Phillippe was debarred from buying, upon which I pass no opinion.

Under the law as it has long existed there was the possibility of recognizing any Indian qualified to be enfranchised and thereby beyond doubt entitled to

become a buyer. It may be inferred even at this distance of time that if the questions now raised had, at the time when respondent was set down in the books of the department as purchaser of the lands in question, been viewed in light thereof and the foregoing circumstances and especially having regard to the fact that, in any event, Phillippe alone was to blame, and had no more substantial grievance at least none worth more than $5.25 to set up, and seeing respondent had contributed $500 to pay his debts and paid practically the whole purchase money to the Crown, no harm would have been done by letting the recognition of respondent stand.

I must not be understood as holding that there cannot be discovered abundant evidence to cover the very palpable defects I point out in the proof of title adduced herein.

This is not one of the many cases wherein probabilities must be weighed.

It is upon the record as it presents the title to the lot in question that we must pass. Fortunately the result does justice herein even if the result of blunders in failing to produce evidence which may exist.

The appeal must be dismissed with costs.

DUFF J.—The action out of which this appeal arises was brought in the Superior Court for the District of Chicoutimi, in the Province of Quebec, by the Attorney-General of the Dominion on behalf of the Crown claiming a declaration that a certain lot of land was the property of the Crown and possession of the same.

The three questions which it will be necessary to discuss are:—

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First.—Was the lot in question within the limits of an Indian Reserve constituted under the authority of 14 & 15 Vict., ch. 106?

Second.—If so, is the title vested in His Majesty in right of the Dominion of Canada or has the Attorney-General of Canada, on other grounds, a title to maintain the action?

Third.—Was a professed sale of the lot made in 1878 to one David Philipe, member of the Montagnais tribe by an agent of the Department of Indian Affairs, a valid sale?

I shall first state the facts bearing upon the first and second of these questions. On the 9th of August, 1853, an order-in-council was passed by which certain tracts of land were severally appropriated for the benefit of the Indian tribes in Lower Canada under the authority of the statute above mentioned. Two tracts were set apart for the benefit of the Montagnais Band, one on the Metabetchouan and one on the Peribonca river in the Saguenay district. A few years afterwards, on the request of the tribe, the Governor in Council sanctioned an exchange of the Peribonca tract for a tract at Pointe Bleue, Ouiatchouan, on the western border of Lake St. John. In August, 1869, the Governor-General in Council, by order, accepted what professed to be a surrender by the Montagnais Indians of the reserve constituting the Township of Ouiatchouan which admittedly is the tract of land that the order-in-council of 1851 authorized to be substituted for the Peribonca Reserve. In view of the contention that the exchange was never effected it is desirable to set out this order-in-council and the surrender in full. They are as follows:—

Copy of a Report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor-General in Council on the 17th August, 1869.

The Committee have had under consideration a memorandum dated 3rd August, 1869, from the Hon. the Secretary of State submitting for acceptance by Your Excellency in Council under the provisions of the 8th section of the Act, 31 Vict., Chap. 42, a surrender bearing date the 25th of June, 1869, executed at Metabetchouan, in the District of Chicoutimi, by Basil Usisorina, Luke Usisorina, Mark Pise Thewamerin and others, parties thereto as chiefs and principal men of the Band of Montagnais Indians, claiming to be those for whose benefit the reserve at Lake St. John, known as the Township of Ouiatchouan, was set apart, executed in the presence of Rev'd Dominique Racine, authorized by the Hon. the Secretary of State to receive said surrender and in that of the Hon. Mr. Justice Roy, Judge of the Superior Court in the District of Chicoutimi, such surrender conveying their interest and right in certain lands on the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th ranges of the said Township of Ouiatchouan, indicated on the copy of a map by provincial surveyor P. H. Dumais, dated A.D. 1866, attached to the said surrender and vesting the lands so surrendered in the Crown in trust to sell and convey the same for the benefit of the said Indians, and their descendants, and on condition that the moneys received in payment for the same shall be placed at interest in order to such interest being periodically divided among the said Montagnais Indians.

The Committee advise that the surrender be accepted and enrolled in the usual manner in the office of the Registrar-General.

Certified,

Certified a true copy. (Sgd.) Wm. H. Lee, Clk. P. C.

DUNCAN SCOTT,
Deputy Superintendent-General of Indian Affairs.

Surrender by the Band of Montagnais Indians for whom was set apart the Reserve of the Township of Ouiatchouan, in the Province of Quebec, to Her Majesty Queen Victoria, of their lands in the Indian Reserve there, as described below, to be sold for their benefit.

KNOW ALL MEN that the undersigned Chief and Principal Men of the above mentioned band living on the above mentioned reserve, for and acting on behalf of our people, do hereby remise, release, surrender, quit-claim and yield up to our Sovereign Lady the Queen, Her Heirs and Successors forever, all and singular those certain parcels or tracts of land situated in the Dominion of Canada and in that part of the said Province of Quebec, being composed of concessions one, two, three, parts of four, five, six and the whole of seven and eight, in the said Township of Ouiatchouan, as described and set forth in the map or plan hereunto annexed.

To have and to hold the same unto Her said Majesty the Queen, Her Heirs and Successors forever, in trust, to sell and convey the same to such person or persons and upon such terms as the Government of the said Dominion of Canada shall or may deem most conducive to

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the interest of us, the said Chief and Principal Men and our people in all the time to come and upon the further condition that the moneys received from the sale thereof shall, after deducting the usual proportion for expense of management, be placed at interest, and that the interest money so accruing from such investment shall be paid annually, or semi-annually to us and our descendants. And we the said Chiefs and principal men of the band aforesaid do, on behalf of our people and for ourselves, hereby ratify and confirm and promise to ratify and confirm whatever the Government of this Dominion of Canada may do or cause to be lawfully done in connection with the disposal and sale of the said lands.

In WITNESS THEREOF, the said Chiefs and principal men have set our hands and affixed our seal unto this instrument in the said Province of Quebec, at Post Metabetchouan. Done at our Council-House this twenty-fifth day of June, in the year of our Lord one thousand eight hundred and sixty-nine.

Signed, sealed and delivered in the presence of:

D. ROY,

Judge of the Superior Court and of the District of Chicoutimi.

Signed by the Chief and thirty-six other Indians, members of the Band.

Since the acceptance of this surrender the lands have been dealt with by the Department of Indian Affairs as lands surrendered under the provisions of the "Indian Act" and held by the Crown under that Act.

First, then, of the contention that the Ouiatchouan Reserve was never lawfully constituted. The order-in-council and the surrender registered pursuant to the order-in-council constitute, in my judgment, together, a public document within the meaning of the rule stated in Taylor on Evidence, 1769*a*, and the recitals in this document are, therefore, *primâ facie* evidence of the facts stated. (See *Sturla* v. *Freccia et al.* (1) at 643-4). Evidence is thereby afforded that the Montagnais Band of Indians did occupy this tract of land as a reserve and the principle *omnia præsumuntur rite esse acta* is sufficient to justify, *primâ facie*, the conclusion that the order-

(1) 5 App. Cas. 623.

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in-council was carried out and that their occupation was a legal one.

The second question depends upon the character of the Indian title to this reserve at the time the "British North America Act" came into force. If at that time there was vested in the Crown in right of the Province of Canada an interest in these lands which properly falls within the description "land," as that word is used in section 109 of the "British North America Act," or within the word "property" within the meaning of section 117, then that interest (as it is not suggested that section 108 has any application), passed to the Province of Quebec. It is necessary, therefore, to consider the nature of the Indian title and, as that depends upon the meaning and effect of certain parts of chapter 14, C.S.L.C., it will be convenient to set out these provisions in full. They are as follows:—

7. Le gourverneur pourra nommer, au besoin, un Commissaire des terres des Sauvages pour le Bas-Canada, qui, ainsi que ses successeurs, sous le nom susdit, sera mis en possession, pour et au nom de toute tribu ou peuplade de sauvages, de toutes les terres ou propriétés dans le Bas-Canada, affectées a l'usage d'aucune tribu ou peuplade de Sauvages, et sera censé en loi occuper et posseder aucune des terres dans le Bas-Canada, actuellement possedées ou occupées par toute telle tribu ou peuplade, ou par tout chef ou membre d'icelle, ou autre personne, pour l'usage ou profit de tells tribu ou peuplade; et il aura droit de recevoir et recouvrer les rentes, redevances et profits, provenant de telles terres et propriétés, et sous le nom susdit; mais eu egard aux dispositions ci-dessous établies, il exercera et maintiendra tous et chacun les droits qui appartiennent légitimement aux propriétaires, possesseurs ou occupants de telles terres ou propriétés.

* * * * *

8. Toutes les poursuites, actions ou procédures portées par ou contre le dit commissaire, seront intentées et conduites par ou contre lui, sous le nom susdit seulement, et ne seront pas périmées or discontinuées par son décès, sa destitution ou sa resignation, mais seront continuées par ou contre son successeur en office.

2. Tel commissaire aura, dans chaque district civil du Bas-Canada, un bureau qui sera son domicile légal, et où tout ordre, avis ou autre procédure pourra lui être légalement signifié; et il pourra nommer des

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députes, et leur déléguer tels pouvoir qu'il jugera expédient de leur déléguer de temps à autre, ou qu'il recevra ordre du gouverneur de leur déléguer. 13 & 14 V., c. 42, s. 2, moins le proviso.

9. Le dit commissaire pourra conceder ou louer, ou grever toute telle terre ou propriété, comme susdit, et reçevoir ou recouvrer les rentes, redevances et profits en provenant, de même que tout propriétaire, possesseur ou occupant légitime de telle terre pourrait le faire; mais il sera soumis, en toute chose, aux instructions qu'il pourra reçevoir de temps à autre du gouverneur, et il sera personnellement responsable à la couronne de tous ses actes et plus particulièrement de tout acte fait contrairement à ces instructions, et il rendra compte de tous les deniers par lui reçus, et les emploiera de telle manière, en tel temps, et les paiera à telle personne ou officier qui pourra être nommé par le gouverneur, et il fera rapport, de temps à autre, de toutes les matières relatives à sa charge, en telle manière et forme, et donnera tel cautionnement que le gouverneur prescrira et éxigera; et tous les deniers et effets mobiliers qu'il reçevra ou qui viendront en sa possession, en sa qualité de commissaire, s'il n'en a pas rendu compte, et s'ils ne sont pas employés et payés comme susdit, ou s'ils ne sont pas remis par toute personne qui aura été commissaire à son successeur en charge, pourront être recouvrés de toute personne qui aura été commissaire, et de ses cautions, conjointement et solidairement, par la couronne, ou par tel successeur en charge dans aucune cour ayant juridiction civile, jusqu'a concurrence du montant ou de la valeur. 13 & 14 V., c. 42, s. 3.

12. Des étendues de terre, dans le Bas-Canada, n'excédant pas en totalité deux cent trente mille acres, pourront (en autant que la chose n'a pas encore été faite sous l'autorité de l'acte 14 & 15, V., c. 106), en vertu des ordres-en-conseil emanés à cet égard, être désignées, arpentées et reservées par le commissaire des terres de la couronne; et ces étendues de terre seront respectivement reservées et affectées à l'usage des diverses tribus sauvages du Bas-Canada, pour lesquelles, respectivement, il est ordonné qu'elles soieut reservées par tout ordre-en-conseil emané comme susdit; et les dites étendues de terre seront, en conséquence, en vertu du présent acte, et sans condition de prix ni de paiement, transferées au Commissaire des terres des Sauvages pour le Bas-Canada, et par lui administrées conformement au présent acte. 14 & 15 V., c. 106, s. 1.

The tract in question was set apart under the authority of section 12. Our inquiry concerns the effect of sections 7, 8 and 9 as touching the nature of the Indian interest.

First. It may be observed that the Commissioner is to hold the Indian lands "pur et au nom" of the tribe or band and that he is deemed in law to occupy

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and to possess them "pour l'usage et au profit de telle tribu ou peuplade." These appear to be the dominating provisions and they express the intention that any ownership, possession or right vested in the Commissioner is vested in him for the benefit of the Indians. Therefore, the rights which are expressly given him are rights which are to be exercised by him for them as by tutor for pupil.

Looking at the *ensemble* of the rights and powers expressly given I can entertain no doubt that in the sum they amount to ownership. By paragraph 7 he is given a right to receive and to recover the rents and profits

et il exercera et maintiendra tous et chacun les droits qui appartiennent légitimement aux propriétaires.

By section 9:—

Le dit commissaire pourra concéder ou louer, ou grever toute telle terre ou propriéte, comme susdit, et recevoir et recouvrer les rentes redevances et profits en provenant, de même que tout propriétaire, possesseur ou occupant légitime de telle terre pourra le faire.

This in the sum, I repeat, is ownership; and none the less so that in the administration of the property the Commissioner is accountable to the Governor. The Governor in this respect does not represent the Crown as proprietor but as *parens patriæ*.

It seems to follow that, on the passing of the "British North America Act," this ownership passed under the legislative jurisdiction of the Dominion as falling within the subject "Indian Lands," and I see no reason to doubt that the provisions of the Act of 1868 (sec. 26, ch. 42), by which the Secretary of State, as Superintendent-General of Indian Affairs, was substituted for the Commissioner provided for by the enactments just cited as the trustee of the Indian title were well within the authority of the Parliament of Canada; nor can I see on what ground it

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could be contended that the provisions of the "Indian Act" (ch. 43, R.S.C.), providing for the surrender of Indian lands or the provisions relating to the sale of the same after the surrender are not within the ambit of that authority.

But it is argued that, on the surrender being made, the lands, under the authority of *St. Catherine's Milling and Lumber Co.* v. *The Queen*(1), became vested in the Crown and fell under the control of the province. There are two answers. First: The Indian interest being, as I have pointed out, ownership is by the terms of the surrender a surrender to Her Majesty in trust to be dealt with in a certain manner for the benefit of the Indians. The Dominion Parliament, having plenary authority to deal with the subject of "Indian Lands" and having authorized such a transfer of the Indian title, it is difficult to see on what ground the transfer could be held not to take effect according to its terms or on what ground the trusts, upon which the transfer was accepted, can be treated as non-operative.

Secondly. If I am right in my view as to the character of the Indian title, it is obvious that any interest of the Crown was a contingent interest to become vested only in the event of the disappearance of the Indians while the lands remained unsold. If that event had taken place, it may be that there would have been a resulting trust in favour of the Crown and if the lands in such an eventuality remained unsold in the hands of the Dominion the question might arise whether as a "royalty" the Crown in the right of the province would not be entitled to the benefit of them. But all this has no application here. So long as the band exists the band is the beneficial owner of the land in question or of the monies arising out of the sale of them.

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The distinction between this case and the case of the *St. Catherine's Milling Company*(1), is not difficult to perceive. The Privy Council held in that case that the right of the Indians, resting on the proclamation of 1873, was a "personal and unsufructuary right" depending entirely upon the bounty of the Crown. The Crown had a paramount and substantial interest at the time of Confederation, which interest remained within the province. The surrender of the Indian right to the Crown (which was not, it may be observed, a surrender to the Dominion Government), left the interest of the province unincumbered. There is no analogy between that case and this, if I am right in my view that the Indian interest amounted to beneficial ownership, the rights of ownership, in some respects, being exercisable not by the Indians but by their statutory tutor, the Commissioner. The surrender of that ownership in trust under the terms of the instrument of 1868 cannot be held, without entirely defeating the intention of it, to have the effect of destroying the beneficial interest of the Indians.

The third question arises in this way. Professing to act under the authority of the "Indian Act" (ch. 18 of 1876), the Indian agent, in May, 1878, sold the lot in question to one David Philippe, a member of the Montagnais Band. On the 7th March, 1889, this land was sold by the sheriff under a judgment against Philippe, and adjudged to the respondent Giroux. The appellant alleged that Philippe was not a competent purchaser and that, by certain provisions of the statutes relating to Indians, the sale to Philippe was forbidden and that the sale was contrary to law.

Two distinct points are made by Mr. Stuart.

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First, he says that the effect of section 42 of the "Indian Act" (ch. 43, R.S.C., 1886), taken with section 2, sub-secs. *c* and *h*, precludes an Indian, within the meaning of the Act, from becoming the purchaser of any part of a surrendered reserve. Section 42, on the literal construction of it might, no doubt, be held to confine the benefits of the certificate of the sale or receipt for the money received on the sale of Indian lands to a "person" within the meaning of section 2 (*c*), that is, to some individual other than an Indian. But the conclusive objection to this line of argument is to be found in the Act of 1876 (ch. 18), which was in force when Phillipe purchased. Section 31 of that Act dealt with the effect of a certificate of sale or a receipt for money received on the sale of Indian lands. It is to the "party to whom the same was or shall be made or granted" that the section refers and the definition of "person" in the interpretation section is without effect.

The second point made rests upon sub-section 3 of section 77 of the Act, R.S.C. 1886, ch. 43, as amended by 51 Vict., ch. 22, sec. 3. It will be convenient to set out sections 77 and 78 incorporating that amendment. They are as follows—

Sec. 77. No Indian or non-treaty Indian shall be liable to be taxed for any real or personal property, unless he holds, in his individual right, real estate under a lease or in fee simple, or personal property outside of the reserve or special reserve in which case he shall be liable to be taxed for such real or personal property at the same rate as other persons in the locality in which it is situate:

2. No taxes shall be levied on the real property of any Indian, acquired under the enfranchisement clauses of this Act, until the same has been declared liable to taxation by proclamation of the Governor in Council, published in the Canada Gazette:

3. All land vested in the Crown or in any person, in trust for or for the use of any Indian or non-treaty Indian or any band or irregular band of Indians or non-treaty Indians, shall be exempt from taxation, except those lands which, having been surrendered by the bands owning them, though unpatented, have been located by or sold or

agreed to be sold to any person; and, except as against the Crown and any Indian located on the land, the same shall be liable to taxation in like manner as other lands in the same locality; but nothing herein contained shall interfere with the right of the Superintendent-General to cancel the original sale or location of any land, or shall render such land liable to taxation until it is again sold or located.

Sec. 78. No person shall take any security or otherwise obtain any lien or charge, whether by mortgage, judgment or otherwise, upon real or personal property of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the next preceding section; but any person selling any article to an Indian or non-treaty Indian may take security on such article for any part of the price thereof which is unpaid. 43 V., c. 28, s. 77.

The argument is that "any Indian located on the land" excludes an Indian purchaser under section 31 of the Act of 1876. I think that argument fails. The meaning of "located Indian," I think, is made sufficiently clear by reference to sections 16, 17, 18 and 20 of the Act of 1886 and, in my judgment, clearly refers to an Indian located under those provisions, that is to say, an Indian who has been permitted to occupy part of the reserve in respect of which he has a location ticket and continues to occupy it notwithstanding the surrender of the reserve. The scheme of these sections appears to be that real estate held by an Indian within the reserve where he resides shall not be subject to taxation or to be charged by mortgage or judgment, but it does not appear to be within the scheme to exempt property purchased by an Indian as purchaser outside of the reserve on which he is living. "Reserve," it may be observed, by reference to the interpretation clause, does not apply to a surrendered reserve.

I may add that the Act does not appear to contemplate the disabling of the Indians from acquiring property and engaging in transactions outside the reserve. See section 67, for example, in addition to sections 64, 65 and 66.

ANGLIN J. concurred with DUFF J.

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Brodeur J.

BRODEUR J.—Il s'agit d'une action pétitoire instituée par le Procureur-Général de la Puissance du Canada demandant que la Couronne soit déclarée propriétaire de la moitié sud-est du lot No. 3 dans la première concession du canton de Ouiatchouan.

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

Le terrain en question faisait partie d'une réserve sauvage établie en vertu de l'acte 14 & 15 Vict. c. 106. En 1869, la Bande des Sauvages Montagnais qui possédait la réserve a décidé de céder et abandonner entr'autres la première concession du canton de Ouiatchouan. Plus tard, le 7 mai, 1878, le surintendant-général des affaires des sauvages a vendu à un nommé David Philippe, pour la somme de $26.25, la propriété en question dans cette cause, qui faisait partie originairement de la réserve des sauvages mais qui était tombée dans le domaine de la Couronne à la suite de la cession faite par la bande.

David Philippe, ayant encouru certaines dettes, jugement fut rendu contre lui et la propriété fut vendue par le shérif. Le terrain fut adjugé au défendeur-intimé, Giroux, qui en prit possession, le défricha complètement et en fit une propriété de bonne valeur.

Des doutes ayant été soulevés par la Couronne sur la validité du décret, l'acquérerur Giroux, pour éviter un procès avec le Gouvernement, préféra prendre un titre de ce dernier et obtint de l'agent un reçu qui se lit comme suit:

Roberval, Pointe-Bleue, 22 juin, 1889.

$164.32.

Reçu de M. Pierre Giroux la somme de cent soixante-et-quatre piastres et 32 cents, en paiement du ½ lot S.E. No. Rang 1er. du Township Ouiatchouan suivant instruction de Département et avec contrat de vente pour le dit ½ lot.

L. E. OTIS, A.S.

Cette nouvelle vente fut confirmée et approuvée par le Ministère des Sauvages; elle fut également approuvée par le Département de la Justice. Plus tard, cependant, nous voyons par la correspondance au dossier que le Département des Sauvages ayant demandé l'opinion du Département de la Justice sur la validité de la vente, en alléguant que le nommé Philippe était un sauvage localisé sur la réserve et qu'il y avait lieu de s'enquérir si ce fait n'affectait pas la validité de la vente judiciare, le Département de la Justice a répondu que dans les circonstances, en vertu de la section 79 de "l'Acte des Sauvages," telle que amendée par 51 Victoria, ch. 12, sec. 75, la terre ne pouvait pas être hypothéquée légalement et que la propriété ne pouvait pas être vendue par autorité de justice.

Malgré cette opinion du Ministère de la Justice aucune action ne parait avoir été prise par le Département que vingt-deux ans après la vente judiciaire.

La première question qui se soulève est de savoir si un sauvage peut acheter du Gouvernement un terrain qui était originairement dans une réserve mais qui a été abandonné.

Lorsque les réserves sont abandonnées ainsi par les sauvages, la Couronne voit à administrer, à vendre ou à louer ces terrains pour le bénéfice et avantage des sauvages. En vertu de la loi, elle est obligée de vendre ces terrains aux personnes qui se présentent les première et suivant les prix qu'elle détermine.

Il y avait du doute de savoir si le nommé David Philippe était un sauvage ou non. Un certain doute a même été exprimé sur la bande à laquelle il pouvait appartenir. Les uns prétendent qu'il était Abénaquis, les autres Montagnais.

Mais en supposant même qu'il était un sauvage de

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la tribu des Montagnais, qu'il eût le droit comme tel de vivre sur la réserve sauvage de la Pointe Bleue, il n'en est pas moins vrai que du moment que cette réserve ou une partie de cette réserve était abandonnée à la Couronne, rien n'empêchait un sauvage d'acheter un de ces terrains ainsi abandonnés.

Les sauvages ont, relativement aux réserves, des droits et des obligations restreintes; mais, du moment que ces réserves sont abandonnées à la Couronne, il me semble qu'un sauvage pourrait avoir le droit d'acheter un de ces terrains, de le cultiver, d'en faire les fruits siens et de jouir sous ce rapport des mêmes droits et des mêmes privilèges que les blancs. Prétendre le contraire serait, suivant moi, nier à ces sauvages le droit de se développer et de faire partie d'une civilisation plus avancée.

L'appelant allégue qu'il n'y a que les blancs cependant qui peuvent acheter ces terrains de la Couronne.

Il n'y a pas de doute, je crois, qu'un sauvage pourrait acheter, comme n'importe quel autre colon, des terres de la Couronne; et il faudrait, suivant moi, un texte bien plus formel que celui de la section 42 qui nous a été cité pour prétendre que dans le cas d'une réserve qui a appartenu jadis aux sauvages ces derniers seraient empêchés de pouvoir s'y établir comme colons.

La section 42 de "l'Acte des Sauvages" de 1886, citée par M. Stuart, ne peut pas être interprétée comme excluant les sauvages du droit de pouvoir acheter.

Je considère donc que Philippe avait le droit d'acheter ce terrain de la Couronne et que la vente judiciaire qui a été faite est valable et que Giroux est devenu acquéreur par bon titre de la propriété réclamée par l'appelant.

Mais il y a plus. En supposant que la Couronne

n'avait pas le droit de vendre la propriété à Philippe il n'y a pas de doute qu'elle pouvait et qu'elle devait la vendre à Giroux. Or, en 1889, la Couronne elle-même s'est fait payer par Giroux une somme de $164.32 pour prix d'achat de la propriété en question et le département a lui-même confirmé cette vente qui avait été faite par son agent.

Je considère donc que, dans les circonstances, il ne peut pas y avoir de doute sur le droit de propriété de Giroux au terrain en question et, par conséquent, le jugement des cours inférieures qui a renvoyé l'action doit être confirmé avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *L. P. Girard.*
Solicitor for the respondent: *L. G. Belley.*

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*Feb. 4.
*May 2.

OCTAVE GAGNON AND ABEL GAGNON (DEFENDANTS)..... } APPELLANTS;

AND

NICHOLAS BELANGER (PLAINTIFF).. RESPONDENT.

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

Title to land—Vente à réméré—Security for loan—Time for redemption—Promise of re-sale—Condition—Equitable relief—Pleading—Waiver—New points on appeal—Practice—Arts. 1549, 1550 C.C.

Where the right to redeem lands conveyed *à droit de réméré* as security for a loan has not been exercised within the stipulated term, or an extension thereof, the purchaser becomes absolute owner and there is no power in the courts of the Province of Quebec under which an order may be made which could have the effect of extending the time limited for redemption.

After the expiration of the time limited for redemption of lands conveyed *à droit de réméré*, as security for a loan, the purchaser in a letter written to the vendor, requested payment of the loan before a date mentioned therein and, in default of such payment, insisted upon the rights granted by the conveyance.

Held, that the letter might be considered as a promise of re-sale of the lands to the vendor which lapsed on failure to make the payment within the time therein stipulated.

Duff J. took no part in the decision of the appeal.

Per Fitzpatrick C.J. and Brodeur J.—Questions which have not been raised or brought to the attention of the courts below ought not to be considered on an appeal to the Supreme Court of Canada.

APPEAL from the judgment of the Superior Court, sitting in review, at Quebec, affirming the judgment of Letellier J., in the Superior Court, District of Roberval, maintaining the plaintiff's action with costs. Mignault, one of the defendants, as security for the

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

re-payment of a loan, executed a deed of sale of his lands to the plaintiff's vendor reserving to himself the right to redeem the lands so sold within a specified time. He did not do so and, after the time fixed for redemption had expired, the agent of the purchaser *à réméré* wrote a letter to Mignault demanding payment of the sum loaned before a date mentioned and notifying him that, unless it was paid within that time, the rights of the purchaser under the deed would be exercised. Owing to mistakes in transmission of the money through the mails, the payment was not made until after the date mentioned in the letter, when, as the property had been sold to the plaintiff in the meantime, the money forwarded in payment was refused and returned to Mignault. Sometime prior to the expiration of the time for redemption, Mignault had made a donation of the lands in question to Octave Gagnon, one of the defendants, and granted a right of passage over the lands to the other defendant. The plaintiff, having registered the deed conveying the lands to him, brought action, *au pétitoire*, to recover the lands against Mignault and the two other defendants, now appellants. Mignault, appearing separately, filed a defence to the action offering to pay the amount due on the loan but did not do so nor deposit the money in court and, finally, he suffered judgment to be rendered against him *ex parte*. The other defendants filed a joint defence to the action and brought the amount due into court, asking for special relief in the circumstances.

Belcourt K.C. and *Chevrier* appeared for the appellants.

A. Lemieux K.C. and *Arthur Bélanger* for the respondent.

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The Chief Justice.

THE CHIEF JUSTICE.—In this case the plaintiff, now respondent, claims to be the owner of a lot of land in possession of the defendant Mignault who is not a party to this appeal. The questions to be determined are:

(a) Whether the transactions which passed between the plaintiff's auteur, Dame Marthe Bourgard, and her agent Turcotte on the one hand, and the defendant Mignault on the other, are such as to prevent plaintiff from asserting his title as owner to the land;

(b) Whether by reason of the course of the proceedings in the courts below the present appellants are precluded from asserting their claim to what, in a legal system different from that which prevails in the Province of Quebec, would be called *equitable relief*.

I state the questions thus broadly so as to include a new and interesting point raised by Mr. Justice Brodeur and which apparently did not occur to any of the counsel in the case. It is not referred to in the factums, was not mentioned at the argument here and passed unnoticed in both courts below. Assuming that it is properly before us, I will endeavour to deal with this new point when in the examination of the evidence I reach the letter out of which it arises.

The issues raised by the pleadings and decided in both courts below offer very little difficulty. We are all, I believe, agreed that, by reason of Mignault's failure to exercise his right of redemption within the stipulated period, the title to the land vested in Miss Bourgard.

The only real difficulty arises out of the letter subsequently written by Notary Turcotte to Mignault. To appreciate the bearing of that letter it will be necessary to consider all the facts as they appear on the record.

On the 9th October, 1908, by deed passed before Turcotte N.P., the defendant Mignault sold to Dame Marthe Bourgard a plot of land described as lot No. 49 B., 6th range of the cadastre of the Township of Normandin. The sale was made subject to a right of redemption exercisable within five years and purports to convey "tous les droits, intérêts, titres et prétentions et améliorations" that the vendor had in the lot described. All payments under the deed were to be made at the domicile of the purchaser at St. Michel de Bellechasse, many miles distant from the residence of the vendor who remained in possession of the property sold, and for the convenience of both parties it was agreed that the notary would be authorized to receive all the payments which the deed called for. The right of redemption was not exercised within the delay, which expired Oct. 9th, 1913, and, thereupon, Miss Bourgard remained absolute owner of the property (article 1550 C.C.). We are all, I understand, agreed that the stipulated term in a deed like the one under consideration must be strictly observed and that it is not within the power of the court to extend it. (Articles 1549 and 2248 C.C.).

On the 8th November, 1913, Turcotte wrote Mignault to say that his client wanted her money and that, if not paid before the twentieth of that month, she would be obliged to sell her interest in the property. Not having received an answer to this letter, Miss Bourgard on the 11th December, 1913, sold the property to the plaintiff, respondent, who brought this petitory action in April, 1914, against Mignault and the two appellants, Octave and Abel Gagnon. The latter were brought into the case as donees of the property by deed from Mignault passed Sept. 4th, 1911.

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Mignault appeared in the action separately, moved for particulars as to the circumstances under which the property was acquired by the plaintiff—and then gave notice of his intention to refund the amount received by him when the sale "à réméré" was made with interest and costs (sauf à parfaire). This notice was filed on the 6th June, 1914. Apparently the offer was not acted upon; no money was tendered or deposited in court. On the 12th June, 1914, the case, on the issue with Mignault, was inscribed for proof and hearing on the merits *ex parte*. And judgment was rendered declaring that Mignault had forfeited his right to re-purchase and that plaintiff was absolute owner of the property. From that judgment there has been no appeal. Much importance was attached, I think rightly, in both courts below to that judgment in its bearing upon the issue with the appellants.

In November, 1914, the appellants filed their joint plea alleging that the "vente à réméré" was merely a disguised loan, that the property was really worth over $1,100 and that within the stipulated period (13th November, 1913), the amount due in capital and interest was sent by registered mail to Turcotte who in the interval had removed from St. Cyrille de Normandin to Quebec, but being improperly addressed the letter did not reach its destination and was returned, after December 20th, 1913, by the post office authorities to the sender, Mignault, who again forwarded the money to Turcotte at his right address; that the latter improperly refused to accept the money on the ground that the delay had expired; and the defendants, Gagnon, brought the amount due into court with their pleadings.

On these issues the parties went to trial, and the

facts as alleged were either admitted or proved by oral and documentary evidence. The trial judge maintained the action on the ground that the right of redemption not having been exercised within the stipulated delay the deed of sale to Miss Bourgard became absolute, and, consequently, the deed of donation by Mignault to appellants was without effect. He also held that the *ex parte* judgment against Mignault was a complete bar to any rights which the appellants might have acquired under the deed. This judgment was confirmed on appeal to the Court of Review.

This is undoubtedly a hard case. The property is apparently worth more than the amount paid for it and the evident intention of the parties was that the title in the property should return to the seller when he had paid his debt. The position is made more difficult by the *bonâ fide* attempt of Mignault to honestly fulfil his obligations frustrated by the unfortunate mistake made by the postmaster in addressing his letter to Turcotte, a mistake which is easily understood when we take into account the illiteracy and lack of familiarity with affairs of men in their position. Mignault, however, when notified by the notary that his second letter arrived too late, took no steps to assert his rights alleging the circumstances under which he had failed to meet his obligations. Had he done so, it is conceivable that, notwithstanding the very stringent provisions of the Code, some measure of relief might have been given him. But, as the judges below point out, he remained silent until towards the end of April, 1914, when the respondent brought this suit and then he was content to serve the notice to which I referred without giving effect to his alleged intention to refund the purchase price and he did not bring the money into court. He allowed judgment

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ordering him to give up the property to go against him *ex parte* and no attempt has been made to have that judgment set aside. It is therefore *chose jugée* as to him. The appellants are in no better position than Mignault. By their deed of donation, made subsequent to the sale to Miss Bourgard, they acquired Mignault's rights, such as they were at that time, and they could in law acquire nothing more (*Sirois* v. *Carrier*(1); *Levasseur* v. *Pelletier*(2); *Ménard* v. *Guibord*(3)). When the delay expired Mignault lost his rights and appellants' title derived from Mignault must have the same fate.

In these circumstances I agree entirely in the conclusion reached by the judges of both courts below. It is impossible to give appellants any relief. Upon its true construction the deed by Mignault to Bourgard must be held to operate as an absolute sale to which was attached a conditional right of re-purchase to be exercised within a fixed delay which, as I have already said, the court has no power to extend (*Shaw* v. *Jeffery*(4)).

Laurent with his usual lucidity of thought and expression says:

> Dans notre droit moderne les juges ne peuvent déroger aux conventions des parties; c'est une loi pour eux comme pour les contractants.

The whole subject is discussed in *Salvas* v. *Vassal*(5), approved of in *Queen* v. *Montminy*(6), at page 490.

Here Mr. Justice Brodeur raises, as I have already said, an interesting and difficult question as to the effect of the letter written by Turcotte on the 13th November, 1913, which reads as follows:

(1) Q.R. 13 K.B. 242.
(2) Q.R. 40 S.C. 490.
(3) Q.R. 31 S.C. 484.
(4) 13 Moo. P.C. 432.
(5) 27 Can. S.C.R. 68.
(6) 29 Can. S.C.R. 484.

Monsieur Romuald Mignault, Cultivateur,
Normandin,

Cher Monsieur:—

En arrivant de Normandin, j'ai trouvé ici une lettre de la personne qui vous a prêté les $300 par mon entremise, qui m'informe qu'elle a absolument besoin de son argent. *Si vous ne pouvez pas le lui rembourser, elle sera forcée de vendre ses droits.*

Or comme vous le savez, c'est un acte à réméré que vous avez, et il serait fort embêtant pour vous que celà tomberait à des personnes qui aimeraient à faire de la misère, car le tout est dû depuis le 20 octobre dernier.

J'espérais pouvoir vous rencontrer à mon voyage à Normandin, mais je n'ai pu vous voir. On m'a dit que vous n'étiez pas à l'église, quand je me suis informé de vous.

Dans tous les cas, je compte que vous y verrez d'hui à une dizaine de jours, car passé le vingt novembre ce sera trop tard.

Votre bien dévoué,

J.S.N. Turcotte.

At the date of this letter Mignault was in default and Miss Bourgard was the indisputable owner of the property. She was free to do with it as she chose. This letter must be read with the following admission made by the parties at the trial:

Les parties admettent que le notaire Turcotte qui a agi comme notaire sur la vente à réméré consentie par le défendeur Mignault en faveur de Mademoiselle Bourgard était *autorisé à donner un délai jusqu'au vingt (20) de novembre mil neuf cent treize (1913), pour retraire la propriété* et autorisé à recevoir l'argent pour Mademoiselle Beauregard, et que l'autorisation pour prolonger le délai était donné par Mademoiselle Beauregard.

Taken together, it seems to me the letter and the admission evidence an intention on the part of Miss Bourgard not to insist upon enforcing her strict rights under the deed of sale if the vendor would pay the amount of the purchase price of the property on or before the 20th November, 1913, or, in other words, the purchaser agrees to extend until that date the period within which the right of redemption may be exercised by the vendor. That is the construction put upon the letter at the time by both parties. Mignault says when examined as a witness, that

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immediately on its receipt he went to the bank, drew out his money and sent the amount he owed by post-office order to Turcotte.

In their plea to the action of revendication of the property, the present appellants say

> Que le ou vers le 8 novembre 1913, le notaire Turcotte, agent de Delle. Bourgard, avertit le défendeur Mignault que *le délai pour le réméré était prolongé jusqu'au vingt novembre, 1913.*

In the suit as brought the plaintiff's demand is in revendication of the property and Mignault, to whom Turcotte's letter is addressed, declares his intention to refund the money but without giving effect to his good intention. He does not invoke the letter or allege that he acquired under it any rights to the property or that it in any way changed the position except with respect to the delay within which he might exercise his right of redemption. My brother Brodeur refers to Troplong, Vente, (at page 220, *post*,) where it is said that the legal effect of such a letter would be equivalent to a promise of sale of the property to Mignault. The same opinion is expressed by other writers collected in Guillouard, "Traité de la Vente," Vol. 2, pp. 190 and 191, art. 654. It will be found, however, on reference to the text writers that they are not in accord. I would draw special attention to this very significant sentence in Beaudry "Vente," No. 1636, p. 541:

> Du moins la prolongation conventionnelle du terme ne pourrait porter aucune atteinte aux droits des tiers qui auraient acquis de l'acheteur.

It would seem that all the authors are preoccupied with the fear that the rights acquired by third parties in the interval between the expiration of the stipulated term and the date of the document granting the extension may be prejudiced. But assuming that Trop-

long's theory is accepted and that at the expiration of the period there can be no extension of the right of redemption, and that the new agreement is to be considered as equivalent to a promise of sale, I cannot, even in that view, see how it is possible to give the appellants any relief for two reasons which seem to me unanswerable.

At the time the letter in question was written the stipulated delay had expired and Miss Bourgard had become absolute owner of the property and, as a necessary consequence, any rights acquired by the appellants under the deed of donation from Mignault lapsed. The most that can be said is that the letter operated as a promise to sell the property to Mignault on condition that he should take advantage of the offer before November 20th, 1913, which he failed to do (Pothier, "Vente," No. 480; *Vide* Fournier J in *Grange* v. *McLennan*(1), at pages 393 *et seq.*, referring to Dorion C.J. in the court below. Refer also to Troplong, at page 394). Further, when this suit was brought, instead of taking advantage of the new opportunity afforded him to redeem his property or to assert his right under the presumed promise of sale, Mignault was content to give the notice above referred to and allowed judgment to go against him by default. This judgment, as held by the Court of Review, disposes of any right Mignault had in the property, and, as I have already said, appellants' title is derived from, and is dependent on, that of their *auteur* Mignault.

The second objection which, as at present advised, seems to me absolutely unanswerable, is that the respondent having bought the property from Miss Bourgard who was, at the time, absolute owner, his

(1) 9 Can. S.C.R. 385.

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registered title cannot be affected by the unregistered promise of sale given to Mignault. There is nothing in the evidence to shew—and it is not suggested—that respondent had any knowledge of the Turcotte letter.

I have gone into this at some length because this undoubtedly is a very hard case and hard cases have a tendency to make bad law. Our duty, of course, is to do justice, but "according to law."

I am disposed also to think that this new point should not be considered now. The attention of counsel has not been directed to it and we are not, on this record, in a position to do justice to all the parties and to the courts below. *Vide The "Tasmania"*(1), *per* Lord Herschell at page 225; *Browne* v. *Dunn*(2); *Dufresne* v. *Desforges*(3); *Connecticut Fire Ins. Co.* v. *Kavanagh* (4); *Cleveland* v. *Chanbliss* (5).

Another question was raised on this appeal which does not seem to have been brought to the attention of the courts below although I find it mentioned in the factums in Review.

It is said, as far as I can understand the facts, that the lot of land could not be sold by Mignault without the consent of his wife.

In fact, there is nothing to shew that in October, 1908, Mignault was married. He does say, when examined as a witness (in 1914), that he was married for a second time, and it also appears in the deeds to appellants that he was married in 1911, but this record is silent as to his status in 1908.

Further it is impossible for me to understand this

(1) 15 App. Cas. 223.
(2) 6 R. 67, at p. 75.
(3) 47 Can. S.C.R. 382.
(4) [1892] A.C. 473.
(5) 64 Ga. 352.

point by reference to 6 Edw. VII., ch. 21, section 1. (Que.) That section reads:

1. Article 1744 of the Revised Statutes, as enacted by the Act 60 Victoria, chapter 27, section 1, is amended by adding thereto the following clause:

The owner of the homestead may, however, under the same conditions and upon observing the same formalities as for its alienation, hypothecate it and thereby render it subject to seizure and sale.

Then 60 Vict., chap. 27, section 1, reads as follows:

1. Articles 1743, 1744 and 1745 of the Revised Statutes are replaced by the following:

1743.—No public lands, granted to a *bonâ fide* settler by instruments in the form of location tickets, licenses of occupation, or certificates of sale or other titles of a similar nature or to the same effect, in virtue of chapter sixth of title fourth of these Revised Statutes, respecting the Department of Crown Lands and the matters connected therewith, and according to the orders-in-council and regulations passed in virtue of the said chapter, shall, so long as letters-patent are not issued therefor, be pledged or hypothecated by judgment or otherwise, or be liable to seizure or execution for any debt whatsoever, except for the price of such lands, nor can the buildings, constructions and improvements thereon, including the mills which the settler makes use of for his own proper service, notwithstanding articles 1980 and 1981 of the Civil Code, and articles 553 and 554 of the Code of Civil Procedure.

1744.—Every settler upon public lands in the province, who has received letters-patent for such land, shall hold such land, provided it does not exceed 200 acres in extent, and if it does so, then 200 acres thereof, together with the buildings, constructions and improvements thereon, including the mills employed of by such settler for his own use as a "homestead."

No such homestead shall, during the life of the original grantee, of his widow and of his, her or their children and descendants, in the direct line, be liable to be seized and sold for any debt whatsoever.

The proprietor of a homestead may alienate the same either by gratuitous or onerous title.

However, if married, the notarial consent of his consort is required, and, if the latter is dead, and the proprietor has minor children, the consent of a family council, homologated by the Superior Court of the

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district in which the homestead is situated, or by a judge of that Court.

But the statute of 9 Edward VII., chap. 30, section 5, provides:

> No acts or transactions made and entered into in virtue of articles 1743 and 1744 of the Revised Statutes as contained in the Act 60 Victoria, chapter 27, section 1, amended by the Act 6 Edward VII., chapter 21, section 1, shall be deemed to have been invalidated by this Act.
>
> The proprietor of a homestead and of public lands in virtue of articles 1743 and 1744 of the Revised Statutes, has the right, and is declared to have always had the right to alienate by gratuitous or by onerous title, even without the consent of his consort expressed in a notarial deed.
>
> This Act shall not affect pending cases which may have been taken before the coming into force thereof.

Although it does appear that the lot in question was acquired from the Crown under location ticket there is nothing to shew that the patent had not issued previous to the date of the sale to Miss Bourgard. On the contrary, all the presumptions arising from the recitals in the deeds of donation point to the title having issued before 1908.

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

DAVIES J.—With great reluctance because of the extreme hardship to the appellant under the facts as proved of maintaining the judgment appealed from, I feel myself obliged under the law as it stands in the Province of Quebec to concur in dismissing this appeal.

IDINGTON J.—I regret to find that this is one of those cases in which the law does not enable the court to execute justice and hence that this appeal must be dismissed.

DUFF J.—Not having heard the whole of the argument I take no part in the judgment.

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ANGLIN J.—But for the letter of Notary Turcotte, written on the 8th November, 1913, giving the appellants until the 20th November, 1913, to pay the sum of $300 and interest, it would appear that their rights had become extinguished and the title under which the respondents hold absolute on the 20th October, 1913. Arts. 1549, 1550 and 2248 C.C. That letter probably did not effect a prolongation of the right of redemption (droit de réméré) but operated only as a unilateral promise of re-sale (7 Mignault, 159). If, however, the letter could be regarded as having extended the right of redemption, the extended right would be of the same nature and subject to the same conditions, and, the money not having been paid, it would have expired on the 20th November, 1913, with the like consequences. If, on the other hand, the letter merely amounts to a promise of re-sale, that lapsed on non-payment of the price within the delay stipulated. *Taché* v. *Stanton*(1); *Marcoux* v. *Nolan* (2); *Munro* v. *Dufresne*(3); *Foster* v. *Fraser*(4); Cujas, 25 Dig.; Pothier, "Vente," No. 63.

BRODEUR J.—Le 20 octobre, 1908, Romuald Mignault vendait avec faculté de réméré à Mlle. Beauregard l'immeuble en question en cette cause moyennant une somme de trois cents piastres ($300).

La faculté de réméré devait être exercée le ou avant le 20 octobre, 1913, en remettant à l'acheteur la somme de trois cents piastres ($300), plus l'intérêt de 6% par an. Il était convenu que pendant ce laps de temps Mignault demeurerait en possession de l'immeuble, qu'il l'entretiendrait en bon état de répar-

(1) Q.R., 13 S.C. 505.
(2) 9 Q.L.R. 263.
(3) M.L.R., 4 Q.B., 176.
(4) M.L.R., 6 Q.B., 405; 4 S.C., 436.

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ations locatives, qu'il paierait les taxes municipales et scolaires et, en plus, l'intérêt sur la somme de $300.

Cette vente fut enregistrée au bureau d'enregistrement du comté.

Le 4 septembre, 1911, Mignault a donné entr'autres la propriété en question à son beau-fils, Octave Gagnon, l'un des appelants dans la présente cause, avec obligation de garder, nourrir, vêtir le donateur et son épouse pendant leur vie ou bien de leur payer une rente annuelle de $100 par année et de payer leurs dettes hypothécaires et autres affectant la dite propriété.

Il est bien évident que la somme de trois cents piastres payée par Mlle. Beauregard ne représentait pas la valeur de la propriété et que dans l'intérêt des parties on aurait eu recours à la vente avec faculté de réméré afin de pouvoir garantir davantage le remboursement de la somme que Mlle. Beauregard prêtait à Mignault.

Le contrat comportait que les paiements du capital et de l'intérêt devaient se faire au domicile de l'acheteur à réméré. Les parties ne demeurent pas dans la même région. Une distance d'environ 200 milles les sépare. Et alors il est admis que le notaire qui avait passé le contrat et qui demeurait près du vendeur pourrait recevoir l'argent. Le contrat a donc été modifié à ce sujet. Plus tard, le notaire a laissé le Lac St. Jean pour venir demeurer à Québec.

Le 20 octobre, 1913, date fixée par la convention pour l'exercice de la faculté de réméré, le remboursement du capital prêté ne se fit pas et alors, en vertu de l'article 1550 C.C., Mlle. Beauregard demeura propriétaire irrévocable de la chose vendue.

Le 8 novembre, 1913, M. Turcotte, le notaire de

Mlle. Beauregard, écrivait à M. Mignault, lui demandant le remboursement de la somme de $300 et il ajoutait que, s'il ne pouvait pas payer avant le 20 novembre, sa cliente serait forcée de vendre ses droits.

Le 13 novembre, M. Mignault acheta au bureau de poste un mandat pour la somme qui était due en capital et intérêts, et l'envoya au notaire Turcotte, à Québec, à qui les paiements d'intérêts avaient été faits antérieurement, seulement, au lieu d'adresser la lettre à la rue *Hébert*, qui lui avait été indiquée, il l'adressa à la rue *Albert*, et la lettre, après avoir été à différents bureaux de poste n'est revenu à l'envoyeur que le 20 de décembre.

Il ré-expédia de suite le mandat au notaire Turcotte mais dans l'intervalle Mlle. Beauregard avait vendu ses droits à l'intimé en la présente cause, Nicolas Bélanger, le 11 décembre, 1913, et le notaire a alors renvoyé l'argent à Mignault.

Bélanger poursuit maintenant, au pétitoire, Mignault et Octave Gagnon et il dirige aussi sa poursuite contre Abel Gagnon parce que Mignault lui avait donné un droit de passage sur la propriété.

Les appelants soumettent que le contrat entre les parties était évidemment un contrat de prêt et non pas un contrat de vente.

Il est vrai que les parties sont entrées en négociations pour un emprunt; mais comme les garanties qui étaient offertes par M. Mignault n'étaient pas suffisantes, je suppose, pour garantir le prêt, il a été convenu qu'on aurait recours à une vente avec faculté de réméré afin de pouvoir rendre certain le remboursement du prêt. Les parties ont accepté cette méthode de contrat et nous ne pouvons pas intervenir pour

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changer leurs conventions faites évidemment avec délibération.

Dans la province de Québec, le réméré n'est généralement stipulé que pour donner une garantie plus sure au créancier qui a prêté son argent et qui ne veut pas courir le risque d'en perdre une partie en faisant les frais nécessaires pour vendre l'immeuble en justice. Ce contrat est légal lors même que le prix de la vente serait bien inférieur à la valeur de l'immeuble, car l'annulation d'un contrat pour lésion d'outre moitié n'existe plus. *Salvas* v. *Vassal*(1).

Il est incontestable que le demandeur, intimé, fait preuve d'un sens moral plus ou moins facile en refusant d'accepter l'argent qui lui a été offert avec ses frais de justice et en insistant pour garder une propriété représentant une bien plus grande valeur que la somme qu'il a déboursée. Il est à espérer que sa conscience lui indiquera un jour la fausseté de sa conduite et l'incitera à réparer le tort et le dommage qu'il cause aux appelants.

J'avais cru au cours du délibéré que l'opinion exprimée par Troplong et autres auteurs sur la nature de la nouvelle convention qui avait été faite entre les parties par la lettre du notaire Turcotte du 8 novembre, 1913, pourrait nous permettre de maintenir l'appel. Mais cette nouvelle convention, suivant l'opinion de ces auteurs, ne pourrait tout au plus être considérée que comme une promesse de vente. Mlle. Beauregard qui serait devenue propriétaire irrévocable, vu le non-exercice de la faculté de réméré, aurait alors par la lettre de son notaire Turcotte promis de vendre l'immeuble en question jusqu'au 20 novembre, 1913. C'était alors au promettant acheteur d'offrir le paie-

(1) 27 Can. S.C.R. 68.

ment du prix de cette promesse de vente dans les délais stipulés. Il ne l'a pas fait, ou plutôt le mandat-poste qu'il a envoyé ici ne s'est pas rendu. *Munro* v. *Dufresne*(1); *Foster* v. *Fraser*(2); *Dechamps* v. *Goold*(3).

On a soulevé devant cette cour aussi que la vente avec faculté de réméré était nulle parce qu'elle n'avait pas été enregistrée au bureau des terres de la Couronne.

Ce point n'a pas été soulevé en cour inférieure et il est possible que s'il l'avait été il aurait donné lieu à une preuve qui aurait détruit toute la force de cette objection. Nous ne pouvons donc pas la considérer dans le cas actuel.

Je suis donc forcé à regret de conclure que l'appel doit être renvoyé avec dépens, tout en formulant l'espoir que le défendeur verra à rendre justice au vieillard et à son beau-fils qui se trouvent privés du fruit de plusieurs années de travail.

Appeal dismissed with costs.

Solicitor for the appellants: *Armand Boily.*
Solicitor for the respondent: *Arthur Bélanger.*

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(1) M.L.R. 4 Q.B., 176. (2) M.L.R. 6 Q.B. 405.
(3) Q.R. 6 Q.B. 367.

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*Feb. 23, 24.
*May 2.

THE TORONTO RAILWAY COMPANY ..... } APPELLANTS;

AND

THE CORPORATION OF THE CITY OF TORONTO AND THE CANADIAN PACIFIC RAILWAY COMPANY ..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Provincial crossing—Dominion railway—Change of grade—Elimination of level crossing—Substitution of subway—Public protection and safety—Power to order provincial railway to share in payment of cost—"Railway Act" ss. 8(a), 59 and 288.

The provisions of the "Railway Act" empowering the Board of Railway Commissioners to apportion among the persons interested the cost of works or constructions which it orders to be done or made are *intra vires*.

On Avenue Road, Toronto, the tracks of the Toronto Ry. Co. crossed those of the C. P. Ry. Co. at rail level. On report of its chief engineer that this crossing was dangerous the Board, of its own motion, ordered that the street be carried under the C. P. Ry. tracks. This change of grade relieved the Toronto Ry. Co. from the expense of maintaining an interlocking plant and benefitted it otherwise.

Held, that the order was made for the protection, safety and convenience of the public; that the Toronto Ry. Co. was a "company interested or affected by such order"; and that the Board had jurisdiction to direct that it should pay a portion of the cost of the subway. *British Columbia Electric Railway Co.* v. *Vancouver, Victoria and Eastern Railway Co.*, [1914] A.C. 1067, distinguished.

The agreement between the Toronto Ry. Co. and the City of Toronto by which the former was given the right to lay its tracks on certain streets including Avenue road did not affect the power of the Board to make said order.

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

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APPEAL from an order of the Board of Railway Commissioners for Canada on certain questions of law, by leave of the Board, and on a question of jurisdiction, by leave of the Chief Justice of Canada.

The following are the questions so submitted to the Supreme Court of Canada for decision:—

"1. That the Board of Railway Commissioners for Canada had no jurisdiction to order the Toronto Railway Company to contribute to the cost of the construction of the subway at Avenue Road.

"2. That by reason of the terms of the agreement between the Toronto Railway Company and the City of Toronto, dated the 1st day of September, 1891, and confirmed by 55 Vict., chap. 99, the Toronto Railway Company should not have been ordered to contribute to the cost of the said subway.

"3. By reason of the agreement between the Toronto Railway Company and the City of Toronto, dated the 1st day of September, 1891, and the Act of the legislature confirming the same, that the said Toronto Railway Company is entitled to the use of the said street in the exercise of its franchise. And because the City of Toronto and the Canadian Pacific Railway Company agree upon the elimination of the grade at the crossing of the said street by the Canadian Pacific Railway Company it does not entitle either party to call upon the Toronto Railway Company to contribute to the cost of the same."

D. L. McCarthy K.C. for the appellant. The order of the Board was not made for the protection of the public but was merely a matter of municipal improvement. The fact that the appellant company was benefitted did not empower the Board to saddle it with a portion of the cost. *British Columbia Electric Rail-*

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way Co. v. *Vancouver, Victoria and Eastern Railway Co.*(1).

W. N. Tilley K.C. for the respondents the Canadian Pacific Railway Co. referred to *City of Toronto* v. *Canadian Pacific Railway Co.*(2); *Ottawa Electric Railway Co.* v. *City of Ottawa*(3).

Colquhoun for the respondent the City of Toronto.

THE CHIEF JUSTICE.—This is an appeal by leave against an order of the Board of Railway Commissioners for Canada dated the 12th November, 1914, made in the matter of the apportionment of the cost of the grade separation work at North Toronto (exclusive of Yonge street), whereby and so far as the appellants are alone concerned it was ordered

that 10% of the cost of the separation of grades at Avenue Road, North Toronto, be borne and paid by the Toronto Street Railway Company.

The "Railway Act" gives power to the Railway Board where a railway is constructed across a highway to order that the railway be carried over the highway and to order what portion, if any, of cost is to be borne respectively by the municipal or other corporation or person in respect of such order. Though perhaps not very clearly worded, the meaning of section 238 must be that such order must be with a view to the protection, safety and convenience of the public.

That this enactment is *intra vires* of the power of Parliament I do not think admits of doubt; it was so decided in the case of *City of Toronto* v. *Canadian Pacific Rly. Co.*(2). We have therefore only to consider

(1) [1914] A.C. 1067. (2) [1908[A.C. 54.
(3) 37 Can. S.C.R. 354.

whether or not the order so far as it directed the appellant to pay a portion of the cost was made without jurisdiction.

At the argument much stress was laid by counsel for the appellant on the case of *British Columbia Electric Railway Co.* v. *Vancouver, etc., Railway Co. and The City of Vancouver*(1); indeed, I apprehend that but for that case the present appeal would hardly have been brought. The decision of the Judicial Committee in that case, however, depends upon the facts of the particular case. The application to the Railway Board for an order for four streets to be carried across the railway on viaducts was made by the city corporation and their Lordships approved of the statement that

> the occasion for the application arose from the necessity of determining the permanent grade of these four streets.

The judgment continues:—

> It follows therefore that the application was a matter between the corporation and the railway company alone. * * * It is evident from the reasons given by the Railway Board that they directed the tramway company to pay a proportion of the cost of the improvements because they were of opinion that the tramway company would benefit by them. * * * The fundamental error underlying the decision of the Railway Board is that they have considered that the fact that the tramway company would be benefitted by the works, gave them jurisdiction to make them pay the cost or a portion of it.
>
> There is nothing in the "Railway Act" which gives any such jurisdiction.

Now the facts in the present case are wholly different. It is abundantly clear from the record that the substantial and, indeed I think I may say only, reason for the order of the Railway Board for this grade separation was the elimination of dangerous crossings. That incidentally the tramway company will be benefitted by the separation of the grades can-

(1) [1914] A.C. 1067.

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not of course bring the case within the ruling of the Judicial Committee in the Vancouver Case. If the tramway company could have been ordered to pay part of the cost though they derived no benefit from the work, it would be absurd to suppose that they could not be so ordered because they did obtain benefit.

It can make no difference that occasion was taken for abolishing this crossing when the separation of grades in a neighbouring street was decided upon. The two subways were naturally and properly ordered as part of one scheme for the public safety and convenience.

Whatever the rights of the appellant and the City of Toronto, respondent, under their agreement they are only as between the parties and cannot affect the validity of the order of the Railway Board.

DAVIES J.—This is an appeal from an order of the Board of Railway Commissioners directing the Toronto Railway Company to pay a portion of the cost of a subway ordered by the Board to be constructed at Avenue Road in the City of Toronto. Leave to appeal was granted by the Chief Justice on the ground that the Board had no jurisdiction to make the order complained of.

Leave to appeal was also granted by the Chief Commissioner upon certain questions of law;

1. As to the power of the Board to order the appellant to contribute to the cost of the construction of the subway in question.

2. As to the effect of an agreement between the appellant and the City of Toronto upon the granting of the order appealed from; or, as I understand the questions, whether that agreement precluded the Board from making such order.

The main question of the jurisdiction of the Board to make the order involves the constitutionality of the provisions of the "Railway Act" under which it professedly was made, and also involves the questions whether, assuming the sections to be constitutionally valid, the order of the Board was really and truly made under its paramount power of providing at railway and highway crossings for the safety and protection of the public, or whether the subway at Avenue Road was a matter really and practically of street improvements merely, the cost of which the appellants could not be obliged to contribute to.

Passing by for a moment its constitutional validity, sec. 227 of the "Railway Act," as amended by the Act of 1909 regulating the crossing of railway lines by other railway tracks or lines, vests very ample and complete powers in the Railway Board alike as to the terms, conditions and incidents subject to which such crossing may be allowed, as also with respect to the kind and nature of such crossing, and when read in conjunction with sections 28 and 32 of the "Railway Act" would authorize the Board to proceed under such section 227 as well on its own motion, as on a special application for leave to permit a crossing; and as well with respect to an existing crossing which had been allowed by it or by its predecessor the Railway Committee of the Privy Council as with respect to a right to a new crossing sought to be obtained.

When it is once made clear to the Board of Railway Commissioners that the public protection and safety requires that a crossing of railway tracks applied for should only be granted on certain terms and conditions or that an existing crossing requires additional safeguards and protection, then I think under the

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227th section of the Act coupled with the 28th, 29th, 32nd and 59th sections the powers of the Board are complete for the purposes the legislature intended and may be exercised by them either of their own motion or on special application made to them.

If I am wrong in my construction of these sections of the Act, I am still of the opinion that under the special circumstances of this case, namely, where the double tracks of the Toronto Street Railway along Avenue Road cross the double tracks of the Canadian Pacific Railway where they cross that road, the Board had ample powers under section 258 relating to highway crossings to make such order as to the protection, safety and convenience of the public as it did make in this case and including that part of the order assigning the proportion of the costs of the new protection works to the Toronto Street Railway which in the judgment of the Board that street railway should assume and pay.

Then comes the question whether in making the order now in appeal assigning the street railway's contribution towards the construction work ordered, the Board acted under its paramount power of providing for the protection and safety of the public at these railway crossings on this public street or highway, or made it for some other reason or motive.

Mr. McCarthy contended strenuously that they did not make it under the paramount power for protection and safety and that the assessment of the Toronto Street Railway was not legal or justifiable, because it was based, as he contended, upon the grounds that the Toronto Street Railway Company were relieved of the expense of contributing to the cost of operating the then interlocking plant necessi-

tated by their crossing at rail level the tracks of the Canadian Pacific Railway and were also relieved of the possibility of an accident at that crossing. That was, he contended, the real reason for assessing a contribution towards the subway upon the Toronto Railway.

No doubt some observations were made by the Assistant Chief Commissioner in the reasons given on the 5th May, 1914, for the order assessing a portion of the cost of the protection works ordered on and at Avenue Road which give colour to this argument.

These observations and the argument at bar on the point necessitated a very close scrutiny of the entire record of the proceedings before the Board of Railway Commissioners at its several meetings in order to determine what the real grounds were on which the order complained of was made. I have made such a scrutiny with the result that no doubt exists in my mind that the controlling ground which moved the Commissioners to make the order in question was the safety and protection of the public and that the separation of the grades at Avenue Road was ordered mainly if not entirely for that reason, and not with any idea of municipal improvement. The observations made by the Assistant Chief Commissioner in his reasons for making the subway order were intended, I think, not as reasons for the making of the order for the subway, but rather as reasons in support of the quantum of the cost which they had allotted to the Toronto Railway Company to pay.

The then existing interlocking plant at the crossing in question which constituted the protection and safety provided for the public at this point was no doubt sufficient for the day and times when it was

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ordered. But the City of Toronto, it is a matter of common knowledge, has enormously increased its population during the past few years. The traffic on its principal streets has greatly increased and the Board, in acting as it did in making the order, had the benefit of a report on the subject it was dealing with made by its engineers and a knowledge of the facts gained from such report and the plans before it and from the repeated discussions by counsel at its several meetings and from, I assume, actual views of the locality made by its members.

Mr. Maclean, one of the Board of Railway Commissioners, in his reasons for concurring in the order appealed from, says:—

> At the hearing, Mr. Geary, for the city, pressed with great earnestness the contention that the city should not be called upon to contribute to the cost of the grade separation. The work, however, is undoubtedly in the *interest of public safety. The element of danger which was manifestly present* was attributable not only to the increase of traffic on the railway, but also to the increase of traffic on the highways. The railway was rightfully in its location, under proper sanction of law; and the Board is, in my opinion, justified in following the methods of division of cost which it hitherto has applied. The fact that the method of distribution of cost has had the sanction of precedent is, to my mind, by no means the most important factor.

On the whole, I repeat, the only conclusion I could draw from a careful reading of the whole record is that the paramount consideration which weighed with the Board and moved it to make the order was the "protection, safety and convenience of the public."

Then with regard to the constitutional validity of the sections in question, I cannot entertain any doubt. Similar legislation was before this court in the case of *The City of Toronto* v. *The Grand Trunk Railway Co.*(1), when the constitutional validity of sections 187 and 188 of "The Railway Act of 1888" was in-

(1) 37 Can. S.C.R. 232.

volved. Substantially, and for the purposes of this constitutional argument, these sections are the same as those of the present "Railway Act" now before us. This court held these sections to be *intra vires* of the Parliament of Canada. Leave to appeal was refused by the Privy Council.

Subsequently the question of the constitutional validity of these sections 187 and 188 of "The Railway Act of 1888" was brought before the Judicial Committee in the case of the *City of Toronto* v. *The Canadian Pacific Railway Co.*(1), when they were held to be *intra vires* and where it was further held that a municipal corporation was a "person interested" within the meaning of the words of the section.

In delivering the judgment of their Lordships, Lord Collins says:—

> In the present case it seems quite clear to their Lordships that if, to use the language above quoted, "the field were clear," the sections impugned do no more than provide reasonable means for safeguarding in the common interest the public and the railway which is committed to the exclusive jurisdiction of the Legislature which enacted them, and were, therefore, *intra vires*. If the precautions ordered are reasonably necessary, it is obvious that they must be paid for, and in the view of their Lordships there is nothing *ultra vires* in the ancillary power conferred by the sections on the Committee to make an equitable adjustment of the expenses among the persons interested. This legislation is clearly passed from a point of view more natural in a young and growing community interested in developing the resources of a vast territory as yet not fully settled than it could possibly be in the narrow and thickly populated area of such a country as England. To such a community it might well seem reasonable that those who derived special advantages from the proximity of a railway might bear a special share of the expenses of safeguarding it. Both the substantive and the ancillary provision are alike reasonable and *intra vires* of the Dominion Legislature, and on the principles above cited must prevail, even if there is legislation *intra vires* of the provincial Legislature dealing with the same subject matter and in some sense inconsistent.

I find myself in the face of the different provisions of the "Railway Act" and the decisions of the courts

(1) [1908] A.C. 54.

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upon them quite unable to appreciate or accept the argument that the Toronto Street Railway is not a company "interested or affected" in the change of grades at the Avenue Road and the protective works ordered there within the meaning of the sections of the Act applicable.

The recent decision of the Privy Council in the *British Columbia Electric Railway Co.* v. *Vancouver, Victoria and Eastern Railway Co. and The City of Vancouver*(1), was of course much relied upon by the appellant who sought to make the facts of this appeal analogous to the facts of that case. Superficially there may be some resemblance between the facts in both cases, but it is only superficially. The head-note to the report of the British Columbia Electric Railway case before the Privy Council states the facts and the decision as follows:—

> The corporation of the City of Vancouver, wishing to alter the grading of four streets in the city which were crossed by the tracks of a Dominion railway, applied to the Board of Railway Commissioners for Canada for authority to carry the streets over the railway tracks on bridges. Along two of the streets in question a railway company, working wholly within the province under provincial statutory authority, ran tramways The Board authorized the work and ordered that a part of the cost of construction should be borne by the provincial company, on the ground that that company would benefit by the alteration:—
>
> *Held*, that the order, so far as it imposed part of the cost of the proposed work upon the provincial railway company, was not within the powers conferred upon the Board of Railway Commissioners by the "Railway Act" and was invalid.

Turning to the reasons for the judgment of the Judicial Committee, as pronounced by Lord Moulton, it will be seen how utterly inapplicable that judgment is to the case before us. His Lordship in the first place entirely agrees with the remarks of Duff J. of this

(1) [1914] A.C. 1067.

court as to the *ground and reason* of the application of the corporation to the Railway Board. He goes on to say:—

Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question, he said, whether on the one hand the grade was to be elevated, or on the other, the grade was to be made to conform to the grade of the railway tracks and level crossings established. It was necessary to have the matter disposed of because people were applying for permits to build upon these streets, and these could not be granted owing to the inability of the municipality to give the grade of the streets. The council preferred the former of the two alternative courses because they recognized that the street grades were too low and must inevitably be raised.

His Lordship then adds:

It follows therefore that the application was a matter between the corporation and the railway company alone.

The proposed works for which the authority of the Railway Board had been asked and granted was a matter merely of "street improvements" and he goes on to say:

It is evident from the reasons given by the Railway Board that they directed the tramway company to pay a proportion of the cost of the improvements because *they were of the opinion that the tramway company would benefit by them.*

And later he sums up his reasons for judgment by saying:

The fundamental error underlying the decision of the Railway Board is that they have considered that the fact that the tramway company would be benefitted by the works gave them jurisdiction to make them pay the cost or a portion of it. There is nothing in the "Railway Act" which gives any such jurisdiction.

He further points out that the order does not come under the powers of section 59 of the "Railway Act":

It does not direct that any work should be done. It is an order of a *purely permissive character* granting a privilege to the corporation which they may exercise at the expense of a third party, and it leaves it to the corporation to decide whether they shall avail themselves of it or not. The provisions of s. 59 relate to a wholly different class of cases.

The substance of the judgment, as I understand it, is that on the facts the works for which the electric

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company was ordered, on the application of the corporation of the city, to pay a portion of the cost were not works ordered by the Board "for the safety and protection of the public" at railway or highway crossings, but were merely a matter of street improvements, and that the order was of a

> purely permissive character granting a privilege to the corporation which they might exercise at the expense of a third party.

There is nothing comparable between such a proposed work and the one ordered in this case. The one is a matter merely of "street improvements" for which a "permissive order" is given and a part of the expense of which if undertaken at all by the corporation is ordered to be paid by an electric company because the works may benefit it. The other, the one before us, is a work ordered by the Railway Commissioners under, as I hold, their paramount power of ordering works at highway and railway crossings for the safety and protection of the public.

As I hold the sections of the Act in question, and before by me specially referred to, to be *intra vires* of the Parliament of Canada and the works ordered to have been so ordered not as a matter of street improvements but for the safety and protection of the public, I would dismiss the appeal against the jurisdiction of the Board with costs.

I would answer the questions of law submitted to us as follows:

The first question in the affirmative;

The second question: I do not think the agreement referred to in the second and third questions precluded the Board from making the order requiring the Toronto Railway to contribute to the cost of the subway ordered.

IDINGTON J.—The Railway Commissioners for Canada, clearly intending to promote the safety of the public and solely for that purpose, acting upon their own initiative, as empowered to do when they see fit for such a purpose, ordered on the 13th September, 1910, their approval of a plan dated May, 1910, filed by the railway company.

The plan so referred to was the result of many meetings and much work by both the officers of the Canadian Pacific Railway Co. and of the Board, in the way of meeting the wishes of the latter to have some of the many grade crossings done away with.

It appears from the circular of 15th July, 1909, that the Board had been prompted, to take the steps it did, by Parliament in 1909 providing aid for the elimination of grade crossings, and by the discussion therein, and the general expression of public opinion.

Such being the origin of what led up to the order of 13th September, 1910, and the subsequent history exhibiting the determination of the Board on the subject, I read this order made, after hearing all the parties concerned, as an imperative direction to the railway companies concerned to eliminate the Avenue Road grade crossing and separate there the grades at crossing of the two railways.

The informal nature of the order leads me to state thus why I assume it must be treated as an order of the character I ascribe to it.

The parties concerned never seem to have supposed it anything else, but like people of sense acted upon it as if it must be obeyed.

The Canadian Pacific Railway Co. apparently had the burden of the work imposed upon it but the other company was put for many months to great inconven-

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ience before venturing to lay its rails on the subway thus created.

In making the order the Board reserved the question of the cost of work and all implied therein for a future hearing, if the parties could not agree.

When that came the appellant disputed any liability and denied any power in the Board to deal with the subject, as it (the appellant) was a purely provincial corporation.

Nevertheless the Board ordered the appellant to pay ten per cent. of the cost and allowed it to appeal on three questions for our decision.

The first is as follows:—

1. Whether the Board had power to order the Toronto Railway Company to contribute to the cost of the construction of the subway in question,

and merely involves the question of jurisdiction in respect of which leave to appeal had already been given by the Chief Justice of this court.

I think, having regard to what appears in the case and which I have tried to epitomize, and also to the general scope of the "Railway Act" and direct requirements of many provisions more or less bearing upon the powers of the Board and especially those of section 8, sub-section (*a*), section 59 and section 238 of the "Railway Act" that the Board had jurisdiction to make the order now in question.

Section 238 clearly expresses the power to deal with the whole matter by directing the separation of grades.

Section 8, sub-section (*a*) as clearly indicates the crossing of these roads as a subject matter within the jurisdiction of the Board.

And section 59 seems to enable the Board to apportion the cost between those interested and direct payment accordingly.

These sections must be read in the form they now respectively stand, for section 238 as it stood in the R.S.C. 1906 has been repealed and been much expanded by the section substituted therefor in 8 & 9 Edw. VII., ch. 32, sec. 5, probably to meet the *Toronto Viaduct Case*(1) which I am about to refer to, and incidentally to put beyond question the powers of the Board over such a subject matter as grade crossings. The latter section enables in express terms the Board of its own motion,

> or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, etc.

My only difficulty in the case is an apparent conflict of authority raised by the decision relied upon in the argument by appellant's counsel to which I am about to refer.

On the one hand we have these clear and explicit provisions of the "Railway Act" as it stands amended and the decision of the Judicial Committee of the Privy Council maintaining decisions of this court and Ontario courts holding, under the provisions of the "Railway Act" as it then stood before the Act was made so explicit as it now is, that mere municipal corporations only indirectly interested were liable to contribute even to a less effective (and only secondary) means of providing for the safety of the public.

I say these municipal corporations were only indirectly interested for they had only, in regard to highways, a duty to keep them in repair. They might or might not own them and had only a limited authority

(1) [1911] A.C. 461.

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to levy taxes, in short were mere creatures of the local legislature liable to have their powers expanded or contracted as it saw fit. Nevertheless they were held parties interested.

These cases are represented by what appears to be the final authoritative decision of the Judicial Committee in the case of *City of Toronto* v. *The Canadian Racific Railway Co.*(1).

It would seem as if the appellant running a street railway across the Canadian Pacific Rly. Company's (respondent's) railway in the locality and situation such as described in the opinion judgment of the Board should be much more directly interested in the safety of the public at that crossing point than any mere municipal corporation.

No one ever supposed for an instant that so long as the highway was kept in repair the municipality was liable for any of the numerous accidents at such crossings. But even provincial railways and tramways have had to suffer in that regard.

Yet, on the other hand, years after the decision above referred to and when section 238 of the Act had been amended and other legislation passed dealing with the very grave question of grade crossings and seeking through the Board to eliminate them in part at least, we have the decision of the court above in the case of the *British Columbia Electric Railway Co.* v. *Vancouver, etc. Railway Co.*(2) reversing an order of the Board maintained by this court, approving of a plan for separating the grades as in the order here in question, and directing the appellant (there in question) to contribute to the expense of executing that plan of separation.

(1) [1908] A.C. 54. (2) [1914] A.C. 1067.

The difference between the scheme propounded in that plan and the one involved herein is that the municipal corporation plan there was to carry its highway, and therewith the B. C. Electric Railway, over the steam railway, by a bridge instead of as here in question providing for the crossing by the raising of the C. P. Rly. track and the highway going under in a subway wherein the appellant might lay a new track and thus attain identically the same object which was to separate the grades and thus ensure the safety of the public.

One other difference was that the application there was made to the Board by the municipal corporation and here the proceeding is one initiated by the Board.

I am puzzled to know how that creates any substantial difference for section 238 as amended expressly provided for "any municipal or other corporation" moving in the matter. Nor can I see that because that municipal corporation incidentally desired something to proceed in way of settling its street grades contemporaneously with executing a most desirable purpose of eliminating one or more grade crossings, their application should be held null.

It is quite clear that the Board imagined they were acting within the legislation promoting the abolition of grade crossings, for by the order made in that case it provided for three grants of $5,000 each being paid out of the Railway Grade Crossing fund, created by Parliament for the express purpose of eliminating progressively the grade crossings.

The only other distinction between that case and this would seem to be that the order was permissive or conditional instead of being peremptory. Probably that was a gentler method of accomplishing the desired

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result and could hurt no one, unless and until acted upon, and then would execute the wishes of the Board.

The relations between the appellant and the municipality at that particular juncture added force to the vigorous objections made to that phase of the order.

The distinction between the permissive and conditional character of that order especially under the circumstances existent in connection therewith and this one, clearly made on the initiative of the Board, and free from obvious difficulties suggested in the other, I think distinguishes the two cases sufficiently to maintain the order now in question without at all disregarding the decision of the court above.

It is to be observed that the court above refrained from acting upon the view of the law presented by the minority judgment in that case in this court. That is the more noticeable for the court above drew its statement of fact from that very judgment which strenuously maintained the position that it would be *ultra vires* Parliament to enact anything upon which such an order as there in question could be founded.

The alleged power of Parliament is what appellant also challenges and denies herein and thus raises the only really important question in this case.

Unless and until it is expressly held by the court above that it is not, as heretofore supposed, to be within the power of Parliament to deal effectively with all relating to crossing railroads (whether they are both the properties of corporate creations of Parliament or one or more the property of a provincial corporation and the other of Parliament) so long as one is the creation of Parliament, I think we are bound by the view taken by the court above in the earlier

Toronto case, and certainly not overruled in this later *British Columbia Electric Railway Company's Case* (1), to abide by what I think has become settled law.

That view of the law was upheld in this court in the case of *In re Alberta Railway Act*(2), and in the same case in the Privy Council, *Attorney-General for Alberta* v. *Attorney-General for Canada*(3), at page 370.

I am not disposed to confine as suggested should be done the words of the "Railway Act" referring to crossing railways to the mere physical contact of a crossing on the level, for the sections of the Act already referred to evidently contemplate a crossing where there is no such crossing contact possible.

Indeed in our country in many places such a thing would be impossible, yet control of the crossings must fall under the words "crossing railways."

I therefore think the appellant came for the purposes of this case within the jurisdiction of the Board.

The leave given originally to appellant to cross the Canadian Pacific Railway on Avenue Road ended, as I understood Mr. McCarthy frankly to concede, when the Board decided on another mode of crossing. And it follows that it must, in using the new method of effecting that crossing, be held assenting to the Board's adoption of the new plan. It must abide by the terms imposed upon its impliedly assenting thereto and accepting and using that new mode.

I say impliedly for there was no express order made in that regard.

Counsel assumes that the appellant had a right to use the highway and needs no more. I do not think it is any answer in law. It is ingenious, but will not

(1) [1914] A. C. 1067. (2) 48 Can. S.C.R. 9.
(3) [1915] A. C. 363.

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stand examination, as someone may find to his cost should he running a car plunge through that subway at the moment of an accident on the spot, when he might need authority for being there at all, and wish his master had got an express order from the Board giving him the right to be there.

As to the other two questions presented I see nothing in the agreement between the appellant and the city disabling the Board from dealing with the matter as it has.

There may be something fairly arguable as to the power of the Board to have placed upon the city part of the burden of the cost, either under the decisions I have referred to, or under those coupled with the terms of the agreement.

I can find nothing in either as a matter of law imperatively binding the Board to do so. And when the safety of the public is the chief thing involved, then the inutility of contracts or implication therein for or by way of binding the power of the Board was exemplified in *Canadian Pacific Railway Co.* v. *City of Toronto et al*(1), and in the same case in this court. Sections 237 and 248, possibly enacted to fit that case and all such like, were made to predominate over everything else standing in the way of the Board.

I express, indeed have, no opinion as to the legal right to remedy now by one against the other of such contracting parties as the appellant and the city.

Perhaps if the orders of the Board presented in a formally express manner the exact authority it is presuming to act under, the doing so might avoid some confusion and possible miscarriage of what it intends to direct.

(1) [1911] A.C. 461.

I may also add that much we heard of the Yonge Street crossing and its relation to the questions involved herein seems to me beside that which we have to deal with.

Yonge Street crossing turned out to be a mere question of public convenience which is equally within the power of the Board as that relative to the safety of the public.

It has nothing to do with the questions raised herein except historically, as it were.

I see no reason why the Board should not deal with both questions at the same time.

I think the appeal should be dismissed with costs.

ANGLIN J.—The Toronto Railway Company, a provincial corporation operating a line of electric tramway on Avenue Road, a public street in the City of Toronto, appeals against an order of the Dominion Board of Railway Commissioners, whereby it is required to pay one-tenth of the cost of constructing a subway ordered by the Board at the crossing of Avenue Road by the tracks of the Canadian Pacific Railway Company, a Dominion corporation operating a steam railway. At the point in question there had been since 1902 a crossing at rail level of the tracks of the Canadian Pacific Railway, by the tracks of the Toronto Railway, authorized by orders of the Railway Committee of the Privy Council made on the application of the Toronto Railway Company under sections 173–177 of the Dominion "Railway Act" of 1888—the predecessors of ss. 227–229 of the present "Railway Act," R.S.C., 1906, c. 37. By those orders the Toronto Railway Company was required to provide, and to pay the cost of maintaining, certain additional protection at this highway

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crossing ordered by the Railway Committee in consequence of the advent of its tramway.

In 1909 the Dominion Parliament established a fund for

> aiding in the providing by actual construction work of protection, safety and convenience for the public in respect of highway crossings of the railway at rail level.

and placed the administration of this fund, subject to certain restrictions, in the hands of the Railway Board ("Railway Act," s. 239 (*a*) enacted by 8 & 9 Edw. VII., c. 32, s. 7.)

The record discloses that the proceedings which led to the making of the order for the separation of the grades of the C. P. Railway and of Avenue Road, including the grade of the Toronto Railway, were initiated on July 1st, 1909, by the Railway Board of its own motion for the purpose of carrying out the intention of Parliament in passing the legislation of that year embodied in s. 239 (*a*) of the "Railway Act." No doubt the project for the elimination of the level crossing at Yonge Street which was first taken up, probably because it was the most important, led to the consideration of the neighbouring crossing at Avenue Road and to the direction given by the Board, on the recommendation of its chief engineer, that the C.P.R. Company should submit plans covering the elimination of the latter level crossing as well as that at Yonge Street. But it is equally clear that the Board in giving this direction and in making its subsequent order for the separation of grades and the construction of the subway at Avenue Road was not solely influenced by the fact that the carrying out of the Yonge Street project rendered the work at Avenue Road desirable, if not necessary, but was actuated largely, if not chiefly, by the consideration that the level

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crossing at Avenue Road itself was highly dangerous and that its elimination was demanded in the interests of "the protection, safety and convenience of the public." As the Chief Commissioner (Mr. Mabee) remarked, when making an order on the 17th June, 1910, adding the Toronto Railway Company as a party because it was interested in the Avenue Road crossing, though not in that at Yonge Street, plans for both having been presented,

> These plans now certainly take care of two very dangerous crossings.

The Canadian Pacific Railway Company had itself reported Yonge Street and Avenue Road as dangerous crossings and counsel representing it alluded to that fact at the meeting of the Board at which the subway plans were approved. The appellant's somewhat disingenuous reference to the grade of Avenue Road as having been "altered by arrangement between the municipality and the Dominion road" is an obvious attempt to bring this case within the purview of the recent decision of the Privy Council in the *British Columbia Electric Railway Co.* v. *Vancouver, Victoria and Eastern Railway Co.*(1).

Moreover, if the proceedings should be regarded as having been commenced solely in respect of the Yonge Street crossing, under s.s. 1 of s. 238, as enacted by 8 & 9 Edw. VII., c. 32, s. 5, the Board is empowered to deal not only with any highway crossing at which in its opinion the protection, safety and convenience of the public require that it shall order works to be executed or other measures to be taken, but also with any other crossing directly or indirectly affected.

The question presented is whether under these

(1) [1914] A.C. 1067.

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circumstances the Railway Board had jurisdiction to order the Toronto Railway Company to bear a portion of the cost of the works which it directed at Avenue Road. Its jurisdiction is contested upon two grounds —that the Dominion "Railway Act" does not purport to confer such jurisdiction upon it; and that, if it does, the legislation is *ultra vires*.

For the sake of brevity I shall speak of railways under the legislative jurisdiction of the Parliament of Canada as Dominion railways and of railways or tramways under provincial legislative jurisdiction as provincial railways or tramways.

It is obvious that in the present case there are two matters in respect of which the Railway Board may have jurisdiction—one, the crossing of the Dominion railway by the provincial tramway; the other, the crossing of the Dominion railway by the street or highway. These crossings are separately dealt with by the "Railway Act"—the former by sections 227–229; the latter by sections 237 *et seq.* For sections substituted for ss. 237 and 238 of R. S. C. c. 37, see 8 & 9 Edw. VII., c. 32, ss. 4–6.

By s. 8 (*a*) of the Dominion "Railway Act" every provincial railway or tramway which connects with or crosses a Dominion railway is made subject to the provisions of that Act relating to the connection or crossing of one railway or tramway by another, so far as relates to such crossing. The provisions thus made applicable are ss. 227 and 229. (*British Columbia Electric Railway Co.* v. *Vancouver Victoria and Eastern Railway Co.*(1), at p. 1075).

Under s. 227 the crossing of a Dominion railway by the tracks or lines of any other railway company with-

(1) [1914] A .C.1067.

out leave of the Board, is prohibited: by s.s. 3 the Board is empowered (*a*) to grant a crossing application on such terms as to protection and safety as it deems expedient; (b) to change the plan submitted and fix the place and mode of crossing; (c) to direct that one line or track or one set of lines or tracks be carried over or under another line or track or set of lines or tracks; (d) to direct the construction of such works, structures, etc., as appear to it best adapted to remove and prevent all danger of accident, injury or damage.

This section, *ex facie*, deals only with an application for leave in the first instance to cross a Dominion railway and does not explicitly cover the case of a change or modification becoming necessary or desirable in the protection or character of a crossing already established. It is argued for the respondents, however, that the order of the Board may be treated as having terminated the existing right of level crossing, which had been granted to the Toronto Railway Company by the Railway Committee of the Privy Council, and that, having regard to all the circumstances, that company should be deemed to have been again an applicant to the Board for leave to cross the Dominion railway, this time by means of a subway. Under s. 29 of the "Railway Act" the Board may

> review, rescind, change, alter or vary any order or decision made by it,

and by s. 32 (2) it is given the like power in respect of orders which had been made by the Railway Committee of the Privy Council, which it succeeded. The Board would, therefore, seem to have been competent to vary the order originally made by the Railway Committee of the Privy Council, which granted the application of the Toronto Railway Company to cross the tracks of the C. P. R. at rail level, by directing under

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clauses (b) (c) and (d) of s.s. 3 of s. 227, that the mode of crossing should be changed, that the lines or tracks of the Toronto Railway should be carried under those of the C. P. Railway and that works or structures deemed by the Board best adapted to remove or prevent all danger of accident, injury, or damage should be constructed, etc. The Board might make such an order *sua sponte* (s. 28); and by s. 59 it is empowered to

> order by what company, municipality or person interested or affected by any order made for the construction of works, and in what proportion, the cost and expense thereof shall be paid.

It would seem to follow that without treating the Toronto Railway Company as an applicant to it for a right to cross the lines or tracks of the C. P. Railway by means of or through a subway, the Board, subject to the question of the constitutionality of the Dominion legislation, in view of the provisions of s. 8 (*a*), had jurisdiction, exercising the powers conferred on it by ss. 28, 29, 32 (2), 227 (3) and 59, to make the order in question.

Subject again to the question of constitutional validity, I think it also had jurisdiction to make that order under s. 238, as enacted by 8 & 9 Edw. VII., c. 32. The subject matter before it was the crossing of a Dominion railway by a highway as well as by a provincial tramway. Sec. 238, unlike s. 227, expressly deals with existing crossings. The jurisdiction of the Board under s. 238 to order, of its own motion, or upon complaint or application, that the highway be carried under the railway and that the works in its opinion best adapted to remove or diminish the danger or obstruction in respect of such crossing be constructed is unquestioned. Its power under s. s. 3 of s. 238

or s. s. 2 of s. 59 to order the payment of a portion of the cost of such works by the provincial municipal croporation which controls the highway at the actual crossing has not been challenged since the decision of this court in *City of Toronto* v. *Grand Trunk Railway Co.*(1), from which the Privy Council refused leave to appeal(2); its right to require another municipal corporation in control of an adjacent portion of the highway not actually crossed by the railway also to contribute to the cost of the works ordered was expressly affirmed by the Judicial Committee, when challenged not merely upon the construction of s. 188 of the "Railway Act" of 1888 and s. 47 of the "Railway Act" of 1903 (corresponding respectively to s. 238 and s. 59 of the present statute), but also upon the constitutional validity of these provisions. It was then held that a municipal corporation in either position was a "person interested" within the meaning of s. 188 of the Act of 1888—"a municipality or person interested or affected" within the meaning of s., 47 of the Act of 1903; *City of Toronto* v. *Canadian Pacific Railway Co.* (3).

The language of the present s. 59 is the same as that of s. 47 of the Act of 1903; that of the present s. 238 (3) is—

> The Board may order what portion, if any, of the cost is to be borne respectively by the company, municipal or other corporation, or person

on whose application the Board may, under s. s. 1, order the construction of the works.

It was also held by the Privy Council that

> there is nothing *ultra vires* in the ancillary power conferred by the sections on the Committee (now the Board) to make an equitable

(1) 37 Can. S.C.R., 232. (2) 37 Can. S.C.R., p. ix.
(3) [1908] A.C. 54.

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adjustment of the expenses among persons interested. * * * Both the substantive and the ancillary provisions are alike reasonable and *intra vires* of the Dominion Legislature. *City of Toronto* v. *Canadian Pacific Railway Co.*(1), at pp. 58–9.

The substantive provision empowered the Board to order the works; the ancillary, to apportion the cost and to direct payment.

In respect of the constitutional validity of the sections of the "Railway Act" in so far as they authorize the imposition of the cost of works or precautionary measures upon persons or bodies other than the Dominion railway concerned, I am unable to discern any real ground of distinction between municipal corporations, the creatures of, and, in all their relations, subject to the control of, the provincial legislatures, to which exclusive legislative power in regard to "municipal institutions in the province" has been committed by clause 8 of s. 92 of the B. N. A. Act, and "local works and undertakings" (including provincial railways), which are likewise placed under exclusive provincial control by clause 10 of the same section. Since the Dominion railway company might, however inequitably, be required to bear the entire burden of the expense of crossing protection, it cannot be said to be absolutely necessary that the Railway Board should have authority to impose any part of that expense on any other person or on any other corporation, Dominion or provincial. In regard to both municipal corporations and provincial railway corporations alike Dominion interference must be confined to what is

necessarily incidental to the exercise of the powers conferred on it by the enumerative heads of clause 91 of the B. N. A. Act

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(1) [1908] A.C. 54.

Canada(1)), other than "the regulation of trade and commerce." *City of Montreal* v. *Montreal Street Rly. Co.*(2). The right of the Dominion Parliament to provide for

an equitable distribution among the persons interested

of the expense of furnishing

reasonable means for safe-guarding in the common interest the public and the railway

when Dominion railways are crossed by highways has been expressly recognized in the Privy Council in *City of Toronto* v. *Canadian Pacific Railway Co.* (3), as something within the ancillary power of Parliament —as necessarily incidental to its exclusive jurisdiction over

lines of * * * railways * * * connecting the province with any other province or provinces or extending beyond the limits of provinces. B.N.A. Act, s. 92, clause 10 (*a*).

The power to order municipal corporations to contribute to the cost of crossing works cannot be any more necessary to complete and effective legislative jurisdiction over Dominion railways than the like power in respect of tramway companies whose lines cross such railways. Neither provincial railways nor municipal highways are dealt with by the Railway Board as such under the legislation in question. Both the provincial railway company and the municipal corporation are dealt with under it merely as bodies interested in crossings of Dominion railways and because of such interest, affected by the orders of the Board.

The question remains whether under the circumstances of the present case the Toronto Railway Company is

(1) [1896] A.C. 348, at p. 360. (2) [1912] A.C., 333, at pp. 343, 344.
(3) [1908] A.C. 54.

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a "company, municipality or person interested in, or affected by, the order" for the construction of a subway at Avenue Road and the depression of its tracks involved therein, within the purview of s. 59 of the "Railway Act," or a "corporation or person" on whose complaint or application the Board might have ordered the works under s. 238 of the same Act. Whether the order of the Board should be viewed solely as an exercise of its power under s. 238 (supplemented if need be by s. 59), the Toronto Railway Company being concerned because of its presence and rights upon the highway, or whether as to that company the order should also be regarded as made under the provisions of clauses (c) and (d) of s.s. 3 of s. 227, supplemented by the provisions of ss. 28, 29, 32(2), 59 and 8(*a*) I entirely fail to appreciate the force of the contention that the company is not a "company interested or affected" within the meaning of s. 59 by the order of the Board for the change in conditions at the Avenue Road crossing or that it is not a "corporation" on whose application that order might have been made under s. 238 and therefore under s.s. 3 liable for such portion of the cost of the works directed as the Board has ordered it to bear. The order for the separation of grades and the construction of the subway certainly affects the Toronto Railway Company very directly. It deprives it of its existing right of level crossing and provides for it a new and much more advantageous means of crossing the Dominion railway. It may well be too that the width and depth of the subway ordered depended, to some extent at least, upon the use of the highway by the Toronto Railway for its double lines of track. Its presence upon the highway may have constituted the chief element of danger in the

existing level crossing. I find it difficult to conceive how it could properly be held that the Toronto Railway Company was not interested or affected or was not a "corporation" within s.s. 1 and 3 of s. 238.

The recent case of *British Columbia Electric Railway Co.* v. *Vancouver Victoria and Eastern Railway Co.* (1), was much relied upon at bar by counsel for the appellant. In that case, in the opinion of the Judicial Committee, "the ground and reason of the application" of the municipal corporation, on which the Board acted, was municipal convenience and improvement. It was, in their Lordships' opinion,

a matter between the corporation and the railway company alone,

from which the proper inference would seem to be that the order made by the Board was not regarded as an

order as to the protection, safety and convenience of the public

within s.s. 1 of s. 238, in respect of which under s.s. 3 the Board might order that a portion of the cost of the works should be borne by a corporation or person other than the Dominion railway or the municipal corporation at whose instance they were directed or sanctioned. In such a case the Judicial Committee negatives the right of the Board to order payment of a portion of the cost of the works merely because some benefit would accrue therefrom to the body or person upon whom it is sought to impose that burden. The order made by the Board did not "direct that any work should be done;" it was merely permissive. Therefore their Lordships held that it was not within the purview of s. 59.

Dealing with the question presented solely as one of construction of the "Railway Act," and determin-

(1) [1914] A.C. 1067.

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ing nothing as to the power of Parliament to confer upon the Railway Board the jurisdiction which it had attempted to exercise, their Lordships held that, in ordering the provincial tramway company, whose tracks running along the highway crossed the tracks of the Dominion railway company at rail level on two of the four streets in question, to pay a part of the cost of constructing bridges on those two streets to carry the highway, and incidentally the tracks of the tramway company, over those of the Dominion railway, the Board had exceeded the jurisdiction which the statute purports to confer upon it. But they rejected the contention of counsel for the Dominion railway company that, on the authority of *Grand Trunk Pacific Railway Co.* v. *Fort William Land Investment Co.*(1), the whole order should be rescinded.

The application to the Railway Commission in *British Columbia Electric Rway. Co.* v. *Vancouver, Victoria and Eastern Rly. Co.*(2) was made under ss. 237 and 238 of the "Railway Act," as enacted by 8 & 9 Edw. VII., c. 32. As it concerned existing crossings, s. 238 was the provision applicable. The Railway Board dealt with the matter as one of grade separation. The sentence of the judgment of the Assistant Chief Commissioner in which he grants the application is as follows:—

> In this matter the Board is of the opinion that the application should be granted for the approval of grade separation at these four streets, Hastings, Pender, Keefer, and Harris.

After directing that the work on the four streets should be proceeded with at once, he adds

> Therefore having decided that much, it is incumbent on us to say in what proportions the cost shall be borne by the interested parties.

(1) [1912] A.C. 224. (2) [1914] A.C. 1087.

After dealing with the circumstances, making special allusion to the very considerable traffic on the tramway as indicative of the desirability of grade separation from "the point of view of safety and convenience," the learned Commissioner pointed out the advantages to the tramway company of an overhead crossing and it was ordered to pay 20% of the cost of the works. By the order the Commissioners directed that towards the cost of one of the two crossings in which the tramway company was interested $5,000 should be paid out of the fund established by the legislation of 1909 ("Railway Act," s. 239 (*a*))

> for the purpose of aiding in the providing by actual construction work of protection, safety and convenience for the public in respect of highway crossings at the railway at rail level.

They regretted that the limitation precluding aid for more than three crossings in any one municipality in one year prevented their giving a like sum out of the fund towards the other crossing.

Nevertheless, their Lordships of the Judicial Committee viewed the matter dealt with not as one in which the action of the Board had been influenced by considerations of protection, safety or convenience of the public, but as one of street improvement merely, in which the municipal corporation and the Dominion railway company were alone concerned. There is no allusion in their judgment to s. 238, as enacted by 8 & 9 Edw. VII., c. 32, the third sub-section of which in explicit terms empowers the Railway Board to apportion amongst the "company, municipal or other corporation or person" on whose complaint or application it might have proceeded, the cost of any works or protection which it might order under s. s. 1. There was no similar provision in s. 238 of the "Railway Act" as it appears in c. 37 of the R. S. C. of 1906, and, if

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I may make the suggestion without disrespect, it would almost seem that the provisions of the amendment in 8 & 9 Edw. VII. had escaped their Lordships' attention. The point made as to the permissive character of the order pronounced by the Railway Board and the consequent inapplicability of s. 59 appear rather to support that view. Prior to the amendment of 1909 the authority to apportion the cost of works ordered under s. 238 depended on s. 59; since that time s. 238 itself contains the empowering provision.

In the present case the order is not permissive but mandatory. The proceedings were instituted not by a municipal corporation but by the Board itself. They were prompted by the legislation of 1909 providing a fund to aid in the construction of works for the protection, safety and convenience of the public. That the Board was influenced by considerations of public safety was made clear in what took place prior to the addition, on the 7th of June, 1910, of the Toronto Railway Company as a party interested and again when the decision was finally reached on the 13th September, 1910, to order grade separation and subways at Yonge Street and Avenue Road and to reserve for further consideration the question of cost. It is not at all improbable that one of the chief sources of danger in the case of Avenue Road was the crossing at rail level at the foot of a steep hill of the double tracks of the C. P. Railway by the double tracks of the Toronto Railway. The advantages to the latter company of the subway crossing are obvious. That it was affected by the order and interested in the work seems to me to be as indisputable as that it was a corporation on whose complaint or application the

order for the works might have been made (s. 238 (1)). This case is therefore in several respects clearly distinguishable from that of *British Columbia Elec. Rly. Co.* v. *Vancouver, Victoria and Eastern Rly. Co.*(1) as viewed by their Lordships of the Judicial Committee. With great respect, assuming jurisdiction, the facts that the presence and operation of the Toronto Railway Company at the crossing had very largely contributed to the danger to be removed and that the substituted method of crossing would be distinctly advantageous to it, seem to me most cogent reasons for requiring it to contribute to the cost of making the necessary change.

In *Ottawa Electric Railway Co.* v. *City of Ottawa*(2), an order similar to that now complained of, made against the Ottawa Electric Railway Company, which happened to be a Dominion corporation, was sustained by this court explicitly on the ground that it was a "person interested or affected" within the meaning of s. 47 of the "Railway Act" of 1903. Section 47 corresponds to present s. 59. When the Ottawa Electric case was decided s. 238 did not contain the provision enabling the Board to apportion cost now found in s.s. 3. The decision of this court in *British Columbia Elec. Rly. Co.* v. *Vancouver, Victoria and Eastern Rly. Co.*(1), that s. 59 of the "Railway Act" and s. 238 as enacted by 8 & 9 Edw. VII., c. 32, are *intra vires* of the Dominion Parliament was not affected by the judgment of the Privy Council on the appeal(3).

When apprised that the Toronto Railway Company intended to question the jurisdiction of the Railway Board to order it to bear a portion of the cost of the works at the Avenue Road crossing the Assistant Chief

(1) [1914] A.C. 1067. (2) 37 Can. S.C.R. 354.
(3) 48 Can. S.C.R. 98.

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Commissioner thought it proper to supplement a statement made when pronouncing that order, so that

> the reasons on which (his) judgment rested in regard to the division of cost * * * should be clearly set out.

His purpose apparently was to put it beyond doubt that the Board had been actuated by considerations of public protection and safety. That was clearly unnecessary in view of the history of the proceedings which led up to the order being made for separation of grades and approving of the subway scheme and plans, and of passages in them in which the dangerous character of the crossing at Avenue Road had been emphasized. Moreover, by the Board's order of the 12th November, 1914, payment of 20% of the cost of constructing three of the subways (not exceeding $5,000 in any one case) directed in connection with the grade separation scheme in North Toronto, of which the grade separation at Avenue Road formed a part, was authorized to be made out of the railway grade crossing fund established by s. 239 (*a*) of the "Railway Act" (8 & 9 Edw. VII. c. 32). This order could not properly have been made unless the work so aided was for the protection, safety and convenience of the public. The learned Commissioner probably thought it advisable, however, in view of the fact that when making the order for distribution of cost he had specially alluded to the undoubted advantages which the Toronto Railway Company would derive from the substitution of the subway for a level crossing, to state explicitly that the action of the Board in directing that substitution had been influenced by the danger of the existing level crossing. He had referred to the incidental advantages of a subway to the Toronto Railway Company not as a reason for ordering the separation of grades and the

construction of the subway but as a ground for imposing 10% of the cost on that company.

Mr. McCarthy objected to these additional reasons being considered and also challenged the accuracy of the allusions in them to an accident at the Queen Street crossing, owing to a tramway overrunning Scotch blocks which were set against it, and to another accident at Front Street. The records of the Railway Commission, produced by Mr. MacMurchy, bore out the statements of the Assistant Chief Commissioner as to both cases. Since the appeal to this court is confined to questions of jurisdiction and of law, I think it desirable that in cases which are to come here we should have full and explicit findings from the Board upon all matters of fact which may become material for our consideration. I can readily understand that in the hurry of disposing of the very numerous cases with which the Railway Board is called upon to deal, commissioners in stating the grounds on which they proceed may omit to advert expressly to facts present to the minds of themselves and the parties before them, but of particular moment only when a question of jurisdiction or of law is actually mooted. I agree with the view expressed by the learned Chief Commissioner, Sir Henry Drayton, that

> not only has the learned Assistant Chief Commissioner the right to deliver extended reasons for his judgment at any time that he desires, but that it was his duty so to do, in case any pertinent issue had not been covered in his previous reasons. Under the Act, questions of fact have to be disposed of by the Board, and all accessory findings of fact should be made by the Board so as to relieve the Justices of the Supreme Court from the consideration of all issues except the questions of law submitted.

The only remaining question is that raised in regard to the effect of paragraphs 13 and 18 of the agreement between the City of Toronto and the

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Toronto Railway Company whereby, that company contends, the city is obliged to furnish a right of way on its streets for the company's tracks. This provision, it is argued, relieves the company from all liability to contribute to the expense of alterations in the grades of streets. It may be that, as between the parties to it, the agreement entitles the company to indemnification from the city in respect of such cost. On that question of civil rights in the province the Dominion Railway Board was not competent to pass; and of course I express no view. But I find nothing in the agreement which in anywise interferes with the right of the Board to deal with the Toronto Railway Company as a company or person interested in and affected by its order for separation of grades and the construction of a subway at the Avenue Road crossing, or as a corporation on whose complaint or application that order might have been made and as such liable to bear the portion of the cost which the Board has deemed it proper to impose upon it. This was the view taken by this court in the Ottawa case already adverted to (37 Can. S.C.R. 354) of similar clauses in an agreement between the City of Ottawa and the Ottawa Electric Railway Company.

I would, for these reasons, answer the first question submitted by the Board of Railway Commissioners in the affirmative. To the second and third questions I would answer that I find nothing in the terms of the agreement referred to which precluded the Board making the order requiring the Toronto Railway Company to contribute to the cost of the subway at Avenue Road. The appeal against the jurisdiction of the Board to pronounce that order should be dismissed and the appellant should pay the costs of the respondents.

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BRODEUR J.—I thought at first that the facts of this case were similar to those adjudicated upon in the *Vancouver Case*(1), but they are so different that I have come to the conclusion that this appeal should be dismissed.

The application for a subway was not made by the municipality as in the *Vancouver Case*(1) but the correspondence and the procedure shew that the Board of its own motion inquired into and determined the order complained of.

It is not a matter of municipal improvement that the Board acted upon but it was a question of the protection and safety of the public.

Mr. Commissioner McLean in his judgment puts that very clearly when he said:—

> The work is undoubtedly in the interest of public safety. The element of danger which was manifestly present was attributable not only to the increase of traffic on the railway but also to the increase of traffic on the highways.

It is true that the Assistant Chief Commissioner in his first opinion, dated the 5th of May 1914, mentions other grounds to justify the action of the Board, but he states also that the construction of a subway will remove the possibility of the accidents which the level crossing in spite of the protection already existing might render possible.

The street railway company became with regard to this crossing under the jurisdiction of the Board when it applied some years ago for a level crossing. The Railway Committee could have directed then that the tracks of the street railway should be carried under the tracks of the railway company (section 227, s.s. 3–6 "Railway Act") but it simply granted the applica-

(1) [1914] A.C. 1067.

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tion and ordered under the provisions of section 229 the adoption of appliances which were then considered sufficient for the public safety and convenience.

The street railway company remained concerning the carrying out of that order under the control and the jurisdiction of the Board and if later on the public interest required some better protection, the construction of a subway, for example, the Board could revise its former order and proceed to determine the condition in which the crossing should take place (28-29-227 "Railway Act").

The Board was empowered then under s. s. 3 of section 237 or 238 to determine what portion of the cost of the improvement should be borne by the street railway company.

The facts disclosed in the present case shew conclusively that the powers exercised are ancillary to the control which the Parliament of Canada has on federal railways.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants:
McCarthy, Osler, Hoskin and Harcourt.

Solicitor for the respondent the Can. Pac. Ry Co.:
E. W. Beatty.

Solicitor for the respondent the City of Toronto:
William Johnston.

THE CANADA CEMENT COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

JOHN JOSEPH FITZGERALD (PLAINTIFF) ..... } RESPONDENT.

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*Feb. 25.
*May 2.

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

Deed of land reservation—Right of passage—Changed conditions—Object of conveyance.

F. sold land to the Cement Co., reserving by the deed "the right to pass over for cattle, etc., for water going to and from Dry Lake." The company, in using the land for excavating the marl deposit, cut away the shelving bank of Dry Lake and rendered it inaccessible for cattle.

Held, Fitzpatrick C.J. dissenting, that cutting away the bank at this place without providing another suitable watering-place with a proper way leading thereto was an unwarranted interference with the rights of F. and the fact that the company purchased the land for the purpose of digging marl did not give them a right to extinguish F.'s easement of passage for his cattle.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1) affirming the judgment at the trial(2) in favour of the plaintiff.

The facts are sufficiently stated in the above headnote. The trial judge held that the plaintiff was entitled to a perpetual right of way over the land sold for his cattle to get to water and he sent the case to a referee to ascertain if the defendants could furnish such right of way. In case they could not, plaintiff to have judgment for $1,500 as damages.

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* Present:—Sir Charles Fitzpatrick C.J. and Davis, Idington, Duff and Anglin JJ.

(1) 9 Ont. W.N. 79.

(2) 7 Ont. W.N. 321.

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The Chief Justice.

Tilley K.C. and *Northrup K.C.* for the appellants.

Mikel K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—In the grant by the respondent of part of his farm to the appellant there was the following reservation:

> And the said parties of the First Part reserve to themselves, their heirs and assigns forever, the right to use the roadway at present existing across the marl deposit to the Second Concession and the right to pass over for cattle, horses and other domestic farm animals for water going to and from Dry Lake.

There was some suggestion that these two rights refer to one and the same thing. I can see nothing to support such a contention. The right with which we are concerned is the second mentioned in the reservation and is entirely distinct from the first right reserved.

There was evidence that there was what is called a drift-way, that is a path or track, which was used by the cattle going from the respondent's farm to water at Dry Lake. The land surrounding the lake was, however, open marsh land and the cattle being at large I doubt if there could be said to be any definite way though possibly the cattle went more or less in the same direction. At any rate there is no suggestion of any such drift-way in the reservation and that in marked contrast to the reservation by the first right of the use of

> the roadway at present existing across the marl deposit to the Second Concession.

Now although the respondent tried to avoid answering the question he was obliged to admit that the appellant had not prevented cattle from going from the farm to Dry Lake.

> His LORDSHIP: Try and answer the question.
> A.—They could walk there

MR. NORTHRUP:—To the shore?

A.—Yes.

Q.—There is nothing to prevent your cattle coming from the lane around the head of the dredger to the shore of Dry Lake, whatever that shore is?

A.—No.

Therefore it is clear that the appellant has not prevented the respondent's cattle passing over the lands granted for water going to and from Dry Lake and that is all that the reservation in terms gives a right to.

The appellant in pursuance of the purpose for which it purchased these lands excavated the marl in Dry Lake and, instead of the shelving bank with two or three feet of water at which the cattle were accustomed to drink unattended, the water is now so deep at the bank that it would be unsafe to allow them to go there without someone in charge.

This is the real grievance of which the respondent complains and it is of something outside and beyond the right of way reserved in the conveyance over the lands granted. Consequently we are not concerned with those innumerable cases which are governed by the well-established principle that

> the servient owner cannot so deal with the tenement as to render the easement over it incapable of being enjoyed or more difficult of being enjoyed by the dominant owner.

Again, I do not think we can consider what was the intention of the respondent in making the grant to the appellant. He is very positive now that he intended to reserve the right to water his cattle as he had previously done. Perhaps he did not then consider the matter so fully as he has since done, for otherwise it must surely have occurred to him that since the purpose for which the appellant was acquiring the property was to excavate the marl some inter-

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ference with the water must be inevitable, and that he could not expect to sell part of his land for such a purpose and retain the use of it for farm purposes as completely as before. It is not, however, a question of what the respondent intended, but of what he did. There would be no justification for varying the grant even if such intention were clearly shewn for if at the time the appellant had been asked to pay a further $1,500 for the rights it was acquiring it would probably have refused to proceed with the purchase. We can, therefore, only consider what are the legal rights arising as between the parties.

Now the learned judge at the trial says in his judgment:

> I think the inference is when the right of way was reserved in the second part "The right to pass over, etc.," that that involves the inference and suggestion that there should be a place at the end of that right where they (*i.e.*, the cattle) could water in safety.

In the first place, I point out that we are not directly concerned here with the difference between an implied grant and an implied reservation. This difference is laid down in the well known case of *Wheeldon* v. *Burrows*(1), where Thesiger L. J. states the general rules and says:

> The first of these rules is that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed there will pass to the grantee all those easements which are necessary to the reasonable enjoyment of the property granted and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. The second is that if the grantor intends to reserve any right over the tenement granted it is his duty to reserve it expressly in the grant. Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant.

With this, as I have said, we are not directly

(1) 12 Ch. D. 31.

concerned because the grantor has made an express reservation and all that we have to do is to find what is the right or the extent of the right so reserved.

Nevertheless it is only by implication or, as the judge says, by "inference and suggestion" that the reservation can be held to bear the extended meaning he places upon it and there seems no reason why the same rule should not apply to an implied extension of a reservation as to the reservation itself. On the face of it, the reservation is of nothing but a limited right of way. It is a right to pass over the lands granted for cattle, horses and other domestic farm animals only and only for water going to and from Dry Lake. The words "for water" are certainly capable of bearing a purely restrictive meaning. The lands may not be used for pasturing cattle, exercising horses or any other purpose than for water.

The reservation of the right of way would be just as proper in the form actually used if Dry Lake had been the property of a third party. If the respondent had then become unable to obtain a continued right to use the lake, not only would the appellant be under no liability, but the right of way over its land would have ceased with the purpose for which it was granted.

There is in the grant no reservation of Dry Lake or of any rights in its waters or of convenience of access thereto, yet these are the matters of substance to which the right of way could be only ancillary. If the parties to the conveyance had been agreed as to the reservation of any such rights we should have expected to find that they had been expressly provided for and safeguarded. Had they been so reserved we might in the absence of a grant of right of way have implied one. It is different, however, from the mere grant of a right of way to imply substantive rights which

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the appellant would probably have refused to concede. Considering the purpose for which the company purchased, a purpose of which the respondent was of course aware, I think it is reasonable to suppose that the right of way was agreed to and has to be taken for what it is worth. If the consequence of the appellant's workings renders the access to the water more difficult or were to decrease the quantity of the water or otherwise interfere with the respondent's full enjoyment of the water as he possessed it when he was the owner of the whole property, he has reserved no rights for loss of which he can maintain any claim for damages.

I do not recall any decided case presenting exactly the same features as the present case, but perhaps some light may be gained by reference to the case of *Rhodes* v. *Bullard,* (1).

In covenant the plaintiff declared upon a lease by the defendant to the plaintiff of a messuage and a warehouse and also all that part of the yard belonging to the messuage between that and the warehouse. And the defendant covenanted that he would permit the plaintiff to have free ingress, egress and regress through the gate at the bottom of the yard belonging to the messuage to the warehouse and the use of the pump in the said yard jointly with the defendant whilst the same should remain there paying half the expenses of keeping it in repair.

The defendant removed the pump unnecessarily and it was held that under the words of the covenant he might do so and consequently the breach was ill assigned. The Chief Justice, Lord Ellenborough, draws attention to the fact that there was no demise of the pump and Grose J. says:

(1) 7 East 116.

It is material to consider that there are no words of demise of the use of the pump; but the lessor covenants that the lessee shall have the use of the pump jointly with himself whilst the same shall remain there, etc.

Now it is true that the judgment went upon the words of the covenant, but in the present case not only is there no demise of the use of the water in Dry Lake, but there is no covenant either. If a covenant is to be implied at all, is it reasonable that more should be implied than that the respondent should have the use of the water if and so long as and to the extent that the appellant's workings did not interfere with such use? I think that would be the utmost the respondent could ask.

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

DAVIES J.—I agree in dismissing this appeal for the reasons given by Sir William Meredith C.J. in the Appellate Division in delivering the judgment of that court. Those reasons are quite satisfactory to me.

IDINGTON J.—If the grantees under whom appellant claims title had executed the deed of conveyance in question the reservation of the right of way would then have been construed as a grant by the said grantees to their vendors of the right of way so reserved, as was explained in the case of *The Durham and Sunderland Railway Co.* v. *Walker*(1) at p. 967.

They do not seem to have executed the conveyance and at common law there might be some difficulty in respondent's way besides the question of uncertainty relied upon.

(1) 2 Q.B. 940.

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It seems, however, obviously to have been agreed between the parties that this right of way should be enjoyed by the vendors to serve the user by them of the remaining part of the farm.

In the case of *May* v. *Belleville*(1), Mr. Justice Buckley held the successors in title of the vendees had not signed the deed but their agent had signed the agreement for sale which provided for the right of way. The deed of conveyance there as here contained the reservation of the right of way. The learned judge seems to have held this to be notice of the agreement and the successor in title bound thereby.

The conveyance in question herein seems to me, by its numerous provisions in the way of agreements between the parties for several other contingencies relative to the lands in question and rights in or over them, peculiarly to lend itself to such a mode of judicial treatment of the same and all it contains bearing upon this question of right of way.

Founding the respondent's claim upon his rights to relief in equity I see no difficulty in applying the law as held in the *May Case*(1). In principle I cannot distinguish the cases. It is true that in that case there was an antecedent agreement but does that do more than open the inquiry?

And in this case where there are so many collateral agreements contained in the conveyance, can there be any doubt of the fact? I admit it seems assumed by both parties rather than expressly proven, but should they be driven back to try over again what they do not seem to dispute?

Moreover there is this to be said for that manner of looking at the case, that it lets in the power of the

(1) [1905] 2 Ch. 605.

court, perhaps in a way otherwise difficult to maintain, to deal with the question in the way it has been dealt with by providing for an inquiry as to another way being found.

As to the difficult question of certainty I think it might be fairly arguable, if we had no other evidence than the somewhat indefinite and ambiguous language of the reservation in the deed, that it was void for uncertainty. But when, as must be in the case of such documents, that language is interpreted and construed in light of the evidence of surrounding facts and circumstances existent at the time of the execution of the deed, and the conduct of the parties thereto immediately after such execution, there cannot be any doubt of what it means.

I think strictly speaking the respondent was entitled to continue using, as he had been before the deed, the right of way defined by that actual user; and that appellant had no right by constructing a railway or in course of mining to excavate that part of the land habitually trodden, and so to impair or obstruct the use thereof. The deed is not as definite as it might have been but the cattle seem to have done, of their necessities and long practice, that which roughly marked the path intended.

The contentions of appellant, as to travel by the other way defined being meant, seem to me absurd if any meaning is to be given the words used. They were entirely unnecessary if only the first way defined to the highway was that intended for the cattle to follow.

The appellant seems to have got by the judgment appealed from such relief as may ameliorate its situation, perhaps due to the improvidence of its predecessors in title.

I think the appeal should be dismissed with costs.

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DUFF J.—The appeal should be dismissed with costs.

ANGLIN J.—The defendant appeals from a judgment of the Ontario Appellate Division, which affirmed the judgment of Falconbridge C.J. the trial judge, declaring the plaintiff entitled to a right of passage across the defendant's land for cattle on his farm going to and from Dry Lake for the purpose of watering, granting a reference to enable the defendant to indicate a suitable right of way, and if one can be given to assess damages for interim wrongful interference, or, if none can be given, fixing the damges for permanent deprivation at $1,500.

The plaintiff sold the lands held to be servient to Messrs. Irwin and Hopper, from whom the defendant acquired them. The deed to Irwin and Hopper contained this clause:—

> The said parties of the first part reserve to themselves, their heirs and assigns forever, the right to use the roadway at present existing across the marl deposit to the second concession and the right to pass over for cattle, horses and other domestic farm animals for water going to and from Dry Lake.

This deed was not executed by the grantees.

As an admission upon a matter of law, the statement of counsel for the appellant at the trial that "the title of the plaintiff to the right of way is not in question" may not bind it. But, disregarding that admission, the plaintiff's title is, in my opinion, fully established.

Applying the ordinary rule of construction that, if possible, effect should be given to every word of a document, the language of the deed itself makes it clear that the right of passage to and from Dry Lake for cattle, etc., asserted in this action is distinct from the right to use the roadway at present existing across the marl deposit to the second concession.

To the plaintiff's objection that the reservation relied upon is ineffectual, because a right of way can be created only by grant and Irwin and Hopper did not execute the conveyance to them from the plaintiff, the judgment of Buckley J. in *May* v. *Belleville*(1), at p. 612, gives a convincing answer.

The fact that the location and width of the passage to Dry Lake over the land conveyed were not defined in the deed did not render it void for uncertainty. *Deacon* v. *South-Eastern Railway Co.*(2). Whether the owners of the servient land had the right to assign the way where they could best spare it or the holder of the easement had the right to take it where most convenient for his purpose (Gale on Easements, 8th ed., p. 510; Norton on Deeds, p. 263; *Packer* v. *Wellsted*(3), at p. 111), as the Chief Justice of Ontario points out, citing *Pearson* v. *Spencer*(4), a well-defined way across the land conveyed having been used by cattle from the plaintiff's farm in going to and returning from Dry Lake for many years before and after the grant to Irwin and Hopper, the plaintiff's right to that particular way was probably established. But, as the learned Chief Justice says, the judgment at the trial has recognized the appellant's right to assign any other passage way over its land which will serve the purpose intended, and of that the respondent does not complain.

That the taking away of the bank of Dry Lake at the place where the cattle had been accustomed to water without providing another suitable watering place with a proper way or passage leading to it was an unwarranted interference with the plaintiff's right

(1) [1905] 2 Ch. 605.
(2) 61 L.T. 377.
(3) 2 Siderfin, 39, 111.
(4) 1 B. & S., 571.

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is unquestionable. The right accorded to the defendant by the judgment of assigning to the plaintiff some suitable way other than that formerly used and more convenient and less prejudicial to its mining operations is probably something to which it was not entitled. The further claim, that the fact that the land owned by it was to his knowledge purchased from the plaintiff by its predecessors in order to dig marl from it, gives the defendant the right in so digging to extinguish the plaintiff's easement of passage for his cattle, is so utterly in derogation of the grant of that easement, which the terms of the conveyance to its predecessors in title shew that they undertook to make, —a bargain which equity will enforce, *May* v. *Belleville*(1) at p. 612—that the mere statement of it proves it to be untenable. The contention that the use by the cattle on the plaintiff's farm of other drinking places, not constantly but from time to time, involved an abandonment by the plaintiff of the right of passage to Dry Lake, is equally hopeless.

The appeal, in my opinion, fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Northrup & Ponton.*

Solicitors for the respondent: *Mikel, Stewart & Baalim.*

(1) 1905, 2 Ch. 605.

THE QUEBEC, MONTREAL AND SOUTHERN RAILWAY COMPANY (SUPPLIANTS)..... APPELLANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

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*Feb. 7, 8.
*May 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Railway subsidies—Aid to construction—Purchase of constructed line—Construction of statute—Supplementary agreement—Rights of transferee—Obligation binding on the Crown.

The suppliant company was incorporated by Dominion statute, 6 Edw. VII., ch. 150, with power to hold, maintain and operate the railway of the S.S. Ry. Co. and became vested with the franchises and property of that railway company which had been sold in virtue of the statute, 4 & 5 Edw. VII., ch. 158. The S.S. Ry. Co. had constructed 6½ miles of its railway, between Yamaska and St. Francis River, for which it had not received subsidy aid as authorized by 62 & 63 Vict., ch. 7, and, by 7 & 8 Edw. VII., ch. 63, in lieu of the aid provided by the former statutes, subsidy was authorized to be paid to any company completing the construction of 70 miles of the railway from Yamaska on a location which included the 6½ miles of railway so constructed. Under the authority of this legislation the Crown and the appellant company entered into a supplementary agreement fixing the subsidy for the construction of this 70 miles of railway. The company completed the unconstructed portion of the railway and claimed subsidy for the whole length of the line including the 6½ miles acquired in virtue of the sale authorized by 4 & 5 Edw. VII., ch. 158.

Held, reversing the judgment of the Exchequer Court of Canada (15 Ex. C.R. 237), Idington J. dissenting, that the undertaking of the company to construct the railway was satisfied whether it actually constructed the whole line itself or purchased a constructed portion thereof to form part of the subsidized line; that the statute 7 & 8 Edw. VII., authorizing the subsidy together with the supplementary contract with the Crown constituted an obligation binding on the Crown and the company was, consequently, entitled to the amount of the subsidy applicable to the 6½ miles of the railway in question.

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

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APPEAL from the judgment of the Exchequer Court of Canada(1), dismissing the suppliants' petition of right with costs.

The circumstances in which the claim for subsidy was made are stated in the head-note.

Béique K.C. and *Aimé Geoffrion K.C.* for the appellants.

F. J. Laverty K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal ought to be allowed.

The appellant had the usual subsidy contract with the Crown for the construction of a line of railway 70 miles in length. It utilized for the purpose of this line 6½ miles of the South Shore Railway, which it had previously purchased. If the purchase of these 6½ miles had been made subsequent to the contract and for the express purpose of forming part of the subsidized line I do not understand how any question could have arisen as to the right of the appellant to the proportion of the subsidy attributable to the 6½ miles so purchased; I cannot see what difference it makes that the purchase was made before the subsidy contract was entered into. It seems to me that the undertaking to construct a railway is equally satisfied whether the company actually construct the whole line or purchase a portion of it ready made. The Government itself in satisfaction of its statutory and contractual liability to construct the National Transcontinental Railway has recently purchased a short line of railway to form part of that line.

The Government is not being asked to pay any

(1) 15 Ex. C.R. 237.

subsidy twice over. Parliament was willing to grant a subsidy for a particular 70 miles of railroad and that is all the Government is being asked to pay. No doubt, the subsidy to the South Shore Railway having lapsed, advantage might have been taken to obtain for the country the 6½ miles of road that that company had constructed, without giving any subsidy in respect of this length. Parliament might have offered, in 1908, a subsidy for only 63½ miles, the portion left uncompleted by the South Shore Railway Co. That however is not what was done by the legislature or the Government. Provision was made for a subsidy for the whole 70 miles of railroad and the Crown entered into the usual subsidy contract with the appellant for this line. The appellants had already purchased 6½ miles of road which they could utilize as part of the line and they duly constructed the remainder so as to form a complete line of 70 miles in length as called for by the statute and the contract. I can see no valid reason under these circumstances why the courts should interfere and insist that the appellant is not to be paid the subsidy which Parliament provided and the Crown agreed to grant them.

For the debts of the South Shore Railway Co. it is not contended that the appellant is liable. The Intercolonial Railway had properly proved its claim in the liquidation of the South Shore Railway Co. and been collocated for its dividend. With that claim the appellant is in no way concerned.

IDINGTON J. (dissenting).—The appellant was incorporated in 1906, by 6 Edw. VII., ch. 150, wherein it was recited that the franchises, railway and property of the Quebec Southern Railway, as comprising the

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railways theretofore known as the South Shore Railway, the United Counties Railway and East Richelieu Valley Railway, had been sold pursuant to the provisions of chapter 158 of the statutes of 1905 and had been purchased by the Honourable Frederic L. Béique and that the purchaser bought and became vested with the said franchises, railway and property for the purposes of holding, maintaining and operating the said railway, its property and appurtenances, and that it was expedient to incorporate a company with all the powers and privileges necessary for the said purposes.

Section 7 of said Act is as follows:—

7. The company may acquire the railway mentioned in the preamble, and upon and after such acquisition the franchises rights and privileges heretofore possessed by the South Shore Railway Company and the Quebec Southern Railway Company shall vest in and may be exercised and enjoyed by the company, and the company may thereupon hold, maintain and operate the said railway.

The railway property bought at the sale referred to in the recital was transferred to the company thus incorporated, pursuant to said section 7.

Section 8 of said Act is as follows:—

8. The company may complete the railway which, by the statutes relating to the South Shore Railway Company, the latter was authorized to construct, or any portion thereof, within five years from the date of the passing of this Act; Provided that as to so much thereof as is not completed within that period the power to complete the said railway shall cease and determine.

This section, let it be observed, authorizes the completion of the work begun by the South Shore Railway Company but says nothing of the subsidies by which in part it had been built.

The said company had reaped some subsidies but failed to earn others and all it might have in that regard.

All possible claims in law which that company could conceivably have were thus put aside long before the Act I am about to refer to was enacted.

By 7 & 8 Edw. VII., ch. 63, intituled

an Act to authorize the granting of subsidies in aid of the construction of the lines of railway therein mentioned,

it was enacted, by section 1, as follows:—

1. The Governor-in-Council may grant a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway (not exceeding in any case the number of miles hereinafter respectively stated) which shall not cost more on the average than $15,000 per mile for the mileage subsidized, and towards the construction of each of the said lines of railway, not exceeding the mileage hereinafter stated, which shall cost more on the average than $15,000 per mile for the mileage subsidized, a further subsidy beyond the sum of $3,200 per mile of fifty per cent. on so much of the average cost of the mileage subsidized as is in excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile.

There were 72 different enterprises subsidized by that section, and of these the appellant claims to recover, under item 14, which is as follows:—

14. For a line of railway from Yamaska to a point in the County of Lotbinière, in lieu of the subsidy granted by chapter 57 of 1903, section 2, item 12, not exceeding 70 miles; and for a line of railway from Mount Johnson to St. Grégoire station, in lieu of the subsidy granted to the United Counties Railway Company by chapter 7 of 1899, section 2, item 16, for 1 mile, not exceeding 1½ miles; and not exceeding in all 71½ miles.

The first part of the foregoing is what I think appellant bases its rights upon.

The subsidy granted by ch. 57 of the statute of 1903, sec. 2, item 12, is as follows:—

2. The Governor-in-Council may grant a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway (not exceeding in any case the number of miles hereinafter respectively stated) which shall not cost more on the average than $15,000 per mile for the mileage subsidized, and towards the construction of each of the said lines of railway not exceeding the mileage hereinafter stated, which shall cost more on the average than $15,000 per mile for the mileage subsidized, a further subsidy beyond the

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sum of $3,200 per mile of fifty per cent. on so much of the average cost of the mileage subsidized as is in excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile.

12. For a line of railway from Yamaska to Lotbinière, a distance not exceeding 70 miles, in lieu of the subsidy granted by item 27 of section 2 of chapter 7 of 1899.

Item 27 just referred to of section 2, chapter 7, statute of 1899, had been granted as follows:—

2. The Governor-in-Council may grant a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway (not exceeding in any case the number of miles hereinafter respectively stated) which shall not cost more on the average than $15,000 per mile for the mileage subsidized, and towards the construction of each of the said lines of railway not exceeding the mileage hereinafter stated, which shall cost more on the average than $15,000 per mile for the mileage subsidized, a further subsidy beyond the sum of $3,200 per mile of fifty per cent. on so much of the average cost of the mileage subsidized as is in excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile.

Then follow 51 items, covered thereby, of which No. 27 is as follows:—

27. To the South Shore Railway Company, from Sorel Junction along the South Shore to Lotbinière, Quebec, a distance not exceeding 82 miles.

Such are the terms of the statutory authority upon which appellant's claim rests.

They cannot be enlarged by any order-in-council or agreement professing to execute the purpose expressed in such enactments.

These subsidies granted to the South Shore Railway Company had failed to be as productive to it, as they might have been, by reason of its failure to earn same by the formal compliance with the language of the statute.

There was nothing in law owing that company when appellant acquired its assets and nothing due it by virtue of equity or any equitable considerations which could in law or common sense be assumed to have passed to appellant.

By virtue of such acquisition under and by virtue of the purchase of the assets of a bankrupt company, the appellant neither by express terms nor any implication involved in that transaction could pretend it had any moral or legal right to pose as the builder of that part of the road in fact built by the company whose assets it bought.

The terms of the enactment expressed in the grant clearly mean what they say and that is

> a subsidy of $3,200 per mile towards the construction of each of the undermentioned lines of railway.

If, using the very illustration put forward in argument by Mr. Béique, the appellant had for any good reason discarded the six-and-one-half miles now in question herein, and then already constructed by the bankrupt company, and constructed seventy miles of railway, it would have been competent for the Governor-in-Council to have recognized such a claim.

Or if for any valid reason it had been found necessary to diverge from the straight line and construct seventy miles of railway between the termination of that already constructed and an agreed point in the County of Lotbinière, it might also be competent for the Governor-in-Council to have recognized such a claim.

These suggestions or surmises cannot go far in helping us to interpret and construe this statute but we must recognize the world in which we live and what is apt to transpire therein or we will never correctly interpret anything, not even a statute.

One is reminded, in considering this class of legislation, of the language of Lord Cairns when speaking of a somewhat analogous sort of legislation, he said in

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The Directors of East London Railway Co. v. *Whitechurch*(1), at p. 89:—

> We all know how these clauses are inserted in an Act of Parliament of this kind. They are in the nature of private arrangements put into the Act at the instance of particular parties, who either act with greater caution than other parties, or act with a desire to make a better bargain for themselves than other parties have made. They are not put in by the legislature as part of a general scheme of legislation which it desires to express, but they are in the nature of particular contracts, and ought not to have any effect upon the construction of a general clause such as that which I have read to your Lordships.

I think we must realize that each item following each of these clauses we are concerned with herein may have been the result of much bargaining. And the curious features I have adverted to render some things therein ambiguous. I think in principle these ambiguities must be resolved against the appellant.

For such or other like reasons it is quite conceivable seventy miles of railway might have been agreed upon as within the phrase "towards the construction" of a railway but it is not within the purview of the Act to give a subsidy for anything that had been already constructed, by someone else who is not to obtain directly or indirectly the benefit, or any part of the benefit, of such a grant.

The words "in lieu of the subsidy granted by chapter 57 of 1903" etc., cannot override the obvious purpose of the legislation (which was to secure the construction of seventy miles of railway) and thereby make a pure gift to appellant for something it had no claim to either in law or equity. The moral or equitable obligations to and claims of the bankrupt company or its creditors for that granted by said Act of 1903, in regard to the construction of six-and-

(1) L.R. 7 H.L. 81.

a-half miles of railway, could not be thus compounded or compensated for by juggling of words in this fashion. No one can properly impute to Parliament the crass stupidity of imagining it was thus compensating the bankrupt company or its creditors of whom respondent was one by granting to appellant which had not fallen heir to, or done anything entitling it to reap such compensation.

It is to be observed also that the language is materially changed from that used in the two previous grants. In the first it was "from Sorel * * * to Lotbinière." In this it is "from Yamaska to *a point in the County of Lotbinière.*" Why was the change made? At whose instance? The enacting clause in each statute quoted above uses identical language, yet when it comes to the description of what the appellant urges is identically the same thing the language is changed. Why again I ask? Had someone knowing the facts pointed out that absolute identity would produce a wrong (in short an imposition on the country) by applying the subsidy to those six-and-a-half miles, and was the language then adroitly or stupidly, or both, amended as we see?

Again it clearly could not have been intended to be under the facts literally "in lieu of the subsidy granted by chapter 57 of 1903, etc." for the obvious reason that the donee, evidently intended to be aided thereunder, had by virtue of the Act of Parliament passed in 1905 been put out of existence. And the variation of the language I have just referred to could hardly have been so changed merely through inadvertence. Yet the change, if convenient to resort to now, surely was not designedly intended.

Reliance is however placed upon the two agree-

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ments made between the respondent and the appellant. The second I will not trouble with, for it is but a modification and adoption of the first.

The first of these is dated 25th February, 1909, and begins its recitals by the following:—

> Whereas the company was authorized to build the railway hereinafter mentioned by the Act or Acts following, namely:—Canada, 1906, Chapter 150.

There follow this recital of alleged facts I have already dealt with and the last recital is as follows:—

> AND WHEREAS the company has established to the satisfaction of the Governor-in-Council its ability to construct and complete the said railway; and the granting of the said subsidy to the company has been approved by the Governor-in-Council as will appear by reference to the order-in-council above referred to.

The first of these clearly contemplated a building of a railway and the last the construction and completion of a railway.

This language is strangely inapt for the purpose of expressing a bargain or agreement for the subsidizing in favour of the appellant which was a company that had no existence when the six-and-a-half miles of railway now in question had been constructed, if in fact that six-and-a-half miles was within the contemplation of the parties.

Again the first clause of the agreement is as follows:—

> 1. That the company shall well, truly and faithfully make, build, construct and complete the line of railway mentioned and described in paragraph 14 of the first section of the "Subsidy Act," as above set forth and recited, and all bridges, culverts, works and structures appertaining thereto, in all respects in accordance with the specifications hereto annexed marked "A," or with such amendments thereof as may from time to time during the progress of the said work be approved by the Governor-in-Council.

The six-and-a-half miles for which the subsidy is now claimed and this suit is brought had been built long before appellant had any existence.

How can it pretend to recover under a contract, so framed, for a subsidy that it had never earned yet so expressly given only for building 70 miles of railway and claim as part of it six-and-a-half miles of railway it never built and never in fact intended to build?

I cannot understand how this contract helps appellant. Nor can I understand why or how if the building of six miles and a half done by the predecessor in title was honestly believed to be a righteous foundation for an agreement for the payment of a railway subsidy in respect of the said six miles and a half, there was found so much difficulty in expressing the fact both in the recitals and in the operative clause I have quoted from.

They seem to coincide with the interpretation I have put upon the Act.

The resorting to such language as used is quite inconsistent with the interpretation now set up as a foundation for the claim herein.

It reduces the meaning of the ambiguous language used in item 14 of the "Subsidy Act" to the obvious purport of it when read in the light of the surrounding facts and circumstances as intended to cover so much of the part of the line indicated as in fact needed to be built by the appellant but in no event to exceed seventy miles so built.

There was a claim set up by the respondent's servants that if there was any grant due in respect of these six-and-a-half miles it was to the railway company which had built same and in that case the respondent was entitled to receive the benefit thereof as a creditor of that railway company.

On the facts before us that suggestion may not be in law maintainable but it expresses a thought which

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might well have been given expression to as in line with if not exactly in accord with what has been acted upon.

Parliament no doubt has revived and re-voted subsidies many times to the company building a railway and failing to complete it within the time specified, and possibly has considered or should have considered creditors of an embarrassed company in such a case. If this had been expressed as its purpose herein perhaps no one would have complained. But what right had appellant to claim to reap that which might righteously have been given for such a purpose but could not, without doing an exceptionally unrighteous thing, be given to the appellant?

It is to be observed that though appellant made its claim on the 17th May, 1909, unsuccessfully and the position of the Crown officers was reiterated in another form in February, 1910, yet it was only after three years' deliberation and consideration it summoned courage to assert the claim herein by the petition of right herein and then boldly claimed therein that it had in fact built that which it never built.

I am unable to hold that buying and building are identical and convertibly equivalent terms.

I think it matters not what the orders-in-council disclose if my interpretation and construction of the statute and the agreement, or of either, is maintainable.

Therefore I shall not confuse what I have tried to make plain by an analysis of what seem to me to have been results of inadvertence and could not in my view bind respondent.

I think the appeal should be dismissed with costs.

DUFF J.—The appeal should be allowed with costs.

ANGLIN J.—The statute of 1906, chap. 150, which incorporated the suppliant company recited the sale by the Exchequer Court of the franchises, railway and property of the Quebec Southern Railway, comprising *inter alia* the South Shore Railway, to the Honourable Frederic L. Béique, and authorized the suppliant company to acquire and complete the said railway. At that time about 18¼ miles of the 82 miles of railway from Sorel Junction to Lotbinière, which the South Shore Railway Company had been authorized to construct, had been completed—12 miles from Sorel to Yamaska and about 6¼ miles from Yamaska to the St. Francis River. The South Shore Railway Co. had received the subsidy for the 12 miles section, but no subsidy had been paid for the 6¼ miles. On the 20th Jan., 1902, the Government inspecting-engineer reported the completion of the 6¼ miles from Yamaska to St. Francis River by the Quebec Southern Railway Company. In a report of the 31st January, 1908, he repeated that statement adding:—

> No subsidy was paid, however, the completed section being less than (10) ten miles in length.

(62 & 63 V., ch. 7, sec. 7.) It is only reasonable to suppose that Parliament was cognizant of these facts when, during the session of 1908 (7 & 8 Edw. VII., ch. 63, sec. 1, item 14), it authorized the grant of a subsidy for 70 miles of railway "from Yamaska to a point in the County of Lotbinière"—the balance of the 82 miles which were to have been built by the South Shore Railway Company (for which a subsidy had been first authorized in 1899 by item 27 of section 2 of chapter 7), excluding the 12 miles from Sorel Junction to Yamaska for which the subsidy had been

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paid to the South Shore Railway Company, but including the 6¼ miles from Yamaska to the St. Francis River built by the South Shore Railway Company for which no subsidy had been paid. The subsidy of 1908 is expressly granted

in lieu of the subsidy granted by chapter 57 of 1903, section 2, item 12,

which in turn had been granted,

in lieu of the subsidy granted by item 27 of section 2 of chapter 7 of 1899.

Under the authority of this legislation a subsidy contract (25th Feb., 1909), and a supplementary contract (17th Dec., 1909), fixing the amount of the subsidy under section 10 (7 & 8 Edw. VII., ch. 63), for 70 miles from Yamaska to a point in the County of Lotbinière, were duly entered into between the suppliant company and His Majesty the King, represented by the Minister of Railways.

The Government officials, however, withheld payment of $26,765.45 of the subsidy payable to the suppliant company on the ground that that sum was due to the Crown in respect of traffic balances between the Intercolonial Railway and the South Shore Railway prior to the sale of the latter by the Exchequer Court. In answer to the petition of right claiming this balance of $26,765.45 the Crown, by its statement of defence, also takes the position that the petitioner is not entitled to any subsidy in respect of the 6¼ miles of railway built by the South Shore Railway Company.

The learned assistant-judge of the Exchequer Court held that the Crown was not entitled to set off or compensation in respect of the traffic balance due the Intercolonial Railway because the sale to the Quebec Southern Railway had been made free of all charges, liens and incumbrances, and the subsidy

in question is claimed by the suppliant not as assignee of the rights of that company—its rights thereto having in fact lapsed, under the terms of its subsidy contract, owing to the non-completion of the undertaking within the time stipulated—but by virtue of the statute of 1908 and the contracts of 1909 above mentioned. Neither in their factum nor at bar in this court did counsel for the Crown controvert this holding of the learned trial judge. They rest their case in support of the judgment dismissing the petition of right on the ground, held in their favour in the Exchequer Court, that the suppliant company is not entitled to any subsidy in respect of the 6¼ miles from Yamaska to the St. Francis River because it did not actually construct that part of the railway, and also on an alleged estoppel arising out of the fact that the company had retained and cashed a cheque for $43,414.55 tendered it by the Crown as a balance due after deducting the Intercolonial Railway claim of $26,761.45.

As to the latter point the evidence shews that the cheque was cashed only after the company had protested against the deduction and had received some assurance from the Railway Department that the cashing of it would not prejudice its rights in regard to payment of the sum withheld. Under these circumstances the retention and cashing of the cheque affords no evidence of intent on the part of the company to abandon any right it might have to payment of the sum withheld. It does not raise an estoppel. *Day* v. *McLea*(1).

It is quite within the power of Parliament, if it should see fit to do so, to authorize the grant of a

(1) 22 Q.B.D. 610.

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subsidy for a portion of a railway already constructed by others to a company which assumes the burden of completing the undertaking. There is no reason to suppose that when the statute of 1908 was passed authorizing the payment of a subsidy in respect of a line of railway 70 miles long from Yamaska to a point in the County of Lotbinière, in lieu of a subsidy previously granted which had lapsed, Parliament was not fully aware that the Quebec Southern Railway Company had, before 1902, actually constructed 6¼ miles of the 70 miles from Yamaska to a point in the County of Lotbinière and that that 6¼ miles sold by the Exchequer Court had been acquired by the Quebec, Montreal and Southern Railway Co. under the express authority conferred by its Act of incorporation and formed part of the 70 miles in respect of which Parliament was then asked to authorize the payment of a subsidy. On the contrary, from the evidence afforded by its own statutes there is reason to believe that Parliament knew these facts and that, with that knowledge, it meant to authorize the payment to the Quebec, Montreal and Southern Railway Co. of a subsidy in respect of the 6¼ miles now in question. The contract and supplementary contract converted that authorization into a contractual obligation on the part of the Crown and, in my opinion, gave to the suppliant company, on completion of its undertaking, a right to payment according to the terms of those contracts which it is entitled to enforce by petition of right in the Exchequer Court.

I would, for these reasons, allow this appeal. The appellant should have its costs throughout.

BRODEUR J.—This is a petition of right by which the suppliant (now the appellant) seeks to enforce the

payment of a railway subsidy authorized by statute and provided for in the subsidy agreement between the Crown and the appellant.

It had been considered of public interest that a railway should be built on the south shore of the St. Lawrence from Sorel Junction to Lotbinière, a distance of 82 miles.

In 1899 a subsidy of $3,200 per mile had been granted by Parliament for the construction of that railway to the South Shore Railway Company.

The latter company started to build from Sorel Junction to the Yamaska River, a distance of 12 miles, and then from Yamaska to St. Francis River, a distance of 6½ miles.

The Government paid, in 1902, for the 12 miles covering the distance between Sorel and Yamaska but, as the section of the road from Yamaska to St. Francis was less than 10 miles, no subsidy was paid for the 6½ miles built.

One of the conditions of the grant was that the railway should be completed before the 1st of September, 1903, and, as that condition had not been fulfilled, Parliament in 1903 renewed the subsidy in the the following terms:—

for a line of railway from Yamsaka to Lotbinière, a distance not exceeding 70 miles, in lieu of the subsidy granted by item 27 of sec. 2 of ch. 7 of 1899.

The Minister of Railways who introduced that legislation knew that a part of the railway subsidized in 1899 had been built, namely from Sorel to St. Francis River, but as the payment of the subsidy had been made only for the section between Sorel and Yamaska he had Parliament to renew the subsidy from Yamaska to Lotbinière, a distance of 70 miles.

It is to be noticed also that this subsidy is not

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payable to the South Shore Railway Co., as provided by the Act of 1899, but to any company. That is likely due to the fact that changes were being made with regard to the ownership of the railway.

By an Act passed in 1900 by the Provincial Legislature a new company called the Quebec Southern Railway Company had been incorporated with power to acquire the railways of the United Counties Railway Company and the East Richelieu Valley Railway Company and with power to amalgamate the latter railways with the South Shore Railway.

The amalgamation took place; but on account of difficulties, mostly financial, a receiver was appointed and, in 1905, Parliament authorized the sale of the railway.

The sale took place through the Exchequer Court and the registrar sold to the new company which was formed, which is now the appellant company, on the 4th January, 1907, the property of the South Shore Railway Co., together with all and singular rights-of-way, improvements, franchises and property of every kind of the said company including

> subsidies and privileges in connection with said railways, excepting, however, the subsidy granted by the Quebec Government in connection with the Yamaska and the St. Francis bridges.

In 1908, Parliament renewed the subsidy which had been voted in 1903 in the following words:—

> for a line of railway from Yamaska to a point in the County of Lotbinière in lieu of the subsidy granted by chapter 57, 1903, section 2, item 12, not exceeding 70 miles.

It is pretty evident, by this new legislation, that Parliament intended to give a subsidy not only from St. Francis River but also from the Yamaska River in order to cover the part which had been built for some years. The Governor-in-Council was em-

powered by the "Subsidy Act" to make a subsidy agreement with any company which would build the railway between Yamaska and Lotbinière and, as the appellant company was the only one authorized at the time to build a railway in that locality, a subsidy agreement was passed between the appellant company and the Government by which a subsidy would be paid to them from Yamaska to Lotbinière.

The Government paid from time to time subsidies which covered the six miles built by the South Shore Railway Co.

The Government then considered the contract and the "Subsidy Act" as covering that section which had been built by the South Shore Railway Company.

It is claimed now by the Government that the "Subsidy Act" contemplated a railway to be built and not one already built.

It seems to me that such a construction could not be put on the Act and on the agreement. It was well known at the time by the Department, it was in evidence in 1903 and in 1908 that the section of the railway between Yamaska and St. Francis had been built. However, the Minister of Railways asked Parliament that a subsidy should be paid for not from St. Francis River but from Yamaska.

When the matter was before Parliament, there was also some discussion as to subsidized railways being partially built (p. 13482 Debates, 1907–8). So it seems to me very clear from the language of the statute and from the language of the subsidy agreement that Parliament intended to vote a subsidy not only for the section to be built but for the part which had already been constructed.

It is claimed further by the respondent that the authority to grant a subsidy under the statute is not

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mandatory but purely discretionary; and the cases of *The Hereford Railway Company* v. *The Queen*(1), *De Galindez* v. *The King*(2); *Canadian Pacific Railway Co.* v. *The King*(3), are quoted in support of that contention.

It is to be noticed that in those cases the action was based on the statute and not on the contract and subsidy agreement passed between the Government and a railway company.

I fully recognize that the Governor-in-Council would be absolutely within its discretion in refusing to pass any contract with the appellant company; but when they decide to pass such a contract, when they have exercised their discretion, then the contract and the statute become binding on the Crown and the Crown is obliged to carry out the obligation which it contains, the same way as the railway company is obliged also to carry out the obligation therein contained; otherwise, it would be rather serious that the company would undertake under such agreement to construct a railway and, when the time would come to make the payment, that the Government could say: Well, we are not bound to pay you.

I may say further that that question was raised in the case of the *Grand Trunk Pacific Railway Co.* v. *The King* before the Privy Council(4), and the learned counsel for the Government claimed in his factum that it is open to the Government to evade their liability by refusing to come to an agreement or abstaining from coming to an agreement; but those representing the Government did not think it advisable to argue it

(1) 24 Can. S.C.R. 1.
(2) 39 Can. S.C.R. 682.
(3) 38 Can. S.C.R. 137.
(4) (1912) A.C. 204.

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before the Privy Council and Lord Macnaghten, at page 210, suggests that the point did not commend itself very much to him.

For these reasons, I think the Government must pay the railway subsidy which the company appellant seeks to recover from the Government and that the judgment of the Exchequer Court dismissing the petition should be reversed.

It is recommended that the Crown should pay the costs of this court and the court below.

Appeal allowed with costs.

Solicitors for the appellants: *Béique & Béique.*
Solicitors for the respondent: *Blair, Laverty & Hale.*

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*Feb. 9.
*May 2.

ALFRED LAFOREST (PLAINTIFF) . . . . . APPELLANT;

AND

THE FACTORIES INSURANCE COMPANY (DEFENDANTS) . . . . . } RESPONDENTS.

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

Fire insurance—Statutory conditions—R.S.Q., 1909, arts. 7034, 7035, 7036—Notice—Conditions of application—Conditions indorsed on policy—Keeping and storing coal oil—Agent's knowledge—Waiver—Adjustment of claim—Offer of settlement by adjuster—Estoppel—Transaction.

As required by article 7034 of the Revised Statutes of Quebec, 1909, the statutory conditions were printed upon the policy of insurance. The application for the insurance did not refer to them but contained a condition that the insured should not use coal oil stoves on the premises insured. At the time the premises were destroyed by fire coal oil was kept and stored there in excess of the quantity permitted by clause 10 of the statutory conditions, without written permission of the insurance company. The company had given no written notice to the insured pointing out particulars wherein the policy might differ from the application as provided by the second clause of the conditions.

Held, Brodeur J. dissenting, that the law did not require the statutory conditions to be referred to in applications for insurance; that all applications for insurance to which the Quebec legislation applies must be deemed to be made subject to those conditions, except as varied under articles 7035 and 7036, Revised Statutes of Quebec, 1909, and that there was no necessity for the insurance company to give notice, as mentioned in the second clause of the conditions, calling the attention of the insured to the conditions indorsed upon the policy of insurance.

Per curiam.—Knowledge by an agent soliciting insurance that coal oil, in large quantities, was kept and stored upon the premises to be insured does not constitute notice of that fact to the company insuring them, nor does notice that coal oil in such quantities was kept and stored upon the premises prior to the insurance involve knowledge that it would be kept there afterwards in violation of

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

the conditions of the policy. Fitzpatrick C.J., held that knowledge by the agent was knowledge of the company but was not equivalent to waiver of the condition of the policy respecting the keeping or storing of coal oil.

In the absence of proof that adjusting agents employed by the insurer had authority to dispose of the matter, the offer of settlement of the claim by the adjuster does not constitute waiver on the part of the insurer of objections which might be urged against the claim.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of Pouliot J., at the trial, in the Superior Court, District of Arthabaska, and dismissing the plaintiff's action with costs.

The circumstances of the case are stated in the head-note and the questions in issue on the present appeal are set forth in the judgments now reported.

G. G. Stuart K.C. and *Crépeau K.C.* for the appellant.

Aimé Geoffrion K.C. and *Perrault K.C.* for the respondents.

THE CHIEF JUSTICE:—At the close of the argument I was under the impression that the plaintiff, appellant, was fairly entitled to succeed. But a careful examination of the pleadings and evidence, documentary and oral, leads me irresistibly, if regretfully, to a contrary conclusion.

The action is brought to recover the amount due under a policy of insurance on a stock of goods in a country store in the Province of Quebec. There is no doubt that the goods covered by the policy were destroyed by fire on the 25th November, 1913. The company sets up by way of defence every objection that the ingenuity of counsel could suggest and the plaintiff is entitled at least to the benefit of my opinion that his claim was made honestly and he fails to

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succeed on a ground which involves neither moral nor legal turpitude.

The action was maintained in the Superior Court, but on appeal it was held that there was a breach of the condition in the policy which forbade the keeping and storing on the premises of coal oil in quantities exceeding five gallons without the permission in writing of the company and on that ground the action was dismissed. In my opinion that judgment must be affirmed.

I am satisfied that the insured was in complete ignorance of the statute when he applied for the insurance and it does not appear that his attention was ever drawn to the condition now invoked after the policy came into his possession. He acted throughout in perfect good faith and frankly disclosed to the officials of the company at the date of his application and when he filed his claim that coal oil was kept on the premises. Were I dealing with this case in the court of first instance I would have some difficulty in finding that the evidence was sufficiently conclusive as to the quantity of oil in the store at the time of the fire. The clerk, Lacerte, says that during the evening of the day preceding the fire he brought one "*quart*" of oil into the store, and that he sold a quantity which he estimates at possibly about twelve gallons and I accept this evidence in preference to that given by the witness Demers. There is no evidence as to the quantity of oil contained in a "*quart*" and Laforest speaks of a "*tonne*" containing 45 gallons. It does not appear that the one measure is deemed to be the equivalent of the other. Technically there is of course a wide difference between the two.

However, I am not satisfied that I have sufficient

doubt to rebut the presumption that the decision appealed against is right.

The appellant also urges that the agent of the company, who solicited the risk, visited the premises, and knew that coal oil was kept and stored there at the time he filled in the application. Although I am of opinion that his knowledge was the knowledge of the company because acquired in the course of his employment (*Bawden* v. *London, Edinburgh and Glasgow Assurance Co.*(1); *Wells* v. *Smith*(2)), I cannot hold that knowledge to be equivalent to a waiver of the condition which requires that, once the policy attaches, coal oil cannot be kept or stored on the premises without the written consent of the company.

The appellant relies also on the second statutory condition which creates a presumption that the policy issued conforms to the terms of the application. This point is so fully and satisfactorily covered by my brother Anglin in his notes that it is unnecessary for me to do more than refer to *Provident Savings Life Assurance Society* v. *Mowat*(3).

At the argument I was strongly inclined to hold that the appeal must succeed because the parties had subsequently to the fire entered into an agreement which in the language of the Quebec Code is called a "transaction" (1918 C.C.) with respect to this claim and that in the result the plaintiff was entitled to recover $2,800. I accept the version given by the plaintiff and his wife of the interview during which the compromise was discussed. But to transact it was necessary for the officials of the company to have complete control over the subject matter in dispute

(1) [1892] 2 Q.B. 534. (2) [1914] 3 K.B. 722.
(3) 32 Can. S.C.R. 147.

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(1919 C.C.) and I cannot find in the record sufficient evidence to justify me in holding that Demers and Tanguay had such control. The principle of the Quebec law is:—

> Peuvent seuls transiger les mandataires et administrateurs du patrimoine d'autrui qui ont reçu un pouvoir spécial à cet effet. *King* v. *Pinsonault*(1).

This appeal must be dismissed with costs.

IDINGTON J.—The appellant stored and kept upon his premises within the meaning of one of the statutory conditions of the policy of insurance in question herein, as an identically worded policy was construed, by a minority in this court and by the Judicial Committee of the Privy Council in the case of *Thompson* v. *Equity Fire Ins. Co.*(2), and thereby forfeited his right to recover herein.

The application of appellant for the insurance in question herein contained the following obligation on his part:—

> De plus le requérant s'engage à ne garder ni chaux, ni cendre dans les vaisseaux de bois, dans ou auprès des bâtiments ci-dessus, à ne faire aucun usage de poèle à pétrole ou à gazoline, ni à prendre aucune autre police d'assurance sur les mêmes propriétés dans d'autres compagnies, sans en avertir celle-ci, sous peine de nullité de la police qu'il demande.

His counsel now presents the novel argument that inasmuch as in the same set of statutory conditions required by law to be indorsed on every policy of insurance there is the following clause,

> After application for insurance, it shall be presumed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing, the particulars wherein the policy differs from the application,

(1) L.R. 6 P.C. 245. (2) [1910] A.C. 592.

the respondent was bound to point out in writing the first mentioned condition, as a particular wherein the policy differed from the application.

I am unable to assent to this proposition.

There is in fact no conflict between the terms of the application and the policy if we have regard to the law (now well known to insured) binding the insurer to print upon its policy the statutory conditions.

It may be that the obligation above quoted from the application would be a new or additional condition which unless also printed in a different coloured ink, as required by the statute, might by such omission become null.

That is the converse of this case and the insured is protected by the statute in that regard.

The obvious purpose of the condition, which is now presented for our consideration, was to meet the not infrequent cases of a variation in or departure from the description of the subject matter insured, as given in the application, or the time to run, or rate (if any) specified therein.

Such like errors sometimes might creep in and the insured was thus protected.

It is suggested that the condition, by virtue of which I hold the appellant fails, is one which an insurer might waive. It is very suggestive that the contention does not seem to have been set up in the appellant's pleadings. The omission might be overcome if the law and facts sustained the contention, but, if serious, why was it omitted from the pleading?

The appellant also sets up that the respondent settled and agreed to pay the sum claimed.

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That is met by evidence disputing that of appellant and that in any event the agent had no power to bind respondent in that regard.

Holding these views there is no need to consider other issues raised.

I think the appeal must be dismissed with costs.

DUFF J.—The appeal should be dismissed with costs.

ANGLIN J.—The appellant urges three grounds of appeal against the judgment of the Court of King's Bench which held that he cannot recover upon his insurance policy with the defendant company, because, in breach of statutory condition 10 (*f*), which was indorsed upon the policy as required by article 7034 R.S.Q., when his premises were burned he had upon them for the purpose of sale thirty gallons of coal oil without having obtained the permission in writing of the company. *Thompson* v. *Equity Fire Ins. Co.*(1).

(1) The appellant maintains that the company through its agents adjusted his loss at $2,800 and agreed to pay him that sum in satisfaction of his claim. This fact is denied: it has not been found in favour of the appellant; and the evidence does not warrant such a finding being made.

(2) He contends that, because the application signed by the insured contains conditions, to which he thereby agrees that his policy shall be subject, but neither sets out the statutory conditions nor refers to them, it must, under the second statutory condition, in the absence of written notice from the company to

(1) [1910] A.C. 592.

the insured particularly calling the conditions indorsed upon the policy to his attention, be deemed free from all such conditions not covered by those expressed in the application, *i.e.*, it must be deemed such a contract as would be constituted by a bare acceptance of the application of the insured.

By article 7034 R.S.Q. every company is required to print the statutory conditions upon every policy of fire insurance which it issues and is allowed to vary such conditions only by complying with articles 7035 and 7036. If the conditions are not so printed the policy is nevertheless deemed subject to those of them which contain provisions in the interest of the insured. If the statute is complied with, the statutory conditions in favour of the company as well as those in favour of the insured create contractual obligations between them. Having regard to this state of the law every application for insurance should, in my opinion, be deemed an application for a policy subject to the statutory conditions, except in so far as they may be varied in conformity with article 7035—that is, for a policy which the company may lawfully issue. It may well be that the effect of statutory condition No. 2 is to prevent the insurance company binding the insured by any condition inserted in the policy, other than the statutory conditions, by way of variation or otherwise, which differs from or adds to those expressed in the application. It may be that the statutory conditions themselves should be deemed modified in so far as they are inconsistent with any term expressed in the application— although, in the absence of a variation noted upon the policy itself as prescribed by article 7035, that view would seem to present some difficulties. But the legislature

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did not intend that the statutory conditions should be set forth in the application for insurance; and I am satisfied that, where these conditions have been duly printed upon the policy as required by the statute, it is subject to them, notwithstanding that they are neither set forth nor expressly referred to in the application. In so far as anything in the opinion of Osler J.A. in *Mitchell* v. *City of London Assurance Co.*(1), at pages 278–9, may conflict with this conclusion I am, with great respect, unable to agree with it.

(3) Because, as counsel for the appellant asserted, it is common knowledge that the sale of coal oil is a part of the business of every country general-store, and the agent for the defendant company, when soliciting the plaintiff's insurance, saw coal oil on his premises, he contended that the company should not be heard to set up the condition relied upon; and he cited *Mitchell* v. *City of London Assurance Co.*(1), in support of his argument. But the keeping of coal oil upon the insured premises is not a necessary part of the business in the case of a country general-store as is the carrying of a small quantity of lubricating oil upon a steam tug. Coal oil might have been kept outside and brought into the shop, if at all, in the permitted quantity, *i.e.*, not exceeding five gallons. Notice to a mere soliciting agent—unlike notice to a general agent—is not notice to the insurance company; and, if it were, notice that coal oil was kept on the premises before they were insured does not involve knowledge that it will be kept there afterwards in violation of an expressed condition of the policy.

The appeal, in my opinion, fails and should be dismissed with costs.

(1) 15 Ont. App. R., 262.

BRODEUR J. (dissident).—Il s'agit d'une réclamation pour assurance contre le feu. Plusieurs questions ont été soulevées par la défenderesse, la compagnie d'assurance, contre la réclamation du demandeur. Ce dernier a eu gain de cause en Cour Supérieure; mais en cour d'appel il a été décidé que l'assuré ne pouvait pas réclamer la valeur des pertes qu'il avait encourues parce qu'il avait dans son magasin de l'huile de charbon pour une quantité plus considérable que celle permise par les conditions de la police.

Le demandeur appelle de ce jugement devant cette cour et prétend entr'autres choses que la condition de la police sur laquelle la cour d'appel s'est basée pour renvoyer sa demande ne fait pas partie des obligations contractuelles qui existaient entre lui et la compagnie d'assurance.

Contrairement à la pratique qui est généralement suivie, me dit-on, depuis que la législature a jugé à propos de déterminer les conditions des polices d'assurance, la compagnie intimée a, dans le cas actuel, fait signer une demande d'assurance par le demandeur.

Il s'agit de savoir si, lorsqu'il y a une demande d'assurance de faite, les conditions insérées dans la police qui seraient incompatibles avec cette demande peuvent être invoquées par l'assureur.

L'article 7034 des Statuts Refondus de la Province de Québec déclare que les conditions indiquées dans cet article font partie de tout contrat d'assurance à l'encontre de l'assureur. Parmi ces conditions est le No. 2 qui se lit comme suit:

> Après la demande d'assurance, il doit être considéré que toute police envoyée à l'assurée est censée conforme aux termes de la demande, à moins que la compagnie n'indique par écrit les détails sur lesquels la police diffère de la demande.

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Il me semble que cet article est suffisamment explicite par lui-même pour qu'il ne prête pas à ambiguité. Il ne consacre, après tout, que la doctrine qui se trouve dans tout contrat, c'est que du moment qu'il y a une proposition de faite et que cette proposition est acceptée, le contrat est censé fait suivant les termes de la proposition. Pour le contrat d'assurance, on stipule donc que s'il y a une demande d'assurance et qu'une police soit émise en réponse à cette demande, cette police est reputée conforme aux termes de la demande, à moins que la compagnie n'indique formellement qu'elle est incapable d'accepter la proposition qui lui est faite.

Pourquoi cette législation a-t-elle été adoptée?

C'est que les compagnies d'assurance avaient l'habitude d'insérer en tout petits caractères dans leurs polices multitude de conditions et de clauses qui avaient virtuellement pour effet de faire disparaître toute source d'obligations de leur part. Les tribunaux ont à maintes reprises donné une interprétation libérale à ces clauses extraordinaires. Mais, d'un autre côté, elles donnaient lieu à des procès si nombreux que le législateur a cru devoir intervenir et stipuler les conditions dans lesquelles ces polices seraient censées être émises, tout en déclarant, cependant, que ces conditions ne valaient qu'à l'encontre de l'assureur.

Le législateur a déclaré cependant en même temps quelles étaient les conditions auxquelles l'assuré pourrait se trouver obligé et il a pris le soin de rédiger lui-même ces conditions afin d'éviter les surprises, je pourrais peut-être même dire les fraudes, qui étaient pratiquées antérieurement à l'encontre de l'assuré. Il a laissé aux parties contractantes le soin de déterminer si, en tant que l'assuré est concerné, elles feraient partie du contrat ou non.

L'une de ces conditions stipulées par l'article 7034 est la condition No. 10 qui comporte que la compagnie n'est pas responsable des pertes suivantes, savoir

(*f*) De la perte ou du dommage advenant lorsque du pétrole ou de l'huile de charbon, de la camphine, de la gazoline, un fluide inflammable, de la benzine, du naphte ou tous produits liquides en provenant, ou toutes parties constituantes d'iceux (sauf de l'huile de charbon clarifiée pour fin d'éclairage seulement, d'une quantité n'excédant pas cinq gallons, * * *)

Cette condition que je viens d'indiquer textuellement peut-elle être invoquée dans le cas actuel par la compagnie d'assurance?

Je dis que *non;* et voici pourquoi:

Une demande d'assurance est faite par Laforest, le demandeur. Cette demande d'assurance déterminait le montant de l'assurance qu'il désirait avoir, le taux, la prime, le fonds de magasin à assurer et la bâtisse dans laquelle se trouvaient ces marchandises. Il faisait une description, en réponse à certaines questions qui lui étaient posées, de la valeur du terrain, des bâtiments, des hypothèques qui les grevaient et il déclarait s'il avait déjà passé au feu, quels etaient les moyens de protection qu'il avait contre le feu, à qui les pertes devraient être payables, et il ajoutait ceci:

Le dit requérant assure et convient, par les présentes, envers la dite compagnie, que ce qui précède est la vraie, juste et entière exposition de tous les faits et circonstances, concernant la condition, situation, valeur et risque de la propriété qui doit être assurée, en tant qu'il le connaît lui-même et consent à ce que telle description avec le plan d'autre part, soit considérée comme formant la base de responsabilité de cette compagnie, ainsi qu'une partie essentielle de ce contrat d'assurance. Et il est de plus convenu que si l'agent signe ou remplit cette formule de demande, il sera, en ce cas, l'agent du requérant et non de cette compagnie. De plus le requérant s'engage à ne garder ni chaux, ni cendre, dans les vaisseaux de bois, dans un ou auprès des bâtiments ci-dessus, à ne faire aucun usage de poêle à pétrole ou à gazoline, ni à prendre aucune autre police d'assurance sur les mêmes propriétés dans d'autres compagnies, sans en avertir celle-ci, sous peine de nullité de la police qu'il demande.

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Chaque fois qu'une propriété assurée à cette compagnie aura été détruite ou endommagée par le feu, ou la foudre, la balance du billet de dépôt non cotisée sera déduite de la réclamation à payer. Il est de plus par les présentes compris et convenu que dans le cas de dommage à la propriété assurée ou de destruction d'icelle, cette compagnie ne sera dans aucun cas responsable pour plus des deux tiers de la valeur de cette propriété au moment de la perte, dans le cas où il y aurait d'autres assurances dans une proportion *pro rata* des deux tiers de la valeur de la propriété assurée. Toutes déclarations ou réponses autres que celles mentionnées dans la présente application ne pourront être invoquées contre la compagnie.

Voilà les conditions auxquelles il propose à la compagnie défenderesse de l'assurer. La compagnie défenderesse, en réponse à cette demande, envoie une police et sur le dos de cette police nous trouvons toutes les conditions de l'article 7034. Nous trouvons entr'autres la condition No. 2 que j'ai citée plus haut et la condition No. 10.

La condition No. 2 lie nécessairement la compagnie, car l'article nous dit que les conditions indiquées dans cet article doivent être considérées à l'encontre de l'assureur comme garantie de tout contrat d'assurance. Cette condition déclare formellement que le contrat d'assurance doit être considéré, dans ces circonstances, comme étant absolument conforme aux termes de la demande, à moins que la compagnie n'ait indiqué par écrit les détails sur lesquels la police diffère de la demande. Or, il n'y a pas de preuve au doissier, il n'a pas été suggéré non plus et il n'a pas été plaidé que la compagnie avait indiqué qu'elle ne pouvait émettre une police aux conditions énumérées dans la demande. La compagnie est donc censée, suivant moi, avoir voulu assurer le demandeur aux conditions qu'il indiquait dans sa demande; et toutes les autres conditions, par conséquent, qu'elle peut avoir insérées sur le dos de la police ne sauraient lier l'assuré.

L'intimé invoque en sa faveur le jugement rendu

par cette cour dans la cause de *Provident Savings Life Assurance Society* v. *Mowat*(1), où il aurait été décidé que

> A contract of life insurance is complete on delivery of the policy to the insured and payment of the first premium. Where the insured, being able to read, has had ample opportunity to examine the policy, and not being misled by the company as to its terms nor induced not to read it, has neglected to do so, he cannot after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon.

Je ne crois pas que cette décision, qui a été rendue en 1902, puisse être invoquée sous la législation postérieure qui a déterminé les conditions dans lesquelles les contrats d'assurance contre le feu se formeraient.

La livraison de la police aurait pu d'abord lier l'assuré, comme l'a décidé la Cour Suprême dans cette cause de Mowat; mais maintenant je considère que la législation en décrétant que la police sera censée être conforme aux termes de la demande a mis à néant le principe de droit énoncé dans cette décision.

Dans ces circonstances, je suis donc d'opinion que la condition invoquée contre l'assurée par la cour d'appel ne le lie pas, ne peut pas être invoquée contre lui; et, par conséquent, le jugement de la Cour Supérieure qui a condamné la compagnie d'assurance à payer la somme qu'elle s'est engagée de payer est bien fondé.

L'appel devrait être maintenu avec dépens de cette cour et de la cour d'appel.

Appeal dismissed with costs.

Solicitors for the appellant: *Crépeau & Coté.*
Solicitors for the respondents: *Perrault & Perrault.*

(1) 32 Can. S.C.R. 147.

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*May 16.

THE SAINT JOHN LUMBER COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM ROY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Appeal—Final judgment—Substantive right—"Supreme Court Act," s. 2 (e)—3 & 4 Geo. V., c. 51—Procedure—Service out of jurisdiction—Costs.

No appeal lies to the Supreme Court of Canada from a judgment of the Supreme Court of New Brunswick affirming the decision of a judge who refused to set aside his order for service of a writ out of the jurisdiction. Idington J. dissenting.

Per Davies and Anglin JJ.—The judgment did not dispose of any substantive right * * * in controversy in the action and therefore was not a final judgment as that term is defined in 3 & 4 Geo. V., ch. 51.

The appeal was quashed but respondent was only given the general costs of appeal to the date of the motion to quash as he had not conformed to the requirements of Supreme Court Rules 4 and 5.

APPEAL from a judgment of the Supreme Court of New Brunswick affirming the refusal of a judge to set aside his order for service of the writ out of the jurisdiction.

The respondent moved to quash on the ground that the appeal was not from a final judgment. He claimed, also, that if the appeal would lie it only related to a matter of procedure and should not be entertained.

M. L. Hayward on behalf of the respondent moved to quash referring to *Martin* v. *Moore*(1); *Reg.* v. *Toland* (2); *Pritchard* v. *Norton*(3)

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

(1) 18 Can. S.C.R. 634. (2) 22 O.R. 505.
(3) 106 U.S.R. 124.

J. T. F. Winslow for the appellants contra cited *Bray* v. *Ford*(1)

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Supreme Court of New Brunswick which affirmed an order of a Judge in Chambers who refused to set aside an earlier order made by himself granting leave to serve a writ of summons out of the jurisdiction.

It seems a point of practice and there is no final judgment. The case of *Martin* v. *Moore*(2), seems in point. In the later case of *Howland & Co.* v. *Dominion Bank*(3), the question of jurisdiction of the Supreme Court does not appear to have been considered.

It seems to me the only question here is whether the amendment of the "Supreme Court Act" 1913 defining a final judgment would cover a case such as this. The amount involved is only $48.

With some hesitation I have come to the conclusion that no appeal lies.

DAVIES J.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J. (dissenting)—The respondent's motion to quash this appeal should turn upon a consideration first, of the question whether or not the case is covered by the general refusal of this court in mere matters of procedure to entertain an appeal dependent on procedure as was held under the construction heretofore put upon the "Supreme Court Act" defining the words "final judgment," and secondly, the substitutionary

(1) [1896] A.C. 44. (2) 18 Can. S.C.R. 634.
(3) 22 Can. S.C.R. 130.

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amendment of that Act in 1913 by the first section of 3 & 4 Geo. V., ch. 51, quoted hereinafter.

The appeal involves the question of the jurisdiction of a New Brunswick court to try a case brought there against appellant, a foreign corporation. The appellant contends there is none because by the law of New Brunswick there is no power given in the circumstances to serve the appellant as such. We are not concerned in this motion either with the merits of the case, which is for a trifling amount, or with the law relative to the question of jurisdiction.

It so happens that the case may yet be tried on its merits as the judgment appealed from stands. But in principle the converse case might arise any day, of a suitor prosecuting his rights being denied justice by an order refusing to exercise the jurisdiction of the court and he suffering in such a case would, if the holding of the majority herein is maintained, be driven to a foreign court to prosecute his remedy.

It is alleged that is a mere question of procedure.

Even so this court has affirmed in many cases its jurisdiction to hear appeals involving only questions of procedure.

Of these cases, there is the case of *Lambe* v. *Armstrong*(1), in which the late Mr. Justice Girouard, speaking for the court, succinctly stated the law as follows:—

> This appeal raises only a question of procedure in the court below, and consequently the respondent contended that we should not interfere with the judgment appealed from. But questions of practice cannot be ignored by this court when their decision involves the substantial rights of the litigants, or sanctions a grave injustice. We believe that this is one of those cases.

(1) 27 Can. S.C.R. 309.

That case involved a question of procedure in regard to a sheriff's sale and this court reversed a mere practice order of the Quebec Court of Queen's Bench.

This court in the case of *Eastern Townships Bank* v. *Swan*(1), followed that decision in a case involving a mere question of practice as to the making of an *ex parte* order fixing peremptorily a date for the adduction of evidence, and hearing, and again reversed the same Court of Queen's Bench.

In the case of *Price* v. *Fraser*(2), this court again entertained an appeal where a mere question of procedure was involved and again reversed the same Court of Queen's Bench which had held that the Court of Review had no jurisdiction to make the order it did respecting the mere inscription of a case.

That case raised in principle exactly that which is raised herein. The facts upon which the question of jurisdiction turned, of course, were not the same as here, but simply raised the question of the jurisdiction of the court. And the neat point as here was, whether or not the Court of Queen's Bench, in holding the court below had no jurisdiction, was right or wrong.

In *Finnie* v. *City of Montreal*(3), this court affirmed its jurisdiction to review and reverse the court below on a mere question of practice. I pointed out in the argument of this motion that the law is as laid down in these cases without referring to authority, for the point has been taken so many times and decided that it was no more a question of this court's jurisdiction that was involved in the cases of mere procedure but one of expediency generally decided by regard to

(1) 29 Can. S.C.R. 193. (2) 31 Can. S.C.R. 505.
(3) 32 Can. S.C.R. 335.

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whether or not there was involved a question of the denial of a right sometimes tested by an appeal to the principles of natural justice.

I know of nothing more grave in the administration of justice than a decision of whether or not a court presuming to try a case had jurisdiction to do so.

The appellate court having such power of determination relative to the jurisdiction of an inferior court, which refuses to assert that power, I most respectfully submit, fails to discharge its duty.

In those cases involving the jurisdiction over foreigners and presuming to assert that which it has not, the question becomes more grave and delicate than when only our own citizens are concerned.

In the case of *Arpin* v. *Merchants Bank of Canada*(1), the late Chief Justice Strong laid down the law in refusing a new practice appeal, as follows:—

> We have always said that on points of practice like this we will follow the course of the Privy Council, as laid down in the *Mayor of Montreal* v. *Brown and Springle*(2), and we have already acted on that principle in the cases of *Gladwin* v. *Cummings*(3), *Dawson* v. *Union Bank*(4) and *Scammell* v. *James*(5).

These cases illustrate his meaning and the dictum relied upon in *Brown's Case*(2) is to be found at page 184 of the report wherein it appears.

I think therefore that the motion should be refused and the case heard.

Then let us pass that ground and coming to that involved in the amendment by section 1 of ch. 51 of 3 & 4 Geo. V. which is as follows:—

(1) 24 Can. S.C.R. 142.
(2) 2 App. Cas. 168, at p. 184.
(3) Cass. Dig. 2 ed. 426.
(4) Cass. Dig. 2 ed. 428.
(5) Cass. Dig. 2 ed. 441.

Paragraph (*e*) of section 2 of the "Supreme Court Act," chapter 139 of the Revised Statutes, 1906, is repealed and the following is substituted therefor:—

(*e*) save as regards appeals from the Province of Quebec, "final judgment" means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any action, suit, cause, matter or other judicial proceeding, and, as regards appeals from the Province of Quebec, "final judgment" means, as heretofore, any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

A long line of decisions by our predecessors in this court refusing to hear appeals from judgments and orders, sometimes of an interlocutory character, and at other times determining some of the rights of litigants, seemed to bind us, now sitting in this court, and several decisions were given which seemed within meaning of the "Supreme Court Act," so interpreted, to prevent appeals from what in effect were final judgments though not supposed to be such as intended to come here for review.

This amendment I have just quoted was designed to furnish a remedy therefor.

It was stated by counsel supporting this motion that the Honourable the Minister of Justice had in effect stated in Parliament that the amendment emanated from this court.

I may be permitted to disclaim any responsibility for it. I declined to take part therein for I conceived another method was desirable and the amendment as framed not unlikely to be productive of undesirable results.

I am free, therefore, to interpret and construe it as I should any other new statute enacted to remedy what was considered an obvious evil.

Surely if ever there was a case falling within the scope of legislation such as this, when we have regard

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to the numerous decisions which gave rise to a need for reform, this case presents it, if the jurisprudence of the court had not already settled the question as against the view entertained by my brother judges in proposing to quash this appeal.

If the jurisdiction to try the case brought against a man who disputes that jurisdiction, does not involve the determination of a substantive right of any of the parties to the controversy, I fail to understand what would.

As I have already shewn this court has held in the cases I have cited there was perhaps no need for the amendment to give the right of appeal.

Or are we to be told that there was need for an amendment to take the right of appeal away in cases turning upon what may be called procedure though involving substantial questions of justice as in those I have already cited? And I have by no means exhausted the list of cases wherein the like relief has been got here. If the interpretation counsel supporting the motion tried to put upon the words is correct, such would be the effect of the amendment; it would give relief in a few cases and deprive others of the right of relief they have heretofore had.

I am not concerned on which ground the appellant goes. Whether on the jurisprudence of this court or the amendment, clearly the appellant is entitled to have its appeal heard.

I therefore think the motion should be dismissed.

ANGLIN J.—This is a purely common law action. The subject of appeal must, therefore, be a "final judgment." That an order dismissing a motion to set aside the service of a writ of summons out of the jurisdiction is a final judgment apart from the statu-

tory definition of that term is scarcely arguable. (See cases collected in Snow's Annual Practice, 1916, pp. 1108–9 and 1121–3.) That such an order was not a final judgment within the definition of that term in the "Supreme Court Act" prior to 1913 is settled jurisprudence. *Martin* v. *Moore*(1). The appellant maintains that the case falls within the amendment of 1913.

In my opinion the right to serve a writ of summons out of the jurisdiction is not

a substantive right of any of the parties in controversy in any action,

within the meaning of section 2 (*e*) of the "Supreme Court Act," as enacted by 3 & 4 Geo. V., ch. 51, sec. 1. It is not "a substantive right" at all; and it is not "a right in controversy in the action" within the meaning of that phrase as used in section 2 (*e*).

The question disposed of by the judgment before us is one of remedy rather than of substantive right. The obligation of the contract, which is the substantive right in controversy in the action, *Reg.* v. *Toland*(2), is not affected by the giving or withholding of this additional remedy for its enforcement. Cooley's Constitutional Limitations, 5 ed., pp. 346–9. I say additional, because the existence of a remedy in the forum of the domicile of the defendant is unquestioned. No doubt the plaintiff may gain a substantial advantage and the defendant suffer a corresponding detriment as a result of the judgment in appeal—but no more so than may result in many cases where some right of discovery or other purely incidental right of procedure has been accorded the one or denied the other. Nobody would dream of maintaining that a judgment or order dealing with such a matter of procedure had

(1) 18 Can. S.C.R. 634.

(2) 22 O. R. 505, at p. 509.

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determined a substantive right in controversy in the action. To do so would involve holding that every interlocutory order of the highest provincial court which materially affects the remedy or prospect of recovery is appealable to this court as a final judgment. No line of exclusion could be drawn. It can scarcely be necessary to state that Parliament did not intend to do anything so irrational as to limit the right of appeal to a "final judgment" and then, by a definition of that term, to render the limitation thus imposed useless and absurd. While

> a court of law has nothing to do with the reasonableness or unreasonableness of a provision, except in so far as it may help them in interpreting what the legislature has said, (*Cooke* v. *Chas. A. Vogeler Co.*(1)), you are not to construe the Act of Parliament so as to reduce it to rank absurdity, * * * You must give it such meaning as will carry out its objects. *The "Duke of Buccleuch"* (2).

The language should not unnecessarily be applied to something not within the mischief contemplated by the Act if to do so will produce manifest absurdity or inconvenience. *Yates* v. *The Queen*(3). In my humble opinion the language used in the definition of "final judgment" given its literal meaning does not lead to any such absurdity. On the contrary, it seems apt to preclude precisely the contention which the appellants present in this case. The right determined must be substantive. The judgment must affect the existence or the enforceability of the obligation sued upon —the right in controversy in the action. That, I take it, means that a judgment appealable to this court as a "final judgment" must at least in part dispose of the merits of the action. The amendment of 1913 leaves untouched the considerations which led

(1) [1901] A. C. 102, at p. 107. (2) 15 P. D. 86, at p. 96.
(3) 14 Q.B.D. 648, at p. 660.

this court to decline jurisdiction in *Martin* v. *Moore*(1). In fact it seems designed to make it clear that they are still to prevail.

This amendment was enacted to meet the difficulties exemplified and emphasized by the then recent decisions in *Union Bank of Halifax* v. *Dickie* (2); *Wenger* v. *Lamont*(3); *Clarke* v. *Goodall*(4); *Crown Life Ins. Co.* v. *Skinner*(5); and *Hesseltine* v. *Nelles*(6). In construing it, it is our duty

> to look to the purpose of the enactment, the mischief to be prevented, and the remedy which the legislature intended to apply.

The Queen v. *Allen*(7); to suppress the mischief and advance the remedy; *Heydon's Case*(8), *Peek* v. *North Staffordshire Railway Co.*(9);

> to find out what the meaning of the legislature is; and to attach a rational and beneficial meaning, if possible, rather than an irrational and injurious meaning.

Mersey Steel and Iron Co. v. *Naylor, Benzon & Co.*(10), in 1882. The mischief which the amendment of 1913 was designed to remedy was the fact that theretofore, because no judgment was considered final for purposes of appeal to this court unless it not only disposed of the rights of the parties in controversy in the action but also concluded the action itself, in a common law action, subject to a few special exceptions, a judgment which conclusively determined that the plaintiff was entitled to the relief he sought was not appealable unless it also finally dealt with and disposed of the quantum of the recovery to which he was entitled. That was

(1) 18 Can. S.C.R. 634.
(2) 41 Can. S.C.R. 13.
(3) 41 Can. S.C.R. 603.
(4) 44 Can. S.C.R. 284.
(5) 44 Can. S.C.R. 616.
(6) 47 Can. S.C.R. 230.
(7) L.R. 1 C.C.R. 367, at p. 374.
(8) 3 Coke Rep. 7 (*b*).
(9) 10 H.L. Cas. 473, at p. 492.
(10) 9 Q.B.D. 648, at p. 660.

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the result of the definition of "final judgment" as enacted by 42 Vict., ch. 39, sec. 9—a provision not unreasonable when it was made, but which afterwards became productive of consequences not anticipated owing to the introduction into common law actions of methods of procedure formerly peculiar to courts of equity. *Hesseltine* v. *Nelles*(1). It was certainly not intended by the amendment of 1913 to make appealable to this court any judgment purely interlocutory in character. The purpose of confining the right of appeal to judgments determining substantive rights of the parties in controversy in the action was to exclude judgments or orders dealing with matters of remedy and procedure only. The order maintaining the service of the writ is such an order. It does not determine any substantive right in controversy in the action. I am for these reasons of the opinion that the judgment of the Supreme Court of New Brunswick from which the defendant seeks to appeal is not a final judgment appealable to this court and that this appeal should be quashed.

BRODEUR J.—I am in favour of granting the motion to quash because it is not a final judgment.

The appellant relied on the 1913 amendment but I am of opinion that the order from which he is appealing does not dispose of a "substantive right" of any of the parties in controversy in the action.

On a subsequent day His Lordship the Chief Justice delivered the following opinion as to the costs of the appeal.

(1) 47 Can. S.C.R. 230, at pp. 237-8.

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THE CHIEF JUSTICE.—This appeal has been quashed for want of jurisdiction. The respondent asks not only for the costs of the motion but also for the general costs of the appeal on the ground that he moved as soon as he could and that by consent of counsel the motion, which was returnable on the first day of the May session, stood over until the appeal came on to be heard on the merits.

Rule 4 of the Supreme Court Rules provides for the respondent moving to quash within fifteen days after the security has been approved. Rule 5 provides that all proceedings in the appeal shall be stayed after service of the motion to quash until that motion has been disposed of or unless a judge of the Supreme Court shall otherwise order.

These two rules were adopted when the rules were revised in 1907. Previous to that time it frequently happened that appeals were quashed for want of jurisdiction when they came on to be heard on the merits and when the appellant had expended a very large sum of money in connection with the printing of his appeal book. The rules were devised to save unnecessary expense of this kind.

In the present instance it would appear that the solicitors took it upon themselves to ignore the provisions of Rule 5 and proceeded with the printing of the case and factums before the time had expired within which the appellant could move to affirm jurisdiction and the appeal was inscribed for hearing at the present session. This was entirely irregular and if permitted, would nullify the entire object for which the said rules were passed.

Under these circumstances the respondent is certainly not entitled to obtain anything more than the

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ordinary costs of the motion to quash and what if the rules had been observed would have been the general costs of the appeal up to the date when the motion to quash was served.

Appeal quashed with costs.

Solicitors for the appellants: *Gregory & Winslow.*

Solicitor for the respondent: *M. L. Hayward.*

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*May, 9, 10.
*May 25.

CALEB R. D. MALLORY (PLAINTIFF) . . APPELLANT

AND

THE WINNIPEG JOINT TERMINALS (DEFENDANTS) . . . . . } RESPONDENTS.;

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Railways—System of construction—Exposed switch-rods—Negligence —Dangerous contrivance—Verdict—Findings against evidence.

In accordance with what was shewn to be good railway practice the tracks in the company's yards were provided with switch-rods which were left uncovered and elevated a slight distance above the ties. While in performance of his work, during the day-time, an employee sustained injuries which, it was alleged, happened in consequence of tripping on switch-rods while a car was being moved over the switch. In an action by him for damages, the jury based their verdict in his favour on a finding that the railway company had been negligent in permitting the switch-rods to remain in an exposed condition.

Held, per curiam, affirming the judgment appealed from (8 West. W.R. 853), that the finding of negligence by the jury in regard to the switch-rods in question was against the evidence as to proper method of construction and could not be upheld. Idington and Brodeur JJ. dissented on the view that evidence respecting the unsafe condition of the switch-rods had been properly submitted to the jury and their findings thereon ought not to be questioned.

APPEAL from the judgment of the Court of Appeal for Manitoba(1) reversing the judgment entered at the trial by Prendergast J. on the findings of the jury, and dismissing the plaintiff's action with costs.

The circumstances of the case are stated in the head-note.

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

(1) 8 West. W.R. 853.

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Wallace Nesbitt K.C. and *McMurray* for the appellant.

O. H. Clark K.C. for the respondents.

The Chief Justice.

THE CHIEF JUSTICE.—I would dismiss this appeal and confirm the judgment below for the reasons given by Mr. Justice Perdue.

The general principle applicable in negligence cases is expressed by Lord Halsbury in *Wakelin* v. *London and South Western Railway Co.*(1) in substance as follows:—It is incumbent upon the plaintiff to establish by proof that the death or injury was caused by some negligent act or omission to which the death or injury complained of is attributable. *That is the fact to be proved.* If circumstances are equally consistent with the negligence of the plaintiff or the defendant then the action fails.

At the time of the accident in question the plaintiff was employed by the defendant company as one of a switch-crew of five, and was actually engaged in the terminal yards handling, at the point of intersection of three different lines, a train of four cars one of which, known in these proceedings as car No. 39112, was to be switched by what is known as a "flying switch" from the track on which it stood to a track known as the "B. lead." To do this it was necessary to throw the switch for the latter track and open the knuckle of the coupler on the car. Both of these operations should, to avoid accident, be carried on in that order. The plaintiff was acting in direct co-operation with the switch-foreman, Lait, apparently was directing the movements of the engine attached to the cars and it was his duty to give

(1) 12 App. Cas. 41, at p. 44.

the signal to the engineer, when he saw by the switch signal that the line was ready, to shunt the car from the track on which it stood to the "B. lead." There is a good deal of evidence as to what occurred between the plaintiff and Lait to which, in my view, no importance attaches because the jury find that the accident was attributable directly to the defective condition of the switch-rod, and that no negligence is attributable to Lait. If plaintiff had done his work in the regular and proper order he should have first adjusted the coupler and then thrown the switch, in which case Lait would not have given the signal to the engine and in all human probability the accident would not have happened.

Now, as to the negligence found, it is admitted that the car was properly equipped in accordance with the requirements of the statute. The coupler was operated by a lever from the side of the car. The complaint is that the lever was out of order and that the plaintiff was obliged, to adjust the coupler, to go behind the car and shake the coupler loose with his hand. I can see no reason why he should have assumed that risk and, to have attempted to work at the coupler with his back turned towards the moving car, as he did, was in the circumstances highly imprudent. *Plumb* v. *Cobden Flour Mills Co.*(1). However, it will not be necessary to say more as to this because I am satisfied that the accident cannot be fairly attributed, on the evidence, to the cause assigned by the jury—a defective switch-rod. In the first place, admitting what, in my opinion, is not proved, that the plaintiff slipped on the switch-rods, there is no evidence to support the finding that they

(1) [1914] A.C. 62.

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were not properly constructed or that they should have been covered. It is admitted by all the witnesses including the plaintiff, that switch-rods worked from a switch-stand on the level like those in question are always left uncovered. When they are worked from an interlocking tower it is different because of the delicate mechanism of the locking part. It is also said, although not so found by the jury, that the line was badly ballasted and that a vacant space existed between the switch-rod and the ground which was a cause of danger, but I think the weight of evidence is to the effect that the switch-rods were placed and maintained in accordance with good railway construction and the general practice of railways in this country. Further, the "Railway Act" makes ample provision for the equipment of trains and the construction of road bed, tracks and switches for the general protection of all those who travel or are connected with the operation and maintenance of railways, and it has not been suggested here that the respondent company in any way failed to observe the requirements of the statute. Section 280 of the "Railway Act," which deals with switches, contains no provision relating to the covering of switch-rods and no order or regulation has been made by the Board under the general powers conferred by section 30 of the Act, nor has the inspecting engineer made any order under section 263. The rule applicable to cases like this is well expressed by Pollock in his work on Torts (10 ed.) p. 476, referring to the case of *Crafter* v. *The Metropolitan Railway Co.*(1):—

> A staircase * * * cannot be pronounced dangerous and defective merely because the plaintiff has slipped on it, and somebody can be found to suggest improvements.

(1) L.R. 1 C.P. 300.

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This is an analogous case. Here the switch-rod is proved to have been constructed in the usual way, according to the system generally adopted in this country. If it is left to the jury to decide what improvements ought to be made in the interests of good railway construction then we will have custom or local usage set up as a test of negligence. The standard of care is a legal one and the question for the jury is whether the master or the servant, as the case may be, has lived up to it. If it is for the jury to decide as to proper railway construction in view of the provisions of our "Railway Act," then we will have juries in Manitoba deciding differently from juries in Ontario on the same state of facts with respect to the same railway. I agree absolutely with Mr. Justice Perdue:

> The question as to whether all switch-rods should be covered for the protection of the railway employees is one of very great importance. The form of the protection to be adopted, if protection is to be made obligatory, would necessitate the assistance and advice of experts and the most careful consideration by the legislature or body possessing the power to compel the adoption of the device. Should it be left to a jury to say that defendants were negligent because they adopted the course followed by every railway company in Canada, and left the switch-rods uncovered? It appears to me that the matter is essentially one to be dealt with by Parliament or the Railway Board, so that the device to be adopted will be put in general use by all railways, and it will not be left to the conjecture of a jury to pronounce upon the necessity for, or the sufficiency of, the protection in each case.

The appeal should be dismissed with costs.

DAVIES J.—This was an action brought by the appellant, a switchman in defendants' employ, to recover damages for injuries sustained by him while in the performance of his duties as switchman in defendants' yard or station. The accident happened in broad daylight. A "flying switch" had been made and the plaintiff had cut off two cars which had moved

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to their proper place. Plaintiff then set the switch so that another car might be pushed to another track. The setting of the switch automatically moved the switch-signal so that the switch-foreman, Lait, who was standing by ready to signal the engineer when to back up, seeing the switch was thrown for the "B lead" and Mallory was standing by it, walked towards the engine and gave the signal to "shunt the car," which was done.

It appears from his evidence that Mallory after turning the switch walked over towards the car to be switched and noticed that the knuckle of the coupler in the end of the car was not open. He crossed the track and tried with the lever to open it but for some reason it would not open. Mallory then stepped on the track between the rails and with his back to the car and with one hand on the lever and another on the coupler tried to open the knuckle. He knew that the opening of the switch by himself a few moments before was the signal for the engineer to "shunt the car." He put himself in this very dangerous position with knowledge that he could not be seen by the engineer and that the train would in all human probability immediately move towards him to shunt the car. As he ought to have expected, the car did move with the result that he was knocked down and injured.

The jury properly found that Lait, the signalman, was not guilty of negligence in giving the signal to the engineer to shunt and they also found that Mallory was not guilty of contributory negligence in placing himself where he did with his back to the end of the car to be shunted with one hand upon the lever and one upon the coupler. I must say I think this finding

is contrary to the evidence. I do not propose, however, to base my judgment upon that conclusion.

The jury further found that the defendants were guilty of negligence "in not properly covering the switch-rods" and that the "exposed condition of the switch-rods" constituted "negligence on the part of the defendants" and that the tripping of the defendant was "due to the exposed condition of the switch-rods."

I have very great doubts whether the evidence was such as justified the finding that the plaintiff tripped on the switch-rods. Plaintiff does not say so himself. He says he does not know what he tripped on, whether the switch-rods or a stone or something else. Mr. Nesbitt suggested that there was a space below the switch-rods in which plaintiff's foot may have caught and that the defendants' negligence consisted in their leaving that open space there; but that is all pure speculation. The jury have not so found. They have specially found that the defendants' negligence consisted in "leaving the switch-rods uncovered and exposed" and this is the only negligence found.

The question therefore is fairly and squarely raised whether leaving these switch-rods uncovered was negligence.

It was not contended that the "Railway Act" required them to be covered or that the Railway Board had ever made any order to that effect. It was proved beyond doubt that, except in the case of an interlocking plant which for some special reasons called for a covering of the switch-rods, it was the universal railway practice in Canada and always had been to leave the switch-rods uncovered—that it was good railway practice and that the same practice prevailed universally throughout the United States. As is stated by Perdue J.

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the question on these facts is one to be dealt with by Parliament or the Railway Board.

To that body Parliament had delegated the amplest powers in such a matter as this. The Board is a body of men specially experienced n dealing with such matters and is assisted by skilled experts. In my judgment unless Parliament expressly dealt with such an important matter of universal railway practice the Board was the proper tribunal to do so and it having seen fit by its silence to sanction this practice it is not open to a jury, at any rate in the absence of some evidence that the practice of leaving the switch-rods uncovered was bad and negligent, to hold that it is so.

Parliament did expressly deal in part with the subject by making provision, in section 288 of the "Railway Act," requiring packing of the fixed rails at switches. That Act vests in the Railway Board power to make regulations respecting the appliances, devices, structures and works to be used on a railway for the protection of the company's employees (sections 50 and 269). It was conceded that the Board, in the many orders it has made since it was established, has not made any order or regulation requiring the covering of switches. I am not qualified to give an opinion on the subject, neither, I venture to say, are juries so qualified, at any rate in the absence of proper evidence. To pronounce an opinion upon the subject condemning the universal practice in Canada would require much knowledge of the actual working of our Canadian railways under our climatic conditions and much expert knowledge.

In the case before us there was no evidence that the existing practice and one which has always prevailed in Canada, was other than good railway practice,

except that of Mr. Haddow, whose knowledge on the point was confined to Great Britain. The findings of the jury that the uncovered switch-rods was in itself negligence and that such negligence caused the damage, cannot be upheld.

For these reasons I think the appeal should be dismissed.

IDINGTON J (dissenting).—I think there was evidence to submit to the jury on all the points upon which their findings have been questioned.

As to the question of whether or not the appellant was justified in making the effort he did to serve his masters by stepping behind a car liable to be put in motion, there is abundant uncontradicted evidence that it is usual for men engaged in the service he was, to do the like, to perform the like service, and the respondent no doubt expected it to be done or the prohibition embodied in the contract the appellant signed would have been extended so as to include the doing so.

As to the fact of the appellant having tripped upon the exposed switch-rods there was evidence reasonably applied justifying that inference.

And as to the negligence involved in leaving the switch-rods exposed that would seem to be rather patent so long as men engaged as appellant was were expected to do their work under such circumstances as he did and travel over said rods.

It is idle to talk of what is done on other roads so long as the uses to which that part of the track on other roads is put, or permitted to be put, is not (as it was not herein) shewn to have been used in the like dangerous condition, by men employed in and about their work, in the same manner and liable to the same

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risks as appellant had to encounter in serving respondents.

No matter how dangerous a track may be so long as men have not to walk upon it. When men are invited and expected to do so in order to save the employers' property, it is negligence to fail to cover as in other cases mentioned.

The law imposes upon the employer the duty to furnish a reasonably safe place for his men to work. The respondent did not do so in the case in question.

We are told these rods are covered at interlocking switches to protect the mechanical device.

The cost of repairing the mechanical device makes it worth while protecting the metal, but human flesh and blood come cheaper and therefore needless to bother about that.

Such is the logic by which the railway man reaches the prudent conclusion we are asked to accept as a conclusive answer to this charge of negligence to provide a safe place for men to work in.

Again we are pressed with the so-called argument that the legislature has not intervened, though it has in many other cases, to protect workmen.

The unfortunate truth is that the oft failure of courts of justice to maintain the elementary principle of the common law that the safe place to work in should be provided, so far as reasonably possible, has rendered it necessary for the legislature time and again to step in and address itself to specific results of failure on the part of the courts.

But in doing so it has not abrogated the common law but added new sanctions thereto and in one instance cited in appellant's factum has declared no inference is to be drawn therefrom.

I think the appeal should be allowed with costs.

ANGLIN J.—I am not disposed to disturb the finding negativing contributory negligence and I think that there was evidence to support the finding that the plaintiff tripped upon the switch-rods. The only negligence found against the defendants was "the exposed condition of the switch-rods."

While I attach little weight to the argument that the only duties incumbent upon railway companies in regard to the construction, maintenance and operation of their undertakings are those specifically prescribed by Parliament and the Board of Railway Commissioners, and that the fact that neither the "Railway Act" nor any order of the Board has imposed an obligation to pack or cover railway switch-rods, affords a conclusive answer to this action, with the learned Chief Justice of Manitoba, upon the evidence in this record, I am not prepared to say that "where the ordinary switch-rods universally used in Canada and the United States are not covered, a jury may infer negligence against a railway company." There is no evidence from any person qualified to speak upon the subject that, having regard to climatic and other conditions in this country, it is practicable to cover ordinary switch-rods, as is suggested, or that so covered they would not be a greater menace and source of danger and inconvenience than in their present condition. Without such evidence I think it is not within the province of a jury to condemn as negligent a practice universally observed on this continent. *Jackson* v. *Grand Trunk Railway Co.*(1); *Zuvelt* v. *Canadian Pacific Railway Co.*(2); *Phelan* v. *Grand Trunk Pacific Railway Co.*(3).

(1) 32 Can. S.C.R. 245. (2) 23 Ont. L.R. 602.
(3) 51 Can. S.C.R. 113.

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The fact that interlocking switches are covered is referred to. But the necessity for protecting the delicate mechanism of these switches may make the covering of them indispensable although attended by risks and inconvenience which would render unjustifiable the covering of ordinary switches where such a necessity does not exist.

In the alternative the plaintiff asks a new trial because the learned trial judge refused to submit the condition of the coupler to the jury as a ground of negligence. There was no evidence of any lack of proper inspection—no evidence of any defect in the coupler which such inspection would have disclosed; and, upon the evidence, any defective condition of the coupler that may have existed could not properly have been found to be a proximate cause of the accident.

The appeal, in my opinion, fails.

BRODEUR J. (dissenting).—The plaintiff appellant, was in the respondents' employ and, when in the discharge of his duties, he was injured. He claims that the accident is due to the negligence of the company.

The jury found in his favour in declaring that the exposed condition of the switch-rods in the yard constituted an act of negligence.

It was suggested that some other obstruction might have been the cause of the accident and some evidence to that effect was adduced, but the jury believed the facts as told by the appellant and then we have to accept their verdict in that regard, so that the only question that remains is whether the railway companies in failing to cover their switch-rods between the tracks or in exposing those rods as is proved in this case are guilty of negligence.

It is in evidence that in England switch-rods are covered and in our country semaphore and signal

wires of the interlocking systems in the yards are also covered.

The evidence does not shew the reason why the covering is made in the case of interlocking plants. But I have reason to believe that it is due to the intervention of the Railway Committee of the Privy Council at first and of the Railway Board after.

Those interlocking plants have been brought into our railway system when the applications for crossing railway tracks were being considered. Specifications of those interlocking plants were supplied by the Government authorities and the railways had to cover those wires.

Why the same system was not introduced in the switching apparatus is because the matter was likely never considered by the Railway Board.

It seems to me, however, that in extensive yards like the one under consideration, where employees have to walk on tracks all the time in the discharge of their duties, it is only a reasonable measure of precaution that those dangerous holes in the track should be removed.

The evidence shews that in some cases in Canada those rods are covered. If the Railway Board had passed judgment on the advisability of covering them I might come to a different conclusion. But the fact that the Board has not passed any order would not debar the courts of justice from inquiring as to whether negligence should be charged or not.

When the risk attendant on some act is larger than in some other cases, special precautions should be taken and the degree of care is proportionately larger. *Grant* v. *Great Western Railway Co.*(1).

(1) 14 Times L.R. 174.

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The question of negligence with regard to those rods was properly left to the jury. No objection had been made to that procedure.

For these reasons the appeal should be allowed with costs of this court and of the court below and the verdict of the jury should be sustained.

Appeal dismissed with costs.

Solicitors for the appellant: *McMurray, Davidson & Wheeldon.*

Solicitors for the respondents: *Clark & Jackson.*

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ANDREW STEWART, LIQUIDATOR OF THE DOMINION TRUST COMPANY (DEFENDANT)..... APPELLANT;

*Feb. 2, 3.
*May 2.

AND

BRADFORD W. LEPAGE AND OTHERS (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL IN EQUITY OF PRINCE EDWARD ISLAND.

Procedure—"Winding-up Act"—Suit in P. E. I.—Winding-up in B.C. —Leave of court of B. C.—R.S.C. c. 144, ss. 22 and 23.

Where a trust company incorporated by the Parliament of Canada with headquarters in Vancouver is being wound up in British Columbia, leave of the Supreme Court of that province is necessary before suit can be brought in Prince Edward Island against the liquidator and the company to have the latter declared a trustee of moneys deposited with it for investment, for its removal from office and appointment of a new trustee and for the vesting in such new trustee of the securities representing said moneys. Davies J. dissenting.

Judgment appealed against (24 D.L.R. 554) reversed.

APPEAL from a decision of the Court of Appeal in Equity of Prince Edward Island(1) affirming the judgment of the Vice-Chancellor who refused to set aside the bill of complaint on the ground that the plaintiffs had not obtained leave to bring the suit from the Supreme Court of British Columbia.

The only question raised on this appeal was whether or not a suit of the nature stated in the above headnote could be brought in the courts of Prince Edward Island without the leave of the Supreme Court of British Columbia. In other words, whether or not

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

(1) 24 D.L.R. 554.

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section 22 of the "Winding-up Act" applies to such a case. The courts below held that it does not.

Lafleur K.C. and *A. E. MacDonald K.C.* for the appellant.

Gaudet K.C. for the respondents.

DAVIES J. (dissenting)—This is an appeal from the Court of Appeal in Equity in Prince Edward Island dismissing an appeal from a judgment of Vice-Chancellor Fitzgerald dismissing in turn an application made to him by the appellant, as liquidator of the Dominion Trust Company, to have a bill of complaint filed in his court against the said Trust Company and the liquidator thereof dismissed on the ground that the action was commenced without the leave of the Supreme Court of British Columbia as required by the 22nd and 23rd sections of the "Winding-up Act."

The question for our determination is whether those 22nd and 23rd sections are applicable to proceedings such as these or whether they come within section 133 of the Act.

To determine that question it is necessary to see in what relation the complainants stand to the company and its estate and effects.

To do this, we have only before us the statements in the complainant's bill of complaint. The liquidator has not put in any answer to that bill and it seems to me that on this application we are bound to assume the truth of the statements in the bill.

There is no charge of any breach of trust or any claim that the complainants are creditors of the company. The bill seeks a declaration that certain moneys paid by the complainants to the Trust Company and received by it are trust moneys held by it

for the use and benefit of the complainants and that certain mortgages set out in the schedule to the Act were obtained as securities by the defendant company for loans made with complainants' money, and that the company may be declared to be a trustee of such mortgages for the complainants and that as such company is now insolvent it may be removed from the office of trustee and some other person or company substituted for it.

The certificate or declaration of trust which complainants received from the company when they paid over their moneys to it is set out in the bill.

Assuming therefore the truth of the statements in the bill of complaint the question arises whether section 22 of the Act applies at all.

This section is one taken from the Imperial "Winding-up Act" and has been the subject of numerous decisions in the English courts. In construing it and its application the Appeal Court has held in several cases that it did not extend to the case of a landlord distraining upon the goods of the insolvent company which were found upon the land leased and that the landlord's common law right of distraint was not interfered with by the section which "dealt only with *the company*, its *creditors* and its *contributories*.

In the case of *In re Lundy Granite Co.; ex parte Heavan*(1), the Lords Justices, reversing a decision of Lord Romilly, M.R., held that the sections 163 and 87 of the English Act (corresponding to sections 22 and 23 of our Act), did not prevent a landlord from distraining upon the goods of the company for rent accrued since the winding-up. Sir W. M. James, at p. 467, said:

(1) 6 Ch. App. 462.

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It must be the true meaning of the Act to consider these provisions as confined to proceedings by a creditor of the company against the goods of the company; and the Act must be read according to the manifest intention, which could not have been that during the many years over which the winding-up may extend the court should have power to interfere with the rights of every one who happened to have goods of the company in his possession. The landlord has a right to proceed against his tenant, and against the goods of every stranger which happen to be upon the land, and subject to distress.

In a later case of *In re Regent United Service Stores*(1), the Appeal Court, reversing a judgment of Malins Vice-Chancellor, held that the landlord was not a creditor of the company and that his legal right as landlord could not be interfered with under these sections.

Jessel M.R. at page 618, says:

The first question that arises is, whether the statutory provision applies where the landlord is not a creditor of the company. On this point, I need not say more than that it was decided by the Lord Justices in the case of *In re Lundy Granite Company*(2) that it does not apply. That decision is binding upon us, and we need go no further to find a reason for reversing the decision of the Vice-Chancellor.

The other justices concurred with him and Thesiger L.J., referring to *In re Lundy Granite Company*,(2) said, at page 620:

The *ratio decidendi* was not the difference between claims existing at the time of the winding-up order and claims subsequently arising, but that, where a person has no right to claim as a creditor against the company, the court has no jurisdiction to interfere with his legal right against the company's property.

In the case of *In re Longdendale Cotton Spinning Co.*(3), it was held that the mere fact that an order has been made for winding-up a company does not prevent a debenture holder or mortgagee of the company from bringing an action to realize his security

(1) 8 Ch. D. 616. (2) 6 Ch. App. 462.
(3) 8 Ch. D. 150.

and for that proposition the authority of the Court of Appeal in *In re David Lloyd & Co.*(1) was cited as emphatically negativing the existence of any such right.

In *The Longdendale Cotton Case,*(2) Jessel M.R. says (p. 153):

> Then the third objection is that the mortgagors are themselves desirous of selling the property, and that, if the mortgagee sells the property in the action, the probability is that nothing will be left for the general creditors; whereas if the mortgagors sell it, the result may be better for all parties. The answer to that is, the mortgagors had better redeem. If the mortgagee wants to sell he has the right to sell, and to prevent him from selling would be an interference with his rights, and I see no equity in the mortgagors which should deprive him of those rights.
>
> Then the only other point is whether the winding-up makes any difference or confers any new rights. The mere fact that a winding-up order has been made makes no difference, and does not confer upon the company the right of preventing a mortgagee from realizing his security; and for that proposition I have the authority of the Court of Appeal in *In re David Lloyd & Co.*(1), an authority which emphatically negatives the existence of any such right.

It has been suggested that this case is not a binding authority because it was a *voluntary* winding-up. But the judgment of the Master of the Rolls is not based upon that, but broadly upon the construction of the statute and the authority of *In re David Lloyd & Co.*(1) above cited which was a company being wound up under a *compulsory* winding-up order.

I think we are bound by the decisions of the courts of appeal and should not grant the order dismissing the action under sections 22 and 23.

Then section 133 is relied upon, but it seems to me that the same reasoning which confined the operation of sections 163 and 87 of the English Act to claims of creditors only, must apply to this section also. That section reads as follows:—

(1) 6 Ch. D. 339.

(2) 8 Ch. D. 150.

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All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever.

To give the section 133 the broad construction claimed for it and to extend it to all persons creditors and non-creditors would have the effect not only of practically reversing several English decisions of the Court of Appeal, but would result in transferring the exclusive jurisdiction over trusts and the property trustees hold as such, which is now vested in the Court of Chancery of the Province of Prince Edward Island with regard to trust property held in that province, to the court winding-up an insolvent company in another province.

The result would be that the winding-up court in British Columbia could determine on "summary petition" the legal rights of trustees and *cestuis qui trustent* in Prince Edward Island whether these *cestuis qui trustent* were creditors of the insolvent company or not.

Now I can well understand that such an enactment, however far reaching it might be and however much it might interfere with civil rights in the province in so far as it dealt with the creditors or contributories or assets of the company and so was reasonably necessary for the purpose Parliament was legislating upon, would be *intra vires* of the Dominion Parliament, but I should more than doubt the power of Parliament when legislating upon the subject matter of bankruptcy and insolvency to deal with and take away the rights of third parties not creditors or conributories of the company and not claiming any right to share in the distribution of the assets of the insolvent company.

Surely the negative words of section 133 prohibiting

an action, suit, attachment, seizure or other proceeding of any kind whatsoever

being brought

to enforce any claim for debt, privilege, mortgage, lien or right of property

have reference only to actions of creditors or contributories and do not extend to third parties who are not creditors and are not concerned in the distribution of the assets but seek to assert a legal or equitable right to property they claim as theirs and which the company holds in trust for them.

Of course, I can appreciate the fact that in a case such as the one before us there ought not to be and there would not be any difficulty in obtaining leave from the judge of the British Columbia court having charge of the winding-up proceedings to bring and prosecute this action under section 22, but if the construction of section 133 is as broad and comprehensive as contended for, the only way complainants could enforce their claim as set forth in this action would be a summary petition before the court in British Columbia.

I am strongly inclined to adopt the view of Mr. Justice Haszard that at any rate the application to dismiss the action is premature. It is possible that at the trial if a defence is put in and the crucial statements of fact made in the complainants' bill are controverted and found against the complainants, or if at the hearing they should be found to be creditors or their claim one which affected the distribution of the assets of the company, in other words, if the court found that these moneys and mortgages in

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controversy were really assets of the company and not trust property held for the claimants, a condition would then be found to exist which would make sections 22 and 133 applicable.

In my opinion and as the suit stands at present, they are not so applicable and the courts below were right in so holding.

I would therefore dismiss the appeal.

IDINGTON J.—The appellant is the liquidator of the Dominion Trust Company which was incorporated by an Act of the Dominion Parliament and ordered by the Supreme Court of British Columbia, acting by virtue of the powers conferred upon it by the "Winding-up Act" and amendments thereto, to be wound up.

The respondents instituted thereafter proceedings by way of a bill filed in the Court of Chancery in Prince Edward Island against the said company to have it removed as trustee of certain parties for purposes within the scope of its Act of incorporation and another substituted.

The appellant as liquidator moved the said court to have the said bill dismissed on the ground that leave to bring the suit had not been obtained from the Supreme Court of British Columbia as required by section 22 of the "Winding-up Act" which is as follows:—

> 22. After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes.

The language of this section seems so clear and comprehensive that I can see no room for doubt as to its meaning.

The Dominion Trust Company is a corporate creature of Parliament and everything relative to its

existence or extinction in any way its creator chooses to direct and the relation of those contracting with it pursuant to its corporate powers must be governed by what it chooses to enact.

The "Winding-up Act" seems to apply to any such corporations as the one in question. Indeed there are only a few classes of the Dominion corporations which are excluded from its operation. This is not one. I am, therefore, unable to follow the reasoning upon which the court below has proceeded.

The term assets therein relied upon so much is not defined by the Act and is of somewhat variable meaning according to the context in which it is used. Indeed the Act uses the word in one or two places, as for example, in referring in section 47 to "money and assets" and section 93 "any property or assets," in a way that is illustrative of this.

The ascertainment of the assets distributable amongst the creditors, so far as unsecured, is part of the duty of the liquidator under the direction of the court. He cannot do that efficiently if everyone is to be at liberty to interfere and pursue his own notions of his rights of litigation.

Section 133, for example, furnishes a summary remedy which might be made applicable to respondent's claims, if of the clear and undoubted character their counsel suggests.

If not of that character it is quite competent for the court, in charge of the proceedings, to permit some more suitable remedy either in that court or in such court as it may direct.

The scheme of the Act does not in any way imply that any one is to be deprived of his right in law or equity.

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To say that some of the trust funds are traceable in such a way that in law they must be appropriated to meet the demands of particular *cestuis que trustent* creditors, possibly in priority to others not so fortunate, means nothing in this connection.

All such rights as any man or class of men may have in that regard or any way, must be followed and enforced in a due and orderly manner such as the "Winding-up Act" contemplates and in part prescribes, and evidently intends should be pursued.

The Act in many of its provisions may fall short of meeting what might well have been provided and prescribed for the emergencies of such a case as the respondents present.

The evident scope of the Act, however, clearly is that the courts should be resorted to in order to determine the rights of any creditor or claimant, whatever they may be, according to the settled principles of law applicable thereto.

I see no difficulty in the claims of the respondents, if what they assert be correct, being established just as much as a mortgagee may be permitted to assert his claim.

It is not to be presumed that the court will refuse, in a proper case properly presented, the right to establish any such claim.

It is therefore incumbent upon the court having the matter in charge to give every person the liberty to prosecute his rights, whatever they may be in law, to enforce same.

All that the Act by section 22, as I understand it, means is that reckless and undesirable litigation should be avoided and the consequent waste or ruin thereby of the estate averted.

But whenever there is a fair claim of right in the

way of lien or otherwise presented, he having it or the class he belongs to having it, should be given the right to prosecute and establish same.

Trust funds may thus be traceable as in bankruptcy cases, and a prior claim thereto be established.

I observe that the learned Vice-Chancellor has pointed out the re-incorporation of the company by Prince Edward Island legislation. But that is not what the bill of complaint presents and we must be limited in our view to what it does shew as respondents' ground of complaint.

It is to be observed, moreover, that the effect of re-incorporation by a provincial legislature of a Dominion company, in light of the decision of the Judicial Committee of the Privy Council in the case of *City of Toronto* v. *The Bell Telephone Co.*(1), does not seem to hold out much encouragement to the founding an action or suit on the re-incorporation.

Incidentally it may well be that such legislation, treated as of a contractual nature, may help respondents in asserting their rights.

I think the appeal must be allowed with costs but without prejudice to the parties respondent, or any of them, asserting their right to apply for leave and prosecuting their rights under the direction of the court seized of the proceedings under the "Winding-up Act."

DUFF J.—I would allow the appeal.

ANGLIN J.—Section 133 of the "Winding-up Act" provides a method whereby the complainants may obtain in a summary and inexpensive way the declara-

(1) [1905] A.C. 52.

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tion of trust which they seek. The English statute does not contain a similar provision. I am, therefore, with respect, of the opinion that the reason for which the prohibitive clause of the English "Companies' Act" of 1862 (sec. 87), corresponding to section 22 of our statute, was held inapplicable in some of the cases referred to in Halsbury at p. 538, cited by the learned Chief Justice of Prince Edward Island, not to actions or suits against the company, but to proceedings by way of distress—most of them cases where there was no liability of the company itself, *In re Lundy Granite Co.*(1); *In re Trimsaran Coal, Iron and Steel Co.* (2); *In re Regent United Service Stores* (3), —does not exist here. The complainants' interests are provided for and may be asserted by proceedings in the winding-up. No ground has been shewn, in my opinion, for excluding this suit from the operation of section 22, and a remedy in the winding-up being available, leave to maintain it would not improbably be refused, *In re David Lloyd Co.*(4), although it would otherwise be readily granted, *In re Longdendale Cotton Spinning Co.*(5).

I incline to think, however, that section 133 is prohibitive of any action or suit, such as that brought by the complainants in so far as they seek a declaration of trust and an allocation to the trust of certain "effects or property in the hands, possession or custody of a liquidator," and prescribes an application by summary petition as the exclusive means of obtaining this part of the relief sought. Once the trust has been established the appointment of a new trustee would seem almost a matter of course.

(1) 6 Ch. App. 462.
(2) 24 W. R. 900.
(3) 8 Ch.D. 616.
(4) 6 Ch. D. 339, at p. 343.
(5) 8 Ch. D. 150.

Counsel for the respondents urges the grave inconvenience to his clients in Prince Edward Island involved in their being obliged to proceed in the courts of British Columbia. But by section 125 of the Act provision is made for the transfer of any matter relating to the winding-up to any of the several provincial courts. That section contemplates the application for transfer being made in the first instance to the court charged with the liquidation, with the concurrence of the court to which removal is sought —orders of both courts being obtained if thought advisable. I decline to assume that upon its being shewn to the Supreme Court of British Columbia that the questions as to the existence of the trust alleged by the plaintiffs and the earmarking of certain property held by the liquidator as trust assets can be best inquired into in Prince Edward Island—as from what is now before us would seem to be the case—an order of transfer will not be made, preceded or accompanied by the necessary leave under section 22.

No doubt some inconvenience will be involved in such exceptional cases as this where the winding-up of the company is conducted in a province of the Dominion far distant from that in which persons interested as creditors or claimants may reside. But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved. The great balance of convenience is probably in favour of such single control though it may work hardship in some few cases.

For these reasons I would allow this appeal.

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BRODEUR J.—The appellant is the liquidator of the Dominion Trust Company and the respondents, on behalf of themselves and other *cestuis qui trustent* began proceedings in the Court of Chancery of Prince Edward Island and prayed that the Dominion Trust Company be removed from the office of trustee for the respondents and the other *cestuis qui trustent* and that a new trustee be appointed in its place. They asked also that certain mortgages in the Island taken as security for loans made by the company with moneys received from the respondent and other inhabitants of the Island be vested in the new trustee.

The insolvent company, through its liquidator, has asked that the complaint of the respondents be dismissed on the ground that leave to the Supreme Court of British Columbia to bring the suit was not first obtained as required by section 22 of the "Winding-up Act."

The courts below decided against the appellant and the company on the ground that the trust funds were not affected by the "Winding-up Act" and that the courts of Prince Edward Island alone have jurisdiction over trusts and trustees in that province and must determine whether or not the moneys received by the Dominion Trust Company from the respondents are trust funds.

I am unable to agree with the proposition that the proceedings could be instituted against the insolvent company without leave of the court in whose jurisdiction the liquidation takes place.

Section 22 of the "Winding-up Act" is very wide and reads as follows:

> After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

The object of this legislation is to prevent litigation being carried on by any one prejudicial to the estate, to prevent the assets being dissipated by law suits, and to have all such matters decided promptly by a summary petition (sec. 133).

The Dominion Trust Company was incorporated by the Federal Parliament and its chief place of business was declared by its Act of incorporation to be in the Province of British Columbia. The proceedings to wind up that company were naturally instituted in the Supreme Court of British Columbia.

It may be that by some provision of the Act suits against the company could be brought in some other province (sec. 125); but the courts of the various provinces are declared auxiliary to one another for the purpose of the "Winding-up Act" and the proceedings may be transferred from one court to another with the concurrence, or by the order, of the two courts or by an order of the Supreme Court of Canada.

That provision of the law, however, would not prevent the court in which the liquidation takes place from granting its leave for the continuance or the instituting of suits or proceedings against the company. The distinction which is sought to be made between actions instituted by ordinary creditors and those instituted by or against trustees could not apply because the law is general and declares formally that no suit or proceeding can be commenced or proceeded with without the leave of the court. The courts have in different cases granted leave to proceed against the company, *In re David Lloyd & Co.*(1), but so far as I have been able to see they have not decided that

(1) 6 Ch. D. 339.

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proceedings even by mortgagees or *cestuis qui trustent* could be instituted without leave.

In this case it looks to me as if the ends of justice would be better served by having the question raised in this proceeding disposed of by the courts of Prince Edward Island. However, it was the duty of the respondents to have the leave of the court of British Columbia which they did not secure.

This is a suit in which all the creditors of the company might be interested, because its purpose is to have a declaration that some funds should belong exclusively to the plaintiffs and should not be disposed of for the benefit of the creditors. Besides, the company, by the agreement with the plaintiff creditors, has an interest in those funds; because the interest and profits resulting from the investment of the principal sum over the rate of interest payable to the investor is the property of the company.

For those reasons, I would allow the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Aeneas A. MacDonald.*
Solicitor for the respondents: *Gilbert Gaudet.*

JOSEPH P. BEAUVAIS, AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THOMAS GENGE (PLAINTIFF) ..... RESPONDENT.

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*Feb. 25.
*May 2.

ON APPEAL FROM THE COURT OF REVIEW, AT MONTREAL.

Appeal—Jurisdiction—Court of Review—Arts. 68 and 69 C.P.Q.—"Supreme Court Act," R.S.C. 1906, c. 139, s. 40.

By article 69 of the Quebec Code of Civil Procedure and the third clause of article 68, as amended by 8 Edw. VII., chap. 75, an appeal lies to the Judicial Committee of the Privy Council, in certain cases, from judgments of the Court of Review, where the amount or value of the thing demanded exceeds $5,000. Section 40 of the "Supreme Court Act," R.S.C., 1906, chap. 139, provides for appeals from the Court of Review to the Supreme Court of Canada, in cases which are not appealable to the Court of King's Bench, but are appealable to the Privy Council.

Held, Anglin J. dissenting, that the words "the thing demanded" in the third clause of article 68 of the Code of Civil Procedure refer to the *demande* in the action, and not to the amount recovered by the judgment, if they are different; consequently, an appeal lies, in such cases, from the judgments of the Court of Review to the Supreme Court of Canada where the amount or value claimed in the declaration exceeds five thousand dollars. *Allan* v. *Pratt* (13 App. Cas. 780); *Dufresne* v. *Guevremont* (26 Can. S.C.R. 216); and *Citizens Light and Power Co.* v. *Parent* (27 Can. S.C.R. 316) discussed; *Town of Outremont* v. *Joyce* (43 Can. S.C. R. 611) and *Dominion Salvage and Wrecking Co.* v. *Brown* (20 Can. S.C.R. 203) referred to.

MOTION to quash an appeal from the judgment of the Court of Review, sitting at Montreal, affirming the judgment of Martineau J., in the Superior Court, District of Montreal, by which the plaintiff's action was maintained with costs.

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

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The plaintiff, by his declaration, prayed that the defendants should be condemned to pay him the sum of $5,017.20, for damages claimed under several specified items which, however, when correctly added together, did not amount to $5,000, and, by the judgment in the Superior Court, he was awarded $2,303. The Court of Review, by the judgment appealed from, confirmed this award. In the circumstances, the respondent moved to quash the appeal to the Supreme Court of Canada on the ground that the true amount of the *demande* was less than $5,000; that the controversy on the appeal involved merely the amount of the condemnation ($2,303), and that, under the 40th section of the "Supreme Court Act," no appeal could lie.

Louis Coté supported the motion.

A. Lemieux K.C. contra.

THE CHIEF JUSTICE.—This is a motion to quash an appeal for want of jurisdiction. The facts, as disclosed by the material filed, appear to be that an action was brought by respondent Genge to recover from the defendant (as stated in his declaration) the sum of $5,017.20. Certain affidavits are filed shewing that the particulars attached to the claim had been incorrectly added up, and that, in fact, the only amount, even on the plaintiff's shewing, was $4,978.20.

In my view, the question of jurisdiction must be concluded by the prayer of the plaintiff in his declaration, where he says:—

> Wherefore the plaintiff prays that the defendants may be jointly and severally condemned and adjudged to pay to the plaintiff the sum of $5,017.20, with interest from that date, etc.

This appeal is taken from the judgment of the Superior Court of the Province of Quebec, sitting in

review, which confirmed the judgment of the Superior Court awarding damages in favour of plaintiff for the sum of $2,303.00. The jurisdiction of this Court depends upon the interpretation to be given to section 40 of the "Supreme Court Act" which reads as follows:—

In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that court confirms the judgment of the court of first instance, and its judgment is not appealable to the Court of King's Bench, but is appealable to His Majesty in Council.

This section of the statute had its origin in 54 & 55 Vict., ch. 25, sec. 3, and was passed to meet certain decisions of this court in which it had been held that no appeal lay from the Court of Review of Quebec, but only from the Court of King's Bench.

To determine our jurisdiction it is also necessary to consider the provision for appeal to His Majesty in Council from the Court of Review in the Province of Quebec.

Article 68 (3) of the Code of Civil Procedure provides as follows:—

An appeal lies to His Majesty in His Privy Council from final judgments rendered in appeal by the Court of King's Bench:

(1) In all cases where the matter in dispute relates to any fee of office, rent, revenue or any sum of money payable to His Majesty;

(2) In cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected;

(3) In every other case where the amount or value of the thing *demanded* exceeds five thousand dollars.

Article 69 provides as follows:—

Causes adjudicated upon in review, which are susceptible of appeal to His Majesty in His Privy Council, but the appeal whereof to the Court of King's Bench is taken away by arts. 43 and 44, may, nevertheless, be appealed to His Majesty.

The present case is one in which an appeal to the Court of King's Bench is taken away by articles 43 and 44. We have, therefore, simply to determine

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whether this appeal is in a case where the amount or value of the thing demanded exceeds $5,000.

Previous to 8 Edw. VII., ch. 75, article 68 (3) of the Code of Civil Procedure read as follows:—

> In all other cases where the matter in dispute exceeds the sum or value of five hundred pounds sterling.

The question came up for determination under this sub-section of the article as to the interpretation to be placed upon the words "matter in dispute," and the history of the decisions is somewhat curious.

Previous to the case of *Allan* v. *Pratt* (1), it had been held in this court and in the courts of Quebec that this language must be interpreted in the light of a provision of the Consolidated Statutes of Lower Canada, which provided as follows:—

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

but in *Allan* v. *Pratt* (1), it was held that, in determining the right of appeal, the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal, and, therefore, it is not the amount claimed by the declaration, but the amount actually in controversy which determines the right to appeal.

Subsequent to this decision, this Court, in *Dufresne* v. *Guévremont* (2) and *Citizens Light and Power Co.* v. *Parent* (3), refused to follow *Allan* v. *Pratt* (1). All these earlier decisions, however, have no application to the present case. They were predicated upon the fact that the language of the Code was "the matter

(1) 13 App. Cas. 780. (2) 26 Can. S.C.R. 216.
(3) 27 Can. S.C.R. 316.

in dispute exceeds, etc.," but now by the amendment, 8 Edw. VII., ch. 75, the matter is made clear, and it is "*the amount or value of the thing demanded*" which governs. The jurisprudence, both in this court and in the Province of Quebec, can now be made harmonious and uniform.

In the present case, therefore, the amount demanded in the declaration being over $5,000, although the judgment is only for the sum of $2,303, this court has jurisdiction to hear the appeal.

It has been decided here that the amount "demanded" is the amount claimed in the conclusion of the declaration. See *Town of Outremont v. Joyce* (1); *Dominion Salvage and Wrecking Co.* v. *Brown* (2).

If I were free to deal with this motion without reference to our previous decisions, I would unhesitatingly come to the same conclusion on the literal construction of articles 68 and 69 of the Quebec Code of Procedure.

The general principle applicable to appeals in the French system of procedure is thus expressed in Dalloz, Repertoire Pratique vo. "Appel," No. 50:—

Pour déterminer si une affaire excède ou non le taux du dernier ressort il faut se référer en principe au chiffre de la *demande* exprimée dans les conclusions.

And Rousseau, Lainé, vo. "Appel," No. 64:—

En principe, et cela ne se conteste plus aujourd'hui, c'est la somme *demandée* et non le somme adjugée que détermine le premier ou dernier ressort.

And at No. 73 the same author says:—

On ne peut prendre pour base du dernier ressort que la somme *réclamée*. Elle seule fait l'objet de la contestation.

(1) 43 Can. S.C.R. 611. (2) 20 Can. S.C.R. 203.

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Fuzier-Herman, vo. "Appel," No. 182:—

Le taux de l'appel se calcule sur la *demande* en instance et non sur la *condamnation.*

As I read articles 68 and 69 of the Quebec Code of Civil Procedure, an appeal is allowed to His Majesty in His Privy Council from final judgments rendered in appeal by the Court of King's Bench or the Court of Review: (1) In every case where the *amount* or value of the thing *demanded* exceeds $5,000; (2) in cases where the *matter in dispute* relates to any fee of office, *etc.;* (3) in cases concerning titles to lands or tenements, etc.

In (1) the right to appeal depends upon the *amount demanded* in the case in which judgment is rendered. In (2) and (3) appeals are allowed where the *matter in dispute* relates to titles to lands, *etc.*, fees of office, *etc.*, irrespective of the amount demanded.

In (2) and (3) the matter in dispute must of necessity relate to the matter in dispute *in the case.* The judgment is appealable clearly because the matter in dispute in the case relates to titles to lands, *etc.*, fees of office, *etc.* Why should the same interpretation not apply to (1)?

It is said that the word "*demanded*" does not mean "demanded in the action" or "demanded by the declaration." With all deference, I submit that, when the appeal is contingent upon the amount demanded, articles 68 and 69 fix the appealable limit by reference to the amount demanded in the "case" or "cause." Article 69 refers to "causes" adjudicated upon in review which (causes) are susceptible of appeal to His Majesty in His Privy Council, and article 68 (3), omitting the unnecessary words, provides in every other "case" where the amount demanded exceeds $5,000. This must surely mean the amount demanded

in the "case" or "cause." The word "case" is synonymous with "cause," "suit" or "action." Those words are used as convertible terms all through the Quebec Code of Procedure, *v.g.*, articles 44 and 51, which deal with appeals to the Court of King's Bench and the Court of Review.

It is all made abundantly clear when we consider the French version of article 68. The language is:—

Il y a appel à Sa Majesté en son conseil privé de tout jugement final rendu par la cour du banc du roi:

(1) Dans tous les *cas* où la matière en litige se rapporte à quelque honoraire d'office, etc.;

(2) Lorsqu'il s'agit de droits immobiliers, rentes, etc.;

(3) Dans toute autre *cause* où le *montant ou la valeur de la chose réclamée excede la somme ou la valeur de cinq mille piastres;*

What is the grammatical construction of this last sentence(3), if not "Dans toute autre cause *dans laquelle*"; "où"—adverbe de lieu—remplace "lequel" précédé d'une proposition.

The language is not perhaps very aptly chosen, but the meaning is clear.

Reference to the Code will shew that the jurisdiction of the different courts in the province is regulated by the amount demanded in the action. For instance, article 52 provides for an appeal in suits in which the sum claimed or value of the thing demanded is less than $500. It is not the amount of the judgment that regulates the appeal, but the appeal is from the final judgment *in all suits or actions* which are appealable. The action must involve an appealable claim, whatever may be the amount of the judgment.

As to the meaning of the word "demand," I again submit that it has, in the Quebec Code, a well-settled meaning when used in the connection in which we find it in article 68(3), and connotes

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the claim of redress which the plaintiff makes against the defendant for or by reason of the facts which constitute the cause of action.

By the writ the defendant is summoned to appear and to answer to

the *demand* of the plaintiff contained in the annexed declaration.

Reference to the notes of Sewell C.J., in *Pacquet* v. *Gaspard* (1), in 1817, shews that the Code in article 68(3) uses language which had previously acquired a technical meaning.

Let me also refer at random to some of the articles of the Quebec Code of Civil Procedure where the word is used, for instance, under the captions:—

JURISDICTION, articles 54 and 59(2); JOINDER OF ISSUE, article 214; INCIDENTAL PROCEEDINGS, article 215; CONFESSION OF JUDGMENT, article 527; FILING OF EXHIBITS, articles 155, 157 and 174(5); OBJECT OF THE DEMAND, article 124.

The motion should be dismissed with costs.

DAVIES J.—The only doubt which has been raised in my mind as to the proper disposition to be made of this motion to quash this appeal arises out of the decision of the Privy Council in the case of *Allan* v. *Pratt* (2)

As, however, was pointed out by Taschereau J., who delivered the judgment of this court in *Dufresne* v. *Guévremont* (3), the attention of the Judicial Committee does not appear to have been drawn in that case to article 2311, R.S.Q., which provides that

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

(1) Stu. K.B. 106.

(2) 13 App. Cas. 780.

(3) 26 Can. S.C.R. 216.

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I agree with the construction placed upon this article of the Code by this court in the case last cited, and I cannot but conclude that, had the attention of the Privy Council been called to this article of the Code, their decision in *Allan* v. *Pratt* (1) would have been different.

I would, therefore, reading the article of the Code and the decision of this court above cited, in conjunction with section 46, sub-section 2, of the "Supreme Court Act," affirm our jurisdiction and dismiss the motion.

IDINGTON J.—I think, if for no other reason than out of consideration due to the probable reliance placed by those, including the Legislature of Quebec, concerned in such questions as involved herein, upon the decisions of this court in the cases of *Dufresne* v. *Guévremont* (2) and *Citizens' Light and Power Co.* v. *Parent* (3), we should feel bound thereby and dismiss this motion to quash with costs.

DUFF J. agreed that the motion to quash the appeal should be dismissed with costs.

ANGLIN J. (dissenting).—The respondent (plaintiff) moves to quash an appeal by the defendants to this court from the judgment of the Court of Review, affirming, on an appeal by the defendants the judgment at the trial for $2,303, on the grounds that the amount demanded by the plaintiff's declaration was less than $5,000 and that the sum "demanded" is that now in dispute, viz., the amount of the judgment in the trial court, against which the plaintiff did not appeal.

(1) 13 App. Cas. 780. (2) 26 Can. S.C.R. 216.
(3) 27 Can. S.C.R. 316.

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By the conclusion of his declaration the plaintiff demanded $5,017.20 as damages for loss sustained by him through a fire, for which he asserts defendants were responsible. He now alleges that it is apparent on the face of an itemized statement of damages, filed with his declaration, that the sum of $5,017.20 was inserted in the conclusion of the latter as the result of mistake in computation or clerical error, and that the true amount sought to be recovered has always been $4,874.20. But at the trial he made no modification or reduction in the amount of his demand as stated in the conclusion to his declaration and he has not seen fit then or since to ask any amendment to correct this alleged error. For the purpose of this motion, the amount demanded in the action must, I think, be taken to be that stated in the conclusion of the declaration.

There remains the more important and difficult question whether the right of appeal is governed by the amount so demanded or by the amount of the judgment recovered, which alone is now in controversy, the plaintiff not attempting to appeal against it, and his claim for any larger sum being concluded against him by his failure to appeal from the judgment at the trial.

The Court of Review not being "the highest court of final resort" ("Supreme Court Act," sec. 36) in the Province of Quebec, the right of appeal from it to this court depends upon section 40 of the "Supreme Court Act":—

40. In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that court confirms the judgment of the court of first instance, and its judgment is not appealable to the Court of King's Bench, but is appealable to His Majesty in Council.

Under this provision, assuming that the decision is not appealable to the Court of King's Bench (arts. 43 and 44 C.P.Q.), which is conceded, in order to establish a right of appeal from it to this court the only other condition prescribed is that it should be appealable to the Privy Council. Upon this question section 46(2) of the "Supreme Court Act," which deals with appeals to this court from the court of last resort in the Province of Quebec, has no bearing.

By art. 69 (formerly 1178(*a*)) of the Quebec Code of Civil Procedure, it is enacted that:

> Cases adjudicated upon in review, which are susceptible of appeal to His Majesty in his Privy Council, but the appeal whereof to the Court of King's Bench is taken away by articles 43 and 44, may, nevertheless, be appealed to His Majesty.

Since 1908, by art. 68 C.P.Q., a right of appeal to His Majesty in Council is conferred

> (3) in every other case where the amount or value of the thing demanded exceeds five thousand dollars.

Article 68 C.P.Q. (formerly 1178 C.P.Q.), as it stood prior to 1908, by clause 3 conferred a right of appeal to the Privy Council

> in all other cases wherein the matter in dispute exceeds the sum or value of £500 sterling.

Article 2311 of the R.S.Q., 1888, was as follows:—

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

In the Consolidated Statutes of Lower Canada (1860), ch. 77 (the Act respecting the Court of Queen's Bench), which, by section 52 (afterwards article 1178 C.P.Q.), prescribed the conditions of the right of appeal to the Privy Council, this provision (first enacted by 12 Vict., ch. 38, sec. 82), appeared as section 25, in the following terms:—

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

The same provision is also found in section 2 of chapter 82 of the same Consolidated Statutes, which has general application to the administration of justice.

2. Whenever the jurisdiction of *any* court, or the right to appeal from any judgment of *any* court, is dependent upon the amount in dispute, such amount shall be understood to be that demanded, and not that recovered, if they be different; * * *

In *Dufresne* v. *Guévremont* (1), in 1896, it was unanimously held by this court that article 2311 of the Revised Statutes of Quebec of 1888, applied to appeals to the Privy Council. The same view had been taken by Dorion C.J. in *Grand Trunk Railway Co.* v. *Godbout* (2), in 1877, in regard to section 25 of chapter 77 of the Consolidated Statutes of Lower Canada, and whatever might be thought had the provision been found only in that chapter ("The Queen's Bench Act"), its presence in chapter 82 of the Consolidated Statutes would seem to put it beyond doubt that this view is correct, although Gwynne J. expressed the contrary opinion in *Citizens' Light and Power Co.* v. *Parent* (3). In the revision of 1888 the portion of section 2 of chapter 82, C.S.L.C., above quoted, was dropped (vol. II., app. C, p. cxix.), no doubt because, in view of what Dorion C.J. had said as to the scope of section 25 of chapter 77 in *Grand Trunk Railway Co.* v. *Godbout* (2) and in *Stanton* v. *The Home Ins. Co.* (4), in 1879, it was thought unnecessary to duplicate the latter provision. With the law in this

(1) 26 Can. S.C.R. 216.

(2) 3 Q.L.R. 346.

(3) 27 Can. S.C.R. 316, at p. 318.

(4) 2 L.N. 314.

state, the Privy Council, in *Allan* v. *Pratt* (1), in 1888, held that

> The measure of value for determining a defendant's right of appeal is the amount which the plaintiff recovered; when this falls short of the appealable amount, the court below cannot give leave to appeal;

and on that ground the Judicial Committee dismissed the appeal in that case, where, upon a claim for $5,000, the recovery had been $1,100, notwithstanding that leave to appeal had been granted by the Court of King's Bench. The Board followed its prior decision in *Macfarlane* v. *Leclaire* (2), in which the basis of the right of appeal to the Privy Council had been held to be not the amount demanded in the action (in that case £417 0s. 8d.), but the extent to which the judgment affected the interest of the party prejudiced by it and seeking to relieve himself from it by appeal.

In *Richer* v. *Voyer* (3) the plaintiff's claim was for $2,061.67 with interest. By the judgment, interest and costs being added to capital, he recovered a sum in excess of £500 sterling. The Court of King's Bench refused to allow an appeal to the Privy Council on the ground that the amount demanded in the action was less than £500 sterling, although it had apparently taken the contrary view in *Bellerose* v. *Hart* (4). The Privy Council, however, granted a petition for leave to appeal to it. The ground upon which it did so does not appear in any report of the case that I have been able to find. But in *Stanton* v. *Home Ins. Co.*(5) Dorion C.J. says that leave was granted on the ground that, by adding interest and costs (which were included in the judgment), the amount in dispute was over £500 sterling. He adds that, in his opinion, that was con-

(1) 13 App. Cas. 780.
(2) 15 Moo. P.C. 181.
(3) 2 R.L. 244.
(4) 1 R.L. 157.
(5) 2 L.N. 314.

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trary to the course of decisions in this country and to the statute (C.S.L.C., ch. 75, sec. 25). See, too, Beullac, Code of Civil Procedure, p. 84, No. 24.

In *Quebec Fire Assurance Co.* v. *Anderson* (1), in 1860, the Privy Council granted leave to appeal on an allegation that, with interest and costs added to the principal sum recovered on an insurance policy, a sum amounting to £635 currency, which exceeded £500 sterling, was in issue. But, upon the respondent shewing an error in this calculation, the leave was discharged (2). In this case the petition for leave expressly stated that

> By the Lower Canada Act, 12 Vict. ch. 38, sec. 82, the right of appeal depended upon the amount demanded and not the amount recovered.

The whole report shews that leave was granted, not as an exercise of the royal prerogative, but because, in the opinion of the Board, appealability *de plano* depended on the amount involved in the appeal.

In *Boswell* v. *Kilborn* (3), in 1859, the claim was for £600 currency (less than £500 sterling), and the Court of Queen's Bench refused leave to appeal to the Privy Council on that ground. But the Judicial Committee granted leave to appeal

> first, because by the law of Canada interest ran with the judgment, which would bring the subject-matter within the appealable value.

No direct allusion is made in the *Macfarlane Case* (4) or in *Allan* v. *Pratt* (5) either to section 25 of chapter 77 or to section 2 of chapter 82 of the Consolidated Statutes of Lower Canada, 1860, and we are asked to assume that in both these cases this statutory pro-

(1) 7 L.C.Jur. 150.
(2) 7 L.C.Jur. at p. 151.
(3) 12 Moo. P.C. 467.
(4) 15 Moo. P.C. 181.
(5) 13 App. Cas. 780.

vision escaped the notice of the Judicial Committee itself as well as that of counsel. In view of the decisions in *Dufresne* v. *Guévremont* (1), *Grand Trunk Railway Co.* v. *Godbout* (2), and *Stanton* v. *Home Ins. Co.* (3), we can scarcely suppose that it was regarded as wholly inapplicable to appeals to the Privy Council. In *Stanton* v. *The Home Ins. Co.* (3) Dorion C.J., in delivering judgment in the Court of Queen's Bench, referring to *Richer* v. *Voyer* (4), said that in that case

> The attention of the Privy Council perhaps had not been drawn to the statute (C.S.L.C., c. 77, s. 25), and it might be well that it should be put before them on the next occasion.

How this statute could have escaped attention in *Richer* v. *Voyer* (4) it is difficult to conceive, since in that case leave to appeal to the Privy Council had been refused by the Court of King's Bench on the ground that the amount demanded by the declaration and not that recovered determined the right of appeal. The same observation may be made upon *Boswell* v. *Kilborn* (5). In *Quebec Fire Ins. Co.* v. *Anderson* (6) the statute 12 Vict., ch. 38, sec. 82 (re-enacted by C.S.L.C. (1860), ch. 77, sec. 25, and ch. 82, sec. 2) was expressly brought to their Lordships' attention; and, having regard to what was said by Dorion C.J. in *Stanton* v. *Home Ins. Co.* (3), it is scarcely credible that if the statute had escaped attention in *Richer* v. *Voyer* (4), in *Boswell* v. *Kilborn* (5), and also in *Macfarlane* v. *Leclaire* (7), it was again entirely overlooked in *Allan* v. *Pratt* (8).

(1) 26 Can. S.C.R. 216.
(2) 3 Q.L.R. 346.
(3) 2 L. N. 314.
(4) 2 R.L. 244.
(5) 12 Moo. P.C. 467.
(6) 7 L.C. Jur. 150.
(7) 15 Moo. P.C. 181.
(8) 13 App. Cas. 780.

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Although Taschereau J. made that assumption in *Dufresne* v. *Guévremont* (1) (wrongly, Gwynne J. suggests, in *Citizens' Light and Power Co.* v. *Parent* (2)), the Quebec Court of Appeal, in *Glengoil S.S. Co.* v. *Pilkington* (3), in 1897, with the judgment in *Dufresne* v. *Guévremont* (1) before it, and with article 2311, R.S.Q., 1888, in mind, holding itself bound by the decisions of the Privy Council in *Macfarlane* v. *Leclaire* (4) and in *Allan* v. *Pratt*(5), refused to allow an appeal to the Privy Council because the amount of the judgment was less than £500 sterling, although the plaintiff's demand in his declaration exceeded that amount. The Court evidently thought that it should not assume that two statutory provisions, one of them at least (sec. 2 of ch. 82, C.S.L.C.) unquestionably bearing upon this much debated question, had been entirely overlooked on each occasion when that question was before the Judicial Committee. If those statutory provisions were brought to the attention of the Board, as they undoubtedly were in the *Anderson Case* (6), and as I think we should assume they were in the other cases, unless they were deemed wholly irrelevant, which we cannot assume in view of the decisions to the contrary here and in Quebec and of what took place in *Anderson's Case* (6) and in *Richer* v. *Voyer* (7), its decisions must mean that, notwithstanding the declaration of the provincial legislature (which it was competent to make), *Cuvillier* v. *Aylwin*(8) that the amount in dispute

> shall be understood to be that demanded and not that recovered, if they are different,

(1) 26 Can. S.C.R. 216, at p. 220.
(2) 27 Can. S.C.R. 316, at p. 318.
(3) Q.R. 6 Q.B. 292.
(4) 15 Moo. P.C. 181.
(5) 13 App. Cas. 780.
(6) 7 L.C. Jur. 150.
(7) 2 R.L. 244.
(8) 2 Knapp. 72.

the right to appeal *de plano* to the Privy Council shall, in the case of an appeal by a defendant, be determined by the amount recovered, because the amount demanded may, and should be, held to mean that demanded on the appeal, *i.e.*, the amount or value of the matter in controversy in the appeal, and in such a case the only relief sought is from a condemnation for the amount of the judgment. On an appeal by a plaintiff, on the other hand, from a judgment of dismissal, the whole sum claimed in the declaration may be demanded on the appeal, and, unless the claim is modified, is in fact the amount in dispute. Where a plaintiff merely seeks to increase the amount of a judgment in his favour, the case may be different. A similar view of the construction of the like provision of the "Supreme Court Act" (sub-section 4 of section 29 of chapter 135, R.S.C., 1886, added by 54 & 55 Vict., ch. 25, sec. 3; now sub-section 2 of section 46) was unanimously taken by this court in *Beauchemin* v. *Armstrong*(1), in 1904, where an appeal by a defendant against a judgment for $631 of costs in an action in which the original claim was for $2,217 was quashed on the ground that "the interest of the party appealing was less than $2,000," the court expressly following *Allan* v. *Pratt*(2) and *Monnette* v. *Lefebvre*(3), in 1889. This judgment was delivered by Taschereau C.J., who had delivered the judgment of the court in *Dufresne* v. *Guévremont* (4) and of the majority in *Citizens' Light Co.* v. *Parent* (5).

In *Dufresne* v. *Fee* (6) the same learned Chief

(1) 34 Can. S.C.R. 285.
(2) 13 App. Cas. 780.
(3) 16 Can. S.C.R. 387.
(4) 26 Can. S.C.R. 216.
(5) 27 Can. S.C.R. 316.
(6) 35 Can. S.C.R. 8, at p. 11.

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Justice would distinguish *Beauchemin* v. *Armstrong* (1) on the ground that

> it was not a case where there was a difference between the amount demanded and that recovered.

The decision in *Allan* v. *Pratt* (2) would also appear to have been followed by this Court in *Kennedy* v. *Gallagher* (3), decided on October 6th, 1908. The claim in that case was for $10,400; the recovery, $1,800. The defendants appealed from the judgment of the Court of Review. Their appeal was quashed. Mr. Cameron suggests a possibility that the case may have proceeded on another ground.

It seems difficult to escape the conclusion that in the foregoing cases (with the exception of *Dufresne* v. *Guévremont* (4), in which, although the question as to the right of appeal was the same as that in *Richer* v. *Voyer* (5), the allowance of an appeal by the Privy Council in that case was apparently not brought to the attention of the court, *Citizens' Light and Power Co.* v. *Parent* (6), which followed *Dufresne* v. *Guévremont*(4) and *Dufresne* v. *Fee* (7)), the word "demanded" in article 2311 of the Revised Statutes of Quebec, 1888 (sec. 25 of ch. 27 and sec. 2 of ch. 82 in the C.S.L.C., 1860), was construed as meaning "demanded or in controversy on the appeal." In *Came* v. *Consolidated Car Heating Co.* (8), in 1901, the Court of King's Bench again recognized the rule that the quantum of the interest of the appellant determines the value of the matter in dispute for purposes of the appeal to the Privy Council. In this case leave to appeal was afterwards granted by

(1) 34 Can. S.C.R. 285.
(2) 13 App. Cas. 780.
(3) Cam. S.C. Prac. (2 ed.), 183.
(4) 26 Can. S.C.R. 216.
(5) 11 R.L. 244.
(6) 27 Can. S.C.R. 316.
(7) 35 Can. S.C.R. 8, at p. 11.
(8) 4 Q.P.C. 256.

the Privy Council apparently on the ground that the value of the rights in dispute, apart from the claim for damages, exceeded £500 sterling. (Note, p. 258.)

The rule in *Allan* v. *Pratt* (1) was also accepted by the Court of Review in *Marchand* v. *Molleur* (2), in 1893.

With the law in this state, the Quebec Legislature by 8 Edw. VII., ch. 75, substituted for clause 3 of article 68, C.P.Q., which had formerly read as follows:—

(3) In all other cases wherein a matter in dispute exceeds the sum or value of £500 sterling

the following:—

(3) In all other cases where the amount or value of the thing demanded exceeds the value of $5,000.

In the revision of the Quebec statutes in 1909 article 2311 of the R.S.Q., 1888, is not found, having been repealed by ch. 37 of the statutes of 1908.

The question now presented is whether, as a result of the substitution in clause 3 of article 68, C.P.Q., of the words "the amount or value of the thing demanded" for "the matter in dispute," appealability to the Privy Council no longer depends upon the amount of the interest of the appellant, but is to be determined, alike in the case of plaintiff and defendant, solely by the amount claimed in the declaration, regardless of the value of the matter in controversy on the appeal—with the result that in an action in which $5,001 has been claimed, the defendant would be entitled to appeal *de plano* to the Privy Council, although judgment had been recovered for some very trifling sum and the plaintiff had acquiesced therein.

In the only reported case since 1908 that I have

(1) 13 App. Cas. 780.

(2) Q.R. 4 S.C. 200.

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found, although in his reasons for judgment Jetté C.J. says: "The sum demanded by the action determines the jurisdiction * * * ," in the formal judgment the refusal of leave is based upon the fact that "*the amount in controversy* does not exceed $5,000." Contrary to the view of the Privy Council, in *Richer* v. *Voyer* (1) and *Quebec Fire Ins. Co.* v. *Anderson* (2), in 1860, the court refused to take costs into account in considering the amount in controversy for purposes of appeal. The judgment also rests, however, on the ground that the proceeding had been taken under the "Winding-up Act," and that it does not authorize an appeal to the Privy Council: *Lapierre* v. *La Banque de St. Jean* (3), in 1910.

But if the proper inference from the earlier cases is that, for purposes of appeal to the Privy Council, the word "demanded" in section 25 of chapter 77 and section 2 of chapter 82 of the Consolidated Statutes of Lower Canada, 1860 (R.S.Q., 1888, art. 2311) had been construed to mean "demanded or in controversy on the appeal," so that under that provision the value of the interest of the appellant determined the right to appeal, the same construction should be put upon the word "demanded" in the new clause 3 of article 68 C.P.Q., there being nothing in the context to forbid it. *Greaves* v. *Tofield* (4); *Avery* v. *Wood* (5); *Jay* v. *Johnstone* (6); *Joyce* v. *Hart* (7); *Casgrain* v. *Atlantic and North-West Railway Co.*(8). If by the change made in 1908 the legislature meant to enact that the right of appeal should for the future depend upon the amount claimed in the declaration, in view of the existing

(1) 2 R.L. 244.
(2) 7 L.C. Jur. 150.
(3) 12 Que. P.R. 152.
(4) 14 Ch.D. 563, at p. 571.
(5) [1891] 3 Ch. 115, at p. 118.
(6) [1893] 1 Q.B. 25, at p. 28.
(7) 1 Can. S.C.R. 321, at p. 328.
(8) [1895] A.C. 282, at p. 300.

jurisprudence we should have expected to find it make use of some unmistakable phrase to express that intention, such as "demanded in the action," or "demanded by the declaration," instead of the bare and equivocal word "demanded," shorn even of the words which formerly accompanied it, "and not that recovered, if they be different," which were at least indicative, one would have thought, of an intention to use "demanded" in the sense of "demanded in the action or by the declaration," but were apparently deemed insufficient to warrant giving that construction to it in view of the unsatisfactory basis of appeal to the Privy Council which would result.

Having regard to the reasons assigned by the Judicial Committee in *Macfarlane* v. *Leclaire* (1) and *Allan* v. *Pratt* (2) for holding that the right of appeal to the Privy Council should depend upon the amount of the appellant's interest, I would not be prepared to give to the word "demanded" in clause 3 of article 68 C.P.Q. the meaning "demanded in the action," even if I were satisfied that the predecessors of article 2311 of the Revised Statutes of Quebec, 1888, had been entirely overlooked in those cases or had been deemed inapplicable, because, to do so, would overturn well-settled jurisprudence with revolutionary consequences, and because that is not the only meaning of which "demanded" is reasonably susceptible.

In *Macfarlane* v. *Leclaire* (1) the statute 34 Geo. III, ch. 6, sec. 30, upon which the right of appeal depended, declared final the judgment of the Court of Appeals

> in all cases where the matter in dispute shall not exceed £500 sterling: but in cases exceeding that sum or value * * * an appeal shall lie to His Majesty in his Privy Council *though the immediate sum or value appealed for be less than £500 sterling* * * *.

(1) 15 Moo. P.C. 183. (2) 13 App. Cas. 780.

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Nevertheless their Lordships said:—

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

The right of appeal was maintained, although the original claim had been only for £417 0s. 8d. currency, because "the effect of the judgment was to place in jeopardy" goods for which £1,642 currency had been paid, "and it is the immediate effect of the judgment which must be regarded."

The principle of this decision, their Lordships held, governed *Allan* v. *Pratt* (1).

If (as I think they should) the decisions of the Judicial Committee above mentioned should be taken to have put upon the word "demanded" used in the sections of the Consolidated Statutes to which I have referred the meaning "demanded or in controversy in the appeal," as was understood by the Court of King's Bench in *Glengoil S. S. Co.* v. *Pilkington* (2), and apparently also by our own court in *Beauchemin* v. *Armstrong* (3), and *Kennedy* v. *Gallagher* (4), a contrary intention not being clearly apparent, the legislature should be deemed to have used the same word in a subsequent statute dealing with such appeals with the meaning thus attached to it.

(1) 13 App. Cas. 780.
(2) 28 Can. S.C.R. 146.
(3) 34 Can. S.C.R. 285.
(4) Cam. S.C.Prac. (2 ed.) 183.

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I am, for these reasons, of the opinion that unless the interest of the appellant—the amount demanded or in controversy in the appeal—exceeds $5,000, no right of appeal to the Privy Council is conferred by articles 69 and 68 (3), C.P.Q., and that the respondent's motion to quash should therefore be granted.

Motion dismissed with costs.

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*May 10.
*May 25

THE CANADIAN NORTHERN RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

NORMAN DIPLOCK (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Railways—Negligence—Ejecting trespasser from moving train—Imprudence—Liability for act of servant.

As a train was moving away from a station, where it had stopped, the conductor ordered a brakesman to eject two trespassers from it. On proceeding to do so the brakesman found a man stealing a ride upon the narrow ledge of the engine-tender and, in a scuffle which ensued, the plaintiff, who was on the edge of the ledge but was not seen by the brakesman owing to the darkness was pushed off the train and injured. In an action for damages, the jury found that the brakesman had been at fault in attempting to eject the man whom he saw while the train was in motion and that it was "dubious" whether he was aware of the presence of the plaintiff in the dangerous position.

Held, per Fitzpatrick C.J. and Idington and Anglin JJ. (affirming judgment appealed from (9 West. W.R. 1052)), that the reckless indifference of the brakesman, in circumstances in which he ought to have been aware of the presence of the plaintiff, was a negligent act for which the railway company was liable.

Per Davies and Brodeur JJ. dissenting.—As it was not shewn by the evidence nor found by the jury that the brakesman was aware of the presence of the plaintiff in a dangerous position the plaintiff, being a trespasser, could not recover damages against the company for the injuries he sustained.

APPEAL from the judgment of the Supreme Court of Saskatchewan(1), affirming the judgment entered

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

(1) 9 West. W.R. 1052.

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at the trial by Elwood J., on the findings of the jury, in favour of the plaintiff for damages assessed at $1,730 with costs.

The circumstances of the case are stated in the head-note.

O. H. Clark K.C. for the appellants.

Chrysler K.C. for the respondent.

THE CHIEF JUSTICE.—The questions submitted to the jury are so involved and so numerous as to lead necessarily to unsatisfactory results. They do not, however, appear to have been objected to.

From the answers we must assume the following facts are found: (*a*) that plaintiff, stealing a ride on the company's train, sought refuge on the ledge of the tender with the witness Thacker; (*b*) that the brakesman Wagner knew that both men were on the train when it started from the station; (*c*) that, instructed by the conductor to put them both off, he went forward and ordered them both off; (*d*) that Wagner, without any attempt at investigation to ascertain the relative positions of the men, shoved Thacker off and in so doing shoved the plaintiff off also; (*e*) that the reasonable and probable result of Thacker being put off was that plaintiff would go also and that the speed of the train made it dangerous to put the men off at the time.

Both plaintiff and Thacker were trespassing, but, although the general principle is that a man trespasses at his own risk, it is undoubted that in this instance it was the duty of the railway officials when aware of the presence of the two trespassers not to put them off in such a manner as to endanger their safety. Section 281 of the "Railway Act," although

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not directly in point here, is an application of this general principle, particularly when read with the instructions of the company that the train should be stopped before putting anybody off.

Whether, in the circumstances, Wagner was acting within the scope of his employment in view of the evidence is doubtful, but the point was not raised either here or below and he apparently thought that he had the authority of the conductor. *Vide Hutchins* v. *London City Council*(1).

There is no doubt that on the findings of the jury, and there is ample evidence to support them, unnecessary violence was used towards Thacker and his removal from the train in the circumstances endangered his safety. If the accident had happened to Thacker there would be little doubt that he would have his recourse against the company. Now, as to the plaintiff, Wagner had reason to believe that both men were together, otherwise he would not have ordered them both off. And in shoving Thacker off the train improperly he caused the injury of which plaintiff complains. If Wagner was acting within the scope of his employment, and this apparently is not denied, plaintiff must succeed. The principle of law is that a tort-feasor must be assumed to have contemplated and be liable for all those injuries which result from the wrongful act together with such incidents as a reasonable man might in the circumstances have expected to result in the ordinary course of nature. *Fletcher* v. *Smith*(2), in 1877, at pages 787, 788; *Ratcliffe* v. *Evans*(3). The rule of the ordinary course of nature and probable consequences "is after all only a guide to the exercise

(1) 32 Times L.R. 179. (2) 2 App. Cas. 781.
(3) [1892] 2 Q.B. 524.

of common sense." And the jury have found on the evidence that the fall of plaintiff from the train was the reasonable and probable consequence or result of the violence used improperly to eject Thacker. When we consider the dark night, the narrow ledge on which both men stood, the unnecessary violence of Wagner's attack on Thacker and his knowledge of the plaintiff's presence somewhere on the ledge, the finding of the jury must be sustained.

I would dismiss with costs.

DAVIES J. (dissenting).—This is an appeal from a judgment of the Supreme Court of Saskatchewan affirming the judgment for the plaintiff entered by the trial judge on the findings of the jury. Mr. Justice Newlands dissented on the ground that the plaintiff was one of two trespassers stealing rides upon the railway train and that the trespasser's only right in such cases is that

> the railway company must not wilfully injure him or unnecessarily and knowingly increase the normal risk by deliberately placing unexpected dangers in the way

and that it had not been proved or found by the jury that the company or its servants had done so.

The admitted facts are that the plaintiff and one Thacker were stealing rides upon the appellant's railway and were discovered by the conductor while the train stopped at Hanley Station, a small side station on the railway line. The conductor ordered them off the train and they got off and walked across the track to the east side and hid themselves behind some box cars there. The plaintiff says that as soon as the train began to move he and Thacker climbed on again between the tender of the engine and the baggage car, Thacker going ahead, and that when he (Diplock)

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got up, Thacker had already taken up a position alongside of the ladder which ran down the centre of the back of the tender and that he was standing on the ledge of the tender. He says:

> Thacker was holding on to the ladder and he (Diplock) was holding on to the hand-rail at the outside.

His position was either on the ledge of the tender or on the steps leading to it. The only light there was what was shining out of the car door. The brakesman says he only saw "just one man" on the back of that tender, that he "did not know that the other man was on the outside on the west side" and that he "did not see him at the time."

Now whether the plaintiff was actually upon the ledge holding on the hand-rail or was on the step and so holding is uncertain. The jury did not find that he either saw or should have seen him though they answered the question whether he should have investigated where Diplock was before shoving off Thacker in the affirmative. Answering the question of fact "whether Wagner knew that Diplock was in the position he was" they say "dubious." The question whether he should have investigated and found out is one of law, not of fact for the jury. The facts as stated by the brakesman are that, when he opened the door of the baggage car, he saw only one man on the ledge, that he called to him and asked him to come in the car; that the man refused, and he (Wagner) grappled with him and pushed him off. It may well be that if Thacker who was seen by Wagner and pushed by him had been injured the company would under the findings of the jury as to the dangerous rate of speed of the train have been liable to him in damages. But how can that liability arise with respect to a trespasser whose presence there the brakesman did not

know of? The jury were unable to find that Wagner knew that Diplock was in the position he was. Without such a finding, it is impossible for me to hold that the company should be held liable.

Plaintiff was a trespasser. He was trespassing at his own risk. The company was undoubtedly under a duty not wilfully to injure him. But how could they be said to have wilfully injured him when they did not know of his presence there? It is said they must be held to have known because the conductor told the brakesman there were two men stealing a ride and to put them off. But the brakesman swears that when he went to put them off he only saw *one* man and did not see the other. The jury cannot have disbelieved him or they could not have found it was "dubious" whether Wagner knew that Diplock was in the position he was. If the knowledge of Diplock's position at the time he pushed Thacker off was known to Wagner, the brakesman, there might be a very strong contention made that the company was liable for damages to Diplock for any injuries he sustained on the ground that he had been wilfully injured by Wagner's improper and illegal action. But he could only recover in cases where there was either wilful injury caused to him or where the deliberate action of one of the company's servants placed unexpected dangers in his way. The company could not be held liable to a trespasser for the mere negligence of their servants. There must be much more than negligence. There must be deliberate or wilful wrongful action causing the injuries complained of.

If Wagner did not know and, in the absence of a finding to the contrary, we should accept the evidence that he did not, then no such responsibility arises.

I am quite at a loss to understand how it can be

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successfully argued that because the brakesman was told to go and put off two men who were stealing rides and in discharging that duty he found only one man that he was bound before putting that one off to institute a search for the other. He may well have assumed that when he gave the order to the man he did see to get off the other man whom he did not see obeyed it. But whether that be so or not he neither saw nor knew of the presence of the other man (the plaintiff) and therefore owed him no duty.

The law on the subject of the liability of a railway company is laid down by the Judicial Committee of the Privy Council in the case of *Grand Trunk Railway Co.* v. *Barnett*(1), at page 369, as follows:—

> The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled, unnecessarily and knowingly to increase the normal risk by deliberately placing unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances. A carrier cannot protect himself against the consequences which may follow on the breach of such an obligation (as for instance, by a charge to cover insurance against the risk), for there can be no contracts with trespassers; nor can he prevent the supposed obligation from arising by keeping the trespasser off his premises, for a trespasser seeks no leave and gives no notice.
>
> The general rule, therefore, is that a man trespasses at his own risk. This is shewn by a long line of authorities, of which *Great Northern Ry. Co.* v. *Harrison*(2), *Lygo* v. *Newbold*(3) and *Murley* v. *Grove*(4), are familiar examples.

Accepting this law and applying it to the findings of the jury and the facts as admitted, I am of opinion that the appeal should be allowed and the action dismissed with costs.

(1) [1911] A.C. 361
(2) 10 Ex. 376.
(3) 9 Ex. 302.
(4) 46 J.P. 360.

IDINGTON, J.—The respondent and one Thacker were stealing a ride on appellant's train. When, as it was starting, the conductor said to the brakesman, Wagner,

> There are two men on the end of the car; go and put them off.

It was at night time. The men were standing on the ledge of the tender next the baggage car. Wagner proceeded to the place indicated and tried ineffectually to get Thacker into the baggage car and then said to him "well get off" and gave him a shove which had the desired effect.

The jury find the train was then moving at a speed such as to make it dangerous for him to alight. The result upon respondent of the shoving of Thacker by Wagner appears in the answers to the questions, as follows:—

1. Q. Was the plaintiff injured by the wheels of the C.N.R train passing over his feet? A. Yes.

2. Q. How did he get under the train? A. Result of being pushed.

(a) Q. Did Wagner assault Thacker by kicking or pushing? A. Yes.

(b) Q. Where was Diplock when Wagner attacked Thacker? A. On ledge of tender, west of Thacker.

(c) Q. Was the reasonable and probable result of Wagner kicking or pushing Thacker that Diplock would be pushed off the train? A. Yes.

(d) Q. Did Diplock fall off the train as a result? A. Yes.

(e) Q. Was that the cause of his injury? A. Yes.

(f) Q. Was Wagner's conduct towards Thacker adopted with the object of putting Thacker off the train? A. Yes.

(g) Q. If yes, was Wagner acting in course of his employment? A. Yes.

(h) Q. Did Wagner know that Diplock was in the position he was? A. Dubious.

(i) Q. If he did not know, should he have investigated to find out where Diplock was before he shoved or kicked Thacker? A. Yes.

The other questions and answers relevant to the issues involved in these are as follows:—

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(m) Q. Was the speed of the train when ordered to get off such as to make it dangerous for him to alight? A. Yes.

(n) Q. Did Wagner know it was dangerous, or should he have known, having regard to all the circumstances? A. Yes.

(o) Q. Was the conduct of Wagner reasonable and proper? A. No.

(p) Q. Was Wagner, in ordering Thacker and Diplock off the train acting in the course of his employment? A. Yes.

The finding of the jury as to the rate of speed of the train shews it was an unlawful assault and battery that was thus committed upon Thacker by Wagner. As a legal result thereof he and his employers are liable for the consequences thereof to others.

This is not a case of negligence in which other considerations might have been involved as in *Grand Trunk Railway Company* v. *Barnett*(1), so much discussed in the case.

It is the law involved in the well known squib case *Scott* v. *Shepherd*(2), that should be our guide herein subject to the qualifications to be found as the result of later development of the law resting upon the principle laid down in that case.

The above question (c) and answer thereto seems to me to cover all that need concern us as to these qualifications.

The undisputed terms of the conductor's order indicated to the brakesman that there were two men at the place where the scuffle was had and that both were to be dealt with. Thus the answer of the jury was amply justified by the facts.

The questions of wilfulness and actual accurate knowledge of how these men stood though much discussed below and in argument here and held by the jury "dubious" seems to me beside the question.

Assuming in such case the brakesman had, as I

(1) [1911] A.C. 361. (2) 1 Sm. L.C. (12 ed.) 513.

imagine probable, authority to arrest Thacker and hand him over to the police as a trespasser and had been merely discharging that lawful duty, when a scuffle ensued as result of Thacker's resistance, and the respondent had as part of the consequences accidentally been knocked off the car and injured he, as a trespasser, could have had no remedy.

I assume in stating the law thus that there had been in such supposed case no undue violence on the part of the brakesman and that he had been duly and properly discharging his duty to arrest and keep Thacker in charge.

I desire only to illustrate the wide difference that exists between the case of a man doing an unlawful act and that of a man doing a perfectly legal act.

In the latter case knowledge and wilfulness might have a very important bearing in determining the consequences of what one so placed should be held liable for in a way that is not open to him doing an unlawful act to urge on his behalf.

There was much made in argument, and by the learned judge who dissented in the court below, of the inconsistent nature of the questions first put and later by reason of the learned trial judge putting the following question:—

(j) Q. If Diplock jumped from the train and was not shoved off did he jump because of any order or command of Wagner? A. Yes.

If there had been nothing else in the case than this question and some others following it evidently related thereto or intended to be so there would have to be a new trial to determine the fact of whether Diplock in fact did jump in obedience to what was said and was not pushed off for strangely enough there was no question put to elicit the fact.

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The putting of such an hypothetical case and getting an answer thereto leads nowhere.

However, the whole of these academic questions relative to an assumption of jumping off are rendered harmless as they are needless by the express answer to the second question and others I have quoted.

I think the appeal should be dismissed with costs.

ANGLIN J.—Very reluctantly, because of the unmeritorious features of the plaintiff's case and because I realize and appreciate the grave dangers and difficulties to which trainmen are exposed in dealing with such characters as the plaintiff and his companion, Thacker, when stealing rides on trains, I have reached the conclusion that this appeal cannot succeed. A perusal of the record has left me under the impression that, if trying it without a jury, I should not improbably have dismissed the action on the ground that it had not been satisfactorily shewn that the plaintiff was injured as a result of what took place between the brakesman, Wagner, and Thacker. But findings of the jury which have not been seriously attacked establish that the plaintiff was pushed or forced off the defendant company's train, while it was travelling at a speed which made it dangerous for him to alight, as the result of an attempt made by Wagner, in carrying out orders of the conductor, to force the plaintiff's companion Thacker off the train.

I fully agree that if Wagner had not had reason to believe that the plaintiff, Diplock, was in the narrow and admittedly dangerous space between the tender of the engine and the baggage car, when he pushed or shoved Thacker, no liability to Diplock would have been incurred. The plaintiff was a trespasser and liability to him would not arise from any mere negli-

gence. But the railway company's employee was not on that account

> entitled unnecessarily and knowingly to increase the normal risk by placing unexpected danger in his way.

Grand Trunk Railway v. *Barnett*(1), at page 369.

The jury has not found that Wagner knew "that Diplock was in the position he was." They have found that "he should have investigated" to find where Diplock was before he "shoved or kicked Thacker." Wagner's evidence is that, as the train was about to leave Hanley Station, the conductor said to him,

> There are two men on the end of the car; go and put them off.

He immediately proceeded to do so. He opened the door of the baggage car and saw Thacker standing on a ledge at the back of the tender. He could see only one-half of the back of the tender. The light was weak and uncertain. He says he did not know that the other man was on the west side and that he could not see him. Although he "assumed" there were two men there, he did not take any steps to locate the second man. He did not concern himself about him.

Reading the jury's findings in the light of this evidence, I understand them to mean that, although Wagner did not see Diplock and did not know his exact position, he had reason to believe that he was somewhere in the narrow space between the tender and the baggage car and acted on that assumption, and that in failing to look for him before wrongfully dealing with Thacker in a way which necessarily increased the risk to anybody else in the perilous position in which he had reason to believe the plaintiff might be, he had disregarded the right which even

(1) [1911] A.C. 361.

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a trespasser has that he should not be wantonly or recklessly exposed to unnecessary risk by one who has reason to believe that his acts will have that effect. The duty of a common carrier to a trespasser is thus stated by Bailey J. of the Supreme Court of Illinois in *Chicago, Burlington and Quincy Railroad Co.* v. *Mehlsack*(1), at page 20:—

> His duty rests merely upon the grounds of general humanity and respect for the rights of others, and requires him to so perform the transportation service as not wantonly or carelessly to be an aggressor towards third persons whether such persons are on or off the vehicle.

An observation of Lord Robson, at page 371 of the report of *Grand Trunk Railway Co.* v. *Barnett*(2), is apt to mislead. Referring to the speech of the Earl of Halsbury in *Lowery* v. *Walker*(3), at page 13 he quotes His Lordship as having said that

> the word "trespasser" would have carried the learned counsel for the defendant all the way he wants to get

i.e., one would infer from the use made of this passage, to the conclusion of non-liability. But the rest of Lord Halsbury's sentence was

> to a somewhat difficult and intricate question of law upon which various views might be entertained.

In the same case Lord Shaw of Dumferline had pointedly withheld his assent to the pronouncements of Darling J. and Vaughan-Williams L.J., in the lower courts, as to immunity for injuries caused to mere trespassers.

Wagner, though aware of Diplock's probable presence in a position of peril, seems to have allowed himself to be carried away by excitement, caused, no doubt, by Thacker's successful resistance to his efforts to draw him within the baggage car and, with reckless

(1) 19 Am. St. Rep. 17. (2) [1911] A.C. 361.
(3) [1911] A.C. 10.

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indifference to the consequences either to Thacker or to Diplock, tried to push the former off the train. His attitude towards Diplock is probably correctly expressed in his answer

> I did not bother my head about him.

Under these circumstances I think the verdict and judgment for the plaintiff should not be disturbed.

BRODEUR J. (dissenting).—The jury in their verdict have not found that the brakesman Wagner knew that the respondent, Diplock, was in the position he was in when Wagner tried to push Diplock's companion off the car. Diplock had no business to be on the car of the appellant company; he was even stealing a ride at the time.

The Privy Council in the case of *Grand Trunk Railway Co.* v. *Barnett*(1), has decided that

> although the common carriers are under a duty to a trespasser not wilfully to injure him, they are not liable to him for mere negligence and that as the accident was due to the negligence of the carrier's servants and not to any wilful act the trespasser was not entitled to recover.

Applying that decision to the present case I find that the plaintiff respondent was not wilfully injured because the jury have been unable to state in their verdict whether the brakesman knew that Diplock was there.

I think the appeal should be allowed and that the action should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants:

Borland, McIntyre, McAughey & Mowat.

Solicitors for the respondent:

Bence, Stevenson & McLorg.

(1) [1911] A.C. 361.

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*May 19.
*May 25.

THE MONTREAL TRAMWAYS COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

CHARLES McGILL (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF REVIEW, AT MONTREAL.

Appeal from Court of Review—Jurisdiction—Amount in controversy—Addition of cost of exhibits.

The cost of exhibits (claimed by the action), which may be taxable as costs in the cause between party and party, cannot be added to the amount of the *demande* in order to increase the amount in controversy to the sum or value necessary to give the right of appeal to the Supreme Court of Canada. *Dufresne* v. *Guévremont* (26 Can. S.C.R. 216), followed.

MOTION to quash an appeal from the judgment of the Court of Review, at Montreal(1), affirming the judgment entered at the trial, in the Superior Court, District of Montreal, by Greenshields J., on the findings of the jury, in favour of the plaintiff, with costs.

The action was brought to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the company and, by the conclusions of his declaration, the plaintiff claimed five thousand dollars with interest and "costs of suit, including costs of exhibits." Before instituting the action the plaintiff, as required by statute, served a notice on the defendants claiming compensation and

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

(1) Q.R. 49 S.C. 326.

it appeared that, in the event of the action being maintained, there would be a fee payable on the notice and the cost of service amounted to seventy-five cents. On the hearing of the motion to quash the appeal for want of jurisdiction, under section 40 of the "Supreme Court Act," R.S.C., 1906, ch. 139, it was contended by the appellants that the amount of the fee on the notice and of the cost of serving it should be considered part of the *demande* and, being added to the amount of the damages claimed, would bring the amount of the controversy over the sum necessary to give the right of appeal to the Judicial Committee of the Privy Council under articles 68 (3) and 69 of the Code of Civil Procedure and, consequently, the appeal would lie to the Supreme Court of Canada.

Callaghan supported the motion.

Meredith K.C. contra.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—Apparently a nice question of jurisdiction arises in this case. The conclusion of the declaration is:—

> The plaintiff prays for judgment against the defendants for the said sum of $5,000, with interest from this date and costs of suit, including costs of exhibits.

Articles 68 (3) and 69 of the Code of Civil Procedure give an appeal from the Court of Review to the Privy Council in every case

> where the amount or value of the thing demanded exceeds five thousand dollars.

In the case of *Dufresne* v. *Guévremont*(1), the declara-

(1) 26 Can. S.C.R. 216.

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tion seems to have concluded with much the same language, *viz.*—the plaintiff sued, on the 26th December, 1893, for $2,150 with interest at 8% per annum from date of action till paid, with costs. The Supreme Court held that the claim as set out in the declaration was only for $2,150 and that although the interest was claimed in the declaration it could not be looked at for the purpose of considering whether the amount claimed was more than £500.

The appellants here urge that we must add to the amount claimed in the conclusions of the declaration the fee on the notice of action served on the company and the bailiff's charges for making the service. But, as both these items are included in the costs taxable as between party and party, we do not think they can be considered in determining whether or not the amount claimed is within the appealable limit.

The motion to quash is granted.

Appeal quashed with costs.

GEORGE MEAGHER (PLAINTIFF), AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

MARY ANN MEAGHER, AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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*Feb. 17.
*June 13.

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

Will—Construction—Estate for life—Power of appointment—Trust.

A will devised all the testator's real and personal property to his two daughters (naming them) upon trust as follows:—To make certain payments and then "to hold all my property in lots eight and nine * * * for my said daughters for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make, they my said daughters in the meantime to have all the rents and profits therefrom."

Held, affirming the judgment of the Appellate Division (34 Ont. L.R. 33), Fitzpatrick C.J. and Idington J. dissenting, that the said two daughters took a beneficial life interest in the property; and that the words "or otherwise" where they occur gave them an unfettered power of disposition which they could exercise in favour of any person, including themselves.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) varying the judgment at the trial in favour of the respondents.

The only question on the appeal was as to the construction of clause 5 of the will of Thomas Meagher. The clause is set out in the above head-note.

A. C. McMaster and *J. H. Fraser* for the appellants. By the general devise in the beginning of his will the

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(1) 34 Ont. L.R. 33.

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testator created a trust which governs all that follows: *Buckle* v. *Bristow*(1); and the trustees cannot take beneficially: *Briggs* v. *Penny*(2), at pages 556-7.

The daughters are in no way pointed out as objects of the testator's bounty. See *In re Smith*(3). *Yeap Cheah Neo* v. *Ong Cheng Neo*(4); and *McDermott* v. *Anderson*(5) were also cited.

Hellmuth K.C. for the respondents referred to *In re Howell; Liggins* v. *Buckingham*(6).

THE CHIEF JUSTICE (dissenting).—The will of the testator, Thomas Meagher, commences as follows:—

> For the purpose of carrying out the trusts contained in this my will I give, devise and bequeath all the estate real and personal of which I may die seized or possessed or to which I may be entitled at the time of my decease unto my daughters Mary Ann Meagher and Margaret Ellen Meagher upon trust as follows.

There follows an enumeration of the trusts so declared, of which the fifth is as follows:—

> To hold all my property in lots eight and nine in the third concession from the bay in the Township of York, together with all stock, crops, furniture and other goods and chattels and personal property thereon for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make, they my said daughters in the meantime to have all the rents and profits therefrom.

The dispute in the action has been narrowed down to the single question of the effect of the fifth trust declared by the testator's will. I do not think this question presents any great difficulty; such as it does, arises from the fact that the trust is not set forth in regular and settled terms the meaning of which has

(1) 10 Jur. N.S. 1095.
(2) 3 Mac. & G. 546.
(3) (1904) 1 Ch. 139.
(4) L.R. 6 P.C. 381.
(5) [1915] 1 Ch. Ir. R. 191.
(6) [1915] 1 Ch. 241.

become well established. Where these are departed from, there is always a likelihood that some opening will be left for a doubt as to the construction to be put upon the language employed; a vast amount of ingenuity has been shewn in the suggestion of possible meanings in the present instance.

I cannot doubt that the intention of the testator was to place the disposal of the property in question among his children, both as to shares and time, at the discretion of his daughters, Mary Ann Meagher and Margaret Ellen Meagher. It has to be considered how far he has succeeded in carrying out his intention, because, though we may look to the intention to decide the meaning of any ambiguous phrase, we cannot give an effect to the words used which their meaning will plainly not bear. In my opinion, however, full effect can be given in this case to the intention of the testator without adding to or departing from the exact words used.

I do not understand that any life interest can be taken by the daughters, because there is given to them a power to dispose of the whole property at any time, and it is only in the meantime that they are to receive the rents and profits. By making no appointment, they might, indeed, continue this state of things during their lives, but I do not think this makes any difference; it is only accidental that the power of disposition and the right to receive the rents and profits are in the same hands; if the power of appointment had been given to another child, he could by disposing of the whole property have put an end at any time to the enjoyment by the sisters of the rents and profits.

The most important question is, who are the persons in whose favour the power of disposition may be exercised, and it seems to have been thought that the

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words "or otherwise" following the power "to make such disposition among my children" must be construed to give the daughters a general power of disposition to any one they please. I do not think this is the meaning to be placed on the words "or otherwise." I think they are to be read with reference to the word "among" in the power of disposition among the children. It is, I think, only a way of expressing a very common trust which in proper legal phraseology would be framed as a power to appoint the trust property to such one or more of the testator's children in such shares and proportions and at such time or times as the donee of the power might think fit. There is nothing either in the particular trust or in the general scope of the will to warrant the suggestion that the testator intended to give power to appoint strangers or any other than his own children.

The power of disposition can only be exercised by the two daughters, Mary Ann Meagher and Margaret Ellen Meagher, and on the death of either of them before making any disposition of the property it will fall into the residuary estate

I am not overlooking the words "for themselves" following the names of the testator's daughters, Mary Ann Meagher and Margaret Ellen Meagher, which may be thought to be against the construction which I have placed upon the trust. Apart, however, from the fact that they have no technical meaning, they seem, if not senseless, at any rate inapt to express any possible meaning which the testator could have intended. If they refer to the beneficial interest which these ladies take, it can only be such interest as they have under the trust. I am, however, disposed to think that there is another explanation. It is apparent on the face of the will that it was drafted either by a

lawyer who was not a very competent draftsman or by someone who had considerable knowledge of legal forms. I think it may be that the insertion of the words "for themselves" is due to some confused and mistaken idea of proper and apt legal forms. These are perhaps useless speculations and, looking to the intentions of the testator as they are to be gathered from the whole will including the particular devise and bequest, I should have no hesitation in saying that if the words "for themselves" were repugnant to the construction which I have placed upon the trust, they ought to be disregarded.

The effect of the trust construed in accordance with the views above expressed will therefore be: Devise and bequest of all testator's real and personal estate to trustees; as to the property in the fifth enumeration mentioned—To hold the same upon trust, to make such disposition thereof to or for such one or more of his children in such shares and proportions and in such manner as his daughters, Mary Ann Meagher and Margaret Ellen Meagher, may from time to time direct or appoint, and in the meantime and until any such disposition shall have been made and so far as the same shall not extend, to permit his said daughters, Mary Ann Meagher and Margaret Ellen Meagher, to receive the rents and profits thereof for their own use and benefit and from and after the death of either of them, the said Mary Ann Meagher and Margaret Ellen Meagher, and in default of any such direction or appointment or so far as the same shall not extend, upon the like trusts as are in the will declared concerning the residuary estate.

I think by following these indications there will be no difficulty in settling the judgment varying the judg-

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ment of the Appellate Division. If necessary, the matter can be spoken to in chambers.

The appeal must be allowed and under ordinary circumstances the costs should come out of the estate, but as it appears that all available assets have been distributed and the action is mainly at any rate concerned with the trust declared in the fifth enumeration in the will, I think the costs of all parties may fairly be paid out of the particular trust property.

IDINGTON J. (dissenting).—This will seems to have trust written all over it except one ambiguous bit contained in clause 5. Its first clause was evidently intended to be all comprehensive and determine the general scope and purpose of the instrument. That and clause No. 5 are as follows:—

1. For the purpose of carrying out the trusts contained in this my will I give, devise and bequeath all the estate real and personal of which I may die seized or possessed or to which I may be entitled at the time of my decease unto my daughters Mary Ann Meagher and Margaret Ellen Meagher upon trust as follows:—

* * * * * *

5. To hold all my property in lots eight and nine in the third concession from the bay, in the Township of York, together with all stock, crops, furniture and other goods and chattels and personal property thereon for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make, they my said daughters in the meantime to have all the rents and profits therefrom.

One thing quite clear is that everything was given these daughters for the purpose of carrying out the trusts contained in the will.

Let us take and apply the following extract from Lewin on Trusts, (12 ed.) ch. IX., p. 169, sec. 1, par. 16:—

16. Next, a trust results, by operation of law, where the intention not to benefit the grantee, devisee or legatee is *expressed* upon the instrument itself, as if the conveyance, devise or bequest be to a person "upon trust" and no trust declared, or the bequest be to a

person named as executor "to enable him to carry into effect the trusts of the will" and no trust is declared, or the grant, devise or bequest be upon certain trusts that are too vague to be executed, or upon trusts to be thereafter declared and no declaration is ever made, or upon trusts that are void for unlawfulness, or that fail by lapse, etc.; for in these and the like cases the trustee can have no pretence for claiming the beneficial ownership, when, by the express language of the instrument, the whole property has been impressed with a trust.

We may assume this to be an accurate presentation of the law. For my present purpose I see no reason to labour with the manifold fine distinctions existent behind this expression thereof.

These authorities, cited in foot-notes, t pages 169 and 170, (Lewin on Trusts,) in support of the text I have quoted, shew that the absence of a declaration of trust would not enable such a devisee or legatee to claim the property.

Is it not therefore quite clear that the first clause of this will has impressed upon the bequests and devises comprised threin a trust which would result respectively to the heirs at law or personal representative of the testator unless so far as relieved therefrom by later clear and unmistakable language? No one will attempt to deny that such later language, so far as clearly intelligible, must govern.

This clause 5 contains all that can be invoked to aid the daughters so bound by the obligation of a trust. How can it? It is not necessary to enter upon the profitless discussion of what might have been the exact nature of the title taken by the daughters had the latter part of clause 5 been obliterated, further than to say that even in such a case it might be fairly arguable they took no more than an estate for life under the circumstances in which they had been placed by the rest of the will.

Assuming it possible to maintain in such a case that they would have taken thereby an estate in fee

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simple in the land, and a corresponding absolute property in the personalty, how can we say that the following language:—

> and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make they my said daughters in the meantime to have all the rents and profits therefrom,

must be discarded and is of no effect?

It seems, at least impliedly, to rebut any construction of what had preceded it, as ever having been intended by the testator to transfer absolutely all title or interest he had therein.

It removes all possibility of holding, properly, that the daughters were intended to have taken all freed from any trust. It leaves them nothing but a life estate, carved out of what they got, freed by virtue of the express terms, including the nominative fashion of doing it, from the trust which otherwise would have bound them.

But how does that help us to find a general power or free the additional power over the estate given by these lines from the implication of being impressed with a trust? That additional power is not inconsistent with the trust expressed in the first clause, but quite consistent therewith and what was intended thereby to be defined later.

Either the language creates a power or it does not.

If by reason of and through inaccuracy of expression it fails to convey any meaning, save that I have just adverted to, of making clear it was only a life estate that was intended to be given these daughters, then there has been no trust declared, and the absence of either a declared trust or devise or bequest, in clear and unmistakable terms freeing the same from the trust impressed on it from the beginning, leaves this

property to the heirs at law and personal representatives subject to the life estate therein of the daughters or survivor of them.

And if the language used can be construed as giving a power, that is likewise impressed with a trust unless it can clearly be interpreted as excluding it.

The only thing in this power which lends a possibility of such exclusion is the use of the phrase "or otherwise."

When I find that used as the foundation for a process of reasoning which ends by concluding that the donees of the power are but the probable objects of its execution, I hesitate to attribute such intention to the testator, who certainly could have accomplished that result, if so intended, by using direct and simple language.

The phrase "or otherwise" may mean so much or so little that its slovenly use, so evident here, tempts me to think it would be more in accord with the scope and purpose of the whole will, and the evidence it furnishes of the testator's intention, to read it as having relation to the time when the power was to be used.

It seems to me this is one of those cases where the strictly grammatical construction does not express what the writer intended.

It is more in harmony with all else to be looked at and considered to read the phrase "or otherwise" as related to the question of time. Doing so would give a clear and operative effect to the whole paragraph, instead of rendering it futile.

It might obviously be expedient in the interest of those concerned to execute the trust by appointing part of the property at one time, and other parts at other times, as circumstances developed, or if occasion

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called for it to await a time when a final distribution might be made.

Again, if the power never could be prudently executed in its entirety, the result would be to let the children and (or) their descendants acquire the property by the direction of the court or possibly without such direction.

One of the difficulties attendant upon its due execution might be the possibility of the donees being excluded.

The question thus raised has been dealt with in argument in a recent case of *Tharp* v. *Tharp*(1), where the cases are collected.

I do not intend herein following the inquiry thus suggested, and only mention it for the consideration of those concerned.

I conclude for the foregoing reasons that the appeal should be allowed and the judgment below varied by striking out the words

> and are also entitled to a general power to appoint the corpus of the said real and personal property either to themselves, the said Mary Ann Meagher and Margaret Ellen Meagher, or to any other person as they may think fit, and doth adjudge the same accordingly,

and substituting the words

> and have as trustees a power of appointment over said property in favour of the children of the testator to be executed from time to time or otherwise as prudent persons acquainted with the circumstances and conduct of the said children respectively should feel just.

It seems to me such was the desire of the testator.

It is impossible for us, without the slightest information as to the ages and conditions in life of these children or any of the surrounding circumstances which led the testator to make such a peculiar provision, to say more.

(1) [1916] 1 Ch. 142.

It is possible an equal distribution was not intended. It is possible that the testator expected the distribution to depend upon the conduct of the children, and undeserving ones to feel that the trustees had a power of discrimination. I pass no opinion on such suggestions. They may be, even if one knew, a great deal more than presented of no value.

At present all that seems to me quite clear is that the impress of a trust is stamped on the power for whatever it is worth. If too vague to be effective as probably intended, the trust will result to the benefit of the heirs.

As to the costs, I should leave each party to pay their own costs in the Appellate Division and in this court.

DUFF J.—The appeal should be dismissed with costs.

ANGLIN J.—I know of no rule of equity which prevents a devisee of property upon trust from taking out of it a benefit which it was the intention of the testator that he should have. *Dawson* v. *Clark*(1); *Hughes* v. *Evans*(2). No doubt the intention to benefit the trustee personally must clearly appear. Such an intention, in my opinion, is explicitly stated in the fifth paragraph of the will here in question in favour of the testator's two daughters, in regard to the property therein dealt with, and no contrary intention anywhere appears. The concluding words of the fifth clause,

> they my said daughters in the meantime to have all the rents and profits therefrom

admittedly give them a beneficial life interest in the property in question. I agree that they also preclude

(1) 15 Ves. 409; 18 Ves. 247, at p. 257. (2) 13 Sim. 496.

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Anglin J.

the construction in favour of their having an unrestricted fee simple, which was the view taken by the learned trial judge. The earlier words,

> for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves,

unmistakably indicate that this particular property, which the testator had included in the general devise to them in trust of his entire estate, was nevertheless to be held by the two daughters, not as trustees, but, as the testator puts it, "for themselves," *i.e.*, for their own benefit, having regard to what follows, during life, or until disposed of. The words "for themselves" I regard as at least equivalent in effect to the words "at his own disposal," discussed in *In re Howell*(1), as indicative of the testator's intention that this property was not to be subject to any obligation of trust. After devising the property to his two daughters *nominatim* "for themselves," the testator proceeds to give them the right

> to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make,

i.e., not as trustees, but as individuals with an unfettered power of disposition. I cannot find in these words any indication of an intention to benefit the testator's children exclusively. The words "or otherwise as my said daughters decide to make" distinctly exclude that idea. Should the power conferred not be exercised, subject to the life interest of the two daughters, the property would pass either under the residuary clause or as upon an intestacy.

I can find no justification for distorting the language of the testator by transposing the words "or otherwise," as contended for by counsel for the appellants,

(1) [1915] 1 Ch. 241.

and placing them immediately after the phrase "from time to time" or for refusing to give them their ordinary signification.

In a word, this case is governed by that primary and cardinal rule of interpretation, that the grammatical and ordinary sense of the words is to be adhered to unless absurdity, repugnancy or inconsistency should result—a rule too often disregarded in order to give effect to some technical and artificial rule of construction distinctly subordinate and never meant to be invoked where the language is plain and ordinary and there is neither ambiguity or obscurity in it. A testator's clearly expressed intention, not unlawful or impossible of performance, must be carried out.

I would dismiss the appeal with costs.

BRODEUR J.—After a good deal of hesitation, I have come to the conclusion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McMaster, Montgomery, Fleury & Co.*

Solicitors for the respondents: *Coatsworth & Richardson.*

1916

*May 4.
*June 13.

THE CITY OF EDMONTON.....APPELLANT;

AND

THE CALGARY AND EDMONTON RAILWAY COMPANY....} RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Location—Registration of plans—Construction of line—Plan of subdivision subsequently filed—Dedication of highways—Rights of municipality—Priority—"Railway Act," R.S.C., 1906, c. 37—Dominion "Railway Act," 1903.

The filing of location plans by a railway company in the proper registry office, after such plans have been approved by the Board of Railway Commissioners under the provisions of the Dominion "Railway Act," is sufficient and effective, after the railway company has constructed its line upon the location indicated, to establish the seniority of the right of the railway company over that of the municipality at points where highways were not dedicated, by the filing of plans of subdivision by the owner or otherwise, or actually used, constructed or accepted by the municipal corporation at the time of the registration of the location plans by the railway company.

APPEAL on a case stated by the Board of Railway Commissioners for Canada for the opinion of the Supreme Court of Canada pursuant to the "Railway Act."

STATED CASE.

"1. Prior to the 30th of September, 1902, the Hudson Bay Company was registered as owner * * * of the portion of their reserve in the City of Edmonton now in question.

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

"2. On the 30th of September, 1902, a plan of subdivision of a portion of the reserve was registered in the Land Titles Office. A memorandum of the registration was noted upon the outstanding certificate of title and a new certificate of title was issued to the Hudson Bay Company.

"3. On the 27th of May, 1905, the Calgary and Edmonton Railway Company caused to be filed in the Land Titles Office for the North Alberta Land Registration District a railway location plan which had been duly sanctioned by the Board of Railway Commissioners under the provisions of the 'Railway Act' on the 3rd of May, 1905.

"4. On the 20th of November, 1905, a further plan of subdivision was registered by the Hudson Bay Company. A memorandum of the registration was placed upon the Hudson Bay Company's certificate of title and a new certificate of title was issued.

"5. Agreements for sale and transfers were from time to time made by the Hudson Bay Company, according to plans B 2 and B 4, as shewn by the indorsements on certificates of title. The company retained those lots corresponding with the lands shewn as required by the Calgary and Edmonton Railway on plan, exhibit 4.

"6. Evidence was given before the Board at its sittings at Edmonton on the 31st of October, 1913, as follows:—

* * * * *

"7. On the 20th of October, 1909, an agreement was made between the City of Edmonton and the Calgary and Edmonton Railway Company. The by-law of the City of Edmonton adopting this agreement was validated and confirmed by the Alberta statutes of 1910, ch. 5.

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"8. On the 1st of April, 1912, a transfer was executed by the City of Edmonton pursuant to the agreement, transferring to the Calgary and Edmonton Railway Company the lands described in paragraph 2 of the agreement. This transfer was delivered by the city to the railway company and on the 5th of August, 1912, was returned by the railway company's solicitor to the city solicitor for correction owing to objections taken by the surveyor of the Land Titles Office to the accuracy of the description of the land. Since then the railway company has repeatedly requested its return but this has not been done as, in the opinion of the registrar, a portion of the lane adjoining in the rear of the lots abutting on Jasper Avenue between 9th and 10th streets has not yet been dedicated by the Hudson Bay Company and negotiations for the purpose of removing this difficulty are proceeding.

"9. Transfers have been made by the Hudson Bay Company and others to the Calgary and Edmonton Railway Company of those of the lots according to plan B 4, required by the latter company for railway purposes, and the latter company has now become the registered owner of the lands shewn upon the location plans as required, except such parts of the said lands as are shewn as streets and lanes on plan B 4, and which are described in the transfer. The transfer from the Hudson Bay Company to the Calgary and Edmonton Railway Company was made and accepted on the terms set out in the letters from Curle & Bond, solicitors for the Calgary and Edmonton Railway Company to the Commissioner of the Hudson Bay Company and the reply thereto.

"10. Except as stated in the foregoing paragraphs neither party to the application before the Board of

Railway Commissioners had acquired any rights in respect of the land in question.

* * * * *

"12. The formal order made by the Board on the application was as follows:

"Upon the hearing of the application at the sittings of the Board held at the City of Edmonton, in the Province of Alberta, on Friday, the 31st of October, 1913, in presence of counsel for the said city, the Calgary and Edmonton Railway Company, and the Canadian Pacific Railway Company; and what was alleged by counsel aforesaid:—Counsel for the said municipality submitting that it was necessary, in the first instance, to determine whether or not the municipality has, as a matter of title, the right to open the said highway and was the owner of the land required for the said highway so as to make the said highway senior to the railway;

"The Board finds and adjudges that the title of the railway company is sufficient and effective as against the municipality, and that should the said highway be opened, such opening would be subject to the seniority of the railway company's title and construction.

"(Sgd.) H. L. DRAYTON,
"Chief Commissioner,
"Board of Railway Commissioners for Canada.

"13. The questions which at the request of the Corporation of the City of Edmonton are stated by the Board and submitted for determination by the Supreme Court of Canada are:—

"(1) Whether as a matter of law the filing of the location plan by the railway company in the appropriate Land Titles Office (said plan having been duly

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approved by the Board under the provisions of the Act and carried into effect by the railway company), is sufficient and effective to establish the railway company's seniority to the municipality at points where highways were not dedicated by plan or otherwise or actually used, constructed or accepted by the municipality at the time the location plan was so filed?

"(2) If as a matter of law the municipality had the right as against the railway company to maintain highways at the points in question, was such right discharged by the statute of the Province of Alberta, 10 Edw. VII., ch. 5, sec. 1, and the by-law and agreement thereby validated and confirmed?"

O. M. Biggar K.C. for the appellant.

W. N. Tilley K.C. for the respondents.

THE CHIEF JUSTICE.—My answer to the first question is in the affirmative and it will, therefore, be unnecessary to answer the second.

The question for determination and the circumstances under which this matter was brought before the Railway Board and referred here are fully explained in the notes of my brother Anglin.

Once the location of the railway was officially approved of by the Board and the plan filed with the registrar the right of the railway company to take the land, subject to the payment of compensation, was absolute. By the deposit of the plan the Hudson Bay Company was divested of the power to dispose of its property within the limits of the right-of-way: "*the land was put extra commercium.*" The deposit of the approved plan with the registrar fastened a servitude upon the land taken and

gave the company a statutory right to acquire a complete title to it for railway purposes. The railway company would not be trespassing if it entered upon the land even before its expropriation. *Vide Re Ruttan and Dreifus and Canadian Northern Railway Company*(1), at p. 571. Compare sections 178, 180 of the "Railway Act."

It followed necessarily that the filing of the location plan by the railway company with the registrar was sufficient and effective to establish the railway company's seniority to the municipality at points where the highways were not dedicated by plans or otherwise or actually used, constructed or accepted by the municipality at the time the location plan was filed. *Vide Williamsport Railroad Co.* v. *Philadelphia Railroad Co.*(2).

DAVIES J.—I answer the first question referred in the affirmative, which dispenses with an answer being given to the second question.

IDINGTON J.—I would answer the first question herein submitted in the affirmative. That question being so answered, the second question does not seem to call for any answer.

ANGLIN J.—The question for determination in this case is whether after a railway company had deposited in the proper registry office its location plan, profile and book of reference under sections 122–124 of the "Railway Act" 1903 (now secs. 158–160 of the Revised Statutes of Canada, 1906, ch. 37), the owner of the property across which the railway, according to the

(1) 7 Ont.W.R. 568. (2) 141 Penn. 407.

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plan, etc., so deposited, is carried, can by filing a subdivision plan thereof before notice has been served under section 154 of the Act of 1903 (now sec. 193), oblige the railway company to recognize the existence as highways of streets shewn upon such plan of subdivision as carried across the located right-of-way of the railway.

The location plan, etc., duly approved, were deposited in May, 1905, and notice thereof was duly given under section 152 (now sec. 191). The plan of subdivision was filed in November, 1905. The railway company took actual possession of the right-of-way and constructed its railway upon the portion of it in question some time before the enactment of 8 and 9 Edw. VII., ch. 32, sec. 3. It does not appear when notice under section 154 (now sec. 193), was given.

Section 153 of the "Railway Act" of 1903 (now sec. 192, R.S.C. 1906, ch. 37), was in these terms:

> The deposit of a plan, profile and book of reference, and the notice of such deposit, shall be deemed a general notice to all parties of the lands which will be required for the railway and works; and the date of such deposit shall be the date with reference to which such compensation or damages shall be ascertained.

It was, in my opinion, not within the power of the landowner, after the deposit of the location plan, etc., in anywise to affect the land thereby designated as that which the company intended to acquire for its right-of-way so as to interfere with the right of expropriation or to render its exercise more burdensome or less advantageous to the company.

The agreement of 1909 made between the City of Edmonton and the railway company in my opinion did not affect their respective rights in regard to the question before us. While unable, in view of the express reservation in it of the city's right to set up

the contention that Athabasca and Peace Avenues extend as public highways across the railway right-of-way, to concur in the view expressed by the learned Chief Commissioner that the agreement of 1909

> extinguished any right the public might have of using the continuation of Peace and Athabasca Avenues across the right-of-way of the railway company,

I am on the other hand of the opinion that nothing in that agreement involves any recognition by the company of these two streets as highways crossing its right-of-way, or interferes with its maintaining whatever rights it had acquired by the deposit of its approved location plan, etc.

I would, for these reasons, answer the first question submitted by the Board of Railway Commissioners in the affirmative—a conclusion which renders an answer to the second question unnecessary.

BRODEUR J.—The Board of Railway Commissioners has referred the following questions for the consideration of this court:—

> 1. Whether as a matter of law the filing of the location plan by the railway company in the appropriate Land Titles Office (said plan having been duly approved by the Board under the provisions of the Act and carried into effect by the railway company), is sufficient and effective to establish the railway company's seniority to the municipality at points where highways were not dedicated by plan or otherwise, or actually used, constructed or accepted by the municipality at the time the location plan was so filed?
>
> 2. If as a matter of law the municipality had the right as against the railway company to maintain highways at the points in question was such right discharged by the statute of the Province of Alberta, 10 Edw. VII., ch. 5, sec. 1, and the by-law and agreement thereby validated and confirmed?

In 1905 the respondent company registered a location plan under the provisions of section 160 of the "Railway Act." It appears that the railway company without having paid a compensation to the

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Brodeur J.

landowners started to construct its railway. It is not very clear in the evidence whether this possession of the land has been taken with the permission of the owner; but it is to be supposed, however, that the company was not considered as a trespasser, since no injunction has been taken to prevent it.

Some months after the deposit of the plans with the registrar, the land owner filed with the registrar a subdivision plan of the property in question on which the street Athabasca Avenue was mentioned. There is no formal evidence as to the date at which this street was dedicated to or accepted by the municipality appellant; but it is pretty evident that the railway was constructed before the street was established as a public work by by-law or was assumed for public use by the City of Edmonton (Ordinances N.W.T. 1904, ch. 19, sec. 6 of Title XXX.).

The situation might be different if before the construction of the railway the municipality had constructed its highway. I would be inclined to think that the highway would be considered then as having the seniority, though the location plan of the railway would have been previously deposited.

We could then apply the principle enunciated by the Board of Railway Commissioners in the case of the *Canadian Northern Railway Co. and the Canadian Pacific Railway Co.* and known as the *Kaiser Crossing Case*(1), in which Mr. Mabee, the then chairman of the Board, said:

> I do not think that the mere approval of the plans filed with it necessarily gives seniority to the plans first approved. * * * It seems to me that the railway that is in actual occupation with an existing work upon the ground with the ownership of the fee at the point of crossing has much stronger claims to seniority than the railway which has merely obtained a prior sanction of its plans.

(1) 7 Can. Ry. Cas. 297.

That decision was followed by the Board in another case of the *Canadian Northern Railway Co.* v. *Canadian Pacific Railway Co.*(1), that held:

That construction and not approval of location gave priority.

Assuming then that the construction of the railway in the present case has preceded the construction of the highway, I have no hesitation in answering in the affirmative the first question.

In view of that answer to the first question, it is not necessary to deal with the second question.

Question submitted answered accordingly.

Solicitor for the appellant: *J. F. Bown.*
Solicitor for the respondents: *George A. Walker.*

(1) 11 Can. Ry. Cas .432.

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*May 30.
*June 13.

THE LAKE ERIE AND NORTHERN RAILWAY COMPANY.... } APPELLANTS;

AND

IGNATIUS FRANKLIN SCHOOLEY AND THE BRANTFORD ICE COMPANY..... } RESPONDENTS.

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

Expropriation—Business premises—Special value—Mode of estimating compensation.

Where property expropriated is, owing to its location and adaptability for business, worth more to the owner than its intrinsic value, he is not entitled to have the capital amount representing the excess added to the market value of the property. His proper compensation is the amount which a prudent man in the position of the owner would be willing to pay. Brodeur J. dissenting. Judgment appealed against (34 Ont. L.R. 328) varied.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming with a slight variation of the award of the arbitrators appointed to determine the compensation to respondents for their property expropriated.

The respondents carried on an ice business in Brantford and the business premises were expropriated for purposes of appellants' railway. The evidence produced before the arbitrators appointed to determine their compensation showed that the premises were specially adapted for their business and the arbitrators awarded for such special adaptability the sum of

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

(1) 34 Ont. L.R. 328.

$20,000 representing the annual saving of expense over the cost of doing business in another place capitalized for ten years. This was added to the $29,000 allowed as the market value of the property. The Appellate Division upheld the award save as to $800 allowed for sawdust which was struck off.

Tilley K.C. and *Brewster* K.C., for the appellants.

Cowan K.C. for the respondents.

THE CHIEF JUSTICE.—Any question of principle involved in this case is, I think, covered by the authority of the decision of the Judicial Committee in *Pastoral Finance Association* v. *The Minister*(1).

The arbitrators here have found the market value of the property and then added to the amount the special value of the land to the respondents. To this special value the respondents were undoubtedly entitled whatever exception may be taken to the way in which it was arrived at. In the case above referred to the Judicial Committee say:—

> The substantial ground on which the majority of the court based their decision was that the appellants were not entitled to anything beyond the market value of the land * * * * Their Lordships have no hesitation in deciding that the principle underlying this decision is erroneous. The appellants were clearly entitled to receive compensation based on the value of the land to them.

The Appellate Division, following this ruling, has held that the respondents were entitled to the special value which the arbitrators have allowed. The court indeed takes exception to the method adopted for arriving at the proper compensation by first taking the market value of the property and then ascertaining and adding the special value to the respondents.

(1) [1914] A.C. 1083.

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The Chief Justice.

The court considers, and I think rightly, that the preferable method would have been to ascertain simply the value of the property to the respondents and base upon this the compensation to which they were entitled. The court, however, finds and again, I think, rightly, that there has been no error in principle which can affect the amount of the compensation awarded. With the amount allowed the court professes itself satisfied and declines to vary it.

The only question, therefore, for this court to determine is, in my opinion, the adequacy of the amount of the compensation awarded.

Although I think the sum of $29,000 at which the jury have estimated the market value of the property is a very liberal allowance, I am not disposed to interfere with this, holding as I do, that unless the award of arbitrators is clearly excessive, it should not be disturbed on an appeal to the courts. Notwithstanding, however, this disposition to interfere as little as possible with the award of arbitrators on a simple question of amount, I cannot accept the finding with regard to the special value of the property to the respondents. The sum of $20,000 cannot, I think, be justified by anything in the evidence pointing to such loss by the respondents as would entitle them to compensation on this scale.

Under the circumstances, it is necessary to adhere to the method of valuation which the arbitrators have adopted and to deal separately with the loss which the respondents have sustained by reason of the special value of the property to them.

Upon reading the evidence and giving the matter the most careful consideration, the conclusion that I have arrived at is, that if to the market value found by the arbitrators at $29,000 there is added $4,000

for the so-called special value, the respondents will have received full and ample compensation for the loss which they have sustained by the taking from them of their property.

The appeal must be allowed to the extent of reducing the total award to the sum of $33,000. The appeal of the respondents is dismissed.

DAVIES J.—This appeal is from the judgment of the First Appellate Division of Ontario confirming an award made by arbitrators appointed to value the compensation payable to the respondents for two pieces of property expropriated by the railway company in the City of Brantford on which the respondents carried on an ice business, less the sum of $800 for sawdust which was disallowed.

There was a cross-appeal by the respondents to restore this $800; but I may as well dispose of this cross-appeal by saying that I am quite in accord with the Appellate Division in disallowing this item.

As to the award, the business premises consisted of two distinct parcels of land with buildings upon them, one called the Water Street lands and the other the Greenwich Street lands. As to the former, the arbitrators valued the compensation payable for the lands at $4,620 and the buildings at $3,500, and as to the latter, the lands at $10,560 and the buildings at $8,400. The values placed upon the machinery and the sawdust between the walls are not in dispute.

The total value awarded for the lands, buildings, sawdust and machinery amounted to $29,000 and in their written reasons the arbitrators explained that

the values put upon these lands and buildings is their intrinsic value or real value as taken for any purpose, not necessarily the ice business, but we found also that these lands were especially adapted for the ice

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business, reducing the handling and storing of ice to a minimum of expense and making it much less expensive than it can be done for at the premises to which the claimants propose removing or indeed in any other premises in the City of Brantford that were mentioned or pointed out to us.

The arbitrators then proceed to add to the "intrinsic or real value" of the lands and buildings as determined by them the sum of $20,000 for the reason, as explained by them, of "special adaptability" of the lands for the business of the ice company, thus increasing their award to $49,000. Their language in the award is:—

> Then in addition also for the extra cost of harvesting ice in any other place in the City of Brantford or what may be termed "Special Adaptability" interest in the lands expropriated by the Railway Company * * *

With respect to this item, the main one is dispute, the Appellate Division says:—

> The amount of $20,000 seems large, having regard to the figures awarded for the land and buildings in this case. But there seems to be no basis on which it can fairly be reduced, if, as I think was intended, it represents the special value of the land expropriated and damages for disturbance to business.

I am extremely reluctant to set aside or alter the award of arbitrators who have had the advantages of seeing and hearing the witnesses and visiting the property, and with respect to the $29,000 awarded, though I agree it is very large and, specially with respect to the amount awarded for the Water Street *buildings*, which had been condemned by the city inspector as dilapidated and dangerous, indefensibly large, yet I am not, in view of the judgment of the Appellate Division, disposed to interfere with it holding that it includes all damages for compulsory purchase.

With respect to the additional amount of $20,000 added under the head of "special adaptability," I am of opinion that the arbitrators proceeded upon a wrong principle.

They first found on conflicting evidence that the extra expense of harvesting and selling the ice at the proposed new location would be $2,000 yearly and they proceed to allow this amount for ten years in addition to the intrinsic value of the property taken. There is no justification in my judgment for such an arbitrary assessment.

The true principle on which they should have proceeded is that laid down by the Judicial Committee in the *Pastoral Finance Association* v. *The Minister*(1), namely, that this special suitability of the lands expropriated for the carrying on of an ice business and the additional profits which the owners will derive from so carrying it on, are proper elements in assessing the compensation, but the owner is not entitled to have the capitalized value of those savings and profits added to the market value of the lands.

Their Lordships say at page 1088 of the report of the above case:—

> That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that *they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it.* Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by

(1) [1914] A.C. 1083.

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the use of it. He would, no doubt, reckon out those savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.

This statement of the law shews clearly that in arbitrarily adding ten times the amount of their estimate of the extra yearly cost of harvesting and selling their ice product, the arbitrators proceeded upon a wrong principle and one which, if indorsed by the courts, would, in many cases (I think in this case), be productive of great wrong.

After giving the facts of the case and the arguments at bar and in the respective factums every consideration and giving the judgment which, in my opinion, the Appellate Court should have given, I have reached the conclusion that a prudent man in their position might have been willing to give for the lands taken a sum certainly not greater than $5,000 for these special advantages and adaptability to the ice business in addition to their intrinsic value as found by the arbitrators. In this view my brother Anglin concurs but we agree to reduce that $5,000 down to $4,000 in order that there may be a majority judgment reached. The judgment appealed from accordingly will be reduced to $33,000.

IDINGTON J.—This appeal arises out of the expropriation by appellant under the Railway Act of lands in Brantford used by the respondents for carrying on an ice business.

The arbitrators' award of compensation amounted to a total of $49,000 made up as follows:—

Machinery (valued by consent)	$ 675.00
Water Street lands	4,620.00
Water Street buildings	3,500.00
Greenwich Street lands	10,560.00
Greenwich Street buildings	8,400.00
Sawdust in walls	445.00
Sawdust in ice house for covering ice	800.00
Total of above	$29,000.00
Then in addition also for the extra cost of harvesting ice in any other place in the City of Brantford or what may be termed "Special Adaptability" interest in the lands expropriated by the Railway Company	20,000.00
Making a grand total of	49,000.00

The Appellate Division of the Supreme Court of Ontario struck out the $800 item for sawdust used for covering in the ice house, thus leaving $28,200.00 for lands and buildings.

How such an item of purely personal property crept into such an award puzzles me, yet respondents ask its restoration. The remaining items of the original $29,000 are claimed to be high but admittedly cannot be contested here with much hope of success in face of the evidence and no legal principle violated in acting thereon.

The additional item of $20,000 does not seem to be justifiable on any legal principle put forward to support it when dependent only upon such evidence as relied upon.

The expression of the arbitrators of what the item stands for is rather confusing and, I most respectfully submit, seems the result of the confusion of thought which lies at the root of the error into which the arbitrators fell. And their later deliveries of divergent reasons supporting their respective views, apparently after an appeal was in sight, is an unsatisfactory method of doing so, for the reasons under such circumstances

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do not carry the same weight as if they had been delivered with the award.

The lands are to be estimated in such cases as in question herein upon the basis of their market value. And it is what they are worth to the owner that is to be considered.

In fixing the market value at the figure they did I have to assume the arbitrators proceeded on their appreciation of the evidence before them. We are not seriously asked to change that. But in that evidence so far as counsel in argument or in factum has directed our consideration, there was nothing presented to shew that there was any market price for ice house sites as distinguished from their values for anything else. Yet it is that market price of any land possessing special adaptability for anything that has to be determined if we are in principle to follow the latest authority reiterating the rule in the case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (1), at p. 579.

The direct evidence which ought to be required to fix the market value in that regard has not been produced. In the indirect way, of entering into a long and elaborate investigation of the comparative cost of operating with this plant where it is, as compared with a plant assumed to be placed some place else, there is alleged to exist the basis of a calculation of value to be added to the market price.

Not a tittle of evidence is referred to shewing that any sane man of business would think of investing $48,200 for land and buildings of the kind in question devoted to an ice business selling four thousand tons of ice per season.

(1) [1914] A.C. 569.

The proposition seems to me to sound rather hollow. And without going so far as to hold, as matter of law, that you cannot prove value and even market value by an involved process like unto that tried but uncompleted here, I may say the process has (if it ever can be made operative and serviceable), failed in this case because of that reasonable approach to completion which would make it worth anything being entirely wanting.

Would any one looking ahead to the enlightenment of the public on the subject of health and the gradual enforcement of the results thereof, through boards of health and otherwise, think of purifying the Grand River sewage for the express purpose of an ice business? Would he shew his faith in the business sense of doing so by paying $20,000 for the privilege when and where pure water is to be found and ice produced therefrom at perhaps less expense in any convenient spot? And all for the sake of a few incidental and temporary advantages of handling the product at a trifling less expense. And in Brantford, we are asked to believe these incidental advantages will extend over a period of ten or twenty years. The economic and social forces are against the realization of such imaginary contingencies.

There is only one other ice business in the city and that is supplied by pure water and involves a haulage of a mile and a half more than respondents either had to or has now to face in way of competition.

The proof that this plant had been made profitable and had been placed on a permanently profitable basis that would justify an investment of $48,200, has fallen short. Indeed so far as I can see the evidence is the other way.

The appellant's factum presents a statement of

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counsel's estimate of the results so far as known which I do not adopt in its entirety. But in the main it ought to have been met and displaced if untrustworthy.

The only reason I imagine for respondents' able counsel failing therein is that the main facts were against him attempting it.

Moreover, though respondents' counsel properly enough put forward the interest on $29,000 as an item of expense in order to test whether or not there was such a profit in the business as to render it likely an owner getting that sum for his business stand could rightly complain, yet it is to be observed that the problem facing us is whether or not any one would think of paying $48,200 for such a business stand and to test that we must take interest on the latter sum as a test of what strain the proposition to be maintained by respondents will stand.

Unless there was either a highly profitable or at least a clearly substantial, profitable and permanently established business existent on the premises, this mode of proof of market value thereof is worthless.

All the elaborate calculations of a possible difference in cost of handling are of no consequence if the thing itself has failed to produce to the owner such a productive investment that reasonable men must say he would not and should not be asked to part with such a property for its ordinary market value.

If he expects others, even a railway company, to pay him for depriving him of a business stand something beyond ordinary market value, he must be ready and willing to demonstrate the fact just as fully as possible and allow the fullest possible investigation of the basis of such a proposition.

There was neither cash book nor ledger kept in the business and the only possible available and sub-

stantial means of testing the matter was an inspection and thorough investigation of the bank book and that was refused.

There was, therefore, in short no proof upon which the arbitrators should have allowed any such sum as the item in question, and that part of the award should be stricken out.

The ordinary ten per centum allowance for compulsory taking in absence of such proper proof should be allowed instead, amounting to $2,820.

This is not a case for referring back, for the respondents had deliberately refused that proper investigation of the lines of proof upon which they rested their claim.

The appeal should be allowed with costs here but without costs to either party in the court below, and the award amended in the way I have indicated.

ANGLIN J.—I concur with Mr. Justice Davies.

BRODEUR J.—This is an appeal concerning the compensation which should be awarded to the respondents for the expropriation of lands in the City of Brantford. Those properties were used by the respondents for harvesting and storing ice. They were situated on the Grand River and they were specially adaptable for that business. The current of the river afforded facilities for storing ice which reduced to a minimum the cost of the work.

There is not much difficulty with regard to the value put upon the lands and the buildings. The three arbitrators have come to a unanimous conclusion in that respect.

There is, however, a difference between them. One of the arbitrators is of opinion that the price

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which has been awarded for the lands and the buildings would have included also the special adaptability of this property for the ice business.

The other two arbitrators, on the other hand, state that $29,000, which is the amount awarded for the lands and buildings, would simply give the intrinsic value of the property for any purpose, not necessarily the ice business; but they find that the lands were specially adapted for the ice business and that it has cost less to the owners for handling and storing their ice than it will cost at the place where they will have to remove their place of business.

It appears that the reason for this low degree of expense is that the ice field is some distance above the buildings and that the respondents used to cut the ice in squares on that field. They would cut then a canal through the ice to the storehouse and float the ice down this canal each block being ready for storage.

The other arbitrator does not dispute the advantage of the convenience of harvesting ice at that point; but he claims that the railway company had the option either of compensating them for such advantage or of compensating them for the establishment of the business so far as such business was incidental to the land expropriated. He does not dispute the fact that, if the method adopted by the majority of the arbitrators is correct, the value put as to damages incurred would be correct.

The railway companies in exercising their right of eminent domain are bound not only to pay the market value of the lands expropriated but also the damages incurred by the owner in connection with the expropriation.

Here is a man who had, on account of the con-

venient site of his business, particular advantages for handling it. Those advantages could not be secured elsewhere and in order to carry out the same business as he was doing before he will have to pay extra costs and incur additional expenditure. He will suffer damages then as a result of that expropriation and it seems to me that the principles of law enunciated above render the railway company liable for those additional costs.

The Privy Council in the case of *Pastoral Finance Association* v. *The Minister*(1), decided that the special suitability of the land for a business which the owner carries on elsewhere but intends to transfer to that land and the savings and additional profits which he will derive from so doing are elements in assessing the compensation.

It seems to me that, applying the principles enunciated in the above decision of the Privy Council, the owners, respondents, are in this case entitled to be compensated for special adaptability of the lands expropriated or for extra cost of harvesting ice in any other place in the locality.

The arbitrators have awarded a sum of $20,000 for such compensation and they are all unanimous as to the amount of that compensation if the above principle is right. The amount seems to be very high; but I would not feel disposed to substitute my own judgment as to the value for the judgment of the arbitrators.

There has been a cross-appeal by the respondents concerning a sum of $800 which was awarded by the arbitrators for the sawdust which was in the ice house for covering ice. That amount was refused by the

(1) [1914] A.C. 1083.

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Appellate Division and I concur in the views expressed by that court that the owners are not entitled to the same.

For these reasons the appeal and the cross-appeal should both be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Brewster & Heyd.*

Solicitors for the respondents: *Beatty, Blackstock, Fasken, Cowan & Chadwick.*

WILLIAM W. JONES (DEFENDANT) . . . APPELLANT; 1916

AND *May 9. *June 19.

HENRY C. TUCKER (PLAINTIFF) . . . . RESPONDENT*

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Contract—Foreign lands—Sale of lands—Exchange—Specific performance —Jurisdiction of courts of equity—Mutuality of remedy—Relief in personam — Discretionary order — Appeal — Jurisdiction —"Final judgment"—"Supreme Court Act," R.S.C. 1906 c. 139, s. 38(c).

T., resident in the State of Iowa, U.S.A., brought suit in Saskatchewan for specific performance of a contract by which J., resident in Saskatchewan, agreed to sell him lands in Saskatchewan, part of the price being the conveyance to J. of lands in Iowa by T. The trial judge decreed specific performance of the contract by J., and, on appeal, the full court varied the judgment by ordering that there should be a reference for inquiry and report upon T.'s title to the lands in Iowa, and that, upon the filing of such report, either party should be at liberty to apply for such judgment as he might be entitled to (8 Sask. L.R. 387). On the appeal to the Supreme Court of Canada the material questions were whether or not the fact that the lands to be exchanged were situated outside the province precluded the courts of Saskatchewan from decreeing specific performance for want of mutality of relief, and whether or not there was error in making the order of reference, which, in effect, gave the plaintiff a second opportunity of proving his title.

Held, Idington J. dissenting, that the courts of Saskatchewan, as courts of equity acting *in personam*, have jurisdiction to decree specific performance of contracts for the sale of lands situate within the province where the person against whom relief is sought resides within their jurisdiction; that, in the suit instituted by the foreign plaintiff in Saskatchewan, mutuality of relief existed between the parties, and that the discretion of the court appealed from in ordering the reference before the entry of the formal decree ought not to be interfered with on the appeal.

The jurisdiction of the Supreme Court of Canada to entertain the appeal was questioned by the Chief Justice and Idington J. on the ground that the judgment appealed from was

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

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not a "final judgment." Davies J. was of opinion that, as the suit was "in the nature of a suit or proceeding in equity," an appeal lay to the Supreme Court of Canada in virtue of sub-sec. (*c*) of sec. 38 of the "Supreme Court Act," R.S.C., 1906, ch. 139. Anglin J. thought that, as a matter of discretion, the court might decline to hear such an appeal.

Judgment appealed from (8 Sask. L.R. 387) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Supreme Court of Saskatchewan(1), which varied the judgment of Newlands J. at the trial, whereby specific performance was decreed, by directing that there should be a reference for inquiry and report on the plaintiff's title to foreign lands and, on the filing of such report, that either party should be at liberty to apply for such judgment as he might be entitled to.

The circumstances of the case are stated in the head-note.

Haydon for the appellant.

G. F. Henderson K.C. for the respondent.

THE CHIEF JUSTICE.—I entertain grave doubts whether this appeal ought to be entertained by this court. There is no judgment in the action; the decree directing a reference to the local registrar does not order that on the respondent proving title the appellant is to make a conveyance of his lands in Saskatchewan, but, on the contrary, orders that, on the report being filed, either party is to be at liberty to apply for such judgment as he may be entitled to.

I am, with much diffidence, of opinion that the appeal must fail on the merits. There seems to me nothing in the first point taken by the appellant that, the respondent not having proved his title at the trial

(1) 8 Sask. L.R. 387.

a reference should not have been directed. The plaintiff, in bringing his action for specific performance, was not obliged to prove his title. The rule, as I understand it, is that the defendant is entitled to ask for a reference on the title, which the court will grant as a condition of extending its assistance to the plaintiff.

As to the second point, the appellant claims that there was no mutuality of remedy, but that is, I think, unfounded. It would have been open to the appellant to go, for specific performance, to the courts in whose jurisdiction the lands were situate precisely as the respondent has done. The question of mutuality depends upon each of the parties having their remedy, not upon the particular court in which it is to be sought. I think it makes no difference that the lands are in a foreign country rather than in another province of the Dominion. If they had been situate in Ontario, it might have been necessary for the appellant to go to the Ontario courts for a decree for specific performance, but he would none the less have had his remedy equally with the respondent.

The present is not in the least like reported cases in which the courts have refused specific performance on the ground of want of mutuality. These all assume that, if the court in which the action is brought cannot give a remedy, the defendant has none. In the case of *Flight* v. *Bolland*(1), an infant having brought suit for specific performance, the bill was dismissed because, of course, the defendant could have brought no such suit against the plaintiff, and, therefore, the remedy was not mutual.

There might, perhaps, be cases where the courts of

(1) 4 Russ. 298.

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the foreign country would not afford relief, though the present is, doubtless, not one of them. It must, however, lie on the party claiming that there is no mutuality in the contract, because he is without remedy to shew that this is so. The respondent went into the foreign country and made his contract for the purchase, by exchange, of lands in that country, and there should certainly be no presumption that he cannot enforce his contract in the same way that the respondent can do in this country.

DAVIES J.—This was an appeal from a judgment of the Supreme Court of Saskatchewan varying the judgment of the trial judge, which judgment had decreed specific performance of an agreement made between the parties for the sale of a piece of land in Saskatchewan from defendant, appellant, to plaintiff, and also directing a reference on other points.

The decree of the appellate court now appealed from and under consideration merely directed that there should be a reference as to the plaintiff's title to the piece of land in Iowa which the plaintiff was to convey to the defendant in exchange for the Saskatchewan lands and for a report upon such title, and that, upon such report being filed, either party should be at liberty to apply to the trial judge "*for such judgment as he would be entitled to.*" The appellant's contentions were that the respondent, plaintiff, had failed at the trial to prove his title to the Iowa lands, and that no reference should have been made as directed; and, secondly, that the plaintiff being a non-resident, the court could not enforce the contract as against him, and had, therefore, no jurisdiction.

As to the latter point, I agree with the judgment appealed from that, as the decree sought for by the

plaintiff is for specific performance of the contract respecting the Saskatchewan lands, the court has jurisdiction to make a decree, and that the reference directed to be made as to the title of the Iowa lands to be exchanged for the Saskatchewan lands is a matter of procedure and practice. The fact of the plaintiff being a non-resident could not, in my opinion, take away the jurisdiction they would otherwise possess; nor could the fact that the consideration for the sale of the Saskatchewan lands to the plaintiff was the conveyance to the defendant of certain lands in Iowa have that effect.

The appellate court had jurisdiction to deal with the matter before it, namely, the contractual obligation of the defendant to convey the Saskatchewan lands to the plaintiff, and I approve of the disposition they made of the appeal. It may be argued with much force that, being a matter of procedure and practice and the exercise of a judicial discretion, this court would not interfere with the judgment appealed from on that ground. It must be remembered, however, that this judgment is "in the nature of a suit or proceeding in equity," and that our jurisdiction is governed by sub-section *c* of section 38. It is not necessary that a judgment under this section, to be appealable, should be a "final judgment."

In dismissing the appeal, I desire, in view of the broad language of sub-section *c* of section 38, to base my judgment upon the ground that the court below had jurisdiction to deal with the appeal before them, and that the disposition they made of the appeal was a proper one under the circumstances.

IDINGTON J. (dissenting).—These litigants entered into a contract in writing, in the United States, where

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respondent resided and still resides, whereby the appellant agreed to sell to him a section of land in Saskatchewan at the agreed consideration of $22,800, and, in consideration thereof, the respondent agreed to sell and convey to appellant real estate situate in Iowa same being put in at an agreed consideration of $16,000.

The respondent agreed thereby to execute a mortgage to the appellant on the Canadian lands for $6,800.

It was well understood by the parties, at the time of the making of the contract, that appellant only owned the half of the section of land he professed to be selling, but he said he had the authority of his brother, who owned the other half of the section, to deal with the whole, as they express it.

It turned out that the brother, though assenting in general terms to appellant's desire to sell and dispose of the whole section, never intended to assent to an exchange, and, perhaps, never had heard, till the contract was made, of the exchange proposal now in question, and, when told of it, at once refused to have anything to do with such a transaction.

The respondent sued both brothers for specific performance. At the trial the action was dismissed as against the one who had not signed the contract.

Evidence was given shewing that the north half-section, belonging to the brother thus dismissed, was worth $30 an acre, and the south half, belonging to appellant, which was improved, and had buildings on it, was worth $40 an acre.

The price fixed, for the whole section, by the contract, works out about $35.66 per acre for the whole.

The respondent, upon failing as against the brother of appellant, offered in court to accept the south half-

section belonging to the appellant, and give in exchange the Iowa property.

This the learned trial judge assented to and gave judgment accordingly. There was evidence given professing to prove the title of the respondent to the Iowa property. The attorney giving that evidence stated, in doing so, the conclusion which should have been left to the court to draw from legal facts laying the foundation for the court to do so.

Because of there being no evidence otherwise enabling the learned trial judge to act upon such a transgression of the rule in such cases, the court below set the judgment aside, and directed evidence to be taken by the registrar as to the title and to report thereon, and that either party should then be at liberty to apply to the learned trial judge for such judgment as he might be entitled to.

The appellant contends this was not the judgment the court of appeal should have given, but one dismissing the action on the grounds that the respondent had failed in his proof of title, and that, in any event, the production of such proof and determination thereof involved exactly such questions as would have arisen had the appellant been seeking specific performance of the contract to convey Iowa lands, which the court could not grant under the existent facts.

In other words, he says there never existed that mutuality of contract

> which might, at the time it was entered into, have been enforced by either of the parties against the other.

I quote the pith of the first sentence of the chapter on "want of mutuality in the contract" in Sir Edward Fry's work on Specific Performance.

I felt disposed, during the argument, to think the point of view presented by Mr. Justice Elwood possibly

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maintainable by looking at the land in the foreign country as simply the consideration, and all needed herein was to find if that was ascertainable and ready to be delivered as any other price where specific performance might be ordered. But, upon reflection and an examination of the authorities, it seems to me clear such a proposition is more plausible than sound in law, and is untenable.

The contract, as amended by the court, is simply one of exchange of two parcels of land respectively situated in different countries.

In one way of looking at the matter, this is a claim by the purchaser to have a contract for the purchase of land in Canada specifically enforced. In the other way of looking at it, this is simply a claim by the vendor to have a contract for the sale of land in the United States specifically enforced by the recovery of the consideration therefor.

If we look at the new contract made by the court and to be enforced, the question is reduced to that simple form, if we strip the matter of mere forms and verbiage, and have due regard to that which has become the substance of all that is involved.

I have been unable to find any case in which exactly the like case to this has been decided. But there are many cases in which the principle has been affirmed that the courts must refuse to entertain any claim as enforceable against the lands in a foreign jurisdiction. Where the party against whom relief is sought, it may be in relation to lands abroad, has been found resident within the jurisdiction of the court, it has exercised jurisdiction in a variety of ways, as illustrated in the case of *Penn* v. *Lord Baltimore*(1) and in White and

(1) 1 Ves. Sr. 444.

Tudor's Leading Cases, vol. 2, p. 1047, and in 1 Eq. Cas. Abrgd. 133, there are to be found a number of cases cited which must be considered, if one would be seized of the principle involved.

The elaborate judgment of Lord Chancellor Herschell in the case of *The British South Africa Company* v. *The Companhia de Moçambique* (1), has a most instructive review of the foundation upon which such a jurisdiction rests, and, at page 626, contains the following concise statement of what I take to be the law:—

> Whilst courts of equity have never claimed to act directly upon lands situate abroad, they have purported to act upon the conscience of persons living there. In *Lord Cranstown* v. *Johnston*(2), Sir R. P. Arden, Master of the Rolls, said: "*Archer* v. *Preston* (3), *Lord Arglasse* v. *Muschamp* (4), and *Lord Kildare* v. *Eustace* (5), clearly shew that, with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this court will hold the same jurisdiction as if they were situate in England."

The distinction made throughout in all the leading cases is between remedies *in personam* and *in rem*.

Apply the principles involved to the facts herein, and we are met by two or three outstanding facts which would seem to render a suit by the appellant against the respondent for specific performance as hopeless as one can conceive.

The contract was entered into in the foreign state. The land is there. And the respondent, the vendor of that land, resides there, and, so far as we know, never was in Canada before the proceedings herein, except to inspect this land offered in exchange, and he then had fifteen days to elect whether he should proceed with or abandon the contract. His presence at the trial as a witness could certainly make no safe founda-

(1) (1893) A.C. 602.
(2) 3 Ves. 170, 182.
(3) 1 Eq. Cas. Ab. 133 pl. 3.
(4) 1 Vern. 75, 125.
(5) 1 Vern. 419.

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tion for applying the rule as laid down in Fry's work or above quotation from Lord Herschell's judgment.

How, then, can we find that mutuality the law requires?

The case does not fall within any of the numerous exceptions to the rule. Surely there is quite as much want of mutuality as in the case of an infant as exemplified in the case of *Flight* v. *Bolland*(1), where specific performance was sought by an infant and refused expressly on the ground that such relief could not be obtained by the defendant against him.

There is an article by the late Professor Ames, of Harvard, to be found in a posthumous publication of his Lectures on Legal History, etc., criticizing the statement of the law by Sir Edward Fry in the chapter I have above quoted from, in which he questions the accuracy of the definition which I am for the present accepting. The exigencies of this case do not require me to re-examine Sir Edward Fry's proposition, but, nevertheless, the article is well worth reading and consideration by those who would understand the doctrine of mutuality of contract in question.

It is to be observed that the fundamental rule of the game resting on mutuality is, perhaps, obscured by the numerous exceptions and subsidiary rules, yet the former seems firmly established, even if the masters of the law disagree in regard to the form of its expression.

There is another point taken against the judgment in the appellant's factum. It is submitted that the *cy-près* doctrine invoked in dealing with the agreement and compensation made in the way I have mentioned does not apply to this case.

(1) 4 Russ. 298.

The reason assigned in the factum seems merely a repetition of want of mutuality, but, on examining the evidence, there is, to my mind, a much graver objection. It is this:—The appellant never pretended he owned any but half of the section, and merely pretended he had authority from his brother to deal with his half thereof brought in question.

When a man has, in error, made a contract for sale of more than he has, and the parties he is dealing with know it, or should from the nature of the transaction have known it, the court does not permit of abatement of price by way of compensation to a purchaser, or, in other words, attempt to make a new equitable bargain for the parties.

See the cases of *Castle* v. *Wilkinson*(1); *Avery* v. *Griffin*(2); *Cahill* v. *Cahill*(3); *Rudd* v. *Lascelles*(4), and the case of *Mortlock* v. *Buller*(5), where the principle is stated upon which the court acts.

I cannot conceive the doctrine of compensation applicable when, as here, the parties knew the appellant had, in fact, no title, and depended on his assurance of authority as an agent.

In that case I think all the respondent can claim is the expense he incurred or was put to by reason of the failure of the agent in warranting his authority when he had none, or at least none which would cover the contract entered into.

I would be disposed to say, in order to end, if possible, this litigation, that if the respondent assents to the abandonment of such claim for damages, the action should be dismissed without costs, otherwise the appeal should be allowed with costs throughout.

(1) 5 Ch. App. 534.
(2) L.R. 6 Eq. 606.
(3) 8 App. Cas. 420.
(4) (1900) 1 Ch. 815.
(5) 10 Ves. 292, at p. 316.

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Since writing the foregoing, my Lord the Chief Justice calls my attention to the case of *Montgomery* v. *Ruppensburg*(1), which I cannot follow, especially as, I respectfully submit, the cases relied upon do not touch the principle involved. One of the cases apparently in point goes upon the exceptional case of the contract being unilateral, or, at all events, so as regards the Statute of Frauds. That class of cases and many other exceptions are dealt with both by Sir Edward Fry, affirming the principle I rely upon, and by the late Professor Ames in the work I have referred to above.

Since writing above, the decision of this court, in *St. John Lumber Co.* v. *Roy*(2), renders it doubtful if this case is appealable. My reasons in support of my dissent in that case may suggest grounds for distinguishing. And, if we have jurisdiction, I abide by my reasons herein expressed as above.

But if the judgment appealed from should be treated merely as an exercise of discretion, the case of *The Union Bank of Halifax* v. *Dickie*(3) would apply.

ANGLIN J.—By an agreement in writing, dated the 12th day of December, 1913, the defendant William W. Jones agreed to sell to the plaintiff the whole of section 17, in township 4 and range 3, west of the second meridian, in the Province of Saskatchewan, in consideration of the sum of $22,800, payable, as to $16,000 thereof, by the conveyance to him of certain property in the town of Jefferson, in the State of Iowa, U.S.A., and, as to the balance of $6,800, by the delivery of a mortgage for the said sum, upon terms

(1) 31 O.R. 433. (2) 53 Can S.C.R. 310.
(3) 41 Can. S.C.R. 13.

therein set out, to be made by the plaintiff in favour of the defendant.

The plaintiff sues for specific performance of this agreement. At the trial it developed that the defendant, Wm. W. Jones, could not make title to the north half of the section, which was owned by his co-defendant, John R. Jones, who was not a party to the agreement. The action was dismissed as against John R. Jones. Upon the defendant, Wm. W. Jones, objecting that a decree could not be made against him under the agreement sued upon involving payment by him of $3,200, the difference in value between the land owned by him and the Jefferson property, the respondent, through his counsel, offered to take the defendant's half-section in exchange for his Jefferson property without any cash compensation or difference in price. This adjustment must have been agreed to by the defendant if the court should be of opinion that the facts that the plaintiff is a foreigner and that the property which he had agreed to convey in exchange is foreign land did not disentitle him to the relief of specific performance, and if his title to the Jefferson property were sufficiently proved. I say "must have been agreed to," because the learned trial judge, in his reasons for judgment, says:—

> I am of the opinion that the plaintiff is entitled to specific performance under the terms agreed to in court,

and, in the defendant's appeal to the court *en banc* from the judgment entered for specific performance, it was not urged that such an agreement had not in fact been made at the trial. The defendant's inability to convey part of the property which he had undertaken to give in exchange cannot avail him as a defence to the plaintiff's action for specific performance of the

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contract, so far as he can carry it out, on the basis of an even exchange, the plaintiff relinquishing all claim to payment of the difference between the value of the Jefferson property and the half-section of the Saskatchewan land which the defendant is able to convey: Fry on Specific Performance (5th ed.), pp. 599 *et seq.* Moreover, in view of what occurred at the trial, it is, in my opinion, now too late to urge any such defence.

The decree of the learned trial judge declared the right to specific performance, referred a matter of adjustment of insurance to the local registrar, and ordered the defendant to convey his Saskatchewan land upon the plaintiff executing and delivering to him a good and sufficient deed of the Jefferson property.

On appeal to the court *en banc*, as appears from the judgment of Elwood J., only two objections were urged against this judgment. That learned judge says:—

> The defendant appeals and contends that the plaintiff has not made out a good title to the Iowa property, and also that the court will not decree specific performance because the claim depends on title to land in a foreign country.

The appellate court was of the opinion that, although the fact that the land to be conveyed by the plaintiff was situated abroad did not preclude specific performance being decreed, the plaintiff had not proved his title to it. Instead of dismissing the action, however, the court, in the exercise of its discretion, referred it to the local registrar to inquire into and report upon the plaintiff's title, and ordered that, upon such report being filed, either party should be at liberty to apply to the trial judge for such judgment as he may be entitled to. The defendant now appeals asking that this action be dismissed on two grounds, in addition

to that with which I have already dealt, namely, (*a*) that the fact that the plaintiff's property is foreign land prevents the court decreeing specific performance; (*b*) that the plaintiff should not have been given a second opportunity to prove his title.

As I understand the position of the action, and as counsel for the plaintiff conceded, except perhaps the futility of the defence based on the defendant's inability to convey the north half of the section in question, no substantive right of either party has been determined. The judgment of the provincial appellate court is not final under section 2(*e*) of the "Supreme Court Act," as amended by 3 & 4 Geo. V., ch. 51, sec. 1. While it may strictly be appealable under section 38 of the "Supreme Court Act" as a judgment in an equitable action (see also sec. 45), having regard to the purely discretionary character of the order made and to the fact that it determines nothing against the appellant, there would seem to be grave grounds of objection to this appeal being entertained at all. Moreover, although, there being no cross-appeal, we should assume that the evidence of title adduced by the plaintiff and accepted by the learned trial judge as sufficient was, in fact, insufficient, it would require a very strong and very clear case indeed to justify our interfering with the discretion exercised in giving the plaintiff another opportunity to prove his title, and dismissing his action solely on the ground that he had had his day in court.

It is perhaps better, however, that we should express our view upon the other ground of appeal, because, if it should be well taken, the reference directed as to title and proceedings consequent thereon would be useless, and the action should have been, and should now be, dismissed.

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This question was determined favourably to the plaintiff by Sir Wm. Meredith C.J.O., when Chief Justice of the Common Pleas, in *Montgomery* v. *Ruppensburg*(1). The defendant's objection is really twofold—because the property to be conveyed by the plaintiff is foreign land, he maintains that there is an absence of the mutuality essential to the remedy of specific performance, and that the court lacks jurisdiction to entertain this action.

That there is mutuality of obligation under the contract before us is unquestionable, and on that ground the many cases in which courts of equity have refused specific performance of contracts voidable because of incapacity of one of the parties to the contract, *e.g.*, infancy or coverture, are distinguishable. There is in the present case also mutuality of remedy in the sense that the defendant presumably could have had, in the courts of Iowa, relief similar to that which the plaintiff is seeking in Saskatchewan. The closest analogy seems to be presented by a case in which the Statute of Frauds would have afforded a defence to the plaintiff had he been sued for specific performance by the defendant. The plaintiff renders the remedy mutual by bringing the action, and on that ground is allowed to maintain it: Fry on Specific Performance, (5th ed.), par. 470-1. Unilateral contracts afford other instances.

If the position of the parties were reversed—that is, if the defendant, resident within Saskatchewan, were the owner of the foreign land and the plaintiff, resident abroad, the owner of the land in Saskatchewan —I could understand the objection taken to the jurisdiction of the court, although I would consider it

(1) 31 O.R. 433.

equally untenable. What is sought in this action is to enforce the conveyance by the defendant, a resident of Saskatchewan, of property in that province in exchange for other property (whether within or without the province is immaterial), which the plaintiff is ready and willing to transfer to him.

The jurisdiction of courts of equity, which act *in personam*, to decree specific performance of a contract for the sale of foreign land, where the person against whom relief is sought, and whose conscience is bound by the agreement, resides within the jurisdiction, is well established: *Penn* v. *Lord Baltimore*(1); *British South Africa Co.* v. *Companhia de Mocambique*(2); *Duder* v. *Amsterdamsch Trustees Kantoor*(3); *Ex p. Pollard*(4); *Lord Portarlington* v. *Soulby*(5); *Archer* v. *Preston*(6). Where the parties were domiciled and the property was situate abroad, it was held, in *Davis* v. *Park*(7), that, notwithstanding that the plaintiff and one of the two defendants had come within the jurisdiction, the Vice-Chancellor had *exercised a proper discretion* in discharging an order made in an action for specific performance giving leave to serve the defendant, who was without the jurisdiction. Moreover, since the jurisdiction rests upon some contract or equity between the parties which presents a case for its exercise *in personam* (*Norris* v. *Chambres*(8); *Re Hawthorne*(9)), courts of equity will not entertain actions to determine other rights or questions of title

(1) White & Tud. 1 L.C. Eq. 800, 804.
(2) [1892] 2 Q.B. 358, at pp. 363-4; [1893] A.C. 602, at p. 626.
(3) (1902) 2 Ch. 132.
(4) 1 Mont. & Ch. 239, at p. 250.
(5) 3 My. & K. 104, at p. 108.
(6) 1 Eq. Cas. Ab. p. 133, Pl. 3.
(7) 8 Ch. App. 862*n*.
(8) 29 Beav. 246; 3 DeG., F. & J. 583.
(9) 23 Ch. D. 743.

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in regard to immoveable property situate abroad (*Deschamps* v. *Miller*(1)), or claims which must be enforced directly against the foreign land: *Black Point Syndicate* v. *Eastern Concessions Ltd.*(2); *Grey* v. *Manitoba and North-Western Rly. Co*(3). But no such difficulty presents itself in this case. By bringing his action in the Supreme Court of Saskatchewan, the plaintiff has submitted himself to that court's jurisdiction *in personam*. He has waived whatever right he had to be sued upon his contract in the forum of his domicile, and has made the remedy in the Saskatchewan court mutual: *Martin* v. *Mitchell*(4). It is in the power of that court to provide, as was provided in the decree pronounced by the learned trial judge, that the defendant shall be required to convey only upon the plaintiff making title and conveying his foreign property, which he has offered to do. Indeed, if it be thought advisable for the protection of the defendant, the court may require that the conveyance of his property to the plaintiff shall remain in the hands of its officer, and shall not be delivered to the plaintiff until his conveyance of the Iowa property has been duly recorded and the officer is satisfied that a clear and satisfactory title to it has been vested in the defendant. The plaintiff seeking relief must submit to whatever terms the court, in the interests of justice, may impose as a condition of granting it. He who seeks equity must do equity. The plaintiff, suing in the court of Saskatchewan, has also submitted to its jurisdiction to decree rescission of the entire contract should he be unable, or for any reason fail, to carry out his obligations under it or to fulfil whatever terms or conditions the court may impose upon him.

(1) [1908] 1 Ch. 856.
(2) 79 L.T. 658.
(3) [1897] A.C. 254.
(4) 2 J. & W. 413, at pp. 426-7.

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But, as I have said, I cannot appreciate the ground of the objection made to the jurisdiction. I am unable to find any satisfactory ground of distinction between foreign land and money or chattels as the consideration for and upon receipt of which the defendant is to be required to convey his property.

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

BRODEUR J.—This appeal should be dismissed. The appellant, Jones, practically obtained from the court of appeal all he required to protect his rights. The objections which he now raises might and will be more properly dealt with when the trial judge is moved to render the judgment which either party might be entitled to.

Appeal dismissed with costs.

Solicitors for the appellant: *Allan, Gordon & Gordon.*

Solicitors for the respondent: *Mackenzie, Brown & Co.*

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*June 5.
*June 19.

HOWARD HERBERT VICTOR OLMSTEAD (SUPPLIANT)..... } APPELLANT;

AND

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

HOWARD HERBERT VICTOR OLMSTEAD AND WILLIAM ATCHISON OLMSTEAD (SUPPLIANTS)..... } APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Public work—Damage to adjacent lands—Negligence—Liability of Crown—"Exchequer Court Act," s. 20—Litigious rights—Bar to action—"Rideau Canal Act," 8 Geo. IV., c. 1 (U.C.)—Limitation of actions.

The Crown is not liable, under sec. 20, sub-sec. (*c*) of the "Exchequer Court Act" (R.S.C., [1906] ch. 140), for injury to property by negligence of its servants unless the property is on a public work when injured. *Chamberlin* v. *The King* (42 Can. S.C.R. 350), and *Paul* v. *The King* (38 Can. S.C.R. 126), followed.

Per Fitzpatrick C.J.—Where property is purchased for the purpose of enforcing a claim against the Crown for injury thereto, such purpose constitutes a bar to the prosecution of the claim.

Per Brodeur J.—Section 26 of the "Rideau Canal Act," 8 Geo. IV., ch. 1 (U.C.), providing that any plaint brought against any person or persons for anything done in pursuance of said Act must be commenced within six months next after the act com-

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

mitted, applies to proceedings against the Crown though the Crown was not mentioned and no claim against it founded on tort could then be prosecuted. Idington J contra. Anglin J. dubitante.

APPEAL from the judgment of the Exchequer Court of Canada (1) dismissing the suppliants' petition of right.

The appellant, H. H. V. Olmstead, is the owner of rear half of lot number 5 in the 4th concession of the Township of Kitley in the Province of Ontario, and the appellants, H. H. V. Olmstead and W. A. Olmstead, are the owners of the lot number 4 in the said 4th concession of the Township of Kitley. The appellants' titles were proved at the trial, and no question as to them is involved in this appeal. The lands adjoin each other and border on Irish Creek which empties into the Rideau Canal about two and one-half miles below them.

At Merrickville, which is situate on the Rideau Canal about five miles below the junction of Irish Creek and the Rideau Canal, a dam was built as part of the construction of the Rideau Canal to control the waters thereof for navigation purposes.

At the time of the construction of the Rideau Canal a depth of about 5 feet 3 inches of water on the locksill at the Merrickville lock was established, which continued until 1890 when the depth was raised to six feet. The appellants' lands are not flooded when the water on the locksill does not exceed six feet.

During many of the years between 1890 and 1914 when the petitions of right were filed, the depth of the water on the locksill exceeded six feet whereby the appellants' lands were flooded, and a large portion of them was rendered useless. The appellant, when

(1) 16 Ex. C.R.

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acquiring the lands in question, acquired the rights of their grantors to claim damages for flooding which had occurred during the ownerships of such grantors.

The defences to the actions were the following:—

1. Acquisition of a right to flood by reason of the purchase from one Gideon Olmstead of his rights to do so as owner of a mill and mill dam on Irish Creek.

2. Prescription under the Acts relating to the Rideau Canal.

3. Prescription under the "Limitations Act" of the Province of Ontario.

4. Lost grant.

5. Non-assignability of the claims for damages which belonged to the appellants' grantors.

6. Obstructions in Irish Creek impeding the flow of the water.

The learned judge of the Exchequer Court held that the Crown had not established any prescriptive right to flood the appellants' lands, but he held that the appellants' rights of action were barred by the 26th section of 8 Geo. IV., ch. I. (U.C.), this statute being the original Act providing for the construction of the Rideau Canal.

The learned judge did not deal with any of the other defences raised by the Crown.

Sinclair K.C. for the appellants. Under sec. 20, sub-sec. (*c*) of the "Exchequer Court Act," the Crown is liable, if the cause of injury arises on a public work, though the property injured is not situate thereon. *Price* v. *The King*(1), *Letourneux* v. *The King*(2).

The limitation clause in the "Rideau Canal Act" could not apply to the Crown, which was under no

(1) 10 Ex. C.R. 105. (2) 33 Can. S.C.R. 335.

legal liability for a tort when it was passed. See *Philipps* v. *Rees*(1), *The Queen* v. *Yule*(2), at page 30

Smellie for the respondent.

THE CHIEF JUSTICE.—I think these petitions of right were properly dismissed and whilst agreeing with the reasons for judgment of the judge of the Exchequer Court I am disposed to think the judgment could be supported on more than one ground.

In particular I am of the opinion that it is a good defence to the suit that any such assignment of a right to bring it as set up is illegal. The lands were purchased by the petitioners as to part in the year 1904 and as to the rest in the year 1912, the petitioners by deeds of even date with the conveyances obtaining from the grantors what purported to be an assignment of the latter's rights to certain claims to recover from His Majesty compensation for flooding the lands since the 1st January, 1890. In the petitions of right it is alleged that the

> suppliants' said lands have during each year since and including the year 1890 been overflowed and flooded by waters of the Rideau Canal and have thereby been rendered entirely useless.

It is perfectly clear that what the petitioners purchased and intended to purchase was this so-called right to a claim to recover against the Crown.

The policy of the law has always been opposed to this trading in litigious rights and such transactions are to be discouraged in every possible way. They, of course, have nothing in common with assignments of debts and choses in action which by statute are now permitted.

Whilst the assignment of a right to litigation is forbidden as between subjects, the rule must apply

(1) 24 Q.B.D. 17. (2) 30 Can. S.C.R. 24.

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with greater force in the case of the Crown, since the subject has no right to sue the Crown but can only present a petition of right. There being no such thing as a right to a claim to recover against the Crown, there can be no assignment of any such pretended right.

I think this constitutes not only a good legal defence, but also disposes of any merits the claims might be supposed to have.

The appellants have in the course of the proceedings set up a different claim from anything alleged in their pleadings. In their factum they say:—

> The appellants' lands are not flooded when the water on the locksill does not exceed 6 feet, * * *
>
> Again
>
> It is established that the lockmaster at Merrickville was expressly instructed to hold only 6 feet of water on the locksill * * *
>
> The instructions to the lockmaster shew that any flooding that occurred resulted from the disobedience of the lockmaster who did not observe the instructions given to him.

This, however, is not sufficient to entitle the appellants to claim under sec. 20 (*c*) of the "Exchequer Court Act," for that section not only requires that the injury to the property should have resulted from the negligence of a Crown servant, but also that it should have occurred on a public work. According to the evidence Merrickville is 10 miles away.

DAVIES J.—I think this appeal must be dismissed with costs. I am unable to distinguish it from the cases of *Paul* v. *The King*(1) and *Chamberlin* v. *The King*(2), the decisions in which I think must govern in this case.

IDINGTON J.—I cannot agree with the view expressed by the learned trial judge that 8 Geo. IV., ch. 1, sec. 26, furnished a bar to this action.

(1) 38 Can. S.C.R. 126. (2) 42 Can. S.C.R. 350.

The point made by Mr. Sinclair that the Crown not being named in the section, and that indeed at the time when the Act was passed there could have been no relief sought against the Crown, seems well taken, and to put beyond doubt the possibility of the legislature having contemplated in passing the section in question that it should apply to anything but what it expresses.

Statutes of limitation are not to be extended beyond that which they plainly express. No case exactly in point has been cited nor have I been able to find any, but the converse cases of *Lambert* v. *Taylor*(1) and *The King* v. *Battams*(2), seem to illustrate the principles that should govern.

The claims seem to arise only out of isolated acts, where through the neglect of some one acting on behalf of the Crown, the waters in the Rideau Canal were raised beyond the six feet limit, which, if observed, would on the evidence produce no damage to the suppliants.

It does not appear to me that any such acts of non-continuous negligence, occurring at various times, could give any prescriptive right, especially when any claim of right in respect thereof is denied by respondent.

Nor does it appear to me on the facts that the instructions of the superintendent having been disobeyed and the acts being those of others employed by respondent neglecting their duty being the cause of damage, should furnish any defence herein.

It seems to me from the evidence that the record of these results should have come under the observation of some one in authority for whom the respondent should be held responsible.

I have not observed anything put forward in the

(1) 4 B.&C.138. (2) 1 East 298.

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argument shewing that due care had been taken to check such objectionable irregularities and their consequences.

Even if so existent I doubt the efficacy of such a defence.

The other members of the court have unanimously concluded that the appeal must be dismissed, and I, seeing no useful purpose to be served by me prosecuting my researches in this voluminous record to find out and determine in regard to that and other features of the case, must be content with remaining in doubt.

It may also be that the appellants are without any remedy but that falling within sub-section (*c*) of section 20 of the "Exchequer Court Act" put forward in the appellants' factum and the peculiarities of that sub-section may be held to be such as to give no remedy to them because the property damaged is not "on a public work."

This latter point was not taken or argued but has been forced on our notice in the *Piggot Case*(1) (argued this term. The case of *Chamberlin* v. *The King*(2), might also on argument have been found a bar to this action.

Under the circumstances I can only submit these considerations without assenting to or dissenting from the judgment to be delivered.

ANGLIN J.—As at present advised I gravely doubt whether section 26 of 8 Geo. IV., ch. 1 (U.C.), relied upon by the learned judge of the Exchequer Court, applies to a claim against the Crown. The plaintiff's claim, however, is for damages for injuries sustained through the negligence of a Crown servant in

(1) Page 458, *post*. (2) 42 Can. S.C.R. 350.

carrying on a public work. The injury of which he complains did not happen on the public work. Section 20 (*c*) of the "Exchequer Court Act," therefore, does not confer jurisdiction on the Exchequer Court. *Chamberlin* v. *The King*(1), *Paul* v. *The King*(2). Since these cases were decided *Letourneux* v. *The Queen*(3), cannot be followed in such a case as this. In that case the full limitative effect of the words "on any public work" in sub-sec. (*c*) of sec. 20 would appear not to have been sufficiently considered. The suppliant points to no other provision giving him a right of action against the Crown.

BRODEUR J.—This is an appeal from the Exchequer Court which dismissed the appellants' petition of right.

It is claimed by the appellants that their properties were flooded by the waters of the Rideau Canal.

Several grounds of defence were urged by the respondent but the petitions were dismissed on the ground that the appellants' rights of action were barred by the statute providing for the construction of the Rideau Canal. By the 26th section of that statute (8 Geo. IV., ch. 1, in 1827), it was provided that any suit in damages against any person for anything done in execution of the powers conferred by that law should be brought within six months

after the act committed, or in case there shall be a continuation of damages, then within six calendar months next after the doing or committing of such damages shall cease and not afterwards.

When that Act was passed the right to sue the Crown did not exist.

In 1870 a law was passed authorizing the reference to official arbitrators appointed under the provisions of the Act of 1867 (31 Vict., ch. 12), of claims

(1) 42 Can. S.C.R. 350. (2) 38 Can. S.C.R. 126.
(3) 33 Can. S.C.R. 335.

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arising out of any death or any injury to person or property on any public work, provided (sec. 2) that nothing herein contained shall be construed as making it imperative on the government to entertain any claim under this Act.

In 1887 the "Exchequer Court Act" was passed and it was provided that those claims in damages against the Crown could be prosecuted by petition of right and exclusive jurisdiction thereon was given to the Exchequer Court.

It is contended by the appellants that the limitation enacted by the statute concerning the Rideau Canal would not apply to damages claimed against the Crown because no right of action existed against the Crown at the time the statute was passed.

At that time the action for damages suffered in respect of the canal could be instituted only against the contractors and the officers who may have caused the damages. If later on the liability was extended to the Crown then the provisions of the statutes would apply to the Crown as well as to the other persons.

The limitation section should benefit the Crown as well as the others.

It has been found by the court below that within the six months previous to the petitions of right no damages had been suffered by the appellants. Then they were barred from making any claim for damages against the Crown under the provisions of the 26th section of chapter 1 of 1827.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *R. V. Sinclair.*
Solicitors for the respondent: *Smellie & Lewis.*

[NOTE.—On the same day on which this case was decided judgment was given dismissing the appeal of *Pigott* v. *The King* on the ground that the property of the appellant was not on a public work when injured.]

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THE CORPORATION OF THE DISTRICT OF WEST VANCOUVER (DEFENDANT) ..... APPELLANT;

*May 2, 3.
*June 24.

AND

ELDON RAMSAY AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL, PER SALTUM, FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Municipal corporation—Altering streets—Partial closing of highway—Exchange for adjacent land—Validity of by-law—Assent of ratepayers—R.S.B.C., 1911, c. 170, s. 53, s.-ss. 176, 193.

Under the provisions of sub-sections 176 and 193 of section 53 of the British Columbia "Municipal Act," R.S.B.C., 1911, ch. 170, empowering municipal corporations to alter, divert or stop up public thoroughfares and to exchange them for adjacent land, a municipal corporation has power by by-law to close up a portion of a highway and dispose of the strip so taken from its width in exchange for adjacent or contiguous lands to be used in lieu thereof, although the effect may be to cause the narrowing of the highway. Davies J. dissented.

Per Idington and Brodeur JJ.—Such a by-law is valid although passed without the assent of the ratepayers previously obtained. *British Columbia Railway Co.* v. *Stewart* ((1913) A.C. 816) and *United Buildings Corporation* v. *City of Vancouver* ((1915) A.C. 345) applied.

The decision of the Court of Appeal for British Columbia on a previous appeal in the same proceedings (21 B.C. Rep. 401) was approved.

APPEAL, *per saltum*, from the judgment of Murphy J., in the Supreme Court of British Columbia, maintaining the plaintiffs' action to enforce an award of arbitrators appointed under the compulsory provisions of the British Columbia "Municipal Act."

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

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DISTRICT OF WEST VANCOUVER v. RAMSAY.

In 1913, the council of the municipality entered into an agreement with the Pacific Great Eastern Railway Co., determining the location of the company's railway through the municipality, by which the company was permitted to construct its line of railway upon a longitudinal strip of a public highway in front of lands belonging to the plaintiffs, and a by-law was passed by the council to give effect to the agreement. The assent of the ratepayers to the passing of the by-law had not been previously obtained. The agreement and by-law had the effect of narrowing the highway where it passed by the plaintiffs' lands, as the strip of land on that side of the highway given by the railway company in exchange for the portion stopped up and transferred to the company for the purposes of its railway was not sufficient to restore the highway to its former width. The plaintiffs claimed compensation, and obtained an order from Mr. Justice Clement consolidating the several applications and appointing arbitrators to determine the amount of the compensation to be allowed under the provisions of the "Municipal Act" in that respect. On an appeal from the order of Clement J., the Court of Appeal for British Columbia affirmed the order(1) and held that the municipal corporation had power to close the strip of highway in question from traffic, and that the plaintiffs, as owners of lands abutting thereon, were entitled to compensation for the injury they thereby sustained, to be determined by arbitration as ordered. The arbitrators then proceeded with the arbitration, awarded damages to the plaintiffs, and the action was brought by them for the purpose of enforcing the award and obtaining pay-

(1) 21 B.C. Rep. 401.

ment from the municipality of the amount of compensation allowed them.

At the trial, the plaintiff's action was maintained by Mr. Justice Murphy, and the municipal corporation, in view of the circumstances stated, were granted special leave to appeal, *per saltum*, to the Supreme Court of Canada.

Lafleur K.C. and *R. M. Macdonald* for the appellant.

James A. Harvey K.C. for the respondents.

THE CHIEF JUSTICE.—The principal question on this appeal involves the validity of a by-law passed in the following circumstances by the municipality appellant.

The Pacific Great Eastern Railway Co., a provincial company, authorized by the legislature to be carried along any existing highway, subject to leave having first been obtained from the Minister of Railways and to the consent of the municipality within the limits of which the highway is situate—the consent of the municipality being evidenced by a by-law—located its line along the north shore of English Bay. The appellant, being of opinion that, in the best interests of the municipality, it was desirable to change that location, proposed that

> instead of being carried along the foreshore, the railway should be carried along a more northerly location as shewn on a plan submitted to the corporation.

The railway company accepted the proposal, and made the change upon the following, among other, conditions. The council of the municipality was to give its consent to the company carrying its line or lines of railway upon, along or across the southerly forty-six feet of an unnamed highway, with full and exclusive

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right to the company forever to use and enjoy the same for the purposes of its undertaking. The company also undertook to purchase two strips of land, and out of those strips to dedicate twenty feet in width to the municipality, to be used as a highway, so that there would be on either side of the railway right-of-way two highways, each twenty feet in width, available for traffic. It has not been contended that by this bargain the municipality did not get ample consideration for the privileges granted the company. To give effect to this agreement a by-law was passed conferring on the council of the municipality power to "stop up and close from traffic as a highway" the said southerly forty-six feet of the highway, and to indemnify the company against claims or suits arising out of that proceeding. The effect of the by-law was to narrow the highway somewhat and to relieve the company of its statutory obligation to restore it after the rails were laid.

Actions were brought against the municipality by the plaintiff respondent and some sixteen others to enforce awards of arbitrators appointed to fix the compensation due them as owners of adjoining lands by reason of the narrowing of the highway, and the question for decision is: Had the corporation power by by-law to close a section of the highway in the circumstances set forth? The provincial Court of Appeal, on a previous appeal in these proceedings(1) maintained the by-law on the ground that by section 52, subsection 176, of the "Municipal Act" power is given to municipal corporations to pass by-laws

for establishing, opening, making, preserving, improving, repairing, widening, altering, diverting or stopping up

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public highways, and that those powers, read in the light of sub-section 193 of the same section, are sufficient to authorize the closing to traffic of the strip of the highway in question. I am of the same opinion, and would suggest that sub-section 190, referring to bicycle paths, might also be considered in this connection. It may be that, in certain aspects, the by-law is of doubtful validity, but the only objection urged here and in the court below is thus, stated in appellant's factum:—

> The municipality defend this action on the same point of law as previously taken before Mr. Justice Clement and before the Court of Appeal, viz., that the council of 1913 had no power to stop up the strip of highway, that the assuming to do so was an *ultra vires* act, and, hence, no case existed for compensation, and the appointment of arbitrators was invalid.

It is not suggested that there was misconduct on the part of the council or that any of its members were moved by improper motives, and the provincial courts, which are necessarily more familiar with local conditions than we are, maintained the validity of the by-law. The arrangement made appears to be a reasonable one and in the public interest. In any event, as Chancellor Boyd said in *Re Karry and City of Chatham* (1):—

> The court is not to sit in judgment upon the propriety or alleged unwisdom of the by-law if it admits of reasonable justification.

See also *Rogers* v. *City of Toronto*(2), at page 601, and in *Kruse* v. *Johnson*(3), at page 99, it was said that by-laws of public representative bodies ought to be supported if possible.

The broad language of section 52, sub-section 176, read with 193 and 190, is sufficient to justify the action of the municipality in stopping up the strip of high-

(1) 1 Ont. W.N. 291. (2) 7 Ont. W.N. 600; 33 Ont. L.R. 89.
(3) (1898) 2 Q.B. 91.

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Davies J.

way in question in the special circumstances of this case.

I would dismiss the appeal with costs.

DAVIES J. (dissenting).—This is an appeal, *per saltum*, from the judgment of Mr. Justice Murphy, which involves a previous decision in these proceedings by the Court of Appeal for British Columbia(1), the effect of which was to declare that power was vested by section 52, sub-section 176, of the "Municipal Act" to "narrow" a public highway, so that a railway company might have, when approved of by the Minister of Railways and the consent of the municipality, the right to run its line along a public highway, a question not in dispute, but a right to the *exclusive* possession of a strip of the highway.

The facts are stated in the judgment of Chief Justice Macdonald as follows:—

> The appellant, a municipal corporation, entered into an agreement with the Pacific Great Eastern Railway Company, giving the company liberty to carry its line of railway along a public highway within the boundaries of the municipality, together with the exclusive right of possession of a strip of the highway 46 feet wide, which strip the appellant by by-law closed to public traffic. This left still open to traffic a strip of 20 feet in width of the original road allowance along the northerly side of the portion which has been so closed.
>
> The railway company, on its part, agreed to purchase and dedicate as a highway a strip of land 20 feet wide on the southerly side of the said closed strip, so that the result of the by-law and agreement combined was that highways 20 feet in width were provided for traffic on each side of that portion of the original highway which was stopped up as aforesaid.

The sole question, apart from one of *res judicata* mentioned later, is whether the said sub-section 176 gave the municipality the power to narrow as well as to widen highways.

If they had such power, then the by-law purporting

(1) 21 B.C. Rep. 401.

to give the exclusive right of possession to the railway company of a strip of the highway 46 feet wide which the respondent corporation closed to public traffic cannot be impeached.

I am of the opinion that the section in question does not give them such power. It was evidently carefully drawn and gave power to municipal corporations to pass by-laws

for establishing, opening, making, preserving, improving, repairing, widening, altering, diverting or stopping up public highways.

No express power to "narrow" such highways is given, and when such care seems to have been taken to expressly confer so many intended powers, it does not seem that a fair construction of the expressed powers would justify the inclusion of other powers very largely affecting the public rights and interests and not expressly given. Power to "widen" is given, also to "alter" or "divert" or to "stop up," and the use of these several powers and phrases seems to me to indicate the length to which the legislature thought it desirable to go.

The general policy of the Legislature of British Columbia seems, from the "Highways Act" and the land registry Acts, that these highways should not be less than 66 feet wide.

If the legislature intended to give municipalities power to narrow a highway 66 feet wide to one of 20 feet—a power which might so largely affect the general public—they surely would have expressed that intention by the use of the word "narrow" or some equivalent word.

The power to "alter" does not, I think include the power to narrow; if it did, it would also include the powers to "improve, repair, widen and stop up," which are each expressly given, and would be surplusage if

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Davies J.

"alter" included them. I think that, as contended for, the word alter should be limited to such acts as are not inconsistent with the highway as such.

If my construction is right, the by-law is void, and that disposes of the question of *res adjudicata*. *Toronto Railway Co.* v. *Toronto Corporation*(1).

I would allow the appeal and declare the by-law in question void.

IDINGTON J.—This is an action to enforce an award for compensation allowed to proprietors of lands adjoining a highway on account of the closing of part thereof.

The contention of the appellant herein is that its council had no power by virtue of section 53 of the "Municipal Act," enabling it to make by-laws, and pursuant to one of the objects of such power expressed in sub-section 176, which reads as follows:—

> For establishing, opening, making, preserving, improving, repairing, widening, altering, diverting, or stopping up roads, streets, squares, alleys, lanes, bridges or other public thoroughfares,

to close the part of the highway in question

The by-law in question closed a strip 46 feet wide on the southerly side of a street 66 feet wide.

An agreement was entered into with a railway company whereby it was provided that the railway company should occupy and use the part so closed, and secure for appellant a new road 20 feet wide on the southerly side of the said 46-foot strip. The effect of the agreement being carried out would be that the respective proprietors and the public would have, in lieu of the old road allowance, two roads of 20 feet wide, one on each side of the railway, and that the railway company would abandon its application pending before

(1) 73 L. J. P.C. 120.

the proper authority to construct its proposed railway along the adjacent foreshore.

The cross streets were not to be closed. The neat point is whether or not the council acted *ultra vires* in closing part of the street.

The sub-section in question evidently was copied substantially from Ontario legislation tracing back to the origin of municipal institutions in that province when known as Upper Canada.

Beyond all manner of doubt the power to close or "stop up" cross sectional parts of streets has been exercised in scores of cases, and, so long as not depriving people of ingress and egress to their properties, has been treated as within the power of the respective municipal councils having jurisdiction over their highways.

I am unable to distinguish as a matter of legal construction the power to close a cross-section from that to close a longitudinal section of a street.

The occasions for exercising the former class certainly will, in number, far exceed those likely to happen in the latter class. I should be loath to cast a possible doubt upon the titles of those, in Ontario, for example, resting upon such an exercise of municipal power conferred by said language.

The words "alter" and "stop up" comprehend the whole, if need be, and surely as descriptive of a bare power must be held to cover the part in either class of cases.

I think that the closing of part of the street was, as held by the Court of Appeal, on a previous appeal in these proceedings(1), *intra vires* the council, and hence the appeal should fail.

The question of whether or not the motive for

(1) 21 B.C. Rep. 401

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doing so was proper is one that, if impeachable, should have been attacked by way of a motion or action to quash. So long as the by-law stands, and is *intra vires*, I do not think it can be treated as void and proceedings thereunder held null.

We heard much argument on the illegality of the bargain and the impropriety of it. It may be, when due regard is had to sections 332 and 333 of the Act, that the effect of closing the street was to leave the land vested in the Crown, and the acts of the Minister authorizing the railway company may turn out to have been rested on the right of the Crown to so appropriate the land so abandoned by the exercise of the council in closing the street. Indeed, that may have been part of the scheme for meeting a complicated situation arising out of a desire to save the foreshore from railway invasion.

I express no opinion on the subject of the right in law to do so. I only desire to point out that others not parties to this proceeding ought to be before the court and be fully heard before we should pass upon such an inquiry as started thus.

To allow the appeal and dismiss the respondent's action, which seems well founded, would possibly leave the maintenance of this application and use of part of the highway to continue and respondent without a remedy, for the judgment could not bind the Crown or the railway company.

The decision of the Judicial Committee of the Privy Council in the case of the *British Columbia Electric Railway Company* v. *Stewart*(1) and the *United Buildings Corporation* v. *City of Vancouver*(2) seem to render untenable the objection to the by-law by reason of its not having the sanction of the ratepayers.

(1) (1913) A.C. 816. (2) (1915) A.C. 345.

I do not overlook the principle that what cannot in law be done directly cannot properly be accomplished by an indirect and improper method.

If there was anything done for the mere purpose of evading the salutary provision requiring submission to the electorate, then it should have been developed by bringing all concerned before the court as already suggested.

The appeal should be dismissed with costs.

ANGLIN J.—I am not prepared to overrule the unanimous judgment of the British Columbia Court of Appeal, in the previous appeal in these proceedings(1) holding that, under the powers conferred by section 53, sub-sec. 176, of the "Municipal Act" (R.S.B.C., 1911, ch. 170), the appellant municipal corporation has power to partially stop up a highway, as was done in this case. It may be that the circumstances under which the by-law in question was passed and the motives that prompted it were such that in a proper proceeding it might have been quashed. But in this action, brought to recover the amount of compensation awarded in consequence of the partial closing of the highway, upon the issue as to the validity of the by-law the only question open is the power of the municipal corporation to pass it. I express no opinion upon the estoppel invoked by the respondent alleged to arise out of the proceedings on the application for the appointment of arbitrators.

BRODEUR J.—This is an appeal, *per saltum*, from a judgment rendered by the Supreme Court of British Columbia confirming the award of arbitrators appointed under the provisions of the "Municipal Act" of British Columbia. The corporation appellant, in its st te-

(1) 21 B.C. Rep. 401.

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ment of defence, claims that the appointment of arbitrators was *ultra vires*, and that its own by-law, which has given rise to the claim for compensation, was *ultra vires*.

When the application was made by the present respondents for the appointment of the arbitrators, the questions now raised in the statement of defence were also raised before the judge of the Supreme Court to whom the application had been made, and he decided that he had jurisdiction, that he could appoint the arbitrators, and his judgment was unanimously confirmed by the Court of Appeal.(1)

I agree with the Court of Appeal in the construction they have made of section 53, sub-section 176, of the "Municipal Act," and I concur in the reasons which have been given by the Chief Justice of the Court of Appeal on that question.

It was claimed by the appellant that the by-law in question in this case should have been submitted to the electors.

I find, however, a decision of the Privy Council in the case of *United Buildings Corporation* v. *City of Vancouver*(2) in which it was decided that a by-law stopping up part of a street did not require the sanction of the municipal electors.

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

Appeal dismissed with costs.

Solicitors for the appellant: *Bird, Macdonald & Ross.*
Solicitors for the respondents: *Taylor, Harvey, Grant, Stockton & Smith.*

(1) 21 B.C. Rep. 401.

(2) [1915] A.C. 345.

THE JOSEPH A. LIKELY COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

A. W. DUCKETT AND COMPANY (PLAINTIFFS)..... } RESPONDENTS.

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*May 15.
*June 19.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION.

Shipping—Chartered ship—Suitability for cargo—Duty of owner—Dead freight—Demurrage.

L. chartered the ship "Helen" to carry a full and complete cargo of re-sawn yellow pine lumber from a port in Florida to St. John, N.B. At the port of loading the lumber of dimensions customary in the trade at that port, was furnished in quantity sufficient to fill a ship of the "Helen's" tonnage, but it could not all be stowed in that ship, which was built for the fruit trade, and could not take a full cargo of lumber of that size. The quantity loaded was delivered at St. John, and the shipowner brought action for the freight on the deficiency.

Held, reversing the judgment appealed against (44 N.B. Rep. 12), that it was the duty of the owners to provide a ship capable of carrying the cargo called for by the charter party; that the evidence established that the "Helen" was not so capable; that the charterer, having furnished lumber of the dimensions customary at the port for loading ships of the size of the "Helen," had discharged his duty under the contract, and was not liable to the owner for the dead freight.

Under the demurrage clause of the charter party, the owners claimed damages for delay in loading and discharging the cargo.

Held, that the manner in which the ship was constructed prevented the work of loading and discharging the lumber from proceeding as fast as it otherwise would have done; the delay was, therefore, imputable to the owners themselves and the charterer was not liable.

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

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APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick(1), reversing the judgment at the trial in favour of the defendant.

The material facts of the case are stated in the above head-note.

Powell K.C. and *F. R. Taylor K.C.* for the appellants. The charterers tendered a full and complete cargo of the goods contracted. See *Steamship Isis Co.* v. *Bahr & Co.*(2); *Furness* v. *Charles Tennant, Sons & Co.*(3). He is not bound to offer a cargo suitable for the particular ship. *Stanton* v. *Richardson*(4).

As to the claim for demurrage, see *Postlethwaite* v. *Freeland*(5).

Teed K.C. for the respondents. The appellants have not fulfilled their contract to furnish a full and complete cargo. If they wanted long lengths of lumber carried, they should have ascertained the ship's capacity. See *Carnegie* v. *Conner*(6); *Mackill* v. *Wright Bros.*(7).

As to demurrage, Scrutton on Charter Parties (7 ed.) at pages 283 *et seq.*

THE CHIEF JUSTICE.—I am of opinion that this appeal should be allowed. The notes of my brother judges, both here and below, are so complete that anything I add must be mere surplusage. In my view, the case lies within a very narrow compass. The respondent's undertaking, in the terms of the charter-party, was to furnish a vessel "*in every way fitted*" to

(1) 44 N.B. Rep. 12.
(2) [1899] 2 Q.B. 364; [1900] A.C. 340.
(3) 66 L.T. 635.
(4) L.R. 7 C.P. 421, at p. 430; 9 C.P. 390.
(5) 5 App. Cas. 599.
(6) 24 Q.B.D. 45.
(7) 14 App. Cas. 106.

receive on board and carry from Apalachicola, Florida, to St. John, N.B., a full and complete cargo, both under and upon deck, of re-sawn yellow pine lumber. And the obligation of the appellants, the shippers, was to deliver an average cargo of the kind described alongside and within reach of the vessel's tackle. A cargo of re-sawn yellow pine lumber of the average lengths and sizes was delivered as provided for, but was not received on board the vessel because of its peculiar construction. It is not disputed that the cargo furnished the "Helen" was, as to sizes and dimensions, the same as had been furnished under similar charters for years at Apalachicola. In their factum the respondents admit that the ship and cargo were not suited to each other. The vessel was fitted out for the fruit trade, and not at all adapted, in accordance with the terms of the charterparty, to receive the lumber which the appellants chartered her to carry. I fail to understand how it can be assumed that the onus was upon the appellants to ascertain whether the ship which the respondents chartered to them to receive a full and complete cargo of lumber, was adapted to carry such a cargo. The special construction and equipment of the vessel was a fact within the peculiar knowledge of the respondents, who must also be assumed to know, when they made the charterparty, what was meant by the term "a cargo of re-sawn yellow pine lumber." At the time the charterparty was entered into, the vessel lay in New York Harbour, and the appellants never saw her until she arrived in St. John. In any event, the respondents' contract was to provide a vessel fitted for the cargo and to receive on board the merchandize mentioned in the charterparty, and this they failed to do, and they must suffer for the consequences.

The appeal should be allowed with costs.

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DAVIES J.—The controversy in this appeal is as to the respective obligations of the owner and charterer of a ship chartered by the appellants to carry

a full and complete cargo both under and upon deck of re-sawn yellow pine lumber

from Apalachicola, Florida, to St. John, N.B.

The action was brought by the owners against the charterers to recover damages by way of demurrage or detention and also for dead freight.

The contention of the plaintiff owner was that the charterer was obliged to furnish the steamer with such lengths of lumber as she could well stow and carry to her full capacity, and that, as no special lengths of the "re-sawn yellow pine lumber" were mentioned, the charterer was bound to furnish such lengths only as the steamer could carry, and, not having done so, but having offered timber of lengths the steamer could not carry, was liable for the damages for the dead freight, and that the trade usage did not apply or control.

The defendant's contention, on the other hand, was that he was only bound to provide the lumber stipulated for of the ordinary lengths and dimensions in that trade, and that the accepted trade meaning of the term "re-sawn yellow pine lumber" is such lumber, sawn on four sides, without reference to lengths or dimensions, and that the lumber he furnished was such as was well known to and in the trade as re-sawn yellow pine lumber, sawn on four sides, and practically the same as that furnished by his company under similar charters for many years. There was much difference of judicial opinion in the courts below. The learned trial judge held:—

In view of all this evidence, I think it is abundantly clear that the cargo furnished to the "Helen" at the loading port was quite in accordance with the charter party and the claim for dead freight cannot be

allowed. I find as a fact that the ship "Helen" was unsuitable for the carriage of the freight the plaintiff company engaged to carry, and that defendant company fulfilled its obligation by furnishing a full and complete cargo of re-sawn yellow pine lumber to the plaintiff company's ship "Helen" at the loading port.

As to the detention, it is to be noted that, so far as such claim concerns the port of loading, it rests wholly on the contention that time was lost because the cargo furnished was of unsuitable dimensions.

He further found:—

It is unnecessary for me to recapitulate the evidence of this witness in his description of the particulars, in which he says that "Helen's" construction and equipment delayed the discharge. His testimony convinces me that the delay was due to the ship itself, and not to the presence of the schooner complained of and certainly not to the defendant. The evidence of every witness who speaks of the build and equipment of the steamer—even that of Mr. Duckett himself—confirms me in the conclusion above expressed.

On appeal to the Supreme Court of New Brunswick, Chief Justice McLeod was of the opinion that the defendant company was obliged to fill the steamer to her full carrying capacity and to furnish such lengths of "re-sawn yellow pine lumber as she could carry." Not having done so, he held the defendant liable for the dead freight and for the demurrage at Apalachicola arising out of the fact that the steamer was unable to stow 150,000 feet per day owing to the long lengths of lumber supplied. For the same reasons he held defendants liable for the seven days' demurrage at St. John in unloading. Grimmell J. concurred with the Chief Justice, while Barry J., in a lengthy, reasoned judgment, in which he cites and discusses most of the authorities bearing upon the dispute, agreed with the trial judge.

As a fact it seems clear from the evidence and the argument at bar that, while the cargo tendered to the ship was an ordinary cargo of re-sawn yellow pine lumber mentioned in the charterparty, the steamer could not be called an ordinary steamer of her tonnage. On

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the contrary, she was of a special and unusual build and construction and fitted to meet the requirements of a special trade, the West India fruit trade.

I cannot find any answer, in view of the evidence given of the usage in the yellow pine lumber trade, to the proposition stated by Barry J. that:—

> If the cargo tendered was (as found) an ordinary one and the ship was an unusual and abnormal one, it would be consonant to both sense and reason to say that any loss which may have been occasioned by reason of the unsuitableness of the cargo for the ship or the ship for the cargo ought to be borne by the shipowners, and that the rights and obligations of the parties must be determined by the written contract, the construction of which is for the court without regard to any consideration as to the knowledge of either party with respect to the character of the ship or cargo.

The legal proposition which he deduces from the authorities and on which he based his conclusions was that a shipowner, by entering into a charterparty, impliedy undertakes that the ship shall be reasonably fit for the carriage of a reasonable cargo of the kind stipulated for in the charter, and that the reasonable cargo to be supplied must be of the kind specified in the charter.

The case of *Stanton* v. *Richardson*(1), in 1872, affirmed in the Exchequer Chamber(2) in 1874, and in the House of Lords(3), in 1875, fully sustains this proposition formulated by Barry J. Mr. Justice Brett says, at page 435 of the report in the Common Pleas:—

> I think the obligation of the shipowner is to supply a ship reasonably fit to carry the cargo stipulated for in the charter party,

citing as authorities, *Lyon* v. *Mells*(4); *Gibson* v.

(1) L.R. 7 C.P. 421.
(2) L.R. 9 C.P. 390.
(3) 45 L.J.Q.B. 78.
(4) 5 East 427.

Small(1); *Havelock* v. *Geddes*(2). And see Blackburn J. in *Readhead* v. *Midland Railway Co.*(3).

Applying this principle, Barry J. held that the findings of fact of the trial judge shewed the cargo tendered at Apalachicola to have been an ordinary and reasonable cargo of re-sawn yellow pine lumber as called for by the charter; that the steamer was not a reasonable ship for the cargo offered; and that he could not say the evidence was insufficient to support the finding that the delay in discharging the vessel in St. John was not occasioned by the fault of the charterers, but was wholly attributable to the unusual construction and equipment of the ship.

After hearing all that could be said in support of the judgment appealed from, and after reading and carefully considering the charterparty and the different parts of the evidence called to our attention by Mr. Teed, I have reached the conclusion that the proposition of law on which the Chief Justice and Grimmell J. based their conclusions, namely, that it was incumbent on the defendant company to furnish the steamer with such lengths of lumber as she could stow and carry, and that, having furnished lumber of lengths which prevented the steamer stowing or discharging 150,000 feet per running day, they were liable as well for the dead freight as for the demurrage alike in Apalachicola as in St. John, cannot be supported. On the contrary, I am of the opinion that the judgment of Mr. Justice Barry, founded upon the findings of the trial judge, is substantially right and is supported by the highest authorities.

The question whether the re-sawn yellow pine lum-

(1) 4 H.L. Cas. 353. (2) 10 East 555.
(3) L.R. 2 Q.B. 412.

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ber offered the ship was of reasonable length was one of fact. The evidence shewed that it was of the customary and usual lengths of that kind of timber shipped in the trade at Apalachicola. That being so, I hold, as the trial judge found, that it was a reasonable cargo to be carried under the charterparty; that the obligation of the charterer had been discharged when he offered it; and that the inability of the steamer to carry such lengths of timber owing to her peculiar construction was a failure on the part of the shipowner to furnish a suitable vessel to carry that cargo, or, as put by the Lord Chancellor, in the case of *Stanton* v. *Richardson*(1),

> to provide a ship which is reasonably suited to carry that particular cargo.

I would, therefore, allow the appeal and restore the judgment of the trial judge, with costs in all the courts.

IDINGTON J.—I agree with the construction put by the learned trial judge and Mr. Justice Barry, in the Court of Appeal, upon the charterparty in question herein.

I assume, as they seem to do, that a shipowner, tendering a vessel for a specified service, must supply one reasonably fit for the purpose of being loaded with the freight specified in general terms, as in the charter party.

They have dealt so fully with the evidence and legal authorities applicable thereto that I cannot add anything useful, for I agree in the general line of reasoning they have adopted in relation thereto, so far as the claim set up for loss of freight and loss by delay in loading is concerned.

(1) 45 L.J.Q.B. 78.

If there had been evidence that any substantial part of the freight tendered was of such lengths that men of experience and judgment should say that it was unreasonable to expect it to be shipped on "a vessel of 635 tons net register," specified to be that of the "Helen," the vessel in question, there might be room for Mr. Teed's argument being given effect to.

He has had to contend for that without evidence to support it, and, indeed, is hence driven to urge, what I think is not founded in law, that the charterer takes the risk beyond even that, and must be held to know of the fitness or unfitness of the vessel he charters for the service he contracts for. I cannot assent to such a proposition.

The unfitness of the vessel for the service for which her brokers and in effect owners for the time being tendered her, seems to have been the cause of the loss of time in loading and unloading.

In regard to the loss of time unloading, I wish to guard against committing myself to the proposition that, in the case of such a charterparty as before us, the rules governing the harbour master or his hard necessities must bind the parties concerned.

The learned trial judge seems to me to have set that aside for the purpose of this case, and attributed the loss to other causes. In doing so, I cannot find he conflicted with the evidence.

I think the appeal should be allowed with costs.

ANGLIN J.—Upon the evidence I am satisfied that the cargo tendered by the defendant was reasonable and such as a vessel chartered for the purpose of carrying a cargo of "re-sawn yellow pine lumber" from Apalachicola should be able to load to her full capacity. That the plaintiffs' vessel was unable to do so was, I

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think, due to her peculiar construction and the fact that she had been outfitted for fruit carriage, rendering her unsuitable for the business for which she was chartered to the defendant, and thus involving a breach of the plaintiffs' obligation under the charter. The incapacity of the steamer was the cause of the loss of dead freight of which the plaintiffs complain, and also of the demurrage at the port of loading. I agree with the learned trial judge that the evidence would not warrant a recovery by the plaintiffs for the seven days' demurrage at the port of St. John for which they claim. Apparently there was also a delay at St. John of one-half a day, for which the respondents might perhaps be liable, occasioning damage amounting to $50. On the other hand, had he counterclaimed, the defendant would probably be entitled to a larger sum as damages for failure of the plaintiffs' ship to take the full cargo provided for her.

On the whole, I agree in the conclusions reached by the learned trial judge and by Barry J., who dissented in the Appeal Division, and would allow this appeal with costs and restore the judgment dismissing the action with costs.

BRODEUR J. agrees with Mr. Justice ANGLIN.

Appeal allowed with costs.

Solicitor for the appellant: *Fred. R. Taylor.*

Solicitor for the respondents: *M. G. Teed.*

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THE ALGOMA STEEL CORPORATION LIMITED (DEFENDANTS). } APPELLANTS;

*May 30, 31.
*June 19.

AND

MARY DUBÉ (PLAINTIFF)..... RESPONDENT.

MARY DUBÉ (PLAINTIFF)..... APPELLANT;

AND

THE LAKE SUPERIOR PAPER COMPANY (DEFENDANTS)..... } RESPONDENTS.

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

Hire of machinery—Negligence of hirer—Negligence of owner—Master and servant.

The Steel Company hired from the Paper Company a crane and crew of two men, D. to run it and a fireman. In doing the work for which it was hired, the crane fell and D. was killed. In an action by his widow for damages, the jury found that the crane was a dangerous machine and that the Steel Company was negligent in not having a rigger to superintend its operation.

Held, affirming the judgment of the Appellate Division (35 Ont. L.R. 371), that the Steel Company owed to D. the duty of seeing that the crane was properly operated; that the evidence justified the finding of the jury that a rigger was necessary for that purpose; and that the judgment against that company should stand.

The jury also found that the crane was defective when delivered to the Steel Company, and that the Paper Company was guilty of negligence in not supplying proper equipment for it.

Held, reversing the judgment of the Appellate Division, Davies and Idington JJ. dissenting, that the relation of master and servant existed between the Paper Company and D. up to the time of the latter's death; that the company, in sending D. to run a dangerous machine not properly equipped, would be responsible

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

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for any injury caused by its operation; and that it was not relieved from responsibility by the fact that the injury might have been avoided if the Steel Company had provided proper superintendence over its operation.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming the judgment at the trial in favour of the plaintiff against the Algoma Steel Corporation and dismissing her action against the Lake Superior Paper Company.

The appellant is the widow of the late Martin P. Dubé, and the action was brought by her, on behalf of herself and the children of the deceased, against the Algoma Steel Corporation, Limited (herein referred to as the Steel Company) and the Lake Superior Paper Company for damages resulting from the death of the said Martin P. Dubé.

Prior to the 28th day of May, 1914, the Steel Company hired from the Superior Company a derrick or crane, with its crew, consisting of the deceased, as the operator thereof, and a fireman, to perform certain work upon the premises of the Steel Company. The derrick was duly delivered to the Steel Company by the Superior Company and a considerable amount of work was done with it on the 28th day of May, 1914, all without any mishap.

On the 29th day of May, 1914, the deceased was advised by the foreman of the Steel Company that it would be necessary to move a large iron tank weighing something less than five tons from the trestle or stand upon which it was resting to a flat car which had been placed to receive the tank. The trestle or stand was approximately twelve feet high, and the tank to be moved therefrom was of the following dimensions—

(1) 35 Ont. L.R. 371.

twelve feet wide, sixteen feet long, and four and one-half feet high.

The tracks upon which the derrick or crane ran had been laid by the Steel Company and were unballasted. The deceased was ordered by the representatives of the Steel Company to move the derrick along the tracks to a position approximately thirty feet from the trestle or stand upon which the tank was resting, and, having placed the derrick in that position, the deceased was then ordered to shift the tank to the flat car situate some distance behind the derrick.

The tackle belonging to the derrick or crane was attached to the tank by the workmen employed by the Steel Company for that purpose, and the deceased was given the signal to hoist. The derrick had lifted the tank about a foot above the trestle, and the boom, with the tank attached, was swinging round towards the flat car behind the derrick, when the derrick fell over on its side, and the deceased, in endeavouring to avoid injury, slipped and was crushed between the corner of the derrick and the ground, and was instantly killed.

At the trial counsel for the Superior Company moved for a non-suit on the ground that the deceased was not at the time of the accident in its employ, and that there was no evidence of negligence on its part to submit to the jury. The learned trial judge reserved judgment on the motion, and submitted certain questions to the jury, who returned the answers set out below. Later the trial judge directed judgment in favour of the plaintiff against the Steel Company, but dismissed the action as against the Superior Company. He reached the conclusion that there was no evidence of negligence on which the Superior Company could be held liable. The Steel Company appealed to the

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Appellate Division, and their appeal was dismissed. The plaintiff appealed against the judgment in favour of the Superior Company, and her appeal was also dismissed.

The jury's findings are as follows:—

1. Q. Were the defendants, the Lake Superior Paper Company, guilty of any negligence which caused the death of Martin P. Dubé? A. Yes.

2. Q. If so, what was that negligence? A. In not furnishing proper equipment, clamps and ballast in deck of crane.

3. Q. Was the crane, as it was when used by the defendants, the Algoma Steel Corporation, a safe or a dangerous machine at the time when used and as used by the defendants, the Algoma Steel Corporation? A. Yes.

4. Q. If dangerous, in what respect was it dangerous? A. In not being properly clamped to track or blocked under decking and deck of crane not being properly ballasted.

5. Q. Were the defendants, the Algoma Steel Company, guilty of negligence which caused the death of Martin P. Dubé? A. Yes.

6. Q. If so, what is the negligence which you find? A. In not having a proper rigger to superintend work that wanted to be done.

7. Q. Could the deceased, Martin P. Dubé, in the exercise of reasonable care, have avoided the accident? A. No.

8. Q. If so, what could the deceased have done? A. Nothing more than he did.

Damages, $3,000.00—if both companies are liable, each company shall pay $1,500.00. If only one company is found liable, that company to pay the full sum of $3,000.00.

Anglin K.C. and *J. E. Irving* for the appellants, the Algoma Steel Corporation. The Steel Company cannot be responsible for injury to an employee of the Paper Company in consequence of the latter's negligence. *Child* v. *Hearn*(1); *Membery* v. *Great Western Railway Co.*(2); *Waldock* v. *Winfield*(3).

The Steel Company was not obliged to examine the crane for defects before using it. *White* v. *Steadman*(4), *Bates* v. *Batey & Co.*(5).

The legal effect of the hiring was a warranty that the crane could perform the work safely. Plaintiff representing the owners undertook to work with it, and the Steel Company cannot be liable for the consequences. See *Mowbray* v. *Merryweather*(6); *O'Doherty* v. *Postal Telegraph-Cable Co.*(7).

T. P. Galt and *McFadden* for the plaintiff appellant and respondent. The Steel Company cannot deny that plaintiff was in their employ within the meaning of the "Workmen's Compensation Act," not having given the notice required by section 14. *Wilson* v. *Owen Sound Portland Cement Co.*(8); *Cavanagh* v. *Park*(9).

But, apart from the Act, they are liable, having undertaken a hazardous work without a competent person to direct it. *Canadian Northern Railway Co.* v. *Anderson*(10); *Heaven* v. *Pender*(11).

If the Paper Company is not held liable, the Steel Company should be ordered to pay the costs incurred

(1) L.R. 9 Ex. 176.
(2) 14 App. Cas. 179.
(3) [1901] 2 K.B. 596.
(4) [1913] 3 K.B. 340, at p. 347.
(5) [1913] 3 K.B. 351, at pp. 354-5.
(6) [1895] 2 Q.B. 640.
(7) 118 N.Y. Supp. 871.
(8) 27 Ont. App. R. 328.
(9) 23 Ont. App. R.715.
(10) 45 Can. S.C.R. 355.
(11) 11 Q.B.D. 503.

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by joining the former as a defendant. See *Besterman* v. *British Motor Cab Co.*(1).

Tilley K.C. and *Atkin* for the Paper Company, respondents, referred to *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*(2); *McCartan* v. *Belfast Harbour Commissioners*(3).

THE CHIEF JUSTICE.—I am of opinion that the appeal of the Algoma Steel Company should be dismissed with costs and the cross-appeal of Mrs. Dubé allowed as against the Paper Company with costs, for the reasons given by McLellan and Garrow JJ. in the court below and adopted here by my brother Anglin.

There is evidence to support the finding that the derrick or crane was dangerous as supplied by the Paper Company, and, because of its defective equipment, the crane toppled over and killed Dubé. There was also negligence in the management of the crane by the Steel Company, and both companies, by their joint negligence, contributed to the accident.

If the crane had been properly equipped, it would not have toppled over, and if proper care had been taken in its management, the consequences of the defective equipment might have been overcome. Therefore, I have come to the conclusion that, on the evidence, the verdict of the jury should be supported.

Moreover, the relation of master and servant between Dubé and the paper company continued to exist up to the time of his death. That company was responsible to him for his wages. It alone could dismiss him and he was subject to its exclusive orders. (Vide Walton Compensation, 38 and 89, Halsbury, vol. 20,

(1) [1914] 3 K.B. 181. (2) [1893] 1 Q.B. 629.
(3) [1911] 2 I.R. 143.

p. 191, No. 421; Dalloz, Répertoire Pratique, Accidents de Travail, No. 44; (1916) Q.O.R.S.C. p. 219).

DAVIES J.—I am of opinion that the appeal of the Algoma Steel Corporation must be dismissed with costs, and the cross-appeal of Mary Dubé against both companies, seeking to hold them both liable, should also be dismissed with costs. The result would be that Mary Dubé would be entitled to retain her judgment against the Steel Corporation for the full amount of $3,000 awarded as damages by the jury.

The accident which happened and which caused the death of Dubé was not found by the jury to have happened because of any inherent defects in the crane or its equipment. The proximate and determining cause of the accident was found by them to have been the negligent use by the Steel Company of the crane and its equipment without having any one in charge who was, in fact, competent to direct it. In answer to the question put to them as to the use of the crane by the Steel Company, the jury find that the crane, as it was when used by that company, was a "dangerous machine" in

not being properly clamped to the track or blocked under decking and deck of crane *not* being properly ballasted.

But these findings, in themselves, would not have been sufficient to make that company liable. The mere use by the company of a dangerous machine would not be enough unless it was found that such use, owing to the defects of the machine, caused the accident. The next questions asked the jury were:—

(5) Were the defendants, the Algoma Steel Company, guilty of negligence which caused the death of Martin P. Dubé? Ans. Yes. Q. If so, what is the negligence you find? Answer fully. Ans. In not having a proper rigger to superintend the work that wanted to be done.

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The negligence, therefore, found by the jury, and the only negligence found by them, against the Steel Company was the neglect to provide a proper rigger or competent person to direct and control the working of the crane in the condition it was in and for the work required to be done.

That it was the duty of the Steel Company to have provided such a rigger or competent person is beyond question, and that they failed in that duty is equally clear. That the duty was one which they owed to the deceased engineer seems to me also under the facts as proved quite clear. I do not find it necessary to determine whether or not Dubé was, at the time when working the crane, the servant of the Steel Company. I am strongly inclined to think he was. In any event, they owed a duty towards him, as the engineer of the crane they were working, to provide a competent superintendent to direct his working of the engine with safety. Without such directions he could not work at all. At least, that is my conclusion from the evidence, and I think it was admitted on the argument that Dubé, in the caboose or cabin or small box in which he was, could not direct or control and did not attempt to direct or control the proper movements of the crane. The absence of proper superintendence by the company ensuring his safety in the discharge of his work was a negligent disregard of the duty they owed him, quite irrespective of whose servant he was. He moved the machinery just as he was ordered by the person in charge to do, and every act in connection with the working of the crane was done according to the orders of the rigger or controller who was directing its working. Under these circumstances, it became the duty of the company operating the crane to provide a proper system for its operation. That person or those persons,

for there appeared to be more than one, was, or were, admittedly inexperienced and incompetent, and the jury found that the negligence which caused Dubé's death was in the employment of such incompetent persons "to superintend the work that wanted to be done."

It seems to me, therefore, quite clear that the Steel Company failed to discharge the duty they owed to Dubé under the circumstances, and that, such failure having been found to be the proximate and determining cause of the accident, they are liable for the full amount of the damages.

The jury's findings against the Paper Company are not such as, under the circumstances, make them jointly liable with the Steel Company. It is true the jury find as against them that they were guilty of negligence "in not furnishing proper equipment clamps and ballast in deck of crane," and that the crane, in the condition in which they hired it to the Steel Company, and in which it was when the latter used it, was a "dangerous machine." But they do not find that this faulty equipment or that it being a "dangerous machine" was the immediate and determining cause of the accident. On the contrary, that cause was found to be the neglect of the Steel Company to have the crane used, directed and controlled by a competent manager or rigger.

In all respects, therefore, I am in agreement with the judgment of the Court of Appeal.

I have read the several cases on which the parties respectively rely. But I am fully satisfied that, as was so clearly stated by the Lord Chancellor and the other judges who delivered judgments in the case of *McCartan* v. *Belfast Harbour Commissioners*(1), that each case

(1) [1911] 2 I.R. 143.

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depends upon its own special facts, and that, except where the decisions formulate some legal principle, the decided cases are only useful as illustrations.

It must be remembered that in the case at bar Dubé was exonerated by the jury from any contributory negligence, and the case was argued on that basis.

Mr. Tilley, for the Paper Company, relied strongly upon the case of *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*(1). That was a case where a person directing the operations of a crane, corresponding with the person who is called throughout this appeal a "rigger," was injured by the negligence of the man in charge of the crane, corresponding to the man Dubé in this case. It was the exact reverse of this case, where the man in charge of the crane (Dubé) was killed through the incompetence of the rigger employed by the Steel Company.

Under the special facts of that case, the court held that, as the owner of the crane, when he hired it to another, had parted with the power of controlling the cranesman with regard to the matter on which he was engaged, though the latter still remained his general servant, he was not liable for his negligence.

If in this case the negligence of the cranesman, Dubé, had been a factor, I could see the relevancy of this decision in the *Donovan Case*(1). Under the facts as they exist I do not. The Paper Company are sought to be held liable because of defects in the crane and its equipment. As these have not been found the immediate and determining cause of the accident, I have held that company not liable The Steel Company I have held liable because they failed in their duty to provide a proper system under which the crane

(1) [1893] 1 Q.B. 629.

was worked and a proper controller to direct its working, and that the jury found such failure on their part to be the negligence which caused the accident.

I am also of the opinion that, although under the findings of the jury the Paper Company cannot be held liable, yet that the case as regards the costs of that company comes within the principle of *Besterman* v. *British Motor Cab Co.*(1), where it was held that the upholding of an order on an unsuccessful defendant to pay a successful company defendant's costs depends, in all cases, on whether it was a reasonable and proper course for the plaintiff to have joined both defendants in the action.

In this case I think it was a reasonable and proper course to join both defendants, and that the Steel Company, which I hold liable, should pay to the plaintiff all such costs against the Paper Company which, under the judgment to be delivered, she may have to pay or have incurred by reason of the joinder in the action of the Paper Company.

IDINGTON J.—I think in the circumstances in question herein that the appellant owed to the deceased a legal duty to take care which it failed to discharge, and thereby caused his death.

I so find quite independently of whether or not there was a legal relationship of master and servant within the meaning of the "Workmen's Compensation Act."

In accepting control of, and operating what has been found to have been a dangerous machine, at the time of its so doing, the appellant became bound in law to take due care, in carrying on such operation, that,

(1) [1914] 3 K.B. 181.

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all such persons as might be lawfully in or about said machine were not endangered thereby or should not suffer from its use.

Instead of taking such due care, it handed over the direction and management of the operations therewith to those who were not competent, and hence it should abide the consequence.

The deceased and another who went with the machine formed, as it were, but parts thereof, and could not have been considered by either of the companies as a fully equipped crew intended to operate the machine.

I am, therefore, unable to attach that importance to the conversation had between the respective representatives of each company as to the sending clamps along with the machine which appellant's counsel does and presses so far as to suggest must, when coupled with the fact of and legal effect of a contract of hiring, be held a warranty of the efficiency of the outfit.

Anything that transpired between the companies cannot, as I view the principles of law applicable, as between the deceased and the appellant, absolve the latter so long as it was the party dominant in controlling the operations of the machine.

Moreover, when one tries to render it possible to hold these companies jointly liable, we find the very foundation of their relations, which were reduced to writing, is not produced, and at this stage it is impossible to form any very definite conclusion in regard to such relations. All we know is that there was a sort of letting or hiring of something which was not kept by the owners for general public use, but let with such parts, including in that part of a crew, as the parties agreed upon, for which some compensation was to be made.

Their agreement to dispense with clamps cannot affect respondents' rights.

And whether or not she might have had an action against the company in whose service her late husband was engaged can form no concern of the appellant; short of that being an action against the companies jointly and founded on a joint liability which I cannot find in the facts.

The common sense of the jury in reaching the verdict first returned of $1,500 against each, if it had been maintained, I suspect might, if the case had been fought out on the lines it indicates as possible, have found some support in law.

As the case stands, it is all or nothing so far as appellant is concerned. Its negligence was the last fatal slip of those concerned and the proximate cause of the death of deceased.

I, therefore, think the appeal must be dismissed with costs, including the costs of all parties and of the cross-appeal against the Lake Superior Company, which, of course, fails.

The necessity of keeping the latter company before the court, even by circuitous and cumbrous methods, was fully justified, if we have due regard to the division of opinion in the court below.

If the appellant had ever been found, in the course of this litigation, putting forward and acting upon the principles of law I have proceeded upon and discarding and helping the courts to discard the application of the "Workmen's Compensation Act," I could sympathize with its suffering costs.

By the other course it has possibly got off with a very much more moderate verdict than it might have had returned against it from a common law point of view.

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Anglin J.

ANGLIN J.—That the death of the plaintiff's husband, Dubé, was caused either by lack of proper equipment of a derrick supplied by the defendant, the Lake Superior Paper Company (hereinafter called the Paper Company), to its co-defendant, the Algoma Steel Corporation (hereinafter called the Steel Corporation), or by the unskilful management, or by a combination of both these causes, scarcely admits of doubt, and was not seriously contested. Nor, contributory negligence on the part of Dubé having been negatived by the jury and there being no appeal from that finding, is there much room for doubt as to the liability of one or other, if not of both, of the defendants for the damages assessed at $3,000.

The jury has found that the derrick or crane as supplied and used was dangerous, and that its danger consisted

in (its) not being properly clamped to the track or blocked under decking; deck of crane not being properly ballasted.

It would appear that, if properly equipped, the unskilful use of the crane might not have resulted in its collapse; and it would also seem more than probable that, if it had been skilfully used, the lack of proper equipment might have proved harmless. The failure of the Paper Company to furnish proper equipment, the jury finds to have been negligence on its part which caused the death of Dubé; in failing to provide a competent person to direct the use of the crane the Steel Corporation is found to have been likewise at fault.

The Paper Company's omission to supply clamps, etc., could be chargeable against it as negligence—*i.e.*, breach of duty owing to Dubé under the circumstances—only if it should have reasonably anticipated that the derrick would have been put to a use for which

this equipment would be required. A finding to that effect is involved in the jury's answers to the first and second questions; and there is evidence to support such a finding. The controverted issues on this branch of the case are the existence of the duty to Dubé by the Paper Company which it is charged with having neglected, and whether its breach was a proximate cause of his death.

On the other hand, there is abundant evidence to warrant a finding that a competent supervisor was necessary, and that the omission to provide one (a fact not in dispute) amounted to negligence. Whose negligence is here the vital question.

In order to have a true conception of the duty owing by each of the defendants to Dubé, it is essential to ascertain the relation in which he stood to each of them. There is no suggestion that the Paper Company had undertaken the removal of the Steel Corporation's disused alkali plant as independent contractors. They supplied the Steel Corporation, for a consideration, with the means to effect such removal. They were bailors, and the Steel Corporation bailees, of the derrick. But, upon a consideration of the authorities, I concur in the view of the four judges of the Appellate Division, who held that under the circumstances in evidence Dubé was throughout the servant of the Paper Company. The case, in my opinion, falls within the principle of the decisions in *Quarman* v. *Burnett*(1); *Jones* v. *Corporation of Liverpool*(2); *Moore* v. *Palmer*(3); *Union S.S. Co.* v. *Claridge*(4); *McCartan* v. *Belfast Harbour Commissioners*(5); *Consolidated Plate Glass*

(1) 6 M. & W. 499.
(2) 14 Q.B.D. 890.
(3) 2 Times L.R. 781.
(4) [1894] A.C. 185.
(5) [1910] 2 I.R. 470; [1911] 2 I.R. 143.

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Co. v. *Caston*(1); and *Waldock* v. *Winfield*(2). The absence of control of Dubé by the Steel Corporation, while performing his duties as "runner" of the crane, and of the right to dismiss him and substitute someone else for him, distinguishes this case from *Donovan* v. *Laing, Wharton, and Down Construction Syndicate*(3), *Rourke* v. *White Moss Colliery Co.*(4), and other cases relied on by the Paper Company. The Steel Corporation's right of interference and the control exercised by it was no greater than that of the shipowner in *McCartan* v. *Belfast Harbour Commissioners*(5).

In my opinion, as its servant engaged in doing work for its profit which his contract with it obliged him to perform, Dubé was entitled to expect that his employer, the Paper Company, would not send him out with a machine so defectively equipped that its use in the work which was contemplated when it was hired would be dangerous unless that danger should be overcome or obviated by the exercise of care and skill by a person not supplied by the Paper Company. Assuming that, as between the defendants, it was the contractual duty of the Steel Corporation to have provided a competent "rigger" as between itself and its employee, I think the Paper Company cannot invoke the failure of its co-defendants to provide such a rigger, whose skill and vigilance, if exercised, might have saved the employee from the consequences of his employers' own negligence in sending him out to perform work for which the crane supplied by it was so inadequately equipped that its use was dangerous. Whatever rights (if any) the Paper Company may have against the Steel Corporation because of the absence of a competent rigger, that

(1) 29 Can. S.C.R. 624.
(2) [1901] 2 K.B. 596, at pp. 603-4.
(3) [1893] 1 Q.B. 629.
(4) 2 C.P.D. 205.
(5) [1910] 2 I.R. 470; [1911] 2 I.R. 143.

fact, in my opinion, does not afford a defence to it as against the plaintiff. I also agree with Garrow and Maclaren JJ.A. that there is evidence to support the finding that the negligence of the Paper Company was a proximate cause of the collapse of the crane, and I incline to think that the plaintiff is entitled to recover against this defendant under the "Workmen's Compensation Act" as well as at common law, although, but for the existence of the relation of master and servant, unless the Paper Company was under contractual obligation to its co-defendant to furnish a "rigger," it would probably not be liable at all under the doctrine enunciated in such cases as *O'Neil* v. *Everest*(1), in 1892. Dubé was killed in the course of his employment, while, and in consequence of, acting in obedience to a negligent order of a person in the employment of the Paper Company, to whose orders he was bound to conform. He was killed owing to defects in machinery negligently supplied to him by his employer for the work he was sent to do. The fact that, although the collapse of the derrick was a natural consequence of the Paper Company's negligence, that negligence became operative because its effect was not counteracted by competent supervision (though the duty to provide that supervision rested on its co-defendant) does not suffice to prevent the Paper Company's negligence being truly a cause and not merely a condition of that collapse happening. *Paterson* v. *The Mayor of Blackburn*(2); *Reg.* v. *Haines*(3); *Engelhart* v. *Farrant & Co.*(4), at pp. 246-7, *per* Rigby L.J.; *Burrows* v. *March Gas and Coke Co.*(5).

(1) 61 L.J.Q.B. 453, at p. 455.
(2) 9 Times L.R. 55.
(3) 2 C. & K. 368.
(4) [1897] 1 Q.B. 240.
(5) L.R. 5 Ex. 67; 7 Ex. 96.

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The plaintiff's case against the Steel Corporation is perhaps not quite so clear. Dubé was not its servant. The highest degree of care that it owed him was that which is due to an invitee or licensee. It may be that, as between the Steel Corporation and the Paper Company, the latter is under an obligation arising out of warranty which may entitle the Steel Corporation to indemnification. That question is not before us, and I express no opinion upon it. The existence of such a warranty would afford no answer to a claim by the plaintiff for breach of a duty owing to her deceased husband. Nor does the fact that Dubé was the servant of the Paper Company affect the liability of the Steel Corporation if it was under a duty to supply a competent rigger as the jury has found. Upon the evidence there is some uncertainty as to whether the order of the Steel Company was for "a derrick and crew," by which might well be understood a body of men in number and qualification sufficient to control and operate the derrick, or was for "a locomotive crane with engineer and fireman," as its pleading avers. The written order is not in evidence. Counsel for the Paper Company at the trial made this statement:—

> The Paper Company owned the crane and employed Mr. Dubé as the engineer to run it and McLaughlin as the fireman to fire it. They then hired it with its crew to the Algoma Steel Corporation.

In his factum counsel for the Paper Company speaks of the Steel Corporation "having hired a derrick with its crew of two men only." The evidence makes it reasonably clear that, in addition to the "runner" and the fireman, the crew of a derrick such as that in question should include a competent man known as a "rigger" to supervise the "spotting" of it and the management of the work to be done. The failure to provide such a man was certainly negligence on the

part of one or other of the defendants. Inasmuch as the jury has attributed that negligence to the Steel Corporation and not to the Paper Company, it would seem probable that, in its opinion, the contract between these two companies required the Paper Company to furnish only the runner and fireman, leaving the obligation upon the Steel Corporation, which was to order the derrick to be put in operation, to furnish the necessary supervisor. If that be the correct view of the case, and I think it is a fair inference from the jury's findings, which cannot upon the evidence be held to be clearly erroneous, the liability of the Steel Corporation would also seem to be clear. It could not be heard to urge "identification" of Dubé with his employer, the Paper Company, as a defence (see *Child* v. *Hearn*(1); *Membery* v. *Great Western Railway Company*(2)); indeed, it would itself be liable to the Paper Company for any damages sustained by it in consequence of the breach of the implied undertaking to provide a rigger competent to handle the derrick with reasonable care and skill.

But, whatever may have been the duty in this respect of the two companies *inter se*, I rather incline to think that the necessity for having a competent rigger in charge was so clear that, as to any person likely to be injured through just such an accident as that which happened, whether one of its own employees, a mere stranger lawfully on the premises, or an employee of the bailor, the Steel Corporation, before directing that the derrick should be put into operation, was under an obligation to see that it was in charge of such a rigger. Attempting the removal of such a heavy article as a tank weighing 8,700 pounds without a competent rigger verges very close upon, if

(1) L.R. 9 Ex. 176, at p. 182. (2) 14 App. Cas. 179, at p. 191.

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it does not amount to, recklessness, such as would entail liability to a mere licensee or invitee.

When the derrick was placed or "spotted" in order to remove the tank, in the carrying of which it collapsed, it was found that, as then adjusted, the arm of the crane would not reach it. Instead of moving the derrick closer, as the evidence shews might easily have been done, one Jeffrey, an employee of the Steel Corporation, directed Dubé to lower the arm of the crane. This had the effect of increasing the distance between the derrick and the end of the arm, thus augmenting the leverage, which proved to be too great when the load was swung out. This was the immediate cause of the collapse. A competent rigger would, in all probability, have either insisted upon the derrick being placed nearer or being secured by clamps or by blocking up the platform before attempting to move this heavy tank with the arm extended practically to its extreme length. It may be that, as against the Paper Company, the Steel Corporation was warranted in assuming that the operation could be fully performed just as it was attempted. But I gravely doubt that it would have been justified in making such an assumption as against any person—even a servant of the Paper Company—whose personal safety was thus jeopardized. In view of the jury's findings, however, it seems to be unnecessary to determine this question.

I am, for these reasons, of the opinion that the verdict against the Steel Corporation must stand. The negligence of both defendants having materially contributed to causing the unfortunate Dubé's death, each is liable for the total result of their joint wrong, and, whatever may be their rights of indemnity *inter se*, neither can ask to have the damages apportioned as against the plaintiff The main appeal should be dis-

missed and the cross-appeal allowed, and the plaintiff should have judgment for $3,000 against both defendants, with costs throughout.

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BRODEUR J.—In hiring their crane to the Algoma Steel Company, the Lake Superior Paper Company should have furnished a proper equipment, clamps and ballast, to raise the five or six tons of weight that were mentioned. But they have not done so, and, as a result of that defective equipment, the accident in question has happened to their servant Dubé.

The jury has found that they were negligent. There was evidence to justify such a verdict, but the courts below have not, however, accepted it.

That is not a question of law that was being raised on that issue between the Paper Company and the relatives of the victim, but it was a question of fact of which the jury was the judge. (*McCartan* v. *Belfast Harbour Commissioners*(1)).

Of course, if there had been no evidence to justify the verdict, the latter should be set aside. But there was sufficient evidence to justify it, and it should be maintained.

The appeal of Mary Dubé against the Lake Superior Paper Company should then be allowed.

As far as the Algoma Steel Company is concerned, the jury found also that the latter company was guilty of negligence in not having a competent foreman to superintend the work that had to be done.

That verdict was approved by the courts below and should be maintained.

The judgment should be that the defendant companies are condemned to pay, jointly and severally, the

(1) [1911] 2 I.R. 143.

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sum of $3,000, of which $1,250 to the plaintiff, Mary Dubé, and the balance distributed in equal shares to the six children of the victim. The defendant companies should pay the costs throughout.

Appeal by the Algoma Steel Corporation dismissed with costs.

Appeal by Dubé allowed with costs.

Solicitor for the appellants, the Algoma Steel Corporation: *J. Ewart Irving.*

Solicitors for the respondent, Mary Dubé: *McFadden & McMillan.*

Solicitors for the respondents, the Lake Superior Paper Company: *Hearst, Rowland & Atkin.*

JOHN HERON AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

ABRAHAM LALONDE AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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*May 3, 4.
*June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Assessment and taxation—Sale for delinquent taxes—Tax sale deed —Premature delivery — Statutory authority — Condition precedent —Evidence—Presumption—Curative enactment—"Assessment Act", B.C. Con. Acts, 1888, c. 111, s. 92—B.C. "Assessment Act, 1903", 3 & 4 Edw. VII., c. 53, ss. 125, 153, 156—Certificate of title (B.C.)

The British Columbia "Assessment Act" (Con. Acts, 1888, ch. 111, sec. 92), provides that the owner shall have the right to redeem land sold "at any time within two years from the date of the tax sale or before delivery of the conveyance to the purchaser at the tax sale." The tax sale deed in question was dated on the day before the expiration of two years from the date of the tax sale. The B.C. "Assessment Act, 1903," 3 & 4 Edw. VII., ch. 53, secs. 125, 153 and 156, declares that all proceedings which may have been heretofore taken for the recovery of delinquent taxes under any Act of the province, by public sale or otherwise, should be valid and of full force and effect; that tax sale deeds should be conclusive evidence of the validity of all proceedings in the sale up to the execution of such deed, and that such sale and the official deed to the purchaser of any such lands shall be final and binding upon the former owners of the said lands and upon all persons claiming by, through or under them.

Held, per Fitzpatrick C.J. and Idington and Anglin JJ. (reversing the judgment appealed from (9 West. W.R. 440; 24 D.L.R. 851)), Davies and Brodeur JJ. dissenting, that, in the absence of evidence to the contrary, it must be presumed that the delivery of the conveyance to the tax sale purchaser took place on the date of the tax sale deed; that the execution and delivery thereof were premature,

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

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and, therefore, the conveyance was ineffectual and insufficient to justify the issue of a certificate of title under the provisions of the "Land Registry Act" or of the "Torrens Registry Act, 1899", nor could the curative clauses of sections 125, 153 and 156 of the "Assessment Act, 1903" be applied so as to have the effect of validating the void conveyance.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Clement J. at the trial, by which the plaintiffs' action was dismissed with costs.

The plaintiffs brought the action, as beneficiaries under the will of the late Robert Heron, deceased, for a declaration that certain lands in the City of Vancouver, B.C., had been unlawfully and wrongfully sold at a tax sale of lands for delinquent taxes by the assessor of the District of New Westminster, on the 22nd of July, 1896, and subsequently, for a second time, by the assessor for the District of Vancouver, on the 9th of December, 1903; and for a decree setting aside the said tax sales and all deeds, etc., subsequent thereto. The circumstances of the case are stated in the judgments now reported.

W. N. Tilley K.C. for the appellants.
James A. Harvey K.C. for the respondents.

The CHIEF JUSTICE concurred with IDINGTON J.

DAVIES J. (dissenting).—The appeal in this case is absolutely without any intrinsic merits and if successful may cause very grave injustice to *bonâ fide* purchasers of land in British Columbia.

I am glad to find myself fully in accord with the unanimous judgment of the Court of Appeal for British Columbia confirming the judgment of the trial Judge, Clement J.

(1) 9 West. W.R. 440, 24 D.L.R. 851.

The questions relied upon in this court were that the tax deed in question was dated the 22nd July, 1898, that the time for the owner to redeem did not expire till the end of that day, and, although there was no evidence whatever of any delivery of the deed on the *day* it is *dated*, it must be presumed to have been delivered on that day.

The other point attempted to be raised in this court as to the jurisdiction of the assessor, E. L. Kirkland, to hold and conduct the tax sale in question was not raised in the Court of Appeal, and was, in fact, abandoned before that court. The affidavit of Mr. McCrossen who was counsel in the court of first instance for the defendant respondents and also in the Court of Appeal makes this quite clear. He not only states that the question of the tax sale deed having been executed, as counsel for appellant alleged, a day too soon "was the only point argued by Mr. Martin," but that

> at the conclusion of his argument the learned Chief Justice of the Court of Appeal for British Columbia expressly asked Mr. Martin if that was the only point in the case and Mr. Martin replied that it was the only point in the case.

The judgment of the learned Chief Justice, who spoke for the whole court, expressly shews that only one point was there raised and that was the one arising out of the date of the deed.

No affidavit to the contrary was made on behalf of the appellant and I cannot but think that to allow a point abandoned in the Court of Appeal to be raised in this court would be contrary to our usual practice and would be an injustice to the respondent. In such a case as this, where the appellant has no merits whatever and is relying upon mere technical objections, I do not think he should be heard on the abandoned point. If the majority think otherwise then I say that

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Davies J.

I agree with the judgment of my brother Brodeur, which I have had an opportunity of reading, that the objection to the jurisdiction of Kirkland is without foundation.

The other point was that the presumption from the date of the deed necessarily must be the date of its delivery; I decline to accept it. It should not have been in strictness delivered till the morning of the 23rd. If the appellant had tendered his taxes on the 22nd no such delivery on the 23rd or afterwards would have taken place.

I would think the proper presumption to draw from all the facts proved is that legal delivery did not take place till after the 22nd had expired in which case, of course, the claim of the plaintiff entirely fails.

I take it as a general presumption of law illustrating the maxim *omnia præsumuntur ritè et solennitur esse acta* that a man acting in a public capacity should, in the absence of proof to the contrary, have credit given to him for having done so with *honesty and discretion*. See judgment in *Earl Derby* v. *Bury Improvement Commissioners*,(1).

The proper presumption to be drawn under the facts as proved in this case is, in my opinion, that the tax commissioners, having a number of sales to complete, for convenience had the deeds prepared on the day of the expiry of the redemption period after the sale and dated on that day, but knowing that the tax defaulters had the whole of that day in which to redeem, did not deliver this deed in question to the purchaser until the next day. To presume that he acted contrary to law and in violation of his duty I cannot do in the state of the evidence.

(1) L.R. 4 Ex. 222, at p. 226; Broom's Legal Maxims (8 ed.), p. 740.

But, if I am wrong on this question of the proper presumption to be drawn from the date of the deed, then I am in full accord with the judgment appealed from and with the reasons in support of it of my brother Brodeur and those of Chief Justice Macdonald in the Court of Appeal.

I would dismiss the appeal with costs.

IDINGTON J.—I am unable to understand how a bare power given by statute to do anything, only to be exercised by a designated statutory officer within a specified time, and upon certain conditions precedent, can be said to have produced anything effective in law when attempted to be exercised at another time than specified without the conditions precedent having been fulfilled and by another statutory officer than the one designated and having no power in the premises.

Much less can I see how, when the instrument to be produced is a deed, it can when made under such circumstances be called one.

Can the forger if he succeed in getting a specimen of his fine art, wearing the semblance of a tax deed, upon record, by the complaisant negligence of him put on guard as registrar, divest any man of his estate?

The condition precedent to the registrar's authority validating anything is the production to him duly attested of a tax sale deed. How can he validate the forgery? How can he validate that which when it came to him was of no higher legal value than a forgery?

And the appeal to the following curative section in the "Taxation Act":—

A tax sale deed shall, in any proceedings in any court in this province, and for the purpose of the' Land Registry Act"and the "Torrens Registry Act, 1899", except as herein provided, be *conclusive evidence* of the validity of the assessment of the land and levy of the rate,

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the sale of 'and for taxes, and all other proceedings leading up to the execution of such deed, and *notwithstanding any defect in such assessment, levy, sale or other proceedings, no such tax deed shall be annulled, or set aside, except upon the following grounds and no others,—*

does not help further than to substitute the effect of its language for the conditions precedent to the due execution of the power.

Its plain language only touches that which precedes the deed.

It assumes a deed otherwise pursuant to the power to have been executed and by one competent to execute it.

The contention that the point involved in the question of the status of the officer executing the deed was abandoned below does not appear to be well founded.

The case of *Osborne* v. *Morgan*(1), relied upon by the learned Chief Justice of the Court of Appeal, does not seem to me in point.

That was a case where the Crown had an interest in the land and had recognized rights in those given by the executive. The court above merely denied the right of him suing to question in his action that granted and recognized by competent authority.

This is a case, I repeat, of bare power to an officer to do a certain act and nothing more and the question asked whether in law he did so or not—clearly, to my mind, he did not, and I doubt very much on his own evidence if the one who attempted it was the officer who could have executed it.

The appeal being successful as to the first deed renders consideration of the later sale unnecessary further than to say that the assessor was clearly in error in such a view of appellants' right in refusing to

(1) 13 App. Cas. 227.

permit any one to redeem unless under the title supposed to have been acquired by virtue of the first sale.

The appeal should be allowed but, I think, without costs throughout. The contention for abandonment is unfounded so far as the legal rights of the parties are concerned.

There was nothing done to estop the appellants or their predecessors but there was such an approach to laches as entitles us properly to refuse costs.

ANGLIN J.—The respondent's title to the land in question depends upon the validity of an alleged tax sale deed and a certificate of "absolute title" issued under the British Columbia "Land Registry Act," 1906, ch. 23.

That the taxes for which the land was sold were in arrear and that the sale was fair and open, though conducted by an official not authorized, are facts not now disputed. But it is admitted that the tax sale deed bears date one day before the expiry of two years from the date of the tax sale—the statute allows the deed to be made only after that period has elapsed—and it has been proved that the person who executed it was not the assessor for the County of Vancouver in which the land was situated, but the assessor for the County of Westminster who had no authority or jurisdiction whatever in the matter.

It is contended that because there is no positive evidence of when the deed was actually delivered it should be presumed that it was delivered in conformity with the statute. But the officer who executed and delivered it was called as a witness and, although the issue as to the date of delivery was distinctly raised on the pleadings, he did not say a word to suggest

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that delivery was not made on the day on which the deed bears date. Under these circumstances the ordinary presumption that the deed was delivered on the day of its date must prevail. Sheppard, Touch. 72; *Stone* v. *Grubbam* (1614)(1). The matter is of substance because

> the right of redemption subsists until delivery of the conveyance to the purchaser at the tax sale.

It was argued that the deed should be deemed merely irregular and voidable because this objection to its validity could have been cured by re-delivery after the expiry of two years. But in that case it would operate as a new deed then delivered and not at all by virtue of any efficacy which it had previously possessed. Moreover, there is no suggestion that there was in fact any such re-delivery before tender of the redemption money. For these reasons I think this objection to the validity of the deed must prevail.

The objection based on the fact that the wrong assessor had executed the deed is in my opinion even more clearly fatal to its validity. It was mere waste paper.

Counsel for the respondent maintained that this objection had been abandoned in the court below, and he supported this contention by an affidavit not altogether satisfactory. Counsel for the appellants read a telegram from the counsel who had represented them in the provincial courts denying that there had been any such concession. The point is not noticed in the judgments below. If the appellants' success should be dependent upon this ground of appeal, while they would not be precluded from urging it, since the authority of the assessor who executed the

(1) 1 Roll. Rep. 3.

deed is expressly challenged in the statement of claim and there is no controversy as to the facts, a question of costs might arise. *McKelvey* v. *Le Roi Mining Co.*(1), and see cases in Snow's Annual Practice, 1916, at page 1111. The appellants' success on the point as to date of delivery renders it unnecessary further to consider this aspect of the matter.

To meet these difficulties the respondent invokes three curative statutory provisions, sections 125, 153 and 156 of the British Columbia "Taxation Act" of 1903-4, ch. 53.

The first of these sections declares valid and of full force and effect

all proceedings which may have been taken for the recovery

of taxes unpaid on the 31st December, 1902,

under any Act of this province heretofore in force, by public sale or otherwise.

The void tax sale deed was not, in my opinion,

a proceeding for the recovery of taxes under any Act of the province

which this provision would validate.

Section 153 provides that a tax sale deed shall be conclusive evidence of the validity of all proceedings in the sale "up to the execution of such deed." It is obvious that this provision is predicated upon the existence of a tax sale deed. Its curative effect is expressly limited to proceedings anterior to the execution of the deed. It certainly does not constitute a mere piece of waste paper a valid tax sale deed.

Under section 156, if the tax for which the land has been sold was due and it has not been redeemed within the period allowed for redemption,

such sale and the official deed shall be final and binding upon the former owners of the said lands and upon all persons claiming by, through or under them.

(1) 32 Can. S.C.R. 664.

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The facts that the time for redemption does not expire until the delivery of the tax sale deed, *i.e.*, a valid and effectual deed, and that the existence of the official deed, likewise a valid and effectual deed, is a pre-requisite to the operation of this section, render it inapplicable to the case at bar.

No curative section has been brought to my notice which vests title in the tax purchaser or deprives the owner of his right of redemption where no tax sale deed which can be recognized as such has been executed or delivered.

The defendant also relies upon the provisions of the "Land Registry Act" of British Columbia, 1906, ch. 23. A certificate of title under that statute confers on the holder merely a *primâ facie* title: *Howard* v. *Miller*(1), decided in this court on the 28th May, 1913. By section 31, in case of an application for registration by a purchaser of land at a tax sale, the registrar is empowered, after notice to the persons appearing upon the assessment roll to be interested in the land and in default of opposition by any of them, to register such purchaser as owner of the land. By section 32 he is authorized to direct substitutional service of such notice

> where it is made to appear to (him) that the notice mentioned in the last preceding section cannot be personally served or cannot be personally served without *undue* expense.

The owner in this case resided in Victoria, where assessment and other notices had been sent to him, as appears by the evidence. An order was made by the registrar for substitutional service upon him, in common with a number of other owners of property sold for taxes, by advertisement and by mailing a notice addressed to him at Vancouver. This order was made apparently

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

without any material. The only affidavit produced, made by one Hartley, was sworn several days after the last insertion of the advertisement, and states, as to some twenty-three property owners, that in the opinion of the deponent "it would entail *considerable expense* to *serve all* the above parties personally." The registrar, when examined as a witness at the trial, said that he had no personal recollection of the matter or why he had made the order for substitutional service; that it was his practice to do so; that from the papers in the registry office, including Hartley's affidavit, he assumes he made an order for service in this way; that the statute is very broad and wide and he understood authorized a general order for substitutional service without considering the case or position of each particular individual involved. It is fairly obvious that no inquiry was made as to the whereabouts or residence of the registered owner of the lots now in question and that it was not "made to appear to the registrar" that he could not be personally served or could not be so served without undue expense.

Moreover, the notice mailed to the owner at Vancouver was returned to the registrar through the post office undelivered, yet no steps appear to have been taken under sub-section 3 of section 32 which provides that

> on the return of any letter containing any notice the registrar shall act in the matter requiring such notice to be given in such manner as he shall think fit.

In my opinion the order for substitutional service was clearly made without jurisdiction, with the result that registration of the purchaser as owner under section 31 was made without the notice required by that section and was therefore ineffectual and the certificate of absolute title issued to the defendant Lalonde claiming under him is invalid.

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The defendant finally set up abandonment and acquiescence as an answer to the plaintiff's claim. The circumstances would probably not warrant a defence on the ground of laches being made to an equitable claim. The plaintiffs are asserting a legal right which no mere lapse of time short of the period fixed by the statute of limitations would extinguish.

I do not find in the circumstances anything amounting to a representation by the plaintiffs or their testator to persons dealing with the property that they would not assert their right to it, followed by action and on the part of the latter of such a nature that an estoppel would arise against any subsequent assertion of their rights by the former. *Anderson* v. *Municipality of South Vancouver*(1), at pages 446 *et seq.*, and 462.

In my opinion the appeal should be allowed with costs here and in the Court of Appeal and the plaintiffs should have judgment for the recovery of the land with costs of the action. If the relief of an accounting and the claim for damages are insisted upon they are entitled to a reference to the proper officer of the Supreme Court of British Columbia to have those matters dealt with, the costs of which should be reserved to be disposed of in the Supreme Court of British Columbia according to its usual practice.

BRODEUR J. (dissenting).—The question that arises in this case is whether the plaintiffs may redeem some lands sold for taxes. Robert Heron, the former owner of those lands, never paid any taxes on them from 1893, the date he got them from the Crown, until they were sold for taxes on the 22nd of July, 1896.

(1) 45 Can. S.C.R. 425.

Those lands were in the assessment district then known as the New Westminster District and the assessor and collector for that district was Mr. E. L. Kirkland.

In 1895, the New Westminster District seems to have been divided in two, one was called the Vancouver District, for which Mr. Bryne was appointed assessor and collector, and the other was called the Westminster District, with Mr. Kirkland as assessor and collector.

The lands in question being in the City of Vancouver they became part of the Vancouver District.

There is nothing in the Official Gazette, the only document we have on the matter, shewing that the power of the collector for the old "New Westminster District" to collect moneys for arrears of taxes was cancelled.

In 1896, on the 22nd of July, Mr. Kirkland proceeded to sell those lands for the payment of those arrears and, on the 22nd of July, 1898, he made a deed in favour of the person who had bought the property at the public tax sale.

It is now claimed on this appeal that Mr. Kirkland had not the power to sell the lands in question and to execute that deed.

There is no doubt that he was the assessor and the collector of the New Westminster District and that as such he could assess the lots in question and levy taxes thereon. We have no evidence that his powers with regard to the collection of overdue taxes were cancelled in 1895 as claimed by the appellant.

That point was not formally raised by the statement of claim. It is true that some evidence was given which might have some effect on that point but it was not complete and it does not show that Mr.

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Kirkland's authority over the taxes then due was at an end by the division of the district.

I do not see that the point was dealt with in the notes by the judges of the courts below and we have an affidavit shewing that it was never mentioned in the Court of Appeal.

I consider that the evidence which we have before us does not shew that Mr. Kirkland had no power to deal with the collection of the taxes and the sale of the lands upon which they were imposed and that, in these circumstances, the point raised by the appellants in that regard should not be entertained. I may add that the provisions of the "Assessment Act" (ch. 179 of 1897) and particularly sections 27, 78, 81, 87, 92, 94, 96, 116 and 119 give to the assessor who has assessed the property the right to collect the taxes thereby imposed.

From 1896, the date of the tax sale, until 1904, the date of his death, Mr. Robert Heron does not seem to have taken any steps to redeem the property. The evidence does not shew either whether he made inquiries with regard to the payment of taxes or the redemption of the property.

In 1904, after his death, his executor, Mr. Brown, found some papers concerning those lands and made inquiries with regard to them. Having found, however, that they had been sold for taxes, he did not exercise any right of redemption which he might have.

The property was once more sold in 1906 for taxes. From that date until 1913 no steps have been taken by the Heron estate, the appellants, with regard to that property; but the lands having increased in value they instituted the present action.

There is no doubt as to the validity of the second tax sale. There is no question either with regard

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to the validity of the first tax sale; but they claim that their right of redemption under the first tax sale still exists because the deed was executed a day before the date at which it should have been made.

Under the "Assessment Act" of British Columbia the owner of land sold for taxes may

> at any time within two years from the date of this tax sale or before the delivery of the conveyance of the tax sale

redeem the estate sold.

The appellants claim that they are still within the time for exercising that right because there has never been delivery of any legal conveyance to the purchaser.

Was the tax deed void or voidable? If it is an absolute nullity, then no delivery of conveyance has taken place.

The actual execution of the deed could have been performed at any time after the 22nd July. A new deed could have been executed the very next day and no question could be raised with regard to its validity. If the money had been tendered on or before the 22nd July, 1898, the rights of the appellants could not be denied and the execution of the deed on that date, could not have been invoked against them. But no such tender was made and the deed which has been prematurely executed could not be, in my opinion, considered as a nullity. It was simply voidable and now that the deed has its full effect, that it was formally delivered to the purchaser, it seems to me that the right of redemption which the owner of the land possessed has expired. The purchaser's right has become absolute.

Besides, I agree with the learned trial judge that the provisions of section 255 of chapter 222, Revised

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Statutes of British Columbia, 1911, have cured any defects which might have occurred in connection with this tax sale. The section says:—

> A tax sale deed shall, in any proceedings in any court in this province, and for the purposes of the "Land Registry Act", except as hereinafter provided, be conclusive evidence of the validity of the assessment of the land and levy of the rate, the sale of the land for taxes, and all other proceedings leading up to the execution of such deed; and, notwithstanding any defect in such assessment, levy, sale, or other proceedings, no such tax deed shall be annulled or set aside, except upon the following grounds and no other:—
>
> (*a*) That the sale was not conducted in a fair and open manner;
>
> (*b*) That the taxes for the year or years for which the land was sold had been paid; or
>
> (c) That the land was not liable to taxation for the year or years for which it was sold.

It is true these curative sections should not be construed in too liberal a way but the statute is drafted in such terms and such language that a deed which has been executed, like the present one, would preclude the appellants from claiming seventeen years after the sale has taken place the right to redeem the property.

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

Appeal allowed without costs.

Solicitors for the appellants: *Martin, Craig & Parkes.*
Solicitors for the respondents: *McCrossan & Harper.*

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THE CANADIAN NORTHERN WESTERN RAILWAY COMPANY } APPELLANTS;

*May 8.
*June 24.

AND

JOHN T. MOORE ..... RESPONDENT.

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

Railways—Expropriation of lands—Arbitration—Appeal—Jurisdiction of court on appeal—Reference back to arbitrators—Proceedings by arbitrators—Receiving opinion testimony—Number of witnesses examined—"Alberta Evidence Act," 1910—Alberta "Arbitration Act," 1909—Alberta "Railway Act," 1907—Setting aside award—Evidence—Admission in prior affidavit—Ascertaining value of lands.

The provisions of the Alberta "Arbitration Act" of 1909, in relation to references to arbitration, apply to proceedings on arbitrations under the Alberta "Railway Act" of 1907, and give power to the court or a judge, on an appeal from the award made, to remit the matters referred to the arbitrators for reconsideration. Anglin J. inclined to the contrary opinion.

Per Davies, Idington and Anglin JJ. (Fitzpatrick C.J. *contra*).—When arbitrators have violated the provisions of section 10 of the "Alberta Evidence Act" of 1910 by receiving the testimony of a greater number of expert witnesses than three, as thereby limited, upon either side of the controversy, their award should be set aside by the court upon an appeal.

Per Fitzpatrick C.J. and Idington J. (Davies J. *contra*).—An affidavit of the party whose property has been expropriated, made for different purposes several years prior to the expropriation proceedings, cannot properly be taken into consideration by arbitrators as evidence establishing the value of the property at the time of its expropriation.

Per Idington and Brodeur JJ.—In the circumstances of the case the arbitrators were not *functi officiis*, as their award had been invalidly made.

The appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (8 Alta. L. R. 379) and the cross-appeal therefrom were dismissed with costs.

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

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CANADIAN NORTHERN WESTERN RWAY. CO. v. MOORE.

APPEAL AND CROSS-APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), setting aside an award made by arbitrators and referring the matter back to the arbitrators for reconsideration and determination anew of the compensation to be awarded for lands expropriated for railway purposes.

On proceedings taken for the expropriation of the respondent's lands for railway purposes under the Alberta "Railway Act" of 1907, arbitrators were appointed, on 25th June, 1913, and they proceeded with the arbitration on 16th December, 1913, rendering their award on the 21st February, 1914. During the proceedings the arbitrators allowed evidence to be adduced by the opinion testimony of a greater number of witnesses than that limited in regard to expert testimony by the "Alberta Evidence Act", ch. 3, sec. 10, of the statutes of 1910, (2nd sess.) on behalf of the party expropriated, and also refused to receive in evidence an affidavit respecting the value of the lands in question, made by the respondent in the year 1911, when applying for probate of the will of his deceased wife, for the purposes of fixing the succession duty payable in regard to her estate. Upon the opening of the arbitration proceedings, it was determined, with the assent of the parties, that the compensation to be awarded should be upon the basis of the value of the lands at that time, and this appeared to be the date adopted by the arbitrators in the estimation of the value of the lands expropriated.

On an appeal by the railway company, the Appellate Division of the Supreme Court of Alberta set aside the award of the arbitrators, on the ground that they had

(1) 8 Alta. L. R. 379.

improperly heard opinion evidence as to the value of the lands contrary to the provisions of the "Evidence Act," and, being of opinion that on the evidence the court was unable itself to make an award, referred the matter back to the arbitrators to determine anew the compensation to be paid without regard to the evidence theretofore taken.

The railway company now appealed against that portion of the judgment of the court below which referred the matter back to the arbitrators for reconsideration and the respondent, by cross-appeal, contended that the award ought not to have been set aside for the reason stated by the court and that the award of the arbitrators should have been confirmed.

Chrysler K.C. for the appellants. The points in respect of which we allege error are (1) that the court had no power to direct a reference back to the arbitrators to determine anew the compensation, (2) that the arbitrators had no power to proceed further, they being *functi officiis*, and (3) that, in any case, this matter does not fall within the class of cases in which the court has jurisdiction to refer an award back to the arbitrators.

The Alberta "Railway Act," ch. 8, of 1907, contains a complete code in respect of compensation by arbitration for lands taken by railway companies, and the sections, 99 to 114, referring to arbitrations make very complete provision for all contingencies but give no authority to remit any award to the arbitrators. For the jurisdiction of the Supreme Court of Alberta, see the "Judicature Ordinance," ch. 21 of 1898, secs. 3, 8 and 10.

The Alberta "Arbitration Act," ch. 6 of 1909, has no application to proceedings under the "Railway Act," of 1907, and the provisions as to arbitration, in

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the "Railway Act," are self-contained, and constitute a complete code of provisions for the expropriation of lands under that Act. The "Arbitration Act" applies only to the classes of arbitrations—(1) which depend upon a written agreement for submission of present or future differences to arbitration (sec. 2, sub-sec. 1), (2) which originate by order of reference (sec. 11), and (3) statutory arbitrations under section 17. Proceedings under the "Arbitration Act," differ from and are inconsistent with the provisions of the "Railway Act," which is silent as to remitting awards but makes express provision for setting aside awards and appealing therefrom. It was clearly the intention of the legislature to exclude any provision as to remitting awards. See *Simpson Commissioners of Inland Revenue*(1); *In re Keighley, Maxsted & Co. and Durant & Co.*(2); *North Riding of Yorkshire County Council* v. *Middlesborough County Borough Council*(3); *Re British Columbia Railway Act and Canadian Northern Pac. Rway. Co.*(4); *London and Blackwall Rway. Co.* v. *Board of Works for Limehouse District*(5); *Canadian Northern Ontario Rway. Co.* v. *Holditch*(6); *In re Davies and James Bay Rway. Co.*(7); *In re McAlpine and Lake Erie and Detroit River Rway. Co.*(8).

Even under the "Arbitration Act" there would be no right to remit any such case as the present. This right arises in four cases only: (1) when the award is bad on the face of it;(2) when there has been misconduct on the part of the arbitrator; (3) when there has been admitted mistake and the arbitrator himself asks that the matter be remitted; and (4) when addi-

(1) [1914] 2 K.B. 842.
(2) [1893] 1 Q.B. 405.
(3) [1914] 2 K.B. 847.
(4) 20 D.L.R. 633.
(5) 3 K. & J. 123.
(6) 50 Can. S.C.R. 265.
(7) 28 Ont. L.R. 544.
(8) 3 Ont. L.R. 230.

tional evidence has been discovered after the making of the award. *Green* v. *Citizens' Insurance Co.*(1); *In re Keighley, Maxsted & Co., and Durant & Co.*(2); *Re Montgomery Jones & Co., and Liebenthal & Co.*(3); *Re Grand Trunk Railway Co., and Petrie*(4).

In any case the arbitrators are *functi officiis*. *Snetsinger* v. *Peterson* (5).

The award was properly set aside but it was impossible for the court itself to make an award, not only because improper evidence had been heard, but also because of the exclusion by the arbitrators of the affidavit of the owner, which made a valuation of the lands in question, and which might have materially affected the award in determining the value of the lands taken. This affidavit was made by the owner in 1911, before the question of expropriation by the railway was considered. Two witnesses for the owner gave evidence that from 1911 to 1913 the land had increased in value fifty per cent. By this method of ascertainment, the value of the land, in 1913, would have been only a small fraction of the sum awarded. While the arbitrators were not bound to accept this method of ascertaining the compensation, the appellants were at least entitled to use the affidavit as an admission.

The proceedings proved abortive, and the proper course would have been to allow the parties to proceed *de novo* to have the compensation determined by arbitration.

Frank Ford K.C. for the respondent The reasoning of their Lordships Justices Duff and Anglin in the case of the *Canadian Northern Ontario Rway.*

(1) 18 Can. S.C.R. 338.
(2) (1893) 1 Q.B. 405.
(3) 78 L.T.N.S. 406.
(4) 2 Ont. L.R. 284.
(5) Covt. Dig. 146.

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Co. v. *Holditch*(1), relied upon by the appellants, and of Meredith J. in *Re McAlpine and Lake Erie and Detroit River Rway. Co.*(2), cannot now prevail in view of the decision of the Judicial Committee of the Privy Council in *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (3). It is not necessary to consider the position as it might arise under the Dominion "Railway Act" if the Alberta "Arbitration Act" has application to the proceedings of the arbitrators in the present case. The sections to be referred to are secs. 2, 11 and 17 and, in view of the general scope of that Act, as well as of the sections referred to, their terms cannot be taken in the restricted sense in which similar provisions of the Dominion "Railway Act" were treated in the cases above cited.

On the cross-appeal, we contend that the appellants are estopped, by the agreement entered into at the commencement of the arbitration proceedings, from taking the ground now that the arbitrators were wrong in fixing the value of the lands on the basis of their value at the time of the arbitration. On this point we adopt the reasoning of Mr. Justice Stuart in the court below. In the alternative we submit that the agreement amounted to a submission to arbitration outside of and apart from the "Railway Act," or, in further alternative, that it estops the appellants from setting up that a mistake was made by the arbitrators.

As to the infringement, as alleged, of the "Evidence Act" in regard to the hearing of opinion evidence, the provisions of section 10 of that statute are uncertain: *Re Scamen and Canadian Northern Rway. Co.*(4) and it

(1) 50 Can. S.C.R. 265.
(2) 3 Ont. L.R. 230.
(3) (1914) A.C. 569.
(4) 22 West. L.R. 105.

makes it highly dangerous to apply them literally, if indeed any literal meaning can be taken from them. Section 106 of the Alberta "Railway Act" authorizes arbitrators to proceed to ascertain the amount of compensation to be awarded "in such way as they or he or a majority of them deem best", and the legislature could not have intended absolutely to restrict that power. See Phipson on Evidence, ch. 35. As appellants' counsel cross-examined the expert witnesses objection to the admissibility of their testimony cannot be taken on appeal.

The affidavit tendered in evidence was entirely irrelevant as to the value of the lands in question either as of the date of the proceedings before the arbitrators or as of the date of the judge's order appointing them; the valuation therein made had relation merely to the time of the death of the respondent's deceased wife in the year 1911.

It is submitted that the appeal should be dismissed with costs and that the cross-appeal should be allowed and the award of the arbitrators restored with costs.

THE CHIEF JUSTICE.—This appeal and the cross-appeal should be dismissed with costs.

Without expressing any opinion as to whether in expropriation proceedings under the Dominion "Railway Act" the arbitrators having once made an award are *functi officio* (compare *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1) with *Holditch* v. *Canadian Northern Ontario Rway. Co.*(2) at page 541), I am satisfied that the provincial "Arbitration Act" (ch. 6, Statutes of Alberta, 1909, sec. 11) gives to the Alberta court, on appeal, in all cases of arbitration the power to remit

(1) [1914] A.C. 569. (2) [1916] 1 A.C. 536.

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or set aside an award. The sections of the Alberta "Arbitration Act" are quoted at length by Sir Louis Davies in his judgment.

I agree in the conclusions reached by my brother Idington with respect to the admissibility in these proceedings of the affidavit made by the respondent Moore at another time for an entirely different purpose. One can easily imagine conditions under which such a document might be properly introduced, but although a statement made by a party to a proceeding may be used against him as an admission, whenever it is made, I am satisfied that no fault can be found with the arbitrators for having refused to receive the affidavit in the circumstances under which it was offered here.

I am not quite satisfied that section 10 of the "Evidence Act" limiting the number of expert witnesses is applicable to proceedings in which such wide powers are given to the arbitrators. Section 106 of the "Railway Act" directs the arbitrators to proceed to ascertain the compensation due

in such way as they, or he, or a majority of them deem best.

That statute creates for expropriation purposes a tribunal with wide and exceptional powers which it cannot fully exercise if hampered by the special limitations of the "Evidence Act," and I would be disposed to hold that the arbitrators were at liberty to examine or permit the examination of as many witnesses as they thought desirable. In other words, the arbitrators are, in this regard, limited solely by the bounds of a sound and honest discretion, but I defer on this point to the views of the majority.

DAVIES J.—The appeal by the railway company in this case is from the judgment of the Supreme Court

of Alberta, only in so far as that judgment purports to refer the award back to the board of arbitrators.

There is also a cross-appeal by the respondent claiming the judgment appealed from to be *erroneous* in holding that the arbitrators erred in admitting the testimony of more than three witnesses giving their opinion as to the value of the lands compensation for the taking of which under the provincial "Railway Act" the arbitrators were assessing.

On the main appeal as to the power of the court to refer the award back to the arbitrators, I am of opinion that the court possessed such power.

The Alberta "Railway Act," 1907, ch. 8, in its 114th section, provides for an appeal to the court in cases where the award exceeds $600 and declares that upon the hearing of the appeal the court shall, if the question is one of fact, decide the same upon the evidence taken and in sub-section 2 declares that, upon such appeal, the practice and proceedings shall be as nearly as may be the same as upon an appeal from the decision of an inferior court.

Sub-section 3 says:

> The right of appeal hereby given shall not affect the existing law or practice in the province as to setting aside awards.

Then the "Arbitration Act" has the following provisions (Alberta statutes, 1909, ch. 6, defining the law with respect to references to arbitration):—

> Section 2:—In this Act, unless the contrary intention appears:—
>
> 1. "Submission" means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not.
>
> Section 11.—In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.
>
> Section 17.—Whenever it is directed by any Act or Ordinance that any party or parties shall proceed to the appointment of arbitrators

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or appoint arbitrators as provided by this Act or that any party or parties shall proceed to arbitration under this Act or any similar direction shall be made with respect to arbitration under this Act such direction shall be deemed a submission.

While sub-section 3 of section 114 of the "Railway Act," above quoted by me, is not as clear as it might be and does not in so many words speak of remitting the award back, I cannot doubt that in its true construction it covers such a power of remitting back the matter referred for reconsideration.

In my judgment sub-section 3 of section 114 of the "Railway Act" should be held to cover and incorporate these sections of the "Arbitration Act" above cited and, when read together with the 17th section, vest in the court the power of remitting awards back made under the "Railway Act" for reconsideration, which they have exercised in this case.

This conclusion renders it unnecessary on my part to consider the question of the power of the court to remit back an award where no statutory authority to do so exists.

Then as to the cross-appeal of the respondent, who contends that the award should be upheld and not remitted back, I am also of opinion that this cross-appeal must be dismissed.

Two contentions were advanced against the validity of the award—one was that the arbitrators valued the lands as of the wrong date, taking the time when the arbitration was held, 16th December, 1913, instead of the date when the judge's order was made appointing the arbitrators, namely, the 25th June, 1913.

It is not necessary under the circumstances of this case to determine the exact date with reference to which "compensation or damages are to be ascertained." Sub-section 2 of section 100 mentions three different dates. The first is where there is an

agreement made between the parties respecting the lands taken or the compensation to be paid as provided in section 99 and, in such case, the date of the agreement is to be the date for fixing compensation. The other dates where there is no agreement are the service of the notice to treat or the order of the judge made for the appointment of an arbitrator or arbitrators. As between these two latter dates cases may arise in which it would be important to determine which should govern.

In the present case, I concur with the judgment of the appellate court that the parties having agreed at the opening of the arbitration proceedings to adopt the "time of the arbitration" as the date for fixing the compensation, and as the evidence shewed clearly there was no difference in the values of the lands during the year 1913, the date agreed upon, 16th December, 1913, was for all practical purposes the same as that of judge's order, 25th June of the same year, so that no error prejudicing either party was under the circumstances committed. No question was raised as between the date of the judge's order and that of the notice to treat given in the latter part of 1912 and it must be taken that all parties agreed at the arbitration to take the time of the arbitration as the proper time to fix the valuation.

The other objection to the validity of the award and the one sustained by the appellate court was that the provisions of section 10 of the "Evidence Act" limiting the number of expert witnesses to three upon either side had been violated by the admission against the objection of the railway company of more than the statutory number.

The facts respecting the number of witnesses called and examined on the part of the owner are set out

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fully in the reasons for the judgment of the court given by Mr. Justice Stuart. It is unnecessary for me to repeat them here. I agree with the conclusion reached by him that the statute had been clearly violated and that

> the arbitrators admitted very important evidence as to value which was inadmissible and that it was impossible to say what weight they attached to that evidence

or whether it was not "the controlling evidence in their minds."

Under these circumstances, I think the court was right, having the power to do so, to remit the award back to the arbitrators and not to attempt under the circumstances the almost impossible task of making an award themselves.

I am also of opinion that the court was right in holding that the affidavit of the respondent as to the value of the land made by him on his application for probate was improperly rejected. The weight to be given to such an affidavit was a matter entirely for the arbitrators under all the facts and circumstances existing when the affidavit was made. But it should not have been excluded from their consideration.

For the foregoing reasons, I would dismiss both the appeal and the cross-appeal with costs.

IDINGTON J.—The appellant claims that the court of appeal for Alberta had no power, upon setting aside the award, made by the arbitrators appointed under the "Railway Act" of Alberta, to determine the compensation to be made respondent for lands taken and injuriously affected by the exercise of some of the powers of the appellant in the way of expropriation, to remit the matter so in question to the arbitrators.

It argues that the same result should follow as formerly followed upon the setting aside of an award

under a submission at common law. It overlooks, in making such a contention in this appeal, the wide difference in many respects between a submission by parties, relative to the disposition of a matter in dispute between them, and this statutory method of determining the amount of compensation to be made for what must be surrendered and endured by him whose rights have been invaded by virtue of the statutory powers given the expropriating company.

The common law award being set aside the parties still had their full right to resort to the courts to enforce their respective claims and recover or have therein determined what they might be entitled to.

In expropriation cases the party whose property is taken has no remedy except that furnished by the statute authorizing the taking.

That remedy is the constitution of a board appointed by the parties, or, default their agreeing, by the court, and that board has not discharged its duty until it has made an award reached by due process of law within the contemplation of the statute. If it produces an award which in law is null, then on what legal principle can it be said to be discharged of or relieved from the performance of that duty it has undertaken?

That, however, is not the only thing the appellant has overlooked, for there has been much legislation in the several jurisdictions, where the common law prevails, to supplement the powers of the court relative to awards and enable much to be done which could not formerly have been done in the way of relieving unfortunate litigants.

It does not appear to me herein necessary to follow the argument relative to the legislation of that kind in Alberta, or forming part of the law introduced into Alberta, and determine whether or not it is applicable

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to the arbitration here in question, further than to point out that the Alberta "Arbitration Act" expressly provides, by section 2, as follows:—

Section 2.—In this Act, unless the contrary intention appears:—

1. "Submission" means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not;

and by section 11, as follows:—

11.—In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred or any of them to the reconsideration of the arbitrators or umpire.

and by section 17, as follows:—

Section 17.—Whenever it is directed by any Act or Ordinance that any party or parties shall proceed to the appointment of arbitrators or appoint arbitrators as provided by this Act or that any party or parties shall proceed to arbitration under this Act or any similar direction shall be made with respect to arbitration under this Act such direction shall be deemed a submission.

The enactments seem clearly designed to provide for the very contingency in question herein.

It is to be observed that the appellant railway company is the creation of the Alberta Legislature and the proceedings were taken under its "Railway Act."

And in any event, as already suggested, the award having been set aside because of the non-performance according to law of the duty assumed by or cast by law upon the board of arbitrators they must in law proceed to the discharge of that duty in a proper manner, whether specially directed or not, does not seem to matter very much.

The judgment in the case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1), seems to assume as a matter of course the power and duty of the appellate court to remit the matters to the arbitrators, who had erred, as here, to hear evidence and make an

(1) (1914) A.C. 569.

award in accordance with the principle expressed in the opinion judgment of the Judicial Committee. The powers of expropriation and method of fixing compensation in question therein were those of the Dominion "Railway Act" as it stood revised in 1903. Surely if that set of provisions enabled a remitting of the case those under the Acts I have referred to which are still more comprehensive and elastic can enable the court below to do so.

The court of appeal for Alberta has decided it cannot under the circumstances of the appeal there determine the matter pursuant to section 114 of the "Railway Act" and it has not been contended by the cross-appeal herein that such conclusion is erroneous if the questions of law or either of them passed upon by it has been properly maintained.

The cross-appeal however claims that court erred therein and seeks a reversal of the decision.

I see no reason to quarrel with the judgment so far as it relates to the question of opinion evidence and therefore the judgment remitting the matter to the board of arbitrators should stand.

I am, however, not able to agree with the holding of that court relative to the admissibility of the respondent's affidavit made as an administrator in the course of settling the question of succession duties when valuing the entire property of which only a fractional part is in question.

The question to be tried is the value of the property taken or injuriously affected at another and later time and, hence ,as evidence of that it certainly cannot be treated as an admission against an administrator of the fact to be tried or anything clearly and directly bearing thereon.

I can conceive of such an affidavit being used in

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cross-examination, had respondent been a witness, or in the like event in contradiction; and as a most efficient weapon in the hands of the counsel for appellant if he saw fit to put respondent in the witness box.

But in principle I cannot think the affidavit apart from some such contingencies can be properly admitted.

I do not think the part of the formal judgment directing a trial anew necessary or even expedient, if respondent is willing to strike out the excessive expert testimony and rest the case there.

In such event there should be no such order touching costs as the judgment directs.

I think the appeal should be dismissed and the form of order adopted by the court above in the *Cedars Rapids Case*(1) in regard to costs throughout, and otherwise should be adopted.

ANGLIN J.—I agree with the view of the Appellate Division of the Supreme Court of Alberta, stated by Mr. Justice Scott, that the provisions of section 10 of the Alberta "Evidence Act" were violated on the arbitration under review. It may be that section 106 of the Alberta "Railway Act" authorizes arbitrators themselves to call expert witnesses in addition to the number allowed by the "Evidence Act" to be "called upon either side." That case is not before us and I express no opinion upon it.

Likewise it may be open to the parties themselves to give in evidence the opinions of three witnesses on each issue in an action or arbitration which admits of such testimony being adduced. That question also is not before us and I express no opinion upon it.

While the meaning of section 100 (2) of the Alberta "Railway Act" is quite uncertain, and clarifying

(1) [1914] A.C. 569.

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legislation would seem to be greatly needed, I think that under the circumstances of this case there was no error in fixing the date as of which compensation should be ascertained.

The arbitration here in question was held under the provincial "Railway Act." Section 17 of the provincial "Arbitration Act" is invoked by the respondent as a provision making the various sections of that statute applicable to any arbitration directed by any Act or ordinance of the province. But the limitative words "as provided by this Act," found in section 17, indicate that its effect is much more restricted. One of the provisions of the "Arbitration Act" is that

> In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred or any of them to the reconsideration of the arbitrators or umpire (sec. 11).

If this section were applicable, this case would be clearly distinguishable from *Canadian Northern Ontario Railway Co.* v. *Holditch*(1), in which the arbitration dealt with took place under the Dominion "Railway Act."

I understand a majority of the court is of the opinion that the order referring the award back to the arbitrators was properly made. I incline to the contrary opinion.

BRODEUR J.—The question on the main appeal is whether the Appellate Division of Supreme Court of Alberta had the power, under the provisions of the "Railway Act" of that province, to direct a reference back to the board of arbitrators to determine anew the compensation.

By section 114 of the "Railway Act" of 1907, of Alberta, chapter 8, it is stated that

(1) 50 Can. S.C.R. 265.

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Whenever the award exceeds $600.00, any party to the arbitration may within one month * * of the making of the award appeal therefrom upon any question of law or fact to the court.

Sub-section 3.—The right of appeal hereby given shall not affect the existing law or practice in the province as to setting aside awards.

It is submitted on the part of the respondent that the provisions of the "Arbitration Act" of that province (ch. 6, of 1909) apply to arbitration proceedings under the "Railway Act," so long as they are not absolutely inconsistent with its provisions, and he relies on section 2 and section 17 of the "Arbitration Act."

Section 2 defines a submission as meaning a written agreement to submit differences to arbitration.

Then section 17 declares that

Whenever it is directed by any Act or Ordinance that any party or parties shall proceed to the appointment of arbitrators or appoint arbitrators as provided by this Act or that any party or parties shall proceed to arbitration under this Act or any similar direction shall be made with respect to arbitration under this Act, such direction shall be deemed a submission.

The "Railway Act" determines how the arbitrators are to be appointed and regulates to a certain extent their proceedings. But I cannot agree with the appellants when they claim that the provisions as to arbitration in the "Railway Act" are self-contained and constitute a complete code of provisions for the expropriation of land. Of course, in cases where the provisions of the "Railway Act" and of the "Arbitration Act" are inconsistent the "Railway Act" should prevail; but in virtue of section 17 of the "Arbitration Act," which I have quoted above, it seems to me that where there are no provisions in the "Railway Act" as to procedure or as to the power of the court then that procedure and those powers should be determined by the "Arbitration Act."

Now, by the "Arbitration Act," it is stated that in all cases of reference to arbitration the court may remit the matter referred to the reconsideration of the arbitrators (sec. 11). In the case of *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1), the Privy Council, in setting aside an award, ordered that the matter should be remitted to the arbitrators.

In the latter case the proceedings were instituted under the Dominion "Railway Act" in which we find provisions which might lead us to conclude that the arbitrators were *functi officio*. Those restrictions are not to be found in the "Railway Act" of Alberta.

It seems to me in these circumstances that the court below had the power to send back the matter referred to be determined anew by the arbitrators.

The respondent has made a cross-appeal and claims that the reasons given by the court below for setting aside the award should not be accepted.

The grounds upon which the court below set aside the award are that evidence was admitted which should have been rejected and that proper evidence was not admitted.

There is no doubt, in my opinion, that the Alberta "Evidence Act" applies to proceedings before arbitrators; sec. 2, sub-sec. 1. By the provisions of section 10 of that Act it is declared that the number of expert witnesses should not exceed three. The arbitrators in this case, however, have allowed a larger number of expert witnesses than the law permits to be examined. It was one of the grounds on which the court below found that the award should be set aside. I do not see any valid reason why this opinion should not stand.

(1) [1914] A.C. 569.

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It is not necessary for me then to examine the other question which was raised as to whether some evidence had been improperly excluded.

For these reasons the appeal and the cross-appeal should both be dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellants: *Short & Cross.*

Solicitors for the respondent: *Emery, Newell, Ford, Bolton & Mount.*

KATHERINE DONOVAN (PLAINTIFF)..... } APPELLANT;

AND

THE EXCELSIOR LIFE INSURANCE COMPANY (DEFENDANTS) } RESPONDENTS.

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*May 15.
*June 24.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION.

Life insurance—Delivery of policy—Condition—Instructions to agent.

D. applied to an insurance agent in St. John, N.B., for $1,000 insurance on her life. The application was accepted, the premium paid, and the policy forwarded to the agent, with instructions to reconcile a discrepancy between the application and the doctor's return as to D.'s age before delivering it. The agent then ascertained that the age of 64 given in the application should have been 65, and obtained from D. the additional premium required for a $1,000 policy at that age. A new policy was sent by the head office to the agent, who did not deliver it on hearing that D. was ill. She died a few days later. The beneficiary brought action for specific performance of the contract to deliver a policy for $1,000 or for payment of that amount. A condition of the policy sent to the agent was that it should not take effect until delivered, the first premium paid, and the official receipt surrendered during the lifetime and continued good health of the assured.

Held, affirming the judgment of the Supreme Court of New Brunswick (43 N.B. Rep. 580) and of the trial judge (43 N.B. Rep. 325), Davies and Brodeur JJ. dissenting, that there was no completed contract of insurance between the company and D. at the time of the latter's death, as the condition as to delivery of the policy and surrender of the receipt during the lifetime and continued good health of the assured was not complied with. *North American Life Assur. Co.* v. *Elson* (33 Can. S.C.R. 383) distinguished.

APPEAL from a decision of the Supreme Court of New Brunswick, Appeal Division (1), affirming the

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

(1) 43 N.B. Rep. 580.

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judgment at the trial(1) in favour of the defendant company.

The material facts are stated in the above headnote.

Daniel Mullin K.C. for the appellant. Sending the policy to the agent after the risk had been accepted constituted delivery and effected a binding contract of insurance. *North American Life Assur. Co.* v. *Elson*(2). See also *Holdsworth* v. *Lancashire and Yorkshire Ins. Co.*(3).

Fred. R. Taylor K.C., for the respondents referred to *Equitable Fire and Accident Office* v. *Ching Wo Hing*(4); *Canning* v. *Farquhar*(5); *Harrington* v. *Pearl Life Assur. Co.*(6); *Calhoun* v. *Union Mutual Life Ins. Co.*(7), in contending that *North American Life Assur. Co.* v. *Elson*(2) was not applicable under the terms of the policy in this case.

THE CHIEF JUSTICE.—This appeal should be dismissed with costs.

DAVIES J. (dissenting)—The defence set up by the insurance company in this action is, in my judgment, an unrighteous one. I am glad to be able to find that, so far as I am concerned, it cannot prevail.

The real questions, and indeed the only material ones, in my judgment, are whether the policy of insurance was legally delivered before there was a change in the nature of the risk, and, if so, whether condition 1 of the policy prevented it attaching.

(1) 43 N.B. Rep. 325.
(2) 33 Can. S.C.R. 383.
(3) 23 Times L.R. 521.
(4) [1907] A.C. 96.
(5) 16 Q.B.D. 727, at p. 730.
(6) 30 Times L.R. 613.
(7) 19 N.B. Rep. 13.

The application for insurance of Mrs. Donovan was taken by the provincial manager and forwarded by him to the company. On the 18th March, 1912, they had received the application, and wrote to their manager as follows:—

Toronto, March 18th, 1912.

F. S. Ferris, Esq.,
Provincial Manager,
St. John, N.B.

Dear Sir,

Re Application of Mrs. Julia Donovan.

We have accepted this application, and are issuing policy, but before delivering the same, you will please ascertain from Dr. Pratt that he has sent in his confidential report, and that it is satisfactory. It is not yet to hand.

You will also reconcile Dr. Pratt's statement that the applicant is sixty-five, whereas the applicant herself gives her age as sixty-four. In a case of this kind, in future, in view of the age, it is best that proof of age be submitted, with a view of the same being admitted on the policy.

Yours truly,

E. MARSHALL,
General Manager.

Now, I take it as clearly decided by this court, in the case of *North American Life Assurance Co.* v. *Elson*(1), that if the letter contained nothing more than the first two statements,

we have accepted this application and are issuing policy,

just as soon as the policy was executed and posted to the general agent, the contract of assurance would have been complete. If it was destroyed in the mail or otherwise lost, that would not have affected its validity nor could any action of the local agent do so. There would then have been a completed contract of assurance, the premium having been paid and accepted.

The question, however, in this case is whether the letter did not shew a qualified or conditional delivery,

(1) 33 Can. S.C.R. 383.

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and, if so, whether the conditions were complied with. I think it did, because the general agent was informed he was not to deliver the policy until he had ascertained, first, that Dr. Pratt had forwarded his confidential report and that it was satisfactory, and had

reconciled Dr. Pratt's statement that the applicant was 65, whereas the applicant herself gave her age as 64.

The policy itself, a 20-year endowment policy for $1,000 on the life of Julia Donovan, was issued by the defendant under its seal from the head office in Toronto, payable, in the event of the death of the insured, to her daughter, the plaintiff. The manager in St. John received it in due course of mail, and, in his evidence, says "he presumed he called upon Dr. Pratt," but could not remember whether he saw him, but he would not undertake to say that he did not see him.

He, then, to carry out his instructions, on March 26, called on the insured to reconcile Dr. Pratt's statement that the applicant's age was 65 years with the applicant's statement that it was 64.

The learned trial judge found as a fact that there had not been any wilful misrepresentation as to age, and that *at this time, March 26, when Ferris called, the applicant was in good health.* The learned judge says:—

I accept her statement that when Mr. Ferris called—that is to say, on the 26th March—her mother was in good health.

Mr. Ferris admitted that, in calling the plaintiff's attention to the alleged discrepancy between the age mentioned in the application and that reported by Dr. Pratt, she at once stated that her mother would be 65 on her next birthday. The agent and inspector of the company, Dr. King, who filled in the application, stated in his evidence that Mrs. Donovan had told him her age was 64 *at that time,* consequently she would be 65

on her next birthday, and the doctor had put her age for insurance purposes at 65, her next birthday.

These facts reconciled the apparent discrepancy, and Mr. Ferris, the provincial manager, then accepted from the plaintiff the $4.15 of additional premium, calculated on the age of 65, told her, after receiving it, that he would send back the policy to have the age and the premium corrected, and that, while it would be some days before he would receive it back, "in the meantime everything was all right." In this both the plaintiff and Mr. Ferris, the manager, agree.

He did mail it back to the head office the same day, 26th March, and on April 4 he received a corrected policy in accordance with the age discrepancy he had "reconciled."

At that time, Mr. Ferris says that, because he had learned of the then illness of the assured, he did not hand over the policy to her. He said he knew that the premium had been paid and that the company had been informed of the payment.

Now, with respect to the crucial point of the delivery of the policy, what is the proper inference to be drawn from the evidence as to whether the companys' provincial agent had ascertained

that Dr. Pratt's confidential report had been sent in and that it was satisfactory,

and that he, the agent, had reconciled the age discrepancy? Surely, only one inference can be drawn. He "presumed, he says, that he went to see Dr. Pratt" before going to see the insured. He cannot remember whether he saw him or not. It was his duty to see him, and the fact that after "he presumed he called upon Dr. Pratt" he went to the insured, reconciled the age discrepancy question, recovered the excess premium of $4.15 from her required because the assured's

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next birthday would be 65, and, on being asked whether everything was all right now, replied that it was—completes the necessary facts to enable a proper inference to be drawn from them.

The inference then and the only inference which can be drawn from these proved facts is that he had fully complied with his instructions as to Dr. Pratt's confidential report, and had subsequently satisfactorily "reconciled" the age discrepancy and then received the excess premium, and assured the plaintiff that everything was all right.

It seems to me from that moment the contract of assurance was complete, and that the company could have been compelled to issue a policy in accordance with it, and that, if the assured died in the meantime, there was a contract which the plaintiff, as beneficiary, could have enforced. The subsequent illness of the assured at the time when the rectified policy came back to the provincial agent, namely, the 4th April, could not operate to annul a completed contract. Manual delivery of the second or rectified policy was not essential to complete the contract. That was complete when the conditions contained in the letter from the general manager of March 18th had been complied with or at any rate when the new policy was executed and forwarded unconditionally from Toronto. The policy was merely the evidence of the contract.

It does not seem to me that the withholding of the manual delivery of the rectified policy from the assured by the provincial agent on April 4th, after he had unconditionally received it, because he heard the assured was then ill, could in any way operate to destroy or impair that completed contract.

The learned judges in the Court of Appeal for New Brunswick

inclined to the view that the first policy did not represent a concluded and completed contract expressive of their true intentions between the parties.

But, apart from that they held and, as I understand their reasons, they based their judgment upon the fact that the condition (1) of the policy had not been complied with alike as to its delivery and the surrender of the official receipt. That condition reads:—

> This policy shall not take effect until the same has been delivered, the first premium paid thereon and the official receipt surrendered to the company during the lifetime and continued good health of the assured.

I have already given my reasons for holding that there was a legal delivery of the policy, if not when the first policy was forwarded to the provincial agent and the instructions enclosing it complied with, at any rate when the rectified and fully executed policy was posted from Toronto on the 1st or 2nd of April, directed to the provincial agent *without any conditions as to its delivery*. That unconditional forwarding of the policy to the provincial agent operated in law as a legal delivery from its posting. The agent says distinctly that he did not get any letter of instructions from the company with that policy. They simply enclosed the policy and the official receipt to him, and, as he heard the assured was ill, he returned both to the company, and did not hand them over to the assured. As to the full premium, that had been admittedly paid and received, and as to the "surrender of the official receipt," there is not a particle of evidence that I can find shewing that any such official receipt ever was given to the assured which could be surrendered. On the contrary, there was merely a receipt for the monies paid given by the provincial agent, and it could not be contended and was not contended that such a receipt was in any sense an official

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receipt such as that referred to in condition (1), the official receipt there mentioned being, as I understand it, substantially an interim insurance issued by the head office and held by the assured until he receives his formal policy, and, when the latter is given him, the receipt is to be surrendered.

If no official receipt was given to the assured, and no one says it was, and there is no evidence from which it can be inferred it was, then it is plain that its "surrender" could not be required by the company before the policy attached and that part of condition (1) would not be applicable at all. It is surely plain and clear that the surrender up of the "official receipt" is only necessary in cases where such a receipt has been delivered. In this case there is no pretence that it was delivered.

As authority for this position taken by me, that there was a complete delivery of the corrected policy when, with full knowledge of the facts, it was executed by the officials of the head office in Toronto and mailed without conditions to their provincial agent in St. John, and, secondly, that, when received by that official, he had no power to cancel it, and that physical possession of the policy by the assured was not necessary to complete the contract, I rely not only upon the case already cited from this Court, but also upon the well-known case decided by the House of Lords, after having the opinions of the judges summoned before them, of *Xenos* v. *Wickham*(1).

The facts of that case, of course, are different from this, but the principles there laid down, it seems to me, govern this case. It was there held that

A policy of insurance purported to be "signed, sealed and delivered" by two of the directors of an insurance company in the presence of

(1) L.R. 2 H.L. 296.

their secretary, and according to the powers vested in the directors by the deed of settlement of the company. This statement was taken, as against the company, to be conclusive that it was not only duly signed and sealed, but also duly delivered.

A policy "signed, sealed and delivered" is complete and binding as against the party executing it, though, in fact, it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it.

That case was decided in 1867. Then, again, in 1896, the case of *Roberts* v. *Security Company*(1) was decided by the Court of Appeal, affirming the decision of the Divisional Court.

It determined two points: First, that when there was no evidence of a conditional delivery and when the policy was executed by the directors of the company, the insurance became effective and constituted a completed contract of insurance; and, secondly, that by the recital therein the defendants had waived the condition for prepayment of the premium, and, therefore, the policy had attached. On the first point, the language of Lord Esher is in full accord with the decision of the House of Lords in *Xenos* v. *Wickham*(2), and admits of no doubt as to the law.

The learned trial judge suggests that this decision of *Roberts* v. *Security Company* (1) had been questioned by the Privy Council in the appeal of *Equitable Fire Office* v. *Ching Wo Hing*(3), but a reference to the latter case shews clearly that the observation of Lord Davey, in delivering the opinion of the Judicial Committee, was confined solely to the second point decided in *Roberts* v. *Security Co.*(1) as to the recital in the policy operating as a waiver, and had nothing to do with the first point decided that the execution of the policy by the directors constituted a complete

(1) [1897] 1 Q.B. 111. (2) L.R. 2 H.L. 296.
(3) [1907] A.C. 96.

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contract, although the assured had not received physical delivery of the policy.

Then there was the case of *Canning* v. *Farquhar*(1), where the Court of Appeal decided that, the nature of the risk having been altered at the time of the tender of the premium, there was no contract binding the company to issue a policy.

But in the case before us there is no pretence for saying that, when the premium was paid in full and accepted by the provincial agent, who then wrote to the company, and when the company, acting upon their agent's letter, executed the new or later policy, the nature of the risk had been altered. The learned trial judge, on this crucial point, as I have already pointed out, found the fact in plaintiff's favour.

Lord Esher, in that case of *Canning* v. *Farquhar*(1), says, at p. 731:—

> When does the contract of insurance commence? It commences at the time when the premium is offered.

If at that time the offer of the premium is accepted and there has been no change in the nature of the risk, the negotiations for a contract have matured and the contract is complete.

That I take to be the substance of the decision in *Canning* v. *Farquhar*(1).

The text writers on the subject of insurance are, I think, quite in accord with what I have written as to the above several decisions which are binding upon us.

The grounds of my judgment for allowing this appeal are that there was no wilful misstatement of fact in the application for insurance by the deceased; that the first policy sent to the assured by the com-

(1) 16 Q.B.D. 727.

pany had been sent for delivery conditionally; that the two conditions, the seeing to the confidential report of Dr. Pratt and the "reconcilement" of the discrepancy between the ages of the assured as stated by her and that stated by Dr. Pratt, had been effected; that at the time the assured "was in good health," and the trial judge so found the facts; that the company had been informed by its agent of the true facts and of the payment to its agent of the full premium based upon the age of 65, and had then (2nd April, 1912), with full knowledge of all material facts, executed the second or corrected policy and mailed it to the agent without any conditions attached; that the contract of insurance was, if not before, then at least fully completed, and that there was no power on the part of the agent, on his receipt of the policy without conditions and simply on his then hearing of a change in the health of the assured, to withhold the policy or to attempt to cancel a completed contract.

I am, therefore, of opinion that the appeal should be allowed and judgment entered for the plaintiff for the amount of the policy executed by the company and mailed from Toronto to its provincial agent in St. John on the 2nd day of April, 1912, $1,000, with interest from the due date of that policy, and costs in all the courts.

IDINGTON J.—The findings of fact by the learned trial judge and maintained by the Court of Appeal have reduced anything involved in this appeal to the bare question of law relative to the delivery of the policy in question. The delivery of the first policy can certainly not be maintained as complete in face of the terms of the letter of March 18th, 1912, by the general manager to the provincial manager. If the

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conditions set forth in that communication had been complied with, then it would be fairly arguable that the company had intended to deliver the policy. If, for example, the provincial manager had been able to reconcile Dr. Pratt's statement that the applicant was 65 with the fact that the applicant had given her age as 64, there would have been much in favour of the appellant's contention. Inasmuch as it was impossible to reconcile these statements, it would seem to have been his obvious duty to return the policy as he did. There is, however, a statement in the application which must be taken to be the basis of the concensus of mind between the parties and to govern the question involved herein relative to the delivery. The application reads thus:—

> That any policy which may be issued under the application shall not be in force until the same be delivered and until the actual payment to and acceptance of the premium by said company, or its authorized agent, in accordance with the company's rules, during my lifetime and continued good health, and said premium shall then be considered to have been paid and the insurance to have been begun at the due date named in the policy.

In pursuance thereof it is competent for the company to define the mode of delivery by which it is to be bound.

The first condition of the policy provides:—

> 1. When Policy in Force.—This policy shall not take effect until the same has been delivered, the first premium thereon paid and the official receipt surrendered to the company during the lifetime and continued good health of the assured.

It seems to me impossible within the language of that condition to hold that it had been the intention of the company to deliver, or be held as having delivered, any policy unless and until the condition had been complied with.

As the policy and official receipt for the premium

were not dealt with within the terms of the said condition, the company cannot, I think, be held bound.

To hold otherwise would seem to conflict with the supreme rule, relative to the common purpose or intention of the parties thereto, which must govern this and every other contract.

The courts in both the cases of *Roberts* v. *Security* Co.(1) and the *North American Life Ins. Co.* v. *Elson*(2), so much relied upon by appellant, observed, or intended to observe, that rule, and only decided that, after fully assenting to an insurance contract, the insurer could not recede.

This company, now respondent herein, would seem to have taken special pains to avoid any misunderstanding by courts of its intention, though it may thereby have misled others.

I think the appeal must be dismissed with costs.

ANGLIN J.—There was no delivery of the first policy of insurance—that sued upon. By a condition of the application, delivery of the policy was made a prerequisite of the creation of contractual liability. The present case is in several particulars distinguishable from *North American Life Ins. Co.* v. *Elson*(2), relied on by the appellant, notably in that in the case now at bar the policy was sent to the company's agent not for unconditional delivery, as in the *Elson Case*(2), but to be delivered only upon conditions stated in the letter from the company to their agent referring to it. Instead of delivery being made when the agent called at the applicant's residence on the 26th of March, he became satisfied that there had been a misstatement of the age of the applicant—one of the matters sub-

(1) [1897] 1 Q.B. 111. (2) 33 Can. S.C.R. 383.

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ject to which the policy had been forwarded mentioned in the company's letter. He appears to have explained to the applicant's daughter (the plaintiff in this action), with whom he dealt on her mother's behalf, the effect which the difference between the age stated in the policy and the actual age of the applicant would have upon the amount that would be payable under the policy, and also to have informed her that for a slight additional premium a policy could be obtained which would entitle the beneficiaries to the full amount of the insurance. Thereupon it was determined that such a policy should be taken rather than the policy which the company had sent to the agent, and the policy so sent was accordingly returned by the agent to the company at Toronto with the additional amount of premium which he had obtained from the applicant's daughter. A second policy of insurance was thereupon prepared and forwarded to the agent, but it was not delivered by him because he learned that the insured was ill. The evidence clearly establishes that when the agent visited the house of the insured on the 26th of March for the purpose of discussing the difficulty arising out of the misstatement of age in the application for the first policy, the applicant had already become ill. She never recovered and died on the 7th of April. Her daughter deposes that she had been continuously ill for about three or four weeks before her death, and there is no contradiction of this evidence. In face of it, the finding of the learned trial judge that the plaintiff's mother was in good health on the 26th of March is somewhat difficult to understand. The application made continued good health of the insured at the time of payment and acceptance of the premium a condition of the policy coming into force. The conclusion, therefore, seems

inevitable that the risk never attached, and that the judgment dismissing the plaintiff's action is correct and must be affirmed.

BRODEUR J.—This is an action concerning a contract of insurance instituted in the following circumstances:—

In the month of March, 1912, the plaintiff's mother, Mrs. Donovan, expressed her wish to the agent of the respondent company to take a life insurance policy for $1,000. As she was then 64 years of age, the agent, however, would not receive the application before conferring with the company. He came back to Mrs. Donovan's residence a few days after, and an application was made for a policy.

She did not know how to read and write at all; the necessary answers were written by the agent. She declared that she was 64 years of age, and the agent, instead of entering 65 as being her next birthday, as required by the printed form, inserted by mistake 64, and received the payment as based upon the age of 64.

When she was examined by the doctor she must have made the same declaration about her age, but the doctor properly entered 65 as being her next birthday.

The policy was issued by the company and sent to the provincial manager in St. John, N.B. He was advised, however, that before delivering the policy he should

> also reconcile Dr. Pratt's statement that the applicant is sixty-five, whereas the applicant herself gives her age as sixty-four. In a case of this kind, in future, in view of the age, it is best that proof of age be submitted with a view of the same being admitted on the policy.

On the 26th of March the provincial manager called at the home of the assured with the policy, and the following occurred, as told by the plaintiff:—

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Q. Mr. Ferris came to the shop, did he?
A. Yes.
Q. You saw him personally?
A. Yes.
Q. Just tell us what took place, what he said to you?
A. He said he brought the policy and he opened it and he told me it was for $800; there was a mistake of one year in the age.
Q. Did he say this?
A. Yes, he said that. So he said to secure the other $200, to pay a few more dollars, and that would make the thousand; so he took away the policy and said it would be nine or ten days before the other would come back, but in the meantime that it was all right.
Q. What did you do when he said that?
A. I gave him the balance.
Q. How much?
A. I gave him a five-dollar bill and he gave me some change back.
Q. You gave him what he asked?
A. Yes, I gave him what he asked.
Q. What did he say then?
A. He said it might be nine or ten days before the policy would came back, but in the meantime everything was all right; that was all the conversation.

At that time the insured was in good health. Unfortunately, she took sick a few days after, and she died on the 7th of April.

In the meantime the policy was sent back to Toronto to be modified or to have a new one issued and a new one was issued on the 1st of April. When the agent received it, he did not make the delivery immediately, because he heard that the insured was sick, and after her death he went and offered to return the money.

The question is whether the plaintiff, in those circumstances, as a beneficiary under the policy of insurance, would be entitled to recover.

In the policy it was provided that, in order that a policy should be binding, it should be delivered. It is contended by the respondent that there was no delivery in the present case, and that, consequently, the contract was not binding.

It was decided in the case of *North American Life Assurance Co.* v. *Elson*(1) that an insurance policy having been sent from Toronto on the 27th September to the company's agent at Winnipeg and forwarded by him on October 1st to the insured, that the contract of insurance was complete; that the policy and receipt were delivered when the papers were mailed at Toronto on the 27th September.

It was contended in this case that the policy was binding, and, relying on that judgment in the case of *Elson*(1), that the policy was duly delivered when it was mailed from Toronto. But the instructions given by the company to their provincial manager in New Brunswick not to deliver the policy until he would have reconciled the different ages given by the agent and by the doctor may and must affect the case and lead me to distinguish this case from the *Elson Case*(1).

But when the facts had been ascertained by the provincial manager of the respondent and when he goes to the insured with the policy and when the facts and circumstances reported above have taken place, can it be said that there was actual delivery?

I am inclined to answer that question in the affirmative.

Constructive delivery has taken place. It is true that the policy had been given back to the manager to have another one issued for a larger amount, but there was, according to my opinion, a binding contract, which bound the respondent company for at least $800. The representations with regard to the age of the insured are not sufficient to invalidate the contract, because it was formally stated that if some

(1) 33 Can. S.C.R. 383.

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errors happen with regard to the age, the amount of the policy or the premiums varied.

I have come to the conclusion that there was a binding contract for $800, and that the judgment of the courts below dismissing appellant's action should be reversed.

The appeal should be allowed, with costs of this court and of the courts below.

Appeal dismissed with costs.

Solicitor for the appellant: *Daniel Mullin.*

Solicitor for the respondents: *Fred. R. Taylor.*

JAMES F. GILLIES (DEFENDANT).....APPELLANT; 1916

AND *May 31. *June 24.

N. B. BROWN (PLAINTIFF).....RESPONDENT.

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

Debtor and creditor—Surety—Statute of Frauds—Advances to company—Third party's promise to repay.

B., a director of a mining company, advanced money for the company's purposes, which G., the president and largest shareholder, orally agreed to repay.

Held, affirming the decision of the Appellate Division (35 Ont. L.R. 218), which reversed the judgment for the defendant at the trial (34 Ont. L.R. 210), Fitzpatrick, C.J., and Idington J. dissenting, that this was not a promise to pay a debt of the company and void as a contract by virtue of the fourth section of the Statute of Frauds; that G. was a primary debtor for the monies advanced by B. and liable to the latter for their re-payment.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, *Brown* v. *Coleman Development Co.*(1), reversing the judgment at the trial(2) in favour of the defendant.

The action in this case was brought against the appellant and the Coleman Development Co. to recover monies advanced by respondent for the company's operations, which, he alleges, appellant promised to repay. It was referred to a referee, who found that the promise of repayment was made, and gave judgment against the appellant and for the company. On appeal, Mr. Justice Middleton accepted the findings

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

(1) 35 Ont. L.R. 219.

(2) 34 Ont. L.R. 210.

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of fact by the referee, but reversed his judgment on the ground that the appellant's agreement was one to answer for the debt of the company and void under the Statute of Frauds. He gave judgment against the company, and dismissed the action against appellant. The Appellate Division restored the judgment of the referee.

Tilley K.C. and *H. S. White* for the appellant.

McCullough for the respondent.

THE CHIEF JUSTICE (dissenting).—It has been assumed that this case is concluded by the authority of decided cases, of which *Lakeman* v. *Mountstephen*(1) is a leading case. I think that is far from correct. All that was before the House of Lords, in that case, was the question whether there was evidence to go to the jury. *Per* Lord O'Hagan:—

> Our judgment proceeds merely on the ground that there was evidence to go to the jury.

In the present case, whilst fully admitting that there was evidence on which it was possible for the referee to find a primary liability of the appellant, this court has also to consider whether the facts establish such liability.

Although this court is reluctant to disturb findings of fact arrived at in the courts of original jurisdiction, yet this rule calls for a less strict observance where the finding is not of a judge or a jury, but a referee, whose decision may not command so much confidence. In the present case, moreover, the finding of the so-called fact is, in reality, rather an inference from the facts.

I am far from satisfied that the evidence shews an

(1) L.R. 7 H.L. 17.

original primary liability of the appellant to the respondent, but there is more than this. Lord Selborne, in the case above-mentioned, when laying down that there can be no suretyship unless there be a principal debtor, adds:—

> Who, of course, may be constituted in the course of the transaction by matters *ex post facto* and need not be so at the time.

In my view, the evidence does not support the conclusion arrived at below, and I would allow the appeal with costs.

DAVIES J.—The sole question in this case is whether the contract made between Brown and Gillies for the advances made by the former to the Coleman Development Company was one which involved a personal liability on Gillies' part, and, if it did, whether it came within the Statute of Frauds and was a promise to pay the debt of the company.

Mr. Tilley's argument was that the subsequent transactions with the company shewed that the contention as to Brown being a primary debtor was incorrect and, in fact, impossible.

I am unable to accept that contention, and think these subsequent transactions are quite consistent with Gillies' primary liability for the monies advanced by Brown. I agree with the Second Appellate Division in its conclusion as to the law on the proved facts. The findings of fact of the referee were accepted by Mr. Justice Middleton, who determined, however, against Gillies' primary liability.

Gillies' promise to Brown was, in effect: If you advance these monies to pay the accruing liabilities of the company, which I had agreed to do, but find myself at present unable to do, I will return them to you. It matters not that the monies advanced were for the

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advantage of the company. I think both parties fully understood that Gillies was the primary debtor to whom Brown looked for payment, and that the evidence shews this to be so.

It does not seem to me that the Statute of Frauds applies at all to a case such as this. That statute applies only to cases where the promise is made to the creditor or person to whom the debt is owing. A promise to a debtor to pay his debt is not within the statute. *Eastwood* v. *Kenyon*(1), in 1840.

I would dismiss the appeal with costs.

IDINGTON J. (dissenting)—This action brought by respondent Brown, as plaintiff, against appellant Gillies and the Coleman Development Company, was referred to the late Mr. Kappelle as official referee, and, after he had heard the evidence for plaintiff and part of that for the defence and died, the continuation of the reference was transferred to Mr. Cameron as official referee.

His report maintaining respondent's claim was reversed by Mr. Justice Middleton, and, on appeal, the report of the referee was restored.

The question of law raised is whether or not the contract, if any, between appellant and respondent falls within the Statute of Frauds, section 4.

In order to appreciate properly the facts, which one must have an accurate conception of in such cases in order to apply the law, I read the respondent's evidence, and found myself, from the peculiarities I found therein, compelled to read and consider the entire evidence in the case.

It is, unfortunately, by reason of the death of the learned referee, one of those cases where we cannot,

(1) 11 Ad. & E. 438.

as I conceive, rest satisfied with findings of fact, so far as dependent upon the relative credibility of the parties, by the judge upon whom it has devolved to finish a half-tried case. This is not the first of that kind to come here. He is in little, if any, better position than we when re-hearing trials upon mere depositions. Indeed, he may, in a sense, sometimes be in a worse, in case those coming before him happen to be possessed of a demeanour to impress him favourably.

The appellant was the owner of some mining claims and promoted the incorporation of the defendant company; became, and continued throughout, its president and possessor of $200,000 face value of its stock, as the price of conveying his claims to the company, and, later, acquired a very large number of shares to recoup him for advances to develop the property, and the solicitor who procured the charter was assigned stock in the way of compensation for his services, and became one of the directors.

Others seem to have taken merely the necessary stock to qualify them as directors, and a purchase by respondent from appellant, in the spring of 1906, of 500 shares left the appellant more deeply interested than all the rest combined in the success of the company.

By reason of his falling ill in July, 1906, and being unable for a time to look after the business, the solicitor suggested engaging respondent at ten dollars a day for two days in each week, and to this appellant assented.

He was engaged accordingly, and soon became also the secretary and a director of the company, which position he held during all the time we are concerned to know anything of their affairs.

He presented an account of $192—substantially—

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for services, at a meeting in July, 1906, and took payment in shares at 25c. a share.

On the 29th October, 1906, he presented another account for $800, and accepted payment in shares issued on same basis.

He would seem thus to have become a shareholder of a greater number of shares than any other person besides appellant.

His present claim rests upon an alleged conversation had in December, 1906, and the construction put thereupon.

His evidence is as follows:—

98. Q.—When did you commence advancing monies? A.—Along in December.

99. Q.—Of what year? A.—The fall of 1906.

100. Q.—How did you come to make those advances? A.—Mr. Gillies' money had run short, and he didn't want to discontinue the operations and have the company die out. He wanted to keep working, and he told me that if I would advance this money and keep the thing alive, that he had monies coming in and he would return it to me.

101. Q.—When you say "advanced" this money—what money? A.—Money to the workmen or to keep the operations of the company going. There were supplies and wages.

102. Q.—When do you say that arrangement was made? A.—Prior to the payment of this 4th December to William Hill.

103. Q.—Well, did you agree to that? A.—Yes, I agreed to it.

Either this story is true or false. It is unsupported by anything that can properly be called corroboration. It is absolutely denied by the appellant.

A perusal of the entire evidence leaves a most unpleasant impression as to each as a witness. The respondent, notwithstanding what he would have the court believe as to this bargain with appellant in December, 1906, presented, at a meeting 22nd January, 1907, an account for $2,800, admittedly comprising advances of the character he had just bargained so recently to look to appellant for repayment of.

If his story is true, then he had no right to render

this account to the company, so far as it embraces items for advances. His doing so tends to destroy belief in his story and helps us to credit appellant in his denial.

But what could he expect in way of repayment? He knew the company had no cash. And less than two months had elapsed since, if his story is to be believed in the sense he now asks the court to accept and act upon it, he was to look to appellant alone.

In presenting the account to the company, we hear nothing from him but a demand for stock at 25c. on the dollar, although believed by those at that meeting, including himself, to be worth par or perhaps twice its face value. He did not, when appellant resisted him, there turn round and demand the repayment from him of the money advanced. Why? Can there be a doubt in the mind of any one reading his evidence that he much preferred stock at 25c.?

Passing these men for the moment, there was in the person of the solicitor, also a director, another witness. He is one of repute and standing, whose veracity has not been questioned, and his version of what transpired does not agree with that of the respondent. And he denies the adoption of a resolution, whilst he was present, which is found afterwards written up in the minute book by the respondent in the following terms:—

Resolution passed by the Directors of The Coleman Development Company, Limited, on the 22nd day of January, 1907, at 9.30 p.m.

Present:—

James F. Gillies.
N. B. Brown.
John McKay.

Moved, seconded and resolved, that the account of N. B. Brown, amounting to the sum of twenty-eight hundred dollars, be paid by essuing stock at twenty-five cents per share amounting to eleven thousand two hundred paid-up shares, and the same is issued.

Carried

JAMES F. GILLIES, *President.*
N. B. BROWN, *Secy.*

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The appellant denies this, but has to admit his signature thereto. And counsel asks us to look at these signatures in the minute book and find, what he contends, that all appellant's signatures to a series of minutes were written at one time with the same pen and ink.

I did not hear this challenged as fact in argument, and, without posing as an expert, I may say it is to be regretted the point was not developed by expert testimony.

Whatever may be the facts, there is certainly a curious appearance in this alleged resolution, in which I take the liberty above of making the spelling conform with the signed minute instead of that in the printed case.

The sequel to this alleged resolution is also curious.

No stock certificates were issued until the following August, and then as of course by the respondent.

Assuming for the moment this only an accident and the resolution quite regular, if these two parties could manufacture wealth in that manner, why should the appellant not look to the company? Why should he pick out a man likely only, if paying personally, to pay only dollar for dollar, and let go the chance of multiplying wealth by an issue of stock?

The attitude of mind of the respondent Brown towards this company and its stock is illustrated by the following letter:—

Haileybury, Ont.,
March 10, 1907.

Mr. John McKay, Soo.

Dear Sir,—Your favour of the 8th inst. to hand, and, in reply, beg to say that, so far as I am concerned, I have no objection whatever to your selling your stock at $1.75. I would not like to see it put on here for less than 2.00, as a great many of the holders of it here have paid two and up as high as 2.60, the party who would be buying your stock would, in all probability, hold it at 2.00 or better—in that event there could be no harm done the holders here, as they are all

pretty well satisfied it will yet make them some money. Mr. Gillies has ordered a compressor plant, and when it is installed, which will be in the course of a couple of months, together with the depth we will be then on the big vein, I think the stock should sell at 5.00, they are down on the big vein about 10 to 12 ft. from where they are sinking to where the find was made it is as straight as a gun shot through that swamp the vein where they are sinking is about as wide but has not metal in it of course it is perhaps twenty feet higher than where it was first found. Mr. Gillies is in Toronto, has been sick I believe. I am expecting him back every day; you did not say if you got the bag of ore samples which I sent you.

Yours truly,

N. B. BROWN.

When brought face to face with this letter, he says he did not believe what he asserts therein.

I prefer to believe his letter to his frail memory.

And in that letter, read in light of the minutes of that January meeting, I can easily understand why a man, acting as the respondent did in relation thereto and holding such high hopes of the stock, should prefer looking to the company to recoup his advances by issues of stock at 25c. on the dollar, to charging up his advances dollar for dollar against appellant, whose possible means of repayment may have been dependent on same source.

Better an investment that might multiply ten or twenty times than one that could yield only five per centum per annum.

He has chosen to put his own interpretation upon the meaning of the conversation I have quoted by his own acts.

It seems to me the circumstance of the sending of an account by the plaintiff in the case of *Lakeman* v. *Mountstephen*(1), in 1874, had not by any means the same force as I think should be given here. I need not dwell on the attendant circumstances there. After all, that

(1) L.R. 7 H.L. 17.

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case had been submitted to a jury, and, as Lord Cairns presents the matter, all that was really involved in that case was whether or not there was evidence which should be submitted to a jury, and the jury had found for the plaintiff. I think Mr. Justice Middleton was right in the conclusion he reached, and that his judgment should be restored.

In all these cases the question is really one of fact, and, these once correctly appreciated and comprehended, there is not much difficulty in the law.

There is not much doubt in my mind but that, resting not on the alleged conversation of December, 1906, but upon what transpired between these parties later, the appellant owed the respondent in respect of some of the later advances, but the case has not been so developed as to enable any one to determine the exact truth and found a judgment thereon.

Mrs. Brown's evidence indicates and perhaps corroborates such a view. Beyond that her evidence cannot be stretched. The notes and cheques referred to by the parties needed some explanation by credible witnesses, who, no doubt, could have been got to render that part of the story intelligible and susceptible of judicial determination.

The memorandum of release signed by the parties suggests as much, but is far from furnishing proof of an indebtedness by appellant to the extent of $7,000.

It is the combined indebtedness of the company and of appellant that is therein dealt with.

That document, so far from being corroborative of the respondent's story and claim, seems to me destructive thereof.

The appellant certainly admits by it owing something for himself, but both parties clearly admit the company owed something as well as the appellant.

And, whatever each owed respondent, he agreed both together should be discharged for the sum of $7,000.

According to the contention now set up by respondent, the company owed him nothing. He had no contractual relations with them involved in the matters thus disposed of.

But it may be said his wages were intended. They were already obliterated.

I think the appeal should be allowed and the judgment of Mr. Justice Middleton restored.

ANGLIN J.—It has been held by an official referee acting as trial judge in this action, by Mr. Justice Middleton on appeal, and again, on a further appeal, by the four judges who constituted the Appellate Division, that the defendant made a promise of some sort to repay the monies advanced by the plaintiff to the Coleman Development Company. That finding is sufficiently supported by evidence, and the appeal against it is hopeless.

The only difference of opinion in the provincial courts was that, while it was the view of the official referee and of the learned judges of the Appellate Division that Gillies' promise was absolute and that of a primary debtor, Mr. Justice Middleton held that

> The promise made by Gillies was, in truth, a promise to answer for the debt of the company. * * * I think the true finding of fact ought to be that the company became debtor,

and he discharged Gillies under the fourth section of the Statute of Frauds.

Gillies absolutely denied any promise whatever. His denial was not accepted. The only version of the oral contract is that of Brown, who says that

> He (Gillies) told me that if I would advance this money and keep the thing alive, that he had moneys coming in and that he would return it to me.

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There is no direct evidence of any undertaking of liability by the company, although there is no doubt that the moneys were advanced for its benefit. Upon this evidence I agree with the learned judges of the Appellate Division that a case of direct and primary liability on the part of Gillies is made out.

There were, no doubt, a number of circumstances, as Mr. Justice Middleton points out, which afford somewhat cogent evidence that there was some sort of understanding that Brown would be paid by the company—the facts that accounts were rendered by him to the company covering both wages (for which its liability is admitted) and the advances which he claims Gillies promised to repay, and that the present action was brought against the company as well as Gillies. On the other hand, the plaintiff's particulars clearly distinguish between the two claims, and, in a document evidencing a settlement of the amount of Brown's claim at $7,000, Gillies authorized payment of that sum by one Cartwright, who held an option on Gillies' shares in the company.

Although the evidence in chief given by Brown was heard before another officer since deceased, Gillies' evidence and Brown's evidence in rebuttal were heard by the learned referee who gave the judgment, and who thus had an opportunity of observing the demeanour of both parties as witnesses. A careful study of the evidence in the light of the argument has not convinced me that the conclusion reached by the referee and unanimously affirmed on appeal by the Appellate Division, that the defendant became the primary and direct debtor of the plaintiff, is so clearly erroneous that it should be disturbed in this court. While I have little doubt that it was expected that in some way the monies advanced by Brown would be obtained from the company—and, had its affairs pros-

pered, that would in all probability have happened—I cannot find in the record any evidence which establishes that it ever incurred legal liability to him.

The appeal fails and should be dismissed with costs.

BRODEUR J.—This action had been brought to recover payment of advances made by the respondent, Brown, against the Coleman Development Company and the appellant, Gillies. His action was dismissed with regard to the company, but was maintained against the appellant.

The issue of fact was whether the defendant, Gillies, had agreed to reimburse those advances.

A long *enquête* has taken place, and it was found that the promise to pay, alleged by the plaintiff, was proved. The defendant now claims that his contract with the plaintiff was a contract of suretyship and not a direct obligation to pay.

I have perused the evidence in that regard, and I am unable to find that the facts disclosed shew that Gillies became the surety of the Coleman Development Company. He simply agreed to pay those advances.

It is true that Brown was in the employ of the mining company and that his salary was paid by the latter by way of issue of stock; but it is true equally that some advances previously made to the mining company by Brown were paid also in the same way. But, when large advances were to be made, it was agreed with the appellant, Gillies, that he would reimburse those advances. It was a personal and direct liability on his part, and he cannot now invoke the Statute of Frauds to prevent him from being liable under that contract.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. G. Slaght.*
Solicitor for the respondent: *S. W. McKeown.*

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*June 5, 6.
*June 24.

THE PIONEER BANK (PLAINTIFF)..—APPELLANT;

AND

THE CANADIAN BANK OF COMMERCE (DEFENDANT)..... } RESPONDENT.

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

Guarantee—Sale of goods—Payment of draft—Guarantee by bank—Bill of lading—Goods at disposal of consignor.

M., of Toronto, ordered two cars of oranges from a purchasing agent in California, and the Pioneer Bank cashed a draft on M. for the cost on receipt of the following telegram from the Bank of Commerce: "We guarantee payment of drafts on J. J. M. with bills lading attached * * * covering two cars oranges, etc." The goods were shipped and consigned by the bills of lading to "Mutual Orange Distributors (shippers) notify J. J. M." A note was printed on it to deliver without B/L on written order of shippers. When the goods arrived, M. refused to accept them, and an action was brought on the bank's guarantee.

Held, affirming the judgment of the Appellate Division (34 Ont. L.R. 531), Idington J. dissenting, that the Bs/L were not in a form to protect the defendant bank; that they left the goods under the entire control of the shippers and the guarantor was deprived of its security on the responsibility of its customer or the carrier; and that, though an action against M. for the price of the goods might have succeeded, that on the guarantee must fail.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial in favour of the plaintiff.

The material facts are set out in the above headnote.

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

(1) 34 Ont. L.R. 531.

Saunders K.C. for the appellant.

R. C. H. Cassels for the respondent.

THE CHIEF JUSTICE.—The appellant sued upon a contract contained in a telegram in the following words:—

Toronto, Ont., Nov. 21st, 1913.

The Cashier Pioneer Bank,
Porterville, Cal.

We guarantee payment of drafts on J. J. McCabe with bills lading attached not exceeding in all sixteen hundred and twenty-nine 70/100 dollars covering two cars oranges containing 396 boxes each in P.F.E. 8304 and P.F.E. 11914.

The bills of lading attached to the draft shew that the goods were consigned by the vendors, "Mutual Orange Distributors," to themselves and on the face of the bills appears:—

Note on Waybill.—Permit inspection without bill of lading. Deliver without bill of lading on order of Mutual Orange Distributors' Agent.

The contract is short, and, as I think, simple; indeed if it were not for the introduction into the case of matters foreign to it, there would not seem to be much room for difficulty. It cannot, I think, matter what were the motives of McCabe, the purchaser, in refusing to accept the goods; all that we have to consider is whether the conditions of the contract were fulfilled so as to render the guarantee binding.

A bill of lading is not a thing of little known or uncertain character; on the contrary, it is in every-day use and to a very wide extent in commercial transactions. I should suppose it would be difficult to find any business man who would consider that the bills of lading attached to a draft were such as the respondent intended and had a right to expect. They

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The Chief Justice.

carried no title to the goods as is proved, if proof were needed, by the fact that the vendors were able properly to, and did actually, divert one of the cars in transit. The appellant indeed can only support these bills by alleging some rather dubious customs of the fruit trade in California. I think the true explanation is that, as frequently happens in the conduct of business of every description, matters were dealt with in the most convenient and practical rather than strictly regular way. In the vast majority of cases, particularly when the parties are known to each other, such a course of dealing leads to no trouble; when it does, however, and it becomes necessary to resort to the courts to settle disputes that have arisen, it is only legal rights that can be considered. Mr. Hicks, the vendor's agent, says, in his evidence, that the bills of lading need not necessarily have been made out to J. J. McCabe

> because I knew that I was dealing with a reputable concern in the Mutual Orange Distributors, and I knew that they would not take McCabe's money and not deliver to him what I had bought for him.

An express and vital condition of the contract was not complied with and the obligation under the contract never attached.

It is unnecessary for me to add that if in this suit the issue was between McCabe and his agent in California I would in all respects agree with the trial judge; because I fear that in last analysis McCabe may be the party benefitted by this judgment I most reluctantly agree that this appeal be dismissed with costs.

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

IDINGTON J. (dissenting)—The appellant, being bankers in California, sued the respondent upon the following guarantee:—

Toronto, Ont., Nov. 21st, 1913.

The Cashier, Pioneer Bank,
Porterville, Cal.

We guarantee payment of drafts on J. J. McCabe with bills of lading attached not exceeding in all $1,629.70/100 covering two cars oranges containing 396 boxes each in P.F.E. 8304 and P.F.E. 11914.

(Sgd.) THE CANADIAN BANK OF COMMERCE.
Market Branch.
1.04 p.m.

This was given at the request of McCabe named therein and a dealer in such goods as specified, and was confirmed by a letter of same date signed and countersigned respectively, on behalf of respondent, by its acting manager and accountant.

The appellant relying thereon discounted a draft of one Hicks upon McCabe for the sum of $1,629.70 and complied literally with the condition in the guarantee by annexing the bills of lading to the draft.

The learned trial judge held that in doing so appellant, under the circumstances in question, had done all that was required of it to demand the observance of respondent's obligation.

Both he and the Appellate Division of the Supreme Court of Ontario recognize to the fullest extent the obvious facts that not only could the respondent bank or McCabe have got the two car loads of goods in question, if McCabe had so desired, but also that under the facts and circumstances there was no one else than McCabe or it, claiming or entitled to claim the goods in question.

I am, I respectfully submit, unable to understand how or why under such circumstances the Appellate Division can interpose in the terms of the guarantee a condition which is not expressed therein.

It is idle to suggest that sometimes and for argument's sake I will admit usually bills of lading of a certain class are made to so read that a delivery of

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the goods by the carrier shall be made to the shipper, or according to, and in compliance with, an order endorsed thereon. What has that to do with the real question? A bill of lading might be made to read, as it has been, to deliver to the bearer (See Scrutton on Charterparties and Bills of Lading, art. 56, p. 154 of 7th ed.) and then in such a case would the court insist that doing so was all wrong and should not be permitted? Are business men to be bound to follow and observe the notions of judges and courts as to how they should conduct their business and communicate to and with each other their understanding of what they intend? Or must not courts rather try to understand what men of business are about and see that their common purposes are fully and fairly executed, no matter how foreign the methods adopted may be to the ways in which the courts might desire to see them travel?

Indeed, in this very case, the bill of lading, which is the standard approved by the Interstate Commission and substantially adopted by our own Railway Commission, is headed "non-negotiable".

Yet I have no doubt that the goods were deliverable to the owner, whomsoever he might be, at the point of destination.

The method in use is shewn to be, to name a consignee and to let his directions be obeyed. To facilitate this business method a direction is given which all concerned and properly instructed in regard thereto understand the meaning of. That is to name someone at the point of destination to be notified. Such party, if nothing intervenes to create a conflicting right, gets, as of course, the goods. In this case the matter is disposed of on the face of the bill thus:—

Consigned to Mutual Orange Distributors. Notify J. J. McCabe.

And we are told the way bill was made so clearly in conformity with this method, that when one Moore, a local agent of the consignee, by mistake sought to divert one of the cars at Hamilton, he was called up on the phone by the railway company's agent at Hamilton and told that the direction as to that car was to notify J. J. McCabe at Toronto. Immediately he called on McCabe and asked him if those were his cars and was answered in the affirmative. McCabe himself had also been phoning to Hamilton to have one of these cars, then there on its transit towards Toronto, diverted there for a possible purchaser.

It seems this accidental circumstance of Moore's ineffectual attempt, led McCabe to inquire further. And, as the market was falling, when he learned the form of the bills of lading, he fancied he saw a dishonest means of escape from his obligations. Accordingly, without inquiry as to the real nature and effect of such form of bill of lading, he at once saw fit, without asking to see the bills of lading annexed to the draft, or the draft itself, which indeed had not yet been presented, to repudiate, and induce the respondent to repudiate, its obligations.

Both wired accordingly such repudiations to California; without waiting for presentations of the draft, or once attempting to get delivery of the cars by accepting the draft, getting the bills of lading and taking delivery of the cars, which beyond a shadow of doubt would have been accorded him, as the courts below both find. To maintain such a course of dealing seems to me to put a premium upon dishonesty.

Bills of lading and their indorsement, or want of endorsement, give rise to many questions, often difficult of solution, where there are conflicting claims to the property in the goods, or disputes involving

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something of that nature. But this case is entirely free from any of such embarrassments. It turns, or should turn, upon the obligations of respondent in guaranteeing and representing McCabe and enjoying whatever rights he might have, yet subject to the due observance of such obligations as rested upon him.

It is therefore well that we should appreciate exactly what these rights and obligations of McCabe were.

He was in communication with one Hicks, a broker at Potterville in California, and induced him as such broker to buy for him, McCabe, for shipment to Toronto, the two car-loads of oranges in question. Hicks on his behalf bought these two car-loads of oranges from the Mutual Orange Distributors, and, the bargain made, they loaded the cars accordingly, and to expedite the business started them on their way, consigned, as they had a right to do, to themselves, till the price paid. The need of getting this guarantee, before the appellant would advance the money to pay the price, took a day or two, I imagine. Be that as it may, the appellant advanced the money and the full price (less brokerage charges to pay Hicks) was paid the Mutual Orange Distributors, who thenceforward had no claim or possibility of claim on the goods.

Their right ceased thenceforth to divert or order any other delivery than to McCabe or any one, such as the bank, possessing the bills of lading.

It is idle therefore to point to the original memo. at the foot of each of the bills of lading as having longer effect on the destination of the goods.

Even the carriers, having notice of the facts, could no longer take any orders from such consignors

or consignees. No one else than McCabe had any rights in the premises saving only the bank holding the bills of lading, and them only, until he accepted the draft, when the appellant became bound to surrender to him the bill of lading, and entitled to look only to such acceptance and the guarantee of respondent.

When the draft was presented he refused instead of accepting it.

When the railway company tendered him the remaining car left after his interference with the other at Hamilton he refused that also.

The railway company upon delivery to it by McCabe, of the bills of lading without any indorsement by anyone, was bound upon payment of their freight to deliver to McCabe the goods which then and thereby should have become his property.

As I read the documents and the evidence and the law upon the subject as laid down in decided cases, that was his right. I respectfully submit it needed no telegraphing, as suggested by the learned trial judge, to reach that result. Nothing was needed but a straightforward honest and usual course to be pursued by McCabe in order to reap the fruits of the work of himself and of his own agent, for that was all that Hicks was in the premises.

The Mutual Orange Distributors never intended by taking the bills of lading in the form they did to assert or retain any property in the goods beyond the time needed for McCabe's own agent arranging to get the cash from the bank and pay them, and their surrender of the bills under such circumstances needed no endorsement of the bills.

Something was suggested in argument as flowing from what Moore, an agent of the vendors, had said. He had said, though he was not asked to do so, that

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he would give no order. It was urged that this supported respondent and McCabe's positions.

I interpret that incident as of quite the contrary effect. Moore had no more authority than any one else to interfere and it needed no help from him or his principals under the circumstances, as he well knew, to enable McCabe to get the goods.

I have not the time at my disposal to enter upon a long exposition of the law, but those desiring to find it can do so by reading the chapter in Scrutton's work, already cited, on the effect of endorsement and the cases therein referred to and the chapter in Leggett on Bills of Lading, part 4, pp. 611 et seq., the case of *Mirabita* v. *The Imperial Ottoman Bank*(1) and Benjamin on Sales, 5th ed., pp. 380 et seq., and pp. 395 and 396.

The peculiar facts of this case, including Hick's agency and the non-negotiable nature of the bill of lading and the intention of the parties, which must always be borne in mind, render it impossible to accept literally judicial dicta based on an entirely different sort of bill of lading and other purposes than evident herein.

I do not think if one reaches a correct view of the facts there need be much puzzling over the law.

Hicks swears he has handled during six seasons of such dealing from five hundred to a thousand cars a season and in seventy-five per cent. of the cases of shipment he had substantially acted as he did in this case and no difficulty had arisen in any one of them by reason of so doing.

I believe him. Business men and carriers find the honest simple course the best and that course

(1) 3 Ex. D. 164.

pursued by such men in California, where McCabe tried to do business and initiated this transaction, binds him.

The "Banking Act" I incline to think would have protected respondent if it had advanced the money and taken delivery of the bills of lading as they were presented. See sec. 87, sub-sec. 2.

Although having suggested that in the course of the argument as worth looking at I have not had time to form a definite opinion and express none.

The reasoning in the case of *Saunders Bros.* v. *Maclean*(1), properly applied, supports the appellant instead of respondent for whom it was cited. The respondent here is like unto the defendant there. See also *Anglo-Newfoundland Development Co.* v. *Newfoundland Pine and Pulp Co.*(2).

The appeal should be allowed and the trial judgment restored with costs.

ANGLIN J.—The sole question in this case is whether the bills of lading (so called) attached to the draft discounted by the plaintiff bank were in compliance with the terms upon which the defendant bank guaranteed payment of the draft. I agree with the learned judges of the Appellate Division that, in guaranteeing

payment of drafts on J. J. McCabe with bills of lading attached,

the guarantors were stipulating for documents to be attached to the draft which would exclusively entitle them or their customer McCabe (whom they knew and were prepared to trust) to delivery of the consignment from the carrier. The bills of lading in fact attached to the draft made the vendors, The Mutual

(1) 11 Q.B.D. 327. (2) 110 L.T. 82.

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Orange Distributors, consignees, and each on its face also bore this note:—

Deliver without bill of lading on written order of Mutual Orange Distributors' agent.

The way bills also carried the same note. The effect of these documents, according to their terms, was to leave the consignment under the control and subject to the order of the vendors, the Mutual Orange Distributors, and, if it had been delivered to them or upon their order or that of their agent, the carrier would probably have had a complete answer to any claim by the defendant bank. In other words, the effect of the bills of lading was that (if liable on its guarantee) the bank would have been compelled to trust for its security upon the goods to the responsibility of the Mutual Orange Distributors and not to that of its own customer or of the carrier, for which it had stipulated.

It was contended that in California, where the shipment was made and the draft discounted, it was customary for banks to accept a bill of lading under which the consignor should also be the consignee as equivalent to a bill in which the purchaser was named as consignee, and that when such a bill of lading had been issued the carrier would make delivery to the person producing it and to him only. It is possible that if this had been the situation the stipulation upon which the bank guaranteed payment would have been complied with. But there is no evidence that it was customary in California or anywhere else to treat a bill of lading, bearing a note, such as that placed upon the bills here in question, entitling the carrier to deliver without production of the bills of lading, as equivalent to a bill of lading wherein the purchaser was named as the consignee, or that such a

bill of lading would exclusively entitle the person producing it to delivery from the carrier. As Mr. Justice Riddell said, while the defendant bank may not have been entitled to have McCabe named as the consignee rather than the vendors,

the effect of the added clause permitting delivery without bill of lading on the mere order of the consignors (consignees) is different.

Again to quote from the opinion of the learned appellate judge (Riddell J.)

Looking now at the transaction in question, the object of attaching the bills of lading to the draft was the security of the Bank of Commerce. This might have been effected by a bill of lading properly drawn and (or) indorsed, whereby the bank became entitled to the goods themselves. This was not asked for. Or the bill of lading sent forward might be for the protection of the bank in that the bill of lading, being in their hands, no one could legally obtain possession of the goods covered by the bill of lading without the bank's consent. It seems to me clear that both banks quite understood that such a protection should be afforded by the bill of lading, and that anything, even though called a bill of lading, which did not afford that protection to the Bank of Commerce would cause "such a failure of consideration as can not have been within the contemplation of either side": *The Moorcock*(1), at p. 68, *per* Bowen L.J.

Admittedly the bill of lading sent did not, as it could not, prevent the goods being dealt with (and lawfully dealt with so far as the carrier is concerned) without the bank's consent; and therefore, in my opinion, this was not such a bill of lading as the Canadian bank had a right to receive before being bound by their guaranty.

Much was made in the argument of the words, "notify J. J. McCabe," which followed the name of the consignee on the face of the bills of lading. But these words are under the heading

Mail address, not for the purpose of delivery,

and do not import any right to delivery in McCabe. They were probably meant to enable McCabe, upon advice from the carrier of the arrival of the goods,

(1) (1889) 14 P.D. 64.

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to take steps to obtain a right to delivery under the terms of the bill of lading. As a fact, on application to the consignor's agent, McCabe was refused an order for delivery without instructions from the consignors, which were not given.

It may be that by some means or device McCabe could have got the goods from the carrier on their arrival at destination. It may be that, if sued for the price by the vendors, McCabe would have no defence to the action. But it does not follow that there was compliance with the terms on which the defendant bank agreed to assume the liability of a guarantor. Those terms were that from the moment that liability should arise, *i.e.*, from the time at which the draft should be discounted by the plaintiff bank, the guarantor should have, through the bill of lading attached to the draft, such security as would be afforded it by goods held by the carrier subject to delivery only to itself or its customer McCabe. In my opinion the defendant bank did not receive the consideration for which it stipulated as a term of guaranteeing the draft on McCabe and on that short ground its defence should prevail.

For authorities shewing the necessity for strict compliance with the terms of a guarantee reference may be made to DeColyar on Guarantees (3 ed.) p. 201 n. (*i*) and 15 Halsbury, Laws of England, page 479, par. 914.

I would dismiss the appeal with costs.

BRODEUR J.—I concur with MR. JUSTICE ANGLIN.

Appeal dismissed with costs.

Solicitors for the appellant: *Saunders, Torrance & Kingsmill.*

Solicitors for the respondent: *Blake, Lash, Anglin & Cassels.*

THE INGERSOLL TELEPHONE COMPANY AND OTHERS ..... } APPELLANTS;

AND

THE BELL TELEPHONE COMPANY OF CANADA ..... } RESPONDENTS.

1916
*June 14.
*June 24.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railway Board—Powers—"Railway Act" and amendments—Bell Telephone Co.—Use of long distance lines—Compensation—Loss of local business—Competing companies—Special toll.

Under the provisions of the "Railway Act" and its amendment by 7 & 8 Edw. VII., ch. 61, the Railway Board has power to authorize a charge in addition to the established rates of the Bell Telephone Co. as compensation for the use of its long distance lines. Idington J. *contra.*

By said Acts the Board is authorized to provide compensation to the Bell Telephone Co. for loss in its local exchange business occasioned by giving independent companies long distance connection. Davies and Idington JJ. *contra.*

The Board has power also to authorize payment of a special rate by companies competing with the Bell Co. who obtain the long distance connection, though non-competing companies are not subjected thereto. Idington J. *contra.*

APPEAL from the Board of Railway Commissioners for Canada, by leave of the Board, on certain questions of law.

Said questions of law are the following:—

1. "Whether the Board had power, under the 'Railway Act' and amending Acts, to authorize the charging of any additional toll or charge outside the established rates of the Bell Telephone Company of

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

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Canada as a condition precedent to or compensation for the use of long distance lines of the said Bell Telephone Company of Canada.

2. "Whether the Board is authorized, under the 'Railway Act' and amending Acts, to give compensation in respect of the loss of business to the Bell Telephone Company's local exchange business, occasioned by giving independent companies long distance connection.

3. "Whether the Board has power to authorize the payment of a special toll as a condition precedent to companies competing with the Bell Telephone Company obtaining long distance connection with the Bell Telephone Company while not subjecting non-competing companies to a like toll in view of the provisions of the Act relating to discrimination."

Gamble K.C. for the appellants referred to the London Interswitching Case, *Grand Trunk Railway Co.* v. *Canadian Pacific Railway Co. and the City of London*(1).

Cowan K.C. and *Hoyles* for the respondents.

THE CHIEF JUSTICE.—The Bell Telephone Company, hereafter referred to as the Company, operating under a federal charter, carries on business throughout Canada. At its origin the company established a system of telephone lines to serve the local needs of cities, towns and villages, and, as the necessities of its customers increased, long distance lines were built to connect those localities with one another and with localities similarly situated in the United States. Finally, the system developed to such an extent that practically the whole Dominion east of Port Arthur

(1) 6 Can. Ry. Cas. 327.

was provided with a complete telephone service operated free from public control, and, consequently, without regard for the public convenience, except in so far as consistent with the interests of its shareholders. In the course of this development, the desire for telephone service spread so that, to satisfy the wants of rural municipalities, which were dissatisfied with the service rendered, small local companies were organized, sometimes in competition with the local exchanges of the Company, and, in some instances, in places to which the latter had not furnished a service; those companies so established are known in these proceedings as "independent companies."

In the course of time, the communities served by the independent companies desired closer connection, but presumably the capital and experience necessary to establish and profitably maintain the connecting links were not available. A convenient way to satisfy that desire was found in the Company's long distance system. Apparently, the latter company, not anxious to satisfy the wants of their local competitors, refused the relief asked for, hence the usual agitation, resulting in an application to Parliament for the appointment of a parliamentary commission of inquiry, and, on the report of that commission, an Act was passed the purpose of which, as disclosed by the title, was to bring telegraph and telephone companies under the jurisdiction of the Board of Railway Commissioners.

By that Act, ch. 61, 7 & 8 Edward VII., complete control was given to the Board for the regulation of the business of the Company.

By section 4, sub-section 5, of the Act, it is provided, in substance, that any company, province, municipality or corporation, having authority to construct and operate a telephone system, and which desires to be

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connected with and to use any long distance telephone system then in existence, and whether such company is under the control of Parliament or not, may apply to the Board, if no private agreement can be obtained, for relief, and the Board may, in the words of the section,

> order the company (*i.e.*, the company which owns, controls, or operates the long distance telephone system) to provide for such use, connection or communication upon such terms as to compensation as the Board deems just and expedient, and may order and direct, how, etc., when, where and by whom, etc. * * *

By sub-section 6 of section 4 it is provided that the Board shall, in addition to any other consideration affecting the case, take into consideration the standards of efficiency and otherwise of the apparatus and appliances of such telephone systems or lines, and shall only grant the leave applied for in case and in so far as, in view of such standards, the use, connection or communication applied for can, in the opinion of the Board, be made or exercised satisfactorily and without undue or unreasonable injury to, or interference with, the telephone business of the Company.

So that, in effect, the statute provides for the use by local companies of long distance lines on two conditions: (1) The Board must be satisfied, as a condition precedent, that the apparatus of the applicant company is of such a standard as to efficiency or otherwise as to permit the use or connection without undue or unreasonable injury to the long distance line; and (2) the Board may order the connection with and the use of the long distance line upon such terms as to compensation as it deems just and expedient.

It is quite obvious that the Act, whilst giving the Board absolute power of control over all companies for the purpose of regulating the interchange of business

in the public interest, has been careful to require a proper standard of efficiency with respect to equipment and provides for the protection of the rights of the shareholders of the Company, whose property may be appropriated to the use of the independent companies. But the statute does not contemplate the regulation by the Board of competition between public service corporations, and I can find nothing in the reasons given by Commissioner McLean, speaking for the majority of the Board, to justify the assumption that the Board attempts to do anything in that direction.

I quite agree with the late Chief Commissioner Mabee, who said that in most public services competition is desirable in the public interest, but a duplicating of telephone systems is a nuisance. What is required and what the Act contemplates is efficient regulation of the conditions under which the telephone companies are to co-operate in the exchange of business facilities.

In 1911 an application was made to the Board, under the Act, by several independent companies, for permission to connect with and use the long distance line of the Company. At the time about 378 private contracts had been made for that purpose, and, as a result of that application, it was ordered that the Company should connect its long distance telephone system or line with the lines of the applicant companies, subject to certain conditions as to cost of building the connecting lines. The order also provides for the payment to the Company on outbound traffic of a connecting toll of fifteen cents for each long distance message originating upon the lines of the applicant companies and transmitted over the line of the Company, in addition to their long distance tariff.

It is to be noticed that what is called "inbound traffic"—that is to say, traffic originating upon the

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Company's system destined to local points upon the lines of the various applicants—is exempt from this toll.

So that, in substance, it was decided that, if the apparatus of the applicant companies was of the required standard of efficiency, the long distance line built and operated at the expense of the shareholders and subscribers of the Company should, with its staff of operators, be placed at the service of the applicant companies subject to the conditions above mentioned.

It was provided at the same time that this order was to remain in force for a period of at least twelve months, leave being reserved to move to rescind or vary the order at the expiration of that period should any of the parties so desire. Taking advantage of this reservation, the Company asked to have the order rescinded. The independent companies, in reply to that application, asked to have the order maintained, and, at the same time, said that the charges for long distance connection have been and are unfair to the shareholders of those independent systems inasmuch as the toll for long distance connection is altogether too large. There is apparently no complaint with respect to the charge for connecting the lines.

As the result of that application an order was made by the Board providing for, as regards non-competing companies, (1) payment of an annual charge by way of compensation for loss to the Company, as well as for the factor of convenience to the independent subscriber; (2), as regards competing companies, an annual charge is imposed and also a surchage of ten cents on each communication.

The Chief Commissioner dissented from the order, and, in those circumstauces, the following questions are put to us:—

1. Whether the Board had power under the "Railway Act" and amending Acts to authorize the charging of any additional toll or charge outside the established rates of the Bell Telephone Company of Canada as a condition precedent to or as compensation for the use of long distance lines of the said Bell Telephone Company of Canada.

2. Whether the Board is authorized under the "Railway Act" and amending Acts to give compensation in respect of the loss of business to the Bell Telephone Company's local exchange business occasioned by giving independent companies long distance connection.

3. Whether the Board has power to authorize the payment of a special toll as a condition precedent to companies competing with the Bell obtaining long distance connection with the Bell, while not subjecting non-competing companies to a like toll in view of the provisions of the Act relating to discrimination.

I would answer them all in the affirmative.

I am of opinion, as I have already said, that the evident intention of Parliament was to give the Board, in the public interest, absolute power to regulate this public utility, which has grown to be almost an essential factor in the every-day life of the whole community, and for that purpose has conferred the widest discretion upon the Board. In that view I fail to see the practical use of this reference, but the questions are before us and must, therefore, be dealt with.

The statute authorizes the Board to oblige the Company to: (1) Give a connection with its long distance line to local companies; (2) to give those local companies the use of its long distance line for the benefit of the subscribers of such local companies.

In other words, the Board is authorized to expropriate the Company for the benefit of the independent companies, but the Act provides, as common sense and the general principles of law applicable in like cases require, that this may only be done

upon the condition that the equipment of the connecting company shall be such as not to impair the efficiency of the service and upon such terms as to compensation as the Board may deem "just and expedient."

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In other words, the statute requires that the Company should not, in the language of the Quebec Code, be compelled to give up its property

except for public utility and in consideration of a just indemnity previously paid.

I, therefore, construe the Act to mean that power is given the Board to expropriate the Company, to a limited extent, for the benefit of those independent companies, provided it can be done consistently with an efficient service and upon payment of compensation. And large discretionary powers are given with regard to the compensation to be paid by the use of the words, "just and expedient." That is to say, it is left to the commissioners to decide what compensation is, in all the circumstances, "just and expedient" for the use of the connection or communication. If an additional toll or charge, outside of the established rates of the Company, is, in the opinion of the commissioners, necessary to compensate that company for the use of its long distance line, then the statute authorizes the Board to make that charge.

I have no doubt also that the statute authorizes the Board to give compensation with respect to the loss of business of the Company occasioned by giving to local companies long distance connection, and also to make a distinction between the local companies which are called competing companies and those known as non-competing companies.

Speaking of the conditions under which the Company carries on its operations, Commissioner McLean, who delivered the opinion of the majority of the Board, says:—

In the annual payment made by each of the Bell Telephone Company's subscribers there is, in reality, included some contribution not only to the initial cost but also to the maintenance cost of the Bell

long distance equipment. * * * In the Bell annual local service no particular part of the charge is ear-marked for the long distance service, although the long distance is part of the general service which all the earnings assist in maintaining. * * * There is a flat annual service charge. The contribution towards initial and maintenance cost which is contained in the annual payment of the Bell Telephone subscriber is a factor which is peculiar to the Bell Telephone Company subscriber, and is not properly allocatable to the user of the independent telephone who may for the time being be using the Bell long distance equipment. In the case of the Bell subscriber there is a question of joint costs, some contribution to long distance cost being made by an actual user of the local telephone service, who is also an actual or a potential user of the long distance service.

If, as found by the Board—and the fact is not disputed—the long distance line is a charge on the whole Bell system because it was built out of the general capital and is maintained at the expense of the profits made out of the operation of the local exchanges, then it would seem "just and expedient" that, in fixing the compensation to be paid for the use of that long distance connection by a company which has not contributed either to the initial cost or to the maintenance cost, the factor of competition as it is described in the question, with the local exchange should be considered.

In other words, if the long distance lines are, as we must assume, when built, a charge on the Company shareholders and subscribers, and if in their operation a loss is incurred which must be borne by the local Bell Telephone exchanges, then is it not just and equitable that the independent company operating in the same area as the local exchange should also contribute by the surcharge to that loss in the upkeep of the long distance line which is placed by the Board at their disposal? The subscription of the Bell customers being, of course, fixed by the charges which the Company has to meet for the upkeep of its whole system, which includes the long distance and local service, then it is just and expedient that the share-

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holders of the independent companies who have the use of the same service should also contribute by the surcharge to the maintenance of the long distance service.

If the Commissioners deem it expedient to place those localities to which the Company has not given a local service on a more favourable footing, it is within their discretion so to do.

DAVIES J.—The three questions of law which are submitted for our consideration and answer by the Board of Railway Commissioners do not call for or justify any consideration on our part of the desirability or undesirability of duplication and competition, which were referred to and discussed shortly at the argument. Those are matters entirely for the Board to consider and weigh in coming to their conclusions.

We are asked substantially:—

(1) Whether the Board had power to authorize the charge of an additional toll outside of its established rates by the Bell Company in part compensation for the use of its long distance line.

(2) Whether the Board can give compensation to the Bell Company in respect of its possible loss of local exchange business occasioned by giving independent companies long distance connection; and

3. Whether the Board has power to authorize the charge of a special toll to competing companies without subjecting non-competing companies to a like toll.

The answers we are to give to these three questions depend upon the construction we give to sub-sections 5 and 6 of section 4, 7 & 8 Edw. VII., ch. 61, and such parts of the "Railway Act" as may apply.

It seems to me, in construing these sections, that two things have to be decided by the Board:—First,

whether the application for long distance use and connection *should be granted at all;* and, next, if so, upon what terms as to compensation.

Sub-section 6 expressly enacts that the Board shall, *in addition to any other consideration affecting the case,* take into consideration the standards as to efficiency and otherwise of the apparatus and appliances of the applicant's telephones, systems or lines, and shall *only grant* the leave when, in view of such standards, the connection asked can be

exercised satisfactorily and *without undue or unreasonable injury to or interference with* the telephone business of the company,

with which connection is sought.

I would construe this section as prohibiting the granting of the connecting order unless the Board, after considering everything affecting the matter of the application, including the applicants' standards of efficiency of its apparatus and appliances, was satisfied that the connection and use sought would not *unduly injure or interfere* with the telephone business of the company sought to be connected with.

The Board must, before granting the order, be satisfied that no such undue injury will result from granting the connection asked for.

If they cannot so satisfy themselves, they should not grant an order at all.

The language of the 5th sub-section is permissive—may order the connection sought. That of the 6th sub-section is conditional—they shall *only grant* when under certain conditions specified they find the granting of the order will not cause *undue or unreasonable injury to the business of the long distance company.*

When they have so decided, then and then only can they proceed to the question of compensation. It is not a question to be determined that there shall be

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no loss to the long distance company, but that there shall not be *undue or unreasonable* loss to the business of the company. Some loss evidently was contemplated as naturally arising from the granting of the connecting order. If that loss would constitute "undue or unreasonable interference with the telephone business of the company," the order should not be made.

The 6th sub-section provided for the conditions under which the order should or should not be made, and the 5th sub-section for the compensation which should be granted if and when made.

Commissioner McLean construed the 6th sub-section as confined to injury or interference with the company's business arising out of the use of improper appliances by the connecting company.

I cannot put such a narrow construction upon it, in view of the language used:—

> Upon any such application the Board shall *in addition to any other consideration affecting the case* take into consideration the standards, etc.

These latter were, from being specially mentioned, no doubt very important factors for the Board to consider; but they constituted only one factor

> in addition to any other consideration affecting the case.

The result of my construction would be that no order should be granted in any case where it was found that it would result in *undue or unreasonable interference* with the company's business, and that, where such a result was not found and the order was made, the compensation which the 5th sub-section authorized them to award as just and expedient was confined to compensation "for the use, connection or communication" granted, as expressed in the sub-section, and did not authorize compensation for losses which possibly

or probably would or might be caused to the company with which the connection was ordered in its local exchange business. I am quite in accord with Sir Henry Drayton's statement, in his reasons for the dissenting opinion he delivered, that he was "unable to read the somewhat extended clause here applicable as creating a new and novel law of compensation covering the business losses suffered by one public service corporation as the result of competition with another public service corporation."

I agree with him that these possible business losses were not matters the Board was concerned with unless they were found so great as to justify the refusal of the order, as before explained, and that, as Sir Henry puts it,

> compensation for the actual use, connection or communication for the actual facilities supplied and for its subsequent use

is all that the Board can consider and award.

I will not elaborate the matter further, but, in view of what I have said, would answer the questions as follows:—

In answer to the first question:—Yes.

(2) In answer to the second question:—No.

(3) In answer to the third question:—Yes.

I answer the third question in the affirmative because of the special reasons for its insertion in the order as explained by the Assistant Chief Commissioner in his written reasons, concurred in by the other commissioners, except the Chief Commissioner. It seems to have been a clause expressly desired by the appellants and agreed to by respondents, and was not a clause inserted in the order by the Board of its own volition, but simply because it was agreed to by the parties themselves.

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IDINGTON J.—This appeal suggests we should once more turn to the rules in *Heydon's Case*(1), to be found in Craies' Hardcastle at page 104 (2 ed.), and have regard especially to the holding following them expressed as follows:—

> And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.

What was the mischief intended to be remedied by the enactment in 1906, 6 Edw. VII., ch. 42, sec. 31, and substituted by 7 & 8 Edw. VII., ch. 61, sec. 4, sub-sec. 5?

That suggests another question:—What was the mischief intended to be remedied by the "Railway Act's" provisions constituting a Board of Railway Commissioners?

Was it not that the railway companies had forgotten that they owed a duty to the public to furnish facilities for traffic, interchange of traffic, and equality of treatment, both as to rates and otherwise, of everyone offering them business?

It was, no doubt, shocking to the minds of those railway managers, who acted in the single pursuit of what they imagined was their only interest and duty, to be told that they must serve the public, and each member of the public, upon the same basis of compensation and accommodation, and give every facility for accomplishing that service, no matter if it should turn into a rival's lines part of the haulage they had previously deemed their own preserve.

To enforce these obligations the Board of Railway Commissioners was created.

(1) 3 Coke 8.

And when the principles in question had been thus by law established and thus enforced, it seemed to open to Parliament the way for applying similar treatment to the respondent and other like companies dealing not in haulage, but means of communication.

Their rivals in business insisted that it was the public that was to be served and facilitated in business, and, in order that the public might be properly served, connections must be made.

The cases were so much alike; the remedies to be applied so much alike; and the interference with vested rights, bringing liabilities to losses of business to be reaped by upstart rivals, so much alike, that it would seem as if Parliament had only to recognize these facts and then place the telephone companies under the jurisdiction of the Board.

Of course, all that was very shocking to those who had, by the gracious wisdom of Parliament, acquired valuable rights over public highways without giving any compensation or even asking leave of those concerned.

It would seem, however, after having been so favoured, that the public in many cases was not adequately served or charged too much for the service, and hence I gather there sprang up local rivals, more willing to serve or more moderate in charges, or possibly both.

It is suggested even municipalities and provinces were possibly willing to supply the needed want of rural telephone service especially.

Parliament deemed it proper that the respondent and others should not refuse those rivals proper and efficient service, and ordered accordingly, by amending the "Railway Act," and by making the provisions of that Act applicable as follows:—

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The several provisions of the "Railway Act" with respect to the jurisdiction of the Board, practice and procedure, upon applications to the Board, appeal to the Supreme Court or the Governor-in-Council, offences and penalties, and the other provisions of the said Act (except sections 9, 79 to 243, both inclusive, 250 to 289, both inclusive, 294 to 314, both inclusive, 348 to 354, both inclusive, 361 to 396, both inclusive, 405 to 431, both inclusive), in so far as reasonably applicable and not inconsistent with this part or the special Act, shall apply to the jurisdiction of the Board and the exercise thereof, created and authorized by this Act, and for the purpose of carrying into effect the provisions of this part according to their true intent and meaning and shall apply generally to companies within the purview of this part.

Of those enactments thus made applicable in principle, there appear, under the caption of "Equality," a number of sections which the order appealed against seems to me to clearly transgress.

And let it be observed that in the first two lines of section 5 I have just quoted, it is "with respect to the jurisdiction of the Board," these parts of the "Railway Act" stand effectual.

Why did Parliament so enact if it intended in truth to help respondent to squeeze rivals out of existence by means of gross inequalities of tolls and impositions?

Clearly, each of these companies had gathered together, by local influence and energy and low rates, a business that the respondent might have had, but, for want of energy or timidity or excessive charges, had failed to acquire and hold. And that business must be paying its way, but possibly doing no more. And this inequality (expressed in the order now complained of), in defiance of what the provisions of the "Railway Act," by being left applicable thereto, surely intended to be the measure of the Board's jurisdiction, may enable the respondent to reap where it had not sown.

Such a clear purpose cannot be swept away by the interpretation of the words,

and the Board may order the company to provide for such use, connection or communication upon such terms as to compensation as the Board deems just and expedient, etc.

If Parliament really intended to compensate by the destruction of other companies, it should and, no doubt, would have said so.

Moreover, I repeat, it was the public that was to be served and that upon an equal basis of service was what Parliament had in view.

It never could have intended that rural subscribers to the only 'phone company they could get in communication with, were to be penalized for so subscribing.

It is not a question of the rate compensating, for admittedly the ordinary rate would be ample for the service, and needs no surcharge, unless when people have been wicked enough to ignore the respondent.

Substantially such things as set up by respondent happened many times to rival railway companies in the administration of the "Railway Act" in the new departure made, and intended to make the companies realize that it was the public service that must be the key note of their conduct towards each other.

The *London Interswitching Case*(1), when before this court, seemed to me a pretty strong application of the principles invoked therein, and on the basis adopted below for doing justice herein seemed possibly to work an injustice, but I never doubted the correctness of the law as laid down by the late Mr. Justice Killam, acting as Chief Commissioner of the Board, and maintained by this court.

That kind of thing resulting from this sort of legislation never can have been conceived as an injustice by the legislature enacting it. They recognize it may

(1) 6 Can. Ry. Cas. 327.

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to-day work apparent injustice in one place and give a compensating advantage in another. And, if not, the march of events can take no account of such gains or losses as injustice.

And when Parliament imposed upon the Board the duty in question of fixing a just compensation, it never could have intended the Board to do more than the words mean, a just compensation for a service which cannot be measured in one town or township by one method or measure and an entirely different method or measure resulting in lower charges for the service in the next town or township, perhaps further away.

The limited power or jurisdiction of the Board to try and do justice, in making its orders, by importing into the business in hand a something not provided in the Act, but yet a smoothing out of the crudities of the legislature and avoiding injustice, was well illustrated in the case of *The Grand Trunk Pacific Railway Co.* v. *City of Fort William*(1), where the Board, on an application to run over a public street, imposed the condition that the adjoining owners on the street should be compensated.

The majority of this court held that, by virtue of the power in section 47 to make conditional orders, the order of the Board might be upheld. But this was reversed by the Judicial Committee of the Privy Council, holding such an order null.

It strikes me this attempt to do justice as an incident to fixing a just compensation stands on similar legal footing.

The only difference I see is that there the Board attempted to grapple with a hoary-headed species of injustice, and here the quality of the justice is not by any means so clear.

(1) 43 Can. S.C.R. 412.

All the Board has power to deal with is to fix a just compensation for the service if the thing be expedient. We must try and reach the common-sense meaning rather than, by cutting sentences into slices, try to extract a meaning from a legislator's language which would startle him.

Expedient compensation can mean nothing. The draftsman evidently had reference to the occasion and expense relevant to the connection, if expedient, and not the measure of compensation for the service itself once that connection made or ordered to be made.

I think the Board had no power to import into their consideration the question of competition, for a competitor serving the public is entitled, in performing such service, to get the accommodation and service and be treated as if not a rival.

The appeal should be allowed with costs and the questions answered accordingly.

I respectfully submit the first question is ambiguous and can hardly be answered by a simple yes or no. My opinion is that there can be no discrimination in favour of respondent or any one else, or as against anyone. But it may be necessary to alter the established rates from time to time to award proper compensation, and that is within the jurisdiction of the Board.

The other two questions I answer in the negative.

ANGLIN J.—Three questions are submitted by the Board of Railway Commissioners for the opinion of the court. While these questions, as framed, are rather questions of jurisdiction than of law, and as such more properly the subject of an appeal by leave of a judge of this court, they may perhaps be regarded as substantially asking the opinion of the court upon the question whether, in determining the amount of com-

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pensation which should be paid, under sub-section 5 of section 4 of 7 & 8 Edw. VII. ch. 61, to the Bell Telephone Company by independent telephone companies given the advantage of connection with the trunk lines of the former company, the effect upon its local business should be taken into consideration.

By sub-section 5 the Board is empowered

> To order and direct how, when, where and by whom and *upon what terms* and conditions (the) use, connection or communication (of, with or through long distance lines) shall be had, constructed, installed, operated and maintained.

And

> To order the company (*i.e.*, the company owning the long distance lines) to provide for such use, connection or communication upon such terms as to compensation as the Board deems just and expedient.

The clause of the sub-section first quoted covers all "terms" other than those as to compensation. The only "terms" dealt with in the clause last quoted are those "as to compensation." While the Board is authorized to direct the company

> to provide for such use, connection or communication,

it is not *for* this service that it is empowered to order compensation, which, in that case, might mean merely "remuneration," but, as a condition of directing that such use, etc., shall be provided, the Board is authorized to impose "compensation," *i.e.*, indemnification to the company directed to provide it. Murray defines "compensate" as meaning "to counterbalance, make up for, make amends for," and "compensation" as "amends or recompense for loss or damage." We are perhaps most familiar with the use of the term "compensation," both in legislation and jurisprudence, in regard to the expropriation of property for public uses. Mr. Cripps, in his work on Compensation (5 ed.), p. 102, dealing with land expropriated, says:—

> The principle of compensation is indemnity to the owner. * * * The question is not what the persons who take * * * will gain by taking it, but what the person from whom it is taken will lose by having it taken from him.

See, too, Brown and Allen on Compensation (2 ed.), p. 97, and authorities cited by both authors.

If mere payment or remuneration for the service to be rendered were what Parliament intended should be allowed, that idea would have found expression in some phrase very different from, and much more restricted in its scope, than

> upon such terms as to compensation as the Board deems just and expedient.

I also agree with the view expressed by Mr. Commissioner McLean that the addition of the word "expedient" after the word "just" affords a strong indication that it was the purpose of Parliament to entrust to the Board the widest discretion, not merely as to the amount of the compensation to be directed, but also as to the elements which should be taken into account in fixing it.

There can be little doubt that, in determining the prices to be charged for telephones to local subscribers, the Bell Telephone Company takes two elements into account, the value and cost of the local service and the value and cost of the long distance service. A company which does not maintain or provide a long distance service cannot reasonably exact as high a price for telephones from its subscribers and it can well afford to furnish local service at a lower rate. I confess that I fail to appreciate the justice of a demand that the Bell Telephone Company, which owns and maintains long distance lines, shall place them at the disposal of other and rival companies on any terms other than indemnification against loss or damage which it may sustain in consequence. Should it be

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obliged to so so, the probable result in places where the Bell Telephone Company operates a local exchange in competition with an independent company would be either an actual discrimination against Bell subscribers or a compulsory reduction by the Bell Company of its charge for local telephones to the level of the charge made by the company without long distance lines. As is well known, the existence of competition is treated in the "Railway Act" as affording justification for a difference in railway rates which would otherwise be obnoxious to the anti-discrimination provisions of that statute.

These latter considerations do not apply to independent companies within whose territory the Bell Company does not operate local exchanges. They afford reasonable ground for differentiation in the compensation to be made by companies of the two classes.

I would, for these reasons, answer the questions submitted in the affirmative.

BRODEUR J.—This is a reference by the Board of Railway Commissioners under the provisions of the "Railway Act." The questions which are submitted are the following:—

1. Whether the Board has power, under the "Railway Act" and amending Acts, to authorize the charging of an additional toll or charge outside the established rates of the Bell Telephone Company of Canada as a condition precedent to or as compensation for the use of long distance lines of the said Bell Telephone Company of Canada.

2. Whether the Board is authorized, under the "Railway Act" and amending Acts, to give compensation in respect of the loss of business to the Bell Company's local exchange business, occasioned by giving independent companies long distance connection.

3. Whether the Board has power to authorize the payment of a special toll as a condition precedent to companies competing with the Bell Telephone Company obtaining long distance connection with the Bell Telephone Company, while not subjecting non-competing companies to a like toll in view of the provisions of the Act relating to discrimination.

There is no doubt with regard to the answer to be given to the first question. It should be in the affirmative. The Board of Railway Commissioners, by section 4 of chapter 61, 1908, has the power to determine the tolls that are to be charged by any telephone company. That power is as wide and general as possible, and the tolls can be increased or reduced according to circumstances.

That question, however, does not cover the main issues in this reference, for that reference has been made with the purpose of ascertaining whether the Bell Telephone Company was entitled to compensation for the loss of its local exchange business occasioned by giving the appellant companies long distance connections and whether there should be discriminating rates or tolls between competing and non-competing companies.

It was found by Parliament, after careful investigation and inquiry, that the Bell Telephone Company had first built its service lines in cities and towns and then in villages. Connecting trunk lines had been made and long distance connections had been established between those various towns, cities and villages as the public required.

In some rural municipalities the local people interested, finding themselves without telephone service, had local companies formed for the purpose of serving their locality. The service which those companies were giving was not very dear, because they had no long distance lines to keep and maintain. Sometimes, too, those local companies were established because they thought that the service given by the Bell Telephone Company was too expensive.

It was found, however, at one time that those local companies, being deprived of long distance connections, were not giving to their customers as good ser-

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vice as the Bell Telephone Company. The Parliament was then seized of the request that the Bell Telephone Company should be bound to give the use of the connection or communication of their long distance lines to the subscribers of those local companies. But Parliament, in granting that power of expropriation to the local companies over the lines of the Bell Telephone Company, decided by sub-section 5 of section 4 of the Act of 1908, ch. 61, that the Board of Railway Commissioners could order the Bell Telephone Company

upon such terms as to compensation as the Board deems just and expedient

to provide for such use, connection or communication.

The Board dealt with the question in 1911, after having heard all parties interested, and determined the compensation which was to be paid, and, according to the views expressed by the then Chief Commissioner, Mr. Mabee, they determined that the compensation should cover all the damages which could be suffered by the Bell Telephone Company, including damages arising out of the loss to the Bell Telephone Company of its local exchange business.

In 1913 a new application was made by the appellants in this case, asking connections with the Bell Telephone Company on their long distance line.

All these appellant companies are in their locality competing lines with the Bell Telephone Company. The majority of the Board of Railway Commissioners were of the opinion that permission should be given to use the long distance lines of the Bell Telephone Company on the condition, amongst others, that they should compensate the Bell Telephone Company for the loss of its local exchange business.

I am of opinion that this order has been rightly issued. Parliament was very willing to give to those

local companies the right to use long distance lines, but on the condition that they should compensate the Bell Company for all damages arising out of that use.

It has been found as a question of fact by the Board that the Bell Company's subscribers contributed not only to the initial cost, but also to the maintenance of the Bell long distance equipment. If the Bell Company, then, wants to maintain its long distance lines, it has to levy upon its subscribers a certain rate which is necessarily higher than the rate charged by the local companies, those companies having no long distance lines to maintain.

It is pretty evident that if the subscribers of the local companies have the same advantage as the Bell subscribers for long distance connections, all the business done locally by the Bell Company will necessarily disappear, because no subscriber, for example, will pay twenty dollars per year to the Bell Company, if they can get for a smaller price the same local and long distance connections in subscribing to the local companies.

That matter had to be considered by the Board, and I think that, under the powers which are given by the statute, the Board had the right to take into consideration the compensation for the losses which the Bell Telephone Company was going to incur as a result of giving long distance connections.

The compensation contemplated by the statute covered the interference with any private right appurtenant to the property expropriated. The value of the property of the Bell Telephone Company is reduced by the long distance connections which are granted to those local companies, and should then be made the subject of compensation. Halsbury, vol. 6, p. 47.

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I would be, then, of opinion that the second question should be answered in the affirmative.

These same reasons would apply to the third question, which should also be answered in the affirmative.

The appellant should pay the costs of this reference.

Appeal dismissed with costs.

Solicitors for the appellants: *C. & H. D. Gamble.*

Solicitor for the respondents: *Hugh L. Hoyles.*

JOHN J. DORAN (DEFENDANT).....APPELLANT;

AND

WALTER L. McKINNON AND OTHERS (PLAINTIFFS).....RESPONDENTS.

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*June 15.
*June 24.

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

Contract—Purchase of Bonds—Statute of Frauds—Memorandum in writing—Correspondence—Relation of documents—Parol evidence.

In an action against D., claiming damages for breach of a contract to purchase bonds, a telegram from D. to his partner was produced saying, "I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms."

Held, that parol evidence was properly received to shew that terms had been stated by D., over his signature, that they were the only terms and were those referred to in the telegram and the two constituted a sufficient memorandum within the Statute of Frauds. *Ridgeway* v. *Wharton* (6 H.L. Cas. 238) and *Baumann* v. *James* (3 Ch. App. 508) followed. Duff J. dissented.

Judgment of the Appellate Division (35 Ont. L.R. 349) affirming that at the trial (34 Ont. L.R. 403) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming, by an equal division of opinion, the judgment at the trial(2) in favour of the plaintiff.

The only material question raised on this appeal was that relating to the Statute of Frauds under the circumstances stated in the above head-note. The defendant pleaded two other matters of defence—first, that he was only acting as plaintiff's agent for sale of the bonds.

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

(1) 35 Ont. L.R. 349.

(2) 34 Ont. L.R. 403.

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The courts below held, on the evidence, that he was a purchaser, and that finding was accepted on this appeal. The second defence was that plaintiffs had been guilty of misrepresentation by stating that the bonds had not been offered for sale in New York, whereas they had been so offered and refused. That defence was disposed of on the ground that defendant, after becoming aware of the misrepresentation, did not repudiate his contract to purchase, but elected to adhere to it.

Rowell K.C. and *J. E. Lawson*, for the appellant, relied on *Taylor* v. *Smith*(1).

J. B. Clarke K.C., for the respondents, cited *Ridgway* v. *Wharton*(2); *Baumann* v. *James*(3); and *Cave* v. *Hastings*(4).

DAVIES J.—I have had no difficulty in agreeing with the finding of fact of the trial judge, approved of by the Appellate Division, that the appellant defendant is liable on his contract to purchase the Alberta bonds (so-called) in dispute.

I am also satisfied that, whether or not the alleged misrepresentation on the seller's part as to the bonds not having before been offered for sale in New York, was such a misrepresentation as would have availed defendant to repudiate his contract, had he elected to do so in proper time, he, with full knowledge of the facts, elected not to repudiate, but to approbate. He cannot now be heard at this stage of the game to change his mind, more especially as the point was not pressed at the

(1) [1893] 2 Q.B. 65; Halsbury, Laws of England, vol. 7, p. 370, sec. 762.
(2) 6 H.L. Cas. 238.
(3) 3 Ch. App. 508.
(4) 7 Q.B.D. 125.

trial, where it should have been fought out had the defendant desired to take advantage of it.

I have had, however, great difficulty in reaching a conclusion, the contract being one within the Statute of Frauds, whether there is sufficient written evidence to satisfy that statute.

Apart from authority, I should have been inclined to think the evidence insufficient, and, although a careful reading of the many authorities *pro* and *con* has not entirely removed my doubts, I think the weight of the authority is to the effect that parol evidence may be given to connect two documents together which do not expressly refer to each other, but which connection and reference is a matter of fair and reasonable inference.

In this way the two documents may make a contract within the statute. Such evidence may not be resorted to for the purpose of shewing what the terms of the contract are, but only in order to shew what the writing is which is referred to.

In *Ridgway* v. *Wharton*(1) Lord Cranworth, when sitting alone as Lord Chancellor and over-ruling the decision of the Vice-Chancellor, is reported as saying:—

> Even though the terms had in fact been previously reduced into writing, the statute is not complied with unless the whole contract is either embodied in some writing signed by the party, or in some paper referred to in a signed document, and capable of being identified by means of the description of it *contained in the signed paper.*

Afterwards, when the case came before the House of Lords on appeal, he, after two arguments, changed his mind on the point of the admissibility of parol evidence to identify the writing or document to be read into or connected with the one signed by the party sought to be charged, and is reported in 6 House of

(1) 3 DeG. M. & G. 677, at p. 693.

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Lords Cases, at page 257, as saying, after referring to his change of opinion:—

> The authorities lead to this conclusion that if there is an agreement to do something, not expressed on the face of the agreement signed, that something which is to be done being included in some other writing, *parol evidence may be admitted to shew what that writing is*, so that the two, taken together, may constitute a binding agreement within the Statute of Frauds.

In that case "instructions" were referred to which might have been either by parol or in writing, but it was held that it might be shewn by parol evidence that instructions had been given in writing, and that there had been no other instructions than the written document which had been produced.

The case of *Ridgway* v. *Wharton*(1) was followed by *Baumann* v. *James*(2), an action brought by a tenant against his landlord for specific performance of an agreement to grant a lease. The landlord had written a letter promising the tenant a lease for fourteen years "*at the rent and terms agreed upon*," to which the tenant wrote back an unqualified acceptance.

The Court of Appeal held, on the authority of *Ridgeway* v. *Wharton*(1) and other cases, that parol evidence was admissible to connect a report, made by a surveyor, previously recommending the granting a lease for fourteen years at a given rent, and that it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy the Statute of Frauds.

The cases of *Taylor* v. *Smith*(3), *Potter* v. *Peters*(4), and others upon which Mr. Rowell naturally relied to

(1) 3 DeG. M. & G. 677 at p. 693; 6 H.L. Cas. 238, at p. 257.
(2) 3 Ch. App. 508.
(3) [1893] 2 Q.B. 65.
(4) 72 L.T. 624.

support his contention are difficult to reconcile with the decisions above referred to, but the case of *Long* v. *Millar*(1) is in line with them. In the latter case the purchaser signed a memorandum to purchase three lots of land, 40 feet frontage on Pickford Street, Hammersmith, for £310, and agreed to pay deposit in part payment of £31 and pay the balance and complete on the 1st October. The vendor (defendant) signed a receipt for the £31

deposit on the purchase of three plots of land, Hammersmith.

Both documents were signed at the same time, and the Court held that they could be connected by parol evidence, and that, together, they formed a sufficient contract to satisfy the Statute of Frauds. In that case, Bramwell L.J. said (p. 454):—

I think that, subject to the point which has been raised as to the omission of the vendor's name from the agreement signed by the plaintiff and the receipt, there is a sufficient memorandum, and it appears to me that *Ridgway* v. *Wharton* (2) and *Baumann* v. *James*(3) are in point, and are decisive.

Bagallay L.J. says (p. 455):—

The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence.

And Thesiger L.J., at p. 456, says:—

If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in *Ridgeway* v. *Wharton*(2); there "instructions" were referred to; now instructions may be either written or verbal; but it was held that parol evidence might be adduced to shew that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity. Although parol evidence may be given to identify the document intended to be referred to, it must be clear that the words of the document signed by the party to be charged will extend to the document sought to be identified.

(1) 4 C.P.D. 450.
(2) 3 De G.M. & G. at p. 693; 6 H.L. Cas. at p. 257.
(3) 3 Ch. App. 508.

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And in *Wylson* v. *Dunn*(1), Kekewich J., in 1887, at p. 575, says:—

> Therefore the reference may be a matter of fair and reasonable inference, * * * but there need not be an express reference from one letter to the other.

The learned writer of the article on "Contract," in Art. 761, in the 7th volume of Halsbury's Laws of England, has collected all the authorities on both sides of the question in a note to that article, page 369 of that volume. His own opinion of the result of the authorities is summed up in Art. 761, as follows:—

> 761. When one document refers to another, the two may be read together so as to constitute a complete memorandum.
>
> The same rule applies if the documents can be connected together by reasonable inference, although there is no express reference from one document to the other.

Now, in the case before us we have the defendant's telegram of the 3rd June to his associate in New York, Daude, as follows:—

> E. Daude,
> Hotel Martinique, June 3rd, 1914.
> New York, N.Y.
>
> The Alberta Bonds which you have particulars of, no one else has for sale. I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms. Put sale through at once.
>
> (Sgd.) J. J. DORAN.
>
> Rush charge.

The question is, can the identity of the bonds and the meaning of the words, "our terms," be fixed by prior letters or documents signed by the defendant? I am of the opinion that, under the authorities, they can, and that parol evidence was properly received to prove the existence and identity of the documents shewing what these terms were, and that they had been stated by defendant over his own signature, and

(1) 34 Ch. D. 569.

that there were no other terms than those stated and to which the telegram applied.

Once the principle I have accepted is applied to the facts of the case, no room for doubt can exist as to the identity of the Alberta bonds or the meaning of the words "our terms," or as to the statute having been complied with.

The appeal, therefore, fails and must be dismissed with costs.

IDINGTON J.—The telegram of 3rd June, 1914, from appellant to his friend and agent, Daude, as follows:—

E. Daude,
Hotel Martinique, June 3rd, 1914.
New York, N.Y.

The Alberta Bonds which you have particulars of, no one else has for sale. I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms. Put sale through at once.

(Sgd.) J. J. DORAN.

Rush charge.

seems to dispose of the appellant's pretension that he was only an agent of respondents, and opens the way to find in the rest of the correspondence evidence to satisfy the Statute of Frauds, assuming the contract falls within the requirements of that statute.

I think that with no other oral evidence than such as permitted in such cases to enable one to understand what the parties were about, there is enough in the correspondence to demonstrate therefrom a contract evidenced in writing to comply with the statute.

As to the alleged misrepresentation, I do not think even if a possible defence that the appellant can maintain it in face of the fact that after full knowledge of its alleged effect he continued instead of repudiating to act as he did.

I think the damages are more questionable, but I

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am unable to say, as matter of law, that the loss to respondents was less than the learned trial judge has assessed.

The appeal should be dismissed with costs.

DUFF J. (dissenting)—I would allow this appeal.

ANGLIN J.—In view of the explicit finding of the learned trial judge that the plaintiffs and their witnesses are to be credited rather than the defendant and his witness Daude, it is quite impossible to reverse the holding, concurred in by all the appellate judges, that the defendant contracted to purchase the bonds in question as a principal.

I am also satisfied, for the reasons assigned by Mr. Justice Riddell, that if there was misrepresentation as to prior negotiations in New York in regard to these bonds, the defendant, with full knowledge, elected not to exercise any right to rescind to which such misrepresentation might have given rise. The evidence shews that he knew of the prior attempted sale to Harris, Forbes & Co. (of which he complains) before the 17th June. He did not then repudiate the purchase. On the contrary, in answer to a telegram of the plaintiffs of the 26th June,

> When will you take delivery Albertas? Expect hear from you twenty-fourth.

Doran wired on the 28th:—

> Delay greatly your fault. Doing best settle matter fast as possible. Impossible settle by twenty-fourth. Will close deal as soon as possible. Expect have situation settled by Friday. Claftin's failure hurt market. Money situation very bad. If necessary hold bonds subject to prior sale by you.

Subsequent letters and telegrams from the defendant and Daude put in evidence shew that they con-

sidered the contract with the plaintiffs in existence at least down to the 25th July. The first suggestion of repudiation comes from Daude on the 13th August, after the plaintiffs had sent further communications pressing for payment.

The only question requiring further consideration is the defence raised by the fourth section of the Statute of Frauds, which admittedly applies to the transaction. *Driver* v. *Broad*(1).

On the 3rd of June the defendant telegraphed to his representative, or partner, Daude:—

> The Alberta Bonds which you have particulars of, no one else has for sale. I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms. Put sale through at once.

This telegram puts beyond controversy the fact that the defendant purchased the Alberta bonds. It is conceded that the identity of these bonds has been fully established by prior letters signed by the defendant, which also state the names of the vendors, the price, and an arrangement as to commission and place of payment and delivery. The only objection taken to the sufficiency of the telegram of the 3rd June as a memorandum to satisfy the Statute of Frauds is that the phrase, "our terms," might refer to some terms arranged over the telephone on the previous day other than and in addition to those set forth in the plaintiffs' original circular offering the bonds for sale, which admittedly formed the basis of negotiations, and is referred to as such in Doran's letter to Daude of May 26th, repeating some of the particulars, and the subsequent correspondence. A slight reduction of the quantity of the bonds as stated in Doran's letter of the 26th, the plaintiffs' assent to the commission for which the defendant stipulated, and the place of pay-

(1) [1893] 1 Q.B. 539, 744.

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ment and delivery are set forth in a telegram from Doran to Daude of the 29th May. There is no suggestion in the evidence that there were any other "terms" of the sale. The phrase, "our terms," in the telegram of June 3rd, is certainly ambiguous, but, upon the authority of such cases as *Baumann* v. *James*(1), *Cave* v. *Hastings*(2), and *Ridgway* v. *Wharton*(3), I have no doubt that parol evidence was properly received to shew that terms had been stated by the defendant in writing over his own signature, that there had been no other terms than those so stated, and that it was to the terms so stated that the telegram referred. That evidence has been given and is conclusive.

On the 16th of June the defendant wired to Doran as follows:—

> Alberta Bonds must be paid for to-day. McKinnon's statement shews them worth $227,085.98, less our commission, $2,500.00, or $224,585.98 to them. Answer at once.

This telegram clearly refers to and implies a recognition of a statement of McKinnon & Co. Such a statement had been sent to the defendant on the previous day, accompanied by an intimation that the plaintiffs were ready to make delivery, and understood that the defendants would take it on the following day. The statement was in the form of an account, and gave full particulars of the purchase. On the authorities above cited, to which may be added *Long* v. *Millar*(4), I have no doubt that the statement referred to in Doran's telegram to Daude may be identified by parol evidence. I think that Doran's telegram of the 16th, with McKinnon's statement of the 15th, contains a sufficient memorandum to meet the require-

(1) 3 Ch. App. 508.
(2) 7 Q.B.D. 125.
(3) 6 H.L. Cas. 238.
(4) 4 C.P.D. 450.

ments of the statute. It, at all events, supplies any possible deficiency in the earlier documents.

No ground has been shewn for a reduction in the damages awarded. The plaintiffs disposed of the bonds with reasonable promptitude, and they made every reasonable effort to obtain the highest possible price for them in order to protect themselves as well as the defendant. There is no evidence that they did not get the full market value or as high a price as could be obtained at any time after the defendant had repudiated his contract.

I would dismiss the appeal with costs.

BRODEUR J.—It was contended by the appellant that his relations with the respondents were those of principal and agent. But I am unable to concur in such a contention.

The plaintiffs (respondents) are bond investment brokers. They were the owners of $230,000 railway bonds, guaranteed by the Alberta Government, and having seen in the newspapers that Mr. Doran, the defendant (appellant), had tendered for $1,000,000 bonds issued by the city of Toronto, approached him with the view of selling to him their bonds.

They gave him the price at which they would dispose of those bonds and they told him the allowance or bonus they would give him.

The defendant tried to sell those bonds, and he evidently got a better price than the one stipulated for by the respondents, and, without disclosing the name of his alleged principal, he negotiated with the respondents for an outright purchase of the bonds.

On the 3rd of June, 1914, he telegraphed to Mr. Daude, his friend or partner in New York, that he had absolutely bought the bonds.

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With such an admission, it is impossible now for the appellant to say that he acted as agent of the respondents. It is pretty evident that he became the purchaser of those bonds.

He was then relying on some negotiations which were being carried on in New York by Mr. Daude for the resale of those bonds. But, unfortunately, those New York negotiations failed, and the European war, which, a few weeks after, was declared, rendered ineffective all efforts he made to dispose of the bonds. Now that he is sued in damages for breach of contract, he claims that there was no memorandum in writing signed by him sufficient to satisfy the Statute of Frauds.

It becomes necessary, in order to discuss properly that defence, to go fully into the documents, letters and correspondence filed in the case.

At first there was a general circular issued by the respondents, giving the quantity of bonds to be sold, their price and conditions generally.

That circular was formally handed to Mr. Doran on the 26th of May, and he was told that the bonds would be sold to him at the price stated in the circular, less one-half of one per cent. That reduction in the price represented a sum of $1,150.

On the same day he writes to his associate or friend, Mr. Daude, apprising him of the offer, and asking him to wire him if he could handle those bonds. On the 29th of May he wired to Daude that McKinnon would sell the bonds "less $2,500 to us subject to Toronto payment and delivery." On the 30th he wires again: "McKinnon wants confirmation *re* Alberta Bonds. Answer."

On the 2nd of June the respondents write a letter in the following terms:—

J. J. Doran, Esq., June 2, 1914.
Crown Office Bldg.,
Toronto, Ont.

Dear Sir,—Following your telephone conversation with our Mr. McKinnon, we take pleasure in confirming to you the sale of $223,700 Province of Alberta (Guaranteed) Bonds, bearing 5%, payable semi-annually, maturing Oct. 22nd, 1943. The price is a rate to yield you 4.95% less an allowance to you of $2,500.00.

The legal opinion of J. B. Clarke, K.C., has already been obtained, however, the legal files are not yet completed. Mr. Clarke is at present out of town, and upon his return, which is expected in a few days, we will take the necessary steps to have the legal papers completed and forwarded to you in order that your solicitor may approve legality.

Assuring you of our appreciation of this our first transaction with you, we are,

Yours very truly,
W. L. McKINNON & Co.

On the 3rd of June Doran sends the following telegram to Daude:—

E. Daude,
Hotel Martinique, June 3rd, 1914.
New York, N.Y.

The Alberta Bonds which you have particulars of, no one else has for sale. I absolutely bought them yesterday after our 'phone conversation, they agreeing to our terms. Put sale through at once.

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On the 5th of June the respondents sent to the appellant the complete legal file mentioned in their previous letter of the 2nd of June.

He had them examined by his solicitor, Mr. Fullerton, as appears by the letter of the latter of the 9th of June.

On the 15th of June the respondents sent a statement, figured as at the 16th June, shewing as at that date the amount to be paid $224,585.98, and closed their letter by saying:—

As we understand that funds are now being transferred here from New York, and that you wish to take delivery to-morrow, we shall try to get in touch with you by telephone in the morning in order to ascertain an hour for delivery to suit your convenience.

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On the 16th of June Doran sent the following telegram to Daude:—

H. Daude,
Hotel Martinique,
New York, N.Y.

Alberta Bonds must be paid for to-day. McKinnon statement shews them worth $227,085.98, less our commission, $2,500.00, or $224,585.98 to them. Answer at once.

(Sgd.) J. J. DORAN.

Rush charge.

It is established by the oral evidence given that all those documents have reference to the alleged sale of those Alberta bonds. Those letters and documents, according to my opinion, constitute a memorandum sufficient to satisfy the Statute of Frauds.

The correspondence between Doran and Daude is admissible as evidence of the contract of sale. Any note or letter written by a purchaser to a third person containing directions to carry the agreement into execution may be a sufficient memorandum to meet the requirements of the statute. *Seagood* v. *Meale*(1) in 1721; *Welford* v. *Beazely*(2) in 1747; *Gibson* v. *Holland*(3) in 1865; Sugden, Law of Vendors and Purchasers, 14th ed., p. 139; Agnew, Statute of Frauds, p. 244.

We have in the present case the circular containing the offer of sale of those bonds. We have also the letter of Doran to Daude of the 26th of May, stating all the conditions at which sale could be made. It is pretty evident, however, that the allowance of $1,150 was not considered attractive enough. They asked a sum of $2,500. The matter of that further reduction was discussed by Doran and McKinnon, and at last

(1) Prec. Ch. 561. (2) 3 Atk. 503.
(3) L.R. 1 C.P. 1.

the latter yielded, since, on the 3rd of June, Doran informs his agent or associate, Daude, that McKinnon agreed "to our terms." We see also that that telegram was sent the day after McKinnon wrote a lengthy letter giving all the conditions of the sale. Later on, in the middle of June, Doran is seen urging upon his New York friend to close and send the money.

There is no doubt that McKinnon's letter of the 2nd of June was binding on them; then the subsequent note in writing, signed by Doran, is sufficient to bind them. Parol evidence could be adduced to show that those documents referred the one to the other, and that the contract described by McKinnon is the same as the one accepted by Doran.

It is a pretty well-settled rule that when one document refers to another, the two may be read together so as to constitute a complete memorandum. The same rule applies if the documents can be connected together by reasonable inference, although there is no express reference from one document to the other. Halsbury, vol. 7, No. 761.

On that question of reference I will quote also the following decisions in support of the respondents' contentions: *Dobell* v. *Hutchinson*(1) in 1835; *Ridgway* v. *Wharton*(2) in 1856; *Baumann* v. *James*(3) in 1868; *Long* v. *Millar*(4) in 1879; *Cave* v. *Hastings*, 1881(5). In so far as I have been able to find, these decisions have never been overruled, and are accepted as the settled law of the land. The appellant relied mostly on: *Pierce* v. *Corf*(6) in 1874; *Taylor* v. *Smith*(7) in 1892; *Potter* v. *Peters*(8) in 1895.

(1) 3 A. & E. 355.
(2) 6 H.L. Cas. 238.
(3) 3 Ch. App. 508.
(4) 4 C.P.D. 450.
(5) 7 Q.B.D. 125.
(6) 29 L.T. 919.
(7) [1893] 2 Q.B. 65.
(8) 72 L.T. 624.

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In those three cases the documents contain no reference to one another, and could not be connected by reasonable inference from the circumstances of the case. They have never been considered, however, as overruling the decision rendered by the House of Lords in the case of *Ridgway* v. *Wharton*(1).

The case of *Potter* v. *Peters*(2) was decided by His Lordship Mr. Justice Kekewich, in 1895, the same judge who, in 1887, rendered judgment in the case of *Wylson* v. *Dunn*(3), where a letter, not referring expressly to a former one, contained the declaration that he was willing to take half an acre of the land "as agreed upon," was held, however, as containing a sufficient reference to form a valid contract within the Statute of Frauds.

In *Taylor* v. *Smith*(4) an invoice of the goods was sent by the plaintiffs to the defendant, and the carrier also sent an advice note to inform him of the arrival of the goods. That advice note specified the quantity of goods, but did not state their price nor refer to the invoice or any other document. The defendant, after inspection, wrote on the advice note: "Rejected; not according to representation." It was held that there was not a sufficient note of the bargain as required by the Statute of Frauds.

No reference was made by the judges who decided *Taylor* v. *Smith*(4) to *Ridgway* v. *Wharton*(1). One of the judges has referred, however, to the case of *Long* v. *Millar*(5), which I have quoted above, and said the case of *Taylor* v. *Smith*(4) wanted the main

(1) 6 H.L. Cas. 238.
(2) 72 L.T. 624.
(3) 34 Ch. D. 569.
(4) [1893] 2 Q.B. 65.
(5) 4 C.P.D. 450.

element to be found in the *Millar Case*(1), viz., the existence in a document signed by the defendant of words referring to a contract of purchase.

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I have, then, come to the conclusion that the appellant, in the present case, fails, and that his appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *James S. Fullerton.*
Solicitors for the respondents: *Clarke & Swabey.*

(1) 4 C.P.D. 450.

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*June 5.
*June 19.

JOHN PIGGOTT AND SONS (SUPPLIANTS)..... } APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Crown—Negligence—Injury to "property on public work"—Jurisdiction —R.S.C. [1906] c. 140, s. 20 (b) and (c).

To make the Crown liable, under sub-sec. (c) of section 20 of the "Exchequer Court Act" (R.S.C. [1906] ch. 140), for injury to property, such property must be on a public work when injured. *Chamberlin* v. *The King* (40 Can. S.C.R. 350) and *Paul* v. *The King* (38 Can. S.C.R. 126) followed. *Letourneau* v. *The King* (33 Can. S.C.R. 335) overruled.

Injury to property by an explosion of dynamite on property adjoining a public work is not "damage to property injuriously affected by the construction of a public work" under sec. 20 (b) of the Act.

APPEAL from a judgment of the Exchequer Court of Canada dismissing the suppliants' Petition of Right.

Servants of the Crown engaged in building a cement dock on the Detroit River caused damage to suppliants' dock adjoining the work by their blasting operations. The suppliants claimed damages by Petition of Right, which was dismissed by the Exchequer Court for want of jurisdiction. They then appealed to the Supreme Court of Canada.

W. L. Scott for the appellants referred to *Letourneux* v. *The King*(1).

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

(1) 33 Can. S.C.R. 335.

Newcombe K.C. for the respondent cited *Paul* v. *The King*(1); *Chamberlin* v. *The King*(2).

THE CHIEF JUSTICE.—The appellants brought their Petition of Right to recover damages against the Crown for injuries alleged to have been caused to their dock through negligence in the course of the work of constructing a public dock 100 feet from the premises of the petitioners.

The "Exchequer Court Act" provides, section 20 (so far as material):—

> The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*a*) Every claim against the Crown for property taken for any public purpose;
>
> (*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work;
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment.

At the trial it was pointed out by the Judge of the Exchequer Court that, excepting by statute, the Crown was not liable for wrongs committed by its servants, and that section 20 (*c*) of the "Exchequer Court Act," the only statutory provision imposing such liability, did so only in the case of injury to property on any public work.

The appellants now seek to rest their case upon section 20 (*b*) of the Act. This, however, is to confuse two kinds of action of entirely different nature. Paragraphs (*a*) and (*b*) of section 20 are dealing with questions of compensation, not of damages.

Compensation is the indemnity which the statute provides to the owner of lands which are compulsorily

(1) 38 Can. S.C.R. 126. (2) 42 Can. S.C.R. 350.

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taken in, or injuriously affected by, the exercise of statutory powers.

For acts done in pursuance of statutory powers there can be no damages, for, the acts being made lawful by the statute, the doing of them can occasion no wrong. For loss occasioned by the doing of such acts compensation is the remedy provided by statute.

It is clear that in the case of a private company or individual committing such acts as those alleged in the petition of right, the appellants would have had their remedy in an action for damages. The Crown, however, cannot be sued for what would, between subjects be a wrong done, except in so far as provided by statute.

It follows that the appellants cannot establish a claim either to compensation under paragraph (*b*) or to damages under paragraph (*c*) of section 20 of the "Exchequer Court Act," and their action accordingly fails.

The appeal must be dismissed with costs.

DAVIES J.—I think this appeal must be dismissed with costs as being directly within the construction of the "Exchequer Court Act" laid down by this court in the cases of *Paul* v. *The King*(1) and *Chamberlin* v. *The King*(2).

IDINGTON J.—When the "Petition of Right Act," 1875, 38 Vict. ch. 12, was passed, it recited the expediency of making provision for proceeding by way of petition of right, and to assimilate the proceedings on such petitions, as well as in suits by the Crown, to the

(1) 38 Can. S.C.R. 126. (2) 42 Can. S.C.R. 350.

course of practice and procedure in force in actions and suits between subject and subject.

It enacted by the first clause thereof that the petition should set forth with convenient certainty the facts entitling the suppliant to relief.

That held out a very comprehensive purpose of relief, but by section 8 there was, in a section that began in an equally comprehensive spirit outlining the practice and procedure to be applied, the following proviso:—

> Nothing in this Act shall be construed to give to the subject any remedy against the Crown, in any case in which he would not have been entitled to such remedy in England under similar circumstances by the laws then in force there prior to the passing of the Imperial statute, 23 and 24 Victoria, chapter 34, intituled, "*An Act to amend the law relating to Petitions of Right to simplify the proceedings and to make provisions for the costs thereof.*"

It was intended by other parts of that Act to execute its purposes by and through the ordinary courts of the province. In consequence of the establishment of this court immediately after such enactment, combined with a power of exercising the functions of an exchequer court, that Act was repealed by 39 Vict. ch. 27, sec. 1. And the jurisdiction to try such Petitions of Right was allotted to the Exchequer Court.

By section 19 of that statute, there was, amongst other things, enacted that it was not to give to the subject any remedy against the Crown save in such cases as embraced in above quoted proviso.

By the later development of the jurisdiction of the Exchequer Court, when separated from this court, it so turned out that the limits of relief under the "Petition of Right Act" were confined to the jurisdiction given that court.

Indeed, it has inadvertently, as I submit, been sometimes said that court had been given not only a juris-

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diction, but that its provisions created a right to relief as well as supplied a remedy.

The measure of relief intended by the "Petition of Right Act" was, I think, wider than that jurisdiction, but, inasmuch as the jurisdiction given in the Exchequer Court was the only jurisdiction to try any such claims, the only practical relief given was that assigned by the said "Exchequer Court Act."

The result has been to limit by the jurisdiction given the only relief, and that is less than, though probably intended to be coterminous with, the relief given in the Imperial Act above quoted.

It would be impossible properly to extend the express language of the jurisdiction given, by means of any section denying the right to be greater than something else.

The absurdity has continued for many years, and probably justice has often been thereby denied.

The sub-section (*c*) of section 2 of the "Exchequer Court Act" under which the appellant seeks relief reads as follows:—

> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

This case illustrates what a stupid enactment this is.

The words therein, "on any public work," rendered it impossible, in the case of *Chamberlin* v. *The King*(1), for us to interfere, solely because the injury, if any, was done to property a long distance from the place where the public work existed from which it was said the cause of the destruction of suppliant's property originated.

(1) 42 Can. S.C.R. 350.

The cause of the injury there in question was alleged to be the issuing of fire from an improperly constructed or guarded smoke stack.

The court below had therein found there was, in fact, no well-grounded cause of complaint, but the suppliant had a right to have us rehear the case and determine the merits of the appeal if there had been jurisdiction in the Exchequer Court.

He was in law properly refused, and the decision was put, I suspect, upon the ground of jurisdiction alone not only as a proper way of disposing of the appeal, but a means of bringing home to others the actual condition of the law.

The learned trial judge herein has followed, properly as I conceive, that decision.

This case illustrates how absurd and barbarous the law is.

If counsel for the suppliant states correctly the facts, then the servants of the Crown negligently used dynamite in such a way as to blow up a pier belonging to the suppliant.

The property owned by the suppliant and by the Crown formed at the time parts of a long pier, of which it was desired by the Crown to destroy part of that which it had acquired, and, in doing so, unintentionally, I assume, destroyed part of that same work which had passed into the suppliant's possession.

What right would any private owner ever imagine he could have to use dynamite under such circumstances until he had severed clearly and completely the connection between the properties so that there could be no risk of such consequences as alleged?

However that may be in fact, there can be no question that, under the plain language of the sub-section,

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dynamite or other explosive might be so used on such a property as to smash to pieces men and property lawfully beside it, and neither owner nor representative could recover for such damages.

The men guilty might be prosecuted criminally and sent to prison, but civil damages there could be none recoverable under this sub-section (*c*).

And all that, I suspect, comes of someone confusing provisions relative to Crown property found in the statutes preceding this with other subject matters that had to be provided for.

I cannot put the construction Mr. Scott asks us to put on the word "construction" in the preceding sub-section, and get out of the difficulty that way.

It was destruction the respondent's servants were engaged in, and not even construction in a sense different from that for which I think the word stands as I read it in sub-section (*b*).

I respectfully submit that the sooner the probably misplaced words, "on any public work," are stricken out of sub-section (*c*) the better.

I think the appeal must be dismissed, but should we give costs? I think not.

ANGLIN J.—I respectfully concur in the reasons assigned by the learned judge of the Exchequer Court for dismissing this action. Since the decisions in *Chamberlin* v. *The King*(1) and *Paul* v. *The King*(2), *Letourneux* v. *The King*(3) is not authority for maintaining such an action. As to clause (*b*) of section 20 of the "Exchequer Court Act," invoked in this court by the suppliant, damage to property sustained in the

(1) 42 Can. S.C.R. 350. (2) 38 Can. S.C.R. 126.
(3) 33 Can. S.C.R. 335.

course of construction of a public work through negligence or otherwise is not "damage to property injuriously affected by the construction" of such public work.

BRODEUR J.—The claim made against the Crown may result from the negligence of its officers, but does not arise out of an injury "on any public work."

There has been a long series of decisions of this court to the effect that the provisions of section 20, sub-section (*c*), of the "Exchequer Court Act" render the Crown liable for injury to property only when the property is situated on a public work. *City of Quebec* v. *The Queen*(1); *Larose* v. *The King*(2); *Paul* v. *The King*(3); *Chamberlin* v. *The King*(4).

It may be that the provisons of the section have not been given a very wide construction by those decisions, but the latter seem to have been accepted by Parliament, since no legislation has ever been passed to extend the jurisdiction of the Exchequer Court to all claims for damages arising from the negligence of a servant of the Crown while acting within the scope of his duties on a public work.

Until such legislation is passed, we are bound by these decisions, and it is then necessary for the plaintiffs, if they sue for damages, to shew that the injury to their property has occurred on a public work.

Their appeal fails because they have been unable to prove such injury.

Appeal dismissed with costs.

Solicitors for the appellants: *Rodd, Wigle & McHugh.*
Solicitor for the respondent: *T. G. Meredith.*

(1) 24 Can. S.C.R. 420.
(2) 31 Can. S.C.R. 206.
(3) 38 Can. S.C.R. 126.
(4) 42 Can. S.C.R. 350.

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RAILWAYS — *Board of Railway Commissioners — Jurisdiction — Provincial crossing — Dominion railway — Change of grade — Elimination of level crossing — Substitution of subway — Public protection and safety — Power to order provincial railway to share in payment of cost—"Railway Act," ss. 8 (a), 59 and 288.*] The provisions of the "Railway Act" empowering the Board of Railway Commissioners to apportion among the persons interested the cost of works or constructions which it orders to be done or made are *intra vires.*—On Avenue Road, Toronto, the tracks of the Toronto Ry. Co. crossed those of the C.P. Ry. Co. at rail level. On report of its chief engineer that this crossing was dangerous the Board, of its own motion, ordered that the street be carried under the C.P. Ry. tracks. This change of grade relieved the Toronto Ry. Co. from the expense of maintaining an interlocking plant and benefited it otherwise.—*Held,* that the order was made for the protection, safety and convenience of the public; that the Toronto Ry. Co. was a "company interested or affected by such order;" and that the Board had jurisdiction to direct that it should pay a portion of the cost of the subway. *British Columbia Electric Railway Co.* v. *Vancouver, Victoria and Eastern Railway Co.,* ([1914] A.C. 1067,) distinguished.—The agreement between the Toronto Ry. Co. and the City of Toronto by which the former was given the right to lay its tracks on certain streets including Avenue Road did not affect the power of the Board to make said order. TORONTO RAILWAY CO. *v.* CITY OF TORONTO **222**

2——*Subsidy — Aid to construction — Purchase of constructed line — Construction of statute — Supplementary agreement — Rights of transferee — Obligation binding on the Crown.*] The suppliant company was incorporated by Dominion statute, 6 Edw. VII., ch. 150, with power to hold, maintain and operate the railway of the S.S. Ry. Co. and became vested with the franchises and property of that railway company which had been sold in virtue of the statute, 4 & 5 Edw. VII., ch. 158. The S.S. Ry. Co. had constructed 6½ miles of its railway, between Yamaska and St. Francis River, for which it had not received subsidy aid as authorized by 62 & 63 Vict., ch. 7, and, by 7 & 8 Edw. VII., ch. 63, in lieu of the aid provided by the former statutes, subsidy was authorized to be paid to any company completing the construction of 70 miles of the railway from Yamaska on a location which included the 6½ miles of railway so constructed. Under the authority of this legislation the Crown and the appellant company entered into a supplementary agreement fixing the subsidy for the construction of this 70 miles of railway. The company completed the unconstructed portion of the railway and claimed subsidy for the whole length of the line including the 6½ miles acquired in virtue of the sale authorized by 4 & 5 Edw. VII., ch. 158.—*Held,* reversing the judgment of the Exchequer Court of Canada (15 Ex. C.R. 237), Idington J. dissenting, that the undertaking of the company to construct the railway was satisfied whether it actually constructed the whole line itself or purchased a constructed portion thereof to form part of the subsidized line; that the statute 7 & 8 Edw. VII., authorizing the subsidy together with the supplementary contract with the Crown constituted an obligation binding on the Crown and the company was, consequently, entitled to the amount of the subsidy applicable to the 6½ miles of the railway in question. QUEBEC, MONTREAL AND SOUTHERN RWAY. CO. *v.* THE KING **275**

3——*System of construction — Exposed switch-rods — Negligence — Dangerous contrivance — Verdict — Findings against evidence.*] In accordance with what was shewn to be good railway practice the tracks in the company's yards were provided with switch-rods which were left uncovered and elevated a slight distance above the ties. While in performance of his work, during the day-time, an employee sustained injuries which, it was alleged, happened in consequence of tripping on switch-rods while a car was being moved over the seitch. In an action by him for damages, the jury based their