REPORTS

OF THE

SUPREME COURT

OF

CANADA.

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. SIR 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.

Errors and omissions in cases cited have been corrected in the TABLE OF CASES CITED.

Page 154, line 21, for "cause ci" read "cause-ci."

" 154, last line, delete semicolon after "d'eau."

" 158, line 18, for "example" read "exemple."

" 158, line 20, for "condédés" read "concédés."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOLUME 47 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Alberta Railway Legislation, In re (48 Can. S.C.R. 9). Leave to appeal to Privy Council granted, 23 July, 1913.

British Columbia Fisheries, In re (47 Can. S.C.R. 493). The three questions submitted were answered in the negative by the Privy Council, 2 Dec., 1913, ((1914) A.C. 153).

British Columbia Electric Rway. Co. v. *Victoria, Vancouver and Eastern Rway. Co.* (48 Can. S.C.R. 98). Leave to appeal to Privy Council granted, 14 July, 1913.

Cameron v. *Cuddy* (not reported). Appeal to Privy Council allowed with costs, (61 Can. Gaz. 726), 7 Aug., 1913.

Como v. *Herron* (49 Can. S.C.R. 1). Leave to appeal to Privy Council refused, 20 March, 1914.

Dumont v. *Fraser* (48 Can. S.C.R. 137). Leave to appeal to Privy Council granted, on terms as to costs, 15 July, 1913.

Guimond et al. v. *Fidelity-Phœnix Ins. Co.* (47 Can. S.C.R. 216). Leave to appeal to Privy Council refused, 28 Nov., 1913.

Hesseltine et al. v. *Nelles* (47 Can. S.C.R. 230). Leave to appeal to Privy Council granted, 18 July, 1913.

Howard v. *Miller* (not reported). Leave to appeal to Privy Council granted, 7 July, 1913.

"Insurance Act, 1910," In re, (48 Can. S.C.R. 260). Leave to appeal to Privy Council granted, 27 Jan., 1914.

King, The, v. *Cotton* (45 Can. S.C.R. 469). Appeal to Privy Council allowed and cross-appeal dismissed with costs against the Crown, 11 Nov., 1913; ((1914) A.C. 176).

Mackenzie v. *Monarch Life Assurance Co.,* (45 Can. S.C.R. 232). Appeal to Privy Council allowed, 17 Oct., 1913.

Maclaren v. *The Attorney-General of Quebec* (not reported). Appeal to Privy Council allowed with costs, 28 Jan., 1914; ((1914) A.C. 258).

"Montcalm," The, v. *The "Kronprinz Olav"* (not reported). Consolidated appeals to Privy Council allowed with costs, 2 Aug., 1913.

National Trust Co. v. *Miller; Schmidt* v. *Miller* (46 Can. S.C.R. 45). Appeal to Privy Council allowed, 21 Oct., 1913; ((1914) A.C. 197).

Peters v. *Sinclair* (48 Can. S.C.R. 57). Leave to appeal to Privy Council granted, 25 July, 1913.

Ryckman v. *Scully* (not reported). Leave to appeal to Privy Council refused, 2 April, 1914.

Robinson v. *Grand Trunk Rway. Co.* (47 Can. S.C.R. 622). Leave to appeal to Privy Council granted, 4 July, 1913.

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Stone v. *Canadian Pacific Rway Co.* (47 Can. S.C.R. 634). Leave to appeal to Privy Council granted, on terms, 22 July, 1913.

"Tordenskjold," The, v. *The "Euphemia"* (41 Can. S.C.R. 154). The appeal to the Privy Council, noted in 41 Can. S.C.R., at p. viii., was not prosecuted; the case was settled between the parties in Oct., 1909.

Union Bank of Canada v. *Felix McHugh* (44 Can. S.C.R. 473), and the same v. *T. P. McHugh* (not reported). Both appeals allowed in part, 17 Feb., 1913; ((1913) A.C. 299).

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Toronto, City of, *v.* Grand Trunk Railway Co.	37 Can. S.C.R. 232	104
Toronto, City of, *v.* Grand Trunk Railway Co. (York Street Bridge Case)	4 Can. Ry. Cas. 62	19
Tourville *v.* Ritchie	21 R.L. 110; 34 L.C. Jur. 243, 312	150, 159
Turgeon *v.* St. Charles	Q.R. 22 K.B. 58	473

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Union Colliery Co. *v.* Bryden	[1899] A.C. 580	308, 423
Union St. Jacques de Montreal *v.* Belisle	L.R. 6 P.C. 31	13
United States *v.* Bain	24 Fed. Cas. 940	87

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Wakelin *v.* London & South Western Railway Co.	12 App. Cas. 41	611
Ward *v.* Grenville	32 Can. S.C.R. 510	157
Watkins *v.* Naval Colliery Co.	[1912] A.C. 693	565
Watts *v.* Kelson	6 Ch. App. 166	64
Webb *v.* Baldwin	75 J.P. 364	59
Weidman *v.* Shragge	46 Can. S.C.R. 1	287
Wenger *v.* Lamont	41 Can. S.C.R. 603	503
West *v.* Gwynne	[1911] 2 Ch. 1	527
Western Assur. Co. *v.* Harrison	33 Can. S.C.R. 473	578
Williams *v.* East India Co	3 East 192	574
Wilson *v.* Smith	3 Burr. 1550	574

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Young *v.* Hoffman Mfg. Co.	[1907] 2 K.B. 646	610

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

WILLIAM H. MERRITT (PLAINTIFF) .. APPELLANT; 1913

AND

THE CITY OF TORONTO (DEFENDANT) ..... } RESPONDENT.

*April 9, 10.
*May 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Riparian rights—Interference—Evidence.

M., claiming to be a riparian owner on the shore of Ashbridge Bay (part of Toronto harbour), claimed damages from, and an injunction against, the city for interfering with his access to the water when digging a channel along the north side of the bay.

Held, affirming the judgment of the Court of Appeal (27 Ont. L.R. 1), by which an appeal from a Divisional Court (23 Ont. L.R. 365) was dismissed, that the evidence established that between M.'s land and the bay was marsh land and not land covered with water as contended and, therefore, M. was not a riparian owner.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of a Divisional

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

(1) 27 Ont. L.R. 1.

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Court(1), which maintained the judgment at the trial dismissing the plaintiff's action.

The plaintiff's action was brought to compel the city to remove a bank of earth from Ashbridge's Bay which had been thrown up in excavating a channel and which, it was claimed, impeded or destroyed his right, as riparian owner, of free access to the waters of the bay. By the judgments of all the courts below the action was dismissed.

Mowat K.C. for the appellant. Adjoining appellant's land is a water lot which is navigable even if it is shallow at times. See *Stover* v. *Lavoia*(2); *Gardiner* v. *Chapman*(3); *Tanguay* v. *Canadian Electric Light Co.*(4).

Geary K.C. and *Colquhoun* for the respondent. *Niles* v. *Cedar Point Club*(5) is precisely this case. See also *The King* v. *Montague*(6); *Baldwin* v. *Erie Shooting Club*(7).

DAVIES J.—The plaintiff sues in this action, claiming to be a riparian proprietor on the shore of Ashbridge Bay adjoining or forming part of the harbour of Toronto. His complaint is that his riparian rights of free and uninterrupted access to the waters of the harbour and bay to and from his lands, have been interrupted by the defendant, who dug a channel running east and west along the north side of the bay, and in and across lots owned by them lying to the south of

(1) 23 Ont. L.R. 365.
(2) 8 Ont. W.R. 398.
(3) 6 O.R. 272.
(4) 40 Can. S.C.R. 1.
(5) 175 U.S.R. 300.
(6) 4 B. & C. 598.
(7) 127 Mich. 659.

plaintiff's lots, and threw up the excavation from the cut made by them upon its north side, thus impeding, if not destroying, the rights of access of plaintiff to the navigable waters of the bay.

The lands lying between plaintiff's lot in which he claims to have riparian rights, is wet, marshy, boggy land, and to maintain his claim for an injunction to prevent interference with his alleged riparian rights the onus lay upon the plaintiff of proving that this lot owned by him was really, as a substantial fact, bounded or covered in part by the waters of the bay, affording him navigable access to the deeper waters outside and beyond his land; in other words that he was what the law calls a riparian proprietor or owner of lands with rights of access, which had been impaired or destroyed by defendant's works.

There was much evidence, some of it conflicting, and some equivocal and indefinite, given at the trial as to the real nature and character of this marshy land, and in the result the trial judge dismissed the action simply without giving any reasons. It is difficult to see how he could have dismissed the action unless he found against the plaintiff on the crucial point of the case, and on an appeal to the Divisional Court against this judgment the learned Chancellor states plainly that

> this action was dismissed by my brother Magee on the ground that the plaintiff's property was land and not water, and that he was not in any sense a riparian proprietor.

I assume he must, before making that statement, have consulted with the trial judge. The judges of the Divisional Court unanimously concurred with the finding of fact of the trial judge, holding that the plain-

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tiff was not a "riparian proprietor" and did not possess any of his claimed riparian rights, and that the law governing his case was that pertaining to the ownership of marsh land only.

The Court of Appeal for Ontario has made the same findings of fact, Maclaren and Clute JJ. dissenting.

After examining such parts of the evidence as were called to our attention by Mr. Mowat, I am not able to conclude that the findings of fact of the three courts were wrong. On the contrary, I have reached the same conclusion as those courts did, which as I understand it was, that plaintiff's rights by virtue of his ownership of the land in question were not those of a riparian owner at all, but were those of the owner of marsh land simply.

It was claimed that this marsh or boggy land was simply a floating mass of vegetable matter more or less movable and with an appreciable depth of water below it.

I think the evidence called to our attention by Mr. Geary as to the character of the marsh and soil in front of this land of plaintiff's, as shewn from the actual cutting of the ditch made by the defendant and the excavations taken from it, sufficiently dispose of that claim as applicable at any rate to the lands lying between plaintiff's claimed *ripa* and the deep water of the bay. The "floating marsh" evidence was not applicable to the locality in front of plaintiff's land.

Not entertaining any reasonable doubt on the crucial facts relating to the character of this marsh and bog land in front of and bordering upon plaintiff's lot, and not finding him to be in any proper sense of the term a riparian proprietor, I think the appeal should be dismissed with costs.

IDINGTON J.—Such remote and slim possibilities of riparian ownership relative to the navigable waters of Lake Ontario as appellant's predecessor in title may have had long ago, seem to have been effectually extinguished by the forces of nature and of social, commercial and political development.

If ever there was a time when the waters of Lake Ontario reached in such depth and volume the appellant's little plot as to make the owner thereof a riparian proprietor entitled to invoke the law he relies upon herein, it must have been before the Don and other earth carriers had deposited their loads in that vicinity to such an extent as to produce the growth of hay to be found in such close proximity to said plot as to prevent easy navigable approach thereto.

Even if the hay may be of a coarse variety and grown upon a floating vegetable mass having no contact with the soil beneath, as is argued and as does happen with aquatic plants in tropical climes, the barrier to commercial utility developing out of that sort of riparian ownership is rather formidable.

And it seems as if the social and political forces had got to work and constructed a break-water and other things calculated to help the Don to fill up and make of this land-locked bay, solid land in spots, soft land in other spots, with tufts of reed or grass thereon, and that floating vegetable mass peculiar to the climate, in other spots, and all interspersed with water holes, here and there. Indeed long before these later developments had been dreamed of there were dreamers in Toronto who got, in A.D. 1847, a license of occupation from the Crown to the good city to have, hold and occupy a large tract of land and marsh and water which, if we have regard to the illuminating

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effect of a statute of a later date defining the harbour, must have comprised the marsh whereon the works now complained of have been executed.

That license reserved the "free access to the beach for all vessels, boats and persons." It does not appear that the hay lands in close proximity to the appellant's land constituted a beach or part of that beach.

Then in 1855 the legislature by way of confirming, as the title of the Act indicates, the city in the possession of the peninsula and marsh held by it under said license, passed an Act enabling a grant to be made by the governor of the province in council of said peninsula or marsh or any part thereof subject to such conditions or restrictions as he might be advised to impose.

That Act recites large sums of money had been expended by the city in laying out lots, etc., in said area. The result seems to me to be that the province had rights therein which the "British North America Act" would have enabled it to execute in accordance with the intent of such legislation which might, but for that, have been of more doubtful effect having regard to the powers assigned by said "British North America Act" to the Dominion over harbours.

Be that as it may the province did make a grant in 1880 to the city and a confirmatory grant or one having that effect was got from the Dominion in 1903. These several transactions seem to raise a rather formidable barrier in appellant's way when he cannot shew himself possessed of a clearer right as a riparian proprietor than the evidence discloses.

The mandatory order and the restraining injunction he seeks herein are remedies requiring some

clearer basis for a court to act upon than is made apparent in face of the foregoing history.

And as to actual damages he seems to have suffered none that I am able from reading his evidence to appreciate.

It is not a case of trespass in which the bare invasion of his right might entitle him to nominal damages.

Again the work complained of seems to have been done pursuant to some authority directing it for sanitary reasons, and if he had, through interference with his rights in said lands suffered by reason of the injurious affection thereof his remedy would probably be by way of arbitration.

This latter ground has not been so relied upon, though pleaded, as to make clear we should rest thereon alone. It seems unnecessary to dwell thereon, for upon the findings of fact concurred in by so many courts there seems to be no interference with any riparian rights such as appellant imagines he has had.

The appeal should be dismissed with costs.

DUFF J.—I think the weight of evidence supports the conclusion reached by the Court of Appeal and the Divisional Court that the *locus in quo* is land, not water. There is, consequently, no foundation for the claim put forward by the appellant that he is entitled to riparian rights.

ANGLIN J.—The judgments of the Divisional Court and of the Court of Appeal upholding the conclusion of the trial judge, who dismissed this action without assigning reasons, rest upon a finding of fact that the plaintiff's lot on its southern side abuts not upon

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Anglin J.

water, but upon land. This finding is supported not merely by evidence sufficient to sustain it, but I rather think by the weight of the evidence in the record. It is certainly quite impossible to say that it is so clearly erroneous that it should be disturbed in this court. It follows that the plaintiff has not the riparian rights upon which his action is founded and that his appeal fails and must be dismissed with costs.

BRODEUR J.—I entirely concur in the opinion of Mr. Justice Davies.

Appeal dismissed with costs.

Solicitors for the appellant: *Mowat, Laughton & Maclennan.*

Solicitor for the respondent: *William Johnston.*

IN THE MATTER OF CERTAIN LEGISLATION OF THE PROVINCE OF ALBERTA RESPECTING RAILWAYS. 1913

*Feb. 19, 20, 21.

*May 6.

REFERENCE BY HIS ROYAL HIGHNESS THE GOVERNOR-GENERAL IN COUNCIL.

Railways—Powers of construction and operation—Conflict of laws—Provincial legislation—Interference with Dominion railways—Constitutional law—Jurisdiction of legislature—Construction of statute—7 Edw. VII. c. 8, s. 82 (Alta.)—2 Geo. V. c. 15, s. 7 (Alta.)—"B.N.A. Act," 1867, ss. 91 and 92.

It is not competent to the Legislature of the Province of Alberta to enact legislation authorizing the construction and operation of railways in such a manner as to interfere with the physical structure or with the operation of railways subject to the jurisdiction of the Parliament of Canada.

Brodeur J. *contra*, was of the opinion that such legislation would be within the jurisdiction of the provincial legislature provided that in its effect there should be no unreasonable interference with federal railways.

REFERENCE by His Royal Highness the Governor-General in Council of questions for hearing and consideration as to the validity of certain legislation by the Legislature of the Province of Alberta respecting the construction and operation of railways.

The questions referred to the Supreme Court of Canada pursuant to the authority of section 60 of the "Supreme Court Act" are as follows:—

"1. Is section 7 of chapter 15 of the Acts of the Legislature of Alberta of 1912, intituled 'An Act to amend the Railway Act' *intra vires* of the provincial legislature in its application to railway companies authorized by the Parliament of Canada to construct or operate railways?

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

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"2. If the said section be *ultra vires* of the provincial legislature in its application to such Dominion railway companies, would the section be *intra vires* if amended by striking out the word 'unreasonably' ?

"Would the said section be *intra vires* if amended to read as follows: (3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as such lands do not form part of the right-of-way, tracks, terminals, stations, station grounds or lands required for the construction or operation of any railway within the legislative jurisdiction of the Parliament of Canada' ? "

Section 82 of chapter 8 of the statutes of the Province of Alberta, 1907, intituled "The Railway Act," is as follows:—

"82. The company may take possession of, use or occupy any lands belonging to any other railway company, use and enjoy the whole or any portion of the right-of-way, tracks, terminals, stations or station grounds of any other railway company and have and exercise full right and powers to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Lieutenant-Governor in Council first obtained or to any order or direction which the Lieutenant-Governor in Council may make in regard to the exercise, enjoyment or restriction of such powers or privileges.

"(2) Such approval may be given upon application and notice and after hearing the Lieutenant-Governor in Council may make such order, give such

directions and impose such conditions or duties upon either party as to the said Lieutenant-Governor in Council may appear just or desirable, having due regard for the public and all proper interests and all provisions of the law at any time applicable to the taking of land and their valuation and the compensation therefor and appeals from awards thereon shall apply to such lands and in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so in addition to otherwise complying with this section."

3. By section 7 of chapter 15 of the statutes of Alberta, 1912, intituled, "An Act to amend the Railway Act," the "Railway Act" of Alberta, 1907, is amended by adding thereto the following:—

"(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct, or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority."

Newcombe K.C., Deputy-Minister of Justice, for the Attorney-General for Canada. The enactment in question may be construed to empower any company or person authorized to construct a railway by the Legislature of Alberta to take possession of, use or occupy any lands belonging to any railway company within the legislative authority of the Parliament of

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Canada; to use and enjoy the whole or any portion of the right-of-way, tracks, terminals, stations or station grounds of such Dominion railway, and to have and exercise full right and powers to run and operate trains over and upon any portion or portions of the Dominion railway, subject to the approval of the Lieutenant-Governor in Council. It will be observed also that sub-section 2, of section 82, of the Alberta "Railway Act," contemplates that notice of the application for approval may be given to the Dominion company, and that the Lieutenant-Governor in Council, after the hearing, may make such order and give such directions and impose such conditions and duties upon the Dominion company as to him appears just or desirable, having due regard for the public and other interests. It may be observed, moreover, that the provisions of sub-section 3 apply only in so far as the taking of the lands does not unreasonably interfere with the construction and operation of the Dominion railway.

It is urged on behalf of the Attorney-General for Canada that sub-section 3 is *ultra vires,* and that it would remain *ultra vires* even if its application were still further limited by striking out the word "unreasonably." The subject-matter of the legislation is Dominion railways which fall within the exclusive authority of the Parliament of Canada under section 91 of the "British North America Act, 1867." This field of legislation is wholly withdrawn from the local legislatures. It is not referable to any class of subjects enumerated in section 92.

Reference is made to the following cases decided by the Judicial Committee of the Privy Council: *Canadian Pacific Railway Co.* v. *The Corporation of the*

Parish of Notre Dame de Bonsecours(1); *Madden* v. *Nelson and Fort Sheppard Railway Co.*(2); *City of Toronto* v. *Bell Telephone Co. of Canada*(3); *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(4); *L'Union St. Jacques de Montréal* v. *Bélisle*(5); *Grand Trunk Railway Co.* v. *Attorney-General of Canada*(6); *La Compagnie Hydraulique de St. François* v. *Continental Heat, Light and Power Co.* (7).

It is submitted that it is, upon the authorities, abundantly plain that the railway lands of a Dominion Railway company cannot be expropriated by provincial authority or encumbered by works or operations not sanctioned by Parliament. Moreover, the rights completely acquired by companies incorporated by Parliament in the execution of its enumerated powers may be enjoyed unaffected by the operation of any local statute intended to modify or subordinate these rights. The local legislature cannot have the power to take away what Parliament gives. Local powers of expropriation, such as they are, are subordinate to the paramount powers of Parliament.

S. B. Woods K.C. and *O. M. Biggar* for the Attorney-General for Alberta. It will be observed that the qualifying words at the end of sub-clause (2) of section 82, of the Alberta "Railway Act," emphasizes the necessity of the local railway company (by which is meant a railway company incorporated by or under the legislative authority of the Province of Alberta) obtaining the opproval of the Board of Railway Com-

(1) [1899] A.C. 367.
(2) [1899] A.C. 626.
(3) [1905] A.C. 52.
(4) [1906] A.C. 204, at p. 210.
(5) L.R. 6 P.C. 31, at p. 37.
(6) [1907] A.C. 65.
(7) [1909] A.C. 194.

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missioners for Canada whenever it is by law required to obtain such approval, in addition to taking the necessary steps under the local Act (by which is meant the Alberta "Railway Act" and amendments) to entitle it to acquire such lands or interests in lands as it finds necessary in order to carry out its undertaking.

The word "land" or "lands" in the local Act is defined as including "all real estate, messuages, lands, tenements and hereditaments of any tenure."

It is submitted that the amendment in question is *intra vires* of the Legislature of Alberta under section 92, sub-section 10, of the "British North America Act, 1867."

A railway to be constructed from one point in the province to any other point in the same province and not going outside of the provincial boundaries is a local work, and undertaking, and may be authorized to be constructed by a provincial legislature. *City of Montreal* v. *Montreal Street Railway Co.*(1). The power of legislation to authorize the construction of a certain work necessarily carries with it the power to enact such legislation as may be required to prevent the purpose of the grant of such power being defeated, even though, in so legislating, the provincial legislature may interfere with or affect a work authorized to be constructed by the Dominion Parliament. The converse of this principle, namely, that Dominion legislative jurisdiction necessarily extends to such ancillary provisions as may be required to prevent the scheme of a Dominion Act from being defeated, even where such ancillary provisions deal with or encroach upon matters assigned to the provincial legislatures under section 92, has been affirmed by the Privy Coun-

(1) 43 Can. S.C.R. 197; [1912] A.C. 333.

cil in *Cushing* v. *Dupuy*(1); *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(2); *Attorney-General of Ontario* v. *Attorney-General for Canada*(3). The Privy Council have also held in *Bank of Toronto* v. *Lambe*(4), that where a power falls within the legitimate meaning of any class of subjects reserved to the local legislatures by section 92, the control of these bodies is as exclusive, full and absolute as is that of the Dominion Parliament over matters within its jurisdiction. Upon this subject the following appears in Todd's Parliamentary Government in the British Colonies (2 ed.), p. 436, in discussing the principal above mentioned with regard to Dominion legislation: "The converse of this principle has also been maintained by the courts in respect to local legislation upon assigned topics which may appear to trench upon prescribed Dominion jurisdiction."

In *Bennett* v. *The Pharmaceutical Association of the Province of Quebec*(5), Chief Justice Dorion states that the court considered it a proper rule of interpretation that the powers given to Parliament or the provincial legislature to legislate on certain subjects included "all the incidental subjects of legislation which are necessary to carry on the object which the "British North America Act" declared should be carried on by that legislature." See also *Ex p. Leveillé* (6); *Reg.* v. *Mohr*(7); *In re Prohibitory Liquor Laws* (8); *In re De Veber*(9); *Jones* v. *The Canada Central Railway Co.*(10), *per* Osler J. and *per* Haggerty C.J. in

(1) 5 App. Cas. 409.
(2) [1896] A.C. 348, at p. 360.
(3) [1894] A.C. 189, at p. 200.
(4) 12 App. Cas. 575, at p. 586.
(5) 1 Dor. Q.B. 336, at p. 340.
(6) 2 Cartwright 349.
(7) 7 Q.L.R. 183, at p. 191.
(8) 24 Can. S.C.R. 170, at p. 258.
(9) 21 N.B. Rep. 401, at p. 425.
(10) 46 U.C.Q.B. 250, at p. 260.

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Reg. v. *Wason*(1), after referring to *Cushing* v. *Dupuy*(2).

This principle has been followed to support the provisions of provincial laws dealing with procedure to enforce the penal provisions of provincial acts in a number of decided cases and it is submitted is applicable to the present case. The power of the province to legislate in respect of this subject-matter is not to be restricted or its existence denied, because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion Parliament. *Bank of Toronto* v. *Lambe*(3); *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*(4).

It is further submitted that the fact that the Dominion Parliament has power to legislate in respect of Dominion railways in a way analogous to the legislation the subject-matter of this reference, in no way interferes with the competence of the provincial legislature to enact the law in question. Both legislatures are equally supreme within their respective jurisdictions. It is, therefore, submitted, that as, under the terms of the "British North America Act" the right of a province to authorize the construction of a railway line that lies wholly within that province is exclusively wthin the legislative powers of that province (excepting always the right of the Dominion to authorize the construction of such a work under the provisions of section 92, sub-section 10*c*, by declaring the same to be for the general advantage of Canada or for the advantage of two or more of the provinces) it follows, that there is necessarily involved in this right

(1) 17 Ont. App. R. 221, at p. 232.
(2) 5 App. Cas. 409.
(3) 12 App. Cas. 575, at p. 586.
(4) [1892] A.C. 437, at pp. 441-3.

the right to so legislate that the work so authorized to be constructed can be carried to completion, and for this purpose to give a railway company authorized by the province to build such a line, the power to acquire either the land or such interests in the land of a Dominion railway company (and whether such land lies between the right-of-way fences of the Dominion railway company or is land owned by it as a land grant or otherwise) as will enable the provincial railway to complete its authorized works.

It must necessarily follow that the provincial legislature has power to give to its creature the right to interfere to some extent with a railway brought into existence by the Parliament of Canada because the taking of such land or interests in land under such legislation by the provincial railway must of necessity interfere to some extent with the Dominion railway. So long as such interference is not unreasonable or undue and is only such as is necessarily involved in the acquiring of such land or interests in land (including therein a right-of-way or easement over the land or through the land) the giving of such rights is within the competence of the provincial legislature. Whether the boundary line of provincial power has been exceeded must be determined by the courts in each case where such question is raised, and if upon the determination of such fact it be found that the rights purported to be given under the provisions of the provincial Act do interfere to such an extent with the construction and operation of the Dominion railway as to be unreasonable or undue, then such authority given by provincial legislation will not be effective and will confer no rights upon the recipient of it. The province cannot use its authority to authorize the

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construction of railways within its boundaries in such a way as to prevent the construction and operation of Dominion railways, nor, conversely, can the Dominion use its authority to authorize the construction and operation of railways so as to prevent the construction and operation of a provincial railway, but each legislative jurisdiction can interfere with the operation of other railways in so far as it may be reasonably necessary to carry out its authority to construct or authorize the construction of a railway within its jurisdiction. Such right or power is, by implication, reserved to each legislative body by the terms of the "British North America Act."

The provision in the local Act, the subject of this reference, is not and cannot be covered by Dominion legislation, and it necessarily follows that unless the legislation that is here attacked is within the competence of the province, a Dominion railway can at any time prevent the construction of a provincial railway, and conversely a provincial railway can prevent the construction of a Dominion railway by merely refusing to negotiate for the right to pass through its properties.

There are certain provisions of the Dominion "Railway Act" purporting to regulate traffic at the point of crossing of a Dominion and provincial railway. R.S.C., 1906, ch. 37, sec. 8 (*a*); 151 (*e*) 176 and 227. But even they do not purport to give a Dominion railway company the power to acquire the land of or running rights over the land of a provincial railway company or *vice versa*: see *Preston and Berlin Street Railway Co.* v. *Grand Trunk Railway Co.* (1) (May, 1906); but have, apparently, been sup-

(1) 6 Can. Ry. Cas. 142.

ported on the ground of public safety and convenience: *Re Portage Extension of Red River Valley Railway*(1); *Canadian Pacific Railway Co.* v. *Northern Pacific and Manitoba Railway Co.*(2); *Credit Valley Railway Co.* v. *Great Western Railway Co.*(3); *Niagara, St. Catharines and Toronto Rway. Co.* v. *Grand Trunk Rway. Co.; Stanford Junction Case*(4); *City of Toronto* v. *Grand Trunk Rway. Co.; York Street Bridge Case*(5). In *City of Montreal* v. *Montreal Street Railway Co.*(6) it was held by the Privy Council that the right of Parliament to enact section 8 of the "Railway Act," so far as it applied to provincial railways, could not be supported under the general power to legislate regarding the peace, order and good government of Canada insomuch as it trenched upon the provincial power of legislation under sub-section 10 of section 92 of the "British North America Act," and was *ultra vires* of the Parliament of Canada. It would appear from this that section 227, so far as it affects provincial railways, is also *ultra vires*.

The effect of striking out the word "unreasonably" in the section in question would be to confine the operation of the provincial statute to the land of Dominion railway companies outside of and other than the land included in the right-of-way fences of the Dominion railway. The legislation of the province is *intra vires* in this regard. The considerations above referred to apply to the answer to this second question.

(1) Cass. Dig. (2 ed.) 487; Cout. Dig. 1226.
(2) 5 Man. R. 301.
(3) 25 Gr. 507.
(4) 3 Can. Ry. Cas. 256.
(5) 4 Can. Ry. Cas. 62.
(6) [1912] A.C. 333.

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The lands of Dominion railway companies, outside of the right-of-way fences, are subject to the local law just as much as the lands of any other companies or individuals and there would appear to be no good reason why they should not be subject to this law as well as to such a law, for instance, as the provincial "Land Titles Act." The taking of such land, or interests therein, does not in any way interfere with the construction or operation of Dominion railways and it could be only upon this ground that the Act would be beyond the competence of the province.

It is, therefore, submitted that the answers should be in the affirmative.

DAVIES J.—I would answer both questions in the negative, and in doing so would explain that I adopt the construction put by counsel at the argument upon the questions. As I understood counsel, it was agreed that the words "lands of the company" in the section we are asked to determine the validity of, meant the right-of-way and the stations and terminals in connection therewith of a railway built under the authority of the Dominion Parliament, and were not intended to refer to or include lands granted by way of subsidy merely and not included in such right-of-way, stations and terminals. The real question, counsel agreed, we were desired to answer was whether the provincial Parliament could so legislate as to force a crossing of a provincial railway over and across a Dominion railway.

Now, as I read and understand section 82, of chapter 8, of the Act of the Legislature of Alberta, 1907, it was only intended to have application to railways authorized to be constructed by the provincial legisla-

ture, and not to railways constructed under authority of the Dominion Parliament. It would seem that the latter sentence of sub-section 3 of section 82 making the approval of the Dominion Board of Railway Commissioners essential in addition to that of the Lieutenant-Governor in Council *"where it was necessary* to obtain the approval of such Board," was inconsistent with this construction. I accept, however, the explanation of Mr. Woods, counsel for Alberta, that the words in question were inserted in the section by inadvertence or mistake and never should have been there.

Then we have the legislation of 1912 amending the provincial "Railway Act" of 1907 by adding the section respecting the power of the legislature to pass which we are asked. It reads as follows:—

(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority.

It refers to railways the construction of which is authorized by the Dominion Parliament and attempts to apply the provisions of the railway legislation of 1907 to such Dominion railways so as to authorize the crossing of such railways by provincial railways.

I do not think such legislation *intra vires* of the local legislatures. The exclusive power to legislate with respect to Dominion railways is, by the 29th sub-section of section 91 of the "British North America Act," conferred upon the Dominion Parliament.

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It is a "matter coming within one of the classes of subjects enumerated in section 91," and being such is not to be deemed to come within those classes of subjects assigned exclusively by that Act to the provincial legislatures.

The provincial legislature while having full power to authorize the construction of a local or provincial railway, cannot in so doing either override, interfere with or control or affect the crossing or right of crossing of a Dominion railway by a provincial railway. Legislation respecting the crossing of Dominion railways by provincial railways is exclusively vested in the Dominion Parliament, and being so vested by virtue of one of the enumerated classes of subjects of section 91, is explicitly withdrawn from the jurisdiction of the local legislature.

The clause in question would give rise to endless difficulties. As it now stands, it is open to the fatal objection that it would refer to the ordinary courts of the land the determination of the question whether the crossing of a Dominion railway by a provincial railway was an "unreasonable interference" with the Dominion railway's operations. This is a question which the Dominion Board of Railway Commissioners alone is authorized to deal with and its decision is final.

But the omission of the word "unreasonably" would not make the legislation *intra vires,* as the subject-matter was not one within the jurisdiction of the local legislatures at all, being as I have said, withdrawn from them by the latter part of section 91.

It was contended strongly by counsel for the province that not only had the legislature of the province power to authorize the crossing of Dominion railways

by provincial ones, but that they had power to authorize the crossing of navigable streams or marine hospital lands or lands reserved for military camps or forts or defence.

The argument was logical enough, granting the premises assumed, namely, that the *exclusive power* to build local railways necessarily involved the power to cross these streams, lands, defence works and Dominion railways.

But it omits to take cognizance of the rule so often and necessarily applied by the Judicial Committee in the construction of the "British North America Act," that the enumerated subject-matters of legislation assigned to the Dominion Parliament are not deemed to come within the matters assigned exclusively to the provincial legislatures though *primâ facie* they may appear to do so, and the further rule of construction that if there is a common field of legislative action within which Parliament and the legislatures are alike competent to legislate, when Parliament occupies the field and legislates, as it has done with respect to the subject-matter under discussion, under one of the enumerated clauses of section 91, its legislation is supreme and overrides that of the local legislatures.

IDINGTON J.—We are asked whether or not the Alberta legislature can amend the "Railway Act" of that province, adding to section 82 thereof the following:—

(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct, or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such other legislative authority,

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and if not will striking out the word "unreasonably" therein render the clause *intra vires*? Any legislative enactment under our federal system, which partitions the entire legislative authority, ought to be approached in the spirit of assuming that the legislature did not intend to exceed its powers; and if an interpretation can reasonably be reached which will bring it within the power assigned the legislature in question, and given operative effect, then that meaning ought to be given it.

Of course, if the plain language is such that to give it operative effect must necessarily involve doing that which is beyond the power assigned the legislature then the Act must be declared null.

Again, the language used is sometimes capable of a double meaning according to the respective surrounding circumstances to which it may be sought to be applied.

In such case the court on the one hand must refuse to give such effect to the language as will maintain anything *ultra vires* the legislature, and on the other give such effect to it as will within the purpose and power of the legislature render it effective.

Then, again, the subject dealt with may be of that complex character that concurrent legislation on the part of a provincial legislature and Parliament is absolutely needed to effectuate satisfactorily the purpose had in view.

To the man accustomed to deal only with the legal product of a single legislature possessing paramount legislative authority over all matters that can be legislatively dealt with, this latter situation seems almost incomprehensible. The situation often exists, must be reckoned with and dealt with accordingly.

We must not too readily knock aside a provincial enactment. It may be not only susceptible of use, but be actually needed to give operative effect to the authority of Parliament which in a sense may be paramount in authority and power in relation to what the legislature may be attempting yet not possessed of the entire field. The recent case of the *City of Montreal* v. *Montreal Street Railway Co.*(1), relative to the question of through traffic furnishes an illustration of how co-operative legislation by a province might have rendered that of Parliament more effectual, or far-reaching in its results.

When we add to these complexities an ambiguity of expression, too often found in statutes, the task of answering such questions as are now submitted becomes increasingly difficult. And when we add thereto the need not only of considering a few concrete facts such as a single case involves, but also the whole range of possible human activities, in the indefinite field thus submitted for us to pass upon, our native humility and modesty are startled and we are tempted to say we do not know.

However, though I have not by any means exhausted the definition or classification of legislative products likely to arise under our federal system, I have indicated some of the manifold considerations that have to be borne in mind in determining whether or not the above section is worthless or may be made use of either in its present shape or when modified in the way suggested.

The subject-matters presented and arguments thereon seem to require I should do so and thus guard

(1) [1912] A.C. 333.

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or qualify the results to be stated in any answers that can be given to the questions submitted.

One difficulty suggested is whether or not the questions should be looked at in light of the fact that the Canadian Pacific Railway Co., clearly a Dominion legislative product, subsidised by a land grant partly situated in Alberta, might be affected by the legislation in another way than is involved in the merely crossing of its track by a local railway.

Counsel seemed to agree that that complicated question ought to be eliminated from the problems before us. But I am not quite sure that they were agreed on any substituted form of question if indeed it was competent for them so to agree. Counsel arguing for the Attorney-General for the Dominion, on whose advice the submission is made, and who is the minister in charge of such a reference, and I incline to think must be treated as if *dominus litis* in such references as those requiring an advisory opinion, has relieved us so far as he can from answering in a way to touch upon questions relative to lands in said subsidy.

I am not sure that his waiver would help much were it a reference of a concrete case involving some right as between the Dominion and a province. It is here, however, merely a question wherein it is desired by the government to be advised before vetoing or refraining from vetoing the legislation. It has also been throughout the argument painfully obvious to my mind that if the legislation is *ultra vires* then it can hurt no one, not even the Canadian Pacific Railway Co., and if it is clearly *intra vires* it would in such case at least so far as relating to said lands, hardly concern any one else than the Legislature of Alberta.

It seemed finally in argument to be, as between

parties arguing before us, a question of the right of a provincial railway to cross a Dominion railway by virtue solely of the provincial legislative authority.

I have not and never had supposed any one else could have had any doubt upon such a point.

The Dominion Parliament having by virtue of its exclusive powers over the enumerated subjects in section 91 of the "British North America Act," created a corporate power and thereby conferred on one or more persons the power to construct or cause to be constructed a railway, that railway cannot be crossed by any other railway company which with its work is only the product of the somewhat analogous powers given by section 92 to provincial legislatures over "local works and undertakings."

I have considered the elaborate argument addressed to us to the contrary and hope I understand it.

As to that parallel drawn between the incidental or necessarily implied powers which have been held to be part and parcel of the power conferred by the powers given the Dominion over the enumerated subjects of section 91 and the supposed need to give vitality to the powers of the provinces over local works and undertakings by means of implying similar incidental and necessarily implied powers in anything to be enacted in order to the carrying into execution of any such provincial powers, I have just this to say.

I agree the analogy holds good until the attempt to give operative effect to it runs against the exclusive precedent power and its products.

The "British North America Act" expressly assigns to the Dominion Parliament in and for the purposes of the executing of the powers over the enumerated subjects in section 91 and the exception in section

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92, sub-section 10, such exclusive and paramount authority over the subject-matters therein mentioned that when we have regard to the matters of the business in hand as when a railway crossing of a Dominion railway by a provincial railway has to be constructed it is clear that it must be affected either by virtue of concurrent legislative provisions covering all that is necessary to provide for executing such a purpose with due security for the safety of all those concerned in the construction and use of the physical product called a crossing, or by virtue of the power having the exclusive and paramount authority referred to exercising the full power necessary to determine the means of executing such a purpose.

Having regard to the nature of the business in hand and the clear language of the "British North America Act," I think the full effect I suggest must be given the predominant or paramount powers I have mentioned. After these powers have been exercised all that the provincial legislature is given must be read as subject thereto.

The argument for the proposition that the powers assigned the province must be given such full effect as to enable the local road to accomplish a crossing without relying upon the authority of the Dominion, was attempted to be supported by the recent decision in the *Marriage Laws Case*(1). I am disposed to think the point well taken as mere matter of argument put forward for consideration. It is to be observed, however, that the opinion therein was merely advisory and decides nothing and is of no consequence in relation to the interpretation and construction of the "British North America Act," save so far as the rea-

(1) 46 Can. S.C.R. 132.

soning upon which it proceeded when applied to said Act commends itself to those having to deal therewith.

Then having due regard thereto I am, with great respect, quite unable to understand how any express and exclusive dominating power such as given by the Act to the Dominion despite the so-called exclusive authority subject thereto given the provinces, is ever in any case to be minimized, much less deleted from the Act because of some apparently inconsistent power given the provinces. If need be to discard either, it is the subsequent and subordinate power that must be deleted, as it were, in order to give the precedent and paramount power its full effective operation.

The use of the adverb "exclusively" in section 92, and adjective "exclusive" in section 91, unfortunately leads those not examining the whole, to assume each must have the same effect. But the language used when analyzed as it has been so often renders it clear that the general purpose was to subordinate the powers of the legislatures, no matter how it might affect them, to those of Parliament, over the said enumerated subjects.

The attempt has been made in many cases to give the subordinate provincial powers such operative effect as the language defining them at first blush might warrant, notwithstanding the precedent dominating power given over the enumerated subjects in the sub-sections of section 91 to the Dominion had not been exercised or at least exhausted or because they had been exercised later than the provincial powers apparently bearing on the same subject.

These attempts always failed in the courts of last resort until the *Marriage Laws Case*(1). The trend of

(1) 46 Can. S.C.R. 132.

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authority in many cases including some of those cited to us, had run so strongly the other way as to become the subject of adverse criticism on the ground that the powers claimed by the Dominion had been carried further than in fact necessary for the due execution of the particular power involved, and thus needlessly invaded the field assigned the provinces.

There is a mass of authority of this kind in the way of decisions in concrete cases, which having binding authority we must observe, despite later merely advisory opinions, even if apparently conflicting, though possibly not.

Then it is said, pursuing same line of argument relative to the power claimed by the enactment now in question, that the Dominion has not by express enactment taken possession of the field and, therefore, the province has authority to enact, and a line of cases is cited to us which it is urged give expression to such a doctrine. When examined these cases do not support the alleged doctrine. In most of them there is nothing more than that a province may have in the exercise of its power over property and civil rights enacted a law which perhaps has been superseded *pro tanto* by an enactment of Parliament in the exercise of its exclusive legislative authority over the enumerated subjects in section 91. This has been sometimes expressed as a taking possession by the Dominion of the same field or part of the same field or as overlapping, as it were, in the same field by concurrent legislation. A more accurate mode of expression is that subjects which in one aspect and for one purpose fall within section 92 may in another aspect and for another purpose fall within section 91. (Clement's Canadian Constitution (2 ed.), page 172, quoting from the judgment of the Judicial Committee

of the Privy Council in the case of *Hodge* v. *The Queen* (1), at page 130.)

With great respect I think the metaphor of a supposed field, as it has sometimes been expressed, is not quite accurate, and in other cases the true limits of the respective powers have been, as result of its misapplication, misapprehended. For example: When by virtue of its authority over property and civil rights a legislature has enacted something giving a right of property, and later the Dominion Parliament has in the due exercise of its exclusive powers over bankruptcy enacted something else which of necessity invaded that right of property, it may in doing so disturb apparently existent rights of property and other civil rights. But such rights of property always were held subject to such disturbing power.

That part of the field of property and civil rights which Parliament may thus have taken possession of, never had existed in the province. It had only exercised its undoubted power over property and civil rights so far as competent for it to do so, but had never occupied the same field as the expression "taking possession of the field" so often implies. The bank or Dominion railway company, for example, operate by virtue of the exclusive authority of Parliament. These corporate bodies rest such operations in the field of property and civil rights sometimes solely upon the authority of Parliament in ways that the legislature of a province with all its power over property could not enable, and at other times upon the authority of both Parliament and legislature.

The purposes and objects to be attained by each legislative power are the measure by which their re-

(1) 9 App. Cas. 117.

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spective legislative fields are constituted and they never can be the same field though the physical appearance as result of obedience to the law either may enact, may produce often a semblance that seems to justify the expression.

Great confusion of thought often exists because people do not stop to think and discriminate between these exclusive powers of Parliament and the residual power which Parliament has for the "peace, order and good government of Canada," but which in its turn is subordinate to the so-called exclusive powers given in section 92 to the provincial legislatures.

The gravest error is likely to grow out of this confusion by accustoming the legislative and judicial mind, if I may say so, to look upon the Dominion as possessing a general supervision or superior power over identically the same thing as the province is entitled to deal with, but which it has not save by the indirect means of the veto power over provincial enactments.

The notion sometimes prevails that, as of course, the legislation of a province must bend before that of Parliament. It must before the paramount exclusive legislative authority given over specified subjects, but not before what Parliament asserts merely by virtue only of this residual power.

In the case of the matter in hand I think there are two answers to the contentions founded on the theory put forward. The Dominion Parliament has, I incline to think, taken possession of the field which I will call the subject of crossing of railways, of which one or more may happen to be a Dominion railway, and has dealt in detail with all the immediate acts involved in carrying out such a purpose, so that in a proper case

there should not be a legal difficulty in accomplishing a crossing of such railway as in question.

But even if it has not gone quite so far I think its enactment under which one of the railways within its exclusive control has been constructed and is being operated, has in itself such force and effect that a provincial legislature cannot interfere to force by its own unaided act a crossing thereof by one of its own creations.

Is there then any purpose which the said section submitted herein can subserve ? Is there anything on which it can so rest as to be possibly *intra vires* the legislature ?

It is quite clear that Parliament has no power to add to a provincial corporation a capacity not already given it. If such a railway company has not been given directly or impliedly the capacity to cross another railway, Parliament cannot give it that capacity except by declaring it a work for the benefit of Canada.

In like manner, if as is contended, Parliament has not so dealt with the subject of crossing and there is nothing enabling it and the Dominion railway charter expressly or impliedly disables it from being done, then I conceive it is quite competent for a legislature to pass some such Act as the section in question to be conditional in its operation upon corresponding legislation being duly enacted by Parliament.

It does not seem to me that such an enactment need be in very exact terms conditional if it is capable of such use or application.

It certainly ought to be held that a legislature is competent to make a tender of such legislative assist-

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ance if we are to work out our federal system in all its bearings.

I must not, however, conceal the fact that I made such a suggestion in the *Marriage Laws Case*(1), and expressed the view that it was quite competent for Parliament to so act upon or by virtue of its powers therein involved, but in view of the result of that case in the Judicial Committee of the Privy Council(2) there is room to argue that such a doctrine as I here enunciate and have often laid down has no foundation.

Parliament certainly has the power to aid thus the treating and dealing with other countries. No one ever questioned it in known instances, and surely it is quite competent for it to so deal with the provinces.

In fact it has heretofore and until the *Marriage Case*(1) so dealt with them.

I have no serious difficulty in this case in so holding if the section can be read, as if conditional, for example, upon due leave being got from the Board of Railway Commissioners to render it operative. So far as that may, if possible, be implied the section may be *intra vires*.

As at present advised I do not think the proviso relative to Railway Commissioners at the end of the sub-section which precedes this amending sub-section, is effective for such purpose, or can be imported into this new legislation as if part thereof.

But the purpose of the submission as indicated by the possible amendment to the section as proposed and the withdrawal of the possible bearing of the enactment upon the Canadian Pacific Railway lands assigned by virtue of its subsidy, seems to be tentative

(1) 46 Can. S.C.R. 132. (2) [1912] A.C. 880.

and, therefore, the liberty extended to us instead of a single affirmative or negative answer, to answer in such a way as to deal with the value of the enactment as giving a right to cross a Dominion railway without the leave of the Board of Railway Commissioners for Canada, or other means given or to be given by authority of Parliament.

My answer, therefore, is that the section as it stands or would stand after striking out the word "unreasonably" would not, without the authority of Parliament or some person or body duly delegated its power in the premises, be effective as giving the right to any provincial railway company to cross a Dominion railway.

DUFF J.—Section 82(2) of chapter 8 of the Alberta statutes of 1907 contains these words:—

> And in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so in addition to otherwise complying with this section,

and in view of that clause it may be doubted whether the power conferred upon provincial railway companies by the first sub-section ought not be held to be exercisable in respect of the "lands" of Dominion railways only after the Board of Railway Commissioners for Canada has pursuant to its lawful powers in that behalf given its approval to the proposed action of the provincial railway company.

It may further be doubted whether on the true construction of section 7 of chapter 15 of the Act of 1912 the amendment effected by that enactment is not limited to authorizing the provincial railways with the approval of the Lieutenant-Governor in Council as

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well as that of the Board of Railway Commissioners for Canada to "take possession of, use or occupy" *lands* of any Dominion railway company as contra-distinguished from "right-of-way tracks, terminal stations or station grounds."

If such be the effect of these enactments they are obviously unobjectionable from a constitutional point of view.

Both parties, however, desire us to deal with the question whether provincial legislation can or cannot validly confer upon a provincial railway company compulsory powers for the purpose of enabling it to construct its line across the line of a Dominion railway by way of level crossing and to run its trains over the line when constructed. I think the question must be answered in the negative. It is, of course, impossible to construct a railway across another existing railway in such a way as to form a level crossing without altering in some degree the physical structure of the works of the existing railway.

Legislation authorizing such action on the part of a provincial railway company and requiring the Dominion railway company to submit to such alteration of the structure of its works, and to the passing of the trains of the provincial railways across its line, in so far as it is merely permissive or facultative, is legislation strictly relating to the provincial railway and if it stopped there would as such be within the powers of a provincial legislature. But in so far as it affects to confer authority upon or compulsory powers as against the Dominion company it is legislation relating to a Dominion railway as such. In that respect it is legislation of a character that the Dominion alone has power

to enact. Some of the powers of the Dominion in respect of Dominion railways are (it could hardly be disputed) exclusive powers. In *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* (1), at page 372, Lord Watson said:—

> The "British North America Act," whilst it gives the legislative control of the appellants' railway *quâ* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament. It, therefore, appears to their Lordships that any attempt by the Legisature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers.

Legislation, therefore, authorizing the altering for railway purposes of the structure of the works of a Dominion railway, and the running of trains over the works as altered is legislation upon a subject which as subject-matter for legislation *necessarily* falls within the field exclusively assigned to the Dominion.

The works dealt with by section 92 (10) are, as Lord Atkinson observed in the judgment in *City of Montreal* v. *Montreal Street Railway Co.*(2), "things not services." Some of them at all events (railways and telegraph lines, for example,) are things of such a character that for many purposes they must be treated as entireties. The observations of his Lordship in the

(1) [1899] A.C. 367. (2) [1912] A.C. 333.

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judgment just mentioned suggest that as far as possible they should be so regarded when considered as subject-matter of legislation. In that view it seems to follow that when you have an existing Dominion railway all matters relating to the physical interference with the works of that railway or the management of the railway should be regarded as wholly withdrawn from provincial authority. *Fisheries Case*(1), at page 715; *Madden* v. *Nelson and Fort Sheppard Railway Co.*(2), at page 628. Questions of a similar character may arise when a projected Dominion railway is to cross a provincial railway. What compulsory powers the Dominion is entitled to exercise in such a case over the provincial railway in respect of the crossing and matters incidental thereto without assuming complete jurisdiction over the provincial railway by declaring it to be "a work for the general advantage of Canada," is a subject which does not require discussion here.

There are two further observations:—

1. In the view I have just expressed (namely, that legislation such as that under consideration conferring authority upon a provincial railway to alter for railway purposes the physical structure of the works of a Dominion railway without the consent of the Dominion railway company or the sanction of the Dominion Parliament and all legislation relating to the management of such a railway is legislation upon a subject which since it necessarily falls within the subject of Dominion railways can only be enacted by the Dominion) no question of the so-called doctrines of "overlapping powers" and "necessarily incidental powers"

(1) [1898] A.C. 700. (2) [1899] A.C. 626.

can arise; and the points raised during the able discussion of those subjects by counsel of Alberta do not require consideration.

2. As is shewn by Lord Watson's judgment in *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* (1) (and, indeed, it must be obvious when we consider the numerous cases in which jurisdiction over the railway of a provincial company has been assumed by the Dominion by declaring the railway to be a work for the general advantage of Canada after the company had received a large land subsidy from the province,) the fact that exclusive jurisdiction in relation to a Dominion railway, as railway, is vested in the Dominion is not incompatible with the possession by the province of some authority over the Dominion railway company as land owner; how far in legislating for a provincial railway the province has authority to confer compulsory powers as against a Dominion railway company as land owner is a question upon which I express no opinion.

ANGLIN J. agreed with Davies J.

BRODEUR J. (dissenting).—We are asked by this reference to declare whether section 7 of chapter 15 of the Act of the Legislature of Alberta of 1912 is *intra vires*.

The Legislature of Alberta passed in 1907 a "Railway Act," and section 82 of that Act provided: —

The company may take possession of, use or occupy any lands belonging to any other railway company, use and enjoy the whole or any portion of the right-of-way, tracks, terminals, stations or station grounds of any other railway company and have and exercise full

(1) [1899] A.C. 367.

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right and powers to run and operate its trains over and upon any portion or portions of the railway of any other railway company, subject always to the approval of the Lieutenant-Governor in Council first obtained or to any order or direction which the Lieutenant-Governor in Council may make in regard to the exercise, enjoyment or restriction of such powers or privileges.

(2) Such approval may be given upon application and notice and after hearing the Lieutenant-Governor in Council may make such order, give such directions and impose such conditions and duties upon either party as to the said Lieutenant-Governor in Council may appear just or desirable, having due regard for the public and all proper interests and all provisions of the law at any time applicable to the taking of land and their valuation and the compensation therefor and appeals from awards thereon shall apply to such lands and in cases under this section where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so in addition to otherwise complying with this section.

It seems to me that the legislation had in view not only the crossing of provincial railways, but also of federal railways because of the reference therein to the Board of Railway Commissioners for Canada. But the definition in the Act of the word "company" made it somewhat doubtful whether the above quoted provisions would apply to federal railways and a new sub-section was added in 1912 by chapter 15, section 7, which reads as follows:—

(3) The provisions of this section shall extend and apply to the lands of every railway company or person having authority to construct or operate a railway otherwise than under the legislative authority of the Province of Alberta in so far as the taking of such lands does not unreasonably interfere with the construction and operation of the railway or railways constructed and operated or being constructed and operated by virtue of or under such legislative authority.

By the "British North America Act" sub-section 10 of section 92, the provincial legislature may exclusively make laws in regard to local works and undertakings.

A railway built within the boundaries of a province is subject to the legislative control of that province.

The corporate powers of such a railway company, its rights and obligations are essentially under such legislative control.

Its power to build a line from one point to another is granted by the provincial legislature and the provincial legislature alone can give such authority. If in its course the railway comes in contact with federal works it may be subject to some federal regulations, but the enabling power to cross those federal undertakings rests essentially with the province.

A provincial railway may have to cross a navigable river. Navigation is under the legislative authority of the federal Parliament and laws have been passed by that Parliament as to the manner in which bridges could be put on those rivers (R.S.C. 1906, ch. 115). In such a case the provincial railway will be required to follow the federal regulations, but the right to build a bridge shall have to be granted to the company by the local legislature.

The legislation, the constitutionality of which is contested, deals with the crossing of railways.

In the case of two provincial railways the executive authority of the province is empowered to deal with the matter, to give its approval and impose such conditions as it may appear just or desirable having due regard for the public interests. In the case of the crossing of a federal railway the provincial railway is still bound to obtain the approval of the provincial government; but, as I read the statute, that provincial railway will also require the approval of the Board of Railway Commissioners for Canada which is the federal authority having executive and judicial control over federal railways.

The power conferred by the legislation upon the provincial railway to cross a provincial or federal rail-

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way is such an enabling power as was within the legislative authority of a provincial legislature.

The claim that the federal Parliament is the only authority that could give such enabling power is unfounded, because the provincial railway company could not construct its line through or over or below a federal railway, unless the federal authorities would be willing to pass the necessary legislation. The powers then granted by sub-section 10 of section 92 of "British North America Act" would become illusory. The enabling power rests with the provincial authority and a regulative power recognized by the provincial legislation may be exercised by the federal authorities.

The crossing of railways is of constant occurrence. The provincial legislature in creating local railway companies have the power to confer upon them as an incident of their legislative authority in the matter the right to cross any other railway, local or federal. But that must be done, of course, without interfering unreasonably with the construction or operation of the other railway. It is precisely what the legislation has provided for in this case.

But there is more. The legislature far from encroaching upon federal legislative or executive authority has enacted that where it becomes necessary for the company to obtain the approval of the Board of Railway Commissioners for Canada it shall do so. There is in the "Railway Act" a legislation regarding the crossing of provincial railways by federal railways. It may be doubtful whether such legislation was within the power of the federal authority, but then concurrent legislation was advisable and it is what was done. The Act in question provides for en-

abling and concurrent legislation that was within the legislative authority of the Province of Alberta.

For those reasons I would answer that section 7 of chapter 15 of the Act of the Legislature of Alberta, in 1912, is *intra vires*.

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*April 16.
*May 6.

JOHN L. McGUIRE AND HATTIE McGUIRE (DEFENDANTS) ..... } APPELLANTS;

AND

THE OTTAWA WINE VAULTS COMPANY AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Fraudulent conveyance—Statute of Elizabeth—Husband and wife—Voluntary settlement—Evidence.

In August, 1908, M. and his brother bought a hotel business in Ottawa for $8,000, paying $6,000 down and securing the balance by notes which were afterwards retired. In November, 1908, M. conveyed a hotel property in Madoc to his wife subject to a mortgage which she assumed. M. and his brother carried on the Ottawa business until March, 1910, when they assigned for benefit of creditors who brought suit to set aside the conveyance to M.'s wife. On the trial it was shewn that for some time before November, 1908, M.'s wife had been urging him to transfer to her the Madoc property, which she had helped him to acquire, as a provision for herself and their children; that she had joined in a conveyance of a property in Toronto in which they both believed she had a right of dower, and the proceeds of the sale of which were applied in the purchase of the Ottawa business; and that all of M.'s liabilities at the time of said conveyance had been discharged. M. ascribed his failure in Ottawa to the action of the License Commissioners in compelling him to move his bar to the rear of the premises whereby his receipts fell off and he lost rents that he had theretofore received, and had to make expensive alterations; and to a fire on the premises early in 1910. The trial judge set aside the conveyance to M.'s wife; his judgment was reversed by a Divisional Court (24 Ont. L.R. 591), but restored by the Court of Appeal.

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

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Held, affirming the judgment of the Court of Appeal (27 Ont. L.R. 319), Davies J. dissenting, that the conveyance by M. to his wife was voluntary; that it denuded him of the greater part of his available assets and was made to protect the property conveyed against his future creditors and is, therefore, void as against them.

APPEAL from a decision of the Court of Appeal for Ontario(1), reversing the judgment of a Divisional Court(2), and restoring that of the trial judge in favour of the plaintiffs.

The facts are sufficiently stated in the above headnote.

F. B. Proctor for the appellants. The Court of Appeal rested its judgment against the appellants on the cases of *Crossley* v. *Elworthy*(3), and *Mackay* v. *Douglas*(4). But the principle of those cases is, that where a person makes a voluntary settlement on the eve of engaging in trade the onus is on him to prove that he was in a position to make it. That proof has been made by the appellants in this case. And see *French* v. *French*(5); *Buckland* v. *Rose*(6); *In re Lane-Fox*(7), at page 513.

In *Collard* v. *Bennett*(8), Vice-Chancellor Spragge upheld a voluntary settlement under conditions very similar to those in the present case.

Mrs. McGuire gave valuable consideration for the Madoc property. The release of a supposed right of dower is sufficient. May on Fraudulent Conveyances (3 ed.) 226.

Hogg K.C. for the respondents referred to *Jackson* v. *Bowman*(9); *Campbell* v. *Chapman*(10).

(1) 27 Ont. L.R. 319.
(2) 24 Ont. L.R. 591.
(3) L.R. 12 Eq. 158.
(4) L.R. 14 Eq. 106.
(5) 6 DeG. M. & G. 95.
(6) 7 Gr. 440.
(7) [1900] 2 Q.B. 508.
(8) 28 Gr. 556.
(9) 14 Gr. 156.
(10) 26 Gr. 240.

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McGUIRE v. OTTAWA WINE VAULTS CO.

Davies J.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

DAVIES J. (dissenting).—This is an appeal from a judgment of the Court of Appeal for Ontario reversing the judgment of the Divisional Court (Chief Justice Falconbridge dissenting), and restoring the judgment of the trial judge, Chief Justice Mulock, setting aside a conveyance made by the appellant John L. McGuire to his wife of the former's equity in a hotel property in the Village of Madoc, on the ground that such conveyance was fraudulent and void as against the grantor's creditors under the statute 13 Elizabeth.

The debts due the creditors of McGuire at the time of the execution of the impeached conveyance, outside of the mortgage debt secured upon the property conveyed, were contracted some time subsequent to the conveyance. Only two creditors gave evidence respecting the debts due them and it shewed that their debts were contracted long after the impeached settlement was made. There was no evidence that any of McGuire's debts which were due at the date of the settlement remained unpaid at the date of the insolvents' assignment.

The mortgage debt was one secured upon property much more than sufficient to pay it and may, therefore, for the purposes of this action, be disregarded. *Jenkyn* v. *Vaughan,* in 1856(1).

It may be conceded as established by the cases that the statute extends to subsequent creditors. They have the same right to set aside an alienation made with intent to delay, hinder or defraud them, as credi-

(1) 3 Drew. 419, at p. 426.

tors whose debts were due at the date of the alienation, but they have a more difficult task in proving a fraudulent intent on the part of the grantor in the case of a voluntary settlement. In such case they must prove either an express intent to delay, hinder or defraud creditors or that after the settlement the grantor had not sufficient means or reasonable expectation of being able to pay his then existing debts. 15 Halsbury's Laws of England, page 88 par. 180. The cases there cited I think support that proposition.

The courts below have all found that the impeached settlement was a voluntary one and I shall deal with the case on that finding, though I am bound to say I should have some difficulty in reaching it on the evidence.

There is no pretence for saying that any fraudulent intent under the statute was proved and the single question left was whether the grantor after the settlement was left without sufficient means or reasonable expectations of being able to pay his then existing debts and so that a fraudulent intent might be inferred.

As to the financial condition of McGuire at the time he made the settlement, I think the statement embodied by Riddell J. in his judgment a fair and proper one. It omits the Madoc property, the settlement of which is in question, and the mortgage upon it, and subject to which the property was conveyed to Mrs. McGuire, and aside from that shews McGuire to have been left with assets of the value of $14,180 and liabilities amounting to $3,947.

Amongst the assets was included $8,500 which he had paid for the Ottawa business and chattels, in-

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cluding the "good will." I agree that looking at McGuire's financial position from a business stand point there is no reason in the world why its value should not be taken into consideration. But when you are considering that financial position with respect to a settlement made by the man upon his wife of part of his property, and determining the "intent" with which it was made, to omit the value of such good will from your consideration would be, to my mind, most unfair.

The learned trial judge in his statement of McGuire's financial condition at the time of the making of the settlement, including the Madoc property in the assets and the mortgage secured upon it in the liabilities, shewed the latter to have been $14,711, while the assets he estimated at $26,754.

Deducting from these assets the $15,000 estimated value of the Madoc property, he reduced them to $11,754. But the learned Chief Justice, while deducting the whole value of the Madoc property from the assets, omitted at the same time to deduct the amount of the mortgage upon that property from the liabilities. This, I think, was a manifest mistake on his part as the mortgage debt of $3,250 being secured upon a property of the agreed value of $15,000, should in such a statement as was being prepared have been omitted from the liabilities.

But in addition to that the learned judge omits any allowance for the good will of the Ottawa business and only allowed $1,134.23 for the chattel property in that business which was valued at $3,500. The reason assigned for this large reduction was that the $1,134.23 represented the actual cash, $571.23, which McGuire's estate received at a much later date when the insolvency took place as the result of a forced sale by the

landlord of the chattels. The landlord when McGuire assigned had distrained under the terms of the lease upon the goods and chattels for three months *advance rent,* and these $571.23 were the net proceeds of the sale. The balance of the $1,134 consisted of $563 received from the insurance company for a part of the property burnt in a fire which occurred before McGuire's assignment. But even with these reductions which I cannot accept as fair, there was added to the above assets of $11,754 (without the Madoc property), $4,634.23, namely, cash in bank, $1,500, stock on hand $2,000, and chattels property $1,134.23. Thus an apparent surplus of only $1,134.23 of assets over liabilities was shewn which, if the error I have pointed out of counting the mortgage debt as part of the liabilities while excluding the property on which it was secured from the assets, was corrected, would leave a surplus of $4,877.23. No allowance was made for the hotel license or the lease, or the good will of the business. The hotel license was valued in the consideration McGuire had paid at from $3,000 to $5,000.

On the facts as he found them and formulated in this statement the learned Chief Justice drew the inference that the settlement was fraudulent and void under the statute.

I have already stated why I accept Mr. Justice Riddell's statement of McGuire's financial position at the time he made the settlement as correct. It shewed McGuire to have had a very handsome surplus of assets over debts and quite justified the settlement he made upon his wife. His business in Ottawa had continued prosperous from the time he bought it and remained so for six or eight months afterwards. The

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firm's obligations seem to have been met with reasonable promptness as they matured and to McGuire the outlook was promising. There was no indication or anticipation by either defendant that the venture was likely to prove a failure. My conclusion is that McGuire was clearly solvent when he made the settlement. He made that settlement in consequence of a promise given by him to his wife when at his solicitation she joined with him in the conveyance of some property he owned in Toronto. He and she both thought she had a dower interest in that property. They may have been wrong in their belief, but from their evidence both husband and wife believed she had. She thought she had a moral claim at any rate to the Madoc property as she had done as much if not more to build it up and make it what it was as her husband had done. He admitted that to be so. She was apparently living in Toronto with her two invalid daughters and the settlement seems to have been made when their home there was broken up and a very short time after she signed away whatever rights she had in the Toronto property. It was made at a time when, if the statement of his financial condition I accept is correct, he was undoubtedly entitled to make it. Even if the onus of proving that is cast upon him on the assumption of the settlement being a voluntary one, I think he has discharged it.

What, then, if this story is true, brought about the insolvency? A perusal of the evidence satisfies me that it was brought about by causes which could not have been foreseen or anticipated when he made the impeached settlement.

In the summer of 1909, McGuire Bros. were compelled by the License Commissioners to move their bar

from the corner of Bank and Sparks Streets, a great thoroughfare, to the upper side of Bank Street. This change necessitated extensive alterations being made claimed to have cost about $4,000. This, of course, was not, and could not have been, anticipated in November, 1908. To make these necessary changes good paying tenants of theirs were dispossessed and their rentals lost. In the early part of 1910 the fire took place causing further damage to their business and much loss. McGuire states in his evidence that the direct loss in the receipts of the bar from the change compelled by the License Commissioners was 25%. The rentals of the tenants they had to dispossess so as to make room for the new bar amounted to $110 per month, and McGuire says they were not able to get a tenant for the corner they vacated. Then the municipality brought into effect a by-law to reduce the number of licenses in the city and that made it impossible for them to sell out. Reverses began about June, 1909. They struggled from that date under the adverse circumstances I have above stated from the evidence, to meet their obligations until December. Then followed the plaintiffs' suit and the assignment followed by the landlord's distress for three months' advance rent and the sale under the distress with its usual pitiful returns.

In all of these facts as stated in evidence, I see nothing to justify the conclusion that the insolvency could have possibly been foreseen in November, 1908. The proper inference is that it was brought about by causes which could not have been reasonably foreseen at that time or for many months afterwards, and so forms an exception to the general rule respecting voluntary conveyances preceding insolvency.

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It was said that this case was governed by that of *Mackay* v. *Douglas*(1). I do not think so. The broad ground upon which that case was decided is stated by the Vice-Chancellor at page 122 to be that a man who contemplates going into trade cannot on the eve of doing so take the bulk of his property out of the reach of those who may become his creditors in his trading operations. The facts of the two cases are not analogous. McGuire was not like a man "going into trade" for the first time when or immediately after he made the settlement. He appears to have been for the greater part of his life in the hotel business, and he did not, as I have shewn, take the bulk of his property out of the reach of his creditors. I think it is a case forming an exception to the principle laid down in *Mackay* v. *Douglas*(1), an exception explicitly stated by the same learned Justice Malins, V.-C., in *Crossley* v. *Elworthy*(2), at page 167. In the case of *Re Butterworth, ex parte Russell* in 1882(3), Jessel M.R. says at page 598:—

> The principle of *Mackay* v. *Douglas*(1), and that line of cases, is this, that a man is not entitled to go into a hazardous business, and immediately before doing so settle all his property voluntarily, the object being this: "If I succeed in business I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss."

I think if that expresses the true principle it would be impossible to bring this case within it. The business he was entering into in Ottawa was the one he had been engaged in all his life. It was not a new business nor was it a hazardous one in the sense in which

(1) (1872) L.R. 14 Eq. 106. (2) L.R. 12 Eq. 158.
(3) 19 Ch. D. 588.

that word is used by Malins V.-C., in *Mackay* v. *Douglas* (1), and by Jessel M.R., in *Re Butterworth* (2).

The settlement impeached did not embrace "all of his property" or indeed the larger part of it. It embraced practically that part of the property which the wife had herself in great part built up. It was made by a man who was not insolvent at the time he made it, but became so afterwards from accidents and causes which he neither did nor could have anticipated. It does seem to me to be rather the refinement of irony when the two chief creditors, the Wine Vault Company and the Capital Brewing Company, in order to defeat the claim of the wife and children to a portion of the property which the life's labours of the former largely created, unite to proclaim a business a "hazardous" one which they themselves exist upon and supply with the "sinews of war" to keep alive and on a commercial basis.

I am of opinion that the appeal should be allowed and the judgment of the Divisional Court restored.

IDINGTON J.—I think this appeal should be dismissed with costs for the reasons assigned by the judgment of the learned trial judge, the dissenting judgment in the Divisional Court and the judgments in the Court of Appeal.

Counsel for appellant quite properly points out that there is an oversight in the first of these in one set of figures necessarily taking into account the Madoc mortgage, and in the next set of calculations not making allowance therefor, but I apprehend the result of these figures did not affect the learned judge's conclusions at all.

(1) L.R. 14 Eq. 106. (2) 19 Ch. D. 588.

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The broad features of the case he presents are a voluntary conveyance by a man three months after he had made a fatal mistake in a business venture and had some reason to see it was such as evidenced by his increasing liabilities, and his inability to explain better than he did how he became fifteen months later hopelessly insolvent.

Making every allowance for his misfortunes hardly accounts for what happened, save that he had made such a mistake in so venturing.

Licenses, good will and other such non-exigible assets must be put aside by any man hoping to shew solvency in cases of this kind.

DUFF J.—I think there is not sufficient ground for impeaching the finding of the learned trial judge that the conveyance was voluntary; but I do not agree that the circumstances justify the conclusion that the necessary effect of the conveyance was to defeat or delay existing creditors. The burden was consequently upon the plaintiffs at the outset to shew that the conveyance was made by the debtor with a view to protecting himself or his family against the consequences of failure in the business into which he had a short time before entered. I think the fact that a collapse did come within a few months after the execution of the conveyance was sufficient to shift the burden to the appellants of shewing that such was not the intent of the transaction. I do not think that burden has been discharged.

ANGLIN J.—It is clearly established, as has been found in the courts below, that the conveyance by the male defendant to his wife was voluntary. The con-

siderations now suggested to support it are afterthoughts and purely illusory.

I am not satisfied that it is an unfair inference from the judgment of the learned trial judge that he reached the conclusion ascribed to him by the dissenting Chief Justice in the Divisional Court and by the unanimous Court of Appeal—in which they expressly concur—that this conveyance was made with the intent of protecting the property transferred from the claims of possible, if not probable, future creditors of the hazardous business in which the defendant John L. McGuire had shortly before embarked. Neither am I convinced that this conclusion is not warranted by the evidence. The appellants have, in my opinion, failed to make a case for disturbing it. Other reasons for the transfer put forward by them do not account for its having been made when and as it was. I agree with the Court of Appeal that this case is governed by the principles on which *Mackay* v. *Douglas*(1), approved by the Court of Appeal in *Ex parte Russell*(2), was decided.

The defendants are, however, entitled to a formal rectification of the judgment pronounced by the trial court. The defendant Hattie McGuire had an inchoate dower right in the Madoc property. A conveyance of that property by her to the assignee, as directed in the second paragraph of the judgment, might deprive her of that right. Of course this was not intended and, had attention been drawn on the settlement of the minutes to this possible effect of the conveyance directed by the judgment, provision excepting from its operation Mrs. McGuire's dower

(1) L.R. 14 Eq. 106. (2) 19 Ch. D. 588.

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right would certainly have been made. In actions such as this, the relief granted is properly confined to setting aside the impeached conveyance, thus removing it as an obstacle to the creditor's recovery under executions against their debtor. The first paragraph of the judgment accomplishes this. Moreover, it is inconsistent to declare a conveyance void and to set it aside and then to direct that the grantee under that conveyance shall convey to the assignee for the benefit of the creditors the property of which she has thus been already deprived. The judgment of the trial court should be amended by striking out the second paragraph.

With this variation this appeal should be dismissed with costs.

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

Appeal dismissed with costs.

Solicitor for the appellants: *Frank B. Proctor.*
Solicitors for the respondents: *Hogg & Hogg.*

J. HENRY PETERS (DEFENDANT) .....APPELLANT; 1913

AND

*April 11, 14.
*May 6.

ANGUS SINCLAIR (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trespass—Easement—Public way—Dedication—User—Prescription—Estoppel—"Law and Transfer of Property Act," R.S.O. 1897, c. 119.

S. brought action against P. for trespass on a strip of land called "Ancroft Place" which he claimed as his property and asked for damages and an injunction. "Ancroft Place" was a *cul-de-sac* running east from Sherbourne Street, and the defence to the action was that it was a public street or, if not, that P. had a right of way over it either by grant or user. On the trial it was shewn that the original owners had conveyed the lots to the east and south of "Ancroft Place" to different parties, each deed describing it as a street and giving a right of way over it to the grantee. The deeds to P.'s predecessors in title did not give him a similar right of way, but some of these conveyances described it as a street. The deed to one of the predecessors in title of S. had a plan annexed shewing "Ancroft Place" as a street fifty feet wide and the grantee was given the right to register said plan. The evidence also established that for 22 years before the action "Ancroft Place" had been entered in the assessment rolls as a public street and had not been assessed for taxes and that the city had placed a gas lamp on the end; also, that for over twenty years it had been used by the owners of the lots to the south and east, and from time to time by the owner on the north side, as a means of access to, and egress from, their respective properties. In 1909 the fee in the land in dispute was conveyed to S. who had become owner of the lots to the east and south.

Held, Idington J. dissenting, Duff J. expressing no opinion, that the evidence was not sufficient to establish that the land had been dedicated to the public, and accepted by the municipality as a street.

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

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Held, further, Idington and Duff JJ. dissenting, that the land was not a "way, easement or appurtenance" to the lot to the north "held, used, occupied and enjoyed, or taken or known, as part and parcel thereof" within the meaning of sec. 12 of "The Law and Transfer of Property Act," R.S.O., [1897] ch. 119.

Held, also, that P. had not acquired a right-of-way by a grant implied from the terms of the deeds of the adjoining lots, Duff J. dissenting; nor by prescription, Duff J. expressing no opinion.

Per Duff J.—The facts established justify the inference that the original owners (Mr. and Mrs. Patrick) always entertained the design that the strip of land in question should be a street affording access to the adjoining parts of lot 22; that, accordingly, it had been surveyed and laid out as a street, on the ground, in 1884; that the sale to McCully, in 1887, proceeded on the footing that the land purchased by him was bounded to the south by a street and this was one of the elements of value determining the price he paid; that, thereafter, in accordance with the same design, Mrs. P. permitted the successive occupants of the lot bought by McC. to use this strip of land as of right for all the purposes of a street; that these occupants, acting as she intended they should and as the situation, created by her, naturally encouraged them to act, purchased and dealt with it upon the same footing as that upon which the sale to McC. took place: Consequently, the respondent is, on the principle of *Piggott* v. *Stratton* (1 DeG. F. & J. 33), as explained in *Spicer* v. *Martin* (14 App. Cas. 12), and of *Cairncross* v. *Lorimer* (3 Macq. 829); *Oliver* v. *King* (8 DeG. M & G. 110); and *Russell* v. *Watts* (10 App. Cas. 590), precluded from disputing the right of the appellant to use "Ancroft Place" as a street.

Per Duff J.—At the time of the sale to McC. the vendor was precluded from using Rachel Street for any purpose inconsistent with its character as a street and its sole value for her as a "street' or "way" was because of the means of access it afforded to the property sold. Its character as a way laid off for the accommodation, *inter alia*, of that property was palpable to everybody: as a way, therefore, it was as regards the vendor's interest in it a "way * * * known or taken to be" an adjunct of the property sold and, as such, passed to the purchaser under the provisions of the "Law and Transfer of Property Act."

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial(1) in favour of the plaintiff.

(1) 23 Ont. W.R. 441.

The essential facts are stated in the above headnote.

W. N. Tilley and *J. D. Montgomery* for the appellant. The deed with the surveyor's plan annexed established "Ancroft Place" as a way attached to the lands to the north and 50 Vict. ch. 25 (Ont.) respecting Land Surveyors and Surveys converted it into a public highway. *Gooderham* v. *City of Toronto*(1), at page 262. The land in question was a "way, easement or appurtenance" to the lot to the north of it "held, used, occupied and enjoyed, or taken or known, as part and parcel thereof" within the meaning of "The Law and Transfer of Property Act," R.S.O. [1897] ch. 119.

The courts below did not give proper effect to the acts of dedication and acceptance proved at the trial and to the above legislation. See *Attorney-General* v. *Antrobus* (2), at page 207. *Grand Trunk Railway Co.* v. *City of Toronto* (3).

Ludwig K.C. for the respondent. It is clear that the use of "Ancroft Place" was not so necessary to the enjoyment of the land to the north as to pass with the conveyance. See Halsbury's Laws of England, vol. 11, sec. 511; Prideaux on Conveyancing (2 ed.), pages 121-2; *Bell* v. *Golding*(4).

There was no proof of intention to dedicate "Ancroft Place" to the public and it was not dedicated. See *Robertson* v. *Meyer*(5), at page 370, as to the inference from the placing of a gas lamp on the lane.

As to user see *Webb* v. *Baldwin*(6).

(1) 25 Can. S.C.R. 246.
(2) [1905] 2 Ch. 188.
(3) 37 Can. S.C.R. 210.
(4) 23 Ont. App. R. 485.
(5) 59 N.J. Eq. 366.
(6) 75 J.P. 364.

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The Chief Justice.

THE CHIEF JUSTICE.—This is an action brought for trespass. The defence was that the plaintiff was not the owner of the lands and premises in question, but on the contrary that the place where the trespass was alleged to have been committed was a public highway. The trial judge found in favour of the plaintiff, and his judgment was affirmed by the Court of Appeal.

The lane over which the appellant claims a right-of-way is a *cul de sac,* and eliminating the question of dedication which was not seriously argued, there is, it seems to me, very little difficulty about this case.

At the time the appellant's property was sold to his predecessor in title, McCully, by Rachel Patrick, the latter held as owner all that part of lot No. 22 which had not been previously disposed of to Ellwell, Davis and Henderson, that is to say, she was still the owner of that portion of lot No. 22 or of those portions of that lot known in these proceedings as the McCully property and Ancroft Place. The latter was then burdened with a right-of-way, under the deed referred to, in favour of Davis, Ellwell and Henderson, but admittedly not in favour of the other portion of the same lot subsequently sold to McCully, and now the property of the appellant. Nor is there evidence to shew that, in fact, it was used by the owner or by others with her knowledge and consent as a roadway for the benefit of that adjoining property.

It is not easy for me to understand how of two adjoining properties owned and possessed by the same person one could be burdened in favour of the other with an easement of this kind except by some express act of the owner manifesting an intention to impose such a burden.

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The Chief Justice.

I was much impressed at the argument by the terms of the deed to Henderson. There is no doubt that Mrs. Patrick, at the time that deed was passed, by an excess of precaution reserved to herself the right to give a passage over "Ancroft Place," then her property, to whoever might subsequently buy that portion of lot No. 22 now owned by plaintiff, but she did not exercise that right, presumably because she was not asked to do it by McCully when he bought his property. Further, if a right of way then existed over "Ancroft Place" in favour of the balance of lot No. 22, now owned by appellant, why make that reservation ? The description contained in McCully's deed of sale, in my opinion, very clearly excludes "Ancroft Place" and, if at that time no right of way existed over it for the benefit of the property he bought, I do not understand where the foundation of the right now asserted can be found.

The statute is not intended to create a right, but merely to give effect to some right in existence at the time the deed of conveyance is made. The only easement that passed by virtue of the section of the Act relied on is an easement, "belonging or in anywise appertaining" to the land conveyed, that is to say, belonging or appertaining to the land at the date of the conveyance. All the judges below have found that no title had, at that time, been acquired by user to a right-of-way over "Ancroft Place," and I cannot find in the evidence anything that would justify me in reversing the two courts below on this question of fact.

I would dismiss with costs.

DAVIES J.—The main questions involved in this appeal are, first, whether Helen McCully, the predeces-

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sor in title of the appellant as grantee under the conveyance from Rachel Patrick, dated 21st November, 1887, acquired a right-of-way over "Ancroft Place," the fee simple title in which was vested in Rachel Patrick. This "Ancroft Place," so called, was a *cul-de-sac* running off from Sherbourne Street in Toronto and lying immediately south of the lands conveyed as above to Helen McCully. Secondly, whether "Ancroft Place" was a public street?

I agree with the Court of Appeal and the trial judge that there was no reasonable evidence of dedication. I do not think the "Place" or way in question ever was a thoroughfare. It was merely a *cul-de-sac* for the convenience of a few property owners abutting on it on the south and east. In the deed given by the former owner, Mrs. Rachel Patrick, to Henderson in 1884 of one of the plots of land to the south and east of this "place" or "street," there was granted to Henderson and his assigns a right-of-way

> over and upon the said street fifty feet wide in common with the said Rachel Patrick, her heirs and assigns and the persons to whom she or her late husband has already or may hereafter grant any portion of said lot 22 abutting on said street.

I think the object and purpose of this clause was to place beyond doubt the fact that the right-of-way granted to Henderson was not to be an exclusive one but one to be used in common by him and Mrs. Patrick and those to whom she or her late husband had granted or might grant such a right.

It did not reserve to Rachel Patrick any rights over this lane or way which she did not have without it. The fee in the lane was in her. She did not grant Henderson an exclusive right-of-way but one in common with herself, and certain definite other persons

her grantees. The clause neither enlarged nor abridged her rights over the lane, and I think the trial judge's construction of its meaning a sound one and that it meant no more than reserving common rights in the way for those to whom she or her husband had granted or might grant them as grantees of the lands "abutting on the street."

The deed or conveyance to the plaintiff's predecessor in title, Helen McCully, did not either bound the lands conveyed to her on this "place," "street," or "lane," nor did it use any language indicating any connection between the two or any right-of way as existing or contemplated by the parties between the lands conveyed and the street or lane. The lands conveyed are expressed as being bounded on one side by Maple Avenue, on another side by Sherbourne Street; but "Ancroft Place" as a "way," "street," "place," "lane" or otherwise is not mentioned or referred to.

I do not think there is any evidence of a dedication of the way or place to the public or of any acceptance of such a dedication by the municipality.

Mr. Tilley rested his case largely upon the contention that while the deed to Mrs. McCully made no reference to any right-of-way over the street or place which was called, as he said, Rachel Street, and had at one time a board with that name upon it affixed to one of its sides, still the deed must be construed by reference to and along with section 12 of the "Law and Transfer of Property Act," R.S.O. ch. 119. His contention was that the deed plus this statute operated to convey to Mrs. McCully a right-of-way over this street, place or lane, as being within the words of

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the statute a way or easement "held, used, occupied and enjoyed and taken or known as part or parcel thereof."

The fact that there was a visible road or lane existing along the south side of the lands conveyed to McCully and that access to and from such lands to the lane was at any rate possible and had been at times resorted to and used by the occupiers of these lands was pressed by Mr. Tilley. But these intermittent and casual users established no right and it would be a dangerous construction of the statute to hold that under the proved facts of this case it created and passed such a right-of-way as is contended for. The lane was not established for the benefit of these lands of the appellant. They were bounded by public streets on two sides and of course no way as of "necessity" could be contended for. In delivering judgment of the court in the case of *Watts* v. *Kelson* (1), at page 173, L.J. Mellish cites with approval the following sentence from the unanimous judgment of the Exchequer Chamber in *Polden* v. *Bastard* (2) :—

> There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognise this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shews an intention that they should pass.

I have read the cases called to our attention on the construction of section 6, sub-section 2, of the English "Conveyancing Act," from which the "Law and Transfer of Property Act," R.S.O. ch. 119 is taken. The two sections are substantially alike. The Ontario section reads:—

(1) 6 Ch. App. 166. (2) L.R. 1 Q.B. 156, at page 161.

Every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all * * * ways * * * easements * * * and appurtenances whatsoever, to the lands therein comprised, belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof.

The cases establish, I think, the question as to whether a claimed way or easement passed or not under and by virtue of the statute to be one of fact to be determined on the circumstances of each case. The question before us is whether before and at the date of the conveyance from Mrs. Patrick to Helen Eliza McCully in 1887 the way in question was a way really and actually used and enjoyed with the property conveyed, or taken or known as part or parcel thereof. If it was so used and enjoyed or taken or known, then it passed to the plaintiffs by the very words of the grant and the Act. In *International Tea Stores Co.* v. *Hobbs*(1), Farwell J., at page 172, referring to a decision of Blackburn J. in *Kay* v. *Oxley*(2), goes on to say:—

He (Blackburn J.) therefore, as I understand him, treats the only relevant question as being: Was the way in fact enjoyed at the date of the conveyance? If so the fact that it was enjoyed under a license which had not been revoked was immaterial. If it had been enjoyed without any license at all for a number of years, although no prescriptive right had been or could have been acquired, still it was in fact enjoyed. It is in each case a question of fact to be determined on the circumstances of the case whether it has, or has not, been enjoyed within the meaning of the statute.

See also *Brown* v. *Alabaster*(3).

On this crucial question the trial judge has, on evidence which seems to me amply sufficient, found against the plaintiff.

(1) [1903] 2 Ch. 165. (2) L.R. 10 Q.B. 360.
(3) 37 Ch. D. 490, at pp. 502-7.

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The appeal court has agreed with that finding; and, concurring with it as I do, I think it disposes of the appeal.

IDINGTON J. (dissenting).—The late Mr. Patrick owned a block of land in the south-east angle of Sherbourne Street and Maple Avenue in Toronto out of the south-east part of which he carved and sold and conveyed two parcels each sixty-six feet wide fronting upon a street fifty feet wide and named by some one after his wife "Rachel Street."

He devised the remainder of the block to his wife. She, after his death, conveyed in 1884 to one Henderson, another part of the original block comprising all that remained thereof unsold south of the northerly limit of said Rachel Street and east of the line of the lands her husband had conveyed as stated above and included part therein of what was to have apparently been a continuation of Rachel Street. The terms of this latter conveyance in relation to Rachel Street I will refer to presently.

The result was to leave vested in Mrs. Patrick a block of land two hundred and five feet six inches on Maple Avenue by one hundred and forty-seven feet nine inches on Sherbourne Street lying next to and on the said northerly line of Rachel Street.

She sold, for $8,000 and conveyed by deed of 21st November, 1887, to Mrs. McCully, this remaining block of land describing it by metes and bounds. The southerly boundary given therein admittedly coincides with the northerly line of Rachel Street.

That conveyance made pursuant to the Act respecting short forms of conveyances must be read as if it had incorporated therein the substance of section

12 of the "Law and Transfer of Property Act" of which the first part thereof is as follows:—

12(1). Every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all houses, outhouses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances, whatsoever, to the lands therein comprised, belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof.

The question raised herein is whether or not that conveyance so read contained a grant of the right-of-way over said part of Rachel Street for the distance of one hundred and thirty-six feet unappropriated by the earlier conveyance to Henderson and leading out to the said Sherbourne Street.

The evidence makes it very clear that before and up to the time of the conveyance to Mrs. McCully this space of land was designated as a street by the name first given it of Rachel Street or "Ancroft Place" later placarded on the southerly fence bounding same; that it was not assessed but treated by the assessors as a street from and including the year 1887 when first annexed to the city down to the trial hereof; that the lands lying to the south of it conveyed by Patrick as already stated were assessed according to their frontage on Rachel Street or "Ancroft Place" as if a public street and Henderson's was similarly treated; that it was fenced on either side and on the end abutting what was sold to Henderson but not fenced on the Sherbourne Street side; that the appearance thus given it was that of a public street; that from such appearance any person buying the land sold and conveyed to Mrs. McCully would clearly as-

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sume it was such or at least a right-of-way giving a rear access to any one purchasing or using said land; that said land sold her was a much more valuable piece of land with such right of access than if it had it not; that Dr. McCully, her husband, in treating for said land was told by the agent of Mrs. Patrick, that "Ancroft Place" or Rachel Street was a public street just as its appearance indicated; and that when Mrs. Patrick conveyed to Henderson it was by her deed to him expressly declared said street was "fifty feet wide and ran from Sherbourne Street to the land hereby conveyed," and provided in the said deed to him as follows:—

> Together with the free and uninterrupted use and right-of-way at all times in perpetuity to the said James Henderson, his heirs and assigns, and his and their servants, in, over and upon the said street fifty feet wide in common with the said Rachel Patrick, her heirs and assigns and the persons to whom she or her late husband has already or may hereafter grant any part of said lot twenty-two abutting on said street. The said described lands hereby granted and the said street (fifty feet wide) are shewn on the surveyor's diagram hereunto annexed.

The lot twenty-two thus referred to was the block originally owned by Patrick. The only part of it thus left vested in Mrs. Patrick and for and in respect of which her use of this street in common with others was thus provided for, was the land which she three years later conveyed to Mrs. McCully under whom appellant claims.

If that is not a reservation and declaration that the right-of-way is "to be held, used, occupied and enjoyed, or" to be "taken or known as part or parcel thereof," *i.e.,* of said land for which it was thus expressly reserved, what was it for?

It is said she owned the legal estate in the street and hence argued she had no need to reserve any-

thing but had it as of right. Many people own the legal estate in a street but their right of travel thereon rests not on such legal estate but on the law and facts constituting it a public highway.

It was the incompleteness of the dedication herein that rendered her right to the use thereof in any way doubtful. And if she had happened to give by her several grants, including that to Henderson, rights-of-way to be used by each of these grantees, in common with the others named, over the place, and failed to reserve the like right to herself and said nothing more, then clearly she would have faced the very grave difficulty that these grants of right-of-way to such a specific number of enumerated persons, or a class of persons, in common, might be treated as exclusive of any other. If there had been no right-of-way reserved, then those having in such case a grant of way in common to and for themselves as grantees thereof, might have claimed these as exclusive rights-of-way and restrained any one else using the same place for right-of-way to serve any other property, such as the remainder of the block.

This is so common an incident in transactions relative to rights-of-way, or rights-of-way in common, that one is surprised to hear it argued that as of course because she had the legal estate therefor she could grant to some one else an equal privilege and destroy the value of the right-of-way she had granted.

The very argument put forward now for respondent rests upon this right of exclusion, or might have been rested thereon to protect those others who alone had rights in common to travel there if none had been reserved to serve the other property. If nothing else

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had interfered they need not have feared intrusion from any one else.

It is by getting a clear conception of what the actual legal position would have been under grants in common limited to only a certain class of persons and the rights springing therefrom, that we get a clear notion of what this reservation meant in law. It is idle to talk of her legal estate, for that would not have entitled her in face of limited grants in common to invade such rights and derogate therefrom by either intruding upon the privacy or cumbering improperly a way confined to a few.

Of course there are so many indications of a purpose to dedicate to the public this space of ground, that the legal rights I am illustrating by may not be needed to protect appellant. The simple and clear propositions of law involved in this reservation and its consequences under the circumstances ought, however, to suffice.

It seems quite clear that this reservation to serve the uses of the land later sold to Mrs. McCully, was well designed in law and enabled Mrs. Patrick to add thereby to the value thereof whilst in her hands and to make of it merchandise, as beyond a shadow of doubt she did. And when her grant to Mrs. McCully is read in light thereof, and all else that appears in the surrounding facts and circumstances, which in every case must be considered if proper effect is to be given to deeds made under said Act, there is no doubt in my mind but that the right of way over "Ancroft Place" to serve the land conveyed to Mrs. McCully, passed by that grant. There is also some evidence of an actual user of the space as a right of way to reach a rear en-

trance to said lands by means of bars when the lot was used as a pasture field before the grant to Mrs. McCully.

If the intention existed as seems pretty evident it did, to dedicate the said land as a public highway, and only failed, if it did fail (as to which I express no opinion) for want of clear acceptance by the public, or authority representing the public, there was at the time of the said grant surely the clear purpose that the right-of-way was to be taken and enjoyed as part of the thing granted unless we are to suppose the people bargaining were bereft of common sense. It was so clearly to the advantage of her selling, to give it and get for it a price nowhere else available, and of her buying, that she should acquire what would be worth to her more than to any person else.

She or her successors in title ought not to be made to buy it over again.

It is urged the description in the deed being by metes and bounds instead of using the line of Rachel Street or "Ancroft Place" as one of the boundaries rebuts the presumption. A glance at the plan shews this was impracticable or inexpedient because the southerly boundary of the land conveyed ran in a straight line past and beyond the limits of "Ancroft Place."

If Mrs. Patrick instead of selling the whole block to Mrs. McCully had sold to any one a small rear lot carved out of it and not fronting on either Sherbourne Street or Maple Avenue, but of which the boundary on the south coincided with the north line

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of "Ancroft Place" and no entrance or exit had been provided on either Maple Avenue or Sherbourne Street, and no more had appeared in the deed than in this to Mrs. McCully, and the grantee had been perverse enough to want a way of necessity to either Maple Avenue or Sherbourne Street, instead of using this apparent road Ancroft Place furnished, how would such a grantee be treated by any court hearing him insist on such a way of necessity? Would the court not tell him that it was clear he had a way out by Ancroft Place and could not so insist? Would it not be clear that on the facts this was a way "enjoyed or taken or known as part or parcel" of the land granted him?

In every case of this sort the facts must be looked at and the true position inferred therefrom or injustice may be done in many cases.

The leading authorities were all cited and if the case is reported they will appear in the report of argument hereof.

I have examined many of those cited and others, but do not think it necessary to review them. For those, however, who desire to know more accurately than I can express myself what I think should ever guide in such cases, I would refer to the language of Cotton L.J. in *Birmingham, Dudley and District Banking Co.* v. *Ross*(1), at foot of page 308 and top of page 309, where he was dealing with a case regarding a question of light and the implied rights of the parties resultant from their dealings. The case may not appear so apposite as others to be found in some of the leading

(1) 38 Ch.D. 295.

cases, but his language is so expressive of the principle to be adopted in this class of cases that I need not seek elsewhere a means of presenting it. If such must be the view to be taken regarding an implied obligation, how much more so relative to the effect of an express grant carrying what corresponds thereto so far as the language of the statute will fit the facts.

Although much has been urged as to dedication and the case has gone off in that way in the courts below, I do not think it necessary to deal therewith to dispose of the action.

The action fails on the merits as to the alleged trespass without disposing of a number of interesting legal questions, and should be dismissed with costs.

The appellant is entitled to an injunction as prayed for in his counterclaim restraining the respondent from obstructing or otherwise interfering with the appellant's user and enjoyment of "Ancroft Place" for the purposes of a way.

DUFF J. (dissenting).—There are several grounds upon which I think this appeal ought to be allowed. My views can, I think, be best stated by setting out first in chronological order the more important material facts. The accompanying sketch shows the situation of the appellant's property. The street marked as "50-foot street" on the sketch is the way which will be hereinafter referred to as Rachel Street or "Ancroft Place." The whole of the property shown in the sketch including the "50-foot street" is comprised in lot 22, as shown upon a plan that, at the commence-

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ment of the transactions to which I shall have to refer, was registered in the Registry Office of the County of York, as plan No. 329. On this registered plan the "50-foot street" is not shown. In 1874 one Thaddeus Patrick became the owner of lot 22. Although not shown on the plan, this "50-foot street" was then an existing street having defined northerly and southerly limits. On the south side there were two adjoining houses having a common party-wall facing the street. In 1875, Patrick conveyed one of these houses together with a block of land having a frontage of 66 feet on Rachel Street to the Rev. Jos. Ellwell. The northern boundary of the plot of land is described in the conveyance as "the southern limit of a street 50 feet in width." In 1882, after the death of Thaddeus Patrick, Rachel Patrick, his widow and devisee, conveyed the adjoining house, together with the plot of land connected with it, to Dr. Davies, and the northerly boundary of this plot is described in the conveyance as "the southerly limit of a street 50 feet wide." At that time the street appears to have extended easterly at least to the boundary between the lots 22 and 23. In 1884, it is stated by one of the witnesses that there were stables on the southerly side of the street, at least as far east as that line. At that time (1884), there were ornamental trees following the line of the street on both sides, and there was a well marked waggon track in the centre. Some time prior to the 8th of July, 1884, it does not appear precisely when, a survey of lot 22 was made, and a plan drawn which was attached to a conveyance of part of the lot from

Rachel Patrick to James Henderson, that was executed on that date. The accompanying sketch reproduces this plan with the addition of the legends "appellant's property," "property sold to McCully," and the dotted line running north and south between Maple Avenue and Rachel Street. The street in question is the subject of various stipulations in this conveyance. It is described as running easterly from Sherbourne to the "land hereinafter conveyed" and as being of the

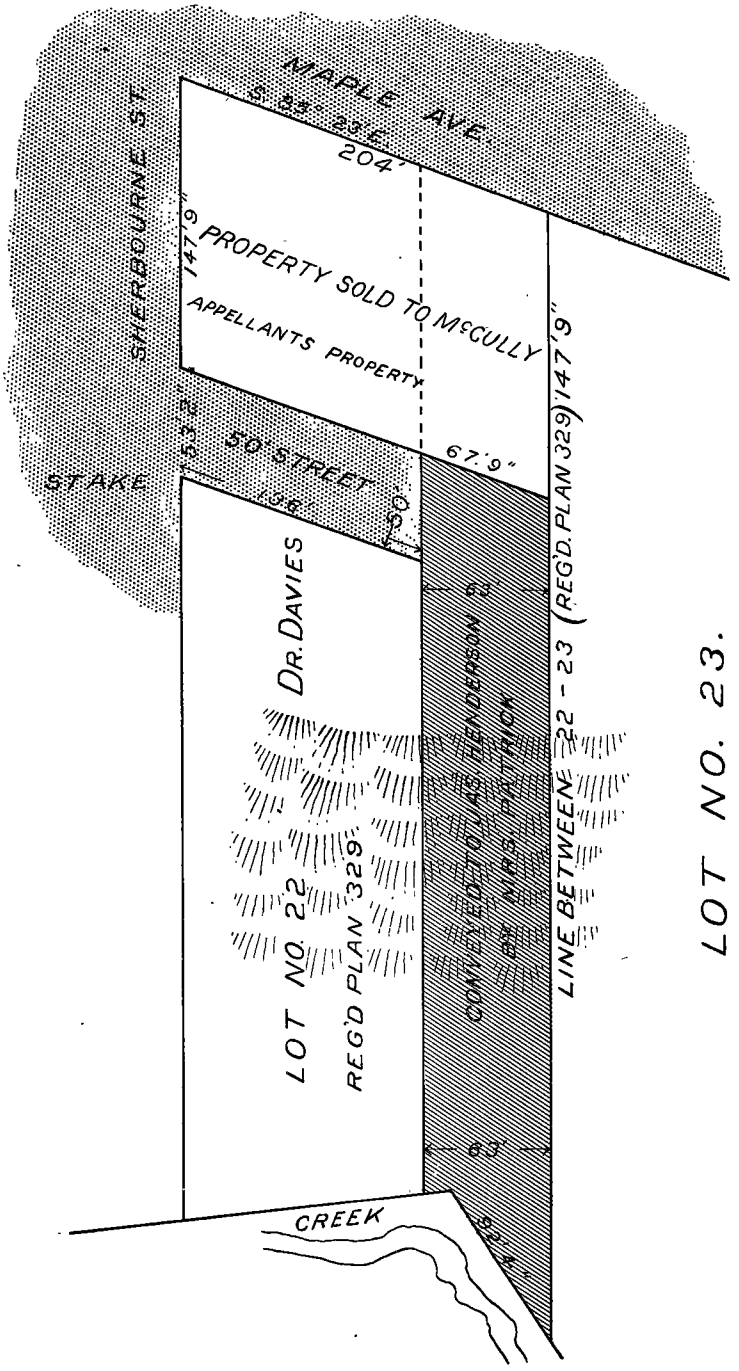
full width of 50 feet measured across said street and at right angles to its northerly and southerly limits.

The other provisions relating to it are as follows:—

Together with the free and uninterrupted use and right of way at all times in perpetuity to the said James Henderson his heirs or assigns and his and their servants in, over and upon the said street fifty feet wide in common with the said Rachel Patrick her heirs and assigns and the persons to whom she or her late husband has already or may hereafter grant any part of said lot twenty-two abutting on said street. The said described lands hereby granted and the said street (fifty feet wide) are shown on the surveyor's diagram hereunto annexed.

Together with the right at any time after one year from the date hereof to register the plan of sub-division of said lot twenty-two as hereunto annexed and showing when registered the land hereby granted to the said James Henderson and the said fifty feet street and for that purpose to use and sign the name of the said Rachel Patrick and her assigns.

And the said party of the first part hereby further covenants with the said party of the second part that upon any laying out or plotting of said lot twenty-two and upon any plan thereof whether for the purposes of registration or otherwise the said street of the full width of fifty feet shall be laid down and appear as the same is shown on the hereunto annexed diagram.


MAPLE AVE.
S 33° 23' E
204'
SHERBOURNE ST.
147'9"
PROPERTY SOLD TO McCULLY
APPELLANTS PROPERTY
67'9"
147'9" (REG'D. PLAN 329)
LINE BETWEEN 22 - 23
ST AKE
50' STREET
50'
DR. DAVIES
LOT NO 22
REG'D PLAN 329
CONVEYED TO G. HENDERSON & CO BY MRS PATRICK
63'
CREEK
LOT NO. 23.

In 1887, the municipal boundaries of Toronto were extended so as to embrace part of the Township of York and thereafter the locality in question came within the limits of St. Paul's Ward. In the summer of that year lot 22 was for the first time placed upon the municipal assessment rolls of Toronto. Mr. Unwin, a well-known surveyor in Toronto, who was the assessor for St. Paul's Ward in that year and in each year for 15 years thereafter, gave evidence at the trial. He says that the area included within Rachel Street, as shewn upon the sketch, was laid out upon the ground as a street and was entered by him in the assessment roll as a public street running off Sherbourne Street; that this area was treated as the site of a public highway and as such was not assessed and was not taxed by the municipal authorities down to the time of the trial in 1911. He says, moreover, that the Ellwell, Davies and Henderson properties were assessed as fronting on this street.

It was in November, 1887, that the whole of that part of lot 22 situated north of the northerly limit of Rachel Street and of the lands conveyed to Henderson, including what is now the appellant's property, was sold by Mrs. Patrick. Before going into the details of this transaction it may be noted that by this sale Mrs. Patrick divested herself of all the lands she then held adjoining or in any way communicating with Rachel Street. The purchaser was a Dr. McCully. The conveyance was taken in the name of his wife, but the purchase money was paid by him, and it was he who made the agreement of purchase. Dr. McCully was then living in Toronto, though a few years afterwards, for reasons which he explains in his evidence, he went to the United States. He was

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examined as a witness at Dallas, Texas, in May, 1911, six months before the trial. It was not suggested in cross-examination that he had any interest which could in any way affect his evidence, and though there was ample time after his examination before the trial to investigate his statements, he was not contradicted in any material particular. He says that, in 1887, he accidentally learned that the Toronto Street Railway Co. was likely to extend its line across the Rosedale Ravine on Sherbourne Street past the property in question. He says he had had his eye on the property since 1884 and that immediately (having ascertained that it was then on the market) he entered into negotiations for the purchase of it. Mrs. Patrick's agent, through whom he bought the property, was a solicitor practising in Toronto, and McCully says he made it a particular point to ask him whether the road at the south of the property was a street and that he was assured by the agent that it was. He regarded the point as of great importance, he says, because his plan was to divide the property into four 50-foot lots facing Maple Avenue with stables in the rear, having an entrance from Rachel Street. That entrance he considered, he says, enhanced the value of the property by at least $1,000. In the following year he changed his plans, and sold the property *en bloc* to one James Dickson, a commission merchant in Toronto. Dickson built a house upon it and a stable. He placed a gate on Maple Avenue and another opening on Rachel Street, and the stable could be approached by either entrance. Dickson kept horses in the stable two or three days each week during several years. Sometimes he used the Maple Avenue entrance, sometimes the Rachel Street entrance. One would gather from his evidence

that he used the Maple Avenue entrance more frequently during the first two years. Afterwards, the Sherbourne Street bridge having been built in 1890, he used the Rachel Street entrance more frequently. In 1895 he sold the house, retaining the stable, and left Toronto to reside elsewhere. In 1897 the stable was mortgaged, and in 1899, through a sale made under a power contained in the mortgage, the stable became the property of Mrs. Cockburn to whom the house had already been sold. During the four years which elapsed between Dickson's departure and the purchase of the stable by Mrs. Cockburn, the stable appears to have been occupied during two winters and summers and the Rachel Street entrance was used by the occupants. From 1899 down to 1909 the stable appears to have been let from time to time and during the whole of the period the Rachel Street entrance was made use of by the tenants of the stable as well as for various other purposes connected with the appellant's property, such for example as the collection of garbage by the municipal scavenging department. In the meantime Henderson had built a house at the end of the street on the property acquired by him from Mrs. Patrick by the deed of 1884. Sidewalks had been laid down, the roadway improved, a gas lamp had been set up in front of Henderson's gate by the City Fire Department under the authority of the municipal council at the expense of the city; the name Rachel Street had been changed to "Ancroft Place." The present appellant bought the property in 1905 from Mrs. Cockburn and built on it a brick stable with an entrance from Ancroft Place. In the various instruments dealing with the property subsequent to McCully's conveyance to Dickson, the property was

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described as fronting on a street. In 1910 the respondent, having in the meantime acquired the Henderson, Ellwell and Davies properties, that is to say, the properties adjoining Ancroft Place with the exception of that owned by the appellant, obtained from Mrs. Patrick a quitclaim of her interest in the site of the street, and then proceeded to block up the entrance to the appellant's property from "Ancroft Place."

In these circumstances the appellant's title to a right of access to Sherbourne Street by way of "Ancroft Place" may be supported, it appears to me, on at least two grounds; first, an express grant of the right, and secondly, I think the conduct of Mrs. Patrick, before and after the sale to McCully, taken together with the circumstances of that transaction, disentitle her and her successor (who is not and does not pretend to be a purchaser for value without notice) from preventing the appellant using Rachel Street as a street affording communication to and from Sherbourne Street with the southern boundary of her property.

The facts established justify the inferences that Mrs. Patrick and her late husband always entertained the design that Rachel Street should be a street affording access to the parts of lot 22 adjoining it; that in accordance with that design she had the street surveyed and laid out as a street on the ground in 1884; that the sale to McCully in 1887 proceeded on the footing that the property was bounded on the south by a street and that this circumstance was one of the elements of value which went to determine the price paid by McCully; that thereafter in accordance with the same design Mrs. Patrick permitted the successive occupants of the property bought by McCully to use

the street as of right for all the purposes of a street; and that these purchasers acting as she intended they should act and as the situation created by her naturally encouraged them to act, purchased and dealt with this property from time to time upon the same footing upon which the sale to McCully took place.

The first point of importance is that Mrs. Patrick in selling to McCully in 1884 dealt with the property sold upon the footing that the area known as Rachel Street was set apart permanently as a street for the accommodation *inter alia* of the property sold and that she dealt with it in this way deliberately with the object of getting the benefit of this circumstance in the price realized upon the sale.

I have already pointed out that, by the sale to Henderson in 1884, Mrs. Patrick dispossessed herself of all of lot 22 except that parcel afterwards sold to McCully and Rachel Street. As a result of the stipulation in the conveyance to McCully, Rachel Street became useless to her for any purpose except as affording a means of access to the parcel afterwards sold. Henderson was expressly given the right to use it as a street; the other property owners on the south side already had that right. The street was formally laid out on the ground as such, and a plan was prepared of it which Henderson was given the right to register after the expiration of a year. In no circumstances could this plot be used by her in any manner inconsistent with its destination as a street without the consent of these owners, and if Henderson chose to register the plan, the street would "be converted into a public highway." Obviously in a practical sense her interest in Rachel Street consisted solely in the fact

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that the right to use it as a street gave additional value to the property on the north side which she still owned. In these circumstances it is hardly conceivable that in selling that property she should think of separating the title of that property from the right to use Rachel Street. By doing that she would be denuding the property sold of an obvious and important element of value without retaining anything which would be of any present or probable value to her; because, apart from other considerations, it is obvious that if Henderson registered the plan, and the street in consequence became a public street, the purchaser would get the benefit of it whether he had paid for that benefit or not. The declaration in the conveyance to Henderson shews that she had this in contemplation at the time the street was laid out in 1884; and her subsequent conduct is hardly consistent with any other view than that she supposed the purchaser of the McCully property had acquired the right to use the street. In face of the declaration in the deed of 1884, it cannot be supposed that Mrs. Patrick was not alive to the advantages of Rachel Street as an accommodation to the property on the north side. Is it conceivable, if on the sale to McCully she deliberately withheld the benefit of this accommodation (and we must imagine this in order to suppose that it was not taken into account as an element in the price), that she would have remained silent and inactive for the 22 years following that sale while the street was being actively enjoyed (for at least 18 out of the 22 years) as an accommodation by McCully's successors in title?

I do not think it is conceivable; and I do not think it is consistent with the facts to suppose that the right to use Rachel Street as a means of access to the

property sold was not regarded by Mrs. Patrick as one of the elements of value which were represented by the price paid by McCully.

Mrs. Patrick's intention being that the title to the property afterwards sold to McCully should not be separated from the right to use Rachel Street, but that Rachel Street should be a permanent street for the accommodation *inter alia* of that property there can, I think, be little doubt that McCully was in fact invited to enter into the purchase (as it was intended by the vendor he should be) on the footing of Rachel Street being of that character; and that he did enter into it upon that footing.

In this connection the importance of the fact of Rachel Street having been laid out on the ground as a street has, I think, been overlooked in the court below. The effect of it is shewn by the action of Mr. Unwin, a surveyor of long experience, when he came to assess lot 22 in the summer of 1887. What he saw led him to treat Rachel Street as a public street; and I think the significance of what he did has not been sufficiently attended to. His duty was to assess all land not specifically exempt from taxation. If Rachel Street was not a public street, it was his duty to assess it. On the other hand if it was a public street it was his duty to take that fact into consideration in putting a value upon the property having access to it. There can be no doubt that this was done. This consequence followed from the fact that this public official, who of course knew his duty and who was at the time an experienced surveyor, deliberately concluded from what he saw in 1887 that this street had been laid off as, and in fact was, a public street.

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In these circumstances, having regard to Mrs. Patrick's known intention respecting this street, one cannot doubt that her agent was acting entirely in accordance with his duty in answering McCully's inquiry as McCully says he did or that McCully in view of the visible signs that Rachel Street had been set apart as a street, was entitled to accept the agent's assurance as he says he did, and to act upon the footing of Rachel Street being in reality that which it appeared to everybody to be.

In passing one may notice Mr. Ludwig's contention that the absence from the deed to McCully of any reference to Rachel Street justifies the inference that McCully asked for a right of way, and that it was refused. Such a supposition is, for the reasons I have already mentioned, altogether untenable and, moreover, it is impossible to suppose that the respondent, who claims through Mrs. Patrick, could not have ascertained who the agent of Mrs. Patrick was and contradicted McCully's testimony if it was not in accordance with the fact.

There are two alternative grounds in my opinion upon which in these circumstances McCully could have maintained his right to use Rachel Street as against Mrs. Patrick.

1st. The laying out of the property in the manner referred to and the representation of the agent that Rachel Street was a street, might reasonably have led to the belief in the mind of McCully that the street was in fact a public highway. If so, then the vendor would be estopped from denying that it was so in fact.

2nd. If that was not the belief which the existing circumstances and the agent's assurance were calcu-

lated to create in McCully's mind, then at least the statement of the agent was in the circumstances calculated, as it was no doubt intended, to convey to McCully an assurance upon which he was entitled to rely that Rachel Street was what it appeared to be, namely, a street laid off as a permanent accommodation for the property he was negotiating for, and it amounted to a representation that the property was being offered for sale on that footing. In the circumstances such a statement so intended would amount to a promise that no obstruction would be placed in the way of the enjoyment of the street by McCully or his successor in title binding on the vendor within the principle of *Piggott* v. *Stratton*(1), as explained in *Spicer* v. *Martin*(2), at page 23. The Statute of Frauds would be no obstacle in the circumstances of this case. It was, of course, argued that such a promise ought to have been expressed in the deed. The same argument was presented in *Piggott* v. *Stratton*(1), and it is dealt with by Lindley L.J., in *Martin* v. *Spicer*(3), at page 12; see also *Heilbut, Symons & Co.* v. *Buckleton* (4), at pages 37 and 49.

The case in favour of McCully's successors is still stronger. The effect of the representation conveyed by the conduct of Mrs. Patrick in dealing with the property would be intensified as every year passed by and as Rachel Street continued to be used by the occupants of the property in question under the belief that they were rightfully entitled to the enjoyment of it, and as the property continued to be assessed for taxation purposes upon that assumption. It is argued that there is no evidence shewing Mrs. Patrick

(1) 1 DeG. F. & J. 33.
(2) 14 App. Cas. 12.
(3) 34 Ch. D. 1.
(4) [1913] A.C. 30.

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to have been aware of this user. That I think is of little, if any, importance in view of the fact that the evidence points so clearly to this user being in accordance with Mrs. Patrick's own intentions. In these circumstances, the appellant is, I think, entitled to rely upon the principle stated in various forms in *Cairncross* v. *Lorimer*,(1), by Lord Campbell; in *Oliver* v. *King*(2); in *Russell* v. *Watts*(3), at page 613.

The appellant's case, however, does not, in my opinion, rest upon the above considerations alone. The conveyance from Mrs. Patrick to McCully must be construed by reference to section 12, of chapter 119, R.S.O., which is as follows:—

12.—(1) Every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all houses, out-houses, edifices, barns, stables, yards, gardens, orchards, *commons*, trees, woods, underwoods, mounds, fences, hedges, ditches, *ways*, waters, watercourses, light, *liberties*, *privileges*, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the lands therein comprised, belonging or in anywise appertaining, or with the same *demised, held, used, occupied and enjoyed*, or taken or *known as part or parcel thereof;* and if the same purports to convey an estate in fee, also the reversion or reversions, remainder and remainders, yearly and other rents, issues, and profits of the same lands and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim and demand whatsoever, of the grantor, in, to, out of, or upon the same lands, and every part and parcel thereof, with their and every of their appurtenances.

(2) Except as to conveyances under the former Acts relating to short forms of conveyances, this section applies only to conveyances made after the 1st day of July, 1886.

For the purpose of applying this enactment I accept the conclusion of the court below that Rachel Street was not a public highway. It was nevertheless known generally as a "street" as the evidence of Mr.

(1) 3 L.T. 130; 3 Macq. 829. (2) 8 DeG. M. & G. 110, at p. 118.
(3) 10 App. Cas. 590.

Unwin abundantly shews. A "street" is of course not merely a way. In popular language it signifies a way having, or intended or expected to have houses on both sides of it. Imperial Dictionary, *vo.* "Street." *Mayor of Portsmouth* v. *Smith*(1); *Pound* v. *Plumpstead Board of Works*(2); *Robinson* v. *Local Board of Barton-Eccles*(3), at pages 801 and 809; *United States* v. *Bain*(4), and presumptively it is a way for the accommodation of all property adjoining it. The effect of the stipulations in the deeds already referred to was to stamp Rachel Street with that character, and it may be noted that all these deeds would, as a matter of course (as relating to lot 22, and executed by Mrs. Patrick or her husband) be examined by anybody searching the title on behalf of McCully. Mrs. Patrick had by these stipulations disabled herself from using it physically for any purpose inconsistent with its character as a "street." Her interest in it as a "street" therefore was the interest she had as the owner of the property sold to McCully as affording a particular means of access to that property. In its character of "street" or way, it was, from her point of view, an adjunct of that property and of no other property, and its only value to her in that character was as a right which as an adjunct to that property would increase the selling value of it.

The physical situation, moreover, gave it the "apparent" character of a street for the accommodation *inter alia* of that property. It had been laid off on the ground not as a mere private way for the benefit of specific properties, but as a "street" with all which

(1) 13 Q.B.D. 184; 10 App. Cas. 364.
(2) L.R. 7 Q.B. 183, at p. 194.
(3) 8 App. Cas. 798.
(4) 24 Fed. Cas. 940, at p. 943.

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that, as already indicated, implies. Its character was obvious as Mr. Unwin's action and evidence shew; a gateway affording an entrance to the property on the north could not have made that character more obvious.

In these circumstances it is impossible to class this accommodation in its relation to the property in question as a "discontinuous" or "non-apparent" accommodation. Its permanent character and its obvious relation to the property were plain to everybody. It seems impossible to hold that the *signe apparente* was wanting.

We are, I think, to apply the above enactment as if the language describing the subjects mentioned were used in the conveyance as descriptive of the subjects intended to be conveyed. So construing it I cannot escape the conclusion that the way in question, as a way, was "taken and known as part or parcel" of the property conveyed; that, to paraphrase the words of Bowen L.J. in *Bayley* v. *Great Western Rway. Co.* (1), at page 453,

> taking the thing broadly and endeavouring to judge what the intention of the parties as expressed by their language is * * * the grantor intended to give and that

the grantee "should have" the benefit of this way.

I have not considered the question whether a right-of-way has been established by prescription, nor whether "Ancroft Place" is a public highway. In the view expressed above it is unnecessary to pass upon either of these questions.

ANGLIN J.—The facts of this case are fully set out in the judgment of the trial judge(2). His con-

(1) 26 Ch. D. 434.

(2) 23 Ont. W.R. 441.

clusion, affirmed by the Court of Appeal, that the evidence did not establish either dedication of the land in question as a public highway, or the acquisition, by prescriptive title, of an easement over it, appurtenant to the land owned by the defendant, is so clearly right that it is not surprising that the appeal on these grounds was but faintly pressed at Bar.

On behalf of the appellant it was urged, however, that the preparing and annexing to the Henderson deed (for accuracy of description) of a surveyor's sketch, which shews Ancroft Place as a lane or private street, had the effect of making it a public highway by virtue of section 67 of chapter 146, R.S.O., 1877, "The Surveys Act," continued in 50 Vict. chapter 25, section 62, and R.S.O. 1897, ch. 181, sec. 39. At the time the Henderson deed was registered the land in question was still in the Township of York and the statutory provision relied on did not then apply to township lands. This land, however, afterwards became part of the city of Toronto and by subsequent legislation the provision of "The Surveys Act" was extended to townships. R.S.O., 1897, ch. 181, sec. 39. Assuming that, either by reason of the land coming into the city, or because the subsequent amendment extending it to townships should be held to be retroactive (I think it should not, *Gooderham* v. *City of Toronto* (1)), this statutory provision would apply to the plan annexed to the Henderson deed, if otherwise within it, I am of the opinion that the legislature did not mean to give to the preparation of surveyors' sketches such as that in question, made merely to ensure accuracy of description, the effect of dedication

(1) 25 Can. S.C.R. 246.

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as public highways of any private lanes or streets shewn thereon. This ground of appeal, which is not referred to in the judgments below or in the reasons for appeal to the Court of Appeal, and is said to be now taken for the first time, cannot, I think, be maintained.

But counsel for the appellant relied most strongly on a provision of the "Law and Transfer of Property Act," 50 Vict. ch. 20, sec. 5; R.S.O., 1887, ch. 100, sec. 12. The material parts of this section, as quoted in the appellant's factum, are as follows:—

> Every conveyance of land, unless an exception is specially made therein, shall be held and construed to include all * * * ways * * * easements * * * and appurtenances whatsoever, to the lands therein comprised, belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof.

His counsel contends that this legislation imported into the conveyance from Mrs. Patrick to Helen McCully (21 Nov. 1887), under which the defendant claims, a grant of a right-of-way over the land in question.

The whole effect of this statutory provision is that every conveyance to which it applies, unless it contains an express exception, is to be read as if the words set out in the section formed part of the description of the premises conveyed.

Thaddeus Patrick owned the entire lot, No. 22, which comprised the lands lying to the south and east of "Ancroft Place" (now the property of the plaintiff), the land lying to the north (now the property of the defendant) and also "Ancroft Place" itself. In selling the lands to the south and east he and his wife, who succeeded him in title, gave to their grantees, rights of way over "Ancroft Place" to be enjoyed by them and

their successors in title in common with the owners of other abutting lands. The last of the conveyances of these lands—that from Mrs. Patrick to Henderson, made in July 1884—contains these clauses, which follow the description of the lands conveyed:—

Together with the free and uninterrupted use and right-of-way at all times in perpetuity to the said James Henderson his heirs or assigns and his and their servants in, over and upon the said street fifty feet wide in common with the said Rachel Patrick her heirs and assigns and the persons to whom she or her late husband has already or may hereafter grant any part of said lot twenty-two abutting on said street. The said described lands hereby granted and the said street (fifty feet wide) are shewn on the surveyor's diagram hereunto annexed.

To have and to hold unto the said party of the second part his heirs and assigns to and for his and their sole and only use forever.

Together with the right at any time after one year from the date hereof to register the plan of sub-division of said lot twenty-two as hereunto annexed and shewing when registered the land hereby granted to the said James Henderson and the said fifty feet street and for that purpose to use and sign the name of the said Rachel Patrick and her assigns.

And also the following:—

And the said party of the first part hereby further covenants with the said party of the second part that upon any laying out or plotting of said lot twenty-two and upon any plan thereof whether for the purposes of registration or otherwise the said street of the full width of fifty feet shall be laid down and appear as the same is shewn on the hereunto annexed diagram.

This latter covenant conferred rights only upon the grantee Henderson and his successors in title to the property conveyed to him. The defendant is not an assignee of it and it is not so annexed to the land to the north of Ancroft Place that the benefit of it would pass by a mere conveyance of that land. *Reid* v. *Bickerstaff* (1).

The provision authorizing Henderson to register the plan and to use the name of Rachel Patrick and her

(1) [1909] 2 Ch. 305.

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assigns for that purpose has never been acted upon. The presence of these clauses in the Henderson deed, however, and the special grant to him of a right of way on the fifty-foot "street" makes clear the intention of the parties to it that "Ancroft Place" should not become a public highway by virtue of what was then being done. As a result of the several deeds to Elwell, Davis and Henderson of the southern and eastern parcels, Mrs. Patrick remained the owner in fee of "Ancroft Place" subject to the rights-of-way over it which she and her husband had given to these grantees. The words of reservation in the Henderson grant in favour of Mrs. Patrick and subsequent grantees of the portion of the lot which she still held lying to the north of "Ancroft Place" were perhaps inserted *ex majori cautelâ* to preclude any possible claim by the grantees of the southern and eastern parts of lot 22 that they had amongst them an exclusive right-of-way over this private street. They probably also expressed Mrs. Patrick's intention at that time with regard to the northern part of the lot she retained. But they certainly did not in any way bind her to make use of "Ancroft Place" for the purposes of ingress and egress in connection with the land which she retained, or to give that right to her subsequent grantee or grantees.

As the owner of the fee in "Ancroft Place" Mrs. Patrick could not have an easement over it. While she held it and also the adjoining land to the north there could not be in respect of "Ancroft Place"

a way, easement or appurtenance (to that adjoining land) belonging or in any wise appertaining, or with the same demised, held, used, occupied and enjoyed;

nor, in my opinion, could there then be "a way, easement or appurtenance" over "Ancroft Place" "taken or known as part or parcel of" such adjoining lands. Her ownership of the fee in "Ancroft Place" was inconsistent with the existence of any such way, easement or appurtenance in connection with adjoining land also owned by her. It might probably be held on that ground alone that the statutory provision invoked by the appellant did not give to the conveyance from Mrs. Patrick to Mrs. McCully the effect of carrying to the latter the right of way which the defendant now claims to be appurtenant to the land which she bought.

It should be noted that the Ontario statute does not contain the words "or reputed to appertain" which follow the word "appertaining" in the English "Conveyancing Act." The English statute might well be taken to include so called "quasi-easements" which would not pass under the language of the Ontario Act.

The earlier portions of the section of the "Law and Transfer of Property Act" above quoted clearly do not aid the defendant to substantiate his claim. But he places special reliance on the concluding words "taken or known as part or parcel thereof," on an assumption that under them something may pass which is not legally "a way, easement or appurtenance" because exercised over land in which the fee belongs to the owner of the tenement to which such "way, easement or appurtenance," if it had a legal existence as such, would belong or appertain. The basis of the appellant's argument, so far as I am able to understand it, is that if the owner of two adjoining parcels of land—A and B—uses parcel B as a means of ingress and egress to and from parcel A, his exercise of that right over parcel B may be regarded as some-

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thing in the nature of a quasi-easement "taken or known as part or parcel of" parcel A. Assuming that these latter words imported by the statute are susceptible of such a construction—I think they are not —in order to determine whether they accomplish what the appellant maintains they do it becomes necessary to consider the conditions which obtained on the ground at or before the time Mrs. McCully bought from Mrs. Patrick (and perhaps immediately afterwards), in regard to the existence or user of "Ancroft Place" as a means of access to the property now owned by the defendant. *International Tea Stores Co.* v. *Hobbs*(1); *Brown* v. *Alabaster*(2).

Dr. McCully says that when he bought for his wife, in 1887, the land now owned by the defendant it was fenced along "Ancroft Place." He says there was a bar or slat gate on the Maple Avenue frontage, but makes no allusion to any opening in the fence along "Ancroft Place." While Mrs. McCully held this land there were no buildings on it. James Dickson, who bought from Mrs. McCully in 1888, says that the south side of the property was then enclosed by a rough rail fence with no entry to "Ancroft Place" (then Rachel Street). James Lovack, who built the fence on the north side of Rachel Street in 1876 or 1877 says it was "just a common fence, straight along, upright boards." He does not suggest that there was any gate or opening through it to Rachel Street. These witnesses were all called for the defendant. The only witness who speaks of an opening in the fence in question at this period is one White who says he pastured a cow on what is now the defendant's lot in 1876-7

(1) [1903] 2 Ch. 165. (2) 37 Ch.D. 490.

and again in 1892-3. But White says he never knew the lane or street by any other name than "Ancroft Place." Yet it was called Rachel Street until about 1894. White speaks of the pasture as being "through Ancroft Place"—"East." He says he pastured in the same field in 1892 as in 1876-7, and he speaks of the pasture field of 1892 as being "at the end of Ancroft Place"—"east of Ancroft Place." He says when he first pastured there, in 1876-7, the fence was "broken down." But in fact the rail fence put up by Lovack was at that time newly built. White's story that he took a cow in through a gate made of bars or slats in a fence on the north side of Rachel Street in 1876 or 1877 appears to be quite unreliable. It may be that he refers to a later period after Dickson had bought and, in place of the old wooden fence, had erected a wire fence in which he put a gate; or that he went in at the eastern end of Rachel Street through the property afterwards bought by Henderson; or possibly that he went in on the north side, after the fence built by Lovack had become "broken down," through some gap made in it by the ravages of time, or possibly by himself as a trespasser. He gives no account of any right which he had to go upon or use this land as a pasture prior to Dickson's ownership. His evidence is quite insufficient to displace that of Lovack, who built the fence in 1876-7; of McCully, who bought in 1887 and says he was very anxious about the right of access to Rachel Street and that he made many careful inspections of the property before purchasing (neither of whom suggested that there was any gateway in the fence); and of Mr. Dickson, who says that when he bought from McCully in 1888 there was no entry in the fence forming the boundary between the property

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which he purchased and Rachel Street. The defendant has, in my opinion, failed to shew that at or prior to the time of Mrs. McCully's purchase (or immediately afterwards, if that would suffice), "Ancroft Place" was used as a means of egress and ingress in connection with the land conveyed to her or that there was anything upon the premises to indicate to a purchaser of that land that a right of way over "Ancroft Place" would pass with it. Moreover, upon this question of pure fact the appellant is confronted with the adverse findings of the trial judge and the unanimous Court of Appeal. Were the evidence supporting them less clear than it is these findings could not be lightly set aside. The provision of the "Law and Transfer of Property Act" which the defendant invokes, even if construed as he contends it should be, does not assist him to establish his claim.

His counsel placed some reliance on a statement which Dr. McCully says was made to him by the "agent" through whom he bought from Mrs. Patrick, to the effect that Rachel Street was a public highway. The name of the agent is not given and there is no attempt made to shew that it was within the scope of any authority which he may have had from Mrs. Patrick to make such a representation. Dr. McCully says this agent was the solicitor in whose office the transaction was carried out.

Finally some reliance was placed on the plan annexed to the Henderson deed as creating some sort of equitable estoppel. But there is no evidence that Dr. McCully, or any one acting for him or his wife, ever saw or knew of the existence of that plan. The Henderson deed is not in the chain of title to the property which Mrs. McCully bought and it may well

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be that her solicitor in searching title, if any such search was made, would not see that deed or the plan annexed to it. There is absolutely nothing to shew that any reliance was placed upon it at the time of the McCully purchase.

The description of the land conveyed in the deed from Mrs. Patrick to Mrs. McCully contains no reference to Rachel Street, which is not even given as a boundary of it. Having regard to the anxiety which Dr. McCully says he then felt and manifested as to the availability of Rachel Street as a means of access to his wife's property, this omission is, to say the least, singular. If it indicates anything, it is that Mrs. Patrick had abandoned any intention she may ever have had of giving to the grantee of the land lying to the north of Rachel Street a right of way over it.

On the whole case there does not appear to be any tangible ground on which the defendant can rest a legal claim to a right of way over "Ancroft Place."

The appeal, in my opinion, fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Montgomery, Fleury & Co.*
Solicitors for the respondent: *Ritchie, Ludwig & Ballantyne.*

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*April 7.
*May 6.

THE BRITISH COLUMBIA ELECTRIC RAILWAY CO..... APPELLANTS;

AND

THE VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION CO. AND THE CITY OF VANCOUVER..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Constitutional law—Provincial tramway—Jurisdiction of Board of Railway Commissioners — Highways — Overhead crossings—Apportionment of cost—Legislative jurisdiction—Ancillary powers —"Interested parties"—Construction of statute—"Railway Act," R.S.C., 1906, *c.* 37, *ss.* 8, 59, 237, 238—(*B.C.*) 8 & 9 *Edw. VII., c.* 32—"*B.N.A. Act*, 1867," *s.* 92, *item* 10.

On an application by the City of Vancouver, the Board of Railway Commissioners for Canada authorized the Corporation of the City of Vancouver to construct overhead bridges across the tracks of a Dominion railway company, which had been laid down during the years 1909 and 1910 on certain streets in the city, and ordered that a portion of the cost of construction of two of these bridges and of the depression of the tracks at the crossings thereof by the Dominion railway should be borne by a tramway company which derived its powers through provincial legislation and an agreement with the city pursuant to such legislation under which it operated its tramways upon these streets. By the agreement the tramway company became entitled to use the city streets with reciprocal obligations by the city and the company respecting their grading, repair and maintenance, and it was provided that the city should receive a share of the gross earnings of the tramway company. On appeal to the Supreme Court of Canada from the order of the Board:—

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

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Held, Duff and Brodeur JJ. dissenting, that, in virtue of sections 8(*a*), 59, 237, and 238 of the "Railway Act," R.S.C., 1906, ch. 37, as amended by chapter 32 of 8 & 9 Edw. VII., the Board of Railway Commissioners for Canada had jurisdiction to determine the "interested parties" in respect of the proposed works and to direct what proportion of the cost thereof should be borne by each of them. The *City of Toronto* v. *Canadian Pacific Railway Co.* ((1908) A.C. 54); *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* ((1899) A.C. 367); *City of Toronto* v. *Grand Trunk Railway Co.* (37 Can. S.C.R. 232); *County of Carleton* v. *City of Ottawa* (41 Can. S.C.R. 552), and *Re Canadian Pacific Railway Co. and York* (25 Ont. App. R. 65), followed.

Per Duff and Brodeur JJ., dissenting.—(1) The Parliament of Canada, when it assumes jurisdiction, under the provisions of item 10 of section 92 of the "British North America Act, 1867," in respect of a provincial railway, *quâ* railway, must assume such jurisdiction over the work or undertaking "as an integer." (2) The order of the Board cannot be sustained as being made in the exercise of the Dominion power of taxation. (3) As there is no Dominion interest concerned in the provisions of the order under appeal, and the Dominion Parliament has no power to compel the provincial company to assume the burden of the cost of the proposed works, or any portion thereof, the Board of Railway Commissioners had no jurisdiction to assess a proportion of their cost upon the tramway company. (4) The cases cited above must be distinguished as they do not sustain, as a valid exercise of ancillary power by Dominion authority, any enactment professing to control a provincial railway company.

(NOTE.—Leave to appeal to the Privy Council was granted on 14th July, 1913.)

APPEAL from the order of the Board of Railway Commissioners for Canada, dated on the 14th of October, 1912, in so far as it directs the appellants to pay a proportion of the cost of overhead crossings at the intersections of the tracks of their tramway by Hastings and Harris Streets, in the City of Vancouver, B.C., upon the ground that the Board had no jurisdiction to order the appellants to pay any part of the cost of such works.

The order appealed from is recited in full in the

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judgment of Mr. Justice Duff, at page 108 of this report.

R. A. Pringle K.C. and *E. Lafleur K.C.* for the appellants. Upon the true construction of section 8 of the "Railway Act," and of sections 91 and 92 of the "British North America Act, 1867," the Board had no jurisdiction over the electric tramway of the appellants, the appellant company being a provincial corporation, operating a provincial tramway only in the City of Vancouver, and having no connection with any railway or tramway outside the Province of British Columbia, and not subject to the provisions of the Dominion "Railway Act," nor to the jurisdiction of the Board.

The first point to be considered is whether or not that Act of itself gives jurisdiction in such a case as the present. Section 8 reads as follows: "Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by special Act of the legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to (*a*) the connection or crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing." We note particularly the definite distinction made between "a railway connected with or crossing any railway within the legislative authority of the Parliament of Canada," and, "a railway declared by Parliament to be a work for the general advantage of Canada," shewing that, in the mind of the legislature,

a railway which connects with a railway having a Dominion charter does not by reason of such connection become a railway declared by Parliament to be a work for the general advantage of Canada. Section 8 of the "Railway Act" should be limited in its application to such provincial railways as connect, either directly or indirectly, with lines extending beyond the limits of the province, and in view of the provisions of the "British North America Act," it could not have been the intention to subject provincial lines, having no such connection, to the provisions of the "Railway Act." The Act must be interpreted as dealing with matters properly subject to the legislative authority of the Parliament of Canada, and it would be contrary to the spirit of the Act to make it apply to purely provincial undertakings.

The Board had no jurisdiction under sections 237 and 238 of the "Railway Act" as amended by chapter 32 of 8 & 9 Edw. VII., sec. 5, or under any other section of said Act, to order the appellants to pay any proportion of the cost of the bridges referred to in the order.

We crave leave to refer to the following authorities: *Montreal Street Railway Co.* v. *The City of Montreal*(1); *Attorney-General for Ontario* v. *Attorney-General for Canada*(2), at p. 360; *City of Montreal* v. *Montreal Street Railway Co.*(3); Maxwell's Interpretation of Statutes (4 ed.), pp. 163, 211; *Colquhoun* v. *Heddon*(4); *Merritton Crossing Case*(5); *Duthie* v. *Grand Trunk Railway Co.*(6).

Andrew Haydon, for respondents, the Vancouver, Victoria and Eastern Railway and Navigation Com-

(1) 43 Can. S.C.R. 197.
(2) (1896) A.C. 348.
(3) [1912] A.C. 333.
(4) 25 Q.B.D. 129.
(5) 3 Can. Ry. Cas. 263.
(6) 4 Can. Ry. Cas. 304.

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pany. We do not admit that the portion of the cost of constructing the crossings referred to in the order complained of is equitable as against us, and consider that a larger portion of the cost of construction should have been apportioned to be paid by the British Columbia Electric Railway Co.

In *The City of Toronto* v. *Canadian Pacific Railway Co.*(1), it was held that sections 187 and 188 of the "Railway Act" of 1888 were *intra vires* of the Parliament of Canada. These sections were reproduced in the Act of 1903 as sections 186 and 187. In the consolidation, chapter 37, R.S.C., 1906, section 186 appears somewhat more in detail as section 237, and section 187 appears as section 238. Both of these sections were repealed and new sections, considerably amplified but having the same objects in view, were re-enacted in 1909, by chapter 32 of 8 & 9 Edw. VII. Consequently it is not now open to the appellants to contend that these sections are *ultra vires*. See, also, *Grand Trunk Railway Co.* v. *Attorney-General of Canada*(2); *The City of Montreal* v. *Montreal Street Railway Co.*(3). An important feature in the latter case is that the judgment only purports to deal with sub-section (*b*) of section 8, and it is stated that upon the other sub-sections it is unnecessary to express an opinion. It is submitted that sub-section (*a*) of section 8 is *intra vires* of the Parliament of Canada. The federal legislation in connection with this matter is as follows: "Railway Act," 51 Vict., ch. 29, sec. 4; amended by 63 & 64 Vict. ch. 23, sec. 1; and the "Railway Act," 1903, 3 Edw. VII., ch. 58, sec. 7.

The control over the physical crossing should rest in some one body; that body cannot be the legislature

(1) [1908] App. Cas. 54. (2) [1907] A.C. 65.
(3) [1912] A.C. 333.

of the province. The safety of the public travelling on a federal line of railway is of importance. The difficulties referred to in the judgment of the Judicial Committee in the *Montreal Street Railway Case*(1), arising out of dual control, do not exist in the present case. If the Parliament of Canada has not control over the matter of crossings, it would be possible for a provincial line, by building across the proposed route of a federal line, to prevent the construction of the federal line connecting one province with another. It necessarily follows from the fact that Parliament is given power to authorize the construction of lines connecting one province with another, that it must have complete jurisdiction over the matter of ordering such crossings, and, as incidental thereto, the making of orders for protection and safety of the public at such crossings.

For the purpose of carrying out the building of a federal railway, Parliament is empowered to take provincial lands. *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(2).

J. G. Hay for respondent, the City of Vancouver. The decision of the Board in respect to all questions of law and fact cannot now be considered; their decision thereon is final; *James Bay Railway Co.* v. *Grand Trunk Railway Co.*(3). The order complained of is *intra vires* and is justified under sections 8(*a*), 59(2), 237(2)(3), and 238 of the "Railway Act." The Dominion had authority to make these enactments, and also the amendment effected by 8 & 9 Edw. VII., ch. 32, secs. 4 and 5, such legislation being necessary to carry out the ancillary control germane to the

(1) [1912] A.C. 333.
(2) [1906] A.C. 204.
(3) 37 Can. S.C.R. 372.

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subject: *City of Montreal* v. *Montreal Street Railway Co.*(1), at p. 346; *Cushing* v. *Dupuy*(2); *Tennant* v. *Union Bank*(3); *Re Canadian Pacific Railway Co. and County and Township of York*(4), at p. 72; *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*(5); *City of Toronto* v. *Grand Trunk Railway Co.*(6), *per* Girouard J., at p. 238, Davies J., at pp. 240, 241, 243, and 244, Idington J., at p. 248; *Grand Trunk Railway Co.* v. *Attorney-General of Canada*(7); *City of Toronto* v. *Canadian Pacific Railway Co.*(8), *per* Collins L.J., at p. 58; *City of Montreal* v. *Montreal Street Railway Co.*(9), *per* Idington J., at pp. 213 and 215 to 217; Duff J., at pp. 227, 230, 231 and 232; Girouard J., at p. 200; Anglin J., at pp. 237 to 246 and the cases there exhaustively collected and quoted; also the same case on appeal to Privy Council (1), at p. 346. While it was held that sub-section (*b*) of section 8 of the "Railway Act" was *ultra vires,* no such decision was given as to sub-section (*a*) and the subject matters of the two provisions are dissimilar. In the present case there is no attempt to interfere with or regulate the affairs of the appellants *quâ* railway, but it is ordered to pay a certain proportion of cost in like manner as if it had been any other kind of a corporate body or any natural person.

The appellant cannot escape because of being incorporated by or exercising powers given by a provincial legislature. If such an argument were sound the city or any municipality or joint-stock company created by and under the exclusive legislative

(1) [1912] A.C. 333.
(2) 5 App. Cas. 409.
(3) [1894] A.C. 31.
(4) 27 O.R. 559; 25 Ont. App. R. 65.
(5) [1899] A.C. 367.
(6) 37 Can. S.C.R. 232.
(7) [1907] A.C. 65.
(8) [1908] A.C. 54.
(9) 43 Can. S.C.R. 197.

control of the provincial legislature could escape liability, and municipalities have time and again been held liable in just such cases as the present. *Re Canadian Pacific Railway Company and County and Township of York*(1), at p. 570; *City of Toronto* v. *Grand Trunk Railway Co.*(2), at p. 244; *City of Toronto* v. *Canadian Pacific Railway Co.*(3); *County of Carleton* v. *City of Ottawa*(4); MacMurchy and Denison "Railway Law of Canada" (2 ed.), p. 27. If such an argument were sound the present "Railway Act" would be practically unworkable and useless in very many respects.

Even if section 8(*a*) were alone relied on, the present case is one of "connection or crossing." That for the protection of the crossing it is necessary to elevate the appellants' tracks and the city streets for some distance on each side of the actual point of contact of the tracks can surely make no difference. That is a matter entirely for the Board to determine. By section 59 the Board may order any "person" interested to pay the cost or a portion thereof. The appellant is a "person" interested. By section 34, sub-section (20): "Person" includes any body corporate and politic. *City of Toronto* v. *Grand Trunk Railway Co.*(2), at p. 242; *City of Toronto* v. *Canadian Pacific Railway Co.*(3), at p. 59. On the evidence there is no doubt that the appellants are not only interested, but directly benefited by the proposed work, and the Board so found.

Under sub-section (3) of section 238 of the "Railway Act," as amended by 8 & 9 Edw. VII., ch. 32, sec. 4, power is not limited to persons "interested," but is

(1) 27 O.R. 559; 25 Ont. App. R. 65.
(2) 37 Can. S.C.R. 232.
(3) [1908] A.C. 54.
(4) 41 Can. S.C.R. 552.

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extended to any municipality "or other corporation or person." The provisions of the "Railway Act" of 1888 (secs. 187 and 188), under which many of the cases in point have been decided, limited the power to "any person interested." The decision of the Board as to whether or not the appellant is a person or party interested is one of fact which cannot be interfered with. Even if it is not a question in fact the Board's decision is still conclusive and binding and cannot be reviewed on this appeal. "Railway Act," sec. 26, sub-sec. (5); sec. 54, sub-sec. 3; sec. 56, sub-sec. 9; *Re Canadian Pacific Railway Co. and County and Township of York*(1), at p. 569; (2), at p. 73; *Re Grand Trunk Railway Co. and City of Kingston*(3); *City of Toronto* v. *Grand Trunk Railway Co.*(4), at pp. 238 and 239; *Grand Trunk Railway Co.* v. *Village of Cedar Dale* (5); *County of Carleton* v. *City of Ottawa*(6); Mac-Murchy and Dennison's Railway Law of Canada (2 ed.), p. 27.

THE CHIEF JUSTICE.—I am of opinion that the Board had jurisdiction to hear the application and give the relief asked for by the municipality with respect to the highway bridge and to assess the cost upon the parties interested.

I would dismiss the appeal with costs.

DAVIES J. agreed with Anglin J.

IDINGTON J.—It seems to me quite clear that the Board had jurisdiction to make the order complained of. Unless we hold that a local railway company con-

(1) 27 O.R. 559.
(2) 25 Ont. App. R. 65.
(3) 8 Ex. C.R. 349; 4 Can. Ry. Cas. 102.
(4) 37 Can. S.C.R. 232.
(5) 7 Can. Ry. Cas. 73.
(6) 41 Can. S.C.R. 552.

cerned in a crossing of a Dominion railway is something superior to and more sacred than a mere municipal corporation, the principle applicable to the case is completely covered by authority.

There was a railway constructed by the Dominion railway company now in question before the change in the law which section 238*a* of the Act brought about, and a part of it across the streets in question so that we must look at the law as decided relative to the older railways.

Every "person interested" had been theretofore held liable to contribute. Municipal corporations were held to be liable. It dawned at last on some part of the stupid public when the doctrine was pushed rather far, that railway companies, like others, ought to furnish the expenses of averting the dangers they had created.

But even then section 238*a* was the utmost Parliament could see its way to give in way of relief from such a state of things.

It seems idle to say it can be relied on for relief herein against an old railway simply by reason of its needing new sidings.

The appeal should be dismissed with costs.

Since writing the foregoing I have had the privilege of reading my brother Duff's opinion and may be permitted to add that, though I cannot see my way to distinguishing between a municipality having jurisdiction over a street and a street railway company running over a street, yet I never have been able to understand how making others pay for their right-of-way and incidental protection against the dangers they have created, or may create, is a necessarily incidental part of the powers of Parliament over a certain class

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of railways. In my dissenting judgment in the case of *City of Toronto* v. *Grand Trunk Railway Co.*(1), at pages 244 *et seq.*, I tried to shew that it never had been so intended originally, and if the words used could be held wide enough it was not *intra vires* Parliament to so enact. The recoil, from the mode of treatment of the power of Parliament which prevailed in that and other cases, came in the *Montreal Street Railway Case* (2). And section 238*a* above referred to, seems to indicate a railway can be built and run without such powers. Then, if so, wherein is the incidental necessity for pretending to exercise such a power ? Unless necessarily incidental to efficient exercise of the power Parliament has it not, and seems by section 238*a* to have written the condemnation of such an exercise of power. However, until the courts above pass further I must, as I view the results of the appeals thereto, bow to and follow what seems to me the principle thereof.

DUFF J. (dissenting).—This is an appeal by the British Columbia Electric Railway Co. from an order made by the Board of Railway Commissioners, dated the 14th October, 1912, which is as follows:—

ORDER OF BOARD.

Order No. 17,840.

Monday, the 14th day of October, A.D. 1912.

H. L. Drayton, K.C., Chief Commissioner. D'Arcy Scott, Asst. Chief Commissioner.
James Mills, Commissioner. A. S. Goodeve, Commissioner,

Upon the hearing of the application at the sittings of the Board held in the City of Vancouver on the 29th day of July, 1912, the applicant, the Vancouver, Victoria and Eastern Railway and Navigation Company, and the British Columbia Electric Railway Company being represented by counsel at the hearing, the evidence offered and what

(1) 37 Can. S.C.R. 232. (2) 43 Can. S.C.R. 197; [1912] A.C. 333.

was alleged; and upon the reading of the answer filed on behalf of the British Columbia Electric Railway Company and the reply of the Vancouver, Victoria and Eastern Railway and Navigation Company—

It is ordered as follows:—

1. The applicant is hereby authorized to construct Hastings Street, Pender Street, Keefer Street, and Harris Street across the tracks of the Vancouver, Victoria and Eastern Railway and Navigation Company, in the said City of Vancouver, by means of overhead bridges, as shewn on the plan filed with the Board under file No. 20062; detail plans of the said structures to be submitted for the approval of the chief engineer of the Board.

2. Twenty per cent. of the cost of the actual construction work at each of the crossings on Pender and Keefer Streets, not to exceed in each case the sum of $5,000, shall be paid out of the Railway Grade-Crossing Fund; twenty-five per cent. of the remainder of the cost of such work shall be borne and paid by the applicant and seventy-five per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company. Twenty per cent. of the cost of constructing Harris Street bridge, not to exceed the sum of $5,000, shall be paid out of the Railway Grade-Crossing Fund; twenty per cent. of the remainder of such cost to be paid by the applicant, twenty per cent. by the British Columbia Electric Railway Company, and sixty per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company. Twenty per cent. of the cost of constructing the Hastings Street bridge shall be paid by the applicant, twenty per cent. by the British Columbia Electric Railway Company and sixty per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company.

3. *The cost of depressing the tracks of the Vancouver, Victoria and Eastern Railway and Navigation Company shall be included in the cost of the work.*

4. The cost of maintaining the said Keefer, Pender, Harris and Hastings Street bridges shall be borne and paid, fifty per cent. by the applicant and fifty per cent. by the Vancouver, Victoria and Eastern Railway and Navigation Company.

5. In case of dispute between the parties in carrying out the terms of this order, the same shall be settled by the chief engineer of the Board.

(Sgd.) H. L. DRAYTON,
Chief Commissioner.

Board of Railway Commissioners for Canada.

Examined and certified as a true copy under section 23, "The Railway Act."

(Sgd.) A. D. CARTWRIGHT,
Sec. of Board of Railway Commissioners for Canada.

Ottawa, Oct. 25th, 1912.

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There are several grounds of appeal. It will be convenient first to consider the contention that the order in question is so far as it professes to direct the appellants to pay a portion of the cost of the overhead bridges which the municipality is thereby authorized to construct is an order which the Parliament of Canada could not empower the Board of Railway Commissioners to make. The Vancouver, Victoria and Eastern Railway is a railway originally authorized by the Legislature of British Columbia, but afterwards declared to be a work for the general advantage of Canada and thereby brought under the jurisdiction of Parliament. The British Columbia Electric Railway Co., which I shall refer to as the Electric Company, is a company which under an Act of the Legislature of British Columbia has power to operate an electric railway in Vancouver upon obtaining the consent of the municipality, and the Electric Company and the municipality respectively are authorized to enter into an agreement respecting the grading and maintenance of the highways through and upon which the electric railway runs. I shall have to refer in the course of this judgment to some of the terms of the agreement entered into pursuant to this authority. Prior to 1909 the Vancouver, Victoria and Eastern Railway Co., which I shall call the Dominion Company, had constructed a line to the City of Vancouver and had a passenger and freight station there. Some time during the year 1909 (the exact date does not appear) this company laid down a line from False Creek, where its station was, northerly to the south shore of Burrard Inlet. This line was constructed under authority of an order of the Board of Railway Commissioners made in the month of May, 1907. It crossed Harris

and Hastings Streets (running east and west), two of the streets referred to in the order under appeal. At the time the order of May, 1907, was made, the Electric Company had constructed its railway on Harris Street, that is to say, it had laid down on that street a single track, but had no tracks on Hastings Street. When the Dominion Company laid down its line across these streets in 1909, the Electric Company had in the meantime constructed a second track on Harris Street and had also laid down a track on Hastings Street, but it seems that this track had not yet been connected with their city railway system. In the year 1910 (6th Sept.), on the application of the Dominion Company, an order was made by the Board authorizing it to construct two additional industrial tracks from False Creek to Burrard Inlet alongside and parallel to the track laid in 1909 and crossing, of course, the streets already referred to. This application was opposed by the Municipality of Vancouver and by the Electric Company, and the order contains a clause in the following words:—

> That owing to the low-lying nature of the ground through which the said tracks were run and the probable necessity in future of carrying the said streets or some of them over the said tracks, all questions relating to the separation of grades and the distribution of the cost thereof are hereby reserved.

The order under appeal was made upon the application of the municipality; and the circumstances in which that application came to be made were clearly stated to the Board by Alderman Baxter. There is no dispute whatever about the facts. In 1912 the Municipal Council of Vancouver decided to put permanent pavements on four streets running east and west (two of which were Harris and Hastings Streets) which were crossed by the three tracks of the Dominion com-

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pany already mentioned. As was anticipated by the Board in 1909, it was thought that the streets at the place where these tracks crossed were too low and it was considered desirable to elevate the grade of the streets. It was accordingly decided to construct, with the leave of the Board, overhead bridges carrying the highways over these tracks. A by-law was passed by the Council authorizing the construction of these bridges, but on being submitted to the ratepayers was not confirmed as the law of British Columbia required. It was then determined by the Council to apply first to the Board for leave to construct the bridges and for an order apportioning the cost between the Dominion Company and the municipality and then to propose another by-law authorizing the municipality to carry out the scheme as sanctioned by the Board. 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, as Mr. Baxter put it, they recognized that the street grades were too low and must eventually be raised.

The application to the Board then was an application made pursuant to the reservation contained in the order of 1909 to authorize the municipality to con-

struct bridges across the Dominion Company's tracks (if the municipality, by the ratepayers, should approve the proposals of the council in respect of the grades of these streets), and to declare the respective proportions of the cost of the bridges to be paid by the Dominion Company and the municipality.

It will be observed also that the order made was a permissive order leaving it to the discretion of the municipality whether the bridges should be built or not. The order is not an order directing precautionary measures to be taken for the public protection against the dangers of a railway crossing. The tracks in question are for the transport of freight only to and from the company's dock on the harbour front. The statement by Mr. MacNeil, for the Dominion Company, which was not questioned at all, was that there would not be more than two "movements" of freight in each twenty-four hours on these tracks, and that if necessary these "movements" could all take place at night. The real scope, purpose and effect of this order is that it gives permission to the municipality to put into effect, if it sees fit, the Council's proposals to carry these highways over the railway as a necessary part of a design to elevate the grades of the streets; the protection which may incidentally be afforded was not in any sense the object nor was the necessity of it the ground of the order.

It is convenient, I think, to put the question I am now considering in this form:—Could the Parliament of Canada have validly passed, as part of an Act authorizing the construction of the Dominion railway, an enactment having the identical scope, purpose and effect of this order in so far as it levies a part of the

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cost of constructing these bridges upon the Electric Company ?

The only ground upon which such legislation could be sustained would be that it was legislation in execution of the Dominion powers in relation to a Dominion railway.

I think such legislation would not be legislation relating to the Dominion railway, but legislation relating to the Electric Company and its rights in the matter of running its cars on the streets of the municipality.

Looking at the matter broadly, the order seems in relation to each of these highways to be an order requiring the Electric Company to contribute to the cost of the construction of a bridge as part of a municipal highway and the justification of the order appears from the judgment of the Assistant Chief Commissioner to be that when the bridge is constructed the Electric Company will have the right to use it and that the construction of the bridge will enable that company to work its railway more efficiently, more economically and with increased security against injuries to its passengers through accident. An order which on such grounds requires the Electric Company to contribute to the cost of constructing or improving a highway of the municipality, if and when the municipality decides to construct or improve it, seems to be an order in substance and in truth dealing with the Electric Company in its relations with the municipality; and none the less so that in order to construct the work the leave of the Dominion must be obtained because of the fact that the highway crosses a Dominion railway. In so far as the order authorizes the highway to cross the railway it is, of course, a pro-

per exercise of authority in relation to the Dominion railway; so also in so far as it casts upon the Dominion Company a part of the cost of works made necessary by the fact that its railway is there and in so far also as it requires the approval of the bridge by the engineer of the Commission. But the direction that the Electric Company shall pay for the advantages it will gain from this change by reason of the fact that it has under the law the right to use the highway in its altered condition is a direction which deals with a different subject-matter altogether. Indeed, it may be noted that even if the order were an order directing the construction of these bridges as a measure of public safety, the matter of the terms on which the local railway is to be entitled to use them would just as clearly be a matter exclusively of local interest outside the purview of the Dominion power relating to railways.

The argument in support of the Dominion jurisdiction is that the power to pass such legislation is necessarily incidental to the power to make laws in relation to all matter comprised within the subject-matter — Dominion railways.

This proposition is said to be established by certain decisions of the Privy Council and of this court. These decisions I shall consider in detail and at present it is sufficient to say that there is no decision involving the question of the extent or the existence of any power in the Dominion (as incidental to its control of Dominion railways) to assess against a provincial railway company the cost of works made necessary by the construction of a Dominion railway across a municipal highway and there is no decision

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upon the question whether the Dominion has power to assess the cost of works constructed by a municipality against a provincial railway company benefited by such works merely because such works are so situated with reference to a Dominion railway that the municipality must get the leave of Dominion for executing them.

The provisions of the B.N.A. Act with which we are immediately concerned are sections 91(29) and 92(10).

By these provisions local railways wholly within the limits of a single province and not declared to be for the general advantage of Canada come within the exclusive legislative jurisdiction of the province. That does not mean, of course, that such railways in respect of matters which are not properly comprehended within the subject-matter of railways, but which really fall within Dominion jurisdiction under some other head of section 91 are exempt from the authority of the Parliament of Canada. If a provincial railway company is about to make a negotiable instrument or to deal with a bank, it must do so subject to the Dominion law relating to negotiable instruments and banking. Such railways as railways, however (in respect, that is to say, of all matters that are subject-matter of "railway legislation strictly so called"), so long as the Dominion does not assume jurisdiction in the manner provided for by the Act, are primarily under the exclusive jurisdiction of the local legislatures. The works and undertakings dealt with by these sections are as Lord Atkinson explains in *City of Montreal* v. *Montreal Street Railway Co.*(1), "physical things, not services";

(1) [1912] A.C. 333.

and they are things of a special character. Railways, telegraph lines and like works from the practical point of view must for some purposes be regarded as entireties, and the law recognizes that by treating them so in many instances. The "British North America Act" seems to treat them so in these provisions as subjects of legislative jurisdiction. The framers of the Act recognized that the national interest might require the taking over of local works by the Dominion and the Act provides for that, but the Dominion, when it assumes jurisdiction, must assume jurisdiction of the work or undertaking as a whole. Primarily then the effect of the provisions of the Act with regard to a railway which is local in the sense mentioned is that, in its character of railway, it is "as an integer," to use Lord Watson's phrase in *Redfield* v. *Corporation of Wickham*(1), under the exclusive control of the province until the Dominion assumes jurisdiction in the manner provided for. After that it passes in the same character under the exclusive jurisdiction of the Dominion.

In *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*(2), speaking of the extent of the control over Dominion railways committed to Dominion by these provisions, at page 372 Lord Watson says:

> Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; * * * It was obviously in the contemplation of the Act of 1867 that the "railway legislation," strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament.

It cannot, I think, be doubted that, primarily, the jurisdiction committed to the province by these pro-

(1) 13 App. Cas 467, at p. 477. (2) [1899] A.C. 367.

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visions in regard to local railways is as extensive as the jurisdiction thus described. And the considerations I have already referred to appear to me to be quite sufficient to shew that the order in its application to the Electric Company is an order in relation to a matter falling strictly within the subject of "local works and undertakings" assigned to the province by section 92 (10).

It cannot, therefore, be and is not contended that the order appealed from in so far as it professes to levy a contribution upon the Electric Company is

> legislation falling strictly within any of the classes specially enumerated in section 91

in the sense in which those words are used by Lord Herschell in the *Fisheries Case*(1), at page 715.

It is perhaps unnecessary to observe in passing that the order obviously cannot be sustained as made in exercise of the Dominion power of taxation.

It is contended, however, and this is, no doubt, the ground upon which this order must be sustained, if it can be sustained at all, that there is vested in the Dominion Parliament in addition to its authority to enact railway legislation strictly so called in relation to the subject of Dominion railways a power to pass laws which though not legislation of that character would be suitable ancillary provisions to a Dominion railway law; and it is further contended that such ancillary legislation may be legislation relating to a provincial railway and of such a character that from a provincial point of view it would properly be described as "railway legislation strictly so called." I do not think it is necessary for the purpose of this appeal to pass upon the question whether such legisla-

(1) [1898] A.C. 700.

tion is competent to the Dominion, without a formal assumption by the Dominion of exclusive jurisdiction over the provincial railway in the manner provided for by the Act. There is no doubt something to be said for the opposite view.

Where by reason of the relative physical situation of a Dominion railway and a provincial railway or other circumstances legislation strictly relating to the Dominion railway in its operation necessarily and incidentally affects a provincial railway it may be assumed that the Dominion legislation would be unobjectionable from the constitutional point of view. But once you pass beyond that and admit there is (in the absence of an assumption of complete jurisdiction) vested in the Dominion authority to pass legislation which relates to a provincial railway as such or to a provincial railway company as railway company, and which, admittedly is not legislation relating strictly to a Dominion railway you are obviously in difficulties in assigning limits to the jurisdiction.

If the proposed action of the Dominion respecting the provincial line appears to the provincial legislature or the provincial body charged generally with administrative responsibility in relation to the provincial line in the honest exercise of its judgment to be so impracticable in a business sense or so incompatible with the objects of the undertaking that it ought not to be agreed to, it does not seem wholly extravagant to say that from the provincial point of view it would be unreasonable to force the proposal upon the province against its will; in other words, that from the provincial point of view on any such question of reasonableness the province is the final judge.

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Then, if the necessities of the case from the Dominion point of view require that the Dominion view shall prevail against the provincial, the question may be asked:—Have we not reached the stage at which the Act contemplates the assumption by the Dominion of complete jurisdiction?

The other alternatives are that the Dominion is in all cases the final judge of the necessity of its own intervention — an alternative which, I think, is negatived by the decision of the Privy Council in the *City of Montreal* v. *Montreal Street Railway Co.*(1); or that when such a conflict arises it rests with the courts in each case to determine whether the particular enactment in so far as it relates to the provincial railway or the provincial railway company is one that is so essential to the effective exercise of Dominion legislative authority relating to Dominion railways (under the provisions quoted above) that power to pass it must be taken to have been conferred by the grant of that authority. I assume for the purpose of deciding the question before us that in some degree some such power is comprehended within that authority; limited by the necessity above indicated of the existence of which, when it is disputed, the courts must in the last resort be the judges.

In this view then in every case in which a conflict does arise the point for determination must be whether there exists such a necessity for the power to pass the particular enactment in question as essential to the effective exercise of the Dominion authority as to justify the inference that the power has been conferred. *The City of Montreal* v. *The Montreal Street Railway Co.*(1), at pages 342-345.

(1) [1912] A.C. 333.

I do not think the order before us satisfies this test.

In applying this test one should not lose sight of the fact that there is no case in which a Dominion enactment professing to control a provincial railway or a provincial railway company as such has been sustained as a valid exercise of the ancillary power now contended for. There is only one case in which such an enactment has been considered and in that case (*City of Montreal* v. *Montreal Street Railway Co.*(1)) the Dominion legislation was held to be *ultra vires*.

It may further be observed that—if we except cases dealing with matters that have been considered to fall *primâ facie* within item 13 of section 92, ("property and civil rights") or item 16 of section 92, (matters mere local or private within the province)—I do not think there is any case in which it has been held that legislation by the Dominion (which was admittedly in relation to a matter not falling *strictly* within the enumerated subjects of section 91 and which at the same time admittedly related to a matter falling within one of the enumerated subjects of section 92) was legislation which could validly be enacted as ancillary to the exercise of the powers conferred by section 91. It has, of course, been pointed out frequently that you cannot proceed a step in such matters as bankruptcy and banking without directly altering the general law relating to property and civil rights; and matters which from a provincial point of view are "merely local and private" may, from the Dominion point of view, cease to be so and assume Dominion importance by reason of their relation to matters which have become subjects of legislation under section 91.

(1) [1912] A.C. 333.

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On the other hand, in the argument on the *Fisheries Case*(1), Lord Watson said:—

> If you except the liquor question, and I do not wish to re-open discussion about that with regard to the cases at the present moment, because some parts of them are not entirely satisfactory to my own mind, and I have a difficulty in reconciling them; but, apart from that, there is no warrant for saying that both may act effectively, except in this case there is one exception, the general law of the province relating to property and civil rights is subject-matter of legislation by the provincial legislature; and that general law, applicable to property and civil rights, governs a great many cases in which by section 91 exclusive power is given to the Dominion Government; but until that legislation is enacted the general law rules. Bankruptcy is an illustration.

I am not quoting this observation of Lord Watson's (made *arguendo*) as an authority on the construction of section 91. I quote it merely as a statement of fact shewing the state of the decisions in 1898, the year in which the observation was made.

I wish to emphasize the fact that up to the present time the only cases in which the courts have sustained the attempt on the part of the Dominion to exercise an ancillary overriding power have been cases in which the legislation regarded from the provincial point of view would be considered to be legislation dealing with a subject-matter falling within the classes of subjects included in No. 13 or No. 16 of section 92; and to suggest that when it is proposed to exercise such a paramount subsidiary power in relation to matters clearly falling within other classes specifically mentioned in that section great care ought to be observed in order to ascertain whether the Dominion has really been invested with the authority it claims to possess.

I venture to think with great respect that the point of view from which those two sections ought to be regarded is indicated in the following passage in

(1) [1898] A.C. 700.

the judgment of the Judicial Committee in *Citizens' Insurance Co.* v. *Parsons*(1), pp. 108 and 109:—

It is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion Parliament. Take as one instance the subject "marriage and divorce," contained in the enumeration of subjects in section 91; it is evident that solemnization of marriage would come within this general description; yet "solemnization of marriage in the province" is enumerated among the classes of subjects in section 92, and no one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in section 91; but, though the description is sufficiently large and general to include "direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by section 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practicable construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

Since the decision in the *Parsons Case*(1) the necessity of attending to the provisions of section 92 in ascertaining the limits of the enumerated powers conferred by section 91, has been illustrated in the follow-

(1) 7 App. Cas. 96.

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ing cases: In *Cunningham* v. *Tomey Homma*(1), it was necessary to consider the scope of the Dominion authority in relation to "Aliens and naturalization" in its bearing upon matters falling within the first of the articles of section 92 which invests the provinces with exclusive authority over the constitution of the provincial governments "notwithstanding anything in this Act." In *City of Montreal* v. *Montreal Street Railway Co.*(2), already referred to, the Dominion authority relating to Dominion railways had to be interpreted in its bearing upon the subject of provincial railways. In the *Marriage Reference Case*(3), the limits of Dominion authority in relation to "Marriage and Divorce" had to be considered with reference to the jurisdiction conferred upon the provinces in relation to "The solemnization of Marriage." In *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours*(4), Lord Watson pointed out that the exclusive character of the Dominion authority over a Dominion railway, *quâ* railway, does not exclude the power of the province to subject that part of it lying within the boundaries of the province to provincial taxation.

In the matter of railways the Imperial Legislature while conferring exclusive jurisdiction upon the Dominion in respect of certain classes of railways has, in the same breath, so to speak, declared that exclusive jurisdiction with respect to local railways is vested in the province. It seems to be pre-eminently a case (especially in view of the power conferred upon the Dominion by pursuing the course prescribed by the Act to assume complete jurisdiction over local works and undertakings) in which for interpreting and de-

(1) [1903] A.C. 151.
(2) [1912] A.C. 333.
(3) [1912] A.C. 880.
(4) [1899] A.C. 367.

fining the scope of the Dominion authority reference should be had to the terms in which authority in respect of railways is conferred upon the province.

Assuming, therefore, that there may be circumstances in which the Dominion possesses an overriding ancillary jurisdiction to legislate for a provincial railway as such, it is necessary — in determining the scope of the ancillary power and whether in any particular instance the circumstances have arisen which justify the exercise of it, — to decide that question in light of the facts that plenary legislative jurisdiction respecting the provincial railway has been specifically conferred upon the province; and that from the provincial point of view it is the province which was intended to be the final judge as to the desirability of any proposed legislation relating to the provincial railway.

It is to be noted that unity of control in respect of the management of the provincial railway and the constitution and powers of the company *quâ* railway company is not less important than unity of control in respect of the construction, alteration and repair of the railway itself. In the case of a street railway, for example, such matters as the control of rates, the compensation by way of division of receipts or otherwise to be paid by the company to the municipality or the province for the enjoyment of its privileges; the mutual rights and obligations of the company and the municipality in respect of the use, construction, maintenance and repair of highways and the incidence as between the company and the municipality of the cost of works required for the protection of the public; all these matters one would expect to find assigned as subjects of legislative jurisdiction to the same legislative

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authority. See *City of Toronto* v. *Bell Telephone Co.* (1), at pages 57 and 59.

In considering whether the order under appeal can be sustained as made in exercise of some ancillary power vested in the Dominion I wish to emphasize these features of the particular question before us. 1st. It seems to me to be quite clear that the Dominion would have no power to compel the municipality to do the specific things authorized by this order.

The Dominion authority might (what has not been done in this instance) determine that considerations of public safety arising out of the presence of the Dominion railway required that after a given date the highways in question and the Dominion railway should no longer cross each other by level crossings. The Dominion authority might also determine that in the event of the highways being carried over the railway by viaducts a stated portion of the cost should be borne by the Dominion company. But the question whether on the one hand the municipality should undertake the works necessary to carry the highway over the railway under the conditions laid down by the Dominion authority or whether in the alternative the highways should be closed would be a purely local question the determination of which is committed absolutely to the provincial authorities, that is to say, to the provincial legislature in the last resort, and it is impossible to see on what ground it can be pretended that the Dominion could be concerned in such a question as a matter affecting its control of Dominion railways. Assume, for example, that the ratepayers of Vancouver had refused to give the sanction of their approval to the scheme proposed by the Municipal

(1) [1905] A.C. 52.

Council. While the Dominion might stop the highway traffic over the Dominion railway until appropriate arrangements should be made I do not suppose it would be contended that it could force the municipality, against the express provisions of the provincial law governing the municipality as such, to construct the bridges in question. If in the local interest it were necessary that the bridges should be constructed then it is entirely in the hands of the provincial legislature in the last resort to compel the muncipality to act. So with regard to the Electric Company. The provincial authorities (in the last resort the provincial legislature) have full power to compel the Electric Company to act reasonably in relation to all interests concerned.

2nd. No Dominion interest is concerned in the provision of the order to which exception is taken.

I do not repeat what I have already said upon the point that the subject-matter the Board is dealing with in the order against the Electric Company is the subject of the reciprocal rights and obligations of the municipality and the Electric Company in respect of the use of the municipal highways. In respect of the construction of these bridges, the separation of grades having been decided upon, the only matters of Dominion concern from the point of view of the Dominion in exercising control of Dominion railways are these;—the convenience of the bridge in relation to the working of the railway; the sufficiency of the bridge for the support of the highway traffic which may concern the safety of the public in relation to the railway as well as the safety of the railway; and the proportion of the cost of construction and maintenance which ought to be contributed by the Dominion

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company as being an expenditure necessitated by the presence of the railway.

These matters being disposed of what Dominion interest remains to be provided for? In determining the proportion of cost to be assessed against the Dominion Company the Dominion authority may, of course, properly consider the fact that the bridges are to be used by a provincial railway in pursuit of a presumably profitable business; but that proportion being fixed how can the exercise of authority over Dominion railways be affected by the distribution of cost as between the municipality and the Electric Company? What necessity can there be for interposition in such matters by the Dominion railway authority?

One more relevant consideration appears to be as indicated in the judgment in *City of Montreal* v. *Montreal Street Railway Co.*(1), that the matter of the reciprocal rights and obligations of the Electric Company and the municipality is esentially a local and not a Dominion matter. The equities as between these local bodies in respect of the incidence of the cost of these viaducts cannot be fairly appraised without regard to their mutual obligations in respect of other matters; their relations must in any adequate view of them for the purpose of adjusting such equities be looked at as a whole. It is the local legislature or the appropriate local administrative body, which can best deal with these relations in their entirety. It must be observed that the power contended for is a paramount power and if this order is valid there could be no constitutional objection to a like order in face of express legislative enactment by the province to the contrary. I conclude that, if the point were to be determined on

(1) [1912] A.C. 333.

principle, apart from decided cases, the possession by the Dominion of the authority contended for is not essential to enable the Dominion to exercise its powers in relation to Dominion railways.

I come now to the decisions. The proposition said to be established by them is this:—ancillary authority is committed to the Dominion in relation to Dominion railways to adjust the burden of the cost of any work *authorized or required* by the Dominion railway authority in connection with the construction or operation of a Dominion railway among the persons, companies, and municipalities "interested in" or "affected by" such work. That is the formula which is said to be deducible from the decided cases. The formula leaves something to be desired in point of precision. Nobody disputes, of course, that there must be some limit upon this power which is ascribed to the Dominion as incidental to its authority respecting railways. The expressions "interested in" and "affected by" seem altogether too vague to furnish a reliable test for determining that limit. Then who is to decide the question whether a given person or company is "interested in" or "affected by" a given work? The suggestion appears to be that the question is to be determined finally as a question of fact by the Dominion railway authority. But in the absence of some governing principle by which the railway authority is to be guided it seems that in this view the whole matter is left at large and that the formula is worthless. The limit of the overriding jurisdiction of the Dominion in respect of a provincial railway as such cannot finally depend upon the view of a Dominion railway authority as to what in the particular circumstances is reasonable or equitable.

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When the cases relied upon are examined it seems to be perfectly plain that no such principle, if principle it can be called, is established by them. The three cases cited are: *City of Toronto* v. *Grand Trunk Railway Co.*(1); *The Carleton County Case*(2), and the *City of Toronto* v. *Canadian Pacific Railway Co.*(3). The first observation to be made upon these cases is that in none of them did any question arise as to the existence or the limits of an overriding jurisdiction in the Dominion in respect of provincial railways. In none of them was a provincial railway company concerned. There are some observations in the judgments delivered in the first and second cases (which were decisions of this court) of a very general character; but those observations in so far as they are material must be taken to have been superseded by the judgment of Lord Atkinson speaking on behalf of the Privy Council in the *City of Montreal* v. *The Montreal Street Railway Co.* (4). The decision of the *City of Toronto* v. *Canadian Pacific Railway Co.*(3) was a decision of the Privy Council. The dispute was a dispute between the municipality of Toronto and the Canadian Pacific Railway Co. The municipality had applied to the Railway Committee of the Privy Council for an order requiring the Canadian Pacific Railway Company to erect gates and keep a watchman at a place where the railway crossed one of the municipal streets, and as a measure of public safety the order was made; part of the cost of maintenance being assessed upon the municipality. After paying the contribution as directed for several years, the municipality disputed the authority of the Railway Committee in respect of that

(1) 37 Can. S.C.R. 232.
(2) 41 Can. S.C.R. 552.
(3) [1908] A.C. 54.
(4) [1912] A.C. 333.

part of the order. Before the Privy Council the order was impeached as an interference with the matter of civil rights in the province, and it was sustained.

With regard to this decision it may be observed: 1st. That the application to the Railway Committee was made by the municipality. As having control of highways the municipality would be certainly acting within its powers in requesting the Railway Committee to take action to compel the railway company to provide for the protection of the public and in submitting itself to such conditions as those imposed upon it in that case.

2ndly. It is one thing to say (where a highway crosses a railway or a railway crosses a highway by a level crossing), that it is within the jurisdiction of the Dominion as ancillary to its authority to make laws in relation to the railway to prescribe regulations with regard to the use of that part of the highway which is traversed by the railway with the object of securing the common safety of the public and the railway, or to require the municipality, consistently with the law governing the powers of the municipality, to concur with the railway company in taking measures for such common safety so long as the highway is used by the public; it is another thing to say that the grade of the highway being separated from the grade of the railway, the highway being carried over the railway, and all proper measures having been taken to secure the sufficiency of the highway, to support the highway traffic — it is another thing to say that in such circumstances it is within the province of the Dominion to regulate the traffic on the highway or to prescribe conditions (not aimed at the security

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of the public in relation to the railway or of the railway as affected by the presence of the highway), under which any particular kind of traffic shall be allowed to pass over it.

I cannot escape the conclusion that once the highway has been carried across the railway by means of overhead bridges and all conditions have been observed which the Dominion in the exercise of its discretion requires to be observed for securing the safety and efficiency of railway operation as it is or may be affected by the bridges and the safety of the public in using the highway as affected by the presence of the Dominion railway, then the matter of the regulation of highway traffic and of the terms as to tolls or otherwise upon which any particular class of traffic is permitted is purely a matter of local concern.

As to the position of the Electric Company I will only add to what I have already said, a reference to the fact that the agreement between the municipality and that company which, as I have already mentioned, both parties were empowered to enter into by an Act of the British Columbia Legislature, declares the terms and conditions upon which the Electric Company is entitled to use the municipal streets and the reciprocal obligations of the municipality and the company respecting the grading, repair and maintenance of those streets. There is also, as may be observed, a provision according to which the municipality shares in the gross receipts of the company. Their Lordships in the Privy Council, in passing upon *City of Toronto* v. *Canadian Pacific Railway Co.*(1), had not before them any question touching the power of the Dominion with regard to a matter of a nature

(1) [1908] A.C. 54.

so purely local as the rights of the electric company and the municipality *inter se* respecting the use of the municipal streets. Their Lordships treated the question before them as a question of how far the ancillary powers of the Dominion in relation to railways might extend to matters which *primâ facie* would fall within the heading "property and civil rights within the province." I think their Lordships' decision ought not to be treated as furnishing any principle governing the question which arises here.

In applying their Lordships' judgment to the determination of such a question it ought to be interpreted in the light of the subsequent judgment in the *City of Montreal* v. *Montreal Street Railway Co.*(1) and for the reasons already given upon the principles established by that judgment I do not think the order can be sustained.

There is another ground upon which the appeal ought, in my judgment, to succeed. Section 6 of the Act of 1909 is as follows:—

6. The said Act is amended by inserting the following section immediately after section 238 thereof:—

238*a*. In any case where a railway is constructed after the passing of this Act, the company shall, at its own cost and expense (unless and except as otherwise provided by agreement, approved of by the Board, between the company and a municipal or other corporation or person), provide, subject to the order of the Board, all protection, safety and convenience for the public in respect of any crossing of a highway by the railway.

I have mentioned that the order in question was really made pursuant to leave given on the application of the Dominion railway company to cross the highway with its two industrial tracks in 1910. The enactment above quoted seems, therefore, to apply to the tracks laid down in 1910. On the evidence it is doubt-

(1) [1912] A.C. 333.

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ful whether the line built in 1909 was laid down before or after the passing of the Act of that year.

I cannot read section 6 as having no application to tracks such as those constructed in 1910. Each of these tracks was literally a "railway"; and the term "railway," as defined by the interpretation section, includes such tracks. I think the enactment referred to applies to every "railway" in the broadest sense constructed across a highway after the passing of the Act.

The Board had, therefore, no power to assess against the municipality or the Electric Company any part of the cost of works made necessary in consequence of the construction of the tracks of 1910; and since it is obvious the Electric Company and the municipality are (as they were intended by the Board to be) both charged by the order with part of the expenditure necessitated by the presence of these tracks, which included by the express terms of the order the *cost of depressing the tracks,* I think the order cannot be sustained.

ANGLIN J.—The appellant contests the validity of an order of the Board of Railway Commissioners on the grounds that (*a*) the "Railway Act" does not purport to authorize it; and (*b*), if it does, Federal legislation authorizing the making of such an order against the appellant, a provincial railway company, is *ultra vires.*

On the latter point the case is, I think, concluded against the appellant by such authorities as the *City of Toronto* v. *Canadian Pacific Railway Co.*(1); *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de*

(1) [1908] A.C. 54.

Bonsecours (1); *City of Toronto* v. *Grand Trunk Railway Co.* (2); *County of Carleton* v. *City of Ottawa* (3), and *Re Canadian Pacific Railway Co. and The County of York* (4), at page 72.

On the former point I think it clear, apart from any difficulty presented by section 238*a*, enacted in 1909, that Parliament intended by sections 8(*a*), 59 and 237 and 238 (as amended by 9 Edw. VII. ch. 32) of the "Railway Act" (R.S.C. 1906, ch. 37) to confer jurisdiction on the Railway Board to determine who are "interested persons" and shall contribute as such to the cost of crossing-works and to distribute amongst them the burden of such cost.

When before the Board, the present appellant did not invoke or direct attention to section 238*a*, and the hearing would appear to have proceeded on the assumption that that provision did not apply. Nor was leave to appeal to this court granted in respect of any point which arises under it.

Although it would seem that two side-lines of the Vancouver, Victoria and Eastern Railway, crossed by one or both of the bridges in question, were constructed after the enactment of section 238*a*, there is no evidence that the main line of that railway was not built before section 238*a* was enacted. There are statements in the record which indicate that it was; and, nothing appearing to the contrary, this appeal should, I think, be dealt with on that assumption.

The crossing of the highway by the main line of the Vancouver, Victoria and Eastern Railway prior to the enactment of section 238*a* would give the Board jurisdiction to order the appellant company to bear a

(1) [1899] A.C. 367.
(2) 37 Can. S.C.R. 232.
(3) 41 Can. S.C.R. 552.
(4) 25 Ont. App. R. 65.

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portion of the cost of the crossing-works, and there is nothing to warrant an inference that the protection of a bridge-crossing was not rendered necessary by, and ordered on account of, the traffic on the main line of the railway. Neither is there anything to shew that the amount which the appellant will be required to pay is any greater by reason of the existence of the two side-lines subsequently built (if, indeed, such an increase would warrant interference with the order on jurisdictional grounds); and I know of no reason why anything should be assumed in favour of the appellant which might adversely affect the jurisdiction of the Board.

The appeal, in my opinion, fails and should be dismissed with costs.

BRODEUR J. (dissenting) agreed with Duff J.

Solicitors for the appellants: *McPhillips & Wood.*

Solicitors for the respondents, the V. V. and E. Rway. Co.: *MacNeill, Bird, MacDonald & Bayfield.*

Solicitor for the respondent, the City of Vancouver: *John G. Hay.*

ALPHONSE DUMONT (PLAINTIFF) ...APPELLANT; 1912

*Nov. 4, 5.

AND 1913

DONALD FRASER AND OTHERS (DEFENDANTS) ..... RESPONDENTS. *Feb. 18.

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

Watercourses—Driving timber—"Damages resulting"—Reparation—Riparian rights—Construction of statute—Arts. 7298, 7349 *R.S.Q.* (1909)—*Servitude—Injury caused by independent contractor—Liability of owner of timber.*

The privilege of transmitting timber down watercourses in the Province of Quebec given by article 7298 of the Revised Statutes of Quebec, 1909, is not granted in derogation of the obligation imposed upon those making use of watercourses for such purposes to make reparation for damages resulting therefrom by article 7349(2) of the Revised Statutes of Quebec. The effect of the articles is that persons who avail themselves of the privilege thereby conferred are obliged to compensate riparian owners for all damages which result from the exercise of that right except in regard to such as cannot be avoided by the exercise of reasonable care and skill and those in respect of which the riparian proprietor himself may have contributed, or which have been occasioned by his own fault. *Tourville* v. *Ritchie* (21 R.L. 110) referred to.

The judgment appealed from was reversed, Davies and Anglin JJ. dissenting.

Per Davies and Anglin JJ., dissenting.—The evidence shewed that the damages complained of were caused by the fault of a *bonâ fide* independent contractor and, consequently, the owner of the timber which was being driven down the watercourse in question was not responsible for them.

(NOTE.—Leave to appeal to the Privy Council was granted on 15th July, 1913.)

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

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DUMONT v. FRASER.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of Cimon J., at the trial in the Superior Court for the District of Kamouraska, and dismissing the plaintiff's action with costs.

The questions in issue on the present appeal are stated in the judgments now reported.

T. Chase-Casgrain K.C. and *Stein K.C.* for the appellant.

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

DAVIES J. (dissenting).—This is an action for damages caused by the negligent driving of logs by the defendants down the River Cabano. The appellant was a mill owner carrying on his business on the river banks, and the damages were sustained by the damming back of the water upon his lands caused by a jam of the logs of the defendants just below appellant's mills. This damage, it was alleged, was entirely owing to the negligence of respondents who, on the other hand, while denying any liability, contended that appellant's own negligence was largely responsible for the damages he sustained. The gist of the action is negligence causing or contributing to the damages and, if I was able to hold the defendants liable at all, I would concur in the distribution of the damages in the way and to the amounts respectively proposed by Cross J. in the court of appeal.

One main defence set up by the defendants, respondents, was that plaintiff's own negligence was the cause of the entire damage, but whether this was so or not need not necessarily be determined because

the driving of the logs was not carried out or done by the defendants or any of them, but by one Guérette, an experienced driver, with whom a contract for the driving of the logs had been entered into either by the Cabano Log Driving Association, or by its individual members, who were the owners of the logs and the defendants herein. The defendants, respondents, disclaimed having had any right of control or of having actually exercised any control over the work or driving operations of Guérette.

The question, therefore, was fairly presented. Was Guérette, in the carrying out of these log driving operations, when the damages occurred, a *bonâ fide* independent contractor? After a careful examination of the evidence given at the trial, I have reached the conclusion that he was, and that the defendants neither exercised nor claimed the right to exercise any control over his actions or operations. The contract was entered into with him by Mr. Fraser acting for himself and his co-partners in the Association, they being the owners of the logs and on behalf of the association as such. Whether the association had the corporate capacity to enter into the contract to drive the logs is beside the matter because, if it had not, the contract was made by Fraser with Guérette on behalf of himself and the log owners personally. I do not think, therefore, that these log owners are responsible for the negligence, if there was any, of Guérette in driving the logs.

I agree with the judgment of the appeal court of Quebec as stated in the opinion of Chief Justice Archambeault on this ground, and do not, therefore, find it necessary to discuss any other grounds on which that judgment was sustainable.

The appeal should be dismissed.

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DUMONT v. FRASER.

Idington J.

IDINGTON J.—The respondents and others owned timber intended to be floated down Cabano River and same was driven down said river doing damage to the property of appellant who was the owner of a mill and dam on said stream and property on each side of it at the place in question.

The respondents were found liable by the learned trial judge, but the court of appeal reversed this judgment on the ground that the work was done by an independent contractor and that he, as alleged, having same right as any one else by virtue of a section in the Revised Statutes of Quebec, 1909, to which I will refer later, was the party liable if any one.

The circumstances are very peculiar.

These owners of timber to be floated had themselves formed into a corporation known as "The Cabano Logs Driving Association" with powers for improving the river, but no power to drive logs therein or enter upon such a business.

One of the respondents says he bought from the association, for one Guérette, the job of driving said logs at so much per thousand feet.

It seems quite clear in law such a contract, being *ultra vires* the corporation, could give thereby no legal rights to any one.

Guérette, who claims to have become their contractor, could not sue them.

That contract cannot, so far as I see, be relied upon as in law a contract independent or otherwise.

The consequence seems to be that the respondents, who in fact seem to have managed the whole business, must be looked upon as those who caused the logs to be floated and driven.

In law they had a right to have stopped Guérette

at any time, for by law he could not in such circumstances set up his alleged contract.

It may be that had he under such error done work at the instance of respondents he might have been able to recover some compensation for such work as he might have done, but he certainly could not have relied upon this contract.

Nor could he have sued for damages had he been dismissed from his employment.

I fail to see how this sort of alleged contract can be set up as an independent contract over which respondents had no control.

And to shield the employer by virtue of an independent contract he must not only shew he by the contract was or became powerless to interfere, but also where there is or may be risk of danger or injury to others as, for example, upon a public highway he must be able to shew that he has by his contract or otherwise taken care to guard against such danger or injury. How can he in such a case rest on an absolutely void contract?

Again, it is alleged that under article 7298, either the respondents or Guérette had a perfect right to drive logs down the river in question and neither were responsible for damages unless by way of negligence in the driving and any such negligence as is apparent was that of Guérette and not respondents.

Passing the question of an employer without contract to shield him, as I have already indicated was the position of respondents, let us see how this legislation came to be in the singular position it is and how it is found in the revised statutes in the somewhat isolated position it is — and what the legal effect thereof is.

The construction put by this court on the Code and

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result in law in the case of *Tanguay* v. *Canadian Electric Light Co.*(1) seems to take away any right in such a stream as this, only available at times of freshets for driving timber, save such as a statute may have given.

In fact the case has turned in the courts below upon statutory rights parties may have in such case.

The history of this legislation may, for practical purposes herein, begin with 20 Vict. ch. 40, sec. 2, of which the first two sub-sections are as follows:—

II. 1. No person shall enter upon or pass over the land of another, without permission of the owner or his representative, upon pain of incurring a fine of not less than five, nor more than thirty shillings, excepting, however, any person in the discharge of any of the duties imposed by law;

2. It shall be lawful, nevertheless, to make use of any navigable river or watercourse, and the banks thereof, for the conveyance of all kinds of lumber, and for the passage of all boats, ferries and canoes, subject to the charge of repairing, as soon as possible, all damages resulting from the enjoyment of such right, and all fences, drains or ditches which may have been so damaged.

This passed into the Consolidated Statutes of Quebec, (chap. 26,) with an amendment of the first two lines of sub-section 2, to read as follows instead of as above:—

2. It shall be lawful, nevertheless, to make use of any navigable or floatable river or watercourse, and the banks thereof, for the conveyance of all kinds of lumber,

otherwise the statute was as first enacted.

Again, these sub-sections passed into the Revised Statutes of 1888, as article 5551, slightly varied and improved, but not departing in any essential from the two features of legislative concession of right to pass over property of others and the indemnification for all damages resulting from the exercise of that right so given.

(1) 40 Can. S.C.R. 1.

The question is now raised whether or not this simple, just and comprehensive state of the law has been entirely changed by section 7298 in the Revised Statutes, 1909, which reads as follows:—

7298. Subject to the provisions of this sub-section, any person, firm or company may, during the spring, summer and autumn freshets, float and transmit timber, rafts and craft down all rivers, lakes, ponds, streams, and creeks in this province.

The history of it seems to be this, that, in the Revised Statutes of 1888, art. 2972, under the caption of "Toll-bridges," were embodied provisions for the protection of these bridges.

Then, in 1890, these bridges apparently needing further legislative protection, 53 Vict. ch. 37 expressly enacted that sections therein should be added to said section next after sub-section 3 thereof. There were thus added sub-sections (*a*) and (*b*) clearly relevant to these bridges and nothing else but their protection.

The next session 54 Vict. ch. 25 was passed, whereby sub-section (*c*) was expressly added to same section 2972, and, as if relating to same law, a number of sub-sections designated (*d*), (*e*), etc., follow under different headings.

Of these, this sub-section (*d*) reads as follows:—

2972(*d*). Subject to the provisions of this law, any person, firm or company is allowed, during the Spring, Summer and Autumn freshets, to float and transmit timber, rafts and crafts down all rivers, streams and creeks in this province.

This clearly is the section which was intended to be and should have been inserted in the Revised Statutes where it could by relation to the context be given an intelligible meaning.

As it read originally, using the words "subject to the provisions of this law," it was intelligible, either

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as relative to the whole Act then being passed, or in the larger sense if read as part of the Revised Statutes which were to stand amended by those sections; numbered as if part of the Revised Statutes.

It is now made to read as if subject to the section itself, but if we pay heed to the divisions of this revision of the statutes we find "section" is used as a subtitle designating a group of sections.

I must say this sub-section which has become so important in this case does not seem exactly in proper place where it is put, yet I cannot say it has been clearly misplaced, for it never seemed appropriately placed. Bearing in mind the history I have given of it and that it seemed as if a corrective of what had preceded it in legislative history, but to be read as if in harmony with the rest of the Revised Statutes of 1888, can I say it was intended to repeal the law as expressed in art. 5551 of said Revised Statutes?

If not, was it so repugnant to any part thereof as by implication to repeal any part of it? I think not.

Then, does it confer any new right or is it merely a declaratory enactment to remove doubts in some one's mind relative to the extent of the operative effect of art. 5551?

Counsel could not suggest why it was passed.

Inasmuch as art. 7349, of the revision of 1909, appears therein repeating the law of which I outlined the history above from 20 Vict. (1857,) down to then, it clearly was not the intention to repeal the law which with amendments from time to time had remained substantially the same for half a century.

Indeed, the like legislation had existed from 13 & 14 Vict. ch. 40.

When this puzzling section was put into 54 Vict.

ch. 25, that Act began with a distinct heading for its first section to indicate declaratory legislation was deemed necessary.

If permitted to surmise I would suggest that this new section was also intended to have been also declaratory to meet some ingenious objection that the law as it stood did not cover the possible case of streams which were mere streams at freshet times and at other times dry, and hence could not fall within the description given in the revision of 1888, and now art. 7349 of the revision of 1909.

If that was the case then this stream does not, from what we are told at the bar, fall within the class the new section was intended to cover, for it runs continuously. If this stream then does not fall within the language of art. 7349, of the revision of 1909, I fail to understand what could.

No case of the kind I suggest is made by the pleadings or is proven and I assume, therefore, that art. 7349 is what entitled the respondents to claim a statutory servitude over appellant's property. It was clearly in exercise of that right they had driven these logs and they must compensate for any damages done in this operation of driving.

In such case they fall within the law as declared by this court in the case of *Dickie* v. *Campbell*(1) in construing an enactment less express than art. 7349 in its provision for indemnification.

The statute that case turned upon gave indemnification rather by an implication derived from an exception relative to damages than from an express provision providing therefor.

(1) 34 Can. S.C.R. 265.

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In disposing of that case the court expressly anticipates the case of an independent contract and overrules such a defence. Whether this arose from facts which do not appear in the meagre report I cannot say; yet on the possible facts the judgment deals with it expresses sound law. Nay, more, it surely is absolute justice that when a man acquires the right, as a matter of public expediency, to invade another's possession he should, when no other compensation is given, at least indemnify that other for the loss or expense he is put to by the exercise of the statutory right.

It would probably be impossible to estimate compensation in anticipation of what might happen in such cases and the least that should be done is to see that the man whose property is thus subjected to a servitude by law does not suffer.

This principle has been so long adhered to by the legislature and in so many forms that one must be slow in giving an interpretation to an ambiguous sort of legislation that would conflict therewith.

The rules laid down in the interpretation clauses introductory to the revision of the statutes clearly indicate that such revision is to be treated, at least *primâ facie,* as declaratory of the law.

On the facts, I repeat, we must find, and, except in a very express case pleaded and proven, assume the respondents were acting in the drive they directed under the law as set forth in art. 7349 and, therefore, be held responsible for the consequences of such act.

I do not think we can rely entirely upon the grounds taken by Mr. Justice Cross; yet I feel there is great force in the facts he refers to shewing the respondents had no such independent contract as clearly

put the movements of Guérette out of their control. I see no such clear governing reasons to quarrel with the findings of fact and assessment of damages made by the learned trial judge as to render it imperative we should here interfere therewith, and, therefore, conclude the appeal should be allowed with costs here and in the court below, and the judgment of the learned trial judge should be restored.

DUFF J.—The first question arises upon the appellant's contention that the damages sustained by him in respect of which he claims compensation were "damages resulting" from the driving of the logs of the respondents and their associates and that he is entitled, under article 7349(2) of the Revised Statutes of Quebec, 1909, to reparation for that loss. I will first consider the appellant's proposition of law that for all "damages resulting" from the driving of the logs in question the respondents are liable to an action before discussing the question how far the loss for which compensation is claimed falls within that category.

The enactments to be examined are articles 7349 and 7298, R.S.Q., 1909; and it will be convenient to quote them in full:—

II.—TRESPASS ON THE PROPERTY OF OTHERS AND DAMAGE CAUSED THERETO.

7349(1). Except in the discharge of any duty imposed by law, no person shall enter upon or pass over the land or beach-land belonging to any other person or corporation, without permission of the owner or his representative, under penalty of a fine of not less than one nor more than six dollars.

(2) It shall be lawful, nevertheless, to make use of any river or watercourse, lake, pond, ditch, drain or stream, in which or to the maintenance of which one or more persons are interested or bound, and the banks thereof, for the conveyance of all kinds of lumber, and

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for the passage of all boats, ferries and canoes, *subject to the charge of repairing, as soon as possible, all damages resulting from the exercise of such right,* and all fences, drains or ditches damaged.

(3) The proprietor, or his representative or servant may arrest without warrant any person in the act of contravening this article, and bring him or cause him to be brought forthwith before a justice of the peace.

* * * * *

Protection of Public Interest in Rivers, Streams and Creeks.

* * * * *

II. RIGHT OF FLOATING AND TRANSMITTING TIMBER, ETC., DOWN RIVERS, STREAMS AND CREEKS, AND OF EXECUTING WORKS FOR THAT PURPOSE.

7298. Subject to the provisions of *this sub-section,* any person, firm or company may, during the Spring, Summer and Autumn freshets, float and transmit timber, rafts and craft down all rivers, lakes, ponds, streams and creeks in this province.

It is not disputed that if article 7349 stood alone the appellant would be entitled to reparation for all loss that can be described as "damages resulting" from the driving of the logs in question within the meaning of that article. The contention of the respondents is that the rights and obligations of persons making use of streams for the driving of logs during the "Spring, Summer and Autumn freshets" are stated in article 7298; and that the provisions of article 7349 (2) have no application to "damages resulting" from such operations when carried on during those seasons.

The enactment that is now article 7298, (in a form not quite identical with its present form,) became law in 1890; and, at that time, the enactments now reproduced in article 7349 had been in force for many years. The majority of the Court of King's Bench have given effect to the contention of the respondents that, in respect of the matter to which it relates — the use of streams during the seasons mentioned — the later enactment must be taken to have displaced the earlier; and that, no duty to

make reparation having been imposed by the governing enactment, the respondents' responsibility is only such as the law implies, namely, to make good such damages as arose from the negligence of the respondents themselves or of those for whose acts they are answerable according to the general principles of law.

The effect of this view of the Act of 1890 put in concrete form is that when the driving is undertaken by a competent independent contractor during any of the seasons mentioned the owner is not, save in very exceptional circumstances, answerable for the consequences of any negligence in the execution of the work.

With great respect, I cannot agree that the obligation imposed by article 7349 (2) was affected by the later enactment. Before the passing of the last-mentioned Act (now articles 7297-7305) the owners of logs were entitled to make use of the streams of the province for floating them, but the owners of the lands traversed by such streams had a correlative right to be compensated for damages occasioned by such use. I have already said it is not disputed that this obligation to make such compensation (under the law as it was prior to the Act of 1890) rested on all persons availing themselves of the right, whether through independent contractors or otherwise; and, according to the construction we are now considering, this right of compensation, as regards damages caused during the seasons of high-water, was taken away by the Act of 1890. One of the most important principles of interpretation is that which rests upon the presumption that the legislature does not take away vested private rights or impose new servitudes upon private property without compensation. It is not suggested that for the valuable right of which riparian owners are said

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to have been deprived by the Act of 1890 any compensating benefit was conferred upon them; and the effect of that Act, according to the construction proposed by the respondents, would, of course, be to augment the burden of the servitude declared by the earlier legislation. As the principle just indicated seems to apply to such a case, one is bound, before adopting a construction having that effect, to see that it is quite clear that the proposed construction really gives effect to the intention of the legislature, as shewn by the statute.

Looking at the provisions of the Act of 1890 as a whole one sees that the main object of the enactment was to sanction the maintenance of booms and other works for facilitating the use of the streams of the province for floating craft and timber and the improvement of the floatability of such streams and to define in a general way the rights and obligations *inter se* of the owners of such works, on the one hand, and other persons making use of the streams for the transmission of craft and timber, on the other.

The Act was passed in December, 1890. In November of the previous year, the Court of Queen's Bench had held, in *Tourville* v. *Ritchie*(1), that the plaintiff, the owner of a boom in the River St. Francis, was not entitled to charge the defendant for the use he had made of that boom in floating his logs down the river; but, on the contrary, that the boom was an obstruction and that the plaintiff was liable for all damages occasioned by its presence in the river. The Act of 1890 first declares the public right to use the streams of the province during the Spring, Summer

(1) 21 R.L. 110.

and Autumn freshets for flotation purposes. The provision quoted textually, (54 Vict. ch. 25,) is as follows:—

> 2972(*d*). Subject to the provisions of this law, any person, firm or company *is allowed*, during the Spring, Summer and Autumn freshets, to float and transmit timber, rafts and crafts down all rivers, streams and creeks in this province.

It then proceeds to declare that the maintenance of booms and other works for facilitating the use of streams for such purposes and for improving the floatability of streams is and always has been lawful. Then follows a provision that the owner of any such work shall not be entitled to the exclusive use of it, but that he may acquire, upon application to the Lieutenant-Governor in Council, the right to charge tolls for the use of it by others. It seems to be clear enough that the subject the legislature is really dealing with is the rights and obligations *inter se* of persons who are engaged in exercising the public rights mentioned in the statute and not the private rights of riparian owners. One is not surprised to find in a statute dealing with that subject a declaration, on the one hand, of the existing right to use the streams of the province for floating purposes and, on the other, of the existing right to maintain works of the description mentioned for facilitating such use. Looking more particularly at the language of article 7298—the article does not expressly or by necessary implication refer to the right of compensation given by the then existing law.

The right of compensation was not a right of action for a wrong; it was strictly a right to be compensated for the injurious consequences following upon the exercise of another right. The declaration in article 7298, therefore, of the existence of the public

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right does not necessarily involve any negation of the correlative private right. In the absence of any indication that the legislature had such private rights in view I think the weight of argument favours the narrower construction.

There is a passage in Lord Selborne's judgment in *East and West India Dock Co.* v. *Hill*(1), at page 23, which seems to me to be directly applicable here:—

> On principle it is certainly desirable in construing a statute, if it be possible, to avoid extending it to collateral effects and consequences beyond the scope of the general object and policy of the statute itself, and injurious to third parties with whose interests the statute need not, and does not profess to, directly deal.

Subsequent legislation lends some confirmation to this view of the Act of 1890. That Act was amended, in 1904, by making its provisions applicable to "lakes and ponds." By the same statute the enactments now reproduced as articles 2256 and 7349(2) were similarly amended. If the rights of compensation declared by article 7349(2) and article 2256 were regarded as no longer available during the seasons of high-water, by reason of the provisions of the Act of 1890, it is strange that the language of those enactments was not brought into harmony with that state of the law by appropriate amendments. This consideration receives some additional weight from the fact that these same provisions of the law, without additional amendment indicating that they had in effect been modified by the enactment of the Act of 1890, were reproduced in the Revised Statutes of 1909.

In this view of the enactments in question, the law imposes upon persons who avail themselves of the public right the obligation to compensate riparian pro-

(1) 22 Ch. D. 14.

prietors at least for all damages which are caused by the exercise of the right and which could be avoided by the exercise of reasonable care and skill except in so far as they may have been contributed to by the fault of the riparian proprietor himself. It is not necessary for the purposes of this case to consider whether the right of the riparian proprietor is any higher. The learned trial judge has appraised the damages upon this principle and the questions involved on this head being questions of fact and the trial judge having heard the witnesses his conclusion ought to be accepted unless it is clearly erroneous. I think there is no sufficient reason for holding that it is.

But there is another ground on which I think the appellant is entitled to succeed. I shall assume that the provisions of article 7349(2) do not apply in cases to which article 7298 is applicable and, consequently, that the appellant's right to compensation, if any, must rest upon some other foundation than the first-mentioned article. I shall assume also, for the purposes of this appeal without expressing any opinion upon the point, that an owner of logs who, during Spring, Summer or Autumn freshets entrusts the driving of his logs to a competent independent contractor without retaining any control over the execution of the contract, and without actually interfering in fact with the execution of it, is not answerable for damages resulting from the contractor's negligence.

Having made these assumptions, I still think the evidence supports the view at which the learned trial judge, as well as Cross and Carroll JJ. in the Court of King's Bench, arrived — that the drive was not entrusted to an independent contractor and that it was in fact executed under the control of the respondents.

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It was clearly beyond the powers of the Cabano Association either to undertake the driving of logs or to let contracts for the driving of the logs owned by the members of the association; and the so-called contract, therefore, between the association and Alexander Fraser, which the latter alleges was assigned to Guérette, was a mere nullity and may be entirely put out of view.

The facts mentioned by Mr. Justice Cross and by the learned trial judge justify the conclusions, in my opinion, that in fact the understanding at the meeting of the association (at which the so-called letting of the contract to Alexander Fraser took place) was that Donald Fraser & Sons should undertake the drive and that in fact they never relinquished control of it.

The appeal should be allowed and the judgment of the learned trial judge restored.

ANGLIN J. (dissenting).—I would dismiss this appeal for the reasons given by the learned Chief Justice of the Court of King's Bench.

BRODEUR J.—Deux questions principales se présentent dans cette cause ci. La première est de déterminer l'étendue de la responsabilité d'un marchand de bois qui en descendant ses billots cause des dommages aux propriétaires riverains, et nous avons aussi à examiner si l'entrepreneur qui a fait la descente du bois dans le cas actuel était le prête-nom des défendeurs intimés.

Ces derniers sont des concessionnaires de coupes de bois sur les terres de la couronne dans la province de Québec. Ils coupent leur bois en billots dans le cours de l'hiver et au printemps ils jettent ces billots dans un petit cours d'eau; qui s'appelle la rivière

Cabano, pour les descendre à leur moulin qui est situé à son embouchure. Ce cours d'eau est du domaine privé et les riverains en sont les propriétaires. Plusieurs dispositions statutaires ont été passées cependant pour autoriser le flottage du bois dans ces cours d'eau privés. Celle qui je crois doit régir le cas actuel se trouve reproduite dans les statuts refondus de 1909 à l'article 2256. Elle se lit comme suit:—

> Lequel (le porteur l'un permis de coupe) a en tout temps, conformément à son permis, le droit * * * de se servir des rivières ou cours d'eau flottables et des lacs, étangs ou autres étendues d'eau et de leurs berges, pour transporter toutes sortes de bois * * * à *condition de réparer les dommages résultant de l'exercice de ce droit.*

Cette disposition de la loi est très juste et très équitable. Le cours d'eau étant propriété privée le propriétaire devrait pouvoir en jouir comme bon lui semblerait. Il est incontestable, par exemple, qu'il peut y ériger des digues pour faire mouvoir un moulin et ce droit lui a été formellement reconnu par la législation de 1854 dont il est fait mention à l'article 503 du Code Civil. La législature voulant favoriser l'exploitation des forêts sur les terres de la couronne a adopté la loi ci-dessus citée et elle a donné le pouvoir aux porteurs de permis de descendre leur bois sur les cours d'eau pourvu qu'ils paient les dommages qu'ils causeraient. Ce privilège accordé aux marchands de bois restreignait nécessairement le droit de propriété du riverain. Par exemple ce dernier, s'il avait érigé des écluses, était obligé d'y percer des glissoires pour y faire passer les billots des marchands de bois mais il devait être indemnisé si on lui causait des dommages.

Dumont, l'appelant, est un de ces propriétaires riverains sur le cours d'eau Cabano. Il avait érigé une écluse pour alimenter ses moulins à scie et à farine et afin de faciliter la descente du bois il avait une glis-

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soire dans son écluse. Il est d'usage qu'à quelque distance de ces écluses ainsi pourvues de glissoires les proprietaires du bois tendent des estacades et dirigent ensuite les billots vers ces glissoires. Il est allégué et il est prouvé que les estacades érigées près de l'écluse du demandeur n'etaient pas attachées soigneusement et alors une crue soudaine s'étant produite les billots ont brisé l'écluse et sont venus s'arrêter un peu plus bas et ont complètement barré le cours de la rivière qui est sorti de son lit, et qui se frayant un passage sur le terrain de Dumont lui a causé de grands dommages. Tout cela aurait pu être évité si on avait suivi les conseils de Dumont et si on avait, la veille de la nuit où l'accident s'est produit, fait passer les billots dans la glissoire de l'écluse. Mais les défendeurs Fraser n'avaient pas étendu leurs estacades à l'embouchure de la rivière et alors la descente n'a pas pu se faire.

Si les estacades (booms) audessus de l'écluse avaient été fortement attachées l'accident aurait probablement été évité. Mais les défendeurs disent "c'est la faute de l'entrepreneur à qui nous avons confié cette entreprise et nous ne sommes pas responsables de sa négligence." J'examinerai plus loin cette prétention. Pour le moment je vais examiner la question de savoir si les défendeurs sont responsables qu'il y ait négligence ou non.

Le propriétaire d'un cours d'eau privé, comme nous venons de le voir, est obligé de subir le flottage des billots des concessionnaires de coupes de bois, mais ces derniers, par contre, sont responsables des dommage qu'ils causent. Il n'est pas nécessaire qu'il y ait négligence de la part de ces marchands, ils engagent leur responsabilité du moment qu'ils causent des dom-

mages. C'est ce que cette cour a décidé dans la cause de *Dickie* v. *Campbell*(1).

Dans une autre cause jugée par cette cour, *Ward* v. *Township of Grenville*(2), le juge Girouard, à la page 526, dit en examinant une disposition statutaire rédigée dans les mêmes termes, que l'article 2256, R.S.Q., 1909:—

It lays down the rule that the owner of logs and timber floating on a private river, like the Rouge, is responsible for the damage caused by that passage, *whether he is in fault or not*, provided, of course, the riparian proprietors are not in fault. It was quite recently, (1902,) applied by the Superior Court, in Sherbrooke (Archibald J.,) confirmed in review by Tait, A.C.J., Loranger and Fortin JJ., in *McKelvie* v. *Miller*.

La cour de révision, dans une cause du *Club de Chasse et de Pêche Ouiatchouan* v. *La Cie. de Pulpe de Ouiatchouan* (3), a jugé ce qui suit:—

1. Les fabricants de bois, concessionnaires de coupes de bois, etc., ont le droit de flotter le bois qu'ils fabriquent dans les rivières et cours d'eau de la province, à la condition de payer les dommages qu'ils peuvent causer.

2. Ils ne peuvent se soustraire à cette responsabilité en faisant faire le flottage de leur bois à l'entreprise par des tiers.

L'Hon. Juge Lemieux, à la page 140, dit:—

Comme on le voit, le statut ne confère qu'au porteur d'un permis de coupe de bois le droit de se servir des rivières flottables, en tout temps, pour transporter son bois, sauf à payer les dommages, etc. * * * Nous considérons que ce privilège * * * est inhérent à la personne et ne peut être exercé que par un porteur d'un permis de coupe de bois.

Et s'il en est ainsi, il ne peut être cédé ou transporté à des tiers.

Autrement le marchand de bois pourrait toujours se libérer du recours en dommages * * * en donnant des contrats pour la descente de ce bois à des personnes insolvables, etc. * * * Et il s'en suivrait que ces contracteurs, au défi de la loi, pourraient * * * faire le flottage ou la descente des billots * * * qui, en s'échouant, * * * nuiraient aux riverains, et commettraient des torts considérables, sans aucune crainte de recours en indemnité.

(1) 34 Can. S.C.R. 265. (2) 32 Can. S.C.R. 510.
(3) Q.R. 31 S.C. 133.

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La loi ne peut pas permettre un semblable état de choses, qui entrainerait tant d'injustices.

Ce principe est parfaitement reconnu dans la jurisprudence mais on dit qu'une loi passée en 1890, 54 Vict. ch. 25, a restreint la responsabilité du marchand de bois. Un article de cette législation de 1890 se lit comme suit:—

> Sujet aux dispositions de la présente loi, il est permis, lors de la crue des eaux au printemps, en été et en automne, à toute personne, société et compagnie, de faire flotter et descendre les bois, radeaux et embarcations dans les rivières, criques et cours d'eau dans cette province.

Cette disposition ne doit pas s'appliquer au cas actuel.

Les defendeurs sont concessionnaires de coupe de bois, leurs droits et leurs obligations sont régis par les lois des terres de la couronne ou ce que j'appellerai notre code forestier. Ainsi, par example, dans une limite à bois il se trouve parfois des terrains qui ont été condédés à des agriculteurs. La loi, à l'article 1627, S.R.P.Q., 1909, dit que

> les propriétaires de limites à bois et toute personne ayant du bois à flotter, ont le droit, durant l'hiver, de transporter du bois et des provisions en passant sur les propriétés de personnes qui ont des terres dans ces limites; pourvu qu'ils soient tenus d'indemniser ces propriétaires pour tous dommages qu'ils pourraient y causer.

Ces dispositions du code forestier lient les porteurs de coupe et ces derniers n'ont pas le droit de s'y soustraire en invoquant la loi commune. C'est une des raisons pour laquelle les défendeurs ne peuvent pas invoquer la loi de 1890.

D'ailleurs il suffit d'examiner un instant les circonstances qui ont donné lieu à l'adoption de cette loi de 1890 pour se convaincre qu'elle ne saurait être invoquée par les défendeurs.

Dès 1857, par l'acte 20 Vict. ch. 40, on per-

mettait de faire usage des rivières et cours d'eau pour le transport du bois *mais à la charge de réparer tous les dommages résultant de l'exercice de ce droit.*

En 1891, lors de la codification du Code Municipal, on y a déclaré à l'article 891 que l'on pouvait utiliser les cours d'eau municipaux et leurs rives, mais, encore, *avec l'obligation de payer tous les dommages causés.*

La même responsabilité est enoncée dans les lois organiques forestières que nous retrouvons dans les statuts refondus de 1888. Cependant, en reproduisant dans ces derniers statuts la loi de 1857 on a eu le soin de retrancher les rivières navigables vu que leur contrôle législatif, par l'acte de la Confédération, était passé au parlement fédéral. Dans une multitude de procès célèbres de Tourville et Ritchie où l'on soulevait les droits du public dans les rivières navigables, où l'on discutait le droit d'ériger des *booms* dans ces rivières et d'exercer des saisies gagerie sur le bois qui y était retenu, il y a eu en définitive des décisions rendues par la cour d'appel, en 1889, qui paraissent basées sur l'équité plutôt que sur le droit strict. Nous retrouvons quelques uns de ces jugements dans la cause de *Tourville* v. *Ritchie*(1).

Et alors, l'année suivante la législature de Québec, afin de mettre fin à l'incertitude qui existait, a légiféré et a reconnu le droit d'ériger des estacades dans toutes les rivières, de pratiquer des saisies et de faire flotter le bois. Le but de cette législation était de faire disparaître le doute qui pouvait exister quant à l'installation d'estacades sur les rivières navigables et ne peut pas être interprêté comme diminuant la responsabilité de ceux qui pourraient causer du dommage. Cela est

(1) 34 L.C. Jur. 243, 312.

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tellement évident que la vielle loi de 1857 et celle de 1890 ont été amendées, en 1904, par chap. 14, 4 Ed. VII. de manière à ce que deux dispositions statutaires couvrent également les lacs et les étangs.

S'il y avait eu intention de la part de la législature en 1890 d'abolir la législation antérieure de 1857, et si c'est par oubli comme on le prétend que cette ancienne législation n'a pas été abolie, pourquoi alors l'amender en 1904 ? Dailleurs, dans cette législation de 1890 on y déclare formellement qu'elle n'affecte pas les écluses. Donc ces dernières continuent à être régies par la vielle loi de 1857, et comme les dommages en question dans cette cause se rapportent pour grande partie à l'écluse du demandeur les défendeurs ne peuvent pas se soustraire à leur responsabilité.

Ces lois de 1857 et de 1890 ont été reproduites dans nos statuts revisés de 1909. L'une est reproduite au titre des servitudes; c'est la loi de 1890. L'autre se trouve au titre de la responsabilité. Il est donc evident aujourd'hui que, ces dispositions statutaires se retrouvant dans nos statuts, nous devons les interpréter l'une par l'autre. Je suis d'opinion, en resumé, que le marchand de bois peut descendre ses billots dans les cours d'eau et les rivières, mais que dans le cas de cours d'eau privés ce droit est subordonné à l'obligation de payer les dommages.

Ce point décidé, l'appelant devrait réussir. Mais je dois ajouter que les intimés doivent aussi être condamnés parce que leur prétendu entrepreneur n'était que leur prête-nom et que la descente des billots se faisait virtuellement sous leur contrôle. Or, en vertu de l'article 1054 du Code Civil, ils se trouvent responsables du dommage qu'ils ont alors causé. C'est là principalement une question de fait que de savoir si

Guérette avait réellement l'enterprise à forfait, et était indépendant des intimés. La preuve n'est pas absolument certaine et quelque peu contradictoire. Aussi les six juges qui se sont prononcés, en cour supérieure et en cour d'appel, sur ce point sont également divisés. Mais, comme le juge instructeur a vu et entendu les témoins, il est, je crois, en meilleure position de peser leurs déclarations. Il est d'opinion que l'entrepreneur n'était que le prête-nom des intimés et je crois que nous devons accepter son verdict.

En principe l'entrepreneur est responsable à l'exclusion du propriétaire des accidents et dommages survenus au cours du travail; ce dernier, cependant, est responsable lorsqu'il résulte des circonstances de la cause que le contrat est simulé et n'a eu d'autre but que de substituer au regard des tiers à la responsabilité effective du propriétaire celle d'un répondant absolument insolvable. *Longmore* v. *The J. D. McArthur Co.* (1); Sirey, 1901-2-163; Dalloz, 1860-2-231; Fuzier-Hermann, Répertoire, *vo.* "Responsabilité Civile," no. 620; Larombière, "Obligations," 5ème édition, vol. 7, page 606.

Il est bon d'ajouter que dans le cas actuel certains travaux de démolition de la digue de l'appelant ont été faits sous la surveillance et les ordres formels des défendeurs.

L'appel doit être maintenue avec dépens et le jugement de la cour supérieure rétabli.

Appeal allowed with costs.

Solicitors for the appellant: *Lapointe & Stein.*
Solicitors for the respondents: *Taschereau, Roy, Cannon, Parent & Fitzpatrick.*

(1) 43 Can. S.C.R. 640.

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*March 10.
*April 7.

EDWARD BUSHNELL CHAMBERS AND WILLIAM ROBERT GEORGE PHAIR ..... } APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY ..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Location plans—Width of right-of-way—Subsequent alteration—Substituted plans—Approval of new plans—Order having ex post facto effect—Jurisdiction of Board of Railway Commissioners—Construction of statute—"Railway Act," R.S.C., 1906, *c.* 37, *ss.* 162, 167.

The Board of Railway Commissioners for Canada has no jurisdiction, by an order permitting a railway company to file a new location plan, to be substituted for and as of the date of a former location plan previously approved by it, to authorize the company to alter, retrospectively, the former location of its railway. The proper method of effecting any such alteration is by proceedings under section 162 or section 167 of the "Railway Act," R.S.C., 1906, chapter 37.

APPEAL from the order of the Board of Railway Commissioners for Canada approving of a substituted location plan of the "Molston-St. Boniface Branch" of the Canadian Pacific Railway by an order having retrospective effect.

The railway company, in 1904, deposited plans of location and profiles and a book of reference of the

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

cut-off branch of their line from Molson station to a point in the Town of St. Boniface, Man., which shewed a crossing of a portion of lot 97 of the Parish of Kildonan, the property of the appellants, the ground taken by the railway being shewn as 99 feet in width. Prior to the "Railway Act" of 1903, this was the width permitted to be taken, in ordinary circumstances, by the railway company but, by that Act, the width which could be so taken was increased to 100 feet. In 1906, the railway company registered another plan shewing alterations in the branch line and the effect of the new plan upon the appellants' property was that, instead of 99 feet, the width taken was 100 feet. Arbitration proceedings were subsequently commenced, the notice being given according to the last plan filed, and it appeared that, although the first plan had been regularly approved, the latter plan had been so filed without any approval being obtained. The appellants then applied for an order from the court in Manitoba to rescind the order appointing the arbitrators, which was refused on the ground of lack of jurisdiction, and, subsequently, they made an application to the Board of Railway Commissioners for an order rescinding or repealing an order originally made by the Board respecting the construction of the railway across the lots, or for an order requiring the company to obtain the approval of the change or alteration effected by the later plan. The result was that, on the 18th March, 1912, the Board made an order that the railway company should be permitted to file a new location plan as of the date of the plan originally filed and approved by their original order, and shewing the width of 100 feet to be taken.

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On the present appeal it was contended that the Board of Railway Commissioners had no jurisdiction to make an order approving of a plan already filed and giving it legal effect as of an anterior date. The appellants contended that the whole proceedings should be commenced anew and that they are entitled to compensation for the land taken at the increased valuations now prevailing, instead of the prices which were in force at the time of the commencement of the proceedings which they contended were irregular.

Geo. F. Henderson K.C. for the appellants.
Chrysler K.C. for the respondents.

THE CHIEF JUSTICE and DAVIES J. concurred in the opinion stated by Duff J.

IDINGTON J.—The respondents filed, under the "Railway Act," plans and profiles which claimed a right-of-way only ninety-nine feet wide. Some time later the Board of Railway Commissioners approved thereof. And, still later, the railway was built without making compensation for the lands so taken. In course of doing so, the company included by its fences a space of one hundred feet wide, instead of the ninety-nine feet claimed by the plans and profiles filed.

Some months after obtaining the approval of the Board to the first plans and profiles filed the railway company saw fit to file another set of plans claiming a right-of-way one hundred feet wide, but never applied for approval thereof.

Years afterwards, the railway company gave notice of expropriation under this unauthorized set of

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plans and profiles and proceeded to arbitration as to the compensation to be made to the appellants.

On the proceedings being objected to, the Board made an order rescinding its original order of approval and permitting the railway company to file a new location plan of its railway as of the date of the plans filed and approved, said new plans to show a width of land to be taken which will coincide with the arbitration notice filed by the railway company.

The question is now raised by this appeal of the jurisdiction of the Board to make this last-mentioned order.

I have no hesitation in saying such an order is entirely beyond the powers of the Board.

It would be a stretch of authority that in some conceivable cases might work most grievous wrong.

The claim seems to me hardly arguable. No such thing as antedating the operative effect of such an order is contemplated by the Act. It should not be permitted unless with the consent of all who, by any possibility, might be affected thereby.

The Board's extensive powers of rectifying errors do not countenance such a proceeding as this.

The appeal should be allowed with costs.

DUFF J.—I think there was no power to make the order impeached on this appeal. The order does not profess to be made, and clearly enough it is not made, under section 162 or section 167 of the "Railway Act," which are the enactments Mr. Chrysler invoked in support of it. It is simply an order permitting the company "to file" a new location plan of its railway, known as the "Molson-St. Boniface Branch," *as of the date* of the plan filed and approved of "by

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said order No. 544, dated July 12th, 1905." That is an order which can only mean that the plan so authorized to be filed shall be deemed to have been filed and shall take effect as having been filed on a date seven years before the date of the order. It is admitted that, according to the plan which is to have this *ex post facto* effect, the land occupied by the railway mentioned in the order is not identical with that occupied by it according to the plan it is to displace. I think it is clear that the Board has no jurisdiction, by an order of this description, to authorize the railway company to alter, retrospectively, the location plan of its railway. The remedy of the railway company, if it is in any difficulty, is by way of section 162 or section 167 of the "Railway Act."

BRODEUR J. concurred with Duff J.

Appeal allowed with costs.

Solicitors for the appellants: *Hull, Sparling & Sparling.*

Solicitor for the respondents: *E. W. Beatty.*

THE INTERNATIONAL CASUALTY COMPANY AND HENRY VANHUMMELL (DEFENDANTS).. } APPELLANTS;

AND

J. W. THOMSON (PLAINTIFF) ..... RESPONDENT.

1912 *Nov. 18.

1913 *Feb. 18.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Company—Subscription for treasury stock—Contract—Principal and agent—Misrepresentation—Fraud—Transfer of shares—Rescission—Return of payments—Want of consideration.

V. entered into an agreement to purchase for re-sale the unsold treasury stock of a foreign joint stock company "subscriptions to be made from time to time as sales were made;" it was therein provided that the company should fill all orders for stock received through V. at $15 for each share; that V. should sell the stock for $20 per share; that V. should "pay for the stock so ordered with the proceeds of sales made by him or through his agency," and that the contract should continue in force so long as the company had unsold treasury stock with which to fill such orders. The company also gave V. authority to establish agencies in Canada in connection with its casualty insurance business and to appoint medical examiners there. At the time the company had no licence to carry on the business of insurance in Canada, nor any immediate intention of making arrangements to do so, and V. was an official of the company and was aware of these facts. V. appointed T. the sole medical examiner of the company for Vancouver, B.C., assuring him that the company would commence to carry on its casualty insurance business there within a couple of months, and then obtained from him a subscription for a number of shares of the company's treasury stock which were paid for partly by T.'s cheques, payable to the company, and the balance by a series of promissory notes falling due from month to month following the date of

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the subscription and made payable to V. A number of shares equal to those so subscribed for by T. were then transferred to him by V. out of the allotment made to him by the above mentioned agreement, the certificates therefor being obtained by V. in the name of T. from the company, but the company did not formally accept T.'s subscription nor issue any treasury stock to him thereunder. The company did not commence business in Vancouver within the time specified by V. nor did it obtain a licence to carry on the business of insurance in Canada until many months later. In an action by T. against the company and V. to recover back the money he had paid and for the cancellation and return of the notes.

Held, affirming the judgment appealed from (7 D.L.R. 944; 2 West. W.R. 658), Davies and Anglin JJ. dissenting, that, in the transaction which took place, V. was the company's agent; that the company was, consequently, responsible for the deceit practised in procuring the subscription from T.; that there had been no contract for the purchase of treasury stock completed between the company and T.; that the object of T.'s subscription was not satisfied by the transfer of V.'s shares to him, and that he was entitled to recover back the money he had paid and to have the notes returned for cancellation as having been paid over and delivered without consideration and in consequence of the fraudulent representations made by V.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), setting aside the judgment of Murphy J. at the trial, and maintaining the plaintiff's action with costs.

By his action, the plaintiff asked rescission of a contract, made by him, for the purchase of 250 shares of the treasury stock of the company, on the ground of misrepresentations made by the defendant VanHummell, as agent of the company, for the return of moneys paid by him on account of the price of the shares so subscribed for and for the return of certain promissory notes made by him for the amount of the balance of the price of the shares, at $20 each, in order that the said notes might be cancelled as having

(1) 7 D.L.R. 944, 2 West. W.R. 658.

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been fraudulently obtained from him and for want of consideration. The action was tried by Mr. Justice Murphy without a jury and, as against the company it was dismissed with costs, judgment was given in favour of the plaintiff as against VanHummell for the return of the moneys paid on account and for the return of the promissory notes and the plaintiff was given costs of his action against VanHummell. By the judgment appealed from, an appeal by VanHummell from the judgment of the trial judge was allowed, without costs, and a cross-appeal by the plaintiff was also allowed and judgment directed to be entered for rescission of the contract and for the return by the company of the moneys paid and for delivery up of the promissory notes with costs of the action and of the cross-appeal.

The circumstances of the case are stated in the head-note and the matters in issue of this appeal are discussed in the judgments now reported.

Anglin K.C. for the appellant company.
D. J. McDougal for the appellant, VanHummell.
Hellmuth K.C. for the respondent.

THE CHIEF JUSTICE.—In this case the plaintiff, now respondent, asks for the rescission of a contract to purchase shares of stock in the appellant company on the ground of misrepresentation.

It was argued that the contract between the respondent and the company was never executed inasmuch as his offer to subscribe for shares in the capital stock of the company was not acted upon. Undoubtedly, Thomson's application purports on its face to be for treasury stock, the property of the company,

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and not for shares which were already allocated to VanHummell. It is equally certain, if we believe the evidence of the president, Ritter, and of VanHummell, that the certificate issued to Thomson was for 250 shares of the stock previously purchased by VanHummell and held by the company subject to his order, and counsel, at the oral argument here, pressed upon us this consideration: that, not having got the shares he applied for, Thomson is now entitled to recover his money back. That, however, is not the case made upon the pleadings and, although there is some evidence to support it, the course of the trial was not directed towards that issue, nor is it discussed in the factum here. I also doubt very much whether Thomson would have refused to accept the shares if he had known of their previous allotment to VanHummell if all the other conditions of the transaction had been faithfully fulfilled.

Dealing with the issues presented to the courts below, I am satisfied that the plaintiff has made out a case which entitled him to succeed.

On the pleadings and evidence two questions fell to be considered and decided. First: Who were the parties to the contract? Secondly: The character of the representations made on behalf of the company and their effect upon the transaction.

Both courts found that VanHummell acted throughout merely as the agent of the company and that the contract respecting the purchase of the shares was made by him for the company and not for himself. This concurrent finding of the two lower courts is supported by the documentary evidence, and VanHummell, when examined as a witness on discovery, admits that the contract was between the company

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and Thomson and that he was merely the agent "in the sale of the shares." The application for the stock is addressed to the company and the two cheques given in part payment are made to its order. The notes for the balance of the purchase price are made payable to the order of VanHummell — why, I do not pause to inquire — they were, apparently, signed after the transaction had been submitted to the head-office. The receipt for the money and notes is also signed in the name of the company.

As to the second question, I have read the evidence over very carefully and, if we believe Thomson, as the trial judge evidently did, I fail to see how we can refuse to grant rescission. Entering into the contract for the purchase of the shares meant the assumption of an obligation to pay $4,250 in monthly instalments, and having, as the trial judge says, been relieved of all his ready cash nothing could be more natural than that Thomson should be concerned about the payment of his notes at maturity. Dependent, apparently, upon his professional income, he relied upon the increase resulting from the new business to meet these notes. In such circumstances he naturally made inquiries as to the probabilities and says that he received from the authorized agent of the company positive assurance that it would be in business by the 1st of November, and in this he is corroborated by Wilmot. On the faith of this assurance he signed the notes and parted with his money. Time and again he repeats that he relied upon the business of the company to increase his revenue so that he might be in a position to meet his notes and he most emphatically states that the agent affirmed the intention of the company to begin business on the first of November. The exist-

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ence or non-existence of that intention is a fact, and, if he signed the application and parted with his cheques and notes on the faith of the statements made with respect to it, his position is the same as if he acted on a representation of the existence of any other fact. See 20 Halsbury, Laws of England, No. 1617.

Both courts below are agreed that VanHummell, to induce the subscription for the stock, made certain statements with respect to the time at which the company would be prepared to start business in Vancouver. The point of difference between them is just this: the trial judge found that the words used amounted merely to a qualified promise, and no more, that the company would be so far organized by the time fixed as to be then in a position to start business, that with this assurance the respondent was content, and that he was not induced to enter into the contract on the faith of what was said about the business beginning in November. The Court of Appeal came to the conclusion that the words manifested and expressed and were intended to manifest and express a then "fixed intention, readiness or capacity on the part of the company" to commence operations on that date, and that the respondent was induced to apply for the shares on the faith of that representation. There is certainly room for much difference of opinion in the appreciation of the language used by the agent, but, on the whole, after giving the evidence the most careful consideration, I have come to the conclusion that VanHummell did not give the respondent a mere promise or undertaking which was not fulfilled, but, being in the position of one who had special knowledge, he deliberately used language calculated to convey the impression that, at the time, there was an

existing fixed intention on the part of the company to begin business on the first of November, and that the respondent was induced to subscribe for the shares on the faith of the representation made with respect to that intention. I am also satisfied on the evidence that such a representation made by one who had intimate knowledge of the then state of the company's affairs was false. The application for the Dominion licence, without which it was impossible to begin business, was not made for a month after the transaction was closed, and the licence did not in fact issue until this suit was brought and more than half the notes had matured. The strongest evidence in support of my conclusion I find in the terms of the bargain, as given by the trial judge, who says, page 120:—

> Evidence is before me, uncontradicted, and I think very probable —that the agent of those shares endeavoured to ascertain how much ready money the doctor had, and then gave him *such terms as would induce him to make* this purchase; that he pointed out to him that doctors in other places made $1,500 to $2,500 from their connection with this company, and *thereby led him to infer that he could expect something, at any rate, for acting in connection with this company enabling him in part at any rate, to meet those notes.*

All the probabilities support this view. As I have already said, the immediate benefit Thomson expected to derive from his connection with the company was to earn money with which to pay his notes as they matured and this he could not do if the company was not in business during their currency. Can it be said, therefore, that the date at which the company would be a source of revenue was not a determining factor or an inducing cause. The appointment as medical examiner was valuable only in so far as it placed him in funds to meet the liability he was induced to assume. Further, although it is exceedingly difficult to prove the presence or absence of an expressed intention, on

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all the facts it appears to me impossible that VanHummell could, in August, have been at all certain if he had taken reasonable care or made reasonable inquiries that the company would have been in possession of the necessary Dominion and provincial licenses to do business in November. If this is merely a case of error it is an error which should have been avoided. The company was then only in the preliminary stages of its organization in so far as the Canadian branch was concerned. The necessary deposit to satisfy the requirements of the "Insurance Act" had to be found out of the sales of stock in Canada and there remained the formalities with respect to the obtaining of the provincial license to be fulfilled. In fact, the licences did not issue until May of the next year. On the whole, I am of opinion that the consent of the respondent was given on the condition that the company would be in business on the first of November, 1910, and the appeal of the company should be dismissed with costs.

On the issue with VanHummell, I agree that this appeal also should be dismissed with costs.

DAVIES J. (dissenting).—I am to deliver the judgment of myself and Mr. Justice Anglin in this case.

In his pleading the plaintiff seeks rescission of a contract for the purchase of 250 shares of the capital stock of the defendant company, on the ground that two definite misrepresentations were made to him by the defendant VanHummell when selling these shares as agent of the company. No other cause of action against the company was disclosed in the pleadings, or suggested at the trial, or on appeal to the Court of Appeal for British Columbia, or in the appellant's factum on his appeal to this court.

The two misrepresentations relied upon were that the plaintiff would be appointed the company's sole resident physician for the City of Vancouver, and that the company would commence and actively carry on business in Vancouver on or before the first day of November, 1910.

As to the former it was established that the plaintiff was appointed the company's physician for Vancouver as had been undertaken; and the claim for rescission, so far as it was based upon that alleged misrepresentation, was abandoned.

The trial proceeded wholly upon the other ground of misrepresentation. The evidence in respect of it was somewhat conflicting. But at the close of the case the trial judge reached the conclusion that it had not been established that the alleged misrepresentation "was unqualifiedly made" and added that he could "not hold that it essentially entered into the inducement" or "was made so clear as to operate on the doctor's mind to induce him to purchase in the sense set out above."

The learned judge, therefore, dismissed the plaintiff's action as against the company.

On appeal the learned Chief Justice, delivering the judgment of the Court of Appeal, said that:—

> In obtaining subscription for stock from the plaintiff it was made part of the arrangement that the plaintiff should be physician of the company and it was represented that the company should commence business at a date set out as the first of November, which representation was not made good. Then we have the evidence of the plaintiff himself that that representation was material to him; that it was of the essence of the contract. The plaintiff is entitled to the rescission.

In both the trial court and the Court of Appeal it was held that, as put by the learned trial judge:—

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The relation that existed between the International Casualty Company and VanHummell was that of principal and agent for the sale of stock. I can put no other interpretation on the documents that were placed before me, and on the history of what happened between them. * * * VanHummell was the agent of the company and if there had been misrepresentation here which would entitle Dr. Thomson to rescission of this contract the company would be bound.

And, as put by the learned Chief Justice on appeal:—

I think it is manifest that the arrangement between the company and VanHummell was only a contrivance between themselves to constitute him agent of the company; and that as such agent any representations made by him were within the apparent scope of that arrangement. He had authority as agent to sell stock.

Neither in the trial court nor in the Court of Appeal was it found that the alleged representation as to the time when the company would commence business was fraudulently made.

On a careful perusal of the evidence the conclusion of the trial judge upon the question of fact as to the character of the statements made in this connection to the plaintiff appears to be correct. It is not possible, in our opinion, to contend successfully that it was made a term or condition of the plaintiff's contract that it should become void if the company did not commence business on or before the 1st of November, 1910. The application for stock is in writing. It contains no provision of this kind. At the time of his application the plaintiff stipulated for his appointment as physician and had this term of his bargain put in writing, with the following provision:—

This agreement to be ratified by the president of the company and if not so ratified, application for stock together with cheques and notes to be returned.

It would be contrary to the elementary rule of evidence which excludes parol testimony of a term varying or altering a written contract to permit the plain-

tiff to prove that the commencement of business by the company on or before the 1st of November was also a condition subsequent, the non-performance of which would avoid his obligation, to take the stock for which he subscribed.

Regarded as a misrepresentation the alleged statements made by VanHummell as to the commencement of business by the company, in view of the fact that they relate to matters of mere intention, would require to be very clear and positive in order to support the claim for rescission. I agree with the learned trial judge that the onus upon the plaintiff in this connection was very heavy. The mere fact that the stipulation as to his appointment as resident physician and for the cancellation of his subscription, should that appointment not be made, was so carefully reduced to writing, gives rise to serious doubt as to whether there was any definite or unqualified representation as to the time when the company would begin business, and casts still greater doubt upon the position taken by the plaintiff that the representation, if made, was a material inducement for his subscription. The plaintiff admits that he was told the commencement of business would be contingent upon the company's obtaining necessary licences, and he must have known that the issue of these could not be absolutely controlled by it. Taking all the circumstances of the case into account and allowing for the advantage which the learned trial judge had in observing the plaintiff's demeanour when giving his evidence, my conclusion would be that his findings of fact that no unqualified misrepresentation was made and that whatever was said in this connection did not essen-

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tially enter into the inducement for the contract should not have been disturbed.

Assuming, however, for the moment that there was an unqualified misrepresentation by the company's agent and that it did materially induce the contract, inasmuch as it related to a matter of intention and expectation on the part of the company it would not afford a ground for relief by way of rescission, unless it had been clearly established that it was falsely and fraudulently made. *Clydesdale Bank* v. *Paton*(1); Kerr on Fraud (4 ed.), pp. 53-5. This has not been found either by the trial judge or by the Court of Appeal, and I have discovered nothing in the evidence which would justify such a finding, especially at this stage of the proceedings.

We are, therefore, of opinion that the judgment of the Court of Appeal reversing the trial judge on the question of fact and awarding judgment against the defendant company is not sustainable either in fact or in law.

In the course of his argument in this court, however, counsel for the respondent put forward an entirely new ground of claim not disclosed in the pleadings, not taken at the trial or in the Court of Appeal, and not mentioned in his factum on the appeal to this court. He claims judgment for return of the moneys paid by the plaintiff to the company on the ground that while his application was for unallotted treasury stock of the company he was given not such stock, but stock which had been already allotted to the defendant VanHummell and was transferred by him. In the first place, I do not think the plaintiff should be allowed now to set up this new ground of claim.

(1) [1896] A.C. 381, at p. 395.

Had it been raised in the pleadings or even at the trial there might have been more satisfactory evidence than is now before us as to the real nature of the arrangement between VanHummell and the company and as to the character in which he held the 30,000 shares of stock which stood in his name. Notwithstanding the evidence given by the company's president, Ritter, in support of its defence that the plaintiff's contract was with VanHummell and not with the company, to the effect that VanHummell was in fact as well as in name the holder of 30,000 shares, I am by no means satisfied that, had the issue now presented been before the court, other evidence might not have been forthcoming which would have made it clear why VanHummell became the nominal holder of all the company's treasury stock and what were precisely his rights and obligations under his arrangement with the company. The circumstances of this case and particularly the documentary evidence seem to indicate that all the facts are not before us. Moreover, from the examinations for discovery, of VanHummell and of Ritter, the plaintiff was made fully aware of all that he now knows concerning the alleged allotment of the 30,000 shares to VanHummell and of the means taken to satisfy his own application for stock. With that knowledge he deliberately elected to proceed with the branch of his action in which he sought to hold VanHummell liable to him on an alleged agreement to take the stock off his hands and dispose of it. He could only make and enforce such an agreement with VanHummell on the basis that the stock was his to dispose of. At the trial he succeeded in convincing the learned judge who presided that he had made such a bargain with VanHum-

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mell, and obtained a judgment against him for damages for breach of it. Having elected, with full knowledge of the circumstances upon which he now relies in order to recover back his moneys from the company, to proceed with a claim based upon his ownership of the shares which he obtained, he should not, in my opinion, be now allowed to take the stand that he never became owner of these shares and is entitled to a rescission of his contract because they were not what he had bargained for.

But if, notwithstanding these objections, the plaintiff should be allowed now to set up this new ground of claim, in my opinion he cannot succeed upon it. As pointed out by the learned trial judge, the documentary evidence makes it reasonably clear that VanHummell had no beneficial interest in or ownership of the 30,000 shares which stood in his name. He held them merely as agent of and trustee for the company. Concurrently with his subscription, an agreement was made between him and the company which recites that

> the said Casualty Company is desirous of disposing of its unsold treasury stock within the shortest possible time,

and that VanHummell had agreed to subscribe for and purchase the unsold stock of the company for the purpose of resale, said subscriptions to be made from time to time as sales are made. The agreement then provides:—

> (1) That the said Casualty Company so long as it has unsold treasury stock shall fill all orders for stock received by or through said VanHummell at the agreed price of $15 per share, said stock to be sold at $20 per share;
>
> (2) That the said VanHummell is to pay for the stock so ordered with the proceeds of sales made by him or by his agency * * *
>
> (3) That this contract is to continue in full force and effect so

long as the said company has unsold treasury stock with which to fill the orders presented by the said second party (VanHummell) or his agents.

The certificate issued to VanHummell was in a special form and certified him to be the owner of 30,000 shares "subject to payment in cash." As pointed out by the learned trial judge there is no covenant by VanHummell to pay for the shares. The agreement is made upon the basis that, although the 30,000 shares put in VanHummell's name constituted its entire unsold stock, the company would still have unsold stock. It provides that out of its unsold stock the company will fill orders for stock received by or through VanHummell and it is only for such stock as he sells for the company that he agrees to pay anything to it. The price at which he is to dispose of the stock is fixed. The certificate issued makes his ownership conditional on payment. The obvious purpose of the transaction was, for some undisclosed reason, to place the company's treasury stock in the name of VanHummell, and to have him dispose of so much of it as he could as the company's agent. The company undertook to honour his orders for shares out of those so held by him and it was understood that it would take off his hands whatever might not be sold, under the provision enabling it to forfeit for non-payment at the end of a year. This was in fact done. Upon the incomplete evidence before us it is sufficiently clear that this was the substance of the arrangement between the company and VanHummell. However irregular the transaction may have been, and although, as between himself and the company's creditors on liquidation, VanHummell might be held to be a contributory in respect of the entire 30,000 shares, as between him

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and the company, it seems impossible to escape the conclusion that he had no beneficial interest in the stock, that he could neither be compelled to pay for, nor could he insist on holding as his own, any of the shares which he had not sold. Under these circumstances, while the shares which the plaintiff received may have been nominally VanHummell's, they were in reality and in substance the company's treasury stock. If, therefore, the plaintiff should be allowed now to put forward the new ground of claim devised by the ingenuity of counsel representing him in this court, possibly because he regarded the grounds on which the action was launched as of very doubtful value, he should not, in my opinion, succeed upon it. He has got in substance that which he contracted for and he should not be allowed to recover back what he paid for it.

I would for these reasons allow this appeal with costs in this court and in the Court of Appeal and would restore the judgment of the learned trial judge in so far as it dismissed this action as against the defendant company with costs.

IDINGTON J.—Notwithstanding the many legal questions argued, I think if we can find, as the Court of Appeal did, that in fact there was a representation made to respondent at or before the time of his making the application for stock, to which I will presently refer at length, that the appellant company would by first of November following have begun business in Vancouver, the problems involved are not difficult of solution.

The company was incorporated in 1909 in the State of Washington for the purpose, as its name indi-

cates, of engaging in the business of casualty insurance.

On the solicitation of appellant, VanHummell, whose relations to the company will presently appear, the respondent made in writing on the 26th of August, 1910, an application to the company for two hundred and fifty shares of its capital stock.

The making of this application appears in said writing as follows:—

Said stock being of the par value of ten dollars ($10.00) per share. I agree to pay the sum of twenty dollars ($20.00) per share for said stock, it being understood and agreed that the excess amount over and above the par value thereof is to be used for the purpose of securing subscriptions and perfecting the organization of said company, and for the creation of a surplus. Payable on demand.

All amounts must be paid by check, draft or money order made payable to the company.

At the same time he got a letter addressed to him as follows:—

Dear Sir,

The International Casualty Company of Spokane, in consideration of your subscription for $5,000.00 of the Capital Stock of said Company, does hereby appoint you (said Dr. J. W. Thomson) the company's sole resident physician for the City of Vancouver.

This agreement to be ratified by the President of the Company, and if not so ratified your application for stock, together with checks and notes to be returned to you.

H. VANHUMMELL,
For International Casualty Co.

He gave them, at same meeting as he thinks (but later according to VanHummell), two cheques together amounting to $750 payable to the company and twenty notes, each, except the last, for two hundred dollars, and the last for two hundred and fifty dollars, made payable in twenty successive monthly payments to VanHummell or order. He got therefor the following receipt:—

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INTERNATIONAL CASUALTY COMPANY,
Spokane, Washington.
Capital Stock, $1,000,000.00.

RECEIVED of J. W. Thomson Five thousand cash, and notes * * * Dollars in full payment for 250 shares of the Capital Stock of the International Casualty Company of Spokane, Washington.

INTERNATIONAL CASUALTY CO.,
Per H. VanHummell.

$5,000.00.

In evidence he speaks as follows:—

Mr. Deacon: Q. Whose shares were you buying?

A.—I understood it was treasury stock of the International Casualty Company, the receipt was signed——

Q.—On what ground did you understand that?

A.—I understood from VanHummell he was the agent selling stock for the company, and I asked him what authority he had to sell stock for the company, and he told me he was vice-president of the company, and, as near as I can remember, he shewed me a letter authorizing him to sell stock for the company.

Court: Did he tell you he was selling stock for the company?

A.—Yes, sir, and the receipt I received was a printed form, signed by the International Casualty Company, per VanHummell.

* * * * *

Mr. Deacon: Q.—You didn't know that they were VanHummell's shares?

A.—I heard nothing to that effect whatever.

The argument is put forward, notwithstanding said documents, that the transaction was one between VanHummell and the respondent in respect of shares which had been allotted by the company to VanHummell by what he calls an underwriting agreement.

He, however, with commendable frankness, in his examination for discovery, states the matter thus:—

Q.—Now you see this receipt is signed by the International Casualty Company. Did you tell Dr. Thomson that they were your own shares that you were selling him?

A.—No.

* * * * *

Q.—What did you tell him about the shares?

A.—Nothing at all, as to whose or what shares they were.

Q.—You gave him a receipt signed by the International Casualty Company per H. VanHummell?

A.—As agent.

Q.—There is no mention of agent on this receipt?

A.—That was what he understood and what I understood.

Q. That you were signing as agent for the company?

A.—Yes.

Q.—Was anything said in the course of the conversation which would lead him to believe that the shares which you were selling him were your own?

A.—No; nothing at all.

Q.—So he had no reason whatever to believe that the shares were not the treasury shares of the company?

A.—I cannot say what he thought or understood about the matter because there was no discussion regarding that point.

Q.—Had he any reason that you know of to suspect that these shares were not the treasury shares of the company?

A.—None that I know of.

He repeats this in substance in his examination taken under commission.

The above nomination of respondent by VanHummell was sent to the head-office of the company in Spokane and returned with the written approval of the president of the company signed by him at the foot thereof.

Curiously enough neither VanHummell nor respondent are very positive as to when or how it was returned. The former seems to think it came back to him before he got the cheques or notes above referred to. The latter thinks it came to him by mail.

If, as seems quite probable from the care respondent took to make sure of his appointment as the basis of his whole dealing, VanHummell is right, then the circumstance of the notes being made payable to him is easily explained, if, indeed, needing any explanation.

The company set up in its defence that it had, in short, nothing to do with the transactions beyond appointing respondent as its local physician; that the stock was VanHummell's and the transaction his own.

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This has been in fact its attitude throughout, though not distinctly pleaded affirmatively. Its denial of plaintiff's (now respondent's) statement of claim enabled it to make such contention. The effort to make the transaction wear that appearance and to carry it out in ways inconsistent with the documents, do not agree very well with what straightforward dealing required.

The truth seems accurately stated in the above evidence of both those who ought to know; the written parts of the agreement in question here bear that out; the cheques of respondent pursuant thereto were made payable to the company and received by it; and the agreement between the company and VanHummell, relied upon to displace all that, was hidden from the respondent and was nothing more or less than a round-about method of constituting him the agent of the company and giving him such terms of commission as it could not well do to a mere purchaser.

The power thus given was capable of great abuse and if the company adopted that method of creating agents so that it might be in a position to repudiate them and their acts, when leading to inconvenient results, it may as well understand such notions cannot avail anything herein.

The notes given in this case by respondent to VanHummell ought, in light of the foregoing, to have gone directly to the company as, no doubt, was intended by respondent, though a different purpose may have been in the minds of the company's officers.

VanHummell explains that in some other cases this was in truth what was done with such notes. I infer it was well understood between him and the

company that either of them might use them and discount them as occasion and opportunity might best promote the interests of the company, so long as it got three-fourths and VanHummell one-fourth of the proceeds.

I, however, suspect there was another purpose possibly arising from a necessity to shew cash subscriptions instead of notes as a payment for shares.

An improper use of the company's shares was thus possible and in this case was the direct result of the methods of doing business which the company thus adopted.

The respondent's notes were used by VanHummell at the bank to obtain the money wherewith to pay the company for its shares taken out of VanHummell's allotment instead of from the treasury and issued as if for the respondent and then put up as collateral security at the bank along with the same notes that represented their purchase from the company.

These were acts which the company could not, I imagine, do directly, and unless duly provided for by its charter powers, which is improbable, were improper methods.

All these contrivances for whatever purpose were, if not *ultra vires* the company, at least beyond the scope and purpose of the plain contract entered into between the company and respondent, which was clearly intended to have been the foundation for a purchase from it of its treasury stock and to have remained executory instead of being apparently executed in ignorance of respondent and to his detriment in the way it was.

The company must herein be treated as owner of these notes and in all else as if the agreement had

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proceeded in the regular way it manifestly was intended should have been done.

I have no difficulty, therefore, in holding, as did the Court of Appeal, that the transaction was between the company and respondent, and I have no further difficulty in holding that the company, under the circumstances, is bound by any material representations or misrepresentations made by VanHummell in the course of the negotiations inducing respondent to enter into the contract, and it must answer for the legal consequences thereof.

Any difficulty in the case seems to have arisen from the gravity in form of the charges of misrepresentation, so called, inducing the contract.

It seems to me as if the learned trial judge was so oppressed by the nature of the charges that he shrank from believing and finding as fact that the representations had been made as sworn to by the respondent and another witness, yet seems to have no hesitation in believing the same two witnesses as against VanHummell regarding the agreement for cancellation or the taking back by VanHummell of the shares.

In this latter instance he finds corroboration in the circumstances.

With great respect it seems to me that those same circumstances he relies upon reflect as strong light upon and give as much strength to the first contention set up by the respondent as to this found in his favour by the learned judge. And added thereto in support of said first contention, which is the real matter in dispute herein, are the peculiar circumstances I am about to advert to.

The respondent says, and is corroborated by Mr. Wilmot, his witness (and both are reported by the

learned trial judge as appearing credible) that, at the bargain which the above-mentioned documents set forth, it was distinctly stated that the company would likely be ready for business in Vancouver by the first of October, but absolutely sure to begin by the first of November, 1910.

I see nothing improbable in supposing such a statement might be made by VanHummell. And if made I see no reason why the company should not be bound by it when a determination has to be reached relative to the said contract and the inducements leading thereto and the bearing of statement thereon, either as representation or as misrepresentation, has to be considered.

On the contrary, it seems, from the nature of the business in hand, the terms made relative to the payments, and the facts (which all agree were mentioned), as to some doctors elsewhere earning $1,500 to $2,500 a year from such positions as the respondent was bargaining for, to be inherently a thing one should expect to be discussed, just as respondent and Wilmot say it was discussed.

I agree, therefore, with the Court of Appeal in accepting the version of the respondent, and any uncertainty I have is as to whether or not the representation I so find to have been made should be classed as a misrepresentation as the learned trial judge thought, if in fact made and found untrue, it should be held, or as a condition of the contract. It may well have been both. It clearly was a very material part of the consideration inducing respondent to act and being so I do not think we need go further.

I really cannot say that it makes much practical difference which view is taken. Neither the company

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nor VanHummell were as careful to shew respondent all they meant, or as artless as they might have been.

Yet a perusal of VanHummell's evidence does not impress me unfavourably as to his veracity, though I am holding he is in error in his recollection and the respondent right.

It is not, perhaps, a case of gross fraud or deceit. It is rather a case of undue want of care in making the statement.

No reasonable man could well suppose that negotiations for a license begun in July should not end successfully by the first of November, if properly pressed. The thing seemed so probable that VanHummell was likely to assert as certainty if asked. At the same time he should have been able to shew on what ground he founded his belief if he wanted to escape the suspicion of misrepresentation. His single answer is he never said so. I prefer to accept respondent's version corroborated as it is.

I think he and the company were called on by the *primâ facie* case made to shew they had, and how they had, been misled after taking due care to make such representations, or abide by the legal result flowing from a misrepresentation whether wilful or looked upon as recklessly made.

But passing that I think it must be taken, as between the parties now in issue in this appeal, as a condition of the contract, and clearly in any case a material part of the consideration inducing it, and entitling respondent to rescission of the contract in the executory condition it is found when stripped of the false appearances already shewn it is made to wear by means of improper contrivances.

One objection is that it is not in the written con-

tract, and, therefore, is not credible. I do not think this can avail the appellant under the circumstances.

The other is that it is a variation of the written contract. I do not think so. It varied nothing. The contract was not necessarily all in writing, nor did it pretend to be so. Under the circumstances an oral term or condition not contradictory or varying that written might be shewn to exist or to have been a material inducement as part of the consideration.

I, moreover, think there always was in this peculiar contract an implication that the business should be carried on within a reasonable time at least, and this verbal part of the contract may be well held good for fixing as between the parties what might be termed reasonable.

Suppose the company after assenting to this contract had decided never to enter the field of business contemplated, could it be said it might yet hold the respondent bound?

I do not think so. It seems impossible to believe that such a defiance of the clear understanding in writing upon which the parties proceeded could be so tolerated in law.

It is clear to my mind that the respondent had a right when this suit was entered, in April, 1911, to have treated the reasonable time allowed even by implication as ended, unless some better reason shewn than the appellants have suggested.

And in proof there has been nothing offered to justify the delay. Glittering generalities can hardly be permitted to take the place of substantial details of fact to enable a court to judge for itself.

There is a curious piece of evidence not observed,

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or at all events remarked upon, at the argument. It is as follows:—

He then made the excuse that there was certain red tape, in regard to the State Insurance Commission that had to be gone through with, that he was not aware of when he promised the return of the cash and notes. He said that that sometimes took as long as 30 days and as soon as the red tape was gone through with, the money and notes would be returned to me.

The company's president offered no explanation of this in his evidence given later, yet it seems to me suggestive of a great many things that lay in the path of getting licenses issued. Did the very method I have adverted to find a rebuke and form a difficulty? He does in effect testify the company could not traffic in its own stock.

The time for earning money by virtue of the contract which the respondent had a right to expect had been so long passed as to render it inequitable to hold him longer in suspense, especially seeing the terms of payment on his part had been, in a measure, made to be met by part of such earnings.

I think the appeal of the company should be dismissed with costs.

The action was dismissed by the Court of Appeal as against VanHummell. Respondent has acquiesced in that judgment and thus there can be nothing involved in VanHummell's appeal but a question of costs.

This court has repeatedly refused to hear any appeal involving only a question of costs.

Schlomann v. *Dowker*(1) seems exactly in point, even if we have jurisdiction. *Moir* v. *Village of Huntingdon*(2) is likewise. There the court said:—

The court will not entertain an appeal from any judgment for the purpose of deciding a mere question of costs.

(1) 30 Can. S.C.R. 323. (2) 19 Can. S.C.R. 363.

No authority has been cited to the contrary. It is suggested that by reason of a recent statute requiring in the Court of Appeal that costs of appeal should, except in specified cases of which this is not one, follow the event, therefore, the appellant has been improperly deprived of a statutory right. That can create no new right of appeal here. Besides there is nothing to shew that the statute in question was brought to the notice of the Court of Appeal and that thus an exceptional case has arisen to which it might not be proper to apply the settled jurisprudence of the court even where an appeal might lie, but has by virtue of such jurisprudence been denied a hearing.

Then, if the appeal had to be considered on its merits and we had to determine what the proper judgment was in the court below as basis of an inference, I should say that the court below erred in dismissing the action as against VanHummell. The very cases cited in that regard here and below, if closely examined and applied to the peculiar facts herein, should lead to the conclusion that he was improvidently dismissed.

It was assumed below that, unless VanHummell was guilty of deliberate misrepresentation, he was not a necessary party and hence entitled to be dismissed. He was, unless previously instructed by the company to do so in such cases, guilty of most reprehensible conduct in suppressing the respondent's application instead of filing it with the company and thus inducing the company to act as if the application had never existed and to found its issue of shares to respondent on the hidden contract between him (VanHummell) and the company instead of on this respondent's said application. Even if this was done with the conniv-

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ance of the company it was as regards the respondent an improper thing for him to have done.

He took to himself notes which clearly ought to have been taken to the company, and concealed the true situation from respondent. He then used these notes as if his own property and has them yet or subject to his redemption of them from his hypothecation of them so far as unpaid and for that apparent reason if no other as well as foregoing reasons was a proper party and ought to have been held jointly answerable for the surrender of the respondent's notes or due cancellation of same and return of the moneys paid by him.

The inference is clear from full consideration of all the facts that the company and VanHummell jointly entered upon a course of dealing that should never have been used towards the respondent.

I have found his evidence so clearly fastening agency for all he did upon the company that I have had no difficulty in holding it liable, but that is no reason for excusing the appellant VanHummell, or holding he was entitled to be dismissed and hence entitled as of right to his costs either preceding the appeal to the Court of Appeal or costs of such appeal.

I think he was not entitled to either, and what I have said must answer as my reasons in case the appeal were founded independently of the statute on the rule as to just cause in respect of costs.

I may refer to section 53 of the "Supreme Court Act" as sufficient ground besides, or independently of all I have said, for dismissing this appeal and depriving appellant of his costs below and giving costs of his appeal here against him.

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DUFF J.—This is an appeal from the judgment of the Court of Appeal for British Columbia in an action brought by the respondent, Thomson, for the recovery back of certain sums of money and the cancellation of certain promissory notes paid and given by the respondent to the appellant, VanHummell, (as the proposed purchased price of certain shares in the capital stock of the appellant company upon an application by the respondent to the company for such shares) in which the Court of Appeal held that the respondent was entitled to succeed. I think the appeal ought to be dismissed; first, upon the short ground that the plaintiff's offer to purchase shares (which was an offer to the company and was intended by the plaintiff to form the basis of a contract between him and the company) was never accepted and that no such contractual relation as that contemplated was ever established. The moneys in question and the promissory notes having been received by the appellant, VanHummell, who was the company's agent to receive the same for a purpose which has entirely failed, the plaintiff is entitled to recover them back.

The first point is that no contract was ever concluded between the plaintiff and the company. That fact is undisputed. It was the ground upon which the company mainly based its defence at the trial. On that fact they relied in the Court of Appeal (as the judgment of the Chief Justice shews) and in this court Mr. Anglin, who appeared on behalf of the company, took the same position both orally and in his factum.

The contract was not a contract between the company and the plaintiff but between VanHummell and the plaintiff.

The contract was not between the plaintiff and the company but

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between the plaintiff and VanHummell personally. Whatever may have been the conception of the parties or any of them in this connection the facts appear to be that VanHummell sold for himself shares which he had bought or had a right to buy from the company.

I shall presently discuss the question whether the contention that the plaintiff entered into a contract with VanHummell can be sustained. In the meantime I am emphasizing the point that, at the trial and every subsequent stage of the litigation, the company has deliberately taken the position that it never entered into a contract with Thomson in respect of the sale or allotment of any of its shares and never gave VanHummell any authority to enter into any such contract on its behalf.

It was in May, 1911, that the company entered into its arrangement with VanHummell. The company desired to sell its unsold shares. An agreement was made with VanHummell in which it was recited that VanHummell had

> agreed to subscribe for and purchase the unsold stock of the company for the purpose of re-sale, said subscriptions to be made from time to time as sales are made.

The subscription price was fixed at $15 per share and it was provided that VanHummell should sell the shares at $20 per share. Pursuant to this agreement, on the same day, VanHummell applied to the company to have allotted to him 30,000 shares at the price of $15 per share. That application, as was stated by Ritter, the president of the company, in his evidence given on discovery, was accepted by the company and the shares applied for were allotted to VanHummell. They were allotted, however, subject to the condition expressed in a special share certificate which is in evidence, bearing the same date as the application, that

none of the shares comprised in the allotment should be transferable except on the payment of the subscription price of $15 per share. The plan of the company is plainly disclosed by these documents and the oral evidence. The intention was that the company should not enter into contractual relations with the ultimate purchasers of the shares. VanHummell was to sell shares allotted to him pursuant to his agreement with the company and he was to sell them at the price of $20 per share. This sum of $20 per share was not intended to pass through VanHummell's hands as agent of the company, but as the seller of shares which either belonged to him or which he was entitled to have allotted to him on his own account. From the point of view of the company VanHummell was to be the subscriber and the only subscriber. What the object of the company was in proceeding by this method is not expressly stated: but that this was the nature of the arrangement as the company intended it to go into effect is not open to dispute. As between the company and VanHummell this design was strictly carried out. It is stated both by Ritter and by VanHummell, whose evidence was put in by the company, that all shares sold by VanHummell were transferred at his request from shares which had already been allotted to him under the terms of this agreement with the company. It is stated by both of them that the practice was for VanHummell to pay the company for shares so transferred, but looking in turn for personal reimbursement to the persons to whom he had sold them. This course was observed in the transaction with the plaintiff. VanHummell applied to have the requisite number of shares transferred to Thomson from those standing in his name under the allotment

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already referred to, and he paid for them in full at the subscription price of $15 per share, and the shares were accordingly transferred. The company, according to Ritter's evidence, had no further concern in the matter. VanHummell's recourse was against Thomson and against him alone.

The understanding between the company and VanHummell then was perfectly clear and precise, that VanHummell, while representing himself as the company's agent to take subscriptions for shares, was to transfer to subscribers shares that had been already allotted to him under his own subscription contract. But the transaction, as it presented itself to the ultimate purchaser with whom VanHummell was dealing, wore a very different aspect. To him VanHummell represented himself as the agent of the company to receive subscriptions addressed to the company and to receive also on behalf of the company the subscription price of $20 a share. To the subscriber dealing with VanHummell the form of subscription placed before him was not merely an application to the company for shares, but an application setting forth the terms of what, if the proposal should be accepted by the company, would become a contract between him and the company in relation to the disposition by the company of the subscriber's contribution to the company's capital. One of the terms of the application is as follows:—

> I agree to pay the sum of $20 per share for the said stock, it being understood and agreed that the excess amount over and above the par value thereof is to be used for the purpose of securing subscriptions and perfecting the organization of the said company and for the creation of a surplus.

The contract proposed by the subscriber was, in a word, to involve the obligation on the part of the com-

pany to carry out this undertaking. The subscriber having placed this proposal in the hands of VanHummell, together with the amount he had agreed to pay, afterwards received a share certificate which he regarded as an acceptance of this proposal. The respondent's proposal was never presented to anybody who had authority in fact on behalf of the company to accept it. Nobody had authority in fact to enter into such a contract on behalf of the company with Thomson. The sum of $20 per share paid by Thomson according to his belief into the coffers of the company was never intended by the company to pass through the hands of anybody who should be accountable for it as an officer of the company; and it was of the essence of the company's plan that, while VanHummell represented himself as the company's agent to obtain subscriptions, the company itself should not enter into any agreement which would make it accountable for the disbursement of the subscription price to any purchaser of shares under a subscription contract.

In fact, then, there was no contract between the plaintiff and the company. It does not follow, of course, that the plaintiff might not have been in a position to shew that the company was estopped from denying the existence of such a contract. But that does not prevent the plaintiff himself from setting up the true facts if he chooses to rely upon the facts.

The respondent is entitled to say "you permitted VanHummell to represent himself as your agent to receive on your behalf proposals for contracts to be entered into with you together with moneys payable to you by the terms of those proposals. I acted on the belief that he was your agent in fact for those pur-

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poses. When I seek to hold you responsible for the representations upon the faith of which my subscription was given, you declare that my proposal was never in fact accepted by you, that you never had any intention of accepting it, and that you have no contract in fact with me." He is entitled to say that, and he is entitled on discovery of these facts to insist that the moneys and securities which were handed to VanHummell for a particular purpose, and which pursuant to the arrangement between VanHummell and the company had been applied to another purpose should be restored to him. There are two points which perhaps call for some observation. The first point is this: It may be suggested that in substance the plaintiff has got what he expected to get. That, in a word, it was immaterial to him whether a contract was or was not in fact formed between him and the company, so long as he got shares in the International Casualty Company, and, as might perhaps be added, so long as the company by its conduct was estopped from denying that it had entered into such a contract. I do not think there is any substance in this. The evidence demonstrates and the company by its officials and its counsel in effect avow, that the persons having the charge of the company's affairs concocted this scheme with VanHummell which I have described, one object of which certainly was to conceal from persons applying for shares the fact that out of the sum of $20 per share which they believed themselves to be paying into the coffers of the company and for the application of which the company was directly contracting with them, 25% was to be intercepted before any part of it reached the hands of the company; and that this part of the subscription price was not to

pass into the hands of any officer of the company who should be accountable for it as such. It was, I say, obviously, in part at all events, to conceal this state of facts from the subscribers that this scheme was designed. It involved, of course, deception. It was, in plain words, a fraud upon the subscribers. And it will not do for those who conceived and carried out that fraud to escape the consequences of it by saying "now you have found us out, the law will compel us to give effect to the transaction according to your conception of it." Or, in other words, "we elect to be bound by the transaction as you conceived it." The authors of such a fraud are not entitled to any such privilege.

The other point is this:—It is now suggested that this ground upon which I think the plaintiff was entitled to proceed was not put forward at the trial, and the plaintiff ought not to be permitted now to rely upon it. This also appears to be without substance. The plaintiff has a judgment in his favour and if the record discloses grounds upon which that judgment can justly be supported it is our duty to give effect to them even although those grounds were not relied upon at any stage of the proceedings in the courts below. The judgment, of course, could not be justly supported upon grounds relied on for the first time in this court if there were any danger of this court being led into a mistaken conclusion by reason of not being informed of all the relevant facts, but in the absence of any such danger it would be the merest pedantry to reverse a judgment, which according to the record is the judgment that ought to have been pronounced by the court below, merely because counsel for the party who has succeeded did not in the court

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below put his case in the strongest way. I have already pointed out that all the facts necessary to form a complete foundation for the plaintiff's title to relief upon the ground I have stated have either been deliberately put forward by the company as a part of its case or are proved irresistibly. It is a mistake, however, to suppose that this point was not taken in the court below. The plaintiff made it a part of his case both in the cross-examination of VanHummell and in the examination of Thomson to shew that VanHummell represented to Thomson that the shares with which VanHummell was dealing were "treasury" shares. The observations of the learned trial judge indicated that the bearing of this evidence was present to his mind and I see no reason to believe that the effect of it was not dwelt on both at the trial and in the Court of Appeal.

This would be a sufficient ground for dismissing the appeal. There is, however, another ground on which the respondent based his claim to relief and upon which I think he is entitled to succeed. The respondent alleges that for the purpose of procuring his subscription VanHummell, on the day on which the subscription was given as well as before that, told him in answer to his inquiry that the appellant company would probably commence business before the 1st of October, and that it would certainly commence business before the 1st of November. The company did not in point of fact commence business until the 1st of June in the following year; and if this statement of VanHummell's was made with the object of inducing the respondent to subscribe for shares by creating in Thomson's mind a belief that such was VanHummell's real opinion based upon his know-

ledge as an officer of the company, and if such a belief was thereby created and operated as a material inducement in bringing about Thomson's decision to subscribe, and if in fact VanHummell did not believe that the company would commence business as early as the 1st of November, or if he had no opinion or belief on the subject, that is to say, no real belief, then there can be no doubt the respondent is entitled to recover back the notes and money delivered and paid to VanHummell. The first question is: Did VanHummell tell the respondent that the company would certainly commence business not later than the 1st of November in Vancouver? On this point the evidence of the respondent and one Wilmot is explicit. That evidence was accepted by the Court of Appeal. I do not understand the learned trial judge to have any doubt upon the point that the statement was made as reported by the respondent; but he thinks the effect of the statement was qualified by the further statement that it would be necessary to obtain a licence from the Insurance Department in Ottawa and that the statement was subject to the condition that such licence should be obtained before the date mentioned. It is quite true, of course, that this statement of VanHummell's was a statement as to something which was to happen in the future, and that being so, the respondent must have understood VanHummell to be only giving an opinion which might be falsified in the event. But I see no reason to doubt that the respondent was entitled to regard it, and did regard it, as a positive assurance by VanHummell, who represented himself to be the vice-president of the company, that the necessary licence would be procured and the company established in Vancouver and in

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operation before the 1st of November. Then: Was the assurance given with the object of inducing the respondent to subscribe for shares? About that there is little room for doubt. As the learned trial judge mentions, there is uncontradicted evidence and there seems no reason for disbelieving it, shewing that VanHummell proceeded first to ascertain how much ready money the respondent had and then proceeded to arrange the transaction upon terms likely to induce the respondent to subscribe. But the main inducement was that the respondent, who had been for a comparatively short time practising his profession in Vancouver, was to be appointed the resident physician of the company. As VanHummell says he urged upon the respondent the advantage of such a connection, and as the respondent says, no doubt truly, the terms of payment were so arranged as to give some prospect that the instalments of the subscription price could be made from time to time out of fees earned through his connection with the company. The date at which the company should commence actively to carry on business in Vancouver was, therefore, of the very first importance and the object of the assurance is perfectly clear. Then: Was this assurance a material inducement in bringing the mind of the respondent to assent to VanHummell's proposal? I think there is no room for doubt that it was. There can be no doubt that the main inducement operating on the mind of the respondent was the undertaking given to him to appoint him a resident physician of the company. The virtue of that undertaking, of course, rested in the assumption that the company was to carry on business in Vancouver actively, and that the judgment of the respondent should not have been influenced by the probable date

when active business was to commence is a supposition most difficult to accept. Having regard to the terms of payment of the subscription price one might almost consider it impossible to suppose that it would not be a most material consideration. The evidence of Thomson is explicit to the effect that the assurance did operate on his mind as one of the principal inducements and the learned judge appears to accept the statement of Thomson and the witness Wilmot that, at an interview which took place in October between Thomson and VanHummell at which Wilmot was present, Thomson charged VanHummell with having misled him with respect to the date on which it was expected that the company was to commence business. The learned trial judge seems to say that at that time the respondent honestly believed he had been so misled. That, of course, is strong corroboration of the respondent's statement that he was misled. The view of the learned trial judge appears to be that because the respondent did not insist upon this arrangement being inserted in the written contract between him and the company is conclusive against him on the question as to whether it operated on his mind as the "essential" inducement. If the assurance was relied upon as a condition or warranty I think the learned judge's reasoning would be unanswerable to say nothing of difficulties in point of law which such a contention would raise. But, if the assurance involved a fraudulent representation as to the state of VanHummell's opinion on the point, then it is sufficient that that representation should have been one of the inducements affecting Thomson's mind; and I think VanHummell succeeded in his purpose of producing in the mind of the respondent such a degree of certainty that the company's business would be in

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operation in Vancouver within the two months at the very most, that it never occurred to him to ask for anything in the nature of a written undertaking upon the subject. Consider the situation. When the respondent having finally decided to take shares in the company comes to sign his application and give his cheque he is presented with a formal appointment in writing as resident physician in Vancouver and he insists on having that confirmed by the president of the company as a condition of his subscription. Can it be supposed, if the possibility had suggested itself to his mind of the company not commencing business for nine months, that he would have gone on with the transaction in the form in which he actually did enter into it? I think it is impossible to suppose he would.

The last point is: Were these assurances fraudulent? I think the evidence justifies the conclusion that VanHummell knew he was not in a position to form any belief or opinion upon the point as to when the company would be ready to start business in Vancouver of such a character as could reasonably be regarded as forming a ground for action in any matter of business. As to the probability of the company commencing business in Vancouver as early as the 1st of November, he either did not believe that it would be in a position to do so or he had no actual belief or opinion upon the point at all. That is shewn very clearly by his own evidence. VanHummell, indeed, does not deny that he had no ground whatever for making any such statement as that attributed to him. His defence is that he did not make the statement. Unfortunately there is too much reason to think that on other points also he was not unwilling to deceive the respondent in order to induce him to become a subscriber. The respondent, for example,

says he told him he was vice-president of the company, which was untrue. The respondent also says that VanHummell stated the shares were "treasury" shares. VanHummell admits that he regarded these shares as his own, but denies he made the statement. With regard to all these matters he was given to understand in the clearest way on examination for discovery that his honesty would be attacked. Yet he does not appear at the trial and there is no explanation of his absence. The defence relied upon at the trial by the company in itself involved a grave imputation against the good faith of VanHummell. The defence was, as I have pointed out already, that VanHummell had no authority to act as the agent of the company in the sale of its shares, and that he represented himself as the company's agent is indisputable. At the time of the trial when this defence was set up VanHummell was vice-president of the company; and in face of all this he does not appear at the trial in person. All these circumstances, I think, powerfully supported the inference that VanHummell and the company had few scruples, if any, respecting the means they adopted in order to procure subscriptions.

I should dismiss the appeal with costs.

ANGLIN J. (dissenting) agreed with Davies J.

Appeal dismissed with costs as to The International Casualty Co. and without costs as to VanHummell.

Solicitors for the appellants: *McDougal & Long.*
Solicitors for the respondent: *Deacon, Deacon & Wilson.*

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*Feb. 28.
*April 7.

THE JOHN DEERE PLOW COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

JOSEPH MERRITT AGNEW, TRADING UNDER THE NAME, STYLE AND FIRM OF AGNEW McBAIN HARDWARE AND TRADING CO. (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Company law—Foreign corporation—Conflict of laws—Incorporation by Dominion authority—Powers—B.C. "Companies Act"—Unlicensed extra-provincial companies—"Carrying on business"—Contract — Transactions beyond limits of province — Promissory notes — Right of action — Juristic disability — Construction of statute—(B.C.) 10 *Edw. VII. c.* 7, *ss.* 139, 166, 168.

The "Companies Act" (B.C.) 10 Edw. VII., ch. 7, secs. 139, 166, 168, prohibits companies incorporated otherwise than under the laws of British Columbia carrying on without registration or license in the province any part of their business; penalties are provided for doing so without provincial registration or licence; and they are denied the right of maintaining actions, suits or proceedings in the courts of the province in respect of any contract made in whole or in part within the province in the course of or in connection with any business carried on contrary to the provisions of the Act. The appellant company, incorporated under the Dominion "Companies Act," R.S.C., 1906, ch. 79, has its head-office in Winnipeg, Man., and did not become licensed under the B.C. "Companies Act." In February, 1911, the company entered into an agreement with A., who is domiciled in British Columbia, giving him the exclusive right to sell their goods in British Columbia in pursuance of which he ordered

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

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goods from the company to be shipped from Winnipeg to him, *f.o.b.* Calgary, Alta., assuming all risk and charges himself from that point to Elko, B.C., where the goods were to be received and sold by him. He gave the company his promissory notes, dated at Winnipeg, for the price of these goods, some of the notes being actually signed by him at Elko. In an action by the company to recover the amount of these notes the trial judge held that the action was barred by the statute and could not be maintained by the company in any court in the Province of British Columbia. On an appeal, *per saltum*, to the Supreme Court of Canada the judgment appealed from (8 D.L.R. 65; 2 West. W.R. 1013; 22 W.L.R. 243) was reversed, and it was

Held, *per* Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ., that the transactions which had taken place between the company and A. did not constitute the carrying on of business by the company in the Province of British Columbia within the meaning of the B.C. "Companies Act" and, therefore, the disabilities imposed by that statute could have no effect in respect of the right of the company to recover the amount claimed in the action in the provincial court.

Per Idington J.—As the exclusive jurisdiction in respect of bills of exchange and promissory notes has been assigned to the Parliament of Canada, under item 18 of section 91 of the "British North America Act, 1867," the word "contract" as used in section 166 of the B.C. "Companies Act," 10 Edw. VII., ch. 7, cannot be considered as having any application to promissory notes; the plaintiffs' right of action in the provincial court was, therefore, not barred by the provincial statute.

APPEAL, *per saltum*, (by leave of a judge of the Supreme Court of Canada), from the judgment of Murphy J., at the trial in the Supreme Court of British Columbia(1), dismissing the plaintiffs' action with costs.

The action was commenced on 1st March, 1912, and the questions at issue were settled in a special case which, after reciting the claim for the amount of four promissory notes with interest ($3,315.85), given for the price of the goods shipped as mentioned in the head-note, proceeded as follows:—

"1. The plaintiff is a company incorporated by

(1) 8 D.L.R. 65; 2 West. W.R. 1013; 22 W.L.R. 243.

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letters patent * * * duly issued by the Secretary of State of Canada under the authority of the 'Companies Act' of Canada (R.S.C., ch. 79) giving power amongst other things to carry on throughout Canada the business of dealers in agricultural implements, carriages and wagons and machinery and a general agency, commission and mercantile business.

"2. The head-office of the plaintiff is at Winnipeg, in the Province of Manitoba.

"3. The defendant, Agnew, is a merchant residing at Elko, in the Province of British Columbia, and carrying on at that place the business of a general merchant.

"4. On 18th February, 1911, at the City of Winnipeg, the defendant, Agnew, entered into a contract * * * with the plaintiff under which contract the defendant was given the exclusive right for a certain territory in British Columbia to sell certain of the plaintiff's products.

"5. In pursuance of the contract the defendant ordered at different dates from the plaintiff to be shipped to the defendant *f.o.b.* Calgary, in the Province of Alberta, certain goods, for which goods the defendant gave promissory notes.

"6. The following notes represent goods ordered by the defendant at Winnipeg, in the Province of Manitoba, namely: The promissory note for $1,082.25, dated the 20th May, 1911, represents goods ordered by the defendant in person at Winnipeg, in the Province of Manitoba, which order was filled by the plaintiff by shipping the said goods in Winnipeg to the defendant at Elko aforesaid. The remainder of the promissory notes represent goods ordered by the defendant by post, by way of letters posted at Elko aforesaid,

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directed to the plaintiff at Winnipeg, which said orders were filled by the plaintiff by shipping the said goods to the defendant at Elko aforesaid.

"7. The two promissory notes last above mentioned, though dated at Winnipeg were in fact signed by the defendant at Elko in the Province of British Columbia.

"8. The plaintiff is not and was not licensed under Part VI. of the 'Companies Act' of British Columbia nor under any other Act of that province.

"The questions for the opinion of the court are:—

"First: Whether the plaintiff is, in the absence of a licence under Part VI. of the 'Companies Act' of British Columbia (10 Edw. VII. ch. 7), precluded from carrying on business in British Columbia or from maintaining action in respect to any of the claims or notes aforesaid.

"Second: Whether the provisions of said Part VI. of the 'Companies Act' are, in so far as they purport to prohibit the plaintiff from carrying on business in the Province of British Columbia and to maintain actions in the courts of the said province, *intra vires* of the Legislature of the Province of British Columbia.

"If the court shall answer each of the above questions in the negative, as to all of the items comprised in the claim of the plaintiff, then judgment shall be entered for the plaintiff for the sum of $3,315.85, together with interest at the rate of five per cent. from the date of the writ in this action until the entry of judgment and costs of action to be taxed.

"If the court shall answer each of the above questions in the negative, as to the transactions and notes which represent the goods ordered by the defendant at Elko, then judgment shall be entered for the plaintiff

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for the sum of $2,197.90, together with interest at the rate of five per cent. per annum from the date of the writ to the entry of judgment, together with the costs of the action to be taxed.

"If the court shall answer each of the above questions in the negative, as to the transactions and notes which represent the goods ordered by the defendant at Winnipeg, then judgment shall be entered for the plaintiff for the sum of $1,117.95, together with interest at the rate of five per cent. per annum from the date of the writ to the entry of judgment, together with the costs of the action to be taxed.

"If the court shall answer the above questions in any other way than as above indicated judgment shall be pronounced in accordance with the effect and intent of such answers as may be given by the court or as the court may direct."

The following conditions governing shipments were made part of the contract referred to in the statement of the special case.

"The subscribers agree as follows:—

"1. To accept the goods shipped on arrival as specified for herein, or hereafter, during the life of this agreement, paying the carrying charges thereon, safely housing and keeping free from taxes and all other charges for the company, goods on hand, and insure from loss or damage by fire in a reliable company by policy in the company's name at the subscribers' expense, all goods while in the subscribers' custody, and all goods shipped hereafter shall be subject to the same conditions as those herein specified for.

"2. That the said goods shall be at the risk of the subscribers hereto as to damage or destruction from any cause from the time of shipment until all obliga-

tions given therefor have been satisfied, and the subscribers hereto will fulfil and carry out the covenants and agreements herein contained and satisfy all obligations given therefor with interest, notwithstanding that the said goods may become damaged or destroyed while in the possession of the subscribers hereto.

"3. That no claims will be made against the company for breakages unless they occur from manifest defects in material. Breakages thus caused during the first season's use of the implement or vehicle will be made good by new parts, which will be charged for when sent and corresponding credit will be made, only on return of the defective parts to the company, charges prepaid, and the carrying charges on the parts so replaced shall be paid by the subscribers hereto.

"4. That no claims for damages will be made against the company for delay in shipments for any cause whatever.

"5. That a clear shipping receipt for goods shipped shall relieve the company of all responsibility and place the same with the carriers.

"6. That the proceeds of all goods shipped by the company pursuant to this agreement, or which may hereafter be shipped by them, shall be and remain the absolute property of the company, and shall be held by the subscribers hereto in trust for them until payment in full is made to the company of all obligations under this agreement, and the said company shall not rely only on the personal liability of the shareholders hereto in respect hereof.

"7. That all goods shipped under this agreement are to be sold by the subscribers hereto at the prices and on the terms specified in the price list furnished by the company, either for cash or on lien notes to be taken

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on the form of and drawn to the order of the company when so requested, which notes must be taken by the subscribers hereto at the time of the delivery of the goods, and promptly forwarded to the company together with cash received; and upon payment in full of all obligations in respect hereof to the company under this agreement, all notes so taken in the name of the company shall be transferred by them back to the subscribers hereto, without recourse to the company.

"8. That the property and the title to all goods and the proceeds thereof shipped by the company as in this order provided, or which may be subsequently shipped by the company, shall remain in the company and shall not pass from them until all obligations given therefor shall have been satisfied; but the subscribers hereto shall have the right to the possession of same until default in payment of any note or notes or other obligations given to the company for all goods shipped. Upon default in payment, the whole of the amount remaining unpaid, and all obligations given therefor, shall, notwithstanding deferred times of payment mentioned in such obligations, become due and payable as cash forthwith, and the subscribers hereto covenant with the company to pay the same on demand, and in default of payment of all obligations given therefor, the company may resume possession of all goods shipped under this agreement, and which may be subsequently shipped by them, which the company may also do if any of the statements made herein are ascertained to be untrue, or if the subscribers hereto become insolvent or if the company consider themselves insecure, or whenever they may deem it necessary to resume possession from any good cause;

and this agreement shall not be in any way cancelled or rescinded or otherwise affected thereby, or by any resale of such goods: and in the event of the company resuming possession as aforesaid, the subscribers hereto authorize and empower the company to sell the said goods or any of them on the subscribers' account, by public auction or private sale, and to credit the net proceeds of such resale, after deducting all expenses of resuming possession and reselling same, on the purchase money payable hereunder; and the subscribers hereto shall remain liable for the balance of such purchase money and interest, which shall then be payable forthwith, notwithstanding any deferred time of payment mentioned in any obligations given therefor and shall be collectable from any liens or securities held by the company, or by process of law against the subscribers hereto.

"9. To settle by cash and notes bearing the signature of the subscribers hereto promptly the first of the month following date of shipment for all goods shipped, upon the terms as set forth on pages 5, 6, and 7 of this agreement, and at the prices appearing therein opposite each article shipped, with all collection charges, and interest after maturity.

"10. That the rate of interest on accounts and notes past due or extended shall be eight per cent. (8%) and indebtedness past due or extended shall be secured by good farmers' paper, as collateral, at the rate of 1.25 of collateral paper for every dollar of past due or extended indebtedness.

"11. That in the event of the death of one or all the subscribers hereto, or failure, insolvency, loss by fire, transfer of property, suit filed against me or either (of us), discontinuing business, non-payment of ac-

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counts or notes covered by this agreement, or in case of preference given other creditors, all obligations arising under this agreement shall become due and payable forthwith, notwithstanding deferred times of payment.

"12. That no agreements, conditions or stipulations, verbal or otherwise, save those mentioned in this agreement will be recognized.

"13. That the copy of this agreement retained by the company is the original and to be the binding agreement in case the duplicate varies from it in any particular.

"14. All implements are shipped subject to the usual manufacturer's warranty to do good work when properly operated, and failing to do this after the subscribers have used their best efforts, they will give immediate notice to the company and allow time for instructions to be given, or, if necessary, the sending of a person to put it in order. Failing then to make the implement do good work, it may be held subject to the order of the company, but under no circumstances will the subscribers return goods without direction from the company. In case this fault is with the subscribers through their failure to follow directions or carelessness in using, the subscribers agree to pay for the time and expense of the person sent to put it in order.

"15. All claims for shortages must be made to the company in writing within forty-eight hours from receipt of goods. If a written notification of such claims does not reach the company at their office in Winnipeg within five days, no allowance will be made.

"16. No claim shall be allowed for breakage of hardened moulds, shares or landsides, nor for alleged

defective material or workmanship, unless the article is produced and the defect is plainly apparent.

"17. The company shall not be held responsible for the performance of a plow, after it has been heated or radically changed by any one except from the factory."

At the trial, in the Supreme Court of British Columbia, it was held, (Murphy J.), that the action was barred by the B.C. "Companies Act" and could not be maintained by the company in any court in the Province of British Columbia. On the application of the company leave to appeal *per saltum* from this judgment was allowed by a judge of the Supreme Court of Canada.

Chrysler K.C., Wegenast and *Caldwell,* for the appellant.

G. F. Henderson K.C. for the respondent.

THE CHIEF JUSTICE.—I am of the opinion that this appeal should be allowed with costs.

Both of the questions submitted for the opinion of the court assume that the appellant company, in the circumstances of the transactions in question, carried on in British Columbia "a part of its business" within the meaning of the statutory prohibition relied upon —section 166 of the provincial "Companies Act,"—or that the notes sued on were contracts made by that company in the province in the course of or in connection with its business. I do not pause to inquire whether the statute is intended to penalize contracts made in the province in connection with the business carried on there by an unlicensed or unregistered extra-provincial company, or whether all contracts made

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in the province by such companies are uninforceable. The distinction is not material in view of the conclusion I have reached, which is that, on the facts of this case, it does not appear that in taking the notes sued on the company appellant carried on any part of its business in the Province of British Columbia, and, therefore, the assumption on which the questions submitted are predicated is not founded.

As stated in the special case, the facts are: An agreement was entered into between the appellants and the respondent, at Winnipeg, in the Province of Manitoba, under which the respondent was given the exclusive right to buy and sell certain of appellants' machines within a defined area of the Province of British Columbia. Under this agreement, the respondent ordered a shipment of goods, which was executed by delivering them f.o.b. at Calgary, in the Province of Alberta; the goods to be, thereafter, at the expense and risk of the purchaser. The consignment was to be paid for by promissory notes, and the notes sued on herein were made in execution of that undertaking. All of the notes are dated at Winnipeg, where the head-office of the company, appellants, is situate, and made payable at Elko, in British Columbia, where two of them were actually signed.

I cannot see how, assuming the respondent was the agent of the appellants, under the agreement made in Winnipeg, it can be said, on these facts, that the company, appellants, carried on "any part of its business" in British Columbia. The most that can be said is that the appellants sold and delivered goods to the respondent in the Province of Alberta to be afterwards re-sold, possibly by the latter, within the Province of British Columbia. The statute is not in-

tended to reach those who trade *with* the province, but those who carry on business *within* the province, and no act was done by the appellants within the province. If we had to deal with the sale of goods by the respondent to a customer, then the question of carrying on business through an agent in the province might arise.

Can it be said that the promissory notes, made in the province and payable there, but sent to Winnipeg in payment of a debt due under a purchase made at the latter place is a contract made in the province in the course or in connection with the business of the company? A note executed, made payable and delivered to the payee in the province may be a contract made there by the maker of the note, but it is not a contract made by the appellants who assumed no obligation with respect to it. The notes must be considered in connection with the contract of sale and delivery, which is the consideration for which they were given. That contract was complete by the delivery of the goods beyond the limits of the province, and the notes made by the respondent, in British Columbia, were only made in performance of his obligation to pay the amounts specified in those notes under that contract.

As to whether a promissory note is a contract, see Pothier, "Lettre de Change" (Bugnet ed.), vol. 4, pages 473 and 474:—

> La lettre de change appartient à l'éxecution du contrat du change; elle est le moyen par lequel ce contrat s'exécute; elle le suppose et l'établit, mais elle n'est pas le contrat même.

Judgment will be entered for $3,515.85, the amount demanded, together with interest from the date of the issue of the writ, at five per cent., and for costs.

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Davies J.

DAVIES J.—I am of opinion that this appeal should be allowed.

Under the facts stated in the case submitted to us, the plaintiffs were not doing or "carrying on business" in the Province of British Columbia. I think myself bound by the principle of the judgment of this court in *City of Halifax* v. *The McLaughlin Carriage Co.*(1), and *Kirkwood* v. *Gadd*(2). Applying the test stated in those cases to the facts in this case it is impossible to hold, on the facts as stated, that the John Deere Plow Company could be considered as "carrying on business" in British Columbia, within the meaning of that phrase as used in the statute.

In this view it is unnecessary for me to categorically answer the questions submitted as the answers I would give are evident from what I have said above.

IDINGTON J.—The judgment against which this appeal is taken is upon a stated case so framed as to raise questions that are not necessarily involved in determining the right of appellant to recover upon the promissory notes upon which it sues.

Counsel for appellant in answer to a question I put as to whether or not this was the result of a design to obtain the opinion of the court upon legal questions not arising out of the facts stated, but of importance to the parties concerned herein, assured us such was not the case. Counsel for respondent did not dissent from this assurance. The learned trial judge must be taken also to have so viewed the action or he would not have heard it. I think we must, therefore, treat the case as if, on the facts stated, the submission had been whether or not the provisions of

(1) 39 Can. S.C.R. 174. (2) (1910) A.C. 422.

the "Companies Act" of British Columbia as it stood in the earlier half of the year 1911, or as revised later, when applied thereto constitute a defence in whole or in part to appellant's claim to recover on the promissory notes in question. The revision which took place in 1911 altered the numbering of sections and modified the language used in many parts. The action began in 1912 and the part prohibiting certain actions must be looked at as it stood in 1912. The pamphlet copy of this revision was used in argument and hence I refer to sections as numbered therein.

The Act is badly drawn. In the sections 139, 152, 153, and 168, which we have specially to consider, the object designated by the phrase "every extra-provincial company" is expressly or impliedly referred to as subject thereto.

The interpretation clause defines the term as follows:—

"Extra-provincial company" means any duly incorporated company other than a company incorporated under the laws of the Province of British Columbia, or the former colonies of British Columbia and Vancouver Island.

By close examination we find later it does not mean what is thus interpreted, but only means it subject to the awkwardly expressed limitation which the language of section 153 gives.

That section, which I take as the key of this part 6 of the Act, is as follows:—

153. Any extra-provincial company duly incorporated under the laws of—

(*a*) The United Kingdom;

(*b*) The Dominion;

(*c*) The former Province of Canada;

(*d*) Any of the provinces of the Dominion of Canada; and

(*e*) Any insurance company duly authorized by its charter and regulations to carry out or effect any of the purposes or objects to

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which the legislative authority of the Legislature of British Columbia extends, may obtain a licence from the registrar authorizing it to carry on business within the province on compliance with the provisions of this Act, and on payment to the registrar in respect of the several matters mentioned in the table marked "B" in the first schedule hereto the several fees therein specified, and shall, subject to the provisions of the charter and regulations of the company, and to the terms of the licence, thereupon have the same powers and privileges in the province as if incorporated under this Act.

What does this phrase

> any of the purposes or objects to which the legislative authority of the Legislature of British Columbia extends

mean? Let it be noted that it is what "the charter and regulations" of the foreign legislative or creative power of both have authorized to be done by the supposed corporate body that is to become the purpose or object to which the legislative authority of the provincial legislature has been thus directed.

The puzzles of the section do not end with these lines in the beginning of it, but are continued by the lines

> and shall, subject to the provisions of the charter and regulations of the company, and to the terms of the licence, thereupon have the same powers and privileges in this province as if incorporated under this Act.

It is quite possible for a company, by virtue of the limitations of its creation, to be prohibited from carrying on business in British Columbia and yet be able to make, as the appellant did in the case in hand, a contract outside of that province and in respect of some breach thereof be under the need of suing in British Columbia and be entitled to sue therefor in the courts of that province.

I know not whether the appellant has "by its charter and regulations" the right to apply for a license to do business in British Columbia or not. *Primâ*

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facie the patent creating it enables it to apply anywhere to do its business. This suggestion of its regulations limiting its capacity starts the inquiry I have just mentioned as possible. In light of what section 139 provides it becomes a pertinent inquiry as to whether or not the scope of this part VI. of the Act is such that a company may by virtue of its Dominion charter be entitled to enter into such a contract as I have suggested yet be disabled from following its debtor in the courts of that province without taking out a licence which its self-restrictive regulations may render useless for any other purpose than such litigation.

The language of section 139 seems to have been held by the learned trial judge to have some such effect. True, he relies upon other incidents such as the insurance of property that the appellant permitted another to carry into the province and deal with therein. Can the appellant not ship its goods through British Columbia, say to Seattle, and, in doing so, employ men in British Columbia to take care of them and if need be insure them there? And for breach of duty on the part of those bound by or concerned in such obligations can it not bring an action in the courts of that province?

I am not concerned with solving all these problems. I am only raising them here to illustrate the curious things that may happen if this section and some others are to be applied literally.

We are concerned here with section 166 as it stood in 1911, and section 168, of which the first part is as follows:—

166. * * * So long as it, (any extra-provincial company,) remains unlicensed or unregistered under this Act it shall not be capable of maintaining any action, suit, or other proceeding in any

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court in British Columbia in respect of any contract made in whole or in part within this province in the course of or in connection with its business, contrary to the requirements of this part of this Act.

This provision, it is said, bars this action. If the methods of interpretation and construction I have adverted to are correct the defence herein may be well founded.

Section 153, quoted above, does not, however, seem to me to have been so framed as to warrant that mode of treatment. These other sections (including 168 just quoted) must be read as operative within its terms or not at all. It is the one which provides for a licence. The subject throughout part VI. is licence, and the meaning declared by section 152 must be held as limiting the operative effect of all these other penalizing and puzzling sections aimed at the consequence of not obtaining a licence.

I must, therefore, revert to the consideration of the meaning to be extracted from section 152 to give the other sections vitality or force.

It seems inconceivable that a charter of another power can have had in view the carrying out or effecting of

> any of the purposes or objects to which the legislative authority of the Legislature of British Columbia extends.

Yet such creations are those that the literal meaning of this clause deals with.

Passing that for the moment, what we are concerned with here is the recovery upon a number of promissory notes of which some were given in, and some outside the province.

Now, it is as plainly written in the enumerated subjects of section 91, over which exclusive power is

given to the Dominion, as anything can well be, that bills of exchange and promissory notes are not within either

the purposes or objects to which the legislative authority of the Legislature of British Columbia extends.

Hence it seems to me that the kind of contract involved herein is one over which the legislature enacting the disabling section 168, which is relied on, has no more authority than it has over the other corporations and contracts founded on any of the subjects enumerated in section 91 over which Parliament has exclusive legislative authority.

It is possible that Parliament has not yet in this regard covered all the ground thus open to it to take in aid of its corporate creations which must rest only upon its residual power over "Peace, Order and Good Government" as distinguished from those other corporate creations I refer to above and hereinafter.

But the language of this section 152 which I have called particular attention to, lends itself peculiarly to the application of the principle that the legislature cannot deal with promissory notes. Indeed, it seems as if intended, however awkwardly, to exclude the field of legislation beyond its powers, from the range of anything contemplated by this legislation.

The legislatures of the provinces, having assigned to them exclusive legislative authority over property and civil rights beyond that part thereof primarily assigned exclusively to Parliament by said enumeration in section 91 and possibly by implication in a few other sections of the Act which do not concern us here, may, no matter how much inconvenience may possibly by reckless or improper legislation arise, so enact as to contracts as to render them in certain cases null.

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This power clearly cannot be so used as to affect the validity of promissory notes which Parliament has declared shall not be thereby invalidated.

Parliament in the "Bills of Exchange Act" has not expressly dealt with this aspect of the matter and gone so far as it may have a right to go. But, it may be asked, must we not hold that Parliament, by providing for the creation of such companies as the appellant, with the evident purposes of making the franchises so granted as effective as Parliament, acting within its powers, can make them for the execution of their respective purposes, has, so far as necessary therefor by implication, given such effect as it can in relation to promissory notes? I express no opinion.

Such is the problem which I conceive may arise upon this Act in relation to the rights of the Dominion corporate creations resting upon the residual power of Parliament alone and on the law as it stands at present.

Of course, other extra-provincial companies may not stand in the same position.

It seems to me that in this case and in view of the phraseology used in section 152, to which I have adverted the legislature has refrained from questioning the power of Parliament and so advisedly used the word "contract" in section 168, as to avoid any question of conflict.

I admit the word contract might include promissory notes, but when we read it in light of all these considerations I have referred to, I conclude it does not.

For that reason alone the section 168 does not apply as a bar to this action.

There are many other considerations leading to the same result.

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The whole meaning of the section must turn upon the effect of the words "carry on business within this province." That is what the licence is provided for. The fees exacted indicate it must be something thus substantial and not the mere incident, for example, of bringing an action.

I admit the language used in other sections does seem at times to strike at isolated Acts. I cannot think they alter the scope and purpose of the whole of this part of the Act, but must be controlled or read in light of what seems to me the obvious purpose of section 152 as a licensing Act.

I assume for argument's sake such a power of licensing exists, but by no means express any opinion in regard thereto.

Then it has been urged it is a taxing Act within the power to impose direct taxation within the province, and the authority of *Bank of Toronto* v. *Lambe*(1) is invoked.

It seems as clear as can be that banks and railways and other subjects falling within the enumerated subjects of section 91 of the "British North America Act" may be taxable by a province. But I do not think that involves the liability to comply with such regulations as these sections of the "Companies Act" in question require compliance with. And I should say that none of the conceivable corporate creations which may be the product of the exclusive powers over said enumerated subjects of section 91 fall within the sweeping language of these sections now in question unless restricted within the necessarily incidental powers for executing the taxing power. Destroying their right of contracting, or suing, does not seem to fall within

(1) 12 App. Cas. 575.

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that. And so far as the mere taxing power goes this should hold good also relative to other companies. These respective spheres of legislative authority of Dominion and provinces may well be viewed as if appertaining to two independent states in their relation to each other. Each may help the other, but can go no further. It never, however, was intended either should try to destroy the other.

It seems to me that there is also much to be said relative to the quality of the taxation. If it is imposed purely to enable a company to do what appellant has done, then, I submit, such methods of taxation would be indirect taxation and not within provincial powers.

I am not to be taken as suggesting that promissory notes are, as a matter of course, to be held free from taints of illegality and consequence thereof. The causes of illegality founded on mere revenue laws, however, may in regard to promissory notes be ultimately found such as Parliament alone may declare. I express no opinion here in regard thereto and only desire to avoid unwarranted inferences from what I have said.

I conclude that there is nothing in the facts submitted that entitles a province to deprive a company of its ordinary rights of contract and suing in the province.

I think the appeal should be allowed with costs.

DUFF J.—I think the British Columbia "Companies Act" (B.C. Stats., 1910) does not in its true construction disable the appellant company from maintaining this action.

The relevant provisions of the Act are sections 139 and 166. These are in these words:—

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139. Every extra-provincial company having gain for its purpose and object within the scope of this Act is hereby required to be licensed or registered under this or some former Act, and no company, firm, broker or other person shall, as the representative or agent of or acting in any other capacity for any such extra-provincial company, carry on any of the business of an extra-provincial company within this province until such extra-provincial company shall have been licensed or registered as aforesaid.

This section shall apply to an extra-provincial company notwithstanding that it was heretofore registered as a foreign company under the provisions of any Act.

166. If any extra-provincial company shall, without being licensed or registered pursuant to this part, carry on in the Province of British Columbia any part of its business, such extra-provincial company shall be liable to a penalty of fifty dollars for every day upon which it so carries on business, and so long as it remains unlicensed or unregistered under this Act, it shall not be capable of maintaining any action, suit, or other proceeding in any court in British Columbia in respect of any contract made in whole or in part within this province, in the course of or in connection with its business contrary to the requirements of this part:

Provided, however, that upon the granting or restoration of the licence or the issuance or restoration of the certificate of registration or the removal of any suspension of either the license or the certificate, any action, suit or other proceeding may be maintained as if such licence or certificate had been granted or restored or such suspension removed before the institution of any such action, suit, or other proceedings.

The disability to sue imposed by section 166 only affects the company in respect of rights of action alleged to arise out of some contract made

in whole or in part within this province * * * contrary to the requirements of this part;

and the last words "contrary to the requirements of this part" of this Act refer, it seems to me, to the requirements imposed by sections 139 to 167, which ordain that an extra-provincial company shall be licensed or registered under the Act before it can become entitled to "carry on in the province any part of its business." The contracts, therefore, which an extra-provincial company not licensed or registered under the Act is disabled from enforcing by action

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in the courts of British Columbia in virtue of the provisions of section 166 are contracts made in course of or in connection with some business which the company in whole or in part "carries on" in that province.

The learned trial judge held that the appellants were carrying on business by the respondent as their agent or representative, and that the contracts in question were made in connection with that business. In support of this conclusion the respondent relies upon the provisions of an agreement set out in the special case between the parties to the action (1). The appellants are manufacturers of ploughs, and their principal place of business is at Winnipeg; the respondent is a general merchant at Elko, B.C. The promissory notes sued on were given for goods shipped at Calgary by the appellants to the respondent at Elko under the terms of the agreement already mentioned. Some of these goods were ordered by the defendant in person at Winnipeg and others by letter from Elko. The agreement in question binds the respondent to accept all goods shipped under it and to "settle by cash and notes" for all such goods according to the prices set forth in the price list on the first of the month following each shipment. All goods affected by the agreement are to be at the risk of the respondent until paid for; and the respondent is to insure them for the protection of the appellants. In the event of the death of the respondent or his insolvency or of an action being brought against him all moneys owing are to become immediately payable. In default of payment of any obligation given to the appellants for any goods shipped under the agreement all moneys owing by the respondent become payable and the appellants are authorized to sell all goods to which the agreement re-

(1) See pp. 212-217 *ante*.

lates and credit the proceeds to the respondent, who is to remain liable for any deficiency. In the meantime, pending the payment of all obligations in full, the title to all goods shipped remains, until they are sold by the respondent, in the appellants, and all notes taken on the sale of any of them by the respondent from purchasers are to be taken in the name of the appellants. The sales made by the respondent are to be according to a price list furnished by the appellants. This agreement constituted — the learned trial judge holds — the respondent the agent of the appellants for the sale of goods to which it relates. I cannot agree with this. It is, in my judgment, an agreement relating to the sale and purchasing of goods embodying elaborate provisions for the protection of the sellers. Until the sellers have been paid in full the property remains vested in them and all moneys received on sale by the respondent are to be treated as theirs; but the rights thus reserved to them are only for securing the payment of the purchase money; and on payment they would disappear at once. Subject to the rights so held by the sellers as security the purchaser is the beneficial owner of the goods. True, there is a covenant that he will not sell except at the prices specified in the agreement. I doubt very much whether this provision was intended to bind the purchaser with respect to goods that have been fully paid for. If it was intended to apply to goods that have become fully vested in the purchaser its validity is doubtful; but in any case it could only operate as a personal covenant by the respondent affecting the conduct of his own business.

I see nothing in these provisions requiring or, indeed, justifying the inference that the respondent in

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carrying out the agreement was acting as the agent or representative of the appellants in carrying on the appellants' business. What was contemplated was that in the conduct of his own business he should observe the provisions of this contract that he had made with the appellants. The second part of the first question,

> whether the plaintiff * * * is precluded from * * * maintaining action in respect of any of the claims or notes aforesaid

ought to be answered in the negative. The first branch of the first question, and the second question, do not arise on the facts and it would, therefore, be improper to answer them.

I may add, although it is not strictly necessary to the decision, that section 166, which subjects extra-provincial companies to penalties for carrying on in the province any part of their business without licence or registration appears to indicate that the legislature by the phrase "carrying on business" contemplated such conduct on the part of the company as would, according to the general principles of law, amount to a submission to the jurisdiction of the British Columbia courts. According to that view no company would come within the penalties or disabilities imposed by the enactments quoted above unless it had a fixed place of business at which it carried on some part of its own business within the province.

ANGLIN J.—In my opinion the notes sued on were not given to or taken by the plaintiffs in the course of carrying on their business within British Columbia. The burden was on the defendant to prove this. The evidence in the record does not establish that the plaintiffs carried on any part of their business in that

province. On that short ground this appeal should, in my opinion, be allowed.

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BRODEUR J.—The main question to be decided in this case is whether the appellants are carrying on business in the Province of British Columbia.

By the "Companies Act" of that province, it is provided that every extra-provincial company having gain for its purpose is required to take out a licence, and it is also provided, by the same Act, that

> no person shall as the representative or agent of, or acting in any other capacity, for any such extra-provincial company, carry on any of the business of that company until such extra-provincial company shall have been licensed. (Section 139.)

And, if any extra-provincial company shall carry on any of its business in the province, it shall not be capable of maintaining any action in any court of British Columbia in respect to any contract made, in whole or in part, within that province in connection with its business. (Sec. 166.)

It appears by the stated case that the head-office of the company is at Winnipeg; that the respondent, Agnew, is residing in British Columbia and carrying on there the business of a general merchant. In February, 1911, Agnew, in Winnipeg, made a contract with the appellants under which they agreed not to sell, in a certain territory in British Columbia, the classes of goods which the respondent would order. In execution of that contract the respondent, at different dates, ordered from the appellants certain goods to be shipped to him in Calgary, in Alberta, and he gave his promissory notes for those goods. Some of those notes were made and signed in Manitoba. The other notes, though dated in Winnipeg, were, in fact, signed by the respondent at his place of business.

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The company was not registered in British Columbia.

The trial judge found that the appellant company should be considered, on the above facts, as carrying on business in the Province of British Columbia, and, as the company was not registered there, that it could not take any action to enforce the contract with the respondent.

I am not able, for my part, to come to such a conclusion. It cannot be said that the appellants were carrying on any business in the Province of British Columbia. Some of their goods were being sold, it is true, by the respondent, but he was not their representative or agent and did not act in any such like capacity for the appellants, but he was doing with those goods the same as he would do with any other goods which, in his ordinary business, he would bring from any other part of the country.

Having come to that conclusion, I do not think it is necessary then to examine the other question which has been submitted by the plaintiffs, namely, whether or not the appellants, being a company incorporated by the Dominion Parliament, could be subjected to the requirements of the Act above mentioned.

I think that the appeal is well founded and it should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Tupper, Kitto & Wightman.*

Solicitors for the respondent: *Wilson & Jamieson.*

IN RE CHARLES DEAN.

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*Feb. 23.
*Feb. 25.

Criminal law—Habeas corpus—Common law offences—Construction of statute—"Supreme Court Act," R.S.C., 1906, c. 139, s. 62—Jurisdiction of Supreme Court judges.

The jurisdiction of judges of the Supreme Court of Canada in respect of *habeas corpus ad subjiciendum* extends only to cases of commitment on charges of offences which are criminal by virtue of statutes enacted by the Parliament of Canada; it does not extend to cases of commitment for offences at common law or under statutes enacted prior to Confederation which are still in force. *Re Sproule* (12 Can. S.C.R. 140) referred to.

The offence of housebreaking as described in the Imperial statute, 7 & 8 Geo. IV., ch. 29, sec. 15, became part of the criminal law of British Columbia on the introduction of the criminal law of England into that colony by the Ordinance of 19th November, 1858, continued to be so until the Union of the province with Canada, and since then by virtue of sec. 11 of the "Criminal Code," and it is not an offence to which sec. 62 of the "Supreme Court Act," R.S.C., 1906, ch. 139, has application.

APPLICATION, in Supreme Court Chambers, at the City of Ottawa, for the rule calling upon the keeper of the common gaol in the County of Westminster, at the City of New Westminster, in British Columbia, to shew cause why a writ of *habeas corpus ad subjiciendum* should not issue to bring up the body of one Charles Dean who was, as alleged, confined in the said gaol under a warrant of commitment, dated 5th September, 1912, to stand his trial upon a charge of the offence of housebreaking.

J. Travers Lewis K.C. supported the application.

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*PRESENT:—Mr. Justice Duff, in Chambers.

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IN RE DEAN.

E. F. B. Johnston K.C. on behalf of the Attorney-General for British Columbia, shewed cause.

Duff J.

DUFF J.—I think I have no jurisdiction to entertain this application. It will not be necessary, in view of my opinion as to the construction of section 62 of the "Supreme Court Act," to decide the point raised by the contention of Mr. Johnston, on behalf of the Attorney-General for British Columbia, that that enactment is beyond the competence of the Parliament of Canada. Section 62 is as follows:—

> Every judge of the court shall, except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.
>
> 2. If the judge refuses the writ or remands the prisoner, an appeal shall lie to the court.

The language indicates an intention on the part of Parliament to confer only a strictly limited jurisdiction. Anything like frequent interposition in the administration of the criminal law in the provinces by the judges of the Supreme Court of Canada, through the instrumentality of the writ of *habeas corpus,* would obviously lead to the most undesirable results; and, before exercising the authority in a given case, I think it is my duty to scrutinize most carefully the terms in which that authority is given to ascertain whether or not the case is clearly one of those in which it was intended to be exercised.

The jurisdiction extends only, I think, to those cases in which the "commitment" has followed upon a charge of a criminal offence which is a criminal offence by virtue of some statutory enactment of the Parliament of Canada; it does not, in my opinion, ex-

tend to cases in which the "commitment" is for an offence which was an offence at common law or under a statute which was passed prior to Confederation and is still in force.

That, I think, is the effect of previous decisions by judges of this court. See *Re Sproule* (1). The offence for which the applicant was committed to stand his trial is thus described in the warrant of commitment:

> He, the said Charles Dean, at the City of New Westminster, in the County of Westminster, on the 15th day of September, A.D. 1911, did unlawfully break and enter the counting-house of the Bank of Montreal, situated at the corner of Columbia and Church streets, in the City of New Westminster aforesaid, and the sum of $271,000, the property of the said Bank of Montreal, then and there being found therein then and there steal, contrary to the form of the statute in such case made and provided.

These words aptly describe an offence under section 15 of 7 & 8 Geo. IV. ch. 29, which became part of the law of British Columbia under the ordinance of the 19th November, 1858, introducing the civil and criminal law of England into that colony. This enactment continued to be a part of the criminal law of British Columbia down to the time of the Union with Canada, and, by section 11 of the "Criminal Code" it is now part of the "criminal law" of the province in so far as it has not been repealed, "altered, varied, modified or affected" by competent legislative authority. The only change relates to the nature of the punishment to which an offender is liable.

Section 62 has, consequently, no application.

Application refused.

(1) 12 Can. S.C.R. 140.

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*March 1.
*March 4.

THE GRAND TRUNK PACIFIC RAILWAY COMPANY ..... } APPELLANTS;

AND

JOHN Y. ROCHESTER AND OTHERS.. RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Construction—Route and location plans—Approval—Obstruction to navigation—Demolition of works—Jurisdiction of Board of Railway Commissioners—"Railway Act," R.S.C., 1906, *c. 37, ss.* 30(*h*), (*i*), 230, 233.

Where a railway company, in the professed exercise of its powers as a railway company and without the approval of the route by the Minister and of the location plans and works by the Board of Railway Commissioners for Canada, has constructed a solid filling across navigable waters, the Board, under the provisions of sections 230 and 233 coupled with sub-sections (*h*) and (*i*) of section 30 of the "Railway Act," R.S.C., 1906, ch. 37 has jurisdiction to order the demolition of the works so constructed.

APPLICATION for leave to appeal from an order of the Board of Railway Commissioners for Canada, dated on the 2nd of January, 1912, by which the railway company was directed to remove a portion of a rock filling placed across the entrance of Market Cove, at Cameron Bay, B.C., in the construction of a portion of their line of railway.

A portion of the roadbed of the Grand Trunk Pacific Railway Company from Prince Rupert, in British Columbia, westerly, was constructed subsequent to the 31st of December, 1909, and John Y.

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Rochester and others complained to the Board of Railway Commissioners for Canada that the railway company was about to construct a solid embankment, at Cameron Bay, B.C., across the entrance to Market Cove upon the shores of which they held leases of water-lots from the Government of British Columbia. The complainants asked that, on approval of the location plans, their rights should be protected. At the time of this complaint, 25th November, 1909, no route-map for this portion of the railway had been approved by the Minister, and the approval of the location plans and authority for the construction of the works had been withheld by the Board pending inquiries. Without obtaining such approval and authorization, the railway company actively proceeded with the construction of the railway along the route in question in the professed exercise of its powers as a railway company and, in doing so, blocked the entrance of the cove so that navigation of its waters was obstructed by a stone embankment which the railway company placed across its entrance. After hearing the parties interested the Board found, in effect, that the complainants had leases of lands abutting on the waters of the cove for the purpose of securing access thereto by water for their warehouses, etc., and that they were the owners of the riparian rights appurtenant to the possession of these lands; that the railway company had cut off all access by water from the harbour to all points around the cove; that at the time of the construction of the embankment the company had no title to the land across the entrance of the cove; that the company had no right to make the construction without approval of the route-map and of the location plans and works; that the lands and business of the complainants had been injuriously affected

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by the wrongful and illegal act of the railway company; and that there was no necessity for a stone embankment across the entrance to the cove and no reason why an opening should not be left there sufficient to enable vessels to pass in and out during high tide.

Upon these findings it was, on the 2nd of January, 1912, ordered by the Board that the railway company, on or before the 1st of May, 1912, should remove sufficient of the rock-fill to leave an opening at the deepest point of the entrance at least thirty feet in width, and that, before the 15th of February, 1912, the company should file with the Board and furnish the complainants with plans shewing the location of the opening, etc.

The opinion judgments of Chief Commissioner Mabee and Commissioner McLean, delivered upon the making of the order in question, appear at pages 294 to 299 of the Seventh Report (1912) of the Board of Railway Commissioners for Canada (Sessional Paper No. 20*c*), presented to Parliament in 1913.

On the hearing before Mr. Justice Duff, in Chambers, 1st March, 1912,

D'Arcy Tate K.C. appeared in support of the application.

N. G. Guthrie contra.

The application was refused for the following reasons by

DUFF J.—On the 4th of March, last, I dismissed an application made to me on the first day of the same month for leave to appeal from an order made by the Board of Railway Commissioners, on the 2nd of January, 1912, directing the railway company to remove

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Duff J.

part of their rock-fill at Cameron Bay, B.C. I gave no reasons in writing for my decision, at the time, but it is now stated that an appeal from the order of the Railway Commission is pending before His Royal Highness the Governor in Council, and that it may be necessary to refer to the grounds upon which the company's application for leave to appeal was dismissed, and I have been requested, through the registrar, to state the grounds upon which I acted. I think it is reasonable, in the circumstances, to comply with the request.

An appeal lies to the Supreme Court from the Board of Railway Commissioners in two cases only, which are provided for by sub-sections 2 and 3 of section 56 of the "Railway Act." The application in question was made under sub-section 2, and the point to be determined was whether there was any arguable question of jurisdiction which the railway company ought to be permitted to bring before the Supreme Court.

Cameron Bay is a tidal water in which the public have rights of navigation. The Board of Railway Commissioners, in effect, found that the fill in question had been constructed by the railway company in professed exercise of their powers as a railway company, and that the requirements of section 233 of the "Railway Act" had not been complied with. These facts being found by the Board, the question of jurisdiction of the Board to make the order appeared to be obviously concluded by a reference to section 230 of the "Railway Act," coupled with sub-sections (*h*) and (*i*) of section 30 of the same Act, and I dismissed the application accordingly.

Application refused with costs.

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*March 27.
*April 7.

THE CANADIAN NORTHERN QUEBEC RAILWAY COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

ALEXANDER NAUD (DEFENDANT) .. RESPONDENT.

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

Arbitration and award — Procedure — Prolonging date for award — Special circumstances—"Railway Act," R.S.C., 1906, c. 37, s. 204.

On an arbitration respecting compensation to be paid for lands taken under the "Railway Act," R.S.C., 1906, ch. 37, the arbitrators had fixed a day for their award according to the provisions of section 204. After some proceedings before them it was arranged, for the convenience of counsel for the parties, that further proceedings should be suspended until the return of counsel who were obliged to be present at the sittings of the Judicial Committee of the Privy Council and nothing further was done until after the return of counsel from abroad at a date later than the time so fixed for the award. The arbitrators had not prolonged the time for making the award but, upon reassembling after the day originally fixed had passed, they fixed a later date for that purpose. The company's arbitrator and counsel then refused to take part in any subsequent proceedings and the two remaining arbitrators continued the hearing and made an award in favour of the claimant greater than that offered by the company for the lands expropriated. In an action by the company to have the award set aside and for a declaration that the sum offered should be the compensation payable for the lands,

Held, Fitzpatrick C.J. and Anglin J. dissenting, that, in the circumstances of the case, the company should not be permitted to object to the manner in which the arbitrators had proceeded in prolonging the time and making the award. The appeal from the judgment of the Court of King's Bench (Q.R. 22 K.B. 221), declaring the award to have been validly made was, consequently, dismissed with costs.

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

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APPEAL from the judgment of the Court of King's Bench, appeal side(1), by which an appeal from the judgment of Lemieux J., in the Superior Court, District of Quebec(2), was dismissed with costs and the award of arbitrators under the "Railway Act," R.S.C., 1906, ch. 37, stood confirmed.

The circumstances of the case are stated in the head-note and in the judgments now reported.

G. G. Stuart K.C. for the appellants.

Eusèbe Belleau K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—I have read Sir Louis Davies's judgment and were it possible for me to accept his construction of the arrangement made between counsel and the arbitrators at the adjournment of the proceedings on the 18th of January, I would have no hesitation in adopting his conclusion. Unfortunately the evidence of what occurred as given by Mr. Belleau, the respondent's counsel, and Mr. Mayrand, his arbitrator, convinces me that it was then agreed there would be an adjournment until the 26th of January, on which latter date the arbitrators would again meet, and if counsel were not then able to be present, a further postponement would be made until their return from England. The minute of the proceedings of the 18th January is very clear and explicit; it reads: "L'Enquête est ajournée au 26 Janvier courant à 2 heures p.m." It is significant that Mr. Belleau drew the attention of the arbitrators to the statute and insisted that the delay to make the

(1) Q.R. 22 K.B. 221.

(2) Q.R. 42 S.C. 121.

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award should be extended if there was to be a postponement beyond the 15th of February, the date fixed for that purpose at their first meeting, as required by the express terms of section 204 of the "Railway Act." This was clear notice to the arbitrators and if, at the time they did not intend to meet on the 26th January as the appellants contend, it is inconceivable that they did not then provide for the important contingency indicated by respondent's counsel. The award was not made within the delay and the time was not enlarged. There was no meeting on the 26th January nor on any day until after the delay fixed by the arbitrators at their first meeting on or before which their award would be made, and the award made at a subsequent date should be set aside.

I would allow the appeal with costs.

DAVIES J.—This was an appeal from the judgment of the Court of King's Bench, affirming the judgment of the Superior Court of Quebec, refusing to set aside an award made in the respondent's favour for the value of a piece of land expropriated by the railway company. The ground mainly relied upon by the appellants for setting aside the award was that the arbitrators in extending the time for making the award to a further day than that which they had first fixed upon, had not strictly complied with section 204 of the "Railway Act" of Canada, but had made such extension after the time first fixed had elapsed.

It appears to me that the result of this appeal must depend upon the appreciation given to the understanding and agreement made and reached by all the parties and their counsel on the 18th January, as to the postponement of the arbitration proceedings.

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Davies J.

After the arbitrators were appointed they met, and, on the 18th January, after having heard some evidence, counsel intimated that they desired to have the proceedings adjourned so as to enable them to attend the Judicial Committee of the Privy Council in London, and suggested that an adjournment should take place till the 26th January on the understanding that if they were then unable to be present the proceedings should be prolonged until counsel's return from England, and should then be resumed. The 15th February had been originally fixed by the arbitrators as the date, under the section of the statute, for making their award and, when the proceedings were adjourned at counsel's request as above stated, no definite day was named by the arbitrators extending the time from the 15th February. On the return of counsel from England, however, a majority of the arbitrators met and fixed the 15th June as the time for making the award. The company's arbitrator and counsel refused to recognize or attend any of these later arbitration proceedings on the ground that, failing to make an extension of the time for making their award before the 15th day of February, the arbitrators had ceased to have any jurisdiction, and all further proceedings were *ultra vires*.

Whether in making the extension at the time they did the arbitrators acted within their powers or not, depends, in my opinion, upon the construction of the consent agreement respecting the postponement. As I construe that agreement, it provided for a prolongation of the proceedings and their resumption after counsel's return to Quebec. The fact that the arbitrators failed to make an entry before the 15th February of an extension of

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time for the making of their award either at the adjournment on the 18th or on the 26th January, does not vitiate or render null and void all the further proceedings. Such extension was made by the majority of the arbitrators who met after counsel's return when they fixed the 15th June. The company's arbitrator had full notice of all these meetings.

I do not think, under the circumstances and the agreement and understanding reached, that it was too late to name and fix such a date when the return of counsel enabled the arbitrators to resume the proceedings. Their action in so naming the day was an action which must be held to have been made with the consent of the parties; and I do not think the technical point relied upon by the appellants that such prolongation must necessarily be made before the lapse of the day originally fixed for making the award should, under such circumstances as existed in this case, be given effect to, or that it is open to the railway company, after a delay obtained at their own request, to ask that effect be given to such an objection.

The appeal should be dismissed with costs.

IDINGTON J.—The first question raised herein is upon the construction of section 204 of the "Railway Act," which is as follows:—

204. A majority of the arbitrators, at the first meeting after their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made, and if the same is not made on or before such day, or some other day to which the time for making it has, either by the consent of the parties, or by resolution of the arbitrators, or by the sole arbitrator, been prolonged, then the sum offered by the company, as aforesaid, shall be the compensation to be paid by the company.

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The arbitrators had proceeded at some considerable length with their inquiry after having as required by this section named the fifteenth of February then next as the date on or before which their award should be made.

On the eighteenth of January it seems they had a meeting at which it was intimated counsel on both sides had business that would call them before the Privy Council and they might have to leave for England on or before the 26th January, then named as an otherwise convenient day for further proceeding with the continuation of the reference.

There is no dispute about the fact that it was agreed as a matter of courtesy to counsel that the continuation of the reference should be enlarged if counsel were called away on or before the 26th January until such time as they should have returned from England.

The counsel left Quebec for England, as anticipated, either on the 26th January or before. When the arbitrators assembled pursuant to adjournment at the place of sitting on the 26th January, no one met them, and they found or assumed as fact that counsel had gone to England.

The arbitrators disagree slightly as to what exactly was done or said on that day, or 18th of same month, relative to need of a formal record being made of the enlargement till after the return of counsel and to the fixing another date for the making of the award.

Counsel for the appellant now argues, however, that all his side agreed to was that the board were to meet formally, fix a new date limiting the time for making the award, and only then postpone or adjourn, and that to a fixed day.

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There is no such record. There is not a scrape of a pen to indicate that the consent of appellants was expressly made so conditional, and so peculiarly conditional, and the learned trial judge has made a finding of fact undisturbed in appeal which leaves no room for such conditional form of consent having any operation.

There is not a shadow of doubt that all of them and appellant had agreed that the matter of further proceeding with the reference should stand over and await the return of counsel from England.

That they could not return within the time originally fixed for making the award must have been well known to all concerned. This consent by appellants seems to me, in any view one takes consistently with the findings of fact, clearly to delegate to the arbitrators the naming of a new day (which was ultimately done by the arbitrators) and to imply that it mattered not when this was done if done within a reasonable time. The reasonableness of the time fixed, under the circumstances, is not questioned. The reasonable course of awaiting their return before fixing a new date which perchance might prove too early or too remote does not seem open to question. The date was fixed as soon as the counsel had returned from England and the proceedings were then renewed, but the arbitrator named by the appellant, no doubt acting on its suggestion, refused to act longer.

Such a course of dealing seems to me a wretched piece of bad faith which deserved the rebuke the courts below have given it.

The action of the arbitrator was within what was manifestly the purpose of the appellant's own consent and the respondent is not to be penalized because they

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chose to act within that but failed to give it the consecration of forms they might have adopted and acted upon without such consent.

Then in the next place appellant contends that in dealing with the matters submitted the majority of the arbitrators exceeded the terms of the submission by allowing for items they had no power to make any allowance for. The submission was intended to cover the estimating of compensation to be made for taking real estate of which a part was taken from the respondent's mill-dam. Clearly that involved or might involve just such items as allowances were made for and now complained of.

But appellant's counsel, it seems, proposed some questions to a witness which the learned trial judge ruled were not admissible and now claims that as a result the trial ought to be set aside.

The learned trial judge when making his ruling pointed out to counsel that it would not be possible to pass satisfactorily upon the question relative to excess of jurisdiction without knowing what the evidence was which had been put before the board.

I think the learned judge was right in this view whether technically or not his ruling was correct. The ruling itself did not cause any miscarriage of justice.

As counsel refused to place before the court the evidence by means of which alone the limits of the inquiry could be properly understood, I think he cannot now complain.

Even now, as he declines to tell us just what in substance had been so refused to the learned judge, and why it should not have been given, or wherein exactly he does complain, save in regard to the ruling,

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I think the inferences relative to its substantial nature must be against his contention.

The appeal should be dismissed with costs.

DUFF J.—I concur in dismissing this appeal. The respondent appeared at the first meeting of the arbitrators and was ready to proceed. To meet the convenience of the railway company there was an adjournment, and it was distinctly understood that in consequence of the adjournment it might not be possible for the arbitration to proceed until the return of counsel from Europe; and that if that proved to be so the arbitration was to go on, on a date to be fixed by the arbitrators.

It was, I think, clearly implied that the railway company would concur in any steps that might be necessary to enable that to be done. It is true it was supposed that the time would be prolonged by the action of the arbitrators themselves; but it was never in the contemplation of anybody that the respondent should lose his status by an oversight of the arbitrators. The railway company ought not to be permitted in violation of the spirit of the arrangement entered into at their behest and for the purpose of conferring a benefit upon them to raise the purely technical and altogether conscienceless objection which is now put forward.

As to the other point I can see no ground whatever for thinking that the arbitrators have considered elements of compensation that ought not to have been considered.

ANGLIN J. (dissenting).—I have very reluctantly come to the conclusion that the appeal should be allowed.

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While I think the evidence open to the construction that it was understood between counsel on the 18th of January that in the event of their being unable to proceed on the 26th of January the arbitration proceedings should stand enlarged until their return from their prospective trip to England, and that there should be a corresponding extension of the time for making the award, it leaves no room for doubt that it was intended and agreed that this extension should be effected by the arbitrators at a meeting to be held on the 26th of January. It was never agreed or intended that the extension of the time for making the award required by section 204 of the "Railway Act" should be effected by the consent of counsel *proprio vigore*. The 15th February was originally fixed by the arbitrators as the date on or before which their award should be made. There was no extension of that period before it expired, and upon its expiry the arbitrators were *functi* and they were thereafter incapable of extending the time for, or of making a valid award.

But assuming in favour of the respondent that the understanding between counsel on the 18th of January and what occurred on the 25th of January, when they met and expressed to one another their purpose not to appear *pro formâ* before the arbitrators on the following day, should be taken as implying and evidencing a consent that the time for the making of the award should be extended until after their return from England, that would not, in my opinion, suffice to keep the arbitration alive beyond the 15th of February. Section 204 of the "Railway Act" is as follows:—

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204. A majority of the arbitrators, at the first meeting after their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made, and if the same is not made on or before such day, or some other day to which the time for making it has, either by the consent of the parties, or by resolution of the arbitrators, or by the sole arbitrator, been prolonged, then the sum offered by the company, as aforesaid, shall be the compensation to be paid by the company.

The clear purpose of this section appears to be to require that from the initiation of the proceedings of the arbitrators there shall always be a definite and certain date, original or extended, on or before which the award shall be made, and upon the expiry of which without an award being made the arbitration shall come to an end and the statutory consequences shall ensue. The requirement that the date to be fixed originally shall be a definite and ascertained day is, I think, equally applicable and for the same reason to any date to which the time may be extended. The statute, in my opinion, does not contemplate an extension for an indefinite period or to a date which is not certain. Assuming that counsel and arbitrators agreed that the time for making the award should be extended until after the return of counsel from England and to a day to be then fixed, that, in my opinion, would not be such an extension as the statute contemplates or authorizes and the arbitration came to an end on the 15th of February, the only date ever fixed as the limit of time for the making of the award.

I, therefore, find myself driven to the conclusion that the alleged award of the 1st June, 1911, cannot stand. I feel, however, that I should not part with this case without animadverting upon the conduct of the plaintiffs in pressing this action as most dishonourable and reprehensible. It is sharp practice of a kind

which, fortunately, we rarely encounter. But unfortunately upon the view which I hold as to the purpose and effect of section 204 of the statute we are in this instance powerless to prevent its success.

BRODEUR J.—Nous avons dans cette cause à interpréter l'article 204 de l'Acte des Chemins de fer du Canada qui se lit comme suit:— Brodeur J.

La majorité des arbitres, à leur première séance après leur nomination, ou l'arbitre unique, fixe le jour auquel ou avant lequel la sentence est rendue; et, si elle n'est pas rendue le ou avant ce jour, ou un autre auquel, *du consentement des parties* ou par résolution des arbitres, elle a été ajournée, le montant offert par la compagnie est l'indemnité qu'elle doit payer.

L'appelante et l'intimé étaient à procéder devant les arbitres pour faire déterminer l'indemnité qui devait être payée au défendeur pour son terrain exproprié. L'enquête était à peu près terminée lorsque le 18 janvier, 1911, la compagnie de chemin de fer demanda à faire remettre la cause au 26 du même mois, afin de pouvoir produire une preuve additionnelle qu'elle espérait se procurer pour cette date. L'avocat du défendeur, intimé, s'y objecta et entr'autres raisons il allégua qu'il devait sous peu partir pour l'Angleterre avec l'avocat de l'appelante pour plaider une cause devant le Conseil Privé. Il fut convenu alors que si les parties ne pouvaient pas procéder le 26 janvier, l'enquête serait ajournée jusqu'à ce que les avocats fussent revenus de leur voyage, et alors un jour serait fixé pour la continuer.

Les arbitres avaient au commencement de l'enquête fixé le 15 février comme date à laquelle ils devaient rendre leur sentence arbitrale, et à raison de cela, lorsqu'il fut question d'ajourner la cause,

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l'avocat de l'intimé avait demandé aux commissaires de ne pas oublier d'étendre le delai si toutefois ils ne procédaient pas le 26 janvier. Le 26 janvier les arbitres se rendirent au palais de justice, qui était l'endroit où se faisait l'enquête, et comme les avocats étaient partis, ou sur le point de partir pour l'Angleterre ils ne se sont pas réunis et aucune entrée ne fut alors faite dans leur livre de minutes.

Au retour des avocats, dans le mois de mai suivant, deux des arbitres, (celui qui représentait la compagnie refusant de procéder,) donnèrent avis aux parties de terminer et entrèrent dans leur livre de délibérations les faits tels qu'ils s'étaient passés. Mais l'appelante refusa de procéder et les deux arbitres rendirent leur sentence. Par son action l'appelante demande à faire mettre de côté cette sentence arbitrale parce que les arbitres n'avaient plus le droit d'agir et elle veut faire condamner le défendeur, intimé, à accepter le montant qu'elle avait offert avec son avis d'expropriation. L'article 204 de l'Acte des chemins de fer a déjà fait l'objet de plusieurs jugements et dans chaque cas il a été décidé qu'il ne devait pas être appliqué rigoureusement lorsque l'intention des parties est évidente.

Ainsi dans la cause de *Shannon* v. *The Montreal Park and Island Railway Co.*(1), l'honourable juge Taschereau s'est exprimé comme suit:—

> We are bound to construe the sections in question so as to ensure the attainment of that object, and the carrying out of their provisions to their true intent, meaning and spirit. The company would have us read this section 156 textually and gain an advantage over the expropriated owner.

(1) 28 Can. S.C.R. 374.

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La cour d'appel dans la cause *Ontario and Quebec Railway Co.* v. *La Fabrique de Sainte-Anne*(1), a décidé que le consentement d'ajourner peut résulter des faits et des circonstances. Cette dernière cause a beaucoup d'analogie avec la cause actuelle. Les parties avaient procédé à l'enquête et avaient ajourné de temps en temps, et par oubli ou autrement on n'avait pas prorogé la date où la sentence devait être rendue de sorte que quand l'enquête fût terminée et que la cause fût prête à être décidée, le délai fixé par les arbitres était expiré. Les tribunaux ont décidé qu'il y avait un consentement implicite d'ajourner à plus tard la sentence arbitrale et que par conséquent la compagnie de chemin de fer ne pouvait être justifiable de révoquer le consentement qu'elle avait donné.

Il est incontestable que dans la présente instance la compagnie a consenti à ce que la cause fut continuée jusqu'au retour d'Angleterre de son avocat et de l'avocat de l'intimé.

Les minutes des procédures des arbitres étaient ordinairement tenues par l'arbitre de la compagnie et s'il y a eu omission de sa part d'entrer l'ajournement et la convention qui avait été faite le défendeur, intimé, ne doit certainement pas en souffrir.

Je considère que ce serait une grave injustice que de priver dans les circonstances ce dernier de l'indemnité que la majorité des arbitres lui a accordée et je suis d'opinion que le jugement de la cour d'appel

(1) M.L.R. 7 Q.B. 110.

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

Appeal dismissed with costs.

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

Solicitors for the respondent: *Pelletier, Belleau, Baillargeon & Belleau.*

THE CANADIAN PACIFIC RAILWAY COMPANY ..... } APPELLANTS; 1910 *June 15.

AND

THE CITY OF OTTAWA AND CERTAIN RESIDENTS OF THE CITY OF OTTAWA ..... } RESPONDENTS.

(GATINEAU BRANCH CASE.)

Board of Railway Commissioners—Appeals on questions of law—Stated case—Submission of specific question—Practice—Construction of statute—R.S.C., 1906, *c.* 37, *s.* 55 *and s.* 56, *s.-s.* 3.

An appeal, under the provisions of section 55, or section 56, subsection 3, of the "Railway Act," R.S.C., 1906, ch. 37, should not be entertained by the Supreme Court of Canada until the Board of Railway Commissioners for Canada has stated the case in writing and submitted for the opinion of the court some question which, in the opinion of the board, is a question of law. (*Cf.* *"Regina Rates Case,"* 44 Can. S.C.R. 328, where this case was followed by Anglin J., and 45 Can. S.C.R. at pp. 323 to 328.)

APPEAL by leave of the Board of Railway Commissioners for Canada, from an order of the board, dated 26th April, 1910, respecting the operation of the trains on the Gatineau Branch of the Canadian Pacific Railway.

On the 26th of April, 1910, on the application of certain residents of the City of Ottawa residing for the Summer seasons at various points of the branch line of the railway in question, ordered that, during the period from the 1st of May to the 1st of October in

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

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each year, the company should operate all its passenger trains, both north-bound and south-bound, on its Gatineau Branch, from and to a point at or near Sappers' Bridge, in the City of Ottawa, and furnish adequate and suitable accommodation for receiving and delivering passengers at that point.

On an application by the railway company for leave to appeal from the order, upon questions of law, leave to appeal was granted by the board, subject to and upon terms that the appeal should be prosecuted with expedition, but the order granting such leave did not state a case in writing submitting for the opinion of the court any question which, in the opinion of the board, was a question of law. (See Cam. S.C. Prac., 2 ed., at p. 799, where the questions of law suggested on behalf of the appellants, on the application to the board, are recited.)

Chrysler K.C. appeared for the appellants.

Taylor McVeity for the City of Ottawa.

John J. O'Meara for the residents of the City of Ottawa interested.

The court, of its own motion, took objection to the form of the submission of the case by the board.

Chrysler K.C., on behalf of the appellants, contended that, it appeared by the printed case that the hearing before the board consisted of a discussion touching the previous history of the portion of the line of railway situated between Sappers' Bridge and the approaches to Alexandra Bridge along the east side of the Rideau Canal which was occupied by the

railway company by virtue of a lease from the Crown, for purposes specially indicated in the lease, by which, moreover, the lessees were prohibited from using the demised lands for purposes other than rights-of-way, from placing there more than three tracks or using any of such tracks for the purposes of sidings, from storing, side-tracking or allowing to stand thereon any cars, rolling stock or other movable property, and from erecting buildings of any description upon the premises; that the order was made without jurisdiction and that it could not be supported by the evidence nor by a proper construction of section 284 of the "Railway Act."

After consultation, the following opinion, for the court, was delivered by

GIROUARD J.—The majority of the court is of the opinion that we cannot hear the appeal, at the present time at least, as the board has not submitted any question which, in the opinion of the board, is a question of law.

. . . .

Subsequently, on 2nd February, 1911, on an application to the registrar in chambers, and by consent of the parties, the appeal was dismissed with costs.

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*Nov. 27-29.

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*Oct. 14.

IN THE MATTER OF SECTIONS FOUR AND SEVENTY OF THE CANADIAN "INSURANCE ACT, 1910."

REFERENCE BY THE GOVERNOR-GENERAL IN COUNCIL.

Constitutional law—Insurance—Foreign company doing business in Canada—Dominion license—9 & 10 Edw. VII. c. 32, ss. 4 and 70.

Held, per Fitzpatrick C.J. and Davies J., that sections 4 and 70 of The Act 9 & 10 Edw. VII. ch. 32 (the "Insurance Act, 1910") are not *ultra vires* of the Parliament of Canada. Idington, Duff, Anglin and Brodeur JJ., *contra.*

Held, per Fitzpatrick C.J., and Davies J., that section 4 of said Act operates to prohibit an insurance company incorporated by a foreign state from carrying on its business within Canada if it does not hold a license from the Minister under the said Act and if such carrying on of the business is confined to a single province.

Per Idington J.—Section 4 does so prohibit if, and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies as well as others within the terms of which is embraced so much that is clearly *ultra vires.*

Per Duff, Anglin and Brodeur JJ.—The section would effect such prohibition if it were *intra vires.*

REFERENCE by the Governor General in Council of questions respecting the "Insurance Act, 1910," to the Supreme Court of Canada for hearing and consideration.

The following are the questions so submitted.

P.C. 1259.

Certified Copy of a Report of the Committee of the Privy Council, approved by His Excellency the Administrator on the 29th June, 1910.

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

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IN RE "INSURANCE ACT, 1910."

On a memorandum dated 8th June, 1910, from the Minister of Justice, recommending that the following questions be referred to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of section 60 of the "Supreme Court Act":—

1. Are sections 4 and 70 of the "Insurance Act, 1910," or any or what part or parts of the said sections *ultra vires* of the Parliament of Canada ?

2. Does section 4 of the "Insurance Act, 1910," operate to prohibt an insurance company incorporated by a foreign state from carrying on the business of insurance within Canada if such company do not hold a license from the Minister under the said Act, and if such carrying on of the business is confined to a single province ?

The Committee submit the above recommendation for Your Excellency's approval.

RODOLPHE BOUDREAU,
Clerk of the Privy Council.

The following were the counsel who appeared at the hearing.

Newcombe K.C. and *Lafleur K.C.* for the Attorney-General of Canada.

Nesbitt K.C., Aimé Geoffrion K.C., Bayly K.C. and *Christopher C. Robinson* for the Provinces of Ontario, Quebec, New Brunswick and Manitoba.

S. B. Woods K.C. for the Provinces of Alberta and Saskatchewan.

Wegenast for the Manufacturers' Association of Canada.

Gaudet for the Canadian Insurance Federation.

THE CHIEF JUSTICE.—The question in this reference is a narrow one, namely, whether section 4 of

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the "Insurance Act, 1910," 9 and 10 Edw. VII. ch. 32, and section 70 which fixes the penalty for violations of section 4 are *ultra vires* of the Parliament of Canada.

Section 4 reads as follows:—

> In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister.

It is quite obvious that this Act is intended merely to regulate the business of insurance in Canada and in the *Prohibition Case*(1), Lord Watson said that in *Citizens Insurance Company* v. *Parsons*(2), the business of fire insurance was admitted to be a trade.

A review of the insurance legislation of Canada from 1868 downward, which is all set out in Mr. Newcombe's factum, shews that the law as it was at the time of *The Citizens Ins. Co.* v. *Parsons*(2), contains substantially the same provision as section 4 now in question. The court is not called upon to consider the question as to how far the Parliament of Canada could override the statutory conditions of any province by legislating with respect to the conditions which should attach to all contracts of insurance in Canada. The question narrows itself down apparently to this: Assuming that under property and civil rights the provincial legislatures have jurisdiction to legislate generally with respect to insurance companies doing

(1) *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348, at p. 363.

(2) 7 App. Cas. 96.

business in the province, in view of the fact that insurance is a class of business in which it is essential that the public interest should be safeguarded, and this business has always been of great importance and particularly in recent years has grown to be of enormous magnitude, cannot the Dominion Parliament legislate with respect to this subject under the head of "Peace, Order and Good Government," just as it has been held to have jurisdiction in the matter of intoxicating liquors? The following references in support of this proposition are of importance.

In *The Citizens Ins. Co.* v. *Parsons*(1), at page 114, Sir Montague Smith says:—

> It was further argued on the part of the Appellants that the Ontario Act was inconsistent with the Act of the Dominion Parliament, 38 Vict. ch. 20, which requires fire insurance companies to obtain licenses from the Minister of Finance as a condition to their carrying on the business of insurance in the Dominion, and that it was beyond the competency of the provincial legislature to subject companies who had obtained such licenses, as the appellants companies had done, to the conditions imposed by the Ontario Act. But the Legislation does not really conflict or present any inconsistency. The statute of the Dominion Parliament enacts a general law applicable to the whole Dominion requiring all insurance companies, whether incorporated by foreign, Dominion or Provincial authority to obtain a license from the Minister of Finance, to be granted only upon compliance with the conditions prescribed by the Act. Assuming this Act to be within the competency of the Dominion Parliament, as a general law applicable to foreign and domestic corporations, it in no way interferes with the authority of the legislature of the Province of Ontario to legislate in relation to the contracts which corporations may enter into in that province.

Sir Montague Smith in the same judgment refers to the weight to be attached to the exercise of jurisdiction by the Federal Parliament.

In the argument of the *Dominion Liquor License Case*(2), at p. 67, Sir Farrer, afterwards Lord, Her-

(1) 7 App. Cas. 96. (2) Cf. 6 Can. Gaz. 152.

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schell, in his argument, referring to the Dominion "Insurance Act," says:—

I do not think it was questioned that the Dominion Act was a perfectly good Act, which did require all insurance companies throughout the Dominion to take out a Dominion license but it was held that the Ontario legislation was not inconsistent with it.

Sir Montague Smith remarked:—

I forget what the facts were, but I suppose that the case did not interfere with the license to be taken out under the Dominion Act.

In short it may be safely stated that the whole report of the *Parsons Case*(1) shews that it was assumed by both sides that it was within the power of the Parliament of Canada to grant licenses.

Again, at p. 165, Sir Farrer Herschell says:—

Take the statute which was under consideration in the *Citizens Ins. Co.* v. *Parsons* (7 App. Cas. 96), which was in no way disapproved by that judgment. The Dominion Parliament of Canada had said, in order for the general safety and to prevent people from being swindled by bubble companies, no insurance company shall carry on business in the Dominion without a license; that license being granted by the Dominion government. Of course, these insurance companies carried on their business in the provinces; there was nowhere else for them to carry it on, it may in one or it may in all. But the Parliament said: you shall not carry on your business without a license from the Dominion Government, and certainly no suggestion was made by this Board in that case that the law was invalid, because that would have been an easy solution of the matter. Instead of that, the court proceeded to shew that the legislation in the particular case was not inconsistent with the general Dominion legislation.

It appears by the last returns published by the Insurance Department under the authority of Parliament and of the legislatures of Ontario, Quebec and Manitoba that:—

1. The amount of fire insurance in force in Canada at December 31, 1912, in companies licensed by the Dominion was $2,684,355,895, and in companies licensed by the provinces, $949,863,538.

(1) 7 App. Cas. 96.

The premiums paid for this insurance in 1912 amounted to $30,144,264.

The amount of life insurance in force at the said date in companies licensed by the Dominion was $1,070,308,669, and in companies licensed by the provinces, $14,700,988, the number of Dominion policies being 1,497,397.

The premiums paid in 1912 on this insurance amounted to $36,092,719.

The amount of premiums paid to companies licensed by the Dominion in 1912 for insurance other than fire and life amounted to $10,262,049.

2. No figures are available shewing the amount of insurance in force at the time of Confederation. The earliest report is that for the business of the year 1872 from which I take the following:—

The amount of fire insurance in force in December 31, 1872, was $251,725,940.

The amount of premiums paid in 1872 was $2,653,612.

The amount of life insurance in force at December 31, 1872, was $61,365,648.

The amount of premiums paid in 1872 on this insurance was $2,068,953.

So far as appears from this report no return was made of business other than fire and life insurance.

That the Parliament of Canada may legislate with respect to matters which affect property and civil rights when they have attained such dimensions as to affect the body politic of the Dominion, is clearly established: See *Russell* v. *The Queen*(1), at page 839. Also, and particularly, see the judgment of Lord

(1) 7 App. Cas. 829.

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Watson in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), at pages 359 and 360.

My answer to the first question is, No.

My answer to the second question is, Yes.

DAVIES J.—I do not desire in these reasons for my answers to the questions put upon this reference to repeat what I have already said in the reasons for my answers to the questions on the reference respecting companies generally.

It is impossible, however, to avoid some repetition if one is to make one's opinion in the special questions submitted at all clear.

The Dominion Parliament has doubtless the right to impose restrictions upon companies of its own creation enacted in section 4 now under discussion. That I understand is not questioned.

It is conceded on the other hand that the exclusive legislative control over provincial insurance companies carrying on their business wholly within the province rests with the province creating such companies. The legislation here in question recognizes this and exempts from its operation and application every such provincial company.

I have already, in the *Companies Reference* (2), expressed the opinion that the limitation upon the provincial objects is amongst other things territorial and that the Dominion statute professing to confer upon them extra territorial powers by means of a license is *ultra vires.*

If I am right, the Act does not apply at all to provincial companies. Of course, if there is no territorial limitation upon the powers of those companies, and

(1) [1896] A.C. 348. (2) 48 Can. S.C.R. 331.

they can legally carry on their business extra territorially and throughout the Dominion, they would not come within the exception of the Act.

My object in mentioning this is to have it clearly understood that the Act, the section of which is in question and under review, exempts from its application provincial companies confining their business to the provinces creating them which in my opinion they are bound to do.

The exemption is based upon the implication that the limitation upon the exclusive powers given to the provinces to incorporate companies "with provincial objects" is at any rate a territorial one, and the Dominion Parliament proceeding upon that implication and assumption and conceding that such exclusive power should not be invaded by its legislation, declares that the Act shall not apply to such companies. It was evidently not the intention of the Dominion Parliament to entrench upon this exclusive power given to the local legislatures, but while carefully excluding from the operation of the Act all provincial companies created by virtue of it, to enact Dominion legislation which should as far as possible effectively regulate and control the business of insurance as carried on generally throughout the whole Dominion by Canadian and foreign companies alike.

Counsel for the Dominion at bar submitted that the legislation in question could be supported on several of the enumerated powers of legislation assigned to the Dominion in the 91st section of its Constitutional Act. They relied upon the criminal law and the subject of aliens, but I am clearly of the opinion that the legislation cannot be supported under either of these enumerated powers. Parliament when enacting this insur-

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ance legislation was not dealing with the subject-matter of "aliens" as such or with criminal law as such. It was dealing with the subject-matter of insurance attempting to regulate that business so far as it was not within the exclusive powers of the province and as part of such regulations requiring insurance companies within its legislative jurisdiction to take out a license and make certain deposits of money with the Finance Minister and be subject to inspection while carrying on such business.

It was the regulation and not the prohibition of a business that Parliament was dealing with and I shall subsequently attempt to shew the distinction is of vital importance on one at least of the grounds on which the power of the Dominion to enact the legislation is concerned.

The other enumerated powers of the Dominion under which it was sought to uphold the validity of this legislation was that of "the regulation of trade and commerce." If section 4 in question can be brought within that enumerated power all doubt as to its validity would at once be ended.

In the case of *City of Fredericton* v. *The Queen* (1) this court held that the provisions of the "Canada Temperance Act, 1878," prohibiting the traffic in intoxicating liquors came within this enumerated power. On appeal to the Judicial Committee of the Privy Council, *sub nomine Russell* v. *The Queen* (2), this judgment was not sustained as coming within the regulation of trade and commerce, but was sustained, as I understand the judgment, on the ground that the Act in question came within the general powers of

(1) 3 Can. S.C.R. 505. (2) 7 App. Cas. 829.

legislation respecting peace, order and good government and not within the class of subjects assigned exclusively to the provincial legislatures. In the later prohibition case, *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(1), at pp. 362-3, Lord Watson, in stating the opinion of their Lordships on the case before them, said that the decision in *Russell* v. *The Queen*(2) must be accepted as an authority that the respective provisions of the "Canada Temperance Act, 1886," must receive effect as valid enactments relating to the peace, order and good government of Canada and he went on to explain that as these enactments were prohibitive and not regulative their Lordships were unable to regard them as regulations of trade and commerce. He further explains that the object of the Act was

> not to regulate retail transactions between those who trade in liquors and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted.

In other words, because the aim and purpose of the Act was not regulation but prohibition, their Lordships could not agree that it was legislation under the "Regulation of Trade and Commerce." The inference I draw from the language of the judgment is that if the provisions of the enactment there in question had been regulation instead of prohibition they would have been sustained as valid under the enumerated sub-section.

In the Judicial Committee in *Citizens Ins. Co.* v. *Parsons*(3), Sir Montague Smith said, at p. 113:—

(1) [1896] A.C. 348.
(2) 7 App. Cas. 829.
(3) 7 App. Cas. 96.

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Construing, therefore, the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province.

In this view of the case it became unnecessary to consider how far the general power to make regulations of trade and commerce when competently exercised by the Dominion Parliament might legally modify or affect property and civil rights. But I take it as settled law now at any rate that regulation of trade and commerce when competently exercised by the Dominion Parliament may legally modify and affect any of the exclusive powers of the legislatures of the provinces.

The point decided in the *Citizens Ins. Co.* v. *Parsons*(1), was of an extremely limited character and to the effect that the regulation of insurance contracts within a province as to the terms and conditions of the contract was within the legislative power of the province as a matter of property and civil rights and did not affect the regulations of trade and commerce.

It is conceded that the Judicial Committee has never yet expressly assigned to this power over trade and commerce, any Dominion legislation which has come before it. The furthest they have gone in that direction is I think to be found in the above quotation

(1) 7 App. Cas. 96.

from the judgment of the Judicial Committee in the *Citizens Insurance Company Case*(1),

it may be the words would include general regulation of trade throughout the whole Dominion.

It seems to me that such a general regulation of trade though confined to one particular branch of trade would also come within the jurisdiction of the Dominion and that this special legislation now in controversy may well be held within that enumerated power.

That insurance is a trade in one sense at least seems clear, and that it is one affecting the whole Dominion and all classes and conditions of its people is beyond controversy. That in some of its branches at least, such as the insurance of cargoes or property carried from one province to another by land or sea or both, it is a subject-matter of interprovincial concern which could only properly be legislated upon by the Dominion Parliament would, on the construction I put upon the powers of provincial companies, seem also clear. My general conclusion in the absence of any distinct authority is that the subject-matter of insurance generally throughout the Dominion but not including provincial insurance limited to the province may well be held as within the regulative power of Parliament under the enumerated clause relating to trade and commerce. The legislation in question here is assuredly of a character that no provincial legislature could competently enact. So far as provincial legislatures can competently deal with the subject-matter of insurance companies the Act in question in terms does not apply or interfere. The section under consideration would seem undoubtedly good so far as it applied to interprovincial trade insurance and my conclusion

(1) 7 App. Cas. 96.

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on the whole subject is that it may fairly on the authority of the decision of the prohibition case respecting the validity of the "Canada Temperance Act" be held good as a regulation of trade.

If I am wrong in that then I hold that it comes within the Dominion Parliament's general power of legislation for the peace, order and good government of Canada. Holding as I do the view that the limitation upon the provincial power to incorporate companies is territorial and confined to the provinces, then all other legislative power upon that subject-matter must be vested in the Dominion Parliament. If on the general question of the incorporation of companies the power of the provinces to legislate is strictly limited to their respective territorial areas, then it would necessarily follow that all companies with power larger than provincial must be incorporated by the Dominion Parliament and of course be entirely subject to its jurisdiction and control.

If the legislation in question is sustainable only on the general powers of the Dominion relating to peace, order and good government then in my opinion the subject-matter of it is one which to-day has become of national interest and importance, affecting the body politic of the Dominion as a whole and being so would on the authority of the *Prohibition Case*(1), be paramount legislation.

It would seem strange indeed if the Parliament of Canada, on a subject-matter affecting directly the lives, property and interests of a very large proportion of its inhabitants could not legislate either to prohibit foreign companies which may or may not be respon-

(1) [1896] A.C. 348.

sible or reliable from engaging in the business at all in Canada; and still more strange if such Parliament could not regulate these companies in the carrying on of their business in Canada by requiring them to make deposits of money as an assurance of their reliability and take out a license and subject themselves to inspection or otherwise as Parliament may decide.

As a fact ever since the year following Confederation, now more than forty years ago, Parliament has assumed the right so to legislate and the legislation for the past 25 years at least has been substantially in the form the constitutionality of which is now challenged.

The subject-matter of the legislation in question is of a Dominion and not of a provincial character. In its Dominion aspect it is not certainly within any of the exclusive powers of the provincial legislatures and so far as companies incorporated by these legislatures can competently and legally operate and carry on their business they are exempted from the operation of the legislation.

The policy of regulating the business of insurance throughout Canada by foreign companies as well as Dominion companies to the extent of requiring deposits from them as a guarantee of their responsibility and subjecting them to inspection and to the obligation of obtaining a license to operate has been a feature of Dominion legislation since 1868, the year following the Union. It is beyond doubt regulative legislation only and its subject-matter may, I think, be appropriately described as the trade or business of insurance. The fact that with provincial companies

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excepted the legislation applies to foreign companies and to Dominion companies only and that it has remained unchallenged as to its constitutionality until now is not without significance and weight.

The business of life insurance alone in Canada carried on by the companies Dominion and foreign which come within the purview of the Act in question has to-day reached proportions which may well be described as enormous if not colossal. As to the mere amount of this assurance, it runs up into hundreds of millions of dollars. The ramifications of such business extend to every city, town, village and hamlet of the Dominion. The beneficiaries of these assurances are constantly moving from one part of the Dominion to the other. The failure of one or more of these companies carrying the enormous obligations their contracts assume in Canada would be a national disaster. Their proper regulation and the conditions on which foreign companies should be permitted to operate in Canada would seem necessary therefore from a Dominion or national standpoint. The fact that any such foreign company may limit its operation for the time to a single province would not in my opinion relieve it from compliance with the law. It is the subject-matter of its operation which brings it within the control of the Dominion legislation and not the amount of those operations or the limits within which they are carried on. This observation would also apply to persons and not companies engaging in the insurance business.

But it is not alone because the companies to which the section extends are Dominion and foreign, nor because of the enormous proportions and extent to which the business covered by the legislation has

grown in volume and with respect to persons and properties which the subject-matter embraces affecting greatly the happiness, comfort and welfare of such a large and yearly increasing proportion of the Dominion's population, nor because some of its branches are clearly interprovincial, nor because the Dominion has exercised unchallenged legislative power with respect to it substantially in the form now before us for so many years that I hold this legislation to be valid but because the combination of these various facts and reasons convince me that the regulation and control of these insurance companies is necessary in the interests of the inhabitants of the Dominion as a whole and because I do not see how it would be possible for provincial legislation effectively to deal with the subject.

Lastly it seems to me that if the legislation is upheld under the Dominion general powers and not its enumerated ones the *Prohibition Case*(1), is authority that when so legislating on subject-matters which have attained national importance and affects the body politic of the Dominion the legislation is *plenary* and must be given effect to even if it affects subject-matters within the exclusive powers of the local legislatures.

As I have said, I think the subject-matter of this legislation has reached this state of national importance and in fact to a greater extent that had the sale of liquors prohibited by the "Canada Temperance Act" of 1886 and the legislation with regard to the form which the regulation should take is entirely within the province of the Dominion of Canada.

(1) [1896] A.C. 348.

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Having reached this conclusion as to the 4th section, it follows of course that section 70 providing sanctions for its due enforcement would also be valid.

For these reasons, I answer the first question in the negative and the second question in the affirmative.

IDINGTON J.—To answer any questions involving, as these now submitted do, an accurate apprehension of the power of Parliament, we must first ask ourselves whether the power asserted can be rested upon any of the enumerated legislative powers specifically assigned by section 91 of the "British North America Act" or by other sections thereof to the exclusive legislative authority of Parliament.

Whatever enactment can be rested thereon is maintainable. When it cannot be so maintained we must then ask if it touches upon any of the subject-matters assigned by section 92 or other section of the said Act to the exclusive legislative authority of the provincial legislatures.

If in any such case it trenches upon any of the powers thus assigned these legislatures, it is to that extent *ultra vires*.

If it can be maintained as resting solely upon the power given Parliament in section 91, over the "peace, order and good government" of Canada, without invoking any of the enumerated powers therein, and without trenching upon any of these powers given the legislatures, then it is *intra vires*.

What thus rests in this limitation of these words "peace, order and good government" in said section, I shall hereinafter refer to as the residual power of Parliament.

In a sense it is exclusive, but it is not what I refer to as the exclusive power of Parliament. This latter term I apply to what may be used to override all other powers conferred by said Act.

My observation of the needless confusion of thought which so often exists in the minds of those dealing with the "British North America Act," is my excuse for venturing to set out what seems elementary.

Counsel in submitting the question herein and supporting the legislation challenged, correctly apprehended the great value it would be in the way of maintaining same if he could bring it within the enumerated legislative powers I first referred to and sought to rest it upon sub-section 2 of section 91, specifying "The regulation of Trade and Commerce."

Notwithstanding all the learning gathered so carefully from dictionary, literary and legal authorities, I cannot find that the demonstration of what may in some instances be called a trade, even if insurance business fell within them in some such cases, does much to help us to interpret this phrase.

It has never struck me that the phrase "Trade and Commerce" could be properly broken into two or more pieces in order to give this sub-section its correct interpretation; and still less to make every trade, as such, subject to the exclusive authority of Parliament as a way out of the difficulty of finding an appropriate meaning for the whole phrase.

I do not think the busy insurance agent following his trade or calling, falls any more within the scope of this sub-section than the farmer, or fisherman, or blacksmith, or grocer, or anybody else following his trade; not even the lawyer following his honest trade, and undoubtedly having much to do with commerce.

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Life insurance as a whole hardly seems more fitted to be classed as within the ordinary meaning of trade and commerce. And accidents, against which insurance may be had, will happen outside of acts or transactions involved in trade and commerce. Guarantees are needed in many forms, but are not entirely confined to business involving trade and commerce.

And the chief branch of marine insurance, most closely related of all insurances to trade and commerce, seems to be excepted from the Act.

It is to be observed that this very legislation, so far as its principle of dealing with insurance companies foreign to a province is concerned, was before the court in the case of the *Citizens Ins. Co.* v. *Parsons* (1). And this very power over trade and commerce was there invoked to shew that the Ontario Act intituled "An Act to secure uniform conditions in Policies of Fire Insurance" was *ultra vires* a local legislature. The nature of the power is discussed on pages 112 and 113 of that case, and on page 114 the relation of the Ontario Legislature thereto is dealt with.

Can any one imagine that, if this power and its exclusive character overriding all local powers had been deemed to be what we are now asked to hold, the decision in that case would have been what it was and the judgment have stood so long the sheet anchor of provincial rights? I need not repeat here, but adopt what is said on pages 112 and 113, and refer in addition thereto to section 121. Why was that inserted if the Dominion Parliament was to have the sole interprovincial regulative power relative to trade and commerce?

(1) 7 App. Cas. 96.

In this connection we may refer with profit to the cases in the Supreme Court of the United States interpreting the section of their Constitution giving Congress its powers, and which reads thus in subsection 3:—

> To regulate commerce with foreign nations and among the several States and with the Indian tribes.

The latest decision thereon relative to this question of insurance seems to be *New York Life Ins. Co.* v. *Cravens*(1), and the court there held that the subject-matter of insurance did not fall within the term "commerce" as there used. See also *Paul* v. *Virginia* (2).

The decisions of the Judicial Committee of the Privy Council upon the subject of prohibition relative to the liquor traffic in the case of *Russell* v. *The Queen*(3), and *The Attorney-General for the Dominion* v. *The Attorneys-General for the Provinces*(4), seem to have proceeded upon the residual power in Parliament, though the court was invited there, as we are now, to rest upon the power to regulate trade and commerce.

It is true that in the first of these cases the court declined to specify on which ground it rested and intimated it was not to be taken as having discarded the power of trade and commerce. The chief point to be noticed in both cases is a reluctance to rely upon any of such specific powers though the subject-matter of the legislation in question there lent itself much more readily to give place to such an argument than does this Act dealing with all sorts of insurance. True

(1) 178 U.S.R. 389.
(2) 8 Wall. 168.
(3) 7 App. Cas. 829.
(4) [1898] AC. 700.

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it was said that Act was prohibitive and not regulative. Quite so, but must we assume that except by way of criminal legislation Parliament may prohibit anything it sees fit? Whatever may be well said of some kinds of insurance and their close relationship to the subjects of trade and commerce as being conceivably assignable in such an instrument as the "British North America Act" under the description used in and for the purpose of sub-section 2, when we consider the composite character of this insurance Act it seems impossible to rest it as an entirety upon the said sub-section. And if it were permissible for purposes of interpretation to trace the genesis of its drafting we should find the present pretensions were still more unfounded than they appear from what I have urged.

I am afraid we must put aside for the present this sub-section which has been brought out so often in despair to support doubtful arguments.

I think the old residual power of Parliament to make laws for the peace, order and good government of Canada, must alone be relied upon in this emergency.

I now turn to the first question and find the sections submitted apply to persons as well as companies, and the many questions involved in this first one may be simplified and best answered by testing the validity of such legislation when applied to the individual.

The section 4 reads thus:—

4. In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or

file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a license from the Minister.

Can I say that Parliament is acting *intra vires* when enacting that

no * * * person shall * * * grant any annuity on a life or lives * * * unless it be done by or on behalf of (some one) holding a license from the Minister?

Surely if there is any civil right everybody has been supposed to have enjoyed, it is that of doing this very thing and no person but the local legislature can take it away. If it be answered, this is an insurance Act and it is not within the purview of the Act to deal with wills or ordinary contracts, I ask how or where am I to draw the line?

I know of no such urgent situation as to take away from men their ordinary civil right even if some should expand the operation thereof beyond its daily use, and do so for other considerations than usually move thereto.

And if insurance can be so treated why not everything else men engage in or can engage in?

This assertion of power to put everyone under the license of the Minister, does not seem to me a thing that falls, as of course by mere assertion of Parliament desiring it, within the only power whereby it may try to invade the civil rights of one living in a province.

And what is true of the rights of a dweller in a province, must be true also regarding the rights of all his agents acting in the same province. Each is protected by the law of the province in regard to his contracts made within same province. Their contracts in these regards as well as in every other regard

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are good, and cannot be invalidated by anything Parliament may try to enact but cannot.

All that is involved therein and in the several ways specified in said section 4, I must hold as *ultra vires* Parliament.

Then as to insurance companies incorporated by a province, I think they must be held to have whilst acting in the province the same rights as the individuals I have referred to dwelling therein.

It was held in the case of *Citizens' Ins. Co.* v. *Parsons*(1), already referred to, that it was competent for the provincial legislature to so enact relative to the contracts of a foreign company, or of one which might be the creation of Parliament, when made in a province so enacting, that it must comply with the conditions imposed by the legislature for the form of contract, and the company be bound by what the legislature specified such contracts were to be held to mean and could not contract itself out of such act. Much more must a home company the creation of the legislature be so bound. It seems futile to suggest that Parliament can by such legislation as this invade such exclusive jurisdiction of the provinces.

It is answered, that as to such companies the Act excepts them from its operation. I do not so read the Act. In the Act of 1868 there was an excepting provision, which was changed by the Act of 1886, 49 Vict. ch. 45, sec. 3, sub-sec. (*e*), so as to read more stringently in that regard and that was later amended to read as it does now in sub-sec. (*b*), of sec. 3, of the present Act, which is as follows:—

to any company incorporated by an Act of the legislature of the late Province of Canada, or by an Act of the legislature of any province

(1) 7 App. Cas. 96.

now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the legislature of which it was incorporated, and which is within the exclusive control of the legislature of such province.

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The clear effect of that is to exclude from the exception in favour of provincial companies, such of them as might choose, though acting within their corporate powers, to do business, for example, in the United States, and thus leave them subject to the penalties added as sanctions of the Act and make their contracts illegal if the sanction is valid.

In the case of *The Canadian Pacific Railway Co.* v. *The Ottawa Fire Ins. Co.*(1), the question of the right of a corporate creation of a province to do anything beyond its limits was raised, in an incidental manner only, but thought to be so relevant to the issues in the case that a second and special argument was had in this court in regard thereto.

I examined the matter then in as thorough a manner as I knew how, and came to the conclusion that corporate creations of a local legislature acting under section 92, sub-section 11, had inherent in their creation and must always have been intended to have inherent in their creation the same rights as other corporations to do business wherever it was to be found so far as the doctrine of the comity of nations would carry them unless specially restricted by the creating provision or prohibited by the foreign state or province where attempted.

I have found no reason to change my opinion, and I adhere to the conclusion I then reached and have just re-stated. The argument is too long for repetition here even in an abbreviated form, indeed was

(1) 39 Can. S.C.R. 405.

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thought by myself too long for what I was tempted (but for difference of opinion in this court and respect due thereto) to have considered as elementary law.

Even if I was and am wrong and my reasoning therein worthless in itself, I would commend the quotation from Vattel which appears therein at page 438 as deserving the attention of any one concerned in the questions raised herein.

If I am right in regard to the inherent right of a provincial company to go abroad, then the attempt in this Act now in question to restrict the powers, or the exercise of the powers, so conferred is quite unwarranted.

The Dominion Parliament has no power to take away indirectly what it could not interfere with directly. And the curious thing is that by this very Act it clearly appears Parliament considered these provincial corporations had an inherent power to go beyond the limits of the province creating them.

The draftsman of the Act clearly held the same view of their capacity as I have expressed.

Else why offer to extend to them the license of the Minister to do business throughout the Dominion? There is no thought of a re-incorporation by virtue of a license, but only of the control over and permission to a presumably duly constituted corporation competent to do business throughout the Dominion.

On the face of the Act the possession of such competency is attributable solely to the power of the local legislature.

I think that section 4 so far as it thus strikes at such creations is *ultra vires*.

When I called attention to this objection counsel

did not argue that Parliament had any power to restrict the right of the provincial corporation from going abroad into a foreign state, but argued that the Act did not mean so to interfere. The language seems to me too clear to mean anything else.

To enable any provincial corporation doing any business in the parts of the Dominion outside its home province, this enactment requires a license. It need not get such license if its operations are confined wholly to its own province. But if it does such foreign business then it cannot be within the exception. Provincial companies doing such foreign business would, if this section were held valid, be restricted in such case from doing any business in the Dominion, including, of course, their own province. I can see no reason for the amendment unless this was its purpose.

I must, therefore, answer the first question in the affirmative, subject to what I have to say relative to the second question and hypothetically of the whole.

It would be exceedingly difficult if we applied to the interpretation and construction of these sections the rule that prevails relative to illegality in a contract, to say that any one part of this section 4 could be severed from the rest. It, however, seems to me in passing upon the question of whether a statute is *ultra vires* or *intra vires* that it may sometimes be held operative so far as the power extends, and inoperative beyond, though the language used may not in its terms be clearly capable of such separation as to divide the good from the bad. This result, I suggest, may be reached by the test of its applicability to a given object or purpose. The penal clause 70 may

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not be quite so susceptible of such a mode of treatment.

However that may be I will assume for argument's sake my construction may be wrong, and that the purpose of this first question may be to be advised relative to the power of Parliament to control by means of prohibiting contracts, or suit upon contracts, otherwise inoffensive and legal, the business of insurance by individuals domiciled in, or companies incorporated by, a province when carrying on such business in other provinces of the Dominion.

If anything ever has been settled relative to the powers of the Dominion and the provinces, there are two things which seem clearly so. One is that so far as the form and validity of any contract depend on the law of the place of making, they must, save in those cases arising out of and incidental to the exercise of the exclusive legislative authority embraced in the enumerated or specific powers of Parliament, conform to what the provincial legislature of that place has enacted. The other is that in regard to the form and validity of contracts so far as necessary to the full exercise and operative effect of such exclusive legislative authority as has been so assigned to Parliament, the will of Parliament is supreme, and it may rely upon or supplement or so modify the operation of the local law as (but only so far as) such exigencies require in order to accomplish its purpose.

The first is established by the case of *The Citizens' Ins. Co.* v. *Parsons*(1), already referred to. The second is also established by many authorities. The effect given to the use of warehouse receipts author-

(1) 7 App. Cas. 96.

ized by the "Banking Act" may illustrate this branch of these things.

But no decision determines how far, if at all, Parliament resting only on what I have called the residual power, as I hold it must in enacting section 4, can interfere with the power of the provincial legislatures over contract.

The liquor prohibition decision of necessity affected the law of contract so far as regards the sale of liquor.

The right to legislate relative to contracts, as now presented, was never directly touched upon in the argument so far as I can see, and the subject of property and civil rights including same, was only touched upon incidentally to finding a place for the local legislature to rest its right to prohibit, which seems to have been found in sub-section 16 of 92 relative to local matters. In the *Russell Case*(1) the regulation of trade and commerce was not abandoned, the criminal law was hinted at, the right to prevent dangerous things being done suggested. What all these meant or might mean was not decided. But if these measures had been treated as part of the criminal law many men would have approved that treatment as sound sense and I certainly do not see from the point of view of constitutional law, what answer could have been set up thereto. It might have fallen there quite as appropriately as the restraint of trade clauses in the Criminal Code upon which we decided the case of *Weidman* v. *Shragge*(2).

Hence I am not disposed to attach undue importance to the bearing on this question of contract of the

(1) 7 App Cas. 829. (2) 46 Can. S.C.R. 1.

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last of these liquor cases so recent as 1896 and only perhaps a mere advisory opinion which the first was not.

The struggle in 1896 was a peculiar one. It would not, I suspect, have suited either party arguing to have the subject treated as part of the criminal law. And as to property and civil rights I would call attention to the remarks of Lord Macnaghten in the case of *The Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association*(1), at page 78, from which, as it bears directly upon what I am now dealing with, I quote the following:—

> Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter.

In passing I may note that at this period in *Anctil* v. *Manufacturers' Life Ins. Co.*(2), art. 2590 of the Quebec Code was held to have so fixed what might be an insurable interest that a condition in the policy making it incontestible at the end of a time which had elapsed at the death, could not validate it.

This insurance company was not a local company of Quebec creation.

Having already shewn why a man domiciled in a province must be held entitled to contract as an insurer according to the law of the province, how can one residing in one province be prevented from going into another to do likewise? Certainly there is no power given any province to prohibit a man coming there from another province for a lawful purpose. And when there he is entitled to avail himself of the

(1) [1902] A.C. 73. (2) [1899] A.C. 604.

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protection of any law existing where he so finds himself to make any contract unless and until he has by reason of some general law of the province applicable to all men become deprived of such right.

There may be a local law requiring license or special qualifications to carry on his business as in the case of professional men. Or the province may possibly in general terms so limit the right of non-residents to transact a specified business as to exclude him, but yet that does not help the Dominion Parliament to assert authority to set aside or override the local law. What right has it to restrain men from passing from one province to another ? Section 121 giving the absolute right to transfer the product of one's labour from one province to another free, may be incidentally referred to and imply that those doing so cannot be restrained from personally doing every act necessary to enjoy the benefit of the provision. How can Parliament or legislature interfere ?

Then in this regard where does the prohibitive power rest which every corporation is subject to when going beyond the limits of the state which created it ? Is it in the province or is it in the Dominion ? Or is it in both ? Or is it in the former but only so until the latter has signified its will ?

It is not difficult to distinguish between the right of the individual and the corporation. The former, as I have said, has *primâ facie* the right to pass the line, but it is only by virtue of comity the latter can. And surely the power of the province to enact as to what contracts may be valid and what not, must end the matter for all practical purposes so far as the exclusive power over property and civil rights extends.

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As between the Dominion and foreign corporations, I can easily see how the Dominion can under its residual power prohibit the foreign corporations. But on what can it rest its alleged power to direct the admission of said corporations into the provinces against their will? And when attempting to deal with rival corporate creations of a province the difficulty seems much greater.

Suppose, as men have advocated, the fire insurance business should be given by a province to the municipalities to undertake, just as the water supply and lighting are now so generally undertaken, and it became an object of local importance that each municipality or group of municipalities should enjoy the monopoly thereof, can it be said such a plan would be beyond the powers of a province acting under subsections 8 and 16?

I am not prepared to say that such a thing is beyond the powers given to the provinces. And I cannot see why such an exercise of power should be controlled or trenched upon by the Dominion by virtue of anything to be found in this "British North America Act."

It has been frequently said that what cannot be enacted by a local legislature must of necessity be found within the competence of Parliament to enact. This I respectfully deny. It is in my humble opinion, beyond the scheme of our federal system to give operative effect thereto, no matter how high may be the authority laying down such dogma. It would be indeed a very simple formula for solving knotty questions.

Uniformity of law may be a most desirable thing. In the instrument creating our system this very thing

is provided for by section 94, within certain limits, but subject to such conditions and limitations as to demonstrate the impossibility of such a conception being within the power of Parliament. Our school systems vary, our municipal systems vary still more. Our systems of land tenure also vary, as do our laws of inheritance and succession. Yet Parliament cannot meddle therewith.

No man would be bold enough to say we might create by and through Parliament, a State Church, and against the will of the legislature levy in support thereof tithes in the provinces upon property in same, though the oldest of civilized countries deem such an establishment essential. No more could Parliament in pursuance of such an establishment, add to or trench upon provincial mortmain Acts. Yet every one of these things could be dealt with by virtue of this doctrine if correct.

If we will bear in mind that our federal scheme has first assigned to the exclusive power of Parliament the authority to legislate on twenty-nine subject matters enumerated in section 91, besides some other things found in other sections; that subject thereto it has assigned to the legislatures the exclusive legislative authority over sixteen other matters, and only beyond these, but subject thereto and limited thereby, on such other subjects as may, without infringing thereon, be legislatively dealt with for the peace, order and good government of Canada, we will have cleared our minds on these matters and cease assuming that because a better state of law is conceivable, it must of necessity rest in Parliament.

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In regard to some things the power of legislation does not rest in this country.

In regard to other things desirable results are conceivable as possible by the co-operation of both legislatures and Parliament.

So far as the corporate creations of the Dominion rest upon one or more of the twenty-nine enumerated subjects over which Parliament has exclusive legislative authority, there can be no doubt of its power to authorize them to do such business as within the ambit of or resting on such basis of authority either throughout the entire Dominion or such part thereof as Parliament may choose to specify and every statute of any legislature or other law of a province though possibly operative and helpful so far as adaptable in that regard must be held null before the expression of the Parliament will in such cases when and so far as in conflict therewith.

When we reflect that there go with such powers the incidentals thereof which interpretation has implied as a necessary part of same, we may faintly realize over what a vast field of possible corporate activity Parliament is supreme.

Men are apt to be led by contemplation of these operations on that field which meet us at every turn, to the conclusion that all Dominion corporations must possess the same inherent power in relation to provincial laws or in competition with provincial corporations.

So far as I can see those Dominion corporations which cannot be said to rest upon one or more of the exclusive powers of the Dominion Parliament indicated above are as corporate creations of no higher order and possess no greater inherent power or right

than any other, when brought in conflict with any law enacted by a legislature of a province acting within the sixteen enumerated powers in section 92 or other specific power.

Whether Parliament may have or not under its powers over "the regulation of trade and commerce" the authority for directing corporations, directly related to the subjects covered by said phrase, to be permitted to enter all or any one or more of the provinces with the right to transact business therein notwithstanding there may be local regulations to the contrary, is a subject upon which I express no opinion. Indeed, I have none sufficiently accurate and comprehensive to satisfactorily express myself, and can conceive of none unless springing from some trade convention over or in respect of which Parliament might legislate.

My present purpose in referring thereto is merely to eliminate from the problem I am considering at least as much as possible, if not all, of what is entirely irrelevant to its solution.

The difficulty in this submission is that the legislation in question directly trenches upon the field of contract, and upon that field when and where not in subjection to the supreme powers of Parliament, but is to be viewed in relation only to what emanates from a residual power apt to be (and sometimes I fear has been) confused with the other yet supreme Parliamentary powers and their products.

Subject to what I have said I think Parliament can, resting merely on its residual power, enact that any of its corporate creations may enter and transact business anywhere in the Dominion so far as in doing so it does it conformably with such laws as have been

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or may be enacted by any province under and pursuant to the subject matters assigned to the exclusive legislative jurisdiction of the provinces.

The purpose of the legislation before us no doubt is so commendable that it has, therefore, stood a long time unchallenged. It had its origin in legislation of Old Canada existent at Confederation. See 23 Vict. ch. 33, and 26 Vict. ch. 43. Its purpose can be attained by the provincial legislatures each taking away from men and corporations or such class as specified, acting within the province so enacting, the power of contracting with insurers, unless and until the Dominion shall have given a license therefor.

Then this kind of Dominion legislation if otherwise unobjectionable, having the field so cleared, could be so fitted thereto as to be made undoubtedly operative in the provinces so enacting or could be enacted conditionally upon provincial legislation being provided or found existent. This plan need not interfere with the operation of the provincial companies in their own provinces or with them being licensed by the Dominion to go elsewhere.

I put it forward as illustrative of what may be done within the undoubted powers of Parliament and legislatures, when combined, and to shew that there is no such necessity for straining the residual power of Parliament as seems to be assumed in the theory that because we have a very large measure of self-government with distributed powers of legislation, therefore, we must only ask whether or not a given measure is within the power of the local legislatures, and if not found in its entirety there, conclude it must rest in Parliament.

It may be said the method I have suggested as

within our powers of self-government is clumsy or difficult of execution. I answer that if the alternative of stretching the residual power of Parliament to cover all these defects is open, then there is an end of, or at least a means of ending, the federal system.

I answer further that we already have analogous legislation in the adoption of the provincial franchise however variant it be as the basis for Parliamentary elections. Other illustrations exist.

It would seem very absurd to have had so many struggles renewed herein to try and bring any exercise of the power of Parliament within any of the enumerated powers of Parliament, if it has always had the power the easy formula I have referred to says it has. It, however, should never be forgotten that it was out of the need there was found for abridging the powers of Parliament that the federal scheme was begotten.

Notwithstanding all I have said, when I seek to apply it to the case in hand I am confronted by the judgment in the case of *The Attorney-General for Ontario* v. *The Attorney-General for the Dominion* (1), which at foot of page 581 and top of page 582, surely assumes that if it is desirable to legislate in respect of something which a province cannot, then Parliament must have the power. I quote the following therefrom:—

> In the present case, however, quite a different contention is advanced on behalf of the provinces. It is argued, indeed, that the Dominion Act authorizing questions to be asked of the Supreme Court, is an evasion of provincial rights, but not because the power of asking such questions belongs exclusively to the provinces. The real ground is far wider. It is no less than this—that no Legislature in Canada has the right to pass an Act for asking such questions at

(1) [1912] A.C. 571.

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all. This is the feature of the present appeal, which makes it so grave and far-reaching. It would be one thing to say that under the Canadian Constitution what has been done could be done only by a provincial legislature within its own province. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter of affecting the internal affairs of Canada, and, on the face of it, regulating the functions of a Court of law, which are part of the ordinary machinery of government in all civilized countries.

In support of such doctrine we were referred by counsel to the judgment in the case of *La Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*(1), which uses terms which, taken literally, might go far to support any Parliamentary legislation. It does not seem to me that the expressions thus relied upon were so clearly necessary for the decision of the case in either instance on the facts there respectively presented. But if that language (which is to be found also elsewhere) so used and referred to in these cases is to be taken as if they were final decisions demonstrating the true doctrine, the matter is ended.

What I have said relative to the predominance of the enumerated exclusive powers of Parliament rests upon the declaration at the end of section 91, as follows:—

> And any matter coming within any of the Classes of Subjects enumerated in this section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

I refer to this and the remarks thereupon of Lord Watson in *The Attorney-General for Ontario* v. *Attorney-General for the Dominion*(2), at page 359, and top of page 360, as justification for the position I take. I prefer thinking his exposition there given is correct

(1) [1909] A.C. 194. (2) [1896] A.C. 348.

and do so all the more readily because of his high authority and unusual experience in dealing with our federal system.

The benefit of that is well illustrated by his correction in those pages of an earlier expression of opinion by the same court.

The proposition I quote above happened to be used in a case where it ought to have been present to the mind of the court that it was dealing with a subject to part of which the powers of the Dominion and the Province of Ontario through their respective legislatures had been addressed and had by concurrent action attempted a method of solving grave constitutional questions involving the limits of the power of either.

That seemed to me a sane method capable of expansion when public opinion had become ripe therefor. The serious part of the business so far as I am just now concerned is that Parliament having taken the matter in hand had so expanded, independently of the will of the provinces, its assertion of authority as to cover the entire ground. That assertion of authority is rested upon the grounds stated in above quotation.

It is largely justified in the judgment referred to by the long unquestioned use of some such power. The actual concurrence or assent of the provinces had in fact appeared in the cases of the interrogation of this court in regard to matters affecting the provinces.

That acquiescence was turned into an argument to maintain the propositions I have quoted.

I am only concerned now with all these things to demonstrate the clear parallel between that instance of the assertion of Parliamentary authority and this now in hand.

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Each rests on the residual power of Parliament. Each has long been unquestioned. Each has been acted on for a long period. Each has had added to it as the years rolled on new legislative enlargements of accretions, if I may use such expression. Properly speaking I cannot say strength was thereby added unless I assent to the foundation as well laid. The supports of age and acquiescence seem more to favour the Act now questioned than the other.

My opinion has long been that there is a wide field for possible legislation which can only be effectively overtaken and good accomplished therein by such concurrent legislative action as I have adverted to and no doubt in my mind that was contemplated by our statesmen who framed this scheme of government.

Am I to set this opinion aside in deference to expressions such as I have adverted to in the court above? Am I to adopt the easy formula I have referred to ? Or may I say these judgments might have been supported on other grounds ? I have already suggested such possibility but am far from being quite sure that my conception thereof in either case could meet the approval of the court.

I can here do no more than point out the difficulty created and say that case is not this case.

I think I must adhere to the old way which I have expressed above, of reading this written constitution.

The co-operative method of proceeding by concurrent legislation seems to be approved by the court above in the case of *City of Montreal* v. *Montreal Street Railway Co.*(1), at page 346.

(1) [1912] A.C. 333.

Yet in the *Marriage Laws Case*(1), where the terms of the instrument, as it seems to me, lent itself in a peculiar manner to such a mode of treatment, no countenance was given my suggestion in that regard and its application was swept aside so far as a mere advisory opinion can do so.

The criminal law jurisdiction of Parliament was also relied upon herein. My suggestion of its aid in the *Marriage Laws Case*(1) does not seem to have evoked much enthusiastic support, though in that connection it seemed to me much more appropriate than here.

The truth is this "Insurance Act" was obviously not a piece of criminal legislation or intended as such. The mere penal sanction given to it cannot add to its jurisdictional strength, unless clearly resting upon that subject of jurisdiction. Local legislatures are given the like power and their Acts were given by 31 Vict. ch. 71, sec. 3 (Dom.) even greater sanctions. I may observe that that itself was a very early instance of what I am calling, for want of a better phrase, concurrent or co-operative legislation.

If the power to enact the section now in question existed, probably a wilful contravention of it might be indictable. But that jurisdiction to enact has to be found first in such aspect.

I must answer, for reasons given above, the first question in the affirmative, and pass now to the second question.

It is quite clear without any elaborate argument that an Act dealing with insurance which may or may not have any relation to trade and commerce and

(1) 46 Can. S.C.R. 132.

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securing the people of Canada from the possibly disastrous affects of trusting entirely to the honour of foreign companies over which they have no control and of which they may know little, can be enacted by Parliament. Parliament in so enacting does not trench upon any of the subjects assigned to the provinces and, therefore, in so far as a legitimate subject of legislation, seems to act within its powers.

The distinction between the right of one dwelling in or being within a province, and the right of a foreign company, or an alien dwelling in a foreign country, to come or send his agents into Canada against the national will as expressed by Parliament, seems as broad as it is possible to conceive of, relative to such things as involved in settling the limits of jurisdiction of the Dominion and the provinces.

The right to contract does not exist until the would-be actor is in the province.

I see no infringement of any local law relative to contract which can be implied in this aspect of the matter, and such restriction of civil right as there may be is implied in the residual power or it is useless.

For the sake of brevity, clearness and simplicity, I have used contracts as a test, but only as emblematic of all that exclusive domain assigned the legislatures over the sixteen enumerated subjects in respect of which they, in my opinion, by the express language of the Act are paramount over everything that may rest in the residual power of Parliament when the twenty-nine enumerated subjects of section 91 and other specific powers have been exhausted, though Parliament may by virtue of such residual power enact any law a colony can, conditional and dependent upon and to be given vitality and operative

efficiency by the legislatures in their respective provinces, or by their existent legislation.

I must answer the second question in the affirmative, if and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies as well as others within the terms of which is embraced so much that is clearly *ultra vires.*

Subject to the qualifications and limitations expressed in the foregoing opinion, I answer the questions herein submitted as follows:—

(1) Are sections 4 and 70 of the "Insurance Act, 1910," or any or what part or parts of the said sections *ultra vires* of the Parliament of Canada ?

Answer—Yes.

(2) Does section 4 of the "Insurance Act, 1910," operate to prohibit an insurance company incorporated by a foreign state from carrying on the business of insurance within Canada if such company do not hold a license from the Minister under the said Act, and if such carrying on of business is confined to a single province ?

Answer—I must answer the second question in the affirmative if and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies, as well as others within the terms of which is embraced so much that is clearly *ultra vires.*

DUFF J.—It is contended on behalf of the Dominion that the enactments in question can be supported as a valid exercise of the legislative authority of the Dominion either (1) under the introductory clause of section 91, or (2) under No. 2 of the enumerated

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heads of that section "the regulation of trade and commerce." First, as to the power of the Dominion under No. 2 of section 91:—

I think this does not embrace the regulation of occupations as such. "Trades," the pursuit of which constitutes a part of the trade and commerce of the country, may very well be subject to regulation under this power but only as branches of trade and commerce. The regulation of occupations as such seems in its nature to be a matter rather of local than of general importance and I think it requires some straining of the language of No. 2 to bring that matter within it. I do not think that the various kinds of business which are comprehended under the term "insurance" as used in the Act in question can be said to be part of the trade and commerce of the country; or that the transactions dealt with by section 4 of the Act are operations of trade or commerce in the sense in which those words are used in this provision.

As to the introductory clause: I think the Act cannot be sustained as having been passed in exercise of this power for two reasons. I think that the legislature of any one of the provinces could have passed an Act containing provisions substantially identical with the provisions in question (limited, of course, in its application to the province) under the authority given by section 92 to make laws in relation to "property and civil rights in the province."

I think that legislation declaring the qualifications required to enable persons—natural or artificial—in any given province to enter into contracts of the various kinds embraced under "policy of insurance" as defined in section 2 would be legislation in relation to civil rights. If I am correct in this the exception

found in the introductory clause of section 91 excludes the subject-matter of this section from the general authority of the Dominion.

If the Act is not an Act relating to civil rights then it is, in my judgment, an Act relating to matters which in each province are "merely local or private," as those words have been construed by the Judicial Committee in the Privy Council in different cases. On behalf of the Dominion it is said that the object of the Act is to require companies and persons engaged in carrying on the business of insurance to provide security for the performance of their obligations; and that this being a subject of general importance the Dominion is entitled to deal with it by legislation applying uniformly to all the provinces. The decisions upon the "drink legislation" are relied upon as authorities for this proposition.

I have already given my reasons in my opinion in the Companies' Reference for thinking that the decisions on the "drink legislation" afford no positive rule of general application. They do lay down, however, a negative rule that the Dominion cannot under the general power validly legislate for the whole Dominion in respect of matters which in each province are substantially of local interest. I have not been able to understand upon what ground it can be contended that the matter of the qualifications necessary to entitle a corporation or natural person in any single province to engage in transactions of the kind dealt with in section 4 (read in the light of section 2) is not a matter of substantially local interest in that province. The Act, it must be observed, exempts from its operation any company incorporated by the legislature of a province for the

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purpose of carrying on the business of insurance within that province alone; but section 4 has its full operation with regard to individuals and unincorporated associations; that is to say, with respect to the carrying on of the business of insurance wholly within a single province the Act draws a distinction between incorporated companies and natural persons acting either individually or in association with others leaving the former free to do the things mentioned in section 4, but with regard to the latter requiring that they shall comply with the regulations of the Act. Such legislation seems clearly to be directed to these matters as matters of "substantially local" interest in each of the provinces.

I do not think that the fact that the business of insurance has grown to great proportions affects the question in the least. The importance of some such provisions as this Act contains may be conceded. The question is: On what ground can it be contended that this is a matter which because of its importance has ceased to be substantially of local interest? The matter of the solvency and honesty of persons assuming fiduciary relations is at least as important as the matter of the solvency of the insurance companies. It would be difficult to argue that the qualifications of trustees and executors and financial agents is a matter with which the Dominion could deal by a uniform law applicable to the whole Dominion. The Act before us illustrates the extremes to which people may be carried when acting upon the theory that because a given matter is large and of great public importance it is for that reason a matter which is not substantially local in each of the provinces. The business of "guarantee insurance" by section 2(*w*) in-

cludes the executing of "bonds in legal actions and proceedings," and section 4 would appear to prohibit the making of such contracts by persons who are not licensees under the Act. That seems very obviously a purely local matter when the proceedings are in the provincial courts; but if it once be admitted that the Dominion can prescribe the qualifications necessary to entitle anybody to enter into a contract of life insurance or fire insurance it is very difficult to see why it cannot also regulate the qualifications of persons entitled to enter into contracts of suretyship. Such legislation, in my judgment, involves a degree of interference with matters "substantially local" that could not have been contemplated by the framers of the Act. The fact that this legislation has been in force since 1868 was dwelt on by Mr. Newcombe. It is a circumstance for consideration, no doubt, (although the law as it now stands is very much broader than it was down to 1910,) but it must be observed that when the Act was introduced it was opposed by Mr. Mackenzie and Mr. Blake on the ground that the subject of insurance was a subject committed exclusively to the provinces, and the Act passed through Parliament on the assumption that the business of insurance carried on locally, that is to say, in a single province, was not interfered with. The Act, in truth, has until recently, at all events, never been enforced except as against Dominion companies and extra-Canadian companies.

The contention that the Act is criminal legislation is disposed of by the report of the Judicial Committee(1) upon the reference relating to the Dominion Licences Act, 1883. Precisely the same argument

(1) 6 Can. Gaz. 265.

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was with much greater reason (see preamble to the Act) there advanced and rejected, the legislation being held to be *ultra vires*.

To the first question my answer is "Yes."

To the second question my answer is "Yes" if *intra vires*.

ANGLIN J.—The subject of insurance is not specifically enumerated as a head of legislative jurisdiction either in section 91 or in section 92 of the "British North America Act." The right to carry on that business is (at all events *primâ facie*) a civil right in each province of Canada within the meaning of "civil rights" in clause 13 of section 92.

Section No. 4 of the "Insurance Act, 1910," undoubtedly purports to interfere with and to regulate the exercise of that civil right by "companies, underwriters and persons." Section 70 is ancillary to, and has been passed as a means of enforcing, and to provide a sanction for, section 4. It is not an independent enactment and it is conceded that if section 4 is held to be *ultra vires* section 70 must fall with it.

A provincial company which carries on its business "wholly within the limits of the province by the legislature of which it was incorporated" is the only material exception from the prohibitions imposed by section 4. A provincial company which does business in any foreign country, although it should not operate in any part of Canada other than the province by the legislature of which it was incorporated, is not excepted. Neither is a person nor an association of underwriters whose operations are confined strictly within the province of which he or they are residents.

It is sought to uphold this incursion by the Do-

minion Parliament into the field of civil rights on the ground that it is legislation either

(*a*) In respect of aliens, (*b*) in the nature of criminal law, (*c*) in regard to trade and commerce, or (*d*) upon a matter which is "of Canadian interest and importance."

If it can be fairly brought under (*a*), (*b*), or (*c*), subject perhaps to what Lord Atkinson recently said in regard to (*c*) in the *Montreal Street Railway Case*(1), at pages 343-4, with which, however, must be compared Lord Watson's language in the *Prohibition Case*(2), at pages 362-3, the paramount jurisdiction of the Federal Parliament in regard to the subjects of legislation enumerated in section 91 might properly be invoked to support it. If, however, the legislation in question is not properly ascribable to (*a*), (*b*), or (*c*) and it becomes necessary to resort to (*d*) the case for the validity of the statute is vastly more difficult.

It is only necessary to read the "Insurance Act, 1910," very cursorily to realize that in passing it nothing was farther from the mind of Parliament than an exercise of its jurisdiction in respect to "Aliens." The Act does not distinguish between alien companies and companies incorporated by the Parliament of the United Kingdom or by the Legislatures of the Canadian provinces (subject to the exception noted above) nor between citizens of Canada or subjects of the Empire and those of foreign states. "The leading feature"—"the pith and substance of the enactments" of section 4 is wholly foreign to legislation in respect of "aliens and natur-

(1) [1912] A.C. 333. (2) [1896] A.C. 348.

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alization," and that head of power may not be invoked to sustain it. *Union Colliery Co. of British Columbia* v. *Bryden*(1), at page 587.

Neither can the provisions of sections 4 and 70 be ascribed to the exercise of legislative jurisdiction over "criminal law." No criminal offence is created. Fitting penalties are attached to breaches of prohibitions of a regulative character, not as providing for the punishment of crimes, but as incidental to the regulative legislation, much as a provincial legislature may provide for the contravention of its enactments under clause 15 of section 92 of the "British North America Act." This legislation is not criminal law in the sense in which that phrase is used in clause 27 of section 91.

The argument based on "the regulation of trade and commerce," while perhaps more plausible, appears upon consideration to be equally fallacious. Whether the business of insurance can ever properly be spoken of as a trade is at least doubtful. But, read, as it must be, in connection with the word "commerce," with which it is associated, I think it reasonably clear that the word "trade" in clause 2 of section 91 of the "British North America Act" does not cover the business of insurance. The weight of authority certainly supports that view. If, however, insurance is a trade in the ordinary sense of that term, having regard to what has been said as to the scope and meaning of clause 2 of section 91, in such cases as *Citizens' Ins. Co.* v. *Parsons*(2), I think that under it Parliament is not empowered to regulate the conduct of any single trade or business in the pro-

(1) [1899] A.C. 580. (2) 7 App. Cas. 96.

vinces or to prescribe the conditions on which it may be carried on. That seems to me to be so purely a matter of civil rights in each province, something so essentially local that it appertains exclusively to provincial jurisdiction. The regulation of trade and commerce in clause 2 of section 91 should be given a construction which will preclude its being invoked to justify Dominion legislation trenching upon the provincial field. This I take to be the meaning of Lord Atkinson's observation in the *Montreal Street Railway Case*(1), at pages 343-4; so read it is reconcilable with what Lord Watson said in the *Prohibition Case* (2). I am, therefore, of the opinion that the validity of sections 4 and 70 of the "Insurance Act, 1910," cannot be upheld under the power conferred on the Dominion for "the regulation of trade and commerce."

In the *Prohibition Case*(2) Lord Watson laid down very clearly the proposition that Dominion legislation not ascribable to one of the enumerated heads of jurisdiction under section 91, but dependent wholly on the "peace, order and good government" provision

> ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in section 92.

In the *Montreal Street Railway Case*(1), at pp. 348, 360, Lord Atkinson repeats and emphasizes this view. Yet in the *Prohibition Case*(2), after pointing out that the jurisdiction of the Dominion Parliament to enact the "Canada Temperance Act" had been rested on the "peace, order and good government" provision rather than on "criminal law" and could not be sup-

(1) [1912] A.C. 333. (2) [1896] A.C. 348.

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ported under "the regulation of trade and commerce," Lord Watson says, at p. 367, that in so far as the provisions of the provincial "Local Option Act" (upheld as an exercise of legislative power by the Province of Ontario under either clause 13 or clause 16 of section 92) come into collision with the provisions of the Canadian Act they must yield and remain in abeyance until the Canadian Act is repealed. In the same judgment his Lordship had already said (p. 361) that

> some matters in their origin local and provincial might attain such dimensions as to affect the body politic of the Dominion and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great care must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial and has become matter of national concern in such sense as to bring it within the jurisdiction of the Parliament of Canada.

This judgment rests upon the view that when a matter primarily of civil rights has attained such dimensions that it "affects the body politic of the Dominion" and has become "of national concern," it has, in that aspect of it, not only ceased to be "local and provincial," but has also lost its character as a matter of "civil rights *in the province*" and has thus so far ceased to be subject to provincial jurisdiction that Dominion legislation upon it under the "peace, order and good government" provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount.

As I understood him, counsel for the Dominion contended at bar that if there would, upon any state of facts, be jurisdiction to enact the legislation in question the existence of that state of facts must be assumed in favour of its validity. Had Parliament expressly declared the existence of such a state of

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facts, whatever might be the awkwardness, inconvenience and difficulty of inquiring into and passing upon the truth of such a declaration, in the absence of such a facultative provision as is found in clause (*c*) of sub-section 10 of section 92 of the "British North America Act" in regard to "Works," I incline very strongly to the view that the declaration of Parliament could not be taken as conclusive upon the question of its jurisdiction. The "Insurance Act," however, does not contain such a declaration. Without it, although according to the view of it expressed by Lord Watson in *The Prohibition Case*(1), the decision upholding the "Canada Temperance Act" would appear to rest upon a somewhat similar assumption, I know of no ground upon which it can be even plausibly argued that, merely because such an assumption is essential to the validity of an Act of Parliament, a matter so distinctly of civil rights in the province as the right to carry on a particular business and the conditions upon which that right may be exercised should, without any evidence of facts justifying such an inference, be deemed to have lost that character and to have become so much a matter of national concern that exclusive provincial jurisdiction over it had been superseded by Dominion control under the power to legislate for the "peace, order and good government" of Canada. If such an assumption should be made—if indeed the Parliament of Canada could by an appropriate declaration conclusively establish the existence of a state of facts upon which such a transfer of legislative jurisdiction would occur — the autonomy of the province would be entirely

(1) [1896] A.C. 348.

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at its mercy and there would be few subjects of civil rights upon which it might not displace the provincial power of legislation.

For these reasons I am of the opinion that section 4 of the "Insurance Act, 1910," taken as a whole, is at all events *primâ facie, ultra vires* of the Parliament of Canada. Excluding their application to Dominion companies and to certain companies incorporated by, or under the authority of, the legislature of the late Province of Canada, which is of comparatively slight importance, I find no sufficient ground for distinguishing between its several prohibitions which would all appear to be tainted with the vice of unwarranted interference with the exclusive jurisdiction over civil rights conferred on the provincial legislatures. Section 70, as already stated, falls with section 4.

I would, therefore, upon the case as submitted, answer the first question in the affirmative as to the whole of sections 4 and 70, except in their application to companies incorporated by or under the authority of the Dominion Parliament, and to companies incorporated by or under the authority of the legislature of the late Province of Canada for the purpose of carrying on business in a territory not wholly comprised either within the Province of Ontario or the Province of Quebec.

To the second question I would answer—It would do so if *intra vires.*

BRODEUR J.—The question that we have to consider is whether the Dominion Parliament can regulate the insurance business.

The business of insurance is not necessarily a

trade. The large companies that are carrying out that business are, generally speaking, commercial ventures with an object of gain or profit for their shareholders. But alongside of that we have the Mutual Benefit Insurance Association, which is entirely beneficial, we have also in the large railway and other companies an insurance fund for the employees to which the employees themselves and their employers contribute that could certainly not rank as commercial enterprise and there is the contract of indemnity made by insurers which can scarcely be considered a trading contract.

It is true that the Dominion insurance law as it stands to-day does not undertake to control those mutual companies incorporated by local statutes. But if the existing law is declared constitutional nothing then would prevent the Federal Parliament undertaking to regulate those insurance associations in the same way as they are legislating to-day with regard to individuals. The contention on the part of the Dominion Parliament is that their legislative power rests on their right to regulate trade and commerce, to legislate with regard to aliens and naturalization and the criminal matters.

The claim as to criminal legislation was not strongly pressed at bar, but was simply mentioned. It cannot be stated that this insurance legislation has in view the creation of any new crime. It is not so worded. We might say the same thing concerning the naturalization idea. That legislation has certainly not for its object to give rights and powers to aliens, and the fact that foreign insurance companies could come and do business in Canada under certain conditions could certainly not be considered as legislation of a naturalization nature.

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The only strong claim that can be made for the validity of this law is that it falls under sub-section 2 of section 91 of the "British North America Act," "The regulation of trade and commerce."

It is contended on the part of the provinces that the insurance contract is essentially a civil right and the Dominion insurance legislation virtually wipes out the sub-section 13 of section 92 as far as insurance business is concerned.

If the power to regulate trade and commerce gives the power to regulate a particular trade and commerce then it follows that the Federal Parliament would have the authority to determine the nature of the insurance contracts and the laws of the province in that respect would be of no concern. (*Tennant* v. *Union Bank*(1).) It has been decided by the Privy Council on the contrary in *Citizens' Ins. Co.* v. *Parsons*(2), that statutory provincial legislation may be passed to determine the nature of the contract that insurance companies may make.

It seems to me that if the authors of the "British North America Act" intended to put insurance under federal control they would have mentioned it as they have done for banking, weights and measures, bills of exchange, interest, patents and copyrights. The special enumeration of those subjects does not necessarily preclude any others being included in the provisions of section 91 of the "British North America Act," but it goes a long way to shew how the insurance question was considered. Besides the existing legislation at the time of Confederation and the proceedings of the Quebec Conference shew very con-

(1) [1894] A.C. 31.

(2) 7 App. Cas. 96.

clusively that the matter of insurance pertains to provincial legislation.

Under the Union of Upper and Lower Canada the matter was considered so much a question of local interest that those two provinces had each their own mutual insurance law. See Consolidated Statutes of Lower Canada, 1860, ch. 68; and Consolidated Statutes of Upper Canada, 1859, ch. 52.

The chapter 68 of the Lower Canada Statutes was under the title "Joint Stock Companies," and the Upper Canada legislation was under the title "Municipal Institutions."

The Commissioners appointed for the Codification of civil laws of Quebec in their 7th report dealt with the insurance law and enacted the articles 2468 and following of the Code, which cover the whole subject.

They considered the insurance law as a matter of civil law.

That report was made and discussed in Parliament at about the same time the Confederation resolutions were framed and discussed.

It is to be noticed that in 1864, at the Quebec Conference of the delegates of the provinces the question of insurance was mentioned. A proposition which carried was at first made that the regulation and the incorporation of fire and life insurance companies should be under the legislative control of the Federal Parliament; but a few days later that proposition was struck out. (Pope, Confederation Documents, pp. 30 and 88.)

The only inference to be drawn from those facts is that the insurance laws are pertaining to civil rights and that the subject was in the opinion of the

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Fathers of Confederation a matter that should be under the legislative control of the provinces.

What is the scope of the power to regulate trade and commerce? The regulation of trade and commerce in sub-section 2 of section 91 refers to political arrangements or interprovincial trade and perhaps to the trade generally. *Citizens Ins. Co.* v. *Parsons*(1), at page 111. The commercial relations with foreign nations or with the British Empire are of Federal concern. The question whether our country should be under a free trade or a protectionist policy pertains to the central Parliament; but the regulation of a particular trade could not be done under that section and we have in that regard the authority of the Imperial Parliament. By the Act of Union of England and Scotland (6 Anne, ch. 6) it is provided that all subjects of the United Kingdom should have "full freedom and intercourse of trade and navigation," and that all parts of the United Kingdom should be under the same prohibitions, restrictions and regulations of trade.

The Imperial Parliament has passed laws affecting and regulating specific trades in one part of the United Kingdom only, without it being supposed that it violated the Union. Laws like those relating to bankruptcy and sale of liquors vary in Scotland and England.

I am of the opinion that under the sub-section 2 of section 91, of the "British North America Act," the Canadian Parliament cannot undertake to regulate any specific trade.

The section 4 of the Dominion "Insurance Act" that requires all persons to take a permit before mak-

(1) 7 App. Cas. 96.

ing any contract is *ultra vires* and the section 70 which imposes a penalty on those that would carry on the business of insurance without taking that license is also illegal.

We are asked by a second question to state whether the above section 4 applies to foreign companies. I think there is no doubt as to this section applying to foreign companies.

Then my answers to questions referred to us would be as follows:—

QUESTION I.	ANSWERS.
Are sections 4 and 70 of the "Insurance Act of 1910," or any and what part or parts of the said sections *ultra vires* of the Parliament of Canada ?	Those two sections are *ultra vires.*
QUESTION 2.	
Does section 4 of the "Insurance Act, 1910," operate to prohibit an insurance company incorporated by a foreign state from carrying on the business of insurance within Canada if such company do not hold a license from the Minister under the said Act and if such carrying on of the business is confined to a single province ?	Yes, if *intra vires.*

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*March 3, 4.
*Oct. 14.

JAMES J. DENMAN (PLAINTIFF) ....APPELLANT;

AND

THE CLOVER BAR COAL COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Company law—Agreement by directors—Onerous contract—Non-disclosure to shareholders—Breach of contract—Damages—Settlement of accounts—Appeal—Jurisdiction—Reference to master—Final judgment.

After some subscriptions for stock had been received and the company was about to offer other stock for public subscription, a meeting of the directors was held at which the plaintiff, then one of the directors and the company's manager, resigned his office as a director and was appointed sales agent for the company's output of coal for five years from that date, at a liberal scale of remuneration, with the exclusive right to make such sales in Alberta, Saskatchewan and Manitoba. At the same time an arrangement was made by which the other directors derived advantages in regard to certain matters in dispute, respecting the affairs of the company, between them and the plaintiff. The material facts and circumstances connected with these arrangements were not disclosed to the shareholders who then held stock in the company nor to other persons who subsequently subscribed for shares of its stock.

Held, affirming the judgment appealed from (7 D.L.R. 96; 2 West. W.R. 986; 22 W.L.R. 128), that, as the plaintiff and his co-directors were in a fiduciary position and complete disclosure of the circumstances in regard to the making of the contract had not been made to all the shareholders, present and future, the agreement was not binding upon the company.

The order in the judgment appealed from directing that, on taking the accounts between the parties, an allowance should be made to the plaintiff, on the basis of *quantum meruit*, for services rendered by him while in the employ of the company was not disturbed.

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

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Per Fitzpatrick C.J., and Idington, Anglin and Brodeur JJ.—Where the judgment sought to be reviewed has finally disposed of one of the issues, forming a distinct and separate ground of action, the Supreme Court of Canada has jurisdiction to hear and determine the appeal. *La Ville de St. Jean* v. *Molleur* (40 Can. S.C.R. 139), and *McDonald* v. *Belcher* ([1904] A.C. 429), followed; *Hesseltine* v. *Nelles* (47 Can. S.C.R. 230), referred to.

APPEAL from the judgment of the Supreme Court of Alberta(1) by which the judgment of Stuart J., at the trial, was set aside in respect to the damages awarded thereby, the plaintiff's claim therefor disallowed, and the judgment varied in certain other respects.

The action was brought by the appellant against the company and A. W. Denman and H. E. R. Rogers, shareholders and directors of the company, to recover damages for breach of an agreement granting him the exclusive rights as agent for the sale of the company's output of coal, in the Provinces of Alberta, Saskatchewan and Manitoba, and also to recover moneys expended by him, as manager, on behalf of the company in the management of its business. The circumstances in which the agreement was made are stated in the head-note and in the judgments now reported.

The judgment, at the trial, in favour of the plaintiff ordered re-payment of the moneys expended by him as manager on the company's account and directed a reference for the ascertainment of the amount of the damages. On an appeal by the defendants, the Supreme Court of Alberta reversed the trial court judgment in respect of damages, disallowed the plaintiff's claim, and varied the order as to re-payment of the moneys expended by directing that the amount should

(1) 7 D.L.R. 96; 2 West. W.R. 986; 22 W.L.R. 128.

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be included in the general accounts between the parties and that an allowance, on the basis of *quantum meruit,* should be made for services rendered by the plaintiff while in the employ of the company.

On the 18th February, 1913,

W. L. Scott, for respondents, moved to quash the appeal, for want of jurisdiction on the ground that the judgment appealed from, though final in regard to some of the issues, left other issues undecided upon the reference to the master for taking accounts and assessment of damages. At the same time, in case it was held that there was jurisdiction, Mr. Scott moved for an order giving him leave to amend the cross-appeal by the respondents on their counterclaim against the appellant.

O. M. Biggar opposed the motion, and judgment thereon was reserved.

The appeal was heard on the merits on the 3rd and 4th March, 1913.

The plaintiff appealed to the Supreme Court of Canada from that portion of the judgment of the Supreme Court of Alberta which disallowed his claim for damages. The respondents cross-appealed on the ground that, in taking the accounts, the moneys alleged to have been expended on behalf of the company by the plaintiff should not be credited to him against the claims of the defendants, also as to the manner in which it was directed that the conveyance of certain coal lands assigned by him to the company should be dealt with, and, likewise, in regard to the credit to be given to the plaintiff, on the basis of *quantum meruit,* for services rendered by him during the time he was acting as sales agent for the company.

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The Chief Justice.

S. B. Woods K.C. and *O. M. Biggar* for the appellant.

J. H. Leech K.C. and *W. L. Scott* for the respondents.

THE CHIEF JUSTICE agreed with Anglin J.

IDINGTON J.—The contract of the 27th of June, 1908, between these parties, sued upon herein, was negotiated for and verbally concluded whilst appellant was one of the three directors of the respondent company, and its manager. He had been its promoter and, with his fellow directors, its founder. They had got others to subscribe for stock and were seeking subscribers for that as yet unallotted and open to be taken by the public.

These men having, under such circumstances, reached an agreement between themselves met as a board on said date and what they did is tersely stated in the appellant's factum, as follows:—

> A meeting of the directors was held on the 27th June, 1908, at which the sales agreement was ratified, the plaintiff's resignation as director and secretary-treasurer accepted, the transfers of shares approved and resolutions passed that one Finch, an employee of Rogers in Winnipeg, be appointed secretary-treasurer, and that Rogers be empowered to employ some one to keep the books. This he never did and they continued to be kept by the plaintiff until the following February.

The contract thus produced gave the appellant for five years from the following 1st September the unusual commission of fifty cents a ton upon the sales of all the company's output of coal from a mine near Edmonton which could be sold in the Provinces of Alberta, Saskatchewan and a large part of Manitoba.

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The other terms did not of necessity impose any very formidable risk on the part of the appellant, and he had the option of terminating the contract on two months' notice. The company could not end it unless appellant made default in carrying out his part of its terms for two months.

The proposition that such a contract made by one holding the position of a director is voidable does not seem to permit of much doubt; unless the power to do so has been expressly given by its charter, or unless and until the shareholders concerned have been consulted, and ratified it.

Nor could the resignation of the directorship add much to the strength of such a contract when the proceedings relative thereto were had upon the express understanding that the resignation was to be contemporaneous with the formal execution of the contract.

And when, as here, the whole business, including the execution of the contract, depended upon a compact between the directors whereby those remaining such were, as the price of their assent, to get satisfaction from the appellant for claims he had repudiated up to then and the purpose of all was then to invite new subscriptions for stock and unload the burthen of this contract upon the public, I do not think it could be maintained against the will of a single shareholder then in existence or who might have become such pursuant to such contemplated invitation, without full disclosure having been made to him of the facts.

Yet such seems, on the admitted facts, to be so clearly appellant's position in this case that it might have simplified matters and saved laborious analysis

of evidence relative to the chief ground taken by the respondent to have had this simple proposition briefly taken and maintained.

I think, possibly, it is within the exact ground taken, which is that there was a fiduciary relation between the appellant and the company, and between him and his co-adventurers, which made it incumbent on him to shew that the contract was fair and reasonable and the result of full disclosure on his part of all he knew which might, if known, be reasonably supposed to have influenced the minds of those contracted with.

A director has been often said to stand as a trustee, and, if any quarrel has been made with the application of that term and "agent" is substituted, he so stands that if a contract made by him with his company is, as I have already said, unless in the excepted cases which have been referred to, voidable, and not one of which he can claim a profit. The appellant has, therefore, having failed to bring himself within any of the exceptions, including the fairness of the contract to which I am about to advert, no right to the damages he claims.

That alone should answer his action and this appeal.

He claims, however, with a certain degree of plausibility, that there were only himself and his fellow directors concerned, and that they each got substantial advantages as the result of the compact made between each of them and him, and, as we cannot herein restore him that which they got from him, we ought not to give relief.

I answer — that is just what renders his case the

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more offensive, and looks so like the bribery of his fellow-directors, inducing them to enter upon the negotiations for this contract, and, indeed, the causal reason or motive for its existence, and its manifest advantages in favour of the appellant, and its features detrimental to the company's interests; and all intended to be unloaded upon the public invited to subscribe.

They were all anxious for new subscribers, and got them we are told; and, having got them according to their plans and desires, they, as part of the respondent, must be protected, whatever happens appellant or his fellow delinquents. They all forgot the duty a director owes in such cases to the future as well as to the existent shareholders.

I incline to think it is impossible by any evidence in this case to overcome the vicious nature of the transaction upon which the contract sued upon must rest. We have, however, not to rest upon that alone, which was, perhaps, not fully argued, but upon the failure of the appellant to justify himself within the narrower ground taken.

The appellant lived in the neighbourhood of the mine, had managed the business throughout from the time he had got, prior to the incorporation, a personal option for the purchase of the property, and the others lived at great distances from the scene of operations. He represented, amongst other things, to his fellow directors that the expense of producing the coal from the mine had been for the years 1907 and part of 1908, anterior to April of last year, from ninety-six cents to $1.05 a ton.

The respondent charges that the contract was in-

duced by this representation and that the cost had been and continued to be much greater.

I think the weight of evidence goes to shew that this representation, which it was practically admitted had been made, but is presented in another light, was a most material consideration under the circumstances, was not well-founded, and, hence, so unfair that a fiduciary agent relying upon a contract, evidently based thereon, cannot maintain it.

It may be that the estimates which appear in the judgment of Mr. Justice Beck, and adopted by at least one judge in the court below, may be such as might be varied by a close and exhaustive analysis of the evidence. I do not propose to enter upon such an exhaustive inquiry as would settle exactly which view was right, for it would, in any event, leave a material difference at best, doubtful and unexplained or inexplicable between the actual cost and that so represented.

The burden of explaining rested upon the appellant. He, while practically admitting the representation, ought to have been able to shew in a more satisfactory manner than his evidence discloses exactly what the cost of production had actually been, and to justify his representation much better than he has done. The time in question was not long. The quantity of coal in question, which was only a little over thirty thousand tons, rendered the problem comparatively easy to solve in a better or clearer way than the appellant has done, especially seeing he had remained in charge for months of the time after that period up to which his representation extended.

The learned trial judge, though disposed to minimize the nature and effect of the representation, does

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not find the charge unfounded. He chiefly proceeds on the ground that there was not prompt repudiation, and that, in fact, there was such acquiescence as to debar the respondent from complaining.

The operations of the contract ran from 1st September, 1908, to 1st March, 1909, when it was repudiated.

Having regard to the fact that those most concerned lived at great distances from the mine and seat of business and, in reason, might only have become alive to the actual facts from the results discovered when the appellant's managership ceased, it seems to me there is no such evidence of acquiescence after discovery as to form a bar to the present complaint. Indeed, there was no discovery, or likely possibility thereof, save from the experience got from results which proved how delusive the representation must have been. And the long period over which appellant seems to have acquiesced in the repudiation, even if conditional, renders it difficult to restore him to such rights as he might have had under the contract.

Meantime, whilst he was acquiescing in this repudiation, others were taking stock in the company and must be entitled to some sort of consideration, and presumed to have acted upon the objectionable contract having been put an end to.

Surely they are entitled through the company to say that one who rested content for nearly a whole year without giving any sign of warning to them, or urgent insistence in regard to his rights under what seems to have been an onerous contract cannot now be restored to his original position.

The application of the principle of acquiescence may not, on either set of facts, settle the rights of

either party herein arising out of the peculiar condition of things the evidence discloses, but, certainly, cannot help appellant.

The learned judge properly points out that Rogers seemed almost to have forgotten the representation. If he alone were to be considered that might have furnished an effectual answer.

The recklessness, to put it mildly, of such an influential director, is neither proper basis of a contract nor helpful in supporting it, when otherwise unsupportable, by reason of others being interested.

The second or tentative bargain substituted for the one I have dealt with is properly found terminable at will.

The appeal should be dismissed with costs. The cross-appeal, or notice of motion therefor, ought to share the same fate, for the judgment below seems to give no more than is right, if, indeed, so much.

The costs of the motion to quash, which must be dismissed, should be fixed at fifty dollars and deducted from the costs allowed respondent.

DUFF J.—I concur in dismissing the appeal and cross-appeal with costs.

ANGLIN J.—If Rogers, A. W. Denman, Robertson and the plaintiff had been the sole shareholders in the defendant company when the agreement of the 27th June, 1908, was made, and if there had then been no intention to bring in other shareholders, or if other shareholders had been brought in only after full disclosure of all the material facts and circumstances connected with the making of that agreement, I should hesitate before rejecting the view of Stuart J. that

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the company had not the right to repudiate it when and as it did.

But that agreement was made between persons standing in a fiduciary relation to the company. It was made concurrently with, if not as part of, and in consideration for a transaction by which Rogers and A. W. Denman obtained personal benefits from the plaintiff. It gave to him, at the expense of the company, an extravagantly advantageous bargain. It was admittedly obtained upon representations of fact made by him, which were unquestionably most material, and which, if not proved by the defendants to have been false, as I rather think they have been, have certainly not been satisfactorily established to have been true by the plaintiff, on whom that burden of proof clearly lay. There were other shareholders at the time the bargain was made some of whom, no doubt, have ceased to be interested in the company. It was then intended that shares should be offered for public subscription and, in fact, a very considerable amount of the company's stock has since been disposed of. There is no suggestion that there was, either to the persons (other than the plaintiff and the interested directors) who held shares when the agreement was made, or to the persons who subsequently acquired shares, such full disclosure of the circumstances surrounding the making of it and such express or tacit ratification by them as would be necessary to render it binding upon them.

Whatever might be urged, were the question one between Rogers, A. W. Denman and Robertson on the one side and the plaintiff on the other, I have not been convinced that as between the plaintiff and the company the temporary and tentative arrangement made

by Robertson with the plaintiff in May, 1909, to replace the arrangement of June, 1908, had lost that character and had become binding as a permanent agreement.

It is not necessary or desirable to enter upon a discussion, or to attempt an analysis of the voluminous evidence in the very bulky record before us, a great deal of which might well have been omitted. I agree with much that the learned trial judge said in condemnation of the conduct of Rogers and A. W. Denman as directors and of their negligence and indifferent attitude to the affairs of the company. But, upon what are the crucial issues of fact as between the plaintiff and the defendant company, my study of the record has not satisfied me that wrong conclusions were reached by the majority of the learned judges who sat in the court *en banc*.

I prefer, however, to rest my opinion that the judgment in appeal should not be disturbed on the ground that the first agreement made by the plaintiff cannot, having regard to his fiduciary position, be held binding on the company, because he failed to prove full and complete disclosure to all the then present and to the future shareholders of the material circumstances surrounding the making of his bargain with the personally interested directors, and that, as against the company, he failed to establish that the temporary arrangement with Robertson had become permanent.

I have not found any ground for disturbing the judgment of the full court in regard to the Bush transaction, as to which the view of the learned trial judge has been practically affirmed. Neither has a sufficient case been made, in my opinion, to justify interfer-

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ence with the direction of that court that, on the taking of the accounts between the parties, an allowance should be made to the plaintiff, on the basis of a *quantum meruit,* for his services while in the employment of the company.

I would dismiss the appeal and the cross-appeal, both with costs.

By the judgment of the court *en banc* the plaintiff's claim to recover damages for breach of contract was finally disposed of. That was "a distinct and separate ground of action." Under the authority of *La Ville de St. Jean* v. *Molleur*(1), and of *McDonald* v. *Belcher*(2), there applied, which is not affected by the judgment in *Hesseltine* v. *Nelles*(3), the plaintiff had a right of appeal to this court from the judgment dismissing his claim for damages for breach of contract. He is, therefore, entitled to his costs of the motion to quash, which should be fixed at $50, to be set off against the costs of the appeal which he is ordered to pay.

BRODEUR J.—I concur in the opinion of my brother Anglin.

Appeal and cross-appeal dismissed with costs; motion to quash dismissed with costs.

Solicitors for the appellant: *Short, Cross, Biggar & Cowan.*

Solicitors for the respondents: *Parlee, Freeman & Abbott.*

(1) 40 Can. S.C.R. 139. (2) [1904] A.C. 429.
(3) 47 S.C.R. 230.

IN THE MATTER OF THE INCORPORATION OF COMPANIES IN CANADA.

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*Feb. 24-28.
*Oct. 14.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

Constitutional law — Incorporation of companies — "Provincial objects"—Limitation—Doing business beyond the province—Insurance company—"Insurance Act, 1910"; 9 & 10 *Edw. VII. c.* 32, *s.* 3, *s.-s.* 3—*Enlargement of company's powers—Federal company—Provincial licence—Trading companies.*

By sub-sec. 11, sec. 92 of "The British North America Act, 1867," the legislature of any Province in Canada has exclusive jurisdiction for "The Incorporation of Companies with Provincial Objects."

Held, per Fitzpatrick C.J. and Davies J., that the limitation defined in the expression "Provincial Objects" is territorial and also has regard to the character of the powers which may be conferred on companies locally incorporated.

Held, per Idington, Anglin and Brodeur JJ., that such limitation is not territorial but has regard to the character of the powers only.

Per Duff J.—Provincial objects means "objects" which are "provincial" in reference to the incorporating province. Whether the "objects" of a particular company as defined by its constitution are or are not "provincial" in this sense is a question to be determined on the facts of each particular case substantially as a question of fact.

Held, per Fitzpatrick C.J. and Davies J., that a company incorporated by a Provincial legislature has no power or capacity to do business outside of the limits of the incorporating Province but it may contract with parties residing outside those limits as to matters ancillary to the exercise of its powers.

Per Idington and Brodeur JJ.—Such company has, inherently, unless prohibited by its charter, the capacity to carry on the business for which it was created, in any foreign state or province whose laws permit it to do so.

Per Duff J.—A provincial company may conduct its operations outside the limits of the Province creating it so long as its busi-

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

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ness as a whole remains provincial with reference to its province of origin.

Per Anglin J.—Such a company has, inherently, unless prohibited by its charter, the capacity to accept the authorization of any foreign state or province to carry on, within its territory, the business for which it was created.

Held, per Fitzpatrick C.J. and Davies J., that a corporation constituted by a provincial legislature with power to carry on a fire insurance business with no express limitation as to locality has no power or capacity to make and execute contracts for insurance outside of the incorporating province or for insuring property situate outside thereof.,

Per Idington, Anglin and Brodeur JJ.—Such a company has power to insure property situate within or without the incorporating province and to make contracts within or without the same to effect any such insurance. In respect to all such contracts it is not material whether the owner of the property insured is or is not a citizen or resident of the incorporating Province.

Per Duff J.—It is not necessarily incompatible with the provincial character of the "objects" of a provincial insurance company that it should have power to enter into outside the province contracts insuring property outside the province.

Held, per Fitzpatrick C.J. and Davies J.—A provincial fire insurance company cannot make contracts and insure property throughout Canada by availing itself of the provisions of sec. 3, sub-sec. 3, of 9 & 10 Edw. VII. ch. 32 ("The Insurance Act, 1910").

Per Fitzpatrick C.J. and Davies J.—That such enactment is *ultra vires* so far as provincial companies are affected.

Per Brodeur J.—Such enactment is *ultra vires* of Parliament.

Per Idington J.—Part of said sub-section may be *intra vires*, but the last part providing for a Dominion licence to local companies is not.

Per Anglin J.—The said enactment is *ultra vires* except in so far as it deals with companies incorporated by or under Acts of the legislature of the late Province of Canada.

Held, that the powers of a company incorporated by a provincial legislature cannot be enlarged either as to locality or objects, by the Dominion Parliament nor by the legislature of another Province.

Held, per Fitzpatrick C.J. and Davies J.—The legislature of a province has no power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province without obtaining a licence so to do from the provincial authorities and paying fees therefor unless such licence is imposed in exercise of the taxing power of the province. And only in the same way can the legislature restrict a company incor-

porated for the purpose of trading throughout the Dominion in the exercise of its special trading powers or limit the exercise of such powers within the province. Brodeur J. *contra.*

Per Idington J.—A company incorporated by the Dominion Parliament in carrying out any of the enumerated powers contained in sec. 91 cannot be prohibited by a provincial legislature from carrying on business, or restricted in the exercise of its powers, within the province though subject to exercise of the exclusive jurisdiction to make laws in relation to "direct taxation within the province." But a company incorporated under the general powers of Parliament must conform to all the duly enacted laws of a province in which it seeks to do business.

Per Duff J.—A company incorporated under the residuary legislative power of the Dominion is not in any province where it carries on business subject to the legislative authority of the province in relation to matters falling within the subject "incorporation of companies"; but as regards all other matters falling within the enumerated subjects of section 92 it is subject to such legislative jurisdiction just as a natural person or an unincorporated association would be in like circumstances. The enactments of sections 139, 152, 167 and 168 of the British Columbia "Companies Act" are valid.

Per Anglin J.—The provincial legislature may impose a licence and exact fees from any Dominion company if the object be the raising of revenue, or obtaining of information, "for provincial, local or municipal purposes" but not if it is to require the company to obtain provincial sanction or authority for the exercise of its corporate powers. And the legislature cannot restrict a company incorporated for the purpose of trading throughout the Dominion in the exercise of its special powers nor limit the exercise of such powers within the province, nor subject such company to legislation limiting the nature or kind of business which corporations not incorporated by it may carry on or the powers which they may exercise within the province.

REFERENCE by the Governor General in Council of questions respecting the incorporation of companies to the Supreme Court of Canada for hearing and consideration.

The questions so referred to the court were the following:—

IN THE MATTER of a Reference by His Excellency the Governor General in Council to the Supreme

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Court of Canada pursuant to section 60 of the "Supreme Court Act" of certain questions for hearing and consideration as to the respective legislative powers under the "British North America Acts" of the Dominion of Canada and the Provinces of Canada in relation to the incorporation of companies and as to the other particulars therein stated.

A report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 9th May, 1910.

"The Committee of the Privy Council have had under consideration a report, dated 2nd May, 1910, from the Minister of Justice, stating that important questions of law have arisen as to the respective legislative powers under the "British North America Acts" of the Dominion of Canada and the Provinces of Canada in relation to the incorporation of companies and as to the other particulars hereinafter stated, and it is expedient that these questions should be judicially determined.

"The Minister accordingly recommends that under the authority of section 60 of the "Supreme Court Act," Revised Statutes of Canada, 1906, chapter 139, the following questions be referred by Your Excellency in Council to the Supreme Court of Canada for hearing and consideration, namely:—

"1. What limitation exists under the 'British North America Act, 1867,' upon the power of the provincial legislatures to incorporate companies?

"What is the meaning of the expression 'with provincial objects' in section 92, article 11, of the said Act? Is the limitation thereby defined territorial,

or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation ?

"2. Has a company incorporated by a provincial legislature under the powers conferred in that behalf by section 92, article 11, of the 'British North America Act, 1867,' power or capacity to do business outside of the limits of the incorporating province ? If so, to what extent and for what purpose ?

"Has a company incorporated by a provincial legislature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province ?

"3. Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts—

"(*a*) within the incorporating province insuring property outside of the province;

"(*b*) outside of the incorporating province insuring property within the province;

"(*c*) outside of the incorporating province insuring property outside of the province ?

"Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country ?

"Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province ?

"4. If in any or all of the above mentioned cases,

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(*a*), (*b*) and (*c*), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases, on availing itself of the 'Insurance Act,' Revised Statutes of Canada, 1906, chapter 34, as provided by section 4, sub-section 3 ?

"Is the said enactment, Revised Statutes of Canada, 1906, chapter 34, section 4, sub-section 3, *intra vires* of the Parliament of Canada ?

"5. Can the powers of a company incorporated by a provincial legislature be enlarged, and to what extent, either as to locality or objects by

"(*a*) the Dominion Parliament ?

"(*b*) the legislature of another province ?

"6. Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a licence so to do from the government of the province, or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such licences ?

"For examples of such provincial legislation, see Ontario, 63 Vict. ch. 24; New Brunswick, Cons. Sts., 1903, ch. 18; British Columbia, 5 Edw. VII. ch. 11.

"7. Is it competent to a provincial legislature to restrict a company incorporated by the Parliament of Canada for the *purpose of trading* throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province ?

"Is such a *Dominion trading company* subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which

corporations not incorporated by the legislature of the province may carry on, or the powers which they may exercise within the province, of imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province ?

"Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation ?

"The Committee submit the same for approval.

"F. K. BENNETTS,

"Asst. Clerk of the Privy Council."

P.C. 1069.

A report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 30th May, 1910.

"The Committee of the Privy Council, on the recommendation of the Minister of Justice, advise that the order in Council of the 9th May, 1910, referring certain questions to the Supreme Court of Canada for hearing and consideration, be amended by substituting for the fourth of the said questions the following:—

"4. If in any or all of the above mentioned cases, (*a*), (*b*) and (*c*), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases on availing itself of the 'Insurance Act, 1910,' 9 and 10 Edw. VII. ch. 32, sec. 3, sub-sec. 3 ?

"Is the said enactment, the 'Insurance Act, 1910,'

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ch. 32, sec. 23, sub-sec. 3, *intra vires* of the Parliament of Canada ?

"F. K. BENNETTS,
"Asst. Clerk of the Privy Council."

A report of the Committee of the Privy Council, approved by His Excellency the Governor General on the 26th September, 1910.

"On a memorandum dated 23rd September, 1910, from the Minister of Justice, submitting — with reference to the Order in Council of 30th May, 1910, amending an Order in Council of 9th May, 1910, referring certain questions to the Supreme Court of Canada for hearing and consideration — that a clerical error has occurred in the concluding sentence of the question stated by the said Order in Council of 30th May, 1910, in that section 3 is erroneously described as section 23. The said concluding sentence should read as follows: 'Is the said enactment, the "Insurance Act, 1910," ch. 32, sec. 3, sub-sec. 3, *intra vires* of the Parliament of Canada ?'

"The Minister, therefore, recommends that the said Order in Council of 30th May, 1910, be amended accordingly."

The Committee submit the same for approval.

F. K. BENNETTS,
Asst. Clerk of the Privy Council.

The following counsel appeared.

Newcombe K.C. and *Atwater K.C.* for the Attorney General of Canada.

Nesbitt K.C., Lafleur K.C., Aimé Geoffrion K.C. and *Christopher C. Robinson* for the Provinces of On-

tario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Manitoba.

S. B. Woods K.C. for Alberta and Saskatchewan.

Chrysler K.C. for the Manufacturers' Association of Canada.

ANSWERS OF THE JUDGES.

THE CHIEF JUSTICE.—The first two questions in this reference can be dealt with together, and this has been done by counsel in argument.

To those two questions my general answer is: The words "Provincial objects" in section 92 (11) are intended to be restrictive; they have reference to the matters over which legislative jurisdiction is conferred by that section, *i.e.*, matters "which are, from a provincial point of view, of a local or private nature" (Lord Watson, *Prohibition Case*(1)).

The Parliament of Canada can alone constitute a corporation with capacity to carry on its business in more than one province. Companies incorporated by local legislatures are limited in their operations to the territorial area over which the incorporating legislature has jurisdiction. Comity cannot enlarge the capacity of a company where that capacity is deficient by reason of the limitations of its charter or of the constituting power. Comity, whatever may be the legal meaning of the word in international relations, cannot operate between the provinces so as to affect the distribution of legislative power between the Do-

(1) [1896] A.C. 348, at p. 359.

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minion and the provinces under the "British North America Act."

This does not imply that a provincial company may not, in the transaction of its business, contract with parties or corporations residing outside of the province in matters which are ancillary to the exercise of its substantive powers. I use the terms "substantive" and "ancillary" as descriptive of the two classes of powers inherent in the company, as these are used in the judgment of the Judicial Committee in *City of Toronto* v. *Canadian Pacific Railway Co.*(1).

It was contended on behalf of the provinces that a distinction must be drawn between trading companies or companies which simply buy or sell commodities, and companies such as manufacturing industries, the incorporation of which contemplates a physical existence within the province; but if the view above expressed as to the capacity of the provincial company is correct, no distinction can be made. In both cases, the substantive functions of the company must be confined to the incorporating province; but as incidental or ancillary thereto such provincial company would not be precluded from entering into contracts with persons or corporations beyond the province, or suing or being sued in another province.

The answer to the *third* and *fourth* inquiries respecting insurance companies is covered by the opinions expressed by me in the *Ottawa Fire Insurance Co.* v. *Canadian Pacific Railway Co.*(2).

The Parliament of Canada alone can constitute a corporation with powers to carry on its business throughout the Dominion; *Colonial Building Co.* v.

(1) [1908] A.C. p. 54. (2) 39 Can. S.C.R. 405.

Attorney-General of Quebec(1); and two or more provinces by joint action, whether by comity or otherwise, cannot extend the powers of a provincial corporation so as to cover the field assigned by the "British North America Act" to the Dominion.

Question 5. Answer: Distinguishing between comity and capacity it follows from the view above expressed of the limited capacity which the province can confer that neither another province nor the Dominion can enlarge by consent or comity the capacity which a company has received from the incorporating province.

Questions 6 and 7. Answer: The right of the province to restrict the operations of the Dominion companies by the imposition of a licence fee was based upon the decisions of *Bank of Toronto* v. *Lambe*(2); *Brewers' and Maltsters' Association* v. *Attorney-General for Ontario*(3), and the *Manitoba Licence Holders' Case*(4), and these cases are undoubtedly authority for the exercise of the licensing power where the licence is a *bonâ fide* exercise of the taxing power of the province; but it was clearly established by the case of *La Cie. Hydraulique de St. François* v. *Continental Heat and Light Co.*(5), that a province cannot exclude a Dominion company from its territory and it cannot do indirectly what it is precluded from doing directly, and to require a licence to be obtained not for revenue purposes, but in reality to shut out the operations of such corporation, is not within the power of the provincial Parliament. The province might well require that foreign corpora-

(1) 9 App. Cas. 157.
(2) 12 App. Cas. 575.
(3) [1897] A.C. 231, at p. 236.
(4) [1902] A.C. 73.
(5) [1909] A.C. 194.

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tions should be registered and file evidence of their corporate powers, names of officers and other details respecting the internal affairs of the company for registration purposes, and impose penalties for non-compliance with such legislation by way of fine; but such legitimate exercise of its powers is quite a different thing from legislation which, under the disguise of a licence requirement, is intended to prevent, or has the effect of preventing, the operation of foreign companies within the territory of the province.

DAVIES J. — This reference for the opinion of the judges of this court on the questions submitted involves a consideration and determination of the meaning of Canada's Constitutional Act and especially of sub-sec. 11 of sec. 92, "The Incorporation of Companies with Provincial Objects." We are asked whether there is any, and if any, what limitation expressed in this sub-section and as to the meaning of the words "provincial objects" together with a number of subsidiary questions to which I will later refer. The vital and substantial question, however, before us is as to the meaning of the words "with provincial objects." Is it necessarily a limitation ? If so, is the limitation a territorial and provincial one or is it a limitation of a legislative character only covering all such subject-matters as are assigned in sec. 92 to the exclusive jurisdiction of the provincial legislatures but without regard to area ?

Among the "classes of subjects" assigned to the exclusive jurisdiction of the Parliament of Canada "the incorporation of companies" is not expressly mentioned except in sub-sec. 15, "Banking, Incorporation of Banks, and the Issue of Paper Money." It is

not, however, denied that the Parliament of Canada has under the residuum of power assigned to it the power to incorporate companies to carry on throughout Canada the objects for which they are incorporated. If any possible doubt at any time existed on the point after the decision in the case of *Citizens Ins. Co.* v. *Parsons*(1), it seems to have been set at rest by the judgment of the Judicial Committee delivered by Lord Chancellor Loreburn in the case of *Attorney-General of Ontario* v. *Attorney-General for Canada*(2). In dealing with cases where the text of what he calls a completely self-governing constitution founded upon a written organic instrument such as the "British North America Act" says nothing expressly, he says, p. 583:—

> It is not to be presumed that the constitution withholds the powers altogether. On the contrary it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as for example a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self government in Canada belongs to the Dominion or the provinces within the limits of the "British North America Act."

The respective powers of the Dominion Parliament and the provincial legislature to incorporate companies has received some consideration by the Judicial Committee in the cases of *The Citizens Ins. Co.* v. *Parsons*(1), above referred to, and *Colonial Building and Investment Association* v. *Attorney-General of Quebec*(3). In the former case Sir Montague Smith speaking for their Lordships says at p. 116, with respect to the Dominion's enumerated power to legislate in respect to trade and commerce:—

(1) 7 App. Cas. 96. (2) [1912] A.C. 571.
(3) 9 App. Cas. 157.

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In the first place, it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces, and the only subject on this head assigned to the provincial legislature being "the incorporation of companies with provincial objects," it follows that the incorporation of companies for objects other than provincial falls within the general powers of the parliament of Canada.

In the *Colonial Building Case*(1), Sir Montague Smith who again delivered the judgment of the Judicial Committee after affirming their Lordships' adherence to the view expressed by them in the *Citizens Insurance Co. of Canada* v. *Parsons*(2) as to the respective powers of the Dominion and provincial legislatures in regard to the incorporation of companies, goes on to say, at p. 165:—

> The Company was incorporated with powers to carry on its business consisting of various kinds throughout the Dominion. *The Parliament of Canada could alone constitute* a corporation with these powers.

And again, at p. 166:—

> What the Act of incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz., throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can acquire and hold it, the Act of incorporation gives it capacity to do so.

"Capacity" and "powers" are here used as synonymous and the conclusion I draw from a careful study of these two judgments is that the Judicial Committee intended to affirm the proposition that the Parliament of Canada alone could confer a capacity upon a com-

(1) 9 App. Cas. 157. (2) 7 App. Cas. 96.

pany exercisable in more than one of the Dominion's provinces.

In a later case which came before their Lordships, *La Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*(1), their Lordships held that the respondent company incorporated by the Dominion Parliament could not be restrained from operating under its statutory powers at the suit of the appellant company which under later Quebec statutes had the exclusive power of so operating in the locality chosen by the respondent.

The judgment was based upon the broad ground that several decisions of the Board had established

> that where a given field of legislation is within the competence both of the Dominion and Provincial legislatures, and both have legislated the Dominion enactment must prevail over that of the province if the two are in conflict as they clearly are in the present case.

No distinction is here made between legislation by the Dominion Parliament under its general powers and legislation by it under some one of its enumerated powers. When legislating under these latter it is clear that Dominion legislation is paramount. I have not understood it to be so when legislating under its general power unless when exercised with reference to a subject matter which had attained national importance. Mr. Lafleur suggested that in this appeal the Judicial Committee were dealing with a company incorporated under the exception to sub-sec. 10 of sec. 92, which formed part of the enumerated powers of the Dominion Parliament under sub-sec. 29 of sec. 91, and that this would explain the language of the judgment. But so far as the report of the case goes there

(1) [1909] A.C. 194.

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does not seem any ground for the suggestion. On the contrary the judgment seems to assume that it was merely formulating propositions which had already been approved of and acted upon by the Judicial Committee. The decisions on which their Lordships rely are not expressly given but I assume that they had in mind amongst others the Prohibition Case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(1), where their Lordships upheld the validity of the "Canada Temperance Act, 1886," enacted by the Dominion Parliament, and held that although it was not legislation within the enumerated powers of that Parliament, but was enacted under the general power to legislate for the peace, order and good government of Canada still it was *paramount* legislation because it was on a subject matter unquestionably of national interest and importance and which had attained such dimensions as to affect the body politic of the Dominion, and further that in so far as the provisions of any provincial statute came into collision with the "Canada Temperance Act"

> the Provincial must yield to Dominion legislation and must remain in abeyance until the "Dominion Act" was repealed by the Parliament which passed it.

Unexplained and accepted as reported simply this *Hydraulic Company Case*(2) would conclude and settle the difficulties as between Dominion and Provincial legislation, as to which the vital questions on this reference are asked. In the late case of *The City of Montreal* v. *Montreal Street Railway Co.*(3), Lord

(1) [1896] A.C. 348. (2) [1909] A.C. 194.
(3) [1912] A.C. 333.

Atkinson speaking for their Lordships of the Judicial Committee, at p. 343, sums up the result of the various decisions of the Judicial Committee on the meaning of these two important sections 91 and 92 of our Constitutional Act, and seems clearly (pp. 343-4) to adopt the view that it is only Dominion legislation enacted under some one of the enumerated powers of section 91, or which is necessarily incidental to the powers conferred therein which can encroach upon or invade any class of subjects which are exclusively assigned to the provincial legislatures. I do not think, however, that their Lordships intended to reverse or overrule their previous decision with respect to the constitutionality of the "Canada Temperance Act" or to question the construction put in that decision upon the general powers of the Dominion to legislate upon matters not enumerated in the 91st section, but which unquestionably had attained national interest and importance, or to determine that the Dominion in legislating under these general powers upon such matters of national interest and importance must not trench upon any of the enumerated subjects in section 92, assigned to the provincial legislatures. If their Lordships did so intend then it would seem to me that the result would be tantamount to a declaration that the "Canada Temperance Act" was *ultra vires* of the Parliament of Canada. I venture to think that if their Lordships intended to deny the power of the Dominion Parliament when legislating under its general powers on matters unquestionably of national interest and importance, which have attained dimensions affecting the body politic of the Dominion to trench upon any of the enumerated powers of the Provincial legislatures they

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would have used different language from that which they have used. Such a construction of the Act would practically deny to the Dominion Parliament power to grapple effectively with any great national evil or condition quite beyond the powers of the legislatures to deal with because the prohibition against trenching upon provincial powers would be fatal. I have no doubt that this was one of the grounds on which their Lordships in the *Prohibition Case*(1), upheld the Dominion legislation as *intra vires*. That the "Canada Temperance Act," 1886, did trench upon "Property, and Civil Rights" seems beyond argument, and still as I understand it, the legislation was upheld because its subject matter had attained national importance and such dimensions as affected the body politic of the Dominion. Lord Watson did not find that it was legislation within any of the Dominion's enumerated powers, but accepted the previous decision of the Judicial Committee in *Russell* v. *The Queen*(2), as authority

> that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion must receive effect as valid enactments relating to the peace, order and good government of Canada.

Lord Watson went on to say further that their Lordships were unable to regard the prohibitive enactments of the Canadian statute of 1886 as "Regulations of Trade and Commerce" for the reason that the object of the Act was not to regulate but to abolish all retail transactions between those who trade in liquor and their customers within every area where the Act is brought into operation.

The validity of the Act was therefore maintained

(1) [1896] A.C. 348. (2) 7 App. Cas. 829.

solely under the Dominion's general powers to legislate for the peace, order and good government of Canada, although it directly affected property and civil rights in provincial areas and was in conflict with provincial legislation on the same subject-matter of legislation. And the ground on which its validity was upheld was that the subject-matter was one of national importance affecting the body politic of the Dominion. My understanding of the decision is that such legislation forms an exception to the general rule that legislation under the peace, order and good government clause must not trench upon the enumerated powers of section 92. The result would be that while Dominion legislation generally under the peace, order and good government power might be good if it only affected incidentally the enumerated powers of the provincial legislatures under section 92, it could only directly affect and overrule legislation under those enumerated powers when enacted on such subject-matters of unquestioned national interest and importance as had attained dimensions affecting the body politic of the Dominion.

If the observations and decisions of the Judicial Committee in the several cases I have referred to as to the powers conferred upon the provincial legislatures with respect to the incorporation of companies are not conclusive as to the nature, character and extent of these powers and we construe sections 91 and 92 of our Constitutional Act broadly and generally and apart from authority we cannot fail to observe what care was apparently taken to assign to the provinces exclusive jurisdiction over all matters or subjects of a purely provincial or local or private nature while assigning to the Dominion jurisdiction over all

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other matters or subjects relating to the peace, order and good government of Canada as a whole. Bearing this in view and reading with critical care the 16 sub-sections of section 92 in which these exclusive powers are expressed, one fails to find anything to support an argument by which the exercise of any of them could have been intended to have a direct extra-provincial object or purpose. Words of provincial limitation of some sort or character are to be found in each one of the 16 sub-sections. These words vary, naturally, as the subject-matter requires; but whether the words or phrases used are "for provincial purposes," or "for provincial, local or municipal purposes," or "of the province," or "in the province," or "in or for the province," or "with provincial objects," they one and all indicate a consistent and uniform purpose of limiting the constitutional powers conferred to matters and subjects purely provincial or merely local or private as distinguished from those which were either Dominion wide in their extent or related to or affected more than one of the provinces.

The special words of limitation as to the meaning of which we are asked are found in the 11th sub-section. "The incorporation of companies with provincial objects." The power given is an exclusive one. The words "with provincial objects" are clearly words of limitation. The addition of the word "only" or the words "and no others" would not alter or change the nature or extent of the limitation. In my opinion the limitation is as to area, the area is that of the province. The company to be incorporated is one with an object or functional purpose to be carried out within the province as distinguished from one with a more general object or purpose, that is one extending to

two or more provinces or to the Dominion at large. The limitation has doubtless reference not only to the area within which the companies are to operate but to the subject-matters over which exclusive legislative jurisdiction is conferred on the provinces by section 92. The argument for the provinces was that it related only to these subject-matters and had no reference to area. I cannot so read it. As was said by the Judicial Committee in the case *Colonial Building and Investment Association* v. *Attorney-General of Quebec*(1), before referred to, the Parliament of Canada can *alone* constitute a corporation with power to carry on its business throughout the Dominion. If the provincial argument is sound that the limitation was not intended to have a reference to area but solely to the subject-matters assigned exclusively to the provinces to legislate upon it is strange that the draftsmen and framers of the Act should have used such inapt language to express their intention as is to be found in sub-section 11. The phrase "classes of subjects" is used many times over in the Act and if the intention was to add a limitation to the power to incorporate companies which would have no reference to area but should apply only to the subject matters assigned to the exclusive legislative powers of the provinces one would imagine that the draftsman would have continued the use of his favourite phrase and made the sub-section to read "The Incorporation of Companies upon or for any of the classes of subjects assigned exclusively to the provincial legislatures."

The result of the acceptance of the provincial contention would be that the provincially incorporated

(1) 9 App. Cas. 157, at p. 165.

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companies would have equal capacity with Dominion incorporated companies to carry on their business throughout Canada. The only difference would be that the provincial companies would do so by virtue of the comity or permission of the provinces other than the one incorporating the company which might be withheld or withdrawn while the Dominion companies would do so by virtue of the inherent powers they derived from their Acts or letters of incorporation.

Such a result would seem to me not only to violate the cardinal principles adopted in the distribution of legislative powers between the Dominion and the provinces of confining the exclusive powers of the provincial legislatures to the province alone and assigning the residuum of legislative power to the Dominion Parliament but is at variance with the rule of construction many times adopted with respect to legislation alike Dominion and provincial of prohibiting that being done indirectly which cannot be done directly.

In the view, however, which I take of the character of the limitation contained in the provincial power to incorporate companies this question of the company carrying on its business beyond the area of the province which created it does not arise. If I am right that the limitation on the power of a province to incorporate companies is a territorial one and limited to the province as distinguished from the Dominion at large then it is plain that every charter granted by statute, or letters patent under the "Companies Act," by the province must have that constitutional limitation read into it and I cannot understand how any doctrine of the comity of nations could

avail either to enlarge the limited constituent powers of a company or the limited area within which the exercise of unlimited powers of a company were constitutionally confined.

The argument of inconvenience arising from the construction of the Act I have reached was pressed very strongly and it was said at Bar that many companies with millions of capital had been incorporated by the provinces and would be seriously hampered if they were not allowed to carry on their business throughout the Dominion in all the provinces which did not expressly prohibit their doing so. In the first place the constitutional limitation upon the exercise by these provincial companies of their powers while preventing them from carrying on their business or exercising their functional powers outside of the province would not prevent them doing everything within or without the province incidentally necessary to the carrying out of any of these functional powers.

A provincial company incorporated for the manufacture and sale of any article while confined to the province creating it so far as the manufacture and sale of the article was concerned could doubtless purchase outside of the province the machinery and raw material necessary to enable it to carry out the purposes for which it was brought into existence and so while confined to the province in carrying on its business of selling its manufactured products could do so to any one willing to buy from any other province so long as it did not attempt to carry on its business in such other province. But I cannot see, unless my construction of our constitutional Act is entirely wrong, how a company incorporated for mining, or fishing, or lumbering, or milling, or manufacturing,

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say in Nova Scotia, could carry on the business of mining, fishing, lumbering, milling or manufacturing in, say the Province of British Columbia, or in any other province than Nova Scotia. To say that with regard to trading companies it is almost impossible for them effectively to carry on their business within the limits of a province, except with great inconvenience and possibly loss is merely to say that they should get a Dominion and not a provincial charter. But while I think the inconveniences and difficulties were greatly exaggerated at Bar I do not see in them any justification at all for adopting an improper construction of our Canadian Constitutional Act with respect to the division of legislative powers.

The foregoing observations and conclusions reached by me contain my answer to the first question submitted which is that the limitation contained in the words "with provincial objects" is a territorial one and also one controlled as to subject matters by the ambit of the legislative powers of the province as defined in section 92 of the Act. They also embody my answer to question two (2) which answer is in the negative, except with regard to such incidental business as may be necessary to carry out the functional powers conferred upon the companies.

The third question reads as follows:—

Has a corporation constituted by a provincial legislature power to carry on a fire insurance business there being no stated limitation as to the locality within which the business may be carried on power or capacity to make and execute contracts—

(*a*) within the incorporating province insuring property outside of the province;

(*b*) outside of the incorporating province insuring property within the province;

(*c*) outside of the incorporating province insuring property outside of the province?

Has such a corporation power or capacity to insure property situ

ate in a foreign country or to make an insurance contract within a foreign country?

Do the answers to the foregoing inquiries or any and which of them depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province?

To each and all of these questions my answer is in the negative.

The fourth and fifth questions read as follows:—

4. If in any or all of the above mentioned cases, (*a*), (*b*) and (*c*), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases, on availing itself of the "Insurance Act," 1910, 9 & 10 Edw. VII. chapter 32, section 3, sub-sec. 3?

Is the said enactment, "The Insurance Act," 1910, chapter 32, section 3, sub-sec. 3, *intra vires* of the Parliament of Canada?

5. Can the powers of a company incorporated by a provincial legislature be enlarged, and to what extent either as to locality or objects by—

(*a*) the Dominion Parliament?

(*b*) the legislature of another province?

I answer these questions in the negative. I feel I need hardly enlarge on what I have already said on this branch of the subject. The Imperial Parliament has assigned to the legislatures of the several provinces exclusive jurisdiction over "the incorporation of companies with provincial objects." My construction of the limitation in this assignment of powers is that it is a territorial one and confined to the subject matters exclusively assigned to the provinces by section 92; that provincial objects mean provincial as distinguished from Dominion and that the *class* of companies it can incorporate is only limited by the exclusion of those companies which may be incorporated by the Dominion Parliament under its enumerated powers. I am quite unable to see how the Dominion Parliament could invade the exclusive power assigned to the provinces and either alter, extend or

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abridge a provincial charter, or how a provincial legislature could on the other hand alter, extend or abridge powers with which the Dominion Parliament invested a company of its creation. The powers of the Provincial legislatures are exclusive though when they clash with legislation of the Dominion under any of its enumerated powers or with legislation under its general powers on subject matters which have attained national importance and affect the body politic of the Dominion at large they must give way to the Dominion legislation which is paramount. But once these limitations upon the exclusive powers of the provincial legislatures are reached and the powers themselves defined, nothing short of another Imperial Act can avail to change or alter that which an Imperial Act has already fixed. The Dominion Parliament certainly cannot even with the consent of all the provincial legislatures amend the Imperial Act and they cannot, therefore, add to the powers or objects of a provincial company which have been defined and circumscribed by Imperial legislation. Nor can a legislature of one province with its limited and defined powers of incorporating companies add to or enlarge the powers of a company incorporated by another province. I answer 4 and 5 in the negative.

The 6th and 7th questions read:—

6. Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a licence so to do from the government of the province, or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such license ?

For example, of such provincial legislation see Ontario, 63 Vict. Ch. 24 New Brunswick, Cons. Sts., 1903, Ch. 18; British Columbia, 5 Edw. VII. Ch. 11.

7. Is it competent to a provincial legislature to restrict a company incorporated by the Parliament of Canada for the purpose of

trading throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province?

Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the province may carry on, or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province?

Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation?

It is difficult if not impossible, to answer these questions categorically. Much necessarily depends upon the form of the enactment passed by the local legislature. "Direct taxation within the province in order to the raising of a revenue for provincial purposes" is one of the enumerated powers assigned provincial legislatures. Legislation, therefore, the *bonâ fide* object of which is such direct taxation within the province would of course be *intra vires* even when laid upon Dominion companies. In the cases of *Bank of Toronto* v. *Lambe*(1), and *Brewers' and Maltsters' Association* v. *Attorney-General for Ontario*(2), the Judicial Committee have laid down the principles which should govern in cases where provincial legislation attempts to lay taxes upon Dominion companies, and I do not see how I can usefully add on a reference such as this, anything to what their Lordships have already said on that subject. My present opinion is that local taxation of a Dominion company otherwise valid, would not be rendered invalid merely by a provision requiring the payment of the tax as

(1) 12 App. Cas. 575. (2) [1897] A.C. 231.

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the condition of the company carrying on its business in the province.

My formal answer indicates the nature, character and extent of the restrictions, if they may be so called, which the local legislatures may, in my opinion, put upon the exercise by the Dominion companies of their powers within provincial areas.

IDINGTON J.—We have here submitted seven interrogative paragraphs, each containing a principal question and a number of subsidiary questions. The answers, however brief, must involve the survey of a wide field of constitutional law.

The Judicial Committee of the Privy Council referring to the nature of these questions and the difficulty of answering them "exhaustively and accurately without so many qualifications and reservations as to make the answers of little value" has said herein:—

> The Supreme Court itself can, however, either point out in its answer these or other considerations of a like kind, or can make the necessary representations to the Governor General in Council, when it thinks right so to treat any question that may be put. And the Parliament of Canada can control the action of the executive.

Opinions of this court, or that higher up, in answer to such questions have been declared by the same judgment to be "advisory * * * and of no more effect than the opinions of law officers."

To answer all these questions, a man might write a large volume, without departing from the lines of thought they suggest, and then leave unanswered a good many of them.

I most respectfully submit, for my part, in line with the foregoing suggestion, that problems such as

are raised by these questions can only be properly solved by the march of events, political and judicial.

The main issues raised by the present inquiry are relative either to the assumption by provincial incorporations of power which it is alleged they have not, or to the enactment by provincial legislatures of statutes claimed to be *ultra vires,* in so far as bearing upon corporations of Dominion creation.

There are legal methods available to attorneys-general of either the Dominion or the provinces, by which the assumption by corporate bodies of powers they have not, and the validity of provincial legislation, can be tested and judicially determined by due process of law.

A single decision on a single point wherein any undue assumption of such like powers has been challenged, would be worth more as a guide to future action than all the answers that can ever be got herein. The growth of judicial decision in concrete cases can alone settle the law. That may be obtained either by the prompt and proper method I have suggested, or by the slower method of awaiting the results of private litigation. In any case it can only be reached in a satisfactory manner, step by step.

When one point has been thus decided it furnishes a safe guide to the decision of the next.

This method of solution by getting mere advisory opinions binding no one upon a group of questions can settle nothing but may mar much. Radical error in any one point and the answer it brings may vitiate the entire results got in such an unusual sort of submission as this. Experience, intelligence and understanding, however serviceable if starting rightly and progressing step by step as each point has been settled,

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may be wasted, or worse, for want of the first thing having been finally decided and used as a guide.

Those who have given most attention to, and brought to bear upon the problems involved the greatest learning and deepest thought, will be those who will have the most profound appreciation of what I have just said, and the need of saying it here.

If I have not made clear the impossibility of a satisfactory solution by this method, perhaps what follows may help to illustrate the soundness of these submissions which I in discharging my duty respectfully make.

Passing to the task of answering the questions I will treat them in their order, taking questions one and two together.

The substantial part of the first question submitted was before this court in the concrete case of the *Canadian Pacific Railway Co.* v. *Ottawa Fire Insurance Co.*(1), when the diversity of opinion in this court relative to the meaning of the phrase "The incorporation of companies with provincial objects" as used in sub-section 11 of section 92 of the "British North America Act," illustrated the worthlessness of advisory opinion and need of a binding decision.

It is difficult to understand the exact position of the counsel for the Dominion in regard to the first question. Their factum puts the matter thus:—that "a provincial company may not it is submitted exercise any of its functional capacities beyond the limits of the incorporating province," though it may be forced by circumstances to go beyond its province to institute an action.

(1) 39 Can. S.C.R. 405.

Yet in deference to what transpired in argument relative to the corporate journalist with subscribers in many provinces, Mr. Newcombe seemed to me to concede much more than he thus desired or intended to argue for.

And Mr. Atwater, going for a time far beyond this position in the factum as the reporter's notes shew, said:—

JUDGE DUFF.—Well, carrying on any mercantile business, whatever is understood by a mercantile business, which consists in making a profit by buying and selling.

Mr. Atwater.—If it was incorporated for the purpose of buying and selling in the City of Montreal, I don't know—I would perhaps hesitate to say it could not import into Montreal the classes of goods which came within its capacities which it was entitled to deal in and do business in, and which could not be obtained in Montreal.

* * * * * *

Mr. Atwater.—Well, if your lordship asks me for my own opinion, for what it may be worth on that point, I don't know that it would be doing business, I don't know that the mere taking of orders by a traveller would constitute doing business.

I understand the term "functional capacities" to cover the daily activities of business within the corporate capacity and that the argument of the factum was intended to deny the power of contracting, for the purpose of such activities, in any place beyond the limits of the province, save incidentally to the necessity of following property or rights for which the possible remedy of recovery had accidentally been removed beyond the limits of the province.

There is, I admit, a difficulty in adhering strictly to such a proposition in face of the concrete facts existent at the door of our court house. There the middle of a stream separates two provinces, and two cities, which the stranger looking at the busy scene would, until told otherwise, say were one. Much if not the

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greater part of the vast business done there is the product of provincial companies acting in utter defiance of such a doctrine. The difficulty of arguing for such a proposition is enhanced when we know that such a growth of provincial authority has taken place under the shadow of the parliament buildings and unchallenged till now by the legislators assembled there.

That, however, is no reason for casting discredit on the work of the dead statesmen who framed the scheme and used the language of which so much has been made. They possessed at least ordinary Canadian intelligence, and knew that corporate companies in Canada had as matter of business necessity to cross the interprovincial and international boundary lines, and that to give them only such limited powers as it is now contended were given, would be a solemn mockery.

Counsel making this contention referred to the historical record in Mr. Pope's book in support thereof.

We find therefrom, that it was only when Mr. (afterwards Sir) Oliver Mowat had moved the adoption of the sixteen subjects to be assigned the provinces, that some one moved in amendment to add:—

> 17. The incorporation of private or local companies, except such as relate to matters assigned to the Federal Legislature.

That found its place later as item 14, then placed next after the item of "Local Works and Undertakings" and the words "Federal Legislature" were changed to "General Parliament." So amended in 1864 the item stood throughout the remaining negotiations for Confederation, the adoption of the scheme by the Canadian Parliament and the London Confer-

ence in 1866, until the draft bill of the "British North America Act" was submitted.

Then it appears the draftsman made it read (11) "The incorporation of companies with exclusively provincial objects"; which stood till the 4th draft of the bill when it was made to read (11) "The incorporation of companies," which was changed at the final draft to what it now reads.

Surely this was a singular struggle for such men seeking apt words to express such a purpose as that of restricting the business operations of such companies within the territorial limits of each province creating them. Such a failure in power of expression is remarkable if that was their purpose, or if such an absurd idea ever entered the mind of any one.

Clearly the sole difficulty was, if the subject were touched upon at all, to avoid invading the Dominion's exclusive and enumerated share of legislative authority, and to define something in contradistinction thereto, but in no way to alter the inherent character of an ordinary corporate company as understood in Canada and England at that time.

The references to debates and proceedings anterior to an Act are generally not permitted in argument as guides to its interpretation. But counsel for the provinces need not complain of this illuminating piece of history which is introduced by their opponents and if allowed any weight destroys any pretension that the private or local companies, or whatever they may be called, were to be crippled creations of a new order unknown in the business world.

We were also referred by counsel for the Dominion to the despatches and opinions of past Ministers of Justice in discharging their duties relative to the veto

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power. If we must accept them as authority, why are we asked? If we need not, and differ therefrom, how much advanced is the solution?

A striking commentary upon the citation of such authority are the facts that the late Sir Oliver Mowat, who is thus cited and relied upon to support the proposition that provincial corporations cannot transact business beyond the respective limits of the province creating them, was long Attorney-General of Ontario, and longer premier of that province, was quite as conversant with the legal conditions under which the provincial corporations operated as any one could be, and as much likely as any one to be alive to the dangers of such corporations transacting business beyond the province if in doing so, as is now contended, they were acting *ultra vires* and had not the inherent power to do so, yet he never instituted proceedings against one of them to restrain this alleged abuse. Those who knew the man, know he was the last man to tolerate such a state of things if he believed it to be illegal. The conclusion to be drawn is that he in common with others held that such corporations had the inherent power, when once created without restriction, to go abroad for such purposes of business as they had been incorporated to carry on, yet that it would be unwise to express such purpose in the charter.

Whether or not a legislature may from time to time have in its enactments so reached out as to appear to be doing what was *ultra vires* its power is one thing. Whether without so reaching out by express language to assert the power that power is inherent in each provincial corporation to avail itself of the comity of nations, is quite another thing.

The Minister of Justice looking to the develop-

ments of the future and possible need, in order to subserve the purposes of the Dominion, of restricting the power of the provinces by means of the exercise of the veto power over provincial legislation, might well desire to avoid giving any apparent sanction for such express reaching out as in fact sometimes existed. In other cases pursuant thereto and to the traditions and policy of his office any such minister may have pushed his argument too far.

The arguments maintaining such authority are only good for some or one of such purposes, and prove nothing herein.

The fact that not a single Minister of Justice or Attorney-General of any province has taken the argument so seriously as to invoke the judicial authority to enforce it, is perhaps the best answer of all to this sort of argument.

Surely all those dealing with the matter of framing this new constitution intended these corporations to be what the ordinary business man supposed a business corporation to mean.

He looks upon it, as these framers acting for him no doubt did, no matter what the philosophers or mystics may say, as simply a convenient method of forming a combination of men having a common business purpose, under a common name with limited or unlimited liability, and such powers of expressing a common will and purpose suitable to the business in hand and restricted in all that within the limits of their articles of association, but by no national boundary line if the foreign country beyond will permit it to go so far.

If such a man had been asked to join an Ontario milling company and did so, he would never have im-

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agined such a thing as that his company could not buy wheat in Chicago, grind it in Toronto and carry the flour to Liverpool, or Constantinople if it chose. If its Chicago office or broker had, for example, got enough of wheat to load a boat, or line of boats, but early frost had closed navigation on the lakes so that it would be more profitable to grind the wheat in Chicago and ship the flour by rail to New York to catch the earliest steamer for Liverpool, and he were then told his company could not save itself that way, what would he say? I imagine that if he were told then, under such circumstances, that if he had got a Dominion charter instead of a provincial one, neither power having any more right to confer power or right to go abroad than the other, he would be tempted to say that the superstition of the days of the big medicine man had passed away. Such is my expansion of the sub-question put in question number two, and the view I hold in answer thereto.

The interests of these provincial incorporations and their creditors have grown to be so vast that to cut away by a stroke of a pen, as counsel for the Dominion Attorney-General urges, the foundation upon which they have proceeded and destroy as *ultra vires* the contracts made on faith thereof, would create financial disaster of such magnitude as to appal any but those heedless of others' rights and reasonable expectations.

Destroy such contracts and under our system Parliament could not so deal with these provincial corporate creations as to enable justice to be done. Parliament has no right to meddle with these provincial corporations or the civil rights which exist in the province creating them. Save in the possible case of local

works and undertakings which it can declare to be for the general benefit of Canada, it would be absolutely powerless to avert the disastrous results sure to follow a final determination such as seems to be sought herein.

Those possible consequences of long years of interpretation, must in such a case be heeded herein and I submit are a bar to publications or invitations thereto of advisory opinion productive, if acted upon, of such results.

It is not our province to deal with the political or economic results, but yet our duty to point out clearly the legal consequences involved in the departure sought.

It never was, in my opinion, intended by the phrase "provincial objects" to restrict the business operations of such a corporation within the province creating it.

In *Canadian Pacific Railway Co.* v. *Ottawa Fire Ins. Co.*(1), I dealt with the question at length and touched upon the chief phases of it, and may be permitted to refer those caring for the details of the argument to pages 436 to 454 of the report of that case. I remain of the opinion there expressed and am quite sure that opinion was and is in accord with what has been acted upon by those provincial authorities creating corporations and of those accepting such corporate powers.

Briefly put, however, it is that the provinces had always had prior to Confederation the power of incorporation of companies having power to do business either at home or abroad; that there is no reason to suppose they ever were intended to have less effec-

(1) 39 Can. S.C.R. 405.

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tive powers, in that regard, when acting within the limits of the subjects over which they were assigned exclusive control; that the assignment of that exclusive control implied the power of incorporation whenever such an expedient could advantageously be resorted to; that no power was given to incorporate municipal institutions or schools, yet no one could pretend that the power to do so did not exist, or that such corporations were restricted from going beyond the province if they saw fit for any purpose of borrowing money or acquiring supplies; that the asylums, hospitals, charities and eleemosynary institutions in and for the respective provinces were in the like position in relation to incorporation and going beyond the province for supplies; that if it had properly been implied that incorporation of all these various institutions could be affected, it should also be as clearly implied that the exclusive power given over property and civil rights implied the power of incorporation, so far as necessary to give efficacious operation to any of such civil rights, and that there was nothing in sub-section 11 to restrict that power save in the case and sense I am about to refer to.

I there also tried to shew that "provincial objects" could not be held to refer to any of the purposes of government which in a sense are the only "provincial objects" most appropriately covered by such a term.

Item number 11 being placed next after that relative to the local works and undertakings might suggest that it may have been in relation to government works that the term was used.

The later item, number 13, of "property and civil rights" being thus left unrestricted, the power of creation of any corporation should follow as a necessary part thereof or implication therein.

However that may be, I thought then and still think and take the liberty of repeating here what I said then in regard to the question of "provincial objects":—

I have shewn that the phrase "provincial objects" cannot relate to or be confined within what its strict literal meaning might require.

It seems difficult and I would have said impossible, but for the contention here set up and heed given to it, to extract from such a phrase any restrictive meaning save that involved in distinguishing the subjects exclusively assigned to the provinces, from those assigned to the Dominion as the line of incorporating power given. That restriction may reasonably be found in the phrase. It may even have been one of the purposes of using it, to save possibility of conflict with or embarrassment, in that regard, in the Dominion's exercise of the power of incorporating.

In view of the civil rights and property (which are the essential elements to be controlled in creating any company) within the provinces being *exclusively* assigned to the provinces it might have been but for sub-section 11 said that the Dominion had to look to the provinces for incorporating power to subserve its exercise of its powers.

The exclusive legislative control over property and civil rights in the province is of such a sweeping and comprehensive character that even the final part of section 91 might not have sufficed for its restrictive purposes unless the incorporating power of section 92 were thus restricted by something to indicate that when the province undertook to incorporate it should keep to that field that was provincial in its character.

But how does that affect the question of the quality of power inherent in a corporation? Sub-section 11 clearly was pointed at something in the nature of a partition of the sovereign legislative powers between the Dominion and the provinces.

But how could that help in regard to a power that neither of them possessed, neither of them could acquire, neither of them modify, but which either of them might without consulting the other exclude from their corporate creatures the right to exercise? I refer to the power to enjoy rights given by virtue of the comity of nations which I refer to hereafter.

I use this extract because it shews not only the argument I wish to adopt here but as it seemed to me fitted to the necessities of a concrete case where definite legal results had to be attained.

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The notion that men may get a charter in one province in order to abandon its use there and take the seat of business of the company, if it ever had one, to another or a foreign country, yet carry on no business in the province of its creation, implies men may resort to such an absurd impropriety to accomplish by such roundabout methods, what in these days of easy incorporation can so easily be reached by acting directly.

Public opinion and the coercive measures it may demand and which lie within the power of the legislatures of other provinces as well as possibly in some extreme cases in the Dominion Parliament, can no doubt check such abuses. A company incorporated expressly to carry on mining or farming or fishing in another province, might well find itself in such conflict with the legislation of that province as to be made speedily aware of such impropriety.

There is an instructive line of American authorities which shews that corporations may be held to have, as inherent in their creation, the power of going beyond the bounds of the parent state to make such contracts as they are capable of, yet when it comes to a question of doing anything for which the special sanction of the company's shareholders is requisite, such business must be done at the company's seat or within the parent state. Some of such cases also seem to say the like rule should be observed where the sanction of the directors is needed. These cases are instructive as illustrations of what is supposed to form part of the inherent power and the inherent limitation which may be implied.

To sum up what I have said and furnish such answers, qualified and limited, as that so said, indicates,

the best reply I can give to these questions is as follows:—That a provincial legislature cannot incorporate a company to do any of the things which lie within the exclusive power of Parliament, and hence cannot be provincial objects, (though possibly Parliament may use such companies acting within their capacity for executing any of its purposes) but its corporate creations have each inherently in it unless specifically restricted by the conditions of the instrument creating it, the power to go beyond the limits of the province for such purposes and transactions as are needed to give due effect to the business operations of the company so far as within the scope of what they were created for. And if they be formed for the purpose of buying and selling grain, they can do so in any place where their business will carry them, and the comity of nations permit them. And those formed to grind grain can, subject to the like limitations, grind it where deemed desirable.

I submit that I have substantially answered all the riddles in questions 1 and 2, yet the subject has no clear limitations that my limited range of vision can reach and outline.

As to question 3 and its subsidiary divisions, I answer each of the latter in the affirmative, always provided, however, that there has been no restriction placed by the charter of the company upon its doing so, and no prohibition in the foreign state or province where contracting invalidating such contracts, and that the company has a home or seat of business in the creating province to which the authorization of such transactions must be attributed. The company's own by-laws or regulations empowering its agents to act abroad, can and must define the details to be ob-

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served in the execution of such contracts and the transaction of such business as done there.

And as to the last subsidiary question, I think it can make no difference what the citizenship may be unless such condition has been imposed by the charter of the company, or some rule of the foreign state concerned.

Of course, in relation to all these questions, we must never lose sight of the possibilities that lie in sub-section 25 of section 91, giving Parliament exclusive power over the subject of "naturalization and aliens," but I do not apprehend anything relative thereto is implied in the questions as put.

In answer to the amended or substituted question, number 4, I, having answered No. 3 in the affirmative, need not answer here save as to the sub-question relative to the power of Parliament to enact sub-section 3, of section 3, of chapter 32, of the "Insurance Act," 1910.

I have dealt so fully in answering the shorter catechism directed recently as to the power of Parliament relative to some provisions of the "Insurance Act," that I respectfully refer thereto for the reasons which govern me in answering this part of the longer catechism.

I cannot say that this sub-section is entirely *ultra vires,* for it may possibly for some purposes be read as part of concurrent legislation dependent upon and to become operative along with and dependent upon such provincial legislation. But as it stands the last part of it must be held *ultra vires,* for the power does not extend to the enabling corporations to do anything beyond the power given by their respective creators.

The insurance companies incorporated by the late Province of Canada are quite independent of anything Parliament may enact unless something falling within the twenty-nine enumerated powers of section 91, such as bankruptcy for example.

They may have had express powers given them to do business anywhere in the world. They may have had such powers made dependent upon any competent legislative authority and got it. Whatever they had they are entitled to hold and to act upon unless duly taken away.

Their case illustrates perhaps more strongly than the case of the provincial companies of any of the present provinces can do, the futility of such legislation as involved in this sub-section.

In the absence of any such companies and those directly concerned, it would seem to me improper to deal further with this inquiry or in any way cast a doubt on the validity of their transactions. The chances are they have done just what they were entitled to do without the proffered licence and the matter is thus reduced to insignificance.

There may be, for aught I know, or have heard, facts furnishing reasons analogous to those upon which the judgment in the case of *Dobie* v. *The Temporalities Board*(1), proceeded, which may enable legislation relative to the companies incorporated by the legislature of the late Province of Canada to be upheld.

In answer to question number 5, I do not think it is competent for any legislature save that creating a corporation to so meddle with the corporation's

(1) 7 App. Cas. 136.

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powers and capacities as to add to or diminish them, unless by the unanimous consent of all concerned, or in special cases, such, for example, as those over which Parliament has a potential power of control by declaring the works which they manage or control to be for the general advantage of Canada.

As to question No. 6, at first blush this seems an enormous question. Counsel for the Dominion, however, graciously intimated it was not expected we should investigate and pass upon the constitutionality of the several statutes cited therein.

The question embraces all companies incorporated by Parliament, as if all stood upon the same footing. This groundless assumption, so often made, lies at the root of nearly all the trouble in which the Dominion and provinces are involved over the subject of their respective powers relative to incorporated companies.

It is as clear as anything can be that it never was intended that Parliament should by any act of incorporation resting merely upon its residual power, be enabled to override or control the legislative powers of the provinces or deal with any of the subject matters exclusively assigned to the provinces.

The great importance to be attached to a clear comprehension of this matter and its bearing upon the entire arguments of this submission must be my apology for a repetition of what I have said so elaborately elsewhere.

In the first place all companies incorporated by Parliament acting within its exclusive legislative authority over the twenty-nine enumerated subjects of section 91 of the "British North America Act," which is an authority that takes precedence of all else in the Act, cannot be prohibited from doing anything, or going anywhere that Parliament wills they should.

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They require no licence and pay no fees therefor, though liable to direct taxation by a province.

Those companies that are not incorporated by virtue of such exclusive legislative authority, but by virtue of the residual legislative authority resting in the general power of Parliament for the peace, order and good government of Canada, must stand before the provincial legislatures on the same footing as all other companies and persons subject to the powers of such legislature in regard to licensing, to taxation and to property and civil rights or other legislation over or incidental to any of the sixteen enumerated subjects in section 92 of said "British North America Act."

How has such confusion of thought as the question indicates ever entered the mind of any one? I can only account for it as flowing from the result of men seeing the large field of commercial activity occupied by the corporations created under the exclusive authority of Parliament, and their failing to discriminate. There cannot be anything clearer or more comprehensive than the authority given each provincial legislature by section 92, sub-section 13, over "Property and Civil Rights in the Province."

It is, however, made expressly subservient to the full exercise by Parliament of the enumerated powers assigned to it in section 91.

The final sentence of said section, reads as follows:

> And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

This sentence read in light of the introductory part of the section, comprehends all that there is in

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the "British North America Act" derogatory of the absolute and exclusive legislative authority of the provincial legislatures over sixteen enumerated subject matters assigned to them; save some general enactments giving Parliament, as in regard to the subject of education, for example, certain specific powers, and saving the veto power to which I will presently refer.

That sentence and all it implies coupled with section 92, ought to settle the matter so far as questions like this number 6 submitted to us, are concerned.

Section 92 is as follows:—

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:—

The last sentence of section 91 and this section 92 make it clear that the enumerated powers in section 91 are paramount, and all else that falls within the scope of the enumerated powers in section 92, must be and remain exclusively within the legislative authority of the provincial legislatures. What possible right then can the Dominion Parliament have to interfere by virtue of its residual powers with any enactment duly made by a provincial legislature relative to the civil rights or property of any one, either individual or corporate, seeking entrance into such province and contracting there ?

The right to do so has sometimes been rested upon sub-section 2 of section 91, enabling Parliament to enact relative to the "Regulation of Trade and Commerce."

That obviously enough relates to what may or may not be done in connection with, or in relation to, the external trade and commerce of the Dominion as a whole and all incidental thereto.

The adjustment of the tariff, for example, is not otherwise provided for. Legislation within section 132 of the "British North America Act" to carry out conventions relative to trade with foreign countries forms another subject which in some of the incidental consequences thereof might possibly require legislation to fall within this item and rest therein as well as upon that section.

The attempt, so often made, to make this cover mere details of business and the laws relative thereto, was not pressed in argument herein as it was in the *Insurance Case*(1).

When it is attempted to bring within its range some branch or mere detail of business connected with or incidental to trade and commerce, one is confronted with the many instances wherein the section specifically provides for separate items equally related to trade and commerce, as, for example, navigation and shipping, currency and coinage, banking, savings banks, weights and measures, bills of exchange and promissory notes, and bankruptcy and insolvency, as well as others which might all be covered by the generic term "trade and commerce," as well as these many other things now and again sought to be brought under its wing. Why should these specific assignments of power relative to matters falling within what the term "trade and commerce" in the widest sense it is capable of, have been made if it ever was intended to cover such as it is now contended it does ?

To attempt to stretch the power so as to enable Parliament to override the local laws duly enacted relative to property and civil rights or aught else as-

(1) 48 Can. S.C.R. 260.

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signed to the exclusive legislative powers of the legislatures is dangerous. Indeed, it seems to me that if such attempts were upheld and followed to their logical consequences they would be destructive of the federal system.

Where can one draw the line if not where I have indicated ?

The vast body of property and civil rights is in a sense almost entirely the offspring of trade and commerce.

The family relation, education and municipal institutions are specifically provided for. What then of property and civil rights would remain to the provinces to be dealt with by them if the phrase "trade and commerce" is to be given the extensive meaning urged ?

It is attempted to distinguish what is involved herein as interprovincial trade and commerce, and thus justify interference.

Let us in answer thereto consider the situation at Confederation, and in connection therewith, section 121 of the Act, which provides as follows:—

> 121. All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

And then the purpose of the veto power given by section 90 to the Dominion.

There was at Confederation no hindrance by law to any one going from one province to another. No law but those making tariffs thus swept away, prevented any one from dwelling where he saw fit, and doing business in one or all of the provinces. And so far as I can learn, the condition of corporate life and activity was similarly free.

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When the tariff barriers were thus removed there was no need for any regulation of the so-called interprovincial trade and commerce. And the enactment of section 121 seems to negative the idea of there being implied any power to take any future action in that regard by Parliament or any other authority. All that could ever be done was to preserve this condition of things. Interprovincial trade and commerce was to flow thereafter as freely as if its right to do so had been declared by an organic law. Such seems clearly to have been the conception of the framers of this instrument. Certainly the draftsman of the Act never could have supposed that a province which was only given a power of direct taxation and a subsidy from the Dominion to help cover its expenses of government, could resort to indirect taxation, even though this section never had existed.

No one seeks to deny the right of Parliament by virtue of its residual powers to incorporate companies. The conflict, so far as it exists, is between Parliament and the provinces relative to the civil rights of these companies thus created.

Now, the condition of things at Confederation, as I have outlined them, permitted those corporations, created thereafter, to go any place within the Dominion, and long years elapsed before any legislation was permitted to interfere therewith.

The Dominion Government was, by section 90 of the Act, given the express power to veto or disallow any Acts whether *intra vires* the powers assigned the provinces or not.

That power alone was all that ever was needed or designed to be exercised by the Dominion in the way of interference with the legislative action of the pro-

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vinces acting within the powers specifically assigned them, and not in conflict with any of the enumerated powers of section 91 given the Dominion, or specific powers given in other sections.

An Act might be *ultra vires* a province and fail by reason thereof before the judgment of the courts without the exercise of the veto power.

But it was never supposed by any one until recent times, that an Act on its face *intra vires* a local legislature, could, after the lapse of time given to veto it, be interfered with by Dominion authority, by virtue of anything resting on its residual power. Yet such is the strange contention that is now set up.

This veto power was given for the express purpose of preserving as matter of expediency or public policy the rights of every one in the Dominion, corporate or individual, to enjoy such rights in as full measure as they existed at Confederation, or might exist thereafter by later legislative development.

The narrow contracted views of a local patriotism, it was felt, might be used by the exercise of the wide powers given the legislatures to the detriment of the Dominion as a whole and of the people thereof outside a province so moved.

It became from the time of Confederation thenceforward the duty of the government of the Dominion to watch local legislation and see that nothing was enacted, even if *intra vires* the powers of a legislature, that would interfere with the prosperity of the Dominion as a whole.

The rich heritage thus to be guarded was that in which every Canadian had a right to share and not that alone of any class of people either as mere provincials or otherwise.

The right to dwell where one saw fit, and there or elsewhere follow his or her avocation, was the common heritage of every Canadian and, for many years, of every Canadian company. If the right has not been well and sufficiently guarded, it must be because the veto power, the only power given by the "British North America Act" to guard it, has not been properly exercised and such rights duly preserved.

It is not that the Acts passed by the provinces are *ultra vires*. It may be that they are *intra vires*. And if a provincial legislature, acting *intra vires,* has duly enacted legislation detrimental to the original rights of persons or companies outside or beyond a province and that has not been duly vetoed there is no help for it in law.

In so far as such enactments may happen to be *ultra vires* they are null. But if *intra vires* they cannot be nullified by any resort on the part of Parliament to its residual power. Such a power is neither expressly nor impliedly given and I venture to say never was thought of by the framers of the "British North America Act."

I am not writing to glorify the veto power, for it also may be capable of great abuse. It seems to have fallen into disuse; perhaps because abused.

Yet, I repeat, it was intended as a beneficent power and is capable of great good service in the class of questions such as raised herein.

To seek to apply it when the proposed legislation can only affect the rights of the people of the province concerned, may be offensive, and in the domain of practical politics be an impossibility. Yet when the legislation proposed would manifestly improperly affect people elsewhere, or corporations created out-

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side the province, such as the Dominion corporations resting upon the residual power of Parliament, or those of other provinces, and thus affect the people of the whole Dominion, surely the exercise of the power in that regard ought to be, and to be held, practicable.

Those who would interpret aright our "British North America Act," and especially the features of it that hinge upon this veto power, must never forget that our Confederation was framed whilst the United States was passing through a civil war for which the want of greater power in the federal government was thought by some to be indirectly responsible.

The nullification ordinances of South Carolina, a generation previously, had formed a prominent feature of much argument.

Our statesmen, profiting by the experience of others, tried to find by anticipation the means of averting such like possible dangers as the result of their work. They found these in the assignment of the residual power to Parliament instead of to the provinces, as it had been left with each of the states in the United States and in the veto power which was in harmony with British legislation and practices in relation to the colonies, which latter in its turn was but part of an early condition of things in the growth of the English Constitution. The residual power given Parliament was as it were a complement of the veto power, but not to be used in substitution therefor. It might operate over that field which the veto power kept open.

Speaking in general terms, what the legislatures seem to have done is to enact that in certain specified contingencies the companies failing to comply with

what has been required of them, shall not be entitled to recover, on contracts they have made in the province, in the courts of the province, which can only exercise such jurisdiction as their parent authority has given them.

It may seem a drastic sort of legislation but not necessarily *ultra vires*. These courts originally were not so restricted. If these restrictions have been detrimental to the rest of the Dominion, that is the fault of those who had the veto power and failed to exercise it.

The consideration, since the argument herein, of the British Columbia legislation in question in the appeal of the *John Deere Plow Company* v. *Agnew* (1), in a case in which the learned trial judge and Court of Appeal for British Columbia, had held a Dominion company, by reason of that legislation on this subject, could not recover, shew many opportunities have occurred and probably may occur again, to apply that remedy to amendments to that particular legislation.

It seems beyond dispute that all such companies carrying on business in a province are subject to direct taxation. See the case of *The Bank of Toronto* v. *Lambe* (2). And at least those companies resting upon the residual power of the Dominion are also liable to the power of a legislature over licensing, if I understand rightly *The Brewers and Maltsters' Association* v. *The Attorney-General of Ontario* (3). The method adopted relative either to taxation or licensing may be objectionable, and the form it takes

(1) 48 Can. S.C.R. 208. (2) 12 App. Cas. 575.
(3) [1897] A.C. 231.

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may be such that on a test thereof the Acts may be found so crudely worded and ill-directed as to render them ineffective.

There are besides other aspects of the matters arising under these exclusive powers of the provinces that are worthy of consideration.

The province within the sphere of action assigned to it occupies the position of an independent state.

Not only is it entitled as a means of protecting its people against improper dealing leading to financial loss at the hands of foreign companies attempting to transact business in the province, to insist upon such information from them as may be reasonably necessary for such protection and for making it readily and locally accessible; but there is also the much wider field of social and economical questions bearing upon the welfare of the people dwelling therein which require the collection of an almost infinite variety of statistical information to lay the foundation for future legislative action to avert, and as occasions may demand to cure the disorders growing from the development of industrial and mercantile pursuits.

Incidentally thereto, for example, the cost of production and rate of profit which people may be entitled to know, from those enjoying benefits at the expense of the public, the modes of business done, or to be done, by these corporate companies, the conditions of those serving them, the conditions under which the service is performed, the housing of such operatives as their mines, factories, or warehouses, may employ, the conditions of the relations of master and servant, and, in a word, the moral and material well-being of those in such service, and those enjoying such service, may each and all absolutely require in-

formation to be given and enlightened legislation to be enacted enforcing needed publicity and bearing upon the respective duties of all concerned.

All these, and many other things, as the result of present and future development, in the operations in which such companies and their relation to others may be concerned, may give rise to a need for local legislation.

We must, if we would in some faint measure realize the magnitude of the task that lies in the path of duty which is before the future legislators of our provinces, grasp the facts that some of these provinces, by reason of their territorial area, vast resources and attractive conditions which they hold out for men to live in and under, at no very distant day will each become the home of many more people than now dwell in the whole Dominion. And resulting therefrom, and their diversities of character and development in industrial pursuits, each will have possibly greater problems of a kind peculiar to itself than we can now readily conceive of to solve, so far as the several exclusive powers given them can enable them to solve or anticipate them.

In short, that field of legislative power which touches most intimately the lives and welfare of the people has been intrusted to such an extent to these local legislatures as to make thoughtful men chary of sweeping their work aside.

Let no one be deceived, for behind the contentions set up herein, there lies if not the set purpose at least the possibility and perhaps hope that as a result to flow from the adoption of these several contentions there may only be Dominion corporate companies and that the only laws any such corporations can be expected to obey are such as Parliament may enact.

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Such a programme is entirely inconsistent with our federal system which has armed the legislatures with the powers I have just adverted to, yet has not disarmed Parliament from enacting the most beneficent legislation restrictive of its corporate creations and their relations to others.

The legislation, however, required in a province whose inhabitants are most largely devoted to mining, would not be so apparent to those inhabitants of another, more largely devoted to fishing and industries related thereto, or legislation required by either be so apparent to the inhabitants of yet another, devoted solely to agricultural pursuits, and *vice versâ*. And hence Parliament might be slow to act when the legislature on the spot might be quickened to action therein by local knowledge.

Such are the conditions which lie at the basis of the federal system, relative to the need for legislation anticipating or curing evils, prompt response to the need, and adequate application of the remedy.

Again the corporate power and its many manifestations of combinations and of encroachment upon the rights and expectation of others, may need the fullest application of these powers in order that right be done and the future well being of all be assured.

I see no reason to fear all such growth if properly watched and checked in regard to such possible abuses which occasionally in modern times are said to reach almost to a something akin to piracy. But I do see that it may need all the watchful care of both Dominion and provinces to furnish the necessary checks upon abuse. Indeed, I suspect the outcome of such development as is progressing, will, if public opinion is well directed, be a scheme requiring concurrent

legislation and united action of both the Dominion and the provinces. The power that alone controls the laws giving and governing property and civil rights and defining the jurisdiction of the courts to enforce them, has the master hand and can neither be ignored nor defied. It alone can apply the most effective weapon against this combination and encroachment, which I have referred to, by withdrawing, and that automatically, as the offence is committed, the right to resort to the courts. Is possible realization thereof to be deleted from our constitution ?

The power of Parliament over criminal law can never be half so effective as this merely provincial power if well directed.

The trouble is the matter has not been dealt with in the way the "British North America Act" provided.

If the Dominion authorities chose they could have vetoed any such legislation as now complained of, if it seemed likely to improperly interfere with the operation of Dominion corporations. They can by watching such local legislation insist on that conforming to what is reasonable under pain of vetoing it. That is the clear method and the only direct method, which the "British North America Act" furnishes. It is likely to be very effective if confined to such like use as involved in the fair and reasonable limitations thereof needed to protect Dominion corporations resting upon the residual power in their legitimate expectations. If this power has not been and is not to be directed by a public opinion sufficiently enlightened and robust to check any evils of a possible kind, nothing any court can do by the way of advisory mixed construction or misconstruction of the Act will help.

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I am not assuming this has not been done. I merely point out, if such legislation as complained of has existed or may hereafter exist and is or may be a source of well founded grievance, where the fault, if any, lies or may lie and the remedy, if one be required.

The prevalent public opinion of the entire people of the Dominion must ultimately determine where and to what extent the exercise of this veto power is to be effectively operated.

That public opinion can be most effectively evoked by the Dominion authority challenging and proposing to veto any obnoxious measure.

If any such changes of an undesirable nature have already been made, they can be rectified by public opinion and self interest being made to operate upon the enacting legislature. The time has passed in such cases for Dominion interference.

I do not find any right in Parliament to override in any direct way as the question seems to imply, the will of the legislature, save, I repeat, in relation to companies and things falling within its exclusive legislative authority already referred to.

Prohibition of a company going into a province is rather an inapt term in this connection. It is conformity with the law of the province that is required. And if we drop the word "company" for a moment and ask what power Parliament has in any way relative to the person, to say he or she is or is not entitled to do business according to forms of contract in a province, not sanctioned by its legislation, and may or may not refuse to conform to the law of the province, we may get a clearer view of how matters stand.

I repeat, the corporate company is but a certain legal combination of men, and in a legal sense no greater than the man, before the legislature.

I may observe that the provincial legislation seemingly questioned is directed against (if such a term is proper) all foreign companies as well as those created by Parliament or other local legislatures. Dominion creations, save those clothed by Parliament by virtue of the exclusive legislative authority with other rights, stand on the same footing in this regard as those of the provincial legislatures or of a foreign state.

There is, however, another feature of the "British North America Act" relative to contracts which I suspect has not been developed as it might be. That is the exclusive control that Parliament has over bills of exchange and promissory notes.

This is part of the law of contracts not necessarily within the item of property and civil rights, as given the provinces. If Parliament should choose to exercise all its power relative thereto in favour of its companies, it might do much to ameliorate the condition of things a province may be disposed to push too far.

The province cannot take away this part of a Dominion company's contractual powers if Parliament says so in an effective manner, and its incidental power relative thereto is to be as liberally construed as it has been in other instances relative to contract. See, for example, the case of the *Grand Trunk Railway Co.* v. *The Attorney-General of Canada*(1).

In view of all these considerations I can see no valid constitutional objections to a reasonable Act providing for registration and information and taxation.

(1) [1907] A.C. 65.

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In regard to question number 7, I am at a loss to find in it anything but what I have covered by the foregoing.

What is meant by a trading company? No one has ventured to tell us or explain the meaning of such language. Is this another attempt to get an opinion on sub-section 2 of section 91? That sub-section, however, was not brought forward as prominently in argument herein as in the case of the Insurance reference. We have, indeed, heard little argument bearing upon this question, save references to the *Telephone Case*(1) and the *Hydraulic Case*(2) which I am about to refer to.

The former was held to fall clearly within another exclusive power of Parliament contained in sub-section 29 of section 91, and the power incidental thereto, and not sub-section 2.

The case of *La Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*(2), relied upon, I have dealt with in the Insurance Companies Reference heard before this one, and I need not repeat here what I said there. In addition thereto I may refer to what I said in the case of *In re Alberta Railway Act*(3), at foot of page 27 to top of page 33, relative to the features of the opinion in the *Hydraulic Case*(2) in regard to the respective fields of legislation open to the Dominion and the provinces.

It seems to me, I respectfully submit, that there may have been in that case a grave misapprehension of the doctrine involved in what has been expressed, sometimes loosely, as entitling the provincial legisla-

(1) [1905] A.C. 52. (2) [1909] A.C. 194.
(3) 48 Can. S.C.R. 9.

ture to occupy a certain field until the Dominion had entered the same field. In truth they never can occupy the same field in the sense which seems to have prevailed in that case, and indeed may have been present to the minds of others elsewhere. My reasons for so holding appear in the passages I refer to in the Alberta case just cited.

I may refer also besides to what I have said in the *Insurance Case*(1), to the language used in the *Citizens Insurance Co.* v. *Parsons*(2), at pages 112 and 113, as to the scope and purpose of sub-section 2 of section 91.

I may add, however, that in my opinion, if the doctrine apparently laid down in the *Hydraulic Case* (3), that the Dominion Parliament can, in matters not resting in its exclusive authority, prevail over the provincial authority, is to stand, then there is not in the Act any restraint upon Parliament such as people for a lifetime have believed there was, and to secure which Confederation was brought about. Where, if followed, would such a doctrine land us ?

The conclusive establishment of such a doctrine, I respectfully submit, would be fraught with danger to the Canadian scheme of federation, if not entirely destructive thereof.

When the A. B. C. of the framework of the "British North America Act" has been duly observed, there need not be so much perplexity in determining its interpretation in any given case as seems so often to have arisen. Such is my excuse for repeating, with perhaps tiresome reiteration that A. B. C.

In conclusion I may add a word as to *Russell* v.

(1) 48 Can. S.C.R. 242. (2) 7 App. Cas. 96.
(3) [1909] A.C. 194.

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The Queen(1), and its bearing upon questions raised herein.

The judgment therein shews an analysis of the Act based upon something like my A. B. C. suggestion and adopts a mode of reasoning upon which the decision rests which expressly finds the question of property and civil rights and the item in the Act regarding same are not involved in the enactment there in question. Hence the decision cannot help an attack such as made herein upon actual or hypothetical provincial legislation expressly dealing therewith and resting thereon.

Whatever may be said of the reasoning in the *Russell Case*(1) it can hardly be said that the propositions involved in these later contentions are necessary corollaries thereof.

Subject to the respective limitations indicated in my foregoing opinion, the questions submitted should be respectively answered as follows:—

I would group questions one and two together, and for answer thereto say:—

A provincial legislature cannot incorporate a company to do any of the things which lie within the exclusive power of Parliament enumerated in section 91 of the "British North America Act," and hence cannot be "provincial objects," but its corporate creations have each inherently in it, unless specifically restricted by the conditions of the instrument creating it, the power to go beyond the limits of the province to do business for such purposes and transactions as are needed to give due effect to the business operations of the company so far as within the scope of what they were created for, and the comity of nations will permit them.

(1) 7 App. Cas. 829.

And if they be formed for the purpose of buying and selling grain, they can do so in any place where their business will carry them, and the comity of nations permit them. And those formed to grind grain, can, subject to the like limitations, grind it where deemed desirable.

As to the question No. 3, I answer in the affirmative; provided no restriction against the corporation doing so has been placed in the company's charter, and no prohibition in the foreign state or province where contracting. Citizenship cannot affect the matter unless by reason of some such restriction, or by reason of Parliament, by virtue of its power over aliens and naturalization, having legislatively intervened for such purpose.

As to question No. 4, my last answer renders it unnecessary to answer it save as to the sub-question, and in answer to that I submit the section may be held to be so completely *ultra vires* as to render it entirely inoperative. It may be, however, that it is capable of being read as a prohibition of alien or foreign companies, which Parliament by virtue of its powers over aliens, desired to prohibit unless when licensed; or it may be operative by virtue of some possible conditions of fact of which we are not informed, relative to pre-confederation companies.

Anything of that nature may involve so many limitations and qualifications as to render any answer worthless; or worse as being possibly prejudicial to companies that may be concerned.

To question No. 5, I answer "No."

As to question No. 6, I answer that as to companies incorporated by the Parliament of Canada, their rights must depend upon whether incorporated

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by virtue of the paramount and exclusive powers of Parliament over the subject-matters enumerated in section 91 of the "British North America Act," or upon the residual powers of Parliament.

If upon the former there can be no prohibition properly so-called though they are subject to direct taxation which may possibly assume a licensing form.

But, if dependent upon the residual powers of Parliament they must conform to the laws of the province which have been duly enacted within the exclusive powers of the provincial legislatures, and not vetoed by the Dominion authorities.

When the veto power has not been exercised in respect of any provincial enactment, *intra vires*, the Dominion must be held to have given its irrevocable sanction thereto so effectually that Parliament by virtue of its residual power cannot override same.

As to question No. 7.

In answer to this question, I know of no corporate bodies which can be distinguished in their legal capacities and powers by any such term as "trading companies." Such corporations as fall within the enumerated powers of Parliament are entitled to the rights it may have given them. All others must conform with the laws of the province duly enacted within the enumerated powers given by section 92 to the exclusive legislature authority of the provinces, and not disallowed by the veto power.

DUFF J.—The first two questions are as follows:—

(1) What limitations exist under the "British North America Act, 1867," upon the power of the provincial legislatures to incorporate companies?

"What is the meaning of the expression 'with provincial objects' in section 92, article 11, of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?

"(2) Has a company incorporated by a provincial legislature under the powers conferred in that behalf by section 92, article 11, of the "British North America Act, 1867," power or capacity to do business outside of the limits of the incorporating province? If so, to what extent and for what purpose?

"Has a company incorporated by a provincial legislature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province?"

It will be convenient to consider these questions together. The "companies" referred to in them may be assumed to be companies incorporated for the carrying on of some business for gain to be distributed among the members thereof as private individuals. There are certain kinds of business and certain classes of undertakings which by section 91 are exclusively committed to the control of the Dominion, *e.g.*, banking and works extending beyond limits of a province. I do not intend to consider the exact scope of this exclusive jurisdiction of the Dominion. Such exclusive jurisdiction being vested in the Dominion by force of the enumerated clauses of section 91 cannot be affected by any of the provisions of section 92. It will be understood that what follows has no

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reference to companies to which that jurisdiction extends.

The point to be considered really is: What are the meaning and effect of No. 11 of section 92 ? I think only a very general answer can be given to this question. "Objects" means, I think, *le but organisé* of the company, the business which the company is authorized by its constitution to carry on with a view to the profit which is the ultimate purpose of its members. This business must be such, I think, that it falls within the description "provincial"—the adjective provincial having reference to the incorporating province. The legislature of Ontario, that is to say, is empowered by No. 11 of section 92 to incorporate companies for carrying on any kind of business which fairly falls within the description "Ontario business." The view put forward on behalf of the provinces that "provincial" is used in another sense, that its antithesis is not "extra-provincial" or "non-provincial" but "Dominion," ("Dominion" including those matters which regarded as the objects of a company are exclusively committed to the Dominion by section 91) does not appear to me to be a view which can be reconciled with the decisions in the *Parsons Case*(1), and the *Colonial Building Association's Case*(2), I have given my reason for this in *Canadian Pacific Railway Co.* v. *Ottawa Fire Ins. Co.*(3). Here I will only say this: In *Citizens Ins. Co.* v. *Parsons*(1), at page 117, Sir Montague Smith observed:—

> The incorporation of companies for objects other than provincial falls within the general powers of the Parliament of Canada,

and this proposition is based upon the ground that the

(1) 7 App. Cas. 96. (2) 9 App. Cas. 157.
(3) 39 Can. S.C.R. 405.

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only subject assigned exclusively to the legislatures of the provinces "on this head" (incorporation of companies) is "the incorporation of companies with provincial objects." In the subsequent decision above referred to(1), at pages 164 and 165, it is stated that their Lordships adhere to the view expressed by them in the *Parsons Case*(2),

> as to the respective powers of the Dominion and provincial legislatures in regard to the incorporation of companies.

Again, referring to the company in question in that case "the company was incorporated with powers to carry on its business consisting of various kinds throughout the Dominion. The Parliament of Canada could alone constitute a corporation with these powers." Upon this last passage an argument has been based to the effect that their Lordships in these judgments are dealing not with the nature of the capacity which the respective legislatures may confer upon companies incorporated by them, but with the rights with which they may invest them in respect of the carrying on of their business. "Powers to carry on its business" meaning according to this construction the *right* to carry on its business throughout the Dominion. No doubt there may be ambiguity in the word "powers" when taken apart from the context in which it is employed, but in this judgment a reference to the following passage at page 166 seems to me to remove all possible question as to their Lordships' meaning. Their Lordships' opinion as expressed in the judgment, be it observed, was that a certain Act of the Parliament of Canada incorporating the company in question was within the authority of the Dominion because a pro-

(1) 9 App. Cas. 157. (2) 7 App. Cas. 96.

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vincial legislature would have no authority to incorporate a company with such "powers." At page 166 the effect of this Act is stated by their Lordships in the passage referred to.

> What the "Act of Incorporation" has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz., throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any province consistently with the laws of that province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of Incorporation gives it capacity to do so.

It was an enactment having this effect that in their Lordships' view could not be passed in exercise of the powers of a provincial legislature under section 92.

The limitation above indicated, viz., that the business is to be a "provincial" business in the sense mentioned is the only limitation, I think, which can be derived from the Act. In the cases just referred to their Lordships are of course dealing only with companies carrying on business for the private profit of their members; but it is arguable that the characteristic marked by the word "provincial" may consist in some relation between the company and the province as a political entity. One may instance a company formed by a province exclusively for some purpose connected with the Government of the province; but, as I have already said such companies are outside the range of the present discussion. I mention them here because I do not wish to be understood as expressing a positive opinion that the characteristic expressed by the word "provincial" as used in No. 11 can only consist in some relation between the business of the company and the province as a geographical area.

The cases just mentioned decide that as a rule the territorial relation must as regards companies formed in the usual way for the profit of their members furnish the test; but I am not sure that these decisions oblige us to hold that this is the single exclusive test for the application of No. 11.

One can, however, say with confidence, that where the business as authorized by the constitution of the company is so related to the territory of the incorporating province that the business can be said to be "provincial" in the territorial sense, then it is clear that the company comes within the class of companies to which No. 11 applies. Whether a particular business does or does not fall within that description must be a question to be determined in each case substantially, it seems to me, as matter of fact. It seems very clear that the business of working a coal mine in Cape Breton must be a provincial business in relation to Nova Scotia and equally clear that the business of working coal mines in Nova Scotia, Alberta and Vancouver Island is not a provincial business in relation to Nova Scotia, Alberta or British Columbia. Coming to the concrete instances mentioned in the questions I think the business of working mills for grinding grain in a single province is as to that province a "provincial" business. The business of working mills for grinding grain in more provinces than one is not as to any one of those provinces a "provincial" business. The case of a mercantile business presents perhaps more difficulty. I think the decision of the Privy Council in the *Colonial Building Association's Case* (1) requires me to hold that the business of a grain merchant carried on in such a way that there

(1) 9 App. Cas. 157.

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are places of business in different provinces of Canada is not a "provincial" business within the meaning of that word as used in No. 11. On the other hand, I have not been able to convince myself that the business of a grain merchant carried on by means of places of business confined to one province cannot fairly be described as a "provincial" business in reference to that province, merely because it is a part of the business so carried on, that grain is bought outside the province and sold outside the province. I think there is nothing in the decision or the language of the judgment in the *Colonial Building Association's Case*(1) inconsistent with that view. The judgment ought to be read *secundum subjectam materiam*. The Act of Incorporation which was there in question and was held to be beyond the powers of a province authorized the company to carry on its business anywhere in Canada and to establish branch offices in London, New York and in any city or town in the Dominion. The company was enabled, indeed, to carry on as much or as little of its business as the directors might see fit in any province of Canada subject to the single restriction that the general office was to be in Montreal. In applying the rule stated in their Lordships' judgment that the incorporation of a company empowered to carry on its business throughout the Dominion is beyond the powers of a provincial legislature one ought, I think, to construe the phrase "carry on business" in the light of these provisions of the Act then before their Lordships. Their Lordships had not before them any question, and I think one is entitled to say that their Lordships did not intend to lay down any binding rule for determining just how

(1) 9 App. Cas. 157.

far a company incorporated by a province might be authorized by the provincial legislature to enter into business transactions beyond the limits of its province of origin. The decision unquestionably establishes, in my judgment, as I have already said, that the capacity to carry on business throughout the Dominion in the unlimited way provided for in the Colonial Building Association's Act of Incorporation is a capacity which a provincial legislature could not confer upon a company incorporated by it. I do not think that the authority of the decision can fairly be said to extend beyond that so far as this point is concerned.

I think you may find the characteristic "provincial" for the purposes of No. 11 in the fact that the business is carried on by means of places of business situated in one province alone. It appears to me that you must look at the business as a whole and that such a business (as the business of an incorporated company) is *primâ facie* "provincial."

What I have just said will indicate the extent to which I think the question relating to the capacity of provincial companies to carry on business outside the province can be answered. I think a province can confer upon its companies the capacity to acquire rights and exercise their powers (in respect of matters relating to the business of the company), outside the province, so long as the business when looked at as a whole as that of an incorporated company (in connection, that is to say, with the capacities and powers of the company so exercisable beyond the limits of the province) is still a "provincial" business. Whether in any particular case that is or is not so is a question to be determined according to the circumstances of that case.

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There is one observation which I think ought to be added in view of an argument presented by Mr. Nesbitt to the effect that the opinions above indicated as to the construction of No. 11 of section 92 are views which are novel in this country and which, if accepted, would throw the business of the country into confusion. As to the practical effect of this construction I do not feel satisfied that one has before one the material necessary to enable one to form a judgment upon that point. As to the view being a novel view I think I may properly call attention to some observations made by Sir Oliver Mowat in 1897 in the report made by him as Minister of Justice upon an enactment of the Legislature of Nova Scotia. The report so far as material is as follows:—

> The only authority conferred upon a provincial legislature to incorporate companies is for "the incorporation of companies with provincial objects." The undersigned construes this authority to mean *objects provincial as to the province creating the corporation.* In the case of the *Colonial Building and Investment Association* v. *The Attorney-General of Quebec*(1), the appellant company had been incorporated by the Parliament of Canada with power throughout the Dominion to acquire and hold lands, construct houses, sell and dispose of such property, lend money upon mortgages, and deal in public securities. There can be no doubt that a provincial legislature could have incorporated a company with authority to exercise the same powers within the limits of the province, yet in delivering the judgment of their Lordships of the Judicial Committee, Sir Montague E. Smith held that inasmuch as the company was incorporated to carry on its business throughout the Dominion, the Parliament of Canada could alone constitute a company with these powers.
>
> It would seem to follow that the statute in question which confers upon the company authority to acquire, cultivate, improve and sell lands not only in the Province of Nova Scotia, but also in the Province of New Brunswick and elsewhere, is not limited to provincial objects in the sense in which that expression is used in the "British North America Act," and, therefore, that the enactment is *ultra vires.*

(1) 9 App. Cas. 157.

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The undersigned considers that this view should be submitted to the provincial government, and that the statute should be disallowed unless Your Excellency's government is assured that it will be amended within the time limited for disallowance by repealing the authority so far as extra provincial territory is concerned.

This suggestion was accepted by the provincial government and the suggested amendments were made. See Reports of Ministers of Justice on Provincial Legislation, 1896 to 1898, p. 33. Sir Oliver Mowat was, it is perhaps unnecessary to mention, one of the Members of the Quebec Conference, and his long experience in dealing with questions on the "British North America Act" and the weight attaching to his views on such questions make this report a very cogent piece of evidence (if it is not indeed entirely conclusive) against the suggestion put forward by Mr. Nesbitt. The concluding paragraph seems to shew that according to the opinion of Sir Oliver Mowat there was not much room for doubt upon the point. It is difficult to believe if the views expressed by him had been but recently formed (it is impossible to suppose that the subject was a new subject to him) or were considered by him to be opposed to the general current of competent professional opinion that he would have expressed himself so positively on the subject of disallowance.

"(3) Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts—

"(*a*) within the incorporating province insuring property outside of the province;

"(*b*) outside of the incorporating province insuring property within the province;

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"(*c*) outside of the incorporating province insuring property outside of the province ?

"Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country ?

"Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province ?"

Assuming the business of the company to be *primâ facie* provincial in the sense indicated in the reasons given for the answers to questions 1 and 2, I think it is not necessarily incompatible with that restriction that the company should make and execute contracts of the kinds and in the circumstances indicated in sub-paragraphs (*a*), (*b*) and (*c*).

The answer to the question in the second paragraph is "Yes," and in the third paragraph "No."

Question 4. "If any or all of the above mentioned cases (*a*), (*b*) and (*c*) the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which or the said cases on availing itself of the "Insurance Act, 1910," 9 and 10 Edw. VII. ch. 32, sec. 3, sub-sec. 3 ?

"Is the said enactment, the "Insurance Act, 1910," ch. 32, sec. 3, sub-sec. 3, *intra vires* of the Parliament of Canada ?"

Since my answer to the previous questions is in the affirmative the necessity for answering the question in the first paragraph does not arise. In answer to the question in the second paragraph—Since the main enactments of the "Insurance Act" are *ultra vires* the ancillary provisions fall with them.

Question 5. "Can the powers of a company incor-

porated by a provincial legislature be enlarged and to what extent, either as to locality or objects by

"(*a*) the Dominion Parliament?

"(*b*) the legislature of another province?"

My answer to the question in paragraph (*a*) is that the Dominion Parliament cannot do so under its general powers.

The effect of declaring a local work to be a work for the general advantage of Canada upon the jurisdiction of the Dominion Parliament in relation to the powers of a provincial company by which it is owned and worked was not argued, and I express no opinion upon it.

As to paragraph (*b*) my answer is in the negative.

Questions 6 and 7 are as follows:—

"6. Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a license so to do from the government of the province, or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such license?

"For examples of such provincial legislation see Ontario, 63 Vict. ch. 24; New Brunswick, Cons. Sts., 1903, ch. 18; British Columbia, 5 Edw. VII. ch. 11.

"7. Is it competent to a provincial legislature to restrict a company incorporated by the Parliament of Canada for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province?

"Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading

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powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the province may carry on, or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province ?

"Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation ?"

As to companies incorporated or exercising powers conferred by the Dominion Parliament under the authority of the enumerated heads of section 91, I do not think I could usefully attempt to answer either of these questions, except in relation to some specific Dominion enactment passed or contemplated.

As to companies incorporated under the general authority of the Dominion to make laws for the peace, order and good government of Canada, and possessing powers conferred in exercise of that authority my answer to the 6th question is "Yes."

As to the 7th question: Referring to the sole concrete point discussed before us in relation to such last mentioned companies it was I think competent to the British Columbia Legislature to enact sections 139, 152, 167 and 168 of the British Columbia "Companies Act" (ch. 39, R.S.B.C.); and that those enactments are operative with respect to trading companies (carrying on business in the province within the meaning of the Act) incorporated under the Dominion "Companies Act" for carrying on any business which if carried on in a single province would not be subject to the exclusive jurisdiction of the Parliament

of Canada by force of one or more of the enumerated heads of section 91.

My reasons for my answer to questions 6 and 7 are as follows.

Are trading companies incorporated by the Dominion (as such) exempt from provincial jurisdiction in relation to matters comprised within the subjects of the enactments referred to in question 6 ?

The discussion was confined to the effect of provincial legislation upon companies incorporated and exercising powers conferred under the authority of the introductory clause of section 91 or under No. 2 of section 91, the regulation of trade and commerce. The argument against the legislation mentioned in the addendum to question 6 assumed that a company empowered by the Dominion under one or other of these provisions to carry on in more than one province a business which would be a branch of "trade" within the last mentioned enactment is in a more favourable position (as regards such legislation as that in question) than companies incorporated for other purposes because it was argued that such trading companies are (as "agencies of inter-provincial trade" I think the phrase is) in a larger degree reserved for the exclusive jurisdiction of the Dominion. It will be sufficient in the view I have to express to consider whether such legislation is effective in its application to this species of companies.

Consider a trading company incorporated by the Dominion under the *general powers* to make laws for the "peace, order and good government" of Canada, conferred by the introductory clause of section 91. In speaking of this power I shall refer to it as the

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"general power" or the power given by the "introductory clause." A typical company of this class would be a company incorporated under the provisions of the Dominion "Companies' Act" to carry on generally throughout the Dominion or elsewhere a mercantile business of a particular description. By section 5 of the "Companies Act"

> 5. The Secretary of State may, by letters patent under his seal of office, grant a charter to any number of persons, not less than five, who apply therefor constituting such persons, and others who have become subscribers to the memorandum of agreement hereinafter mentioned and who thereafter become shareholders in the company thereby created, a body corporate, and politic, for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, except the construction and working of railways or of telegraph or telephone lines, the business of insurance, the business of a loan company and the business of banking and the issue of paper money.

I shall first consider the provincial legislation on the assumption that there is no Dominion legislation in terms conflicting with it, except in so far as it may be supposed or contended that such provincial legislation is necessarily in conflict with the provision just quoted.

The question of the effect of Dominion legislation professing to confer upon a Dominion company rights or powers exercisable in derogation of such provincial enactments as those under consideration, I will refer to later.

The provincial jurisdiction in relation to the subject of the incorporation of companies of the kind we are concerned with on this reference, viz., companies incorporated for the purpose of carrying on some business for private gain has been held by the highest judicial authority (*Colonial Building and Investment Association* v. *Attorney-General of Quebec*(1); *Parsons*

(1) 9 App. Cas. 157.

v. *Citizens Insurance Co.*(1); *Dobie* v. *The Temporalities Board*(2)) to be exhaustively defined by No. 11 of section 92. Whatever, therefore, belongs strictly to the subject of the "incorporation of companies," as that phrase is to be properly understood in this connection, is a matter which in relation to companies whose objects do not fall within the description "provincial objects" has not been committed to the legislative jurisdiction of the provinces. As regards our typical company, a company having capacity to carry on a mercantile business throughout Canada it is clear that no legislation by a province in relation to the subject "incorporation of companies" can affect it. On the other hand jurisdiction is conferred upon the provinces in relation to taxation, administration of justice, licenses, property and civil rights, matters merely local and private within the province, and such a company is not by reason of the fact that it is exempt from provincial jurisdiction in respect of the subject of the "incorporation of companies," exempt also in any further degree whatsoever, from the jurisdiction of a province in respect of these other subjects. The integrity of the provincial jurisdiction in relation to these subjects is preserved by the express provision in section 91 that the general jurisdiction conferred by the introductory clause (of which the authority respecting "incorporation" is a part) has only relation to "matters not coming within the class of subjects by this Act assigned exclusively to the legislatures of the provinces," and by the provision of section 92 that the jurisdiction conferred thereby upon the provinces is "exclusive."

(1) 7 App. Cas. 96. (2) 7 App. Cas. 136.

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The companies, therefore, which owe their corporate character to this Dominion authority once they receive that character, are not (as such) entities set apart and as a privileged class exempt from the jurisdiction of the provinces in relation to other matters comprised in the subjects assigned exclusively to the provinces.

The authority in relation to "incorporation of companies" assigned to the provinces by No. 11 of section 92 does not and was not intended to confer upon the provinces the power to create corporations exempted from the jurisdiction of the Dominion with regard to any of the matters properly the subjects of legislation by the Dominion under section 91. Just as little reason could there be for asserting that under the general powers (from the scope of which "matters coming within the class of subjects by this Act assigned exclusively to the legislatures of the provinces" are in terms excluded by the Act) the Dominion can create a corporation removed from the legislative jurisdiction of the provinces in respect of the matters thus excluded from Dominion jurisdiction. In each province the Dominion company which as a company is within the provincial territory is (with the reservation indicated above) subject to the provincial jurisdiction and to the Dominion jurisdiction just as otner companies and natural persons are.

The division of powers (under the general scheme of the Act) is according to the subject matter of the legislation, not according to the persons to be affected by the legislation. Care was taken to specify those cases in which it was thought necessary that the rights of a particular class of persons as such or a particular class of institutions as such should be ex-

clusively committed to the control of one legislature or of the other. When, therefore, with regard to provincial legislation which deals with matters *primâ facie* falling within the "administration of justice within the province," "property and civil rights within the province," "matters merely local and private within the province," it is contended that such legislation is inoperative as regards a Dominion company merely because the Dominion company is a company incorporated under the authority of the general power conferred by the introductory clause then it rests with those who so contend to shew that such legislation is legislation relating to the "incorporation of companies" and not legislation in regard to the subjects with which it professes to deal. That subject ("incorporation") would include the constitution of the company, the designation of its corporate capacities, the relation of the members of the company to the company itself, the powers of the governing body. How much more it would include may be left to be determined in each concrete case in which the point arises. In every such case the question would be: On a fair construction of such provincial legislation is the matter of it within the subject of "incorporation of companies?" If it is, it cannot affect a company validly incorporated to carry on trade throughout the Dominion. If it is not and if it relates to matters falling within the subjects enumerated in section 92 then it is not invalid because it applies to such companies. It seems to me to be incontestable that this must be so, even if the legislation did (what the legislation under consideration does not), viz., singled out Dominion companies in general or a Dominion company in particular as the object of its provisions; for the rea-

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son that as I have already said, save only as regards matters which fall within the subject matter of the "incorporation of companies" the Dominion company is subject in the various provinces where it is found to the legislative jurisdiction of the provinces in the same way as any other corporation or natural person, and this jurisdiction is plenary—"as supreme" as that exercised by the provinces before the passing of the "British North America Act": *Liquidators of Maritime Bank* v. *Receiver-General of New Brunswick*(1), at page 441.

In this view it does not appear to me that the legislative provisions in question which were particularly discussed on the argument (sections 139, 152, 167 and 168 of the "British Columbia Companies Act") present any serious difficulty.

Before I come to the consideration of these provisions in detail, however, it is more convenient, I think, that I should deal with certain general assumptions which really constitute the foundation upon which the argument against this legislation rests. The first assumption is that all matters relating to "companies" whose "objects" are not "provincial" are withheld by the terms of section 92 from the jurisdiction of the provinces; the second assumption is that being withheld—in the sense of not having been given—these matters are to be taken to constitute a field of activity "excepted" from the field of provincial jurisdiction; and the third assumption is that such being the case the Dominion jurisdiction in relation to the subject of "companies" other than companies with "provincial objects" stands in the same category as the Dom-

(1) [1892] A.C. 437.

inion jurisdiction in relation to the subjects expressly enumerated in section 91. As to the first of these assumptions it is of course opposed to the express language of the Act. No. 11 of section 92 deals with the subject of "incorporation" and there is no warrant for giving to the words anything other than their natural meaning. They do mean, I agree, that as regards the "incorporation of companies" the provincial jurisdiction relates only to a particular class of "companies," and that (whatever otherwise might have been the effect of No. 13 and No. 16, if No. 11 were not there) on this subject of "incorporation of companies" it must be taken that the provincial jurisdiction is thus limited. But you cannot by any permissible process, infer from the language of No. 11 any limitation upon the jurisdiction of the provinces, in relation to "companies" not within No. 11 in regard to matters which do not fall within the strictly limited subject of "incorporation." With regard to the second assumption it is of very litle consequence whether you say that the subject of the "incorporation of companies" other than those having "provincial objects" is not included in the matters which are excepted from the general jurisdiction, and therefore falls within that jurisdiction; or whether you say that such matters are excepted from the provincial jurisdiction, so long as the exact meaning of your proposition is clearly understood; viz., that the legislative jurisdiction in relation to the "incorporation of companies" with other than "provincial objects" is a jurisdiction which not having been excepted from the general authority of the Dominion under the introductory clause of section 91 remains a part of that authority.

It is important at this point to note that it cannot

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be contended—it certainly was not contended at the bar—that the subject of the "incorporation of companies" with "objects" other than "provincial objects" is a subject "expressly excepted" from the matters assigned to the provinces by section 92 within the meaning of No. 29 of section 91. I do not dwell upon this point; it appears to be obvious that such a conclusion cannot be reached without deleting in effect the word "expressly" from the language of No. 29.

The effect of the third assumption is, of course, to abolish for the purposes of this question the distinction between the general power and the power of the Dominion in relation to subjects enumerated in section 91; with the result first of attracting to the support of the Dominion authority in relation to this particular subject the exception at the end of section 91 (which by its express terms applies only to the enumerated subjects) as well as the primacy conferred by the phrase "notwithstanding anything in the Act" in the early part of the section. These assumptions being made and the net result of them being that the subject of "companies" having objects other than "provincial objects" is one of the enumerated subjects under section 91—it is argued that the legislation in question (which unquestionably is legislation in relation to such "companies" although not legislation in relation to the "incorporation of companies,") is legislation upon a matter, strictly relating to a subject which has been assigned to the Dominion; that while it may be in a sense legislation relating to civil rights, administration of justice, and so on, it still is, when it is looked at carefully, legislation which in reality singles out as its objects corporations which have been exclusively committed to the authority of the Dom-

inion. Given the assumptions stated above, there would unquestionably be not a little force in this contention. Even in the absence of conflicting Dominion legislation (which is the hypothesis upon which I am now proceeding), it may very well be doubted whether such legislation as this could be enacted in respect of corporations included (*e.g.,* Banks) *eo nomine* among the enumerated subjects of section 91. But the assumptions involve, as I have already pointed out, first a misreading of No. 11 of section 92, and secondly, a total misconception of the effect of the introductory clause of section 91.

The argument against the provincial legislation on this head falls to pieces when one brings it into touch with language of the Act.

The contention is really based upon certain decisions and dicta which, for the reasons I shall presently give, appear to me to have been misunderstood. These I think it will be convenient to discuss after I have considered the provincial enactments themselves.

The licensing provisions of the "British Columbia Companies Act."

Coming to the particular provisions which were discussed upon the argument (certain enactments in the "Companies Act of British Columbia"), the first point concerns the authority of a province to require extra-provincial companies including Dominion companies to take out a licence and to pay a licence fee as a condition of carrying on business in the province. There are two points to be noted at the outset: (1), sections 139 and 152, R.S.B.C., 1911, shew clearly enough that the provisions of Part 6 apply only to

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companies "authorized by their charter and regulations to affect some purpose or object to which the legislative authority of the legislature of British Columbia extends," and therefore, can have no application to a bank or to companies incorporated for the purpose of constructing or working a "work or undertaking" extending beyonds the limits of the province or carrying on any business which if confined to one province would be subject to the exclusive jurisdiction of Parliament under one of the enumerated heads of section 91.

(2). The tenor of the license when granted is to authorize the company to carry on business within the province and the Act prohibits the carrying on of any part of the company's business in the absence of such a license; but the construction I draw from the Act as a whole and particularly from secs. 167 to 172 is that the words "carrying on business" in these provisions ought to be read as "carrying on business" in such a way as to bring the company within the penal legislative jurisdiction of the province and generally within the jurisdiction of the courts of the province according to the general principles of law; that is to say, so that the company as a company is present at some place within the province. The provision which forbids any company broker or other person from carrying on any of the business of the company within the province as the representative or agent of the company is very necessary to prevent evasions of the principal enactment, and the penalties imposed by section 170 upon such agents or representatives are, in my judgment, clearly exigible only when in truth and reality the business carried on is the business of the company; and when, of the company, it can be

said in truth by a court in British Columbia in any proceedings against it "they are here" as Lord Halsbury's phrase is. *Compagnie Général Transatlantique* v. *Law*(1).

These preliminary observations being made, it is difficult to say upon what ground it can be seriously argued that the province is acting beyond its powers in requiring the companies to which the Act applies before carrying on any business to which the Act relates, to take out a licence and pay a licence fee. The enactment in this respect, in my judgment, can be supported under either the second or the ninth head of section 92. *Ex hypothesi* the company is within the province. Being there it is subject to the taxing power of the province. It seems clear enough that the fee imposed by these Acts can be supported as a tax. The fact that it is imposed once for all is really no objection. It is a public impost levied by the authority of the Legislature for the purpose of providing a public revenue.

It was argued that under section 92 (2) that is to say, under the authority to "make laws in relation to direct taxation within the province," the province has no power to require the taking out of a licence as a condition of carrying on business, that the authority of the province in other words in respect of licences is limited to that conferred by No. 9. That is certainly not the necessary construction of section 92. It is obvious that a licence fee may be imposed in such a way as to amount to an indirect tax. Even so, the province has authority to impose it if it come within No. 9. In the *Queen Insurance Case*(2), it was held

(1) [1899] A.C. 431. (2) 3 App. Cas. 1090.

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that the pretended "Licence Act" there under consideration was in reality a Stamp Act, in other words, that the pretended licence required by the Act was not a licence within No. 9 and that consequently the duty or fee exacted under the name of a licence fee, which was held to be an indirect tax, could not be supported under that number. The decision does not suggest that a fee which is truly a licence fee and which is at the same time an indirect tax cannot be imposed under No. 9, but on the contrary, the judgment implies the opposite. No. 9, therefore, ought not to be read as limitative of No. 2.

An enactment requiring a licence to be taken out as a condition of carrying on business and the payment of a licence fee as a condition of the right to the licence may, if not otherwise open to objection, be supported as an enactment in relation to the subject of "direct taxation." The point was decided by the Privy Council, in *Brewers' Association* v. *Attorney-General of Ontario* (1). In that case their Lordships had to consider certain provisions of the "Ontario Liquor Licence Act" which required brewers and distillers to take out licences paying therefor a licence fee as a condition of carrying on their business. Lord Herschell in delivering the judgment of the Board stated at p. 235 that the question was whether the fee imposed was direct taxation within the meaning of section 92(2) or if not whether the license was comprised within the term "other licenses" in sub-section 9. The effect of the judgment is that if the fee was "direct taxation," the enactments requiring brewers and distillers first to obtain a licence under the Act in order to sell liquor manufactured

(1) [1897] A.C. 231.

by them was a valid enactment, independently altogether of the question whether the licence could be sustained as a licence under No. 9. Their Lordships in fact held that the fee was "direct taxation," and having stated their Lordships' conclusion upon that point Lord Herschell proceeds to observe that "the view which their Lordships have expressed is sufficient to dispose of this appeal." His Lordship then proceeds to say that their Lordships were not satisfied with the argument of the appellants, that the licence was not a licence within No. 9. But the decision was rested upon the ground that the enactment in question which required a licence to be taken out and a fee to be paid as a condition of carrying on a particular business was "direct taxation" within No. 2.

It appears to me, however, that the enactments in question in so far as they require the payment of a fee as a condition of taking out the licence and the licence as a condition of carrying on business are sustainable under No. 9. I have not been able to satisfy myself that a licence to carry on any business for gain would not fall within the category of "other licences" in No. 9, unless it should be a business which could be held to be exempted from the operation of No. 9 by reason of the provisions of section 91. The considerations bearing upon this last mentioned point may be conveniently postponed until I come to the discussion of the effect of the provincial legislation as regards trading companies incorporated under No. 2 of section 91. The fact that the enactment is framed in general terms could hardly be a ground of objection. If the legislature could validly require licences in respect of any business carried on for gain within the province subject, let us assume, to the overriding

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effect of Dominion legislation, it is difficult to see how the legislation can be objected to because it is framed in general terms and made applicable to all persons or all companies or all partnerships or all unincorporated associations carrying on in the province any business the object of which is gain. In point of fact it is not an uncommon form of legislation on the subject of licences to impose a licence fee of a named amount upon every trade, business or occupation other than certain enumerated ones. It is a clause commonly introduced as a drag-net in order to meet the possibility of the enumeration not having been exhaustive. I have never seen any reason to doubt that such legislation provided it is otherwise unobjectionable is perfectly valid notwithstanding the generality of its terms. The argument presented on behalf of the Manufacturers' Association that the licence in order to be valid must be imposed equally upon all persons, corporations, etc., carrying on any of the kinds of business in respect of which it is imposed is one which perhaps hardly requires discussion. The answer to it of course is that the power conferred upon the province is not the power to impose licences but to "make laws in relation to all matters" coming within the subject which is described by the words of No. 9; and this power is plenary.

I come now to the requirements which must be observed before a licence can be obtained. The regulations broadly speaking are of two classes: first, those designed to give public information regarding the financial position of the company; and second, those requiring the company to place on record in a public office the particulars of its constitution and its regulations, and requiring the appointment of an attorney

for the province, having power to act for and bind the company in judicial proceedings. When one considers the privileges that a limited company enjoys as a limited company these regulations seem to be of no very extraordinary character and moreover to be regulations having direct relation to civil rights and the administration of justice within the province. Such companies carry on their operations, speaking generally, under the protection of the English rule of *ultra vires* and its members enjoy the protection of the principle of limited liability; and as a rule persons dealing with them are deemed to have notice of the limits imposed by the constitution and regulations of the company upon the authority of the governing body and of other officers and agents of the company. It is obvious, of course, that these principles might operate with great injustice in the case of extra-provincial companies in the absence of some such regulations as those in question. In the case of an English company, for example, incorporated under the "English Companies Act," carrying on business in British Columbia the rule affecting persons dealing with the company with notice of the restrictions upon the authority of the company's officers to be found in the articles of association would be little short of an absurdity in the absence of some provision requiring a public record of the companies articles in British Columbia. So with regard to the doctrine of *ultra vires*. Giving full effect to that doctrine it seems reasonable in the interests of those dealing with it that a company should be required in any separate jurisdiction in which it carries on business to make a public record of the instruments defining its constitution. As regards to the appointment of an attorney, for the purpose of

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judicial proceedings, this seems a reasonable measure for ensuring that companies enjoying the protection of the provincial laws as if they were residents of the province and the provisions made for the administration of justice should themselves be amenable to the jurisdiction of the courts. When one considers the difficulties that arise in the course of judicial proceedings in such matters for example, as obtaining discovery where a foreign corporation is concerned, there seems to be nothing extravagant in the regulation referred to as a regulation relating "to the administration of justice." Not one of these regulations can fairly be said to be a regulation relating to the subject of "incorporation" of extra-provincial companies. One may assume for the purpose of the question before us that that subject includes everything embraced in what may be called the "personal law" of the company. But one gets into a different region altogether when one comes to consider the measures required in a particular jurisdiction in which the company is carrying on business for the purpose of protecting the public generally in its dealings with such companies in view of the fact these very matters are under the control of another jurisdiction. There is nothing in these provisions inconsistent with the loyal recognition of the Dominion jurisdiction in all matters falling within the subject of "incorporation."

Contention that these licensing provisions were not passed in bonâ fide exercise of provincial jurisdiction.

On behalf of the Manufacturers' Association the argument was presented that the legislation ought to be declared invalid as not being passed in the *bonâ*

fide exercise of any of the powers conferred by section 92. It is said that the real object of the legislation is to embarrass Dominion corporations in the conduct of their business in the province. Now it is quite true that there is authority for the proposition that if a province professing to legislate in exercise of the powers conferred by section 92 shews by its legislation that it is in reality attempting to exercise some power conferred upon the Dominion, exclusively, then the legislation may be *ultra vires*. *Union Colliery Co.* v. *Bryden*(1), is an instance, which case ought, it may be mentioned, to be read with the subsequent decision *Cunningham* v. *Tomey Homma*(2). But it has never been held and manifestly it would be impossible to hold that the court has any power to effect the nullification of a provincial statute, because of the motives with which the legislation was enacted. In the *Bank of Toronto* v. *Lambe*(3), *at* pages 586-7, it was argued that the tax in question was imposed with some such object as that imputed to the provinces on the present occasion, and the Judicial Committee, speaking through Lord Hobhouse, said this:—

> People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of classes 2 and 9, is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the "Federation Act."
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> The appellant invokes that principle to support the conclusion that the "Federation Act" must be so construed as to allow no

(1) [1899] A.C. 580. (2) [1903] A.C. 151.
(3) 12 App. Cas. 575.

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power to the provincial legislatures under sec. 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under sec. 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within sec. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament.

Those who were responsible for the scheme of Confederation deliberately rejected the American system of constitutional limitations. So far as provincial legislation is concerned they adopted the safeguard of investing the Governor-in-Council with a power of disallowance.

The argument addressed to us on this occasion seems to be addressed to the wrong authority. It is, moreover, to be observed that legislation of this character has for many years past been the subject of discussion between the provincial and the Dominion Governments. Efforts have repeatedly been made to get such legislation disallowed upon the grounds now put forward as a reason for holding the legislation to be *ultra vires*. The arguments which failed to convince the Governor-General-in-Council that the legislation was passed in bad faith, that it was not an honest exercise of provincial powers are now addressed to us. I may observe that the "British Columbia Act" was the subject of a correspondence when first enacted in 1897. The Minister of Justice, Sir Oliver Mowat, expressed the opinion that the re-

gulations which are now denounced as dishonest were not unfair or unreasonable. Correspondence relating to provincial legislation, 1896-1898, pp. 82 and 83. In point of fact the similar legislation in force in Ontario and Manitoba was only allowed to go into effect after vigorous criticism by the Dominion and after amendments had been made which had been demanded by the Department of Justice. The first and second Manitoba Acts were disallowed on the ground that they unfairly interfered with Dominion interests. In 1903 when the "New Brunswick Act" was passed no objection was taken. The history of the discussion indicates that the legislation as it now stands appeared to the various Ministers of Justice who had to consider it to be not fairly open to objection as interfering with Dominion interests. In these circumstances it is, I confess, a little difficult to treat this contention seriously. The truth is that one circumstance which, among many others, led to this legislation was the habitual abuse of the Dominion power of incorporating companies. As the provincial governments have pointed out from time to time when legislation of this character was the subject of discussion a Dominion charter of incorporation under the Dominion "Companies Act" is given to those who seek it without any inquiry whether the intention is to carry on business in more than one province or not. It is within the knowledge of every experienced lawyer that numbers of companies are incorporated under the Dominion "Companies Act" (with no expectation on the part of anybody of carrying on any but a strictly local business) with the hope of escaping regulations governing provincial companies framed for the protection of the public on subjects in relation

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to which the Dominion Act is silent. Again everybody knows that the assumption by the Dominion of jurisdiction over works obviously of only local interest by declaring them to be for the "general advantage of Canada" became a few years ago a grave scandal. Is it suggested that there is any power in any court in the Empire to nullify a charter under the Dominion "Companies Act" or such an Act of the Dominion Parliament on the ground that there had been an absence of the Dominion power ? In the case of enactments of the Dominion Parliament (which are subject to no power of disallowance such as that which exists in respect of provincial legislation) there might be some possible reason for investing the courts with such a power. The constitution, however, has not done so.

I refer to these things to illustrate the difficulties standing in the way of a court which should apply itself to the task of investigating the question whether an enactment of a provincial legislature professing to deal and dealing with matters in respect of which it has jurisdiction ought to be declared invalid on the ground that it is directed against some supposed Dominion interest.

Has the Dominion power to override such provincial legislation ?

I have been considering the effect of this provincial legislation in the absence of the conflicting Dominion legislation. On behalf of the Dominion it is contended that the Dominion in exercise of the general power or of the jurisdiction conferred by No. 2 of section 91 could effectually legislate in such a way as to exempt companies incorporated for trading through-

out Canada from provincial authority in respect of such matters as those dealt with in the provisions of the provincial statutes which we have been just discussing.

The argument as I understand it in support of Dominion jurisdiction is put in some such way as this: the Dominion has, it is said, under the general power authority to legislate in respect of matters which are truly of "national interest and importance," in addition to its authority to legislate in relation to matters comprised within the subjects enumerated in section 91. The business of a company having authority to carry on its business beyond the limits of one province and the powers with which such a company is endowed for that purpose and the right to execute those powers are said to constitute, taken as an entirety, a single subject matter of such "national interest and importance." It being, therefore, competent for the Dominion to legislate on such matters under its general power, such legislation when it comes into conflict with provincial legislation must, it is argued, prevail. It is said that the Dominion enactment incorporating such a company to carry on business in more than one province without imposing any condition or limitation does effectively exempt such a company from the necessity of complying with such provisions as those we have been considering. I think the decisions and the dicta relied upon in support of these propositions when properly understood have not the effect they are assumed by counsel for the Dominion to have and I proceed to consider the authorities in some detail. The question is one of great practical importance; for the proposition advanced amounts to nothing less than this, namely, that in all matters

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which may appear to the courts to be truly "of national interest or importance" the Dominion possesses plenary power to make laws which in each province supersede provincial legislation upon subjects enumerated in section 92; and this principle applied as the Dominion on this reference contends it ought to be applied would unquestionably leave to the provinces very little of that local autonomy which the parties to the Confederation compact believed they had reserved to them.

The cases which have admittedly involved the construction of the introductory clause of section 91 and the scope of the power conferred by that clause are the cases dealing with legislation on the subject of the "drink question" (as Lord Macnaghten called it, in the *Manitoba Licence Holders' Case*(1), and the *Parsons Case*(2); the *Colonial Building Association Case* (3), and the *Montreal Street Railway Case*(4). The counsel for the Dominion as well as for the Manufacturers' Association rely upon *La Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*(5), as supporting the view just indicated, but my own conclusion, which I have reached after careful examination of that case, is that it did not turn upon a consideration of the general power and I shall give my reasons for thinking so later. In the meantime I propose to examine the effect of the decisions which unquestionably are relevant.

The judgment in the *Montreal Street Railway Case* (4), contains an impressive warning against yielding too easily to such contentions as that I am now con-

(1) [1902] A.C. 73.
(2) 7 App. Cas. 96.
(3) 9 App. Cas. 157.
(4) [1912] A.C. 333.
(5) [1909] A.C. 194.

sidering. The following is the passage to be found at pages 343 and 344.

It was laid down in *Attorney-General of Ontario* v. *Attorney-General of the Dominion*(1), (1) that the exception contained in sec. 91, near its end, was not meant to derogate from the legislative authority given to provincial legislatures by the 16th sub-section of sec. 92, save to the extent of enabling the Parliament of Canada to deal with matters local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in sec. 91; (2) that to those matters which are not specified amongst the enumerated subjects of legislation in sec. 91 the exception at its end has no application and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial legislature by sec. 92; (3) that these enactments secs. 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in sec. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in sec. 92; (4) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by sec. 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation.

The cases on the drink legislation ought to be read by the light of this judgment and so read they lend no support to the Dominion's contention.

In *Russell* v. *The Queen*(2), it was admitted by Mr. Benjamin, who appeared for the defendant (the provinces were not represented) that the "Canada Temperance Act" of 1878 (which provided for what may be called the "prohibition" of the sale of intoxicating

(1) [1896] A.C. 348. (2) 7 App. Cas. 829.

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liquor in the localities within which it should be brought into force) if brought into force at once throughout the Dominion would have been valid. "A large admission" Lord Herschell called it in a subsequent case; page 168 of the stenographer's note of the argument in the Liquor Prohibition Appeal, printed in 1895 by William Brown & Co. He relied on the machinery for bringing the Act into force as shewing that the subject was dealt with as a local matter. And their Lordships did not really apply themselves in that case to the consideration of the question whether the matter of the suppression of the "drink" traffic was "substantially a local matter in each of the Provinces." In the Prohibition Reference, *Attorney-General of Ontario* v. *Attorney-General of Canada*(1), at page 362, Lord Watson said that their Lordships were relieved by this decision (*Russell* v. *The Queen*(2)), from the *"difficult duty"* of considering the validity of the "Canada Temperance Act," 1886, which was a re-enactment of the Act of 1878. Their Lordships also said that if the prohibitions of the "Canada Temperance Act" had been made imperative throughout the Dominion their Lordships *"might have been constrained by previous authority to hold"* that the jurisdiction of Ontario to pass a local Act of a similar nature would have been superseded. When these two judgments are read together with the subsequent judgment in the *Manitoba Licence Holders' Case*(3), it becomes apparent that they rest upon considerations which would have no possible application to any question before us.

1st. The judgment in *Russell* v. *The Queen*(2),

(1) [1896] A.C. 348. (2) 7 App. Cas. 829.
(3) [1902] A.C. 73.

proceeds upon the proposition that the "Canada Temperance Act" could not be regarded as a law relating to property and civil rights. It is implied that if such had been the matter of the legislation it could not have been sustained under the general power. In the *Manitoba Licence Holders' Case*(1), at page 78, their Lordships express the opinion that the effect of the previous decisions was that an enactment of similar character when passed by a province would fall within No. 16 rather than No. 13 and that if it fell within the latter it would be doubtful if the provincial enactment could be superseded by Dominion legislation.

From all these judgments it may be inferred, although they do not expressly decide, that uniform legislation by the Parliament of Canada imperative throughout the Dominion relating to matters which if dealt with in a single province would fall within any of the first fifteen heads of section 92, cannot in any circumstances be sustained under the general power to make laws for the peace, order and good government of Canada. If it were otherwise the enactments of section 94 would, as Lord Watson(2), said, be "idle and abortive." Legislation conferring upon Dominion companies rights in derogation of the provisions of the statutes now in question or dealing with the same subject matters unless passed under the authority of the enumerated heads of section 91 would necessarily be legislation in relation to the matters assigned to the provinces under Nos. 2, 9, 13 or 14.

2nd. But assuming this legislation ought, from the provincial point of view, to be regarded as enacted

(1) [1902] A.C. 73. (2) [1896] A.C. 348.

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under No. 16, it seems impossible to deduce from these judgments the proposition now advanced. In *Russell* v. *The Queen*(1), the matter and purpose of the legislation under discussion are indicated by such phrases as "necessary or expedient for national safety or for political reasons" "a law placing restrictions upon the sale, custody or removal of poisonous drugs or dangerously explosive substances" * * * "on the ground that the free sale or use of them is dangerous to public safety * * * and making it a criminal offence to violate these restrictions"; "legislation * * * relating to public order and safety;" "laws for the promotion of public order, safety or morals which subject those who contravene them to criminal procedure and punishment;" laws having "direct relation to the criminal law"(2).

Their Lordships on the prohibition reference appeared to find some difficulty in convincing themselves that legislation to which even such terms were appropriate could be supported under the general power of the Dominion.

In the earlier reference, in 1885 (relating to the Dominion Licence Acts of 1883-4, commonly known as the "McCarthy Act") their Lordships had before them a statute dealing with the "drink question"; but instead of prohibiting the drink traffic professing to make provision for regulating it. The preamble to the Act, 46 Vict. ch. 30, was "Whereas it is desirable to regulate the traffic in the sale of intoxicating liquors and it is expedient that the law respecting the same should be uniform throughout the Dominion and that pro-

(1) 7 App. Cas. 829.

(2) See 7 App. Cas. 829, at pp. 838, 839.

vision should be made in regard thereto for the better preservation of peace and order." This Act which professed to establish a uniform system regulating the "drink" trade throughout Canada for these purposes was held to be *ultra vires* of the Dominion. It is obvious therefore that even as regards a state of affairs which the Dominion may treat as constituting a national evil to be suppressed by laws which in effect are criminal laws the same authority may be disabled from otherwise dealing with it; and this is another indication of the difficulty of extracting from these decisions on the "drink" legislation any principle which can serve as a support for legislation upon another subject even when that subject admittedly concerns directly public order and morals unless the legislation in itself bears a "direct relation to the criminal law"(1).

There is certainly nothing here to afford a basis for the proposition that rights of a company which has been incorporated for carrying on, in more than one province of Canada, an ordinary mercantile business constitute by reason of that fact alone (I exclude of course matters relating to "incorporation") a "matter" in relation to which the Dominion under its general power may legislate to the exclusion of provincial jurisdiction or in derogation of the enactments of a province within whose territorial jurisdiction the company is found, upon matters *primâ facie* within the subjects of section 92. Assuming such matters as subjects of legislation to fall within No. 16 rather than within No. 2, No. 9, No. 13 or No. 14 of section 92, when looked at from the provincial point of view,

(1) 7 App. Cas. 829, at p. 839.

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it could hardly be denied that they are matters "substantially of local interest" in each province merely because legislation upon them only relates to companies carrying on business in more than one province; still less because it relates only to companies having power to carry on business in more than one province. Nobody would argue that the Dominion could by the exercise of any of its residual powers pass laws in relation to a natural person or an unincorporated association of persons carrying on business in more than one province which could have the effect of superseding, as regards such persons or associations, legislation (in respect of such matters) by any province in which he or they should be found setting up a place of business. On the question whether such matters are or are not "substantially of local interest" it must be immaterial whether they are considered in relation to a partnership carrying on business in two provinces or to a corporation carrying on business in two provinces, matters relating to "incorporation"—I repeat—being left out of view.

Where it is intended that a business of a particular character, or an undertaking of a particular character, shall be under the control of the Dominion or the provinces the authors of the Act seem to have said so. In section 91, for example, not only the "incorporation of banks" but "banking" also is specified. In No. 10 of section 92 it is the "undertaking" or "the work" which is expressly committed to the Dominion or the province as the case may be. In the case of "municipal institutions" where the subject is defined as "municipal institutions" simpliciter it was held by their Lordships, in *Attorney-General of Ontario* v. *Attorney-General for Canada*(1), that the

(1) [1896] A.C. 348.

power of creating the institution was all that was thereby conferred.

And the authorities cited in support of the proposition are all authorities upon the effect of some provision of the Act by which the control of a particular kind of *business or work or undertaking* is committed exclusively to the Dominion. In *The Union Bank* v. *Tennant*(1), for example, Lord Watson says that section 91 expressly declares that

> notwithstanding anything in this Act the exclusive authority of the Parliament of Canada shall extend to all matters coming within *enumerated* clauses,

and at p. 46, he says, referring to No. 15 of section 91, the "legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It also comprehends 'banking,' an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker." In *The City of Toronto* v. *Bell Telephone Co.* (2), Lord Macnaghten in the judgment upon which counsel for the Dominion relies was dealing with No. 29 of section 91 and No. 10 of section 92 the joint effect of which is that "works" extending beyond the boundaries of the province or connecting one or more provinces are under the exclusive control of the Dominion.

The *Cie. Hydraulique de St. François* v. *Continental Heat and Light Co.*(3).—The decision in this case which appears to me to be in the same category must be examined at length. The appellant company

(1) [1894] A.C. 31, at p. 45. (2) [1905] A.C. 52.
(3) [1909] A.C. 194.

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was a company incorporated by an Act of the legislature of Quebec, chapter 76 of the statutes of 1902, which authorized it, among other things, within a radius of 30 miles around the Village of Disraeli, and for Disraeli, to construct certain electric tramways, to utilize certain water powers, to acquire the franchises and exercise the powers conferred upon certain named companies, to work the tramways, to generate and distribute electricity for heat, light and motive power and to establish all necessary works in and over the streets and public lands for these purposes. By a subsequent statute it was enacted that no company "shall exercise any privileges, franchises or rights of a like nature to those conferred upon the St. Francis Water Company in the territory designated by the said Act" without obtaining the consent of the said company. In 1897 the respondents in the appeal had been incorporated as the Continental Heat and Light Company by the Parliament of Canada (60 & 61 Vict. ch. 72) with powers (exercisable without any restriction as to territory) to manufacture, supply, sell and dispose of electricity for the purpose of light, heat and motive power, and to construct tramways; and by section 8 it was specially empowered with the consent of "the municipal council or other authority having jurisdiction over any highway or public place" to enter thereon for the purpose of constructing and maintaining lines for the conveyance of the electric power when deemed necessary by the company and to erect, equip and maintain poles and other works and devices, stretch wires and other electrical contrivances thereon, and it was provided that the company should be responsible for all "unnecessary damage" caused in maintaining or carrying out any of the said works.

The Continental Company having proceeded to establish itself by constructing works within the territory designated by the "St. Francis Company's Act," an action was brought to restrain them. No question appears to have been raised as to the interest of the St. Francis Company to maintain the action, the point dealt with and decided which was probably the point the parties desired to raise, being the question of the effect of the prohibition above mentioned as against the Continental Company. Their Lordships held that the prohibition was not effective.

It appears from the judgment of the Court of King's Bench (1), that in that court counsel on behalf of the St. Francis Company admitted the Dominion legislation to be *intra vires*. This admission that the Act was *intra vires* would appear to have removed from the controversy any question material to the present reference. The case was in that court supposed to be governed by the *Bell Telephone Case* (2), in other words the Continental Company's undertaking was treated as an undertaking governed by No. 29 of section 91 and No. 10 of section 92 as an undertaking that is to say extending beyond the limits of a single province. It was, I think, on this hypothesis that the judgment of the Privy Council proceeded. The "St. Francis Act" authorized the establishment of works in a particular locality in the province of Quebec and prohibited the establishment in the same locality of any works of the same character. That was clearly an Act relating to local works within the meaning of No. 10 of section 92. In face of that prohibition no municipal authority or other authority in the

(1) Q.R. 16 K.B. 406. (2) [1905] A.C. 52.

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Province of Quebec could lawfully authorize anybody to enter upon a highway for the purpose of establishing any similar work which was also a local work. The Dominion Parliament could validly authorize the establishment of a work of similar character by declaring that work to be for the general advantage of Canada, or if it were a work connecting two provinces or extending beyond the boundaries of a single province; and it seems clear that their Lordships must have taken that to be the character of the works authorized by the "Continental Company's Act." That the Dominion legislation was paramount in the sense that the provincial legislation was overborne by it, was treated by their Lordships as a self evident result of the authorities. Now, if the Continental Company's undertaking was not a work or undertaking extending beyond the boundaries of the province within No. 10 of section 92, it was certainly a local work or undertaking within that article; and there certainly was no decision, prior to 1909, countenancing the proposition that under the general power Parliament could authorize the establishment of a local work of that description in face of a prohibition enacted by a province.

In this connection it is important to bear in mind the construction which the Judicial Committee of the Privy Council has placed upon No. 8 of section 92, and which can best be stated in the language of Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(1), at pages 363 and 364:—

> The first of these, which was very strongly insisted on, was to the effect that the power given to each province by No. 8 of sec. 92 to

(1) [1896] A.C. 348.

create municipal institutions in the province necessarily implies the right to endow these institutions with all the administrative functions which had been ordinarily possessed and exercised by them before the time of the Union. Their Lordships can find nothing to support that contention in the language of sec. 92, No. 8, which, according to its natural meaning, simply gives provincial legislatures the right to create a legal body for the management of municipal affairs. Until Confederation, the legislature of each province as then constituted could, if it chose, and did in some cases entrust to a municipality the execution of powers which now belong exclusively to the Parliament of Canada. Since its date a provincial legislature cannot delegate any power which it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of sec. 92 other than No. 8.

The control exercised commonly throughout Canada by municipalities over highways, tramways, works for distribution of light, heat and power, is based upon powers conferred by the provinces under heads of section 92 other than No. 8, such for example as 10, 13, 16.

A municipality can confer only such rights in respect of its highways as it is authorized to confer by the legislature having control of such rights. If the legislature of a given province prohibits the establishment of local works of a particular character in a particular municipality, that prohibition is final and decisive unless it be overborne by some superior legislative authority. The prohibition to be found in the "St. Francis Water Company's Act" having made it unlawful for the municipality or other authority having control of highways, to confer any right upon the Continental Company in respect of the establishment of any such works as those authorized by the "St. Francis Company's Act," the effect of the decision as construed by counsel for the Dominion is that the Dominion by incorporating a company having authority

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to establish similar works in any locality in Canada could override such a prohibition. If that is so, it is obvious that the control of the streets of every municipality in Canada with respect to local works, as local works, rests with the Dominion Parliament. That would appear to be a very remarkable result in view of No. 10 of section 92 by which local works and undertakings within a province are committed to the exclusive legislative jurisdiction of the province, and by which exact provision is made for a specific procedure by which the Dominion can obtain control of such works, viz., by declaring them to be for the general advantage of Canada. It is impossible to suppose that their Lordships could have given their decision upon any such principle.

The conclusion I have reached is that this decision proceeded upon the basis of the "Continental Company's Act" having been passed in execution of the authority conferred upon the Dominion by the combined force of section 91 (29), and section 92 (10). Whether a work or undertaking authorized by the Dominion is really a work or undertaking extending beyond the limits of a single province, is a question, of course, which must in each case depend upon the construction of the particular enactment in question.

There is one conceivably possible contention not put forward during the argument, which perhaps ought not to be overlooked in dealing with this point, and that is that the word "undertaking" in No. 10 is intended to include the business of an incorporated company as such. The undertaking of a mercantile company carrying on business in more than one province might perhaps be said to be an undertaking extending beyond the limits of the province. There are

many reasons for rejecting any such construction of the word "undertaking" in No. 10 of section 92, which so far as I know has never been put forward, and certainly has never been acted upon. In *Montreal Street Railway Case*(1) their Lordships observed that the works and undertakings referred to in No. 10, are "physical things." It is also rather difficult to see why if the business of an incorporated company which carries on business in more than one province is an undertaking in the sense of these words, the business of an un-incorporated association or of an individual having several places of business in different provinces, should not equally be an undertaking in that sense. It would follow of course that the Dominion could authorize the construction of a series of local works in each of the provinces quite disconnected as works, merely by authorizing a single company or individual to construct them; a tramway in Winnipeg, another in Montreal, another in Halifax. This seems to be inconsistent with the general objects of the enactments of No. 10 of section 92.

For these reasons I think it is impossible to maintain the contention that such provisions as those above considered as a part of the "British Columbia Companies' Act," are not operative against the Dominion companies incorporated and exercising powers conferred under the authority of the introductory clause of section 91.

"Regulation of trade and commerce."

The 7th question, however, is broad enough in its terms to include powers of trading conferred under

(1) [1912] A.C. 333.

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the enumerated heads of section 91. I do not propose to attempt to deal with this question in its broadest sense. What trading powers might be conferred in conceivable circumstances upon a Dominion company under several of the enumerated heads (*e.g.*, Militia and Defence), and how far such power might be held to be in their exercise free from provincial control, is a question that it would be futile to enter upon. The only one of the enumerated heads to which reference was made during the argument was No. 2, Trade and Commerce. Here again I do not propose to attempt to define or even to indicate what powers might be conferred upon a Dominion company in exercise of this particular jurisdiction. In the *Montreal Street Railway Case*(1) their Lordships held that the same general considerations as those governing the construction and application of the introductory clause, would apply to Trade and Commerce. In *The Bank of Toronto* v. *Lambe*(2), it was in effect stated that its jurisdiction under this head would not enable the Dominion to exempt traders from the provincial power of taxation in any province in which they should be carrying on their trade. In the *Brewers' Case*(3), it was held that the provinces might exact a license fee and regulate the manner in which a Dominion brewing company carried on its trade within the province. In the *Manitoba Liquor Licence Case*(4), it was held that a province might prohibit the sale of intoxicating liquors even by traders trading under a Dominion license, so long as the legislation did not directly interfere with transactions between residents of the province and outsiders. So far as I know nobody has

(1) [1912] A.C. 333.
(2) 12 App. Cas. 575.
(3) [1897] A.C. 231.
(4) [1902] A.C. 73.

doubted that the "Ontario Liquor Licence Act" which was held to be valid in *Hodge* v. *The Queen*(1), and under which authority is given to municipal bodies to require licenses to be taken out by persons dealing in intoxicating liquors, to fix the number of licences and to nominate the licensees, applies to Dominion companies carrying on that business in the province. I have already referred to the decision upon the "McCarthy Act." These decisions seem to suggest that, save at all events in exceptional circumstances, the Dominion could not confer powers upon a Dominion company under No. 2 of section 91, to be exercised in derogation of provincial legislation in respect of the matters dealt with in the legislation under consideration. Whether in any circumstances or in what circumstances, if any, the Dominion would possess such authority, is another point upon which I think it would be utterly futile to attempt to offer an opinion. The point pressed upon us by Mr. Newcombe was this: applying some words of Sir Montague Smith in the *Parsons Case*(2), to the effect that trade matters of interprovincial concern are given to the Dominion by No. 2, of section 91 and that such legislation as that before us necessarily affects interprovincial trade, in so far as it affects companies authorized to carry on some business which could be called a "trade" in more than one province. Now it is observed in the first place that this legislation is not legislation relating to trading companies. It is legislation relating to all companies carrying on business for gain. As I have already pointed out, it deals with companies as established in a province, as being in the province and sub-

(1) 9 App. Cas. 117.

(2) 7 App. Cas. 96.

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ject to the general territorial jurisdiction of the province, and it is with the business so carried on in the province that the legislation is intended to deal. It is not intended in any way to deal with Ontario companies as trading with British Columbia, or as trading into British Columbia. It deals with companies that establish themselves in British Columbia, and there carry on their trade. It may be that the British Columbia establishment is the only establishment the company has. But let us take the case of a company having an establishment in Vancouver and another in Winnipeg. On what conceivable ground can it be said that this legislation affects interprovincial trade in such a way as to make it legislation in respect of the interprovincial trade of that company? The "Partnership Act" of British Columbia requires that every partnership carrying on business in the province shall be registered. The registration involves the public record of certain information and a fee is to be paid. A partnership formed according to the law of Ontario carrying on business in Toronto and desiring to set up business in Vancouver would be obliged to comply with this law.

Is it not an absurdity to suggest that such an enactment is an enactment relating to interprovincial trade? And if the partners form an incorporated company which takes over the business, carrying it on as before, on what ground can it be said that [save as to incorporation] the company is in a less degree subject to the jurisdiction of the Province than the partnership was ?

It is conceivable that conflicting Dominion legislation under No. 2 might in exceptional circumstances overbear some of the provisions of the legis-

lation in question. But I must decline to pass any opinion upon such a question until the particular legislation is brought before me. Confining the question to companies incorporated under the Dominion "Companies Act" I have no hesitation in saying that there is nothing in that Act which in any way has the effect of removing companies formed under it from the operation of such legislation as that in question.

To summarize my views on the points raised by the questions 6 and 7 excluding any question as to the effect of competent Dominion legislation enacted under any of the enumerated heads of section 91.

The authority of the Dominion Parliament under the introductory clause of section 91 to make laws for the peace, order and good government of Canada is not exercisable by the express words of that clause in respect of those matters which fall within any of the classes of subjects exclusively assigned to the provincial legislatures by section 92. In the matter of the incorporation of companies the authority of the provincial legislatures has been held by the Privy Council to be limited to the matters described in the words of No. 11 of section 92, the "incorporation of companies with provincial objects." It has accordingly been held by the same authority that the power of the Dominion Parliament in relation to this subject, "the incorporation of companies," extends to all companies having objects which within the meaning of No. 11 of section 92 are other than "provincial objects"; and it has further been held that the objects of a company incorporated with capacity to carry on its business in all or any of the provinces of Canada without restric-

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tion are objects which do not answer the description "provincial" within the meaning of that clause.

The subject of "incorporation of companies" in relation to such companies as those just mentioned is, therefore, one of the subjects which (not having been assigned to the provincial legislatures by section 92) is comprised within those matters over which the Dominion exercises authority by virtue of its residual powers.

But this particular jurisdiction relates strictly to the subject of the "incorporation of companies." As regards all other matters in connection with such companies they are subject to the jurisdiction of the Dominion and of any province in which they carry on business respectively as a natural person, an unincorporated association, a provincial company, an extra-Canadian company would be in the like circumstances.

The limitation upon the provincial authority in relation to the creation of that species of corporate persons known as companies which is expressed in No. 11 of section 92 does not imply any restriction upon the provincial jurisdiction over corporate persons in relation to matters not comprised within the subject of "incorporation." And with regard to all other matters the jurisdiction of the provinces and the Dominion respectively in relation to corporate persons as well as to natural persons must be discovered by an examination of the provisions of sections 91 and 92 other than No. 11 of section 92.

The argument that the rights of a company incorporated to carry on trade in more than one province even although in fact it carries on its trade in one province only are (by virtue of the fact that it has corporate capacity to carry on trade in more than

one province), in any province in which the company does carry on its business, something other than matters of local interest in that province, even although they are *primâ facie* matters falling within the subjects enumerated by section 92, is an argument which cannot be supported. The argument would lead to the conclusion that the rights of an unincorporated partnership or of an individual, carrying on business in more provinces than one, must in each province with respect to the business carried on there, be considered a matter in respect of which the Dominion could legislate to the exclusion of provincial jurisdiction. There is no warrant in the Act for this theory that the Dominion has authority, in addition to its authority under the enumerated heads of section 91, to legislate (in respect of all persons natural or artificial who happen or have power to carry on business in more provinces than one) in derogation of the provincial authority in relation to matters which would *primâ facie* fall within the provincial jurisdiction. Similar considerations lead to the rejection of the contention that such legislation as that we are considering is legislation in relation to the subject of interprovincial trade. The argument would equally apply to a natural person carrying on business in more provinces than one.

On these principles the provisions of the "British Columbia Companies Act" referred to in question 6 must be held to have been validly enacted and they have the operation indicated above.

ANGLIN J.—In this reference we are confronted with what the Judicial Committee has characterized as

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a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value.

The main purpose would appear to be to elicit opinions from the members of this Court as to the nature and extent of the restrictions upon the power of provincial legislatures in regard to the incorporation of companies, and chiefly as to whether a corporation created by or under the authority of a provincial legislature without any limitation confining the area of its activities within the boundaries of the province, either expressed in its charter or necessarily to be implied from the nature of its undertaking, is capable of exercising such activities outside the territorial limits of the province subject to the law of the sovereignty or other province within which it seeks to operate. Incidentally we are asked to answer a number of questions, more or less cognate, which cover a wide field. In regard to some of these at least, the Lord Chancellor, speaking for the Judicial Committee, has seen fit to suggest that we may with propriety represent to the Executive the inadvisability of attempting to deal with them(1).

In the same judgment their Lordships have once more emphatically stated that in the provisions of the "British North America Act" are to be found all powers necessary and appropriate for self-government in Canada; that when a power appertaining to self-government is not explicitly mentioned in the Act

it is not to be presumed that the constitution withholds the power altogether; on the contrary it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself * * * or otherwise is clearly repugnant to its sense.

(1) [1912] A.C. 571, at p. 589.

For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces within the limits of the "British North America Act" (pp. 683-4).

The only clauses in the "British North America Act" in which any reference is made to the incorporation of companies are No. 15 of section 91, "Banking, Incorporation of Banks, and the Issue of Paper Money," and No. 11 of section 92, "The Incorporation of Companies, with Provincial Objects." If the "Incorporation of Banks" had been omitted from the enumeration of the legislative powers of Parliament, and section 92 did not contain clause 11, in my opinion, the faculties of the Dominion Parliament and of the provincial legislatures, in regard to incorporation, would, under the other provisions of the "British North America Act," have been the same as they are with these two clauses in the statute. The creation of a corporation may be regarded as a means appropriate, convenient and sometimes necessary to the efficient exercise of plenary legislative power in regard to many of the enumerated subjects of legislation comprised in both categories of powers — federal and provincial — under the "British North America Act." The power of the Dominion Parliament to create corporations other than banks is unquestionable under "the peace, order and good government" provision, if not under several of the enumerated clauses of section 91. *Citizens Ins. Co.* v. *Parsons*(1), at pages 116, 117; *Colonial Building and Investment Association* v. *Attorney-General of Quebec*(2), at pages 164-5. Is it open to doubt that, if the words "the incorporation of banks," in clause 15 of section 91, had been omitted, the power — and the ex-

(1) 7 App. Cas. 96. (2) 9 App. Cas. 157.

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clusive power — of incorporating banks would have belonged to the Federal Parliament? I think not. If clause 11 of section 92 had not been inserted in the statute, could the exclusive right of provincial legislatures to create municipal corporations, or charitable or eleemosynary corporations (probably not covered by the word "companies" in clause 11) or companies for purely local purposes be questioned? Again, I think not. And it is, I think equally clear that, although the word "companies" in clause 11 should not be taken to include such bodies as municipal corporation, or charitable or ecclesiastical corporations, the presence of that clause in section 92 does not negative the provincial power of incorporating these or other provincial corporations to which it does not apply.

What then was the purpose and effect of the introduction of clause 11 amongst the enumerated exclusive legislative powers of the provincial legislatures? I think it was intended to preclude the contention that, if the power of incorporation should be regarded as a substantive and distinct head of legislative jurisdiction, it was wholly vested in the Dominion Parliament as part of the residuum under the "peace, order and good government" provision of section 91 (see *Citizens Ins. Co.* v. *Parsons*(1), at pages 116, 117,) because not expressly mentioned in the enumeration of provincial powers; and to make it clear that this power, if so regarded, is divided between the federal and provincial jurisdictions as conferred in part on the latter by clause 11 of section 92, and in part on the former, in the case of banks by clause 15, and in the case of other Dominion corporations under the "peace, order and good government" provision of section 91.

(1) 7 App. Cas. 96.

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When it was deemed advisable to introduce into the list of provincial legislative powers a reference to the incorporation of companies the delimiting or qualifying words "with provincial objects" were added in order to preclude the contention that the exclusive legislative power expressed in clause 11 comprises the whole field of incorporation, to assure to the Dominion its jurisdiction in regard to incorporation as a convenient means of effectively legislating in regard to the subjects assigned to it and to serve as an index of the line of demarcation between the two legislative jurisdictions. It was thus made clear that from provincial jurisdiction there was excluded the incorporation of companies with Dominion objects—companies for the carrying on of works and operations within the legislative jurisdiction of the Parliament of Canada—companies formed for the transaction of affairs "unquestionably of Canadian interest and importance."

Notwithstanding the introduction of this clause, I think the powers of the Dominion Parliament and the provincial legislatures, respectively, in regard to incorporation are precisely what they would have been had it been omitted from the Act and had the power of incorporation been treated not as a distinct and substantive head of legislative jurisdiction—an end in itself—but as a means for the working out of legislative power in respect of the enumerated subjects and as such conferred as incidental to legislative jurisdiction over them. I regard clause 11 as an instance of the express declaration in a statute of what the law would imply, made in the hope that all doubt as to the intent of Parliament should be removed. *Abundans cautela non nocet.* Yet, assuredly, language of more

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certain import and less provocative of controversy might have been chosen.

The Judicial Committee has, on at least four occasions, affirmed the exclusive power of the Dominion to incorporate companies whose capacities, as set forth in their constating instruments, expressly entitle them to operate in more than one province. *Colonial Building and Investment Association* v. *Attorney-General of Ontario*(1), at p. 165; *Citizens Ins. Co.* v. *Parsons*(2), at pp. 99, 116; *Dobie* v. *Temporalities Board*(3), at page 152; *Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*(4). A similar view was taken by the late Chief Justice of this Court in *Hewson* v. *Ontario Power Co.*(5), at page 604. Yet had the objects of such companies not been expressed as intended to be carried out in more than one province they might properly be regarded as provincial.

It is argued, and with much force, that if a provincial legislature may not in express terms confer on its corporate creature power to operate outside the territorial limits of the province, and if a provincial charter purporting to confer such extra-territorial powers is *ultra vires,* it follows that in every provincial charter there must be implied the limitation that the exercise of the powers of the company (at least what have been called "functional" powers or objects, as distinguished from incidental powers) shall be confined to the territory of the province, and that a provincial corporation upon whose objects or powers no territorial restriction is expressly imposed is, nevertheless, subject to the same limitation as if its opera-

(1) 9 App. Cas. 157.
(2) 7 App. Cas. 96.
(3) 7 App. Cas. 136.
(4) [1909] A.C. 194.
(5) 36 Can. S.C.R. 596.

tions were by its charter expressly confined to the province. No doubt that is the case when the nature of the objects of the corporation indicates that they are to be carried out in a certain locality within the province, *e.g.*, the establishment and maintenance of a hospital, or the building of a railway. But I find nothing in the language of clause 11 of section 92 of the "British North America Act" which compels us to hold that the ordinary mercantile trading or manufacturing company incorporated by a province to do business without territorial limitation is precluded from availing itself of the so-called comity of a foreign state, or of a province, which recognizes the existence of foreign corporations and permits their operations in its territory. Of course such foreign operations must be of the class authorized by the constating instrument of the company and not in contravention of the law or policy of the state in which they are carried on.

If the operations or activities of any foreign corporation should depend for their validity upon the powers conferred on it by the law of the incorporating state, it would in my opinion be difficult to sustain them, inasmuch as "the law of no country can have effect as law beyond the territory of the Sovereign by whom it was imposed." But the exercise of its powers by a corporation extra-territorially depends not upon the legislative power of its country of origin but upon the express or tacit sanction of the state or province in which such powers are exercised and the absence of any prohibition on the part of the legislature which created it against its taking advantage of international comity. All that a company incorporated without territorial restriction upon

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the exercise of its powers carries abroad is its entity or corporate existence in the state of its origin coupled with a quasi-negative or passive capacity to accept the authorization of foreign states to enter into transactions and to exercise powers within their dominions similar to those which it is permitted to enter into and to exercise within its state of origin. Even its entity as a corporation is available to it in a foreign state only by virtue of the recognition of it by that state. It has no right whatever in a foreign state except such as that state confers.

When the "British North America Act" was passed the doctrine of comity in regard to foreign corporations was well established as a rule of international law universally accepted. It had been long acted upon in English courts and had received Parliamentary recognition. Modern law acknowledges this capacity of every corporation, not expressly or impliedly forbidden by its state of origin to avail itself of privileges accorded by international comity, as something so inherent in the very idea of incorporation that we would not, in my opinion, be justified, merely by reason of the presence in the clause expressing the provincial power of incorporation of such uncertain words as "with provincial objects," in ascribing to the Imperial Parliament the intention in passing the "British North America Act" of denying to provincial legislatures, otherwise clothed with such ample sovereign powers, the right to endow their corporate creatures with it. *Bateman* v. *Service*(1), at page 391. The impotency which such a construction of the statute would, in many instances, entail upon provincial com-

(1) 6 App. Cas. 386.

panies affords a strong argumuent against adopting it. Had Parliament intended in the case of the provincial power of incorporation to depart from the ordinary rule by confining the activities of every provincial corporation within the territorial limits of the province creating it, it seems to me highly improbable that the words "with provincial objects" would have been employed to effect that purpose. Some such words as "with power to operate only in the province" would have expressed the idea much more clearly and unmistakably. Inapt to impose territorial restriction the words "with provincial objects" may be given an effect, which seems more likely to have been intended and which satisfies them, by excluding from the provincial power of incorporation such companies as have objects distinctly Dominion in character either because they fall under some one of the heads of legislative jurisdiction enumerated in section 91, or because, they "are unquestionably of Canadian interest and importance."

The provincial company is a domestic company and exercises its powers as of right only within the territory of the province which creates it. Elsewhere in Canada, as abroad, it is a foreign company and it depends for the exercise of its charter powers upon the sanction accorded by the comity of the province in which it seeks to operate, which, although perhaps not the same thing as international comity, is closely akin to it. The Dominion company, on the other hand, is a domestic company in all parts of Canada. It exercises its powers as of right in every province of the Dominion. While a Dominion company is, generally speaking, subject to the ordinary law of the province, such as the law of Mortmain (*Citizens Ins. Co.* v. *Par-*

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sons(1), at p. 117)—while it may be taxed by the province for purposes of provincial revenue (*Bank of Toronto* v. *Lambe*(2)), while it may be required to conform to reasonable provisions in regard to registration and licensing (*The Brewers' Case*(3)), a provincial legislature may not exclude it, or directly or indirectly prevent it from enjoying its corporate rights and exercising its powers within the province (*City of Toronto* v. *Bell Telephone Co.*(4); *Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*(5)), as (subject perhaps in the case of alien corporations to the provisions of any general Dominion legislation dealing with them under clause 25 of section 91) it may do in the case of other corporations not its own creatures. It may be that there is some distinction to be drawn, in regard to the extent to which they are subject to provincial law, between corporations created by the Dominion, under clause 15 of section 91 or in the exercise of incidental legislative power under some one to the enumerated heads of section 91, and other corporations created by it solely in the exercise of its power to make laws for the "peace, order and good government" of Canada. For instance, a Dominion railway company in regard to the acquisition and tenure of its right of way might not be subject to a provincial law of mortmain, although it is undoubtedly subject to provincial direct taxation (*Bank of Toronto* v. *Lambe*(2)), and to certain municipal regulations affecting it as a resident of the province (*Canadian Pacific Railway Co.* v. *Parish of Notre Dame de*

(1) 7 App. Cas. 96.
(2) 12 App. Cas. 575.
(3) [1897] A.C. 231.
(4) [1905] A.C. 52.
(5) [1909] A.C. 194.

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Bonsecours(1)). Upon this branch of the subject under consideration I desire to reserve my opinion.

The granting of a charter which in terms purports to confer on a corporation the right to carry on its operations in portions of Canada beyond the limits of the province is *ultra vires* of the provincial legislature and an invasion of the Dominion legislative field because it is an attempt to enable the corporation to exercise its powers as of right in parts of the Dominion not subject to the jurisdiction of the legislature which confers them. It would also seem to be beyond the competence of a provincial legislature to create what is known in American law as a "Tramp Corporation" (Thomson on Corporations, 2 ed., par. 6632), or a corporation with express power to operate abroad (*Hewson* v. *Ontario Power Co.*(2), at page 604).

In its transactions outside the jurisdiction of the legislature to which it owes its existence, a corporation always remains subject to the limitations imposed upon it by its constitution. While it may be further limited in the exercise of its charter powers by the law of the country where it operates, it cannot invoke the law of that country to authorize the transaction of business or the exercise of powers not allowed under its constating instrument. Where the exercise of its corporate powers is territorially limited by the legislature which creates it a company cannot obtain from another legislature the right to exercise those powers beyond the territorial limit so imposed. It is only by re-incorporation, which is nothing else than the creation of a new and distinct body corporate, that another legislature may enlarge the powers

(1) [1899] A.C. 367.

(2) 36 Can. S.C.R. 596.

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or capacities of a company as defined by the legislative authority which created it. The power to amend or to destroy legislation is measured by the capacity to enact it or to reconstruct it. *Dobie* v. *Temporalities Board*(1), at page 152; *The Prohibition Case*(2), at pages 366-7.

Legislation of the Dominion Parliament authorizing a provincial company, as incidental to the accomplishment of its provincial purpose, to affect matters or things subject to Dominion control (such, *e.g.,* as an Act allowing a provincial railway or a municipal corporation to erect a bridge over a navigable river—see *In re Brandon Bridge*(3); Bourinot's Parliamentary Procedure and Practice (2 ed.), p. 680) is in furtherance of that purpose and something which the incorporating province must be taken to have contemplated and sanctioned, and is, therefore, not in any sense an enlargement of its powers or capacities obnoxious to the exclusive jurisdiction of the provincial legislature over its corporate creature. For the same reason, express or tacit sanction by one provincial legislature of the exercise within its jurisdiction of the corporate powers of a corporation created without territorial limitation by, or under the authority of, the legislature of another province is not an enlargement of the powers of such corporation involving an invasion of the exclusive control over it of the legislature to which it owes its existence.

Having regard to the extent and importance of the interests which may be affected by the opinions of the judges of this court and which have not been repre-

(1) 7 App. Cas. 136. (2) [1896] A.C. 348.
(3) 2 Man. R. 14.

sented before us, to the difficult and complex nature of the subject submitted for our consideration and to the utter impossibility of preconceiving all the questions surrounding that subject which may arise, or the varying aspects and circumstances under which they may present themselves, it is, I think, inadvisable to add to the foregoing general statement, which contains many propositions that are obviously elementary as well as some views which I am fully aware have been seriously controverted. It will probably suffice, however, to make clear the reasons upon which are based the following answers to the questions submitted:—

(1) The Legislature of a Canadian province cannot validly incorporate a company which

(*a*) is expressly empowered to exercise its activities in any other part of Canada or abroad, or

(*b*) is empowered to carry on works or operations within the enumerated legislative powers of the Dominion Parliament, or business or affairs "unquestionably of Canadian interest and importance."

The latter limitation—(*b*)—is expressed in clause 11 of section 92 of the "British North America Act" in the words "with provincial objects."

(2) Yes—subject to the general law of the state or province in which it seeks to operate and to the limitations imposed by its own constitution, but not "by virtue of (the powers conferred by its) provincial incorporation."

(3) (*a*) and (*c*). Yes, unless forbidden by its constitution to insure such property.

(*b*) Yes.

The nationality or residence of the owners of the property insured is not material to these answers.

(4) The answer to question (3) being affirmative

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it becomes unnecessary to deal with the first part of question No. 4.

In regard to the second part of question No. 4, as amended, except in so far as it deals with companies incorporated by or under Acts of the legislature of the late Province of Canada which were not confined in their operations to territory not wholly comprised either within the Province of Ontario or the Province of Quebec, sub-sec. 3 of sec. 3 of the "Insurance Act, 1910," is *ultra vires* of the Parliament of Canada.

(5) (*a*) No. (*b*) No.

6. Yes—if the real and primary object of the provincial legislation be the raising of a revenue or the obtaining of information (such, *e.g.,* as the designation of a place at which, or a person on whom process may be served within the province) "for provincial, local or municipal purposes."

No—if the real and primary object be to require the company to obtain provincial sanction or authority for the exercise of its corporate powers.

(7) As to the first part; No.

As to the second part: The Dominion "trading company" is not "subject to or governed by legislation of a province *limiting* the nature or kind of business which corporations not incorporated by the legislature of the province may carry on or the powers which they may exercise within the province." The validity of provincial legislation "imposing conditions to be observed or complied with by Dominion trading companies before they engage in business within the province" may be tested by the criterion stated in answer to question No. 6.

It is practically impossible to anticipate every conceivable form in which provincial legislation directly

or indirectly restrictive may be enacted and it would, therefore, seem to be advisable to refrain from attempting to answer the third part of this question.

The answers to question No. 6 and to the latter half of the second part of question No. 7 are not to be taken as intended to be exhaustive.

BRODEUR J.—The purpose of that reference is to ascertain

(1) whether the provincial companies can carry on business outside of the incorporating province;

(2) if the power of those companies can be enlarged by the Dominion Parliament or by the legislature of another province; and

(3) we are called upon to state whether the provinces may impose restrictions upon Dominion companies.

The subject of the incorporation of companies or corporations is specifically mentioned twice in the "British North America Act."

In the section 91 of that Act, which enumerates the legislative powers of the Federal Parliament, it is stated that

> It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the Peace, order and good Government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative authority of the Parliament of Canada extends to all matters coming within the classes next hereinafter enumerated; that is to say.....
>
> 15. Banking, *Incorporation of Banks*, and the issue of Paper money.

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The section 92 of the same Act contains the other formal reference to the incorporation of companies and reads as follows:—

In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say * * *

11. The incorporation of Companies with Provincial objects.

When the terms of Confederation were discussed at the Quebec Conference, 1864, the question of incorporation of companies was not mentioned at first (Pope's Confederation Documents, p. 24, art. 7, and p. 27); but later on we see that the incorporation of banks was formally assigned to the Federal Parliament. (Pope's do., p. 44, art. 20.) And the incorporation of companies was put under the legislative control of the provinces in the following terms:—

17. The incorporation of private or local companies, except such as relate to matters assigned to the federal Legislature. (Pope, *do.* pp. 28 and 47).

That wording of the clause was adhered to at the London Conference in December, 1866 (Pope, do., p. 106, art. 14). But when the bill came to be drafted, they substituted the following phraseology:—

11. The incorporation of companies with exclusively provincial objects (p. 153, art. 11);

and at last, when the last draft was made, the word *exclusively* was struck out.

During the proceedings of the Quebec Conference we see that it was proposed at one time to vest the Canadian Parliament with the power of regulating and incorporating fire and life insurance companies (Pope, art. 3), but it was decided to strike out that item (Pope, p. 88), and we do not see now in the "British North America Act" any reference to the regulation or incorporation of insurance companies.

The intention of the delegates of the provinces of the Canadian Confederation, if we may infer from those historical documents, was that the companies which do not relate to matters assigned to the central authority should be incorporated by the provinces.

By the "British North America Act" the property and civil rights are under the legislative control of the provinces and it has to be assumed in general principle that the creation of artificial or ideal persons under the name of companies is logically of the provincial domain.

A company is a larger form of a partnership with one special privilege added as to the limitation of the liability of its members.

A company in its ordinary relations with other members of the society is clothed with the same powers and is bound by the same obligations as natural persons are.

The rules that govern those relations are necessarily borrowed from the civil law of which they form a part as well as the rules which govern the rights, obligations, incapacities and privileges of minors, absentees, insane persons, etc. (Reports of the Codifiers of the Civil Code, p. xcvii.)

The creation of an association would then belong essentially to the provinces; but the "British North America Act," as well as the Fathers of Confederation, put in a restriction that the provinces could incorporate companies for matters that fell under their legislative control.

The word "provincial" in section 11 of section 92, is not used in its geographical sense: the objects are not territorial; but that word "provincial" is used with regard to the legislative powers of the province;

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and provincial objects are those that the provincial legislature can authorize or confer.

The "provincial objects" carry the suggestion that they should be distinguished from Dominion objects. They could be defined as all objects which as subjects of legislation are assigned to the province. That restriction has been put in in order to avoid the construction that would have allowed the provinces to incorporate companies to carry out Dominion objects.

There would not have been in the enumeration in section 91 anything relating to the incorporation of companies with the single exception of banks, and could have been argued that the right to incorporate all companies, being of its nature a civil right, should be exercised by the province. We would have seen then interprovincial railways connecting one province with another under the legislative control of Dominion Parliament; but the companies that control those railways would have required provincial charters. Such a state of affairs would have brought a serious confusion and in order to avoid that it was declared that the provincial authorities could incorporate companies whose objects were of the legislative domain of the provinces.

When we examine another sub-section of section 92 we see that the provincial legislatures

> may exclusively make laws in relation to * * * *property and civil rights in the province.*

There again we see a restriction. Does it mean that the capacity of a person should be determined in a neighbouring province or in a foreign country by federal legislation? No, certainly not. The capacity of a person is determined by the law of its domicile and that law is the provincial law; and when that person goes into another province or into another

country his capacity to contract is based upon the law of his province.

The comity of nations recognizes the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation and not prohibited by its charter and not inconsistent with the local laws of the country in which the business is carried on. As to the comity of nations, each province should be considered as a country.

All the powers granted by a province to a company are generally recognized in the other provinces and so long as the powers which that company seeks to exercise are not inconsistent with these granted by the incorporating province and with the laws and policies of the other provinces, the company can carry on there its business.

When a company receives its original incorporation from a provincial legislature, then the breath of life has come into it; it becomes equivalent to a natural person and has the power to do business outside the province which incorporated it.

A province could as well incorporate a company and that company could go and carry on business in a neighbouring province by the laws of courtesy or comity, as a bank incorporated by the Dominion Parliament could go and carry on business in a foreign country.

Now with regard to the enlargement of the powers of a company, I am of opinion that those powers could not be enlarged. A company authorized by its charter to do a certain business could not be authorized by the provinces or by the country in which it operates

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to do another kind of business. It is a question of capacity and by the rules of private international law the capacity of a person is determined by the law of his domicile. I would not hesitate then to answer in the negative sub-section (*b*) of section 5, unless the extension by the legislature of another province to a company of the courtesy should be deemed an enlargement of its corporate powers.

As to the power of the provinces on the Dominion companies, the jurisprudence is well established today that those companies can be taxed by the provinces and they can be prevented from carrying on business if they don't take the license provided by the provincial legislation (*The Brewers Case*(1)). Of course, in dealing with those restrictions, the provinces should be careful that those restrictions cover the exercise of powers vested in them by section 92 of the "British North America Act," On the other hand, the Dominion Parliament should not incorporate any company whose objects are not federal nor interprovincial. I am afraid that in many cases companies have been incorporated by the Dominion with the intention of carrying on a local business and not an interprovincial undertaking, though they alleged in their petition that the undertaking was interprovincial.

My answer to the different questions should be as follows:—

QUESTIONS.	ANSWERS.
I.	I.
What limitation exists under the "British North	The "British North America Act" has assigned in

(1) [1897] A.C. 231.

QUESTIONS.	ANSWERS.
America Act, 1867," upon the power of the provincial legislatures to incorporate companies ?	section 92, sub-section 11, to the provinces the power to incorporate companies with *provincial objects.*
What is the meaning of the expression "with provincial objects" in section 92, article 11, of the said Act ? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation ?	That restriction should not be interpreted with reference to any territorial limitation of their capacities; but it has reference to the distribution of the legislative powers between the Parliament and the Legislatures.
II.	II.
Has a company incorporated by a provincial legislature under the powers conferred in that behalf by section 92, article 11, of the "British North America Act. 1867," power or capacity to do business outside the limits of the incorporating province ? If so, to what extent and for what purpose ?	Yes, subject to the laws of the country or province in which it seeks to operate and subject to the limitations imposed by its own constitution.
Has a company incorporated by a provincial	

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legislature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind outside of the incorporating province ?	
III.	III.
Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts	
(*a*) within the incorporating province insuring property outside of the province ?	Yes, subject to the laws of the country or province in which it seeks to operate.
(*b*) outside of the incorporating province, insuring property within the province ?	
(*c*) outside of the incorporating province, insuring property outside of the province ?	

QUESTIONS.	ANSWERS.
Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country ?	
Do the answers to the foregoing inquiries, or any of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province ?	The nationality or residence of the owner of the property or risk insured is not material to these answers.
IV.	IV.
If in any or all of the above mentioned cases, (*a*), (*b*) and (*c*), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases, on availing itself of the "Insurance Act, 1910," 9 and 10 Edw. VII. ch. 32, sec. 3. sub-sec. 3 ?	My answer to question No. 3 being affirmative, it becomes unnecessary to deal with the first part of the question.
Is the said enactment, the "Insurance Act, 1910," ch. 32, sec. 3, sub-	In regard to the second part of this question, the sub-section 30, section 3, of the "Insurance Act of 1910" is *ultra vires* of the Parliament of Canada.

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sec. 3, *intra vires* of the Parliament of Canada ?	
V.	V.
Can the power of a company incorporated by a provincial legislature be enlarged, and to what extent, either as to locality or objects by	
(*a*) the Dominion Parliament ?	No.
(*b*) the legislature of another province ?	
VI.	VI.
Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province, unless or until the companies obtain a licence so to do from the government of the province, or local authority constituted by the legislature, if fees are required to be paid upon the issue of such license ?	Yes.
For examples of such	

QUESTIONS.	ANSWERS.
provincial legislation, see Ontario, 63 Vict. ch. 24; New Brunswick, Cons. Sts., 1903, ch. 18; British Columbia, 5 Edw. VII., ch. 11—now sec. 166, R.S. B.C., ch. 39.	
VII.	VII.
Is it competent to a provincial legislature *to restrict a company* incorporated by the Parliament of Canada for the purpose of trading throughout the whole Dominion in *the exercise of the special* trading powers so conferred or to limit the exercise of such powers within the province ?	Assuming as the question does that a trading company can be duly incorporated by the Parliament of Canada, I say that those companies are subject to the provincial laws enacted under section 92, "British North America Act."
Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the pro-	

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QUESTIONS.	ANSWERS.
vince may carry on, or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporations before they engage in business within the province ? Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect, by provincial legislation ?	

PAUL L. TURGEON, ÈS-QUALITÉ (CONTESTANT) ..... } APPELLANT;

AND

FRANÇOIS-XAVIER ST. CHARLES (PETITIONER) ..... } RESPONDENT.

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*March 28, 31.

*Oct. 14.

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

Appeal—Jurisdiction—"Supreme Court Act," ss. 36, 37, 46—Judge in Chambers—Originating petition—Arts. 71, 72, 875, 876 C.P.Q.—Liquor laws—"Quebec Licence Law," R.S.Q., 1909, arts. 924 et seq. — Property in licence—Agreement—Ownership in persons other than holder—Invalidity of contract—Public policy.

A cause, matter or judicial proceeding originating on petition to a judge in chambers, in virtue of articles 875 and 876 of the Quebec Code of Civil Procedure, is appealable to the Supreme Court of Canada where the subject of the controversy amounts to the sum or value of two thousand dollars.

It is inconsistent with the policy of the "Quebec Licence Law" (R.S.Q., 1909), that the ownership of a licence to sell intoxicating liquors should be vested in one person while the licence is held in the name of another. An agreement having that effect is void inasmuch as it establishes conditions contrary to the policy of the statute. Judgment appealed from (Q.R. 22 K.B. 58) reversed, Brodeur J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of Mr. Justice Greenshields, in Superior Court chambers, in the District of Montreal, by which the respondent's petition was granted with costs.

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

(1) Q.R. 22 K.B. 58.

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The proceedings were commenced by petition to a judge in chambers by the respondent whereby, on his own behalf as well as in his capacity of testamentary executor of the late Ferdinand Paquette, deceased, he claimed the property, goodwill and accessories of a restaurant, including the licence to sell spirituous liquors in connection therewith, whereof the respondent, as curator of the insolvent estate of Joseph Goderre, had taken possession by virtue of a judicial abandonment. These proceedings were instituted under the provisions of articles 875 and 876 of the Quebec Code of Civil Procedure. The prayer of the petition was granted by Greenshields J. and his decision in favour of the petitioner was affirmed by the judgment now appealed from.

On the argument the court raised the question of its jurisdiction to hear and determine the appeal, which depended on whether or not the originating petition was or was not a proceeding in a superior court within the provisions of sections 36, 37 and 46 of the "Supreme Court Act," R.S.C., 1906, ch. 139.

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

Lafleur K.C. and *St. Germain K.C.* for the appellant.

Aimé Geoffrion K.C. and *A. Perrault* for the respondent.

THE CHIEF JUSTICE (oral).—This appeal must be allowed with costs, reserving to the respondent his right to rank on the estate as a privileged creditor with respect to the amount paid by him in order to

obtain the transfer and renewal of the licence in question.

DAVIES J.—I concur in the opinion stated by my brother Anglin.

IDINGTON J.—The appellant is curator of the estate of one Goderre who had been a hotelkeeper in Montreal for some years and up to the time of his judicial abandonment, on the 21st of March, 1910, of his property as an insolvent.

As such he held at that date a licence to sell intoxicating liquors. This licence had been issued to him under the provisions of the "Quebec Licence Act," on the first of May, 1909, for one year.

The appellant applied for and got the consent of the Licence Commissioners pursuant to the provisions of the said Act to the transfer to him, as curator, of said licence, and later procured from them, on the first of May following, a renewal of said licence for the next ensuing year from said date.

The appellant, as such curator, having taken possession of the business premises and stock-in-trade of the insolvent, was duly proceeding to sell same with said licence by public auction to be held on the 31st May, 1910, when the respondent, on the 26th May, 1910, applied by petition addressed

to one of the judges of the Superior Court sitting in and for the District of Montreal,

to have the said curator ordered to turn over to him the said licence and certain stock-in-trade relating to said business.

The prayer of the petition was granted by Mr. Justice Greenshields and his order has been upheld by

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the court of appeal. The appellant seeks a reversal of said judgment.

The petition is founded upon articles 875 and 876 of the Code of Civil Procedure.

During the argument a question was raised as to whether an appeal would lie to this court from such a judgment.

Section 46 of the "Supreme Court Act," defining the grounds of appeal from the court of final resort in the Province of Quebec, seems comprehensive enough to include the subject-matter in controversy herein which is admitted to be above two thousand dollars in value.

It is urged that the proceeding in question was not one taken in the Superior Court, but was a mere chamber motion and, hence, non-appealable.

The distinction between a judge in chambers and his sitting as a court is, for many purposes, quite valid.

The Code of Civil Procedure (in like manner as procedural legislation does in other provinces on the like subject) declares, by article 24, that the court has the same powers as a judge over matters assigned to the latter by article 71; that the judge can adjourn an application brought before him into the court or *vice versâ*, and, by article 72, that a decision of a judge in chambers shall have the same effect as judgments of the court and be subject to appeal and other remedies as against judgments.

Article 876 is as follows:—

> Any property not belonging to the debtor, which is in the curator's possession by virtue of the abandonment, may be recovered by the person thereto entitled, upon a petition to the judge.

It would seem as if this remedy had been provided as a specific mode of trial and adjudication relative

to the title to property which had passed into the curator's hands and to which a third party might have made a claim. Its peculiar terms may have a bearing (which I pass for the present) upon the merits of this appeal.

The question of our jurisdiction, it is to be observed, does not, having regard to the terms of the "Supreme Court Act," necessarily turn upon the form but upon the substance of the question of whether or not the proceeding has been had in a superior court.

I think our jurisdiction to hear this appeal is quite as well founded as it was in the case of *The North British Canadian Investment Co.* v. *The Trustees of St. John School District*(1), where the question was the right of appeal when an officer under the "Land Titles Act" of the North-West Territories had been directed by a judge to make an entry affecting a title; or the case of *The City of Halifax* v. *Reeves*(2), when the proceeding was begun and founded upon a petition to a judge in chambers.

As to the merits of the appeal there is nothing, so far as I can see, to be gained by going into many of the questions argued before us. It must be determined by the question of whether or not, having regard to the provisions of the "Quebec Licence Act" (which alone creates thereby such rights of property or otherwise as any one can have in, to or over such licences) the respondent has any such right of property in the licence as to entitle him to the order made directing the curator to transfer it to him.

Not even the court can have any power or authority directing its curator or any one else to meddle

(1) 35 Can. S.C.R. 461.

(2) 23 Can. S.C.R. 340.

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with such a transfer unless given by said Act the power to do so.

In 1906, the hotel business in question with the then stock-in-trade, the goodwill, the lease and licence had been transferred by one Thibault to the respondent and a partner named Paquette, since dead but whom he represents, and by them re-transferred to the said Goderre under an instrument which contained what was expressed to be a suspensive condition and is claimed now to have been so effectively such that the respondent and Paquette could, and he now, personally and as representative, can claim that, by reason of default in the terms of the payment of the price of that sale to Goderre, the said licence has reverted to him by reason of the terms of the condition or became his because the said Goderre had so covenanted.

It may be observed just here that by reason of the licence only having a yearly existence it is rather difficult to define in legal terms just what the claim is. I, therefore, try to put it thus alternatively, and express something that we are expected to grasp, however elusive it becomes once it is touched or some one tries to touch it.

Having regard to the purview of the "Liquor Licence Act" and the provisions thereof specially applicable to the curator of an insolvent estate, I do not think such a contention as is thus set up is maintainable.

Article 923 of the said Act is as follows:—

923. Subject to the provisions of this section as to removals and transfers of licences, and as to voluntary or judicial abandonments made by *bonâ fide* insolvents, every licence for the sale of liquor shall be held to be a licence to the person therein named only and for the premises therein described, and shall remain valid only so long as

such person continues to be the occupant of the said premises and the owner of the business there carried on.

It would puzzle one to frame language more destructive than this of such a claim as respondent sets up. If words mean anything these must mean that the licence was personal and remained valid only so long as the person named continued to be the occupant of the premises and the owner of the business there carried on. The moment he ceased to carry on the business that moment the licence lapsed save in so far as

the provisions of this section as to removals and the transfer of licences and as to voluntary or judicial abandonments made by *bonâ fide* insolvents

preserved the licence, and then only in and for the interests of those named in regard to any preservation of it.

There is not a sentence or semblance of a provision in the Act making any preservation of such licence subserve the purposes of any such bargain as the respondent relies upon. Indeed, there are provisions distinctly anticipating the lapsing of licences not specifically preserved by the terms of the Act and dealing with the accrual of benefit the public interests or policy may be expected to derive therefrom.

This, I most respectfully submit, ends or ought to have ended any pretension on the part of the respondent to invoke the powers of the court or any judge thereof acting under article 876 which *primâ facie* enables only a dealing with property seizable by the sheriff and claimable by some party having a title thereto or right therein of some kind. No court or judge can re-create that which has perished, still less make a valid order which in effect contravenes the

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plain duty the law in question provides for the doing of, by an officer whose peculiar duty it is to serve the interest of the general creditors.

But that is not all; for article 953, sub-section (*b*), which is specifically directed to cover the cases of transfers referred to in above article 923, provides for a special transfer fee of $75,

> when it is granted in consequence of a voluntary or judicial abandonment in a case of *bonâ fide* insolvency,

and, by sub-sections 3 and 4, in the case of the death of a licensee or of a voluntary or judicial abandonment of property on his part, as follows:—

> 3. Save in the case of an abandonment of property or of the death of the licensee, no transfer of a licence shall be made until after the expiration of forty days from the date upon which the licence was delivered by the collector of provincial revenue.
>
> 4. In the case of the death of a licensee or of a voluntary or judicial abandonment of property on his part, a delay of thirty days is granted to his heirs or representatives, or to the provisional guardian or the curator of his estate, during which delay the licence continues in force, in order to give them an opportunity to apply for a transfer.

And by sub-section 5 of article 953 the transferee of a licence approved of and duly certified as provided therein is to enjoy the rights which accrued to the original licensee.

> But in the case of the death of a licensee, or of a judicial abandonment on his part, the municipal council shall give the preference to the purchaser of the stock-in-trade of the licensee's estate and shall transfer the licence to him or to the person recommended by him — provided such purchaser or such person so recommended be of good character and repute — for the same premises or for other premises should the landlord of the deceased or transferror refuse to accept such transferee as his tenant.

How can respondent claim to have fallen within the first part of this sub-section or to defeat the second part just quoted ?

Then article 922 expressly declares such

licences shall be granted for one year, or for part of a year only, and shall expire on the first day of May subsequent to their issue.

There are other provisions indicating, as in article 924, the qualifications and formalities to be observed to get or hold a licence; and, as in article 940, respecting preference for a particular place; and, as in article 954, giving three months from date of abandonment "failing which the licence is of no avail"; and, in article 1082, when not a *bonâ fide* case of insolvency the general policy of the Act and the purpose of protecting creditors of an insolvent licensee. But nothing is to be found to preserve the rights of persons whose whole scheme was part of a system of trafficking in licences for the direct and incidental profits of such traffic and but a palpable evasion of the said policy of the legislature and its purpose in this enactment to protect creditors of an insolvent.

How, for example, when the lease of the premises was got by Goderre for a new term of five years and this lease has thus got beyond respondent's control, can he claim a transfer without the premises it applies to ? True, the landlord may be got to consent, may be pacified or he may have assented to all this, though it does not appear in evidence. But the possibilities are such as to be quite unworkable unless we adopt the theory that a licence once granted is a thing to be bargained about and handed round from hand to hand, just as a horse or other chattel, all of which is not what the Act contemplates.

There are also provisions to meet the case of companies getting and dealing with licences through their employee or nominee.

These provisions of business convenience, in such

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cases safeguarded against abuse, shew it never was intended such a bargain or consent as respondent relies upon should be held valid.

If it had been the law before that such rights could exist or be created, then there was no need for such a special enactment relative to companies. It was because substitutes or nominees of the capitalist or liquor dealer behind the scene would not be tolerated that this special enactment was made to provide for. Such rights as any one can have in regard to a licence must rest upon the Act and respondent is not one of any such class as the Act gives a right to.

The attempt elaborated in respondent's factum to make out of the several exceptions the Act provides for a rule of law that, hence, the licence is a piece of property, just as any other, is a curiosity in the way of legal argument deserving of notice, but, I respectfully submit, no more need be said than state it.

The licence is annual and only good for the year. Some sort of consideration is given relative to parties who may have been for several years holders of a licence for the same place, but that does not help respondent. Moreover, his whole arrangement was such a conflict with the policy of the Act as, in my opinion, to render the whole security illegal. The stock-in-trade claimed was of so little value as to render this branch of the dealing of small consequence herein. No separate claim was urged here on that head.

We have pressed upon us the jurisprudence of Quebec on the subject, but the Act, in its main features, is so like what prevails elsewhere we cannot assent thereto and apply other principles of construction elsewhere even if we could find such jurisprudence had been older than shewn herein.

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The appeal should be allowed with costs throughout and the petition be dismissed with costs. Of course, respondent is entitled to be recouped his advances to keep the licence alive since the insolvency.

DUFF J.—I concur in the result.

ANGLIN J.—I am unable to accede to the suggestion that there should be read into section 37(*a*) of the "Supreme Court Act" words which would restrict its application to cases originating in the Circuit Court or in some other court. That provision dispenses, in cases of the classes therein specified, with the usual requirement that, in order to be appealable to this court the proceeding must originate in a Superior Court. The word "court" is not mentioned in clause (*a*); it does occur in clauses(*b*) and (*d*). We have before us the judgment of the highest court of final resort in the Province of Quebec rendered in a judicial proceeding in which the matter in controversy exceeds the value of $2,000. This case, therefore, in my opinion, fulfils the conditions upon which a right of appeal is conferred by section 37.

Thibault, the original owner of the business and licence in question, on the 14th of December, 1906, executed a contract of sale to Messrs. St. Charles and Paquette of his business, stock-in-trade, licence, etc. A special term of the contract was that Thibault would transfer the licence to his vendee's nominee. Pursuant to that undertaking he transferred the licence to one Goderre, who subsequently became insolvent and made an abandonment under which the appellant, Turgeon, became curator of his estate. The Licence Commissioners approved of the transfer from Thibault

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to Goderre and the latter thus became the holder of the licence of which several renewals were subsequently issued to him. Concurrently with the transaction between Thibault and St. Charles and Paquette and the transfer of the licence to Goderre an agreement was made with Goderre by St. Charles and Paquette whereby they sold to him the business, stock-in-trade, licence, etc., subject to a suspensive condition in the following terms:—

> Faute par monsieur Goderre d'observer toutes les conditions qu'il a ci-dessus assumées, ou faute par lui de payer, trente jours après échéance, un seul des versements qu'il s'est ci-dessus engagé de payer, messieurs St. Charles et F. Paquette auront le droit de reprendre possession immédiate du dit fonds de commerce de restaurant licencié, avec accessoires, tel que ci-haut défini, comprenant la licence pour la vente des liqueurs spiritueuses attachée au dit fonds de commerce et les renouvellements de cette licence, avec le droit d'avoir telle licence transportée au nom de toute personne désignée par eux, et ce, sans être tenus de donner aucun avis à cette fin à monsieur Goderre, ni d'user d'aucun procédé judiciaire, ni de donner aucune indemnité à Monsieur Goderre, les sommes d'argent jusqu'alors payées par ce dernier devant demeurer la propriété de messieurs Paquette et St. Charles et de Monsieur Thibault, à titre de dommages-intérêts liquidés, étant spécialement convenu que le présent contrat est fait sujet a la condition suspensive que tout ce que cédé et transporté ici demeure et demeurera la propriété de messieurs St. Charles et Paquette jusqu'à ce qu'ils aient été intégralement payés du prix qui forme la considération du présent contrat, ce contrat n'étant qu'une promesse de vente et les parties étant d'accord pour convenir que l'article 1478 du code civil de la Province de Québec n'aura pas lieu de s'appliquer ici.

In my view under these documents St. Charles and Paquette never became owners of the licence in question. They certainly were not at any time the holders of it. Assuming that a licence under the "Quebec Licence Law" is property (I rather think it is not), I am of the opinion that the licence in question and all right of property in it passed directly from Thibault to Goderre. If so, no property in the

licence passed from St. Charles and Paquette to Goderre under the contract between them; and, since the suspensive clause in that contract in terms purports to affect only what passed or was transferred by it, the licence would not be subject to that clause. Neither could it "remain" (*demeure*) the property of St. Charles and Paquette.

But if this be too narrow a view to take of the purpose and effect of the two documents of the 14th of December, 1906, and if under the Thibault sale St. Charles and Paquette acquired some right of property in the licence as well as in the other subjects of sale, then, if the agreement between Goderre and St. Charles and Paquette should be construed solely according to what appears to be the expressed intent of the parties and without regard to the nature of any of its subject-matters or any incidents attached to them by law, it would, if valid, probably have the effect of confining the right of Goderre to a mere contingent or precarious right of possession of the several subjects with which it purports to deal — including the licence — the entire right of property in them remaining in St. Charles and Paquette pending fulfilment of the suspensive condition as to payment.

A study of the provisions of the "Quebec Licence Law," however — particularly article 923 — has satisfied me that any property which may exist in a licence in that province is and must remain vested in the holder of the licence, upon whom it confers a personal right or privilege so long as he holds it and is the occupant of the premises and owner of the business in respect of which it issues. Having regard to this essential characteristic of a licence it is inconsistent with the letter and the spirit of the "Quebec Licence Law"

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that there should be vested in one person the property in a licence held by another under a right intended to be more than merely temporary. The statute (art. 953(4)) specially provides for a short delay in the case of the death of, or voluntary or judicial abandonment of his property by the licensee. Unless, perhaps, pending the carrying out of an assignment intended to become effective practically at once, the law contemplates that the holder of a licence shall be its real owner. If, therefore, upon the only possible construction of the agreement in question, it involves Goderre holding for a term of years a licence of which during the entire period the ownership should be in St. Charles and Paquette, it would, in my opinion, be void as providing for a condition of things entirely contrary to the policy of the licence law. But, *ut res magis valeat,* I would be inclined to treat the agreement, at all events so far as the licence is concerned, as intended to provide not that the property in it while it was held by Goderre should be vested in St. Charles and Paquette, but that the latter should have a right at any time, on default in payment by Goderre according to the terms of his contract, to retake (*reprendre*) the licence by employing such means for that purpose as the law provides. I see no difficulty in a construction which involves personal obligation on the part of Goderre, on his making default in payment, to execute, on the demand of St. Charles and Paquette, a formal assignment of the licence, or any other documents requisite and proper to enable the latter to secure a transfer of it to themselves or to their nominee. But I cannot, consistently with the provisions of the licence law, as I appreciate them, admit its validity if the agreement be susceptible only

of a construction which involves St. Charles and Paquette having a right of property — or a *jus in re* — in the licence itself while it was held by Goderre.

I do not wish to be understood as questioning the assignability of a licence or the right of a transferee who can obtain the approval of the commissioners to become its holder. That question is not before us. The agreement under consideration is not a transaction of that kind. On the contrary, if it necessarily means what the respondent contends, it provides that a licence which was and was to remain the property of Messrs. St. Charles and Paquette, should, nevertheless, be held during its original term and renewals by Goderre. Such a contract is, in my opinion, not possible under the "Quebec Licence Law."

Whether St. Charles and Paquette never had any right of property in the licence by virtue of their agreement with Thibault, or whether under their transaction with Goderre he became the owner of it subject to a contractual obligation, on his making default in payment, to re-transfer it to them or to their nominee, the licence was not at the time of Goderre's insolvency the property of St. Charles and Paquette and it is not now their property

in the curator's possession by virtue of the abandonment —

which a judge might, upon petition, order the curator to transfer or deliver to them under article 876 of the Code of Civil Procedure.

That is, as I understand his petition, the remedy which the petitioner sought and the jurisdiction to which he appealed. But if he be entitled to take advantage of what is, perhaps, the broader provision of article 875 of the Code of Civil Procedure, which his counsel invoked at bar, I am still of opinion that he

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cannot succeed in this proceeding. I am unable to distinguish, on principle, between the property of an insolvent debtor subject to an executory contract, which creates a merely personal obligation to transfer it but does not confer on the obligee a *jus in re,* and other property of the debtor which passes under his abandonment to his curator for the benefit of his creditors. As against them (art. 1981 C.C.) I know of no ground upon which the obligee under such a personal contract can enforce "specific performance" (*l'exécution*) (art. 1065 C.C.) of the obligation by the curator. In this case there appear to be other difficulties in the way of adjudging an execution of the obligation which it is not necessary to discuss.

I am, for these reasons, of opinion that, as to the liquor licence in question, which was the only matter seriously discussed at bar, this appeal should be allowed with costs in this court and in the Court of King's Bench, and the petition should be dismissed.

BRODEUR J. (dissident). — L'Intimé St. Charles était, en 1906, propriétaire avec un nommé Paquette d'une licence pour la vente de liqueurs spiritueuses dans la cité de Montréal. Le 14 décembre de cette même année (1906) ils ont fait un contrat avec un nommé Goderre par lequel ils lui promettaient de lui transporter un fonds de commerce auquel était attaché cette licence, dès qu'il leur aurait payé un certain montant comme prix de vente, lequel prix de vente était stipulé payable par versements.

La clause spéciale suivante était incorporée dans l'acte:—

Faute par Monsieur Goderre d'observer toutes les conditions ci-dessus assumées, ou faute par lui de payer, trente jours après

échéance, un seul des versements qu'il s'est ci-dessus engagé de payer, Messieurs St. Charles et F. Paquette auront le droit de reprendre possession immédiate du dit fonds de commerce de restaurant licencié, avec accessoires, tel que ci-haut défini, comprenant la licence pour la vente des liqueurs spiritueuses attachée au dit fonds de commerce et les renouvellements de cette licence transportée au nom de toute personne désignée par eux, et ce sans être tenus de donner aucun avis à cette fin à Monsieur Goderre, ni d'user d'aucun procédé judiciaire, ni de donner aucune indemnité à Monsieur Goderre, les sommes d'argent jusque là payées par ce dernier devant demeurer la propriété de Messieurs Paquette et Saint-Charles, et de Monsieur Thibault, à titre de dommages-intérêts liquidés, étant spécialement convenu que le présent contrat est fait sujet à la condition suspensive que tout ce que cédé et transporté ici demeure et demeurera la propriété de messieurs St. Charles et Paquette jusqu'à ce qu'ils aient été intégralement payés du prix qui forme la considération du présent contrat, ce contrat n'étant qu'une promesse de vente et les parties étant d'accord pour convenir que l'article 1478 du code civil de la Province de Québec n'aura pas lieu de s'appliquer ici.

En vertu de cet acte Goderre a pris possession du fonds de commerce, l'a exploité et a obtenu sa licence des autorités provinciales. Cette licence a été renouvelée pendant un certain nombre d'années.

Le 21ème jour de mars, 1910, Goderre a fait cession de ses biens et l'appelant a été nommé curateur. En cette qualité il a pris possession du restaurant y compris la licence qu'il s'est fait transporter. La licence a été renouvelée pour l'année fiscale 1910-11 et le paiement pour ce renouvellement a été fait par l'intimé. Au mois de mai, 1910, le curateur a annoncé en vente la licence en question.

Alors l'intimé (tant personnellement qu'en sa qualité d'exécuteur testamentaire de Paquette) a présenté une requête au juge, conformément aux dispositions de l'article 876 C.P.C. et a demandé à ce qu'il soit enjoint au curateur de ne pas procéder à la vente de la licence et à ce qu'il soit tenu de signer tous les documents nécessaires aux fins de la remettre en la possession de l'intimé.

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Cette requête a été contestée par le curateur dans l'intérêt des créanciers de Goderre, prétendant que cette licence n'appartient pas à l'intimé mais doit être vendue pour les bénéfice et avantage des créanciers en général.

La question est donc de savoir si l'intimé en vertu de son contrat avec Goderre peut réclamer la propriété de cette licence.

L'appelant prétend que St. Charles peut avoir une créance contre la faillite et peut avoir droit à des dommages mais que cette réclamation et ces dommages doivent être payés "au marc la livre." St. Charles répond qu'il est propriétaire de la licence attachée an fonds de commerce, sauf nécessairement à faire approuver son transfert par les autorités chargées d'administrer la loi, mais qu'il n'en a pas moins un droit de propriété qui comporte avec lui tous les avantages qui en découlent, et notamment celui de pouvoir revendiquer la jouissance exclusive de ce droit à l'encontre des créanciers.

Cette cause est de la plus grande importance vu qu'il y a un très grand nombre de personnes qui possédent dans des licences et des fonds de commerce de restaurants des intérêts analogues à ceux en question dans cette cause-ci.

La question de savoir si ces contrats étaient valides est venu déjà à différentes reprises devant les tribunaux de la province et notamment dans une cause de *Canadian Breweries Co.* v. *Gariépy*(1). Cette décision de la cour d'appel a été suivie par l'honorable juge Tellier dans une cause non rapportée, 1908, cour supérieure, Montréal, de *Gariépy* v. *Chartrand* et

(1) Q.R. 16 K.B. 44; 38 Can. S.C.R. 236.

dans une cause de *Labelle et Turgeon* jugée le 4 octobre, 1910, par l'honorable juge Fortin.

Nous pouvons dire par conséquent que la jurisprudence de la province a reconnu la validité de ces transactions et si le législateur n'a pas jugé à propos d'intervenir pour modifier la loi depuis, c'est qu'il est satisfait que cette interprétation est correcte et que le système ne doit pas être changé.

La question s'est présentée en France de savoir si les brevêts d'imprimerie, qui étaient alors absolument personnels et ne pouvaient être exploités que par ceux qui en avaient reçu l'autorisation du gouvernement, étaient susceptibles de faire l'objet d'un contrat et d'engendrer des obligations; et il a été décidé dans une cause rapportée dans Dalloz, 1833-2-50, qu'un brevêt d'imprimerie, qui est incessible et personnel, ayant été vendu à une personne avec tout le matériel, cette personne-là ne serait pas venue à demander la rescision du contrat parce que le gouvernement aurait refusé de confirmer le transfert.

Il est de principe élémentaire que les biens se divisent en biens incorporels et corporels. (Art. 374 C.C.) Le droit du porteur d'une licence est un bien incorporel et il est susceptible d'être transféré, vendu ou aliéné, et entre les parties la vente est parfaite (art. 1472 C.C.).

Dans le contrat que nous avons à examiner Goderre, insolvable, pouvait bien être le porteur de la licence aux yeux de l'autorité publique. Aux yeux des commissaires, il l'était virtuellement; mais dans ses relations avec St. Charles, l'intimé, il est régi par son contrat de 1906. Or, en vertu de ce contrat, St. Charles était le véritable propriétaire de la licence.

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On a prétendu que la licence future ne pouvait pas être susceptible d'être la propriété de l'intimé. L'art. 1061 C.C. déclare cependant que les choses futures peuvent être l'objet d'une obligation; et à l'art. 1488 C.C. au titre de "La Vente" il est déclaré que la vente est valide si le vendeur devient ensuite propriétaire de la chose. La licence future peut donc faire l'objet d'une obligation et elle pouvait faire également l'objet d'un contrat de vente.

Dans ces circonstances je considère que le contrat fait par Goderre, d'une part, et par St. Charles et Paquette, d'autre part, est un contrat parfaitement valide; que ce contrat fait la loi des parties; et, par conséquent, l'intimé était avant la faillite propriétaire de la licence en question. Il peut donc en revendiquer la propriété à l'encontre des créanciers de Goderre; et le jugement de la cour d'appel, qui a reconnu sa prétention, doit être confirmé.

La question s'est présentée de savoir ci cette cour avait juridiction pour entendre le présent appel. Pour les raisons données sur ce point par mon confrère Anglin je suis d'opinion que nous avons juridiction. Cette cause a d'ailleurs originé devant la cour supérieure et je crois que les articles 36 et 37 de "l'Acte de la Cour Suprême," interprétés l'un par l'autre, nous mènent à la conclusion que la présente cause a originé en cour supérieure et est, par conséquent, susceptible d'être portée ici, vu que le montant en litige excède $2,000.

Il y eut un temps dans Québec où on faisait une grande différence entre la juridiction du juge en chambre et de la cour elle-même. Mais par des amendements faits au Code, il a été déclaré que les décisions rendues par le juge en chambre ont la même force et

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le même effet que si elles étaient rendues par la cour elle-même (art. 72 C.P.C.). A tout événement, en admettant que le tribunal de première instance dans le cas actuel ne serait pas la cour supérieure, alors il ne peut pas y avoir de doute que sous la section 37 de l'acte de la cour suprême nous aurions juridiction.

Appeal allowed with costs.

Solicitors for the appellant: *St. Germain, Guérin & Raymond.*

Solicitors for the respondent: *Gouin, Lemieux, Murphy, Berard & Perrault.*

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*Oct. 15.

THE CITY OF CALGARY (DEFENDANT) ..... } APPELLANT;

AND

LUPO HARNOVIS AND DAVE HERCOVISH (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Negligence—Operation of tramway—Carelessness of person injured —Reckless conduct of motorman.

The carelessness of the plaintiffs in driving across the tracks of a tramway was, in this case, excused by the reckless conduct of the defendant's motorman in failing to use proper precautions to avoid the consequences of their negligence after he had become aware of it. Judgment appealed from (11 D.L.R. 3; 4 West. W.R. 263) affirmed.

APPEAL from the judgment of the Supreme Court of Alberta(1), whereby, on an equal division of opinion among the judges, the judgment of Beck J. at the trial(2) in favour of the plaintiffs stood affirmed.

The action was brought by the respondents to recover damages for injuries to themselves and their lunch-van occasioned by a collision with a city tramcar at a subway-crossing of one of the public streets under the tracks of the Canadian Pacific Railway in the City of Calgary. The tramway, operated on the street where the collision occurred, entered the subway from one end about the same time that the plaintiffs' van was passing through the subway from the

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

(1) 11 D.L.R. 3; 4 West. W.R. 263.

(2) 7 D.L.R. 789; 2 West. W.R. 312.

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other end. It was shewn that the plaintiffs had carelessly driven the van across the tracks of the tramway but it also appeared that the motorman who was driving the electric tramcar was able to see the van approaching in the opposite direction and that, by using the appliances on his car promptly, he might have reduced the speed of the car, or brought it to a stop, and thus avoided the accident from which the injuries resulted. At the trial, before Mr. Justice Beck without a jury, the plaintiffs' action was maintained, $1,000 being awarded to Lupo Harnovis and $120 to Dave Hercovish, without costs. On the appeal to the court *in banco,* on equal division of opinion among the judges, the decision of the trial judge in favour of the plaintiffs was affirmed and his judgment was varied by giving the defendant, appellant, costs up to the date of the trial.

The principal grounds urged on the present appeal were that the judgment was against the weight of evidence and that the courts below had erred in holding that the case was governed by the decision in the case of *The Halifax Tramway Co.* v. *Inglis* (1).

D. S. Moffat for the appellant.

G. H. Ross K.C. appeared for the respondents, but was not called upon by the court for any argument.

THE CHIEF JUSTICE concurred with Duff J.

IDINGTON J. concurred in the result of the judgment.

DUFF J.—There was evidence from which the learned trial judge was entitled to find and did find

(1) 30 Can. S.C.R. 256.

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Duff J.

(and I may add that I agree with his finding) that the motorman, when he saw the respondents' van heading across the track, might with the exercise of reasonable skill and diligence have avoided the collision or, at all events, the substantial harm caused by it.

The learned judge also took the view that the respondents, when they directed their horse across the street, were sitting in their van carelessly oblivious of the dangers, actual or possible, of the car-track. The view of the learned trial judge was that, although the respondents were in fault to such a degree as would have debarred them from recovering had it not been for the conduct of the motorman after their negligence became apparent, yet (in the circumstances of this case) as the motorman could have avoided the consequences of the respondents' negligence after he became aware of it, the plaintiffs were entitled to recover. In a word, the decisive negligence was found by him to have been that of the motorman. I agree with this view and I should dismiss the appeal with costs.

ANGLIN J.—There was evidence sufficient to support the finding that the determining cause of the accident in this case was the negligence of the defendant's motorman, but for which he might have prevented the collision after he became or should have been aware of the plaintiffs' danger.

The appeal fails and should be dismissed with costs.

BRODEUR J. also concurred.

Appeal dismissed with costs.

Solicitor for the appellant: *D. S. Moffat.*
Solicitor for the respondents: *H. C. B. Forsyth.*

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*Oct. 14.
*Oct. 21.

JAMES ALBERT STEPHENSON, TENA STEPHENSON, WILLIAM STEPHENSON AND MARGARET STEPHENSON (DEFENDANTS)...

THE SAID TENA STEPHENSON.....APPELLANT;

AND

THE GOLD MEDAL FURNITURE MANUFACTURING COMPANY (PLAINTIFFS).....

RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Appeal—Jurisdiction—Reserve of further directions—"Final judgment"—Construction of statute—"Supreme Court Act," R.S.C. 1906, c. 139, s. 2(e); 3 & 4 Geo. V. c. 41, s. 1.

Before the amendment, in 1913, to sec. 2(e) of the "Supreme Court Act," R.S.C. 1906, ch. 139, judgments were rendered maintaining an action on a bond by which two of the defendants were ordered to pay to the plaintiffs an amount not exceeding that secured by the bond to be ascertained upon a reference to the master and further directions were reserved; as to another defendant, recovery of the same amount, to be ascertained in the same manner, was ordered, but there was no reserve of further directions. Upon an appeal by the last mentioned defendant,

Held, Davies J. dissenting, that the judgment sought to be appealed from (23 Man. R. 159) did not finally conclude the action as proceedings still remained to be taken on the reference, consequently, it was not a final judgment within the meaning of section 2(e) of the "Supreme Court Act," prior to the amendment by the statute 3 & 4 Geo. V., ch. 51 (assented to on the 6th of June, 1913), and it was not competent to the Supreme Court of Canada to entertain the appeal. *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.* (19

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Can. S.C.R. 434). followed. *Ex parte Moore* (14 Q.B.D. 627), distinguished; *Clarke* v. *Goodall* (44 Can. S.C.R. 284), and *The Crown Life Ins. Co.* v. *Skinner* (44 Can. S.C.R. 616), referred to.

Per Anglin and Brodeur JJ.—The amendment of the "Supreme Court Act" by the first section of 3 & 4 Geo. V. ch. 51, has not affected whatever right the appellant may have had at the time the judgment was rendered in respect to an appeal to the Supreme Court of Canada. *Hyde* v. *Lindsay* (29 Can. S.C.R. 99); *Cowen* v. *Evans* (22 Can. S.C.R. 331); *Hurtubise* v. *Desmarteau* (19 Can. S.C.R. 562); and *Taylor* v. *The Queen* (1 Can. S.C.R. 65), referred to.

Per Davies J. dissenting.—The judgment in question does not reserve "further directions" and comes within the rule and principle determining what are "final judgments" laid down in the case of *Ex parte Moore* (14 Q.B.D. 627).

MOTION to quash an appeal by the defendant Tena Stephenson from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Metcalfe J., at the trial, by which nonsuit was entered in the action against her, and declaring her liable for the amount of a bond executed by her in favour of the plaintiffs.

The action was on a guaranty by the defendants which had been given to secure the respondent company the indebtedness then existing and the future indebtedness of the Stephenson Furniture Company towards the plaintiffs to the extent of $2,600. The guaranty purported to be signed by the defendants James Albert Stephenson, his wife, Tena Stephenson, and by William Stephenson and Margaret Stephenson, father and mother of James Albert Stephenson. At the trial the defendants moved for a nonsuit which was granted in respect to Tena Stephenson and Margaret Stephenson and judgment was entered against William Stephenson and James A. Stephenson with a

(1) 23 Man. R. 159.

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reference to the master to take the accounts and ascertain the amount, if any, due by the Stephenson Furniture Company to the plaintiffs.

By the judgment now appealed from, rendered on the 17th of March, 1913 (prior to the amendment of sec. 2(*e*) of the "Supreme Court Act," R.S.C. 1906, ch. 139, by the statute 3 & 4 Geo. V. ch. 51, defining the words "final judgment") the judgment against James A. Stephenson and William Stephenson was affirmed without variation, but the judgment dismissing the action as against Tena Stephenson was reversed and the action against her maintained for the amount, if any, not exceeding $2,600, which, on a reference to the master to take accounts, etc., should be found to be due to the plaintiffs by the Stephenson Furniture Company. As to Tena Stephenson there was no reserve of further directions in the judgment appealed from.

Grayson Smith, for the respondents, supported the motion to quash the appeal on the ground that the judgment was not final. He cited *Clarke* v. *Goodall* (1); *Crown Life Insurance Co.* v. *Skinner*(2); and *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.*(3).

W. L. Scott, contra, distinguished the cases cited in support of the motion, and relied upon *Ex parte Moore*(4) to shew that the judgment appealed from was a final judgment in regard to Tena Stephenson and that, without any further action by the court,

(1) 44 Can. S.C.R. 284.
(2) 44 Can. S.C.R. 616.
(3) 19 Can. S.C.R. 434.
(4) 14 Q.B.D. 627.

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execution could issue against her as soon as any liability was determined upon the master's report becoming absolute.

THE CHIEF JUSTICE.—The motion to quash should be granted. *Ex parte Moore*(1) has been considered; *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.*(2) is followed.

DAVIES J. (dissenting).—The judgment appealed from adjudged that the judgment allowing a nonsuit as against Tena Stephenson be reversed and that the above respondent company should and do recover judgment against her

> for the amount, if any, due by the Stephenson Furniture Co, Limited, to them not exceeding the sum of $2,600 (the amount of her guarantee) and that it be referred to the master to take the accounts and ascertain the amount due by the Stephenson Furniture Company to the respondents and that Tena Stephenson, appellant, should and do pay to the plaintiffs, the respondents above, that amount and costs.

There was nothing said about "further directions." In my opinion this judgment comes within the rule and principle determining what are "final judgments" laid down in the case of *Ex parte Moore*(1), and is not at variance with any of our previous decisions in cases where further directions are reserved.

I would, therefore, dismiss the motion to quash the appeal.

IDINGTON J.—Of the many decisions going to shew that the judgment herein is not a final judgment within

(1) 14 Q.B.D. 627. (2) 19 Can. S.C.R. 434.

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the meaning of the "Supreme Court Act," as it stood when this appeal was taken, the case of *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.*(1) seems to cover the exact contention set up by Mr. Scott in resisting the motion to quash herein which, it seems to me, must prevail with costs.

ANGLIN J.—This is not an action in the nature of a suit in equity within section 38(*c*) of the "Supreme Court Act." It is an ordinary common law action to enforce liability on a bond. In order to establish jurisdiction in this court to entertain her appeal, the appellant must successfully maintain that the judgment against which that appeal is taken is a "final judgment" within the definition of that term in the "Supreme Court Act."

That judgment was pronounced on the 17th of March, 1913. Under a series of decisions (*Hyde* v. *Lindsay*(2); *Cowen* v. *Evans*(3); *Hurtubise* v. *Desmarteau*(4); *Taylor v. The Queen*(5)) it is clear that whatever right of appeal to this court the appellant had when judgment was given against her by the Court of Appeal has not been affected by the subsequent amendment of the "Supreme Court Act" changing the definition of a final judgment, which was assented to on the 6th of June, 1913.

But, in answer to the motion to quash the appeal on the ground that the judgment against the appellant, Tena Stephenson, is not a final judgment, it is

(1) 19 Can. S.C.R. 434.
(2) 29 Can. S.C.R. 99.
(3) 22 Can. S.C.R. 331.
(4) 19 Can. S.C.R. 562.
(5) 1 Can. S.C.R. 65.

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urged that, inasmuch as by that judgment further directions are not reserved and under it execution may issue without any further action by the court, so soon as the amount of the liability has been determined by the master's report becoming absolute (Man. K.B. Rules, Nos. 683, and 692), this case is distinguishable from such cases as *Clarke* v. *Goodall*(1), and *The Crown Life Ins. Co.* v. *Skinner*(2).

In the trial court judgment was awarded against two of the defendants, James Albert Stephenson and William Stephenson, in these terms:—

> And it is further ordered and adjudged that the plaintiffs do recover judgment against the defendants James Albert Stephenson and William Stephenson for the amount, if any, due by the Stephenson Furniture Company, Limited, to the plaintiff not exceeding the sum of twenty-six hundred dollars ($2,600), being the amount mentioned in the guarantee sued on herein and that it be referred to the master of this honourable court to take the accounts and ascertain the amount due by the said Stephenson Furniture Company, Limited, to the plaintiff.
>
> And this court doth further order and adjudge that the said James Albert Stephenson and William Stephenson do pay to the plaintiff its costs of this action.
>
> And this court doth further order and adjudge that further directions and the costs of the reference be reserved until after the master shall have made his report.

On appeal, that judgment was affirmed without variation. As against Tena Stephenson the action had been dismissed at the trial, but, on appeal, this part of the judgment of the trial judge was reversed and judgment was rendered against Tena Stephenson in the following terms:—

> That the appellant, the above named plaintiff, should and do recover against the defendant Tena Stephenson for the amount, if any, due by the Stephenson Furniture Company, Limited, to the plaintiff not exceeding the sum of $2,600, and that it be referred to the master of the Court of King's Bench to take the accounts and

(1) 44 Can. S.C.R. 284. (2) 44 Can. S.C.R. 616.

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ascertain the amount due by the said Stephenson Furniture Company, Limited, to the plaintiff; and that the said Tena Stephenson should and do pay to the plaintiff such amount and the plaintiff's costs of its action as against her in the Court of King's Bench, and that the said judgment in the Court of King's Bench be amended accordingly.

And this court did further order and adjudge that the defendant, Tena Stephenson, do and shall pay to the plaintiff its costs of appeal as against her forthwith after taxation.

It is difficult to understand why, as a result of the judgment of the Manitoba Court of Appeal, further directions should have been reserved in regard to her co-defendants and not in regard to Tena Stephenson, the liability found in each case being, apparently, the same in every respect. The difference was probably due to mere inadvertence; but that may not safely be assumed.

I agree with the appellant's contention that, upon the judgment as entered, execution may issue against her as soon as the master has made his report and it has become confirmed without any further order or direction of the court. Moreover, she is not met with the difficulty which would have presented itself had the judgment in appeal been rendered by the appellate court for Ontario, that, until the amount of the liability is determined there is nothing to shew that it will reach the appealable figure (see *Wenger* v. *Lamont*(1). There is no monetary limitation on the right of appeal in Manitoba cases.

But, although it would be eminently unsatisfactory that an appeal should be entertained by this Court from a judgment under which it may be, for aught that appears before us, that nothing will ultimately be found to be due by the appellant (the master

(1) 41 Can. S.C.R. 603.

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is to find the amount of the liability of the principal debtor, *if any*), I would be disposed to accept her contention that the judgment rendered against her in the Manitoba Court of Appeal is final within such authorities as *Ex parte Moore*(1); *Re Alexander*(2); *Bozson* v. *Altrincham Urban District Council*(3), and that it would be appealable to this court if "final judgment" had not been defined in our statute as it was before the amendment of 1913. The judgment against the appellant is similar to that sometimes rendered in the English King's Bench Division for an amount to be ascertained by an official referee; see Snow's Annual Practice, 1913, page 675.

A similar judgment rendered in the Exchequer Court would be final for the purpose of appeal to this court under section 82 of the "Exchequer Court Act" (R.S.C. 1906, ch. 140), which provides that

> a judgment shall be considered final for the purposes of this section if it determines the rights of the parties, except as to the amount of damages or the amount of liability.

But, in contrast to this special provision applicable only to appeals from the Exchequer Court, from which, as a final court, this court is the immediate appellate tribunal, we had, before the recent amendment, a declaration in the "Supreme Court Act" that in the cases of appeals from the provincial courts, which normally come to this court only after the judgment of the court of first instance has been dealt with by a provincial appellate court, final judgment shall mean

> any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

(1) 14 Q.B.D. 627. (2) (1892) 1 Q.B. 216.
(3) (1903) 1 K.B. 547.

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The action against the present appellant is not concluded by the judgment of the Court of Appeal. In that action, the reference proceedings are yet to be taken and it may be that there will be a series of appeals from the findings of the master. Further proceedings in the action are necessary before it can be said to be "concluded" — before there will be a judgment in it enforceable against the appellant. I am, for these reasons, of the opinion that the judgment against which this appeal is taken is not final within the definition of final judgment in the "Supreme Court Act" as it stood prior to the recent amendment.

The motion to quash should be granted with costs.

BRODEUR J.—I concur in the opinion of Mr. Justice Anglin.

Appeal quashed with costs.

Solicitors for the appellant: *Aikins, Fullerton, Foley, & Newcombe.*

Solicitor for the respondent: *F. J. G. McArthur.*

1911

COLWELL *et al.* v. NEUFELD *et al.*

*Oct. 19, 20.
*Dec. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Vendor and purchaser—Sale of land—Agreement—Bond to secure payment of price—Conditions as to title.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Macdonald J., at the trial, and ordering that judgment should be entered in favour of certain defendants, now respondents.

The respondents, with some other persons, entered into an agreement with the plaintiffs, appellants, (except Elliott,) for the purchase of certain lands, at the price of $2 per acre, payable on 1st November, 1905, and afterwards entered into the bond upon which the action was taken. Owing to differences which arose between the parties, the plaintiffs refused to proceed further with the execution on their part of the agreement unless the performance of the terms of the agreement by the other parties was guaranteed, and, on the 7th of September, 1905, the bond was executed. The bond was expressed to be given as security for the payment of the price of the lands and it also contained a covenant for the payment to the plaintiffs of $2,500, part of the price, to and for their own use and benefit as liquidated damages for services rendered and to be rendered by the plaintiffs.

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

(1) 19 Man. R. 517.

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COLWELL v. NEUFELD.

This bond was assigned to the appellant Elliott as collateral security for advances to his co-plaintiffs and, during the trial, he was added as a party plaintiff in the action. The case was tried by Mr. Justice Macdonald, who ordered judgment to be entered in favour of the plaintiffs. This judgment was reversed by the judgment now appealed from, the Court of Appeal being of opinion that the plaintiffs had failed to shew that they had acquired any title to or interest in the lands which they had agreed to sell. It was held by the Court of Appeal for Manitoba that, as the plaintiffs could not recover under the agreement they could not recover under the bond.

After hearing counsel on behalf of both parties, the Supreme Court of Canada reserved judgment and, on a subsequent day, the appeal was dismissed with costs.

Appeal dismissed with costs.

J. B. Coyne for the appellants.

C. P. Wilson K.C. for the respondents.

1911

*Oct. 24.
*Dec. 22.

DUFF v. LANE.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Solicitor and client—Retainer—Subsequent proceedings—Habeas corpus—Evidence.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), affirming, by an equal division, the verdict at the trial in favour of the plaintiff (respondent).

Captain Walters, master and managing owner of the schooner Mary A. Duff, retained the plaintiff, a barrister, in the prosecution of some sailors for desertion. The sailors were convicted and imprisoned and plaintiff was also retained to oppose their application for discharge on *habeas corpus* which he did successfully. The captain being about to sail gave his note to plaintiff for the amount of his charges. About the same time he was removed from the position of managing owner and the defendant appointed in his stead. Plaintiff's note was presented to the defendant and paid.

The convicted sailors made a second application for a writ of *habeas corpus* and the order was served at the residence of Captain Walters. His daughter brought it to plaintiff, who telephoned to defendant concerning it and was told that he, defendant, had no instructions in the matter. Plaintiff attended on

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

(1) 45 N.S. Rep. 338.

the second application for the writ and defendant refusing to pay his bill he brought action.

The trial judge and two judges of the full court held that defendant's action in paying the former account and making no objection to his acting on the second occasion estopped him from denying the plaintiff's retainer.

The Supreme Court of Canada unanimously reversed the judgment for the plaintiff, holding that his retainer was at an end when Captain Walters settled his account.

Appeal allowed with costs.

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

Newcombe K.C. for the respondent.

1911

*Oct. 27.
*Dec. 22.

DROLET v. DENIS.

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

Negligence—Employers' liability—Defective appliances—Warning and instruction—Injury to workman.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, sitting in review, (which had reversed the judgment of the Superior Court, District of Quebec,) and maintaining the plaintiff's action with costs.

The husband of the plaintiff sustained injuries, which resulted in his death, while employed in hoisting bags of grain by means of tackle to the upper story of the appellant's warehouse. The deceased employee had fastened two bags of grain to the rope which worked over the pulleys without using a slip-knot and the bags, while being hoisted, became loosened and fell upon him causing injuries from which he afterwards died. Shortly before the accident he had been warned to be careful in performing the work at which he was engaged, but it did not appear that he had been instructed as to the proper method of securing the bags to the hoisting rope. The action was dismissed at the trial by Sir Frs. Langelier, A.C.J., on the ground that the injuries were caused by the negligence of deceased solely, without any fault on the part

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

(1) Q.R. 20 K.B. 378.

of the defendant, his employer. This judgment was reversed by the Court of Review and, in affirming that decision, the judgment now appealed from (Sir Louis A. Jetté C.J. dissenting) held that the employer by his neglect in permitting the deceased to perform his work in an unsafe manner became responsible in damages for the injury which, as the result of want of proper instructions, was the cause of his death.

After hearing counsel on behalf of both parties the Supreme Court of Canada reserved judgment and, on a subsequent day, the appeal was dismissed with costs, His Lordship the Chief Justice dissenting.

Appeal dismissed with costs.

Roy K.C. for the appellant.

Perron K.C. and *St. Laurent* for the respondent.

1912

*Oct. 17, 18.
*Oct. 29.

BIGELOW v. GRAHAM.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of goods—Designated quality—Fraud on purchaser—Damages—Loss of market.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), affirming the judgment at the trial in favour of the plaintiff (respondent).

The respondent, Graham, contracted for the purchase from appellant of a quantity of apples for the purpose of selling them on the Christmas market in England. The apples were to be graded as Nos. 1 and 2 and delivered at Wolfville, N.S., before Dec. 1st, 1908. They were delivered accordingly to the number of 584 barrels and sent to St. John, N.B., for shipment. At St. John the Dominion fruit inspector opened some of the barrels and condemned the grading so they had to be repacked at considerable expense and such delay that the intended market was lost. In the repacking some of the fruit was graded as No. 3 and some rejected as worthless culls.

The respondent brought action to recover the cost of repacking, damages for apples not up to the specified quality and loss of profit. He recovered at the trial on all three heads which the full court affirmed. The defendant appealed to the Supreme Court of Canada against the award of damages for loss of profit only.

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

(1) 46 N.S. Rep. 116.

1912

BIGELOW v. GRAHAM.

After hearing counsel for the respective parties the court reserved judgment and, on a subsequent day, dismissed the appeal with costs.

Appeal dismissed with costs.

Mellish K.C. for the appellant.

W. N. Tilley for the respondent.

1912
*Oct. 24.
1913
*Feb. 18.

CANADIAN PACIFIC RAILWAY CO. v. CARR.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Trespass—Railway company—Occupation of lands—Side tracks—Continuous trespass—Damages.

APPEAL from a decision of the Supreme Court of New Brunswick (1), affirming the verdict at the trial in favour of the plaintiffs (respondents).

The Woodstock Railway Co. was, by its charter, authorized to expropriate land ninety-nine feet in width for its right-of-way and provision was made for compensation to the owners. In 1871 it built its right-of-way fourteen feet wide. In 1892 the Canadian Pacific Railway Co., having acquired the rights of the Woodstock Railway Co., built side tracks adjoining the right-of-way and within the ninety-nine feet. In 1911 the plaintiffs (respondents) brought action for trespass by laying such side tracks on their land.

The court below held that there was no presumption that the Woodstock Railway Co. by occupying fourteen feet took possession of the whole ninety-nine feet allowed by its charter; that the injury to plaintiffs' land was not "sustained by reason of the construction or operation of the railway" and therefore the limitation of one year for bringing action in sec.

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

(1) 41 N.B. Rep. 225.

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CANADIAN PACIFIC RWAY. CO. v. CARR.

306 of the "Railway Act" (R.S.C. [1906] ch. 37) did not apply; and if it did the damage was continuous and plaintiffs could recover damages for six years, which were assessed at $1,200.

In the Supreme Court of Canada the appeal was dismissed, unanimously as to the merits but with an equal division on the question of damages, three of their Lordships being of opinion that they were excessive and the case should be sent back for a re-assessment.

Appeal dismissed with costs.

Hellmuth K.C. and *F. R. Taylor* for the appellants.

Currey K.C. for the respondents.

1913

*May 9.
*May 28.

GUNDY v. JOHNSTONE.

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

Solicitor and client—Special statute—Fixed sum for costs—Delivery of bill—"Solicitors' Act," 2 Geo. V. c. 28, s. 34.

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 defendant (respondent).

The plaintiffs, a firm of solicitors, were retained by the defendant in litigation between him and the Township of Tilbury East and in other matters. They succeeded in having a by-law of the township quashed with costs whereupon a special Act was passed by the legislature validating the by-law and ordering the township to pay defendant's costs as between solicitor and client providing that "such costs are hereby fixed at eighteen hundred dollars." The plaintiffs delivered to defendant a signed bill of their costs containing one item of $1,800 stated to be "settled by agreement between the parties and fixed by statute" and directed to be paid by the corporation to defendant, and detailed items amounting to $84. A month after delivery of the bill action was taken thereon and on the trial plaintiffs failed to prove any agreement in writing respecting the $1,800.

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

(1) 28 Ont. L.R. 121.

1913

GUNDY
v.
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The trial judge dismissed the action holding that the special Act did not relieve the plaintiffs from the necessity of complying with the terms of the "Solicitors Act" and delivering an itemized account of all services rendered. The Appellate Division varied this by giving judgment for the plaintiffs for the $84 details of which were given.

The plaintiffs appealed to the Supreme Court of Canada where, after argument and consideration by the court their appeal was dismissed.

Appeal dismissed with costs.

Ferguson for the appellants.

Houston K.C. for the respondent.

1913

*March 6.
*April 7.

LEONARD & SONS v. KREMER.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Sale of goods—Delay in delivery—Damages—Construction of agreement—Deficiencies in machinery—Exemption clause—"Unable to deliver"—"On or about" stated date.

APPEAL from the judgment of the Supreme Court of Alberta (1), reversing the judgment of Harvey C.J. at the trial by which the counterclaim of the defendant (respondent) had been dismissed with costs.

The action was brought by the appellants for the price of a boiler and attachments and the defendant counterclaimed for damages on account of delay in the shipment of part of the machinery within the time stipulated in the sale-agreement and the unsuitability of other parts for the works in which they were to be used. The trial judge dismissed the counterclaim because of an exemption clause in the agreement providing if for any reason the appellants were "unable to fill" the order which the defendant had given for the machinery "or deliver the goods at the time stated" that they would not in any way be held responsible for damages, and also because the delay had been caused by failure to deliver a part of the machinery which had not been included in the order. By the judgment appealed from the Supreme Court of Alberta held that as the evidence did not shew inability to

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

(1) 4 Alta. L.R. 152.

deliver the machinery at the time stated the clause did not protect the sellers, and also, that the failure to deliver certain parts of the machinery in question had not been the actual cause of the delay from which the damages claimed had resulted. Simmons J. dissented.

After hearing counsel on behalf of both parties the Supreme Court of Canada reserved judgment and, on a subsequent day, it was ordered that the appeal should be allowed in part, that the judgment appealed from should be set aside, that the appellants should recover $465.30 on their claim with interest from the 28th of February, 1911, at the rate of 8% per annum on $444, that the defendant should recover on his counterclaim the sum of $200, and the appellants should have leave to enter judgment for the difference between these two sums. It was also ordered that the costs of the action and counterclaim should follow these events respectively in the usual way and that there should be no costs allowed upon the appeal to the Supreme Court of Canada nor on the appeal to the Supreme Court of Alberta *in banco*.

Appeal allowed in part without costs.

George S. Gibbons for the appellants.

Mellish K.C. for the respondent.

1913

*March 26, 27.
*Oct. 14.

THE QUEBEC AND LAKE ST. JOHN RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

HAROLD KENNEDY (PLAINTIFF) ... RESPONDENT.

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

Railways—Freight rates—Discrimination—Rebate—Construction of statute—Quebec Railway Act, R.S.Q., 1888, art. 5172—Company—Contract by directors—Powers—Approval of tariffs.

An agreement by which a railway company undertakes to grant a rebate upon shipments of car lots of goods made by a manufacturer who engages to bear the cost of loading and unloading his freight, unless shewn to be an artifice to secure unjust discrimination, is not in contravention of the provisions of article 5172 of the Quebec Railway Act, R.S.Q., 1888, prohibiting undue advantage, privilege or monopoly being afforded to any person or class of persons in relation to tolls. Judgment appealed from (Q.R. 21 K.B. 85) affirmed, Idington and Anglin JJ. dissenting.

Per Brodeur J. (approving the judgment appealed from).—The directors of a railway company may bind the company by such an agreement in relation to the business of the railway without having special sanction therefor by the shareholders.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of Lemieux J., in the Superior Court, District of Quebec (2), and maintaining the plaintiff's action with costs.

The action was brought by the respondent to recover $4,533.13, being the amount of rebate claimed

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

(1) Q.R. 21 K.B. 85. (2) Q.R. 39 S.C. 344.

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QUEBEC AND LAKE ST. JOHN RWAY. CO. v. KENNEDY.

under an agreement made between him and the directors of the railway company granting him a rebate of one dollar per car, payable every six months during a period of five years from the month of August, 1903, on all car-loads of certain kinds of manufactured lumber shipped by him from his mills and timber limits upon the line of the company's railway.

In the Superior Court, at the trial, the action was dismissed by Mr. Justice Lemieux. This judgment was reversed and the action was maintained, by the judgment now appealed from, on an appeal to the Court of King's Bench.

The questions at issue on the present appeal are stated in the judgments now reported.

L. A. Taschereau K.C. for the appellants.
G. G. Stuart K.C. for the respondent.

DAVIES J.—This is an action brought by the plaintiff, respondent, against the appellant company to recover the sum of $4,533.13. It was brought on a contract made between the parties for the carriage by the company of the respondent plaintiff's wood and lumber for the term of five years, made in August, 1903, and certain modifications to the same to be found in letters passed between the parties in the months of September and October, 1903. The claim was for a rebate of one dollar per car every six months during the term of the contract on all cars of wood shipped and loaded on the company's cars by the plaintiff on the company's line of railway from plaintiff's mills and limits except on pulpwood, the freight on which was to be net.

There was no dispute as to the amount recover-

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QUEBEC AND LAKE ST. JOHN RWAY. CO. v. KENNEDY.

Davies J.

able if the plaintiff had a right to recover at all. The claim was for the rebate payable under the contract on the carriage of the plaintiff's lumber during the last two years of the contract. The rebate on the first three years the contract was in force had been settled for and paid, but after the 1st of November, 1906, the appellant company refused to pay the rebate, although respondent had shipped and loaded 4,310 cars.

There were a number of minor grounds on which the appellants contended that they were not liable to pay the rebate earned under the contract during the last two years of its existence. But the substantial ones urged at bar against the judgment appealed from were that, under the Quebec statute passed in 1906, and which was in force during the two years in question, the rebate contended for amounted to *discrimination* against other shippers on the same railway and, therefore, violated the statute, and,—secondly, that no tariff of tolls had been approved of in the manner provided for by the Act of 1906.

In my judgment these contentions of the appellant company should not be allowed to prevail as against the plaintiff's claim.

So far as illegal discrimination constituting

an unjust advantage over the other shippers on the same railway

is concerned it is sufficient to say that such discrimination has not been proved. Neither the trial judge nor any of the judges in the court of appeal found that there was such discrimination and, on the facts as I understand them, I think the finding on this point was right. I agree that so far as the statute which was in force at the time of the carriage of the

lumber in question was concerned, that is, for the last two years of the contract, it should be held applicable to such carriage, notwithstanding the lumber was carried under a contract entered into before the statute came into force. I see no ground for holding the statute inapplicable to such carriage of goods. The language of the statute is clear and definite and embracing, and covers the carriage of all goods after the statute came into force, whether carried by virtue of a previous contract or not. I agree that no tolls having been approved of by the proper authorities after the coming into force of the Act of 1906 none could, in consequence of the prohibitive provisions of section 6608 (R.S.Q., 1909,) be charged by the company for the carriage of goods on its railway. That section also prohibits the charging of any money for any services as a common carrier except under its provisions.

The result was that, in consequence of the legislature having omitted to insert in the Act any provision such as that in the Dominion "Railway Act" — enabling the company to continue charging the old tolls, or reasonable tolls, until a tariff of tolls under the new Act was approved by the Railway Committee, the company could not legally charge any tolls or money by way of a *quantum meruit* for the carriage of goods or freight until such tariff of tolls was approved.

But this extraordinary condition of matters did not prevent parties who had goods carried by the railway from voluntarily paying the company fair and reasonable freight for the goods carried. As a matter of common honesty they would do so. And so, in the case under consideration, the respondent continued voluntarily to pay under the contract and

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QUEBEC AND LAKE ST. JOHN RWAY. CO. v. KENNEDY.

Davies J.

agreement he had previously entered into with the company certain agreed freight charges.

But these voluntary payments were made on the clear understanding that the rebate claimed in this action should, on the adjustment of the accounts at the end of the year, be returned to the plaintiff, respondent, as provided for in their agreement. As a matter of fact this rebate was credited to him in the company's books and had been paid in each of the previous three years. So long as this agreed rebate did not constitute discrimination within the meaning of the statute there was nothing illegal in it and, as I have said, all the judges below have held, and I agree with them, that it did not constitute discrimination under the circumstances as proved.

It would be against all equity and good conscience to permit the company to receive this voluntary payment made by the plaintiff, respondent, for the carriage of his lumber, a payment made and received conditionally on the understanding and agreement that a specified rebate should be made when the accounts were adjusted, and then lend the aid of the courts to the company in their repudiation of the terms of the agreement under which they received the money and had contracted to make the rebate.

If, as I say, the rebate agreed to be made constituted discrimination and violated the statute in force at the time, that would be quite another matter. As it did not, then I think the defence which is purely technical and has no merits whatever fails and the appeal should be dismissed with costs.

IDINGTON J. (dissenting).—This action is brought for a rebate of freight rates (thought to have been

fixed pursuant to a statute then in force) which respondent had induced appellant's manager to agree to for a term of five years and which he got until the law was changed.

Such arrangements have always been looked upon with suspicion, and the fact that these parties did not put this one in their contract but in a side-arrangement evidenced by a letter shews that they were quite aware of this suspicion and conscious that the law which permitted it, if it did permit it which I much doubt, was unlikely to continue in face of the rising tide of public opinion against it.

The Act was changed. I see no reason for the amendment made unless it was to cure this evil. I am, therefore, prepared "to suppress the mischief and advance the remedy" by holding that the moment this amendment now in question became law it became impossible for the appellant legally to continue paying the rebates.

Sometimes the purpose of a statute has been such that it has not been permitted to have retrospective effect in its bearing upon contracts.

This statute as amended was intended to be operative without any exception or reservation and to destroy an abuse of which the facts in evidence herein present one of the typical forms.

Hence, there is no room for any such implication as has been sometimes imported by interpretation to save retrospective effects.

The formation of the contract alleged in this case was such, and its legality of such dubious character, that such implications might have been difficult, even if the statute had been less express than I read it.

The appeal should be allowed with costs throughout and the trial judge's order of dismissal restored.

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Anglin J.

DUFF J.—I concur in dismissing the appeal with costs.

ANGLIN J. (dissenting).—In my opinion the railway company's undertaking to give the respondent a rebate of $1 a car upon his shipments was an alteration of its duly sanctioned existing tariff of tolls which it was not within its power to effect without the approval of the Lieutenant-Governor-in-Council, which was not obtained.

Under the statute of 1888, the company was prohibited from levying or taking any tolls not approved by the Lieutenant-Governor in Council; (sec. 9, art. 5172, R.S.Q.). Tolls could be reduced only by a by-law so approved (sec. 6); and a by-law altering tolls had no force until so approved (sec. 12). If the case were governed by this legislation I doubt whether the respondent could justify the bargain made with him by the company.

But, during the last two years of the term of the contract — and it is in respect of them that this action was brought — certain amendments to the statute of 1888, passed in 1906, were in force. In my opinion the legality of the contract — or rather the right of the parties to claim the benefit of its terms in respect of freight carried after the legislation of 1906 came into force—must be determined by it. What it prohibited and declared to be illegal cannot be enforced merely because it had been provided for by a private agreement made before the statute was passed.

Where an Act of Parliament compels a breach of a private contract the contract is impliedly repealed by the Act, so far as the latter extends; or the breach is excused or is considered as not falling within the contract. The intervention of the legislature, in altering the situation of the contracting parties, is analogous to a convulsion

of nature against which they, no doubt, may provide; but, if they have not provided, it is generally to be considered as excepted out of the contract. Maxwell on Statutes (12 ed.), p. 632, and cases there cited: *West* v. *Gwynne*(1).

It is, I think, abundantly clear that such an agreement as that sued upon in this action is forbidden by article 6608, R.S.Q., 1909, enacted by the legislation of 1906. The company is prohibited from charging or collecting tolls not authorized by a by-law duly approved (sec. 1). It is required always to exact the same tolls under circumstances and conditions substantially similar; and any reduction in favour of any person, whether made directly or indirectly, in tolls authorized by the Lieutenant-Governor-in-Council is forbidden (sec. 2). Alterations in tolls can be made only by by-law sanctioned by the Lieutenant-Governor-in-Council (art. 6622). The agreement under which the rebate is claimed by the plaintiff in this action was an indirect, if not a direct, alteration in his favour of tolls which had been duly sanctioned. Not having been provided for by a by-law approved by the Lieutenant-Governor-in-Council it is not binding. Indeed, it cannot be carried out by the company without violating the law.

Whatever may be thought of the propriety of the appellants' attitude in this action from an ethical point of view, courts of law are obliged upon grounds of public policy to refuse their aid to the enforcement of contracts which the legislature has forbidden. Mr. Justice Cross would support the agreement on the ground that what the statute forbids is not a nominal but a real reduction in approved tariff rates, and he says that, taking into account the stipulations in favour of the company to which the plaintiff submitted,

(1) (1911) 2 Ch. 1.

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it has not been proved that the rates charged to the plaintiff were, in money's worth, different from the tariff rates.

The learned judge assumes that the burden of proving that there was such a difference rested on the company. With deference, I cannot assent to that view.

The agreement relied on by the plaintiff shewed, on its mere production, a *primâ facie* special reduction in his favour forbidden by the statute. It was, certainly, for him to prove, if that would afford an answer to the defence of illegality, that other considerations to be given by him to the company under the contract equalled "in money's worth" the reduction in rates which he obtained. That he has not attempted to do and the judgment of the learned trial judge is, at least impliedly, adverse to his contention on this question of fact.

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

BRODEUR J. — L'intimé a poursuivi l'appelante pour réclamer une remise (rebate) d'une piastre par char qu'elle s'était emgagée de lui payer par un contrat du 26 août, 1903. Ce contrat était pour l'espace de cinq ans et devait se terminer en novembre, 1908. Pendant trois ans la compagnie paya cette remise mais elle négligea de payer pour les deux dernières années quoiqu'elle donnât crédit au demandeur dans ses livres. Vers ce temps-là la compagnie passa sous le contrôle de nouveaux administrateurs qui répudièrent le contrat et refusèrent de payer.

La compagnie prétend qu'elle n'est pas tenue de remplir son contrat pour trois raisons:—

1. Parce que la remise constitue un avantage ou un privilège injuste;

2. Parce que la stipulation n'a pas été faite avec l'autorisation des actionnaires de la compagnie et des autorités publiques;

3. Parce que Kennedy n'a pas rempli lui-même ses obligations en ne faisant pas transporter par l'appelants la quantité de marchandizes qu'il s'était engagé de faire.

I.

Sur la première objection je vois que le juge instructeur et tous les juges de la cour d'appel sont unanimes à dire que la preuve ne démontre pas qu'il y aît eu avantage injuste. La preuve a démontré que d'autres expéditeurs avaient, comme Kennedy, des tarifs spéciaux, mais que ces taux ne différaient pas matériellement de ceux qu'il avait alors. Il a été déclaré par le juge instructeur

que les taux accordés à Kennedy ne constituent pas un avantage ni un monopole injuste envers les autres commerçants.

C'est là une question de fait que de savoir s'il y avait préférence ou avantage injuste et du moment que les tribunaux inférieurs sont unanimes il n'y a pas de raison d'intervenir. Voir *Paquet* v. *Dufour* (1).

Cette première objection doit donc être écartée.

II.

La loi édicte que les compagnies de chemin de fer doivent faire approuver leurs taux avant de pouvoir en réclamer le montant. Art. 5172, par 9, S.R.Q., 1888, maintenant 6620 S.R.Q., 1909.

(1) 39 Can. S.C.R. 332.

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La section 6623 S.R.Q. de 1909, déclare que si la compagnie fait un contrat illégal ou viole les dispositions de la loi ou omet d'accomplir quelques dispositions de la loi quant aux taux, elle est passible d'une amende de $1,000.

Dans le cas actuel le compagnie avait un tarif général qui avait été régulièrement approuvé en 1902. Elle juge à propos, en 1903, de diminuer ce tarif. Elle avait parfaitement le droit de le faire; elle aurait dû cependant faire approuver cette réduction; mais elle a négligé de le faire. Elle fait tout de même un contrat avec Kennedy par lequel il s'engage de lui donner tout son transport pourvu qu'il jouisse de cette réduction de fret. La compagnie néglige de faire approuver cette réduction dans ses taux et maintenant quand le demandeur, intimé, demande qu'elle exécute son obligation et qu'elle lui rembourse la remise stipulée elle se prévaut de sa propre inaction et de sa propre négligence et demande à être déchargée de son obligation. C'est une proposition injuste que les tribunaux ne sauraient sanctionner.

L'appelante allègue aussi que la réduction n'a pas été approuvée par la compagnie elle-même, mais que le contrat n'est que l'œuvre des directeurs.

Lorsque les directeurs d'une compagnie agissent en son nom dans les limites de ses pouvoirs ils sont censés avoir été autorizés. Lindley, Law of Companies, p. 219, dit:—

> 'It may be taken as now settled that persons dealing with directors *bonâ fide* and without notice of an irregular or improper exercise of their powers are not affected by such irregularity or impropriety.

III.

L'appellante prétend en troisième lieu que l'intimé

n'a pas exécuté sa part d'obligation en ne faisant pas transporter 3,500 chars de bois par année.

Naturellement si l'intimé s'était obligé à cela il y aurait lieu de donner raison à l'appelante. Mais la correspondance qui a été produite nous révèle que la compagnie a voulu que l'intimé s'engageât ferme de lui faire transporter 3,500 chars et il a positivement refusé de contracter une telle obligation. Ce troisième point est donc mal fondé.

Sur le tout je suis d'opinion de renvoyer l'appel avec dépens.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Pentland, Stuart, Gravel & Thompson.*

1913
*Nov. 10.
*Nov. 17.

RONALD CURRY .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Criminal law—Perjury—Form of oath.

A witness who testifies to what is false is guilty of perjury, although, without being asked if he had any objection to being sworn in the usual manner, but without objecting to the form used, he was directed to take the oath by raising his right hand instead of kissing the Bible.

APPEAL from the judgment of the Supreme Court of Nova Scotia (1) affirming, by an equal division of opinion, the conviction of the appellant for perjury.

The appellant was charged with having committed perjury on the investigation of a charge against a customs official and was tried at Sydney, N.S., and convicted. The following questions were reserved by the trial judge for the opinion of the Court of Appeal.

"Was I right in holding that there was sufficient corroborative evidence to warrant a conviction?

"The defendant was sworn by holding up his right hand without being asked whether he had any objection to being sworn in the regular way.

"It was objected that the accused was never sworn, and that he could not be convicted of perjury on evidence so given.

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

(1) 47 N.S. Rep. 176. (This report incorrectly states that the conviction was quashed.)

"Was I right in holding that he could be convicted on the evidence so given ?"

The judges of the Court of Appeal were unanimous in answering the first question in the affirmative and it is, therefore, not before the Court on this appeal. On the second question they were equally divided.

Maddin for the appellant.

Jenks K.C., Deputy Attorney-General, for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the Supreme Court of Nova Scotia sitting as a court for Crown cases reserved.

The appellant was convicted of perjury by the judge of the County Court District No. 7.

These two questions were reserved for the opinion of the Supreme Court en banc:—

1. In the circumstances in the reserved case was the trial judge right in holding that there was sufficient corroborative evidence to warrant a conviction ?

2. The defendant having been sworn by holding up his right hand without being asked whether he had any objection to being sworn in the regular way, was the judge right in holding that he could be convicted on evidence so given ?

The Supreme Court held unanimously that there was sufficient evidence to warrant a conviction, and this appeal is, therefore, limited to the second question as to which the judges of that court were equally divided.

It is admitted that the accused appeared as a witness in a proceeding before a competent tribunal and being questioned with respect to a matter material in that proceeding made as part of his evidence an assertion of fact which, for the purpose of this appeal, it

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must be assumed he then knew to be false. The defence is that at the request of the commissioner the accused took his oath in the more ancient of the two forms known in modern proceedings, "the adjuratory invocation of the Deity with uplifted hand commonly called the Scotch oath," no attempt having been previously made to ascertain whether he had any objection to taking the oath in the comparatively modern form by kissing the book. And it is argued that in consequence the false assertion which is the foundation of the charge of perjury was not made upon oath. This defence is apparently based on the assumption that the acknowledged form of oath is that which is administered by kissing the book, and that the oath in the Scotch form can only be taken in exceptional cases, as it were, upon cause shewn.

With all deference I cannot see the force of this objection. Both forms are recognized and used in the provincial courts at the option of the witness. In this case, the investigating commissioner asked the accused to raise his hand, which he did without protest, and then repeated to him these words:—

> The evidence you will give in this inquiry will be the truth, the whole truth and nothing but the truth, so help you God,

after which he proceeded to give his evidence. If he did not, in these circumstances take an oath, that is, call God to witness the truth of what he was about to testify to, I am at a loss to understand what these words mean. Having taken the oath in that form without objection, it is an admission that the witness regarded it as binding on his conscience, and that is the object for which the oath was used both in ancient and modern times(1). To hold otherwise would be to

(1) Dal. 47, 4, 439.

put a premium upon perjury, and as those who take part in the administration of justice are painfully aware, a great amount of false swearing is allowed to go unpunished.

It is now admitted to be the absolute right of every person in the English courts to be sworn for every purpose in Scotch form without the use of any book and without any question being asked. It may be open to question whether it is not better as a matter of public policy for our courts and other persons administering oaths to adhere to the time-honoured custom of swearing witnesses upon the Bible or Testament in all cases except those where the witness or party claims to have conscientious objections to swearing in that mode or form.

But we think, however that may be, that where no such objection is raised and the oath is taken voluntarily by a person with uplifted hand and calling God to witness the truth of his evidence or statements, it would be alike a mocking of justice and a disregard of the common law as we understand it to allow such a person on an indictment for perjury to escape on the sole ground that he took the oath without being sworn on the Bible or New Testament.

The appeal should be dismissed. No costs.

DAVIES, DUFF and BRODEUR JJ. concurred.

IDINGTON J.—The appellant having been convicted of perjury, two questions were reserved for the Court of Appeal. Of these one having been disposed of unanimously by that court against the contention of appellant, he can only appeal here in respect of the other regarding which that court was divided.

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Idington J.

That question brought thus before us is stated as follows:—

The defendant was sworn by holding up his right hand without being asked whether he had any objection to being sworn in the regular way.

It was objected that the accused was never sworn, and that he could not be convicted of perjury on evidence so given.

Was I right in holding that he could be convicted on the evidence so given?

The proceeding out of which the charge arises was an inquiry by a commissioner under and pursuant to chapter 104 of the Revised Statutes of Canada, 1906, wherein it admittedly was within the power and duty of the commissioner by virtue of section 4 of the said Act "to require witnesses to give evidence on oath or on solemn affirmation if they are persons entitled to affirm in civil matters."

The commissioner testified at the trial of the appellant, amongst other things, as follows:—

Q. Was the evidence given under oath? A. I think under oath, although some little question with regard to that has been raised. There was no copy of the Bible used. In a few cases where the copy of the Scripture was not readily available I called the witness to hold up his right hand and went through the formula with the man. It was done in this case.

Q. Tell what was done? A. I called the witness to raise his right hand and I put this formula to him: "The evidence you will give in this inquiry will be the truth, the whole truth and nothing but the truth, so help your God?"

Q. And did he raise his right hand? A. He raised his right hand.

By the court.

Q. I suppose, Mr. Duchemin, you determined yourself the manner in which you would swear him? A. Yes, I did not ask any questions.

The contention is that appellant so sworn and giving the evidence in respect whereof he has been convicted of perjury, never in law was sworn because the oath was not accompanied by his kissing the Bible or being examined by the commissioner as

to his religious belief entitling him to be sworn in the form adopted.

The crime of perjury of which he has been convicted and the circumstances under which a person may be convicted thereof, are defined by section 170 and subsequent sections of the Criminal Code:—

Section 170. Perjury is an assertion * * * made by a witness * * * as part of his evidence upon oath or affirmation * * * such assertion being known to such witness to be false and being intended by him to mislead * * * the person holding the proceedings.

And inasmuch as the appellant in this case signed the evidence when read over to him, I think section 172 may also cover this case. It is as follows:—

172. Every one is guilty of perjury who—

(*a*) having taken or made any oath, affirmation, solemn declaration or affidavit where, by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing.

When we are asked as herein to discard the fundamental principle of giving effect to statutes and to fritter away the plain ordinary meaning of the language used in this one, it is somewhat difficult to treat such a contention seriously.

The form now in question herein of "taking or making the oath" is in law and in fact much older than the usual one of kissing the Bible, much older even than the common law, yet recognized by the common law.

This statute was so framed, I think in 1868, as to end, if possible, every frivolous attempt of the perjurer to escape, by way of technicalities and needless subtleties, from the consequences of his misconduct.

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It was amended by the Criminal Code so as to render it yet more comprehensive and plain.

It seems to me to subserve the purposes for which it was enacted and to fit well the case now presented to us.

The appellant took or made an oath and by virtue thereof was permitted to testify and if he wilfully and corruptly testified to that which was false, the plain purpose of the enactment is that he should suffer the punishment it awards.

It is entirely beside the question to cite cases where in the course of administering justice, men have been found to have taken oaths whereby their impiety or ill instructed consciences might permit them to make a secret mockery of justice, and might lead to their injuring others by speaking falsely; and hence out of regard to the rights of those so injured, the evidence so given has been set aside or treated as null.

We are not dealing here with such a question, but with the law which makes such men in any event liable to the punishments the law has provided for the misconduct involved not only in so trifling with the court and the rights of others, but also in so doing, speaking wilfully and corruptly that which was false. In the other case what had been said might have been absolutely true, but had to be treated as non-effective for want of the form of the sanctions the law looked upon as security for truth.

It is, I respectfully submit, a mere confusion of thought thus to mix these entirely different things and their consequences.

Another confusion of thought is that involved in the argument that is sought to be derived from the modifications of the law which debarred many from

testifying in the only form which their consciences permitted them to adopt.

The old law debarred such persons often from testifying at all.

The law also debarred suitors from putting forward and using such witnesses or others not bound by any oath.

But the law in the most barbarous state in which it ever was, never excused him, who despite his incapacity to comply with the law, had taken a form of oath that the court had administered to him, from the consequences of his having wilfully and corruptly violated the pledges he had in any accepted form given the court.

The argument founded upon the 16th section of the Criminal Code has, if possible, still less to commend it.

There never was in the common law anything to justify or excuse any man for violating so plain a statute as this now in question.

It is extremely desirable that men appearing as witnesses in our courts and in such capacity taking any form of oath or making any affirmation, should understand they are, when wilfully and corruptly speaking falsely under any such circumstances, liable to be convicted of perjury, whatever may be their peculiar religious, mental or moral conceptions of the binding effect of the form of oath or affirmation.

The appeal must be dismissed.

ANGLIN J.—The question for determination in this case is whether the defendant took an oath which renders him liable to the penalties of perjury for false testimony given under it. The commissioner before

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whom the oath was taken was authorized to administer it. Because a copy of the Holy Scriptures was not at hand he administered the oath in what is usually known as the Scotch form — that is, the deponent with uplifted hand called upon Almighty God to witness that he would speak the truth. He was not asked whether he had any conscientious objection to taking the oath in the manner customary at the present day in English courts, nor did he explicitly state that the oath in the form in which he took it was recognized by him as binding upon his conscience.

From the short review of forms of oaths in the Encyclopædia of the Laws of England, vol. 10, page 103, it would appear that at common law the touching or kissing of the Bible or Testament is not essential to the taking of an oath. In the leading case of *Attorney-General* v. *Bradlaugh*(1), where various questions respecting oaths, their binding effect and their forms were carefully considered, Lord Justice Cotton, quoting a passage from the judgment of Martin B., in *Miller* v. *Salomons*(2), at page 515, says that that learned judge, after referring to *Omychund* v. *Barker* (3) as correctly stating the law, proceeds thus:—

> The doctrine laid down by the Lord Chancellor and all the other judges was that the essence of an oath was an appeal to a Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood, and that the form of taking an oath was a mere outward act not essential to the oath.

The Lord Justice adds:—

> I read that because it shews how, down to the latest times, what was laid down in *Omychund* v. *Barker*(3) has been recognized, as we recognize it, as correctly stating what the law of England is as regards taking an oath.

(1) 14 Q.B.D. 667. (2) 7 Ex. 475.
(3) 1 Atk. 21.

In the same case (at p. 701) Brett M.R. says:—

> If a person who could take an oath, * * * nevertheless took it in a manner which disregarded the due solemnities of the mode of taking an oath which are appointed in this Act of Parliament, or, if he took the oath, and did not, within the meaning of this Act of Parliament, subscribe the oath; * * * on reflection, I am of opinion that he would be liable to the penalty.

The defendant in the present case did that which constitutes "the essence of an oath" — he called upon Almighty God, in whose existence and divine attributes it is not suggested that he did not believe, to witness the truth of that which he was about to say.

For the defendant it is urged that with him rested the option of determining what form of oath he should take — that, unless he elected not to take the oath in the form customary in the English courts and claimed the right to take it in the Scotch form, an oath in that form should not have been administered to him and would not render him liable to the penalty of perjury. If the assent of the witness to the administration of the oath in any form other than that which is customary in the English courts be requisite, I am of the opinion that by taking the oath in the form in which it was tendered to him, making no protest against it but proceeding to give his evidence with the knowledge that it would be accepted and acted upon as testimony given under oath, he sufficiently assented to the oath being administered in the form in which it was, and that he cannot, upon being afterwards charged with perjury, be heard to say that he was not sworn.

For these reasons I would dismiss this appeal.

Appeal dismissed.

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*Oct. 15, 16.

H. M. COTTINGHAM (DEFENDANT) ... APPELLANT;

AND

ALICE LONGMAN AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Appeal—Findings of jury—Review by appellate court.

Where a case has been properly allowed to go to the jury and there is evidence before them from which they could reasonably draw the conclusion at which they arrived, the verdict should not be disturbed on an appeal.

Judgment appealed from (18 B.C. Rep. 184) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment entered by Morrison J. at the trial, on the verdict of the jury, in favour of the plaintiffs for $5,000 damages and costs.

The principal question, on the evidence at the trial, was as to the identification of the defendant's motor-car by which, it was alleged, the deceased, the husband of the plaintiff, Alice Longman, and the father of the infant plaintiffs, had been killed on account of the defendant's negligent driving. The accident happened while deceased was at work on a highway bridge at night and employed there by the Corporation of the City of Vancouver. When submitting

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

(1) 18 B.C. Rep. 184.

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the case to the jury the learned trial judge did not address them upon the question of negligence. He said: "I purposely avoided it because it seems to me that this is entirely a question of identification of that car, and, if you are not satisfied that it was Cottingham's car, of course, there was no possibility of his doing this. There were other cars about that time, and it is for you to say, within what periods, and the situation on the bridge, not ignoring the other circumstances on the bridge of that four-horse rig. If you believe the evidence, then see what you can make of it."

The jury returned a verdict for the plaintiffs and awarded them $5,000 damages—$3,000 for the widow and the balance divided among the children. The judgment entered upon this verdict was affirmed by the judgment now appealed from.

S. S. Taylor K.C. for the appellant.
George E. McCrossan for the respondents.

After hearing counsel on behalf of the appellant and without calling upon the respondents for any argument, the appeal was dismissed with costs.

THE CHIEF JUSTICE.—To establish liability it is not necessary, in an action of damages for tort, that there should be an eye-witness to the accident. A series of facts may be proved in evidence from which the jury may reach a conclusion, as to the cause of the mishap, in some respects more satisfactory than if they were obliged to depend upon the deposition of an eye-witness. It has so frequently been held here that one must almost apologize for repeating it, that the

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function of an appellate court is to consider in each case whether there was evidence before the jury from which they could reasonably draw the conclusion at which they arrived.

Here the finding of the jury has the approval of the provincial Court of Appeal as well as of the trial judge.

Nothing was said here, nor can I see anything in the factum which would justify us in reversing.

Having regard to the principle which I have just stated, the appeal is dismissed with costs.

IDINGTON J. concurred in the dismissal of the appeal.

DUFF J.—I think this appeal ought to be dismissed with costs.

There is a fallacy in the argument presented on behalf of the appellant which resides in the proposition stated by his counsel almost in so many words that in a civil action complaining of a tort it is incumbent upon the plaintiff to demonstrate the culpability of the defendant. It ought not to be necessary to controvert so obvious an error. But although seldom put forward in a form so unqualified, this proposition has unquestionably often enough in the past been the tacit assumption upon which the defence in such cases as this has been based and, sometimes, it is to be feared that it has formed the real basis of judicial pronouncements in such actions. The subject of the nature of proof upon which a jury is entitled to act in civil cases was fully discussed in some recent judgments (see *Grand Trunk Railway Co.* v. *Griffiths*(1),

(1) 45 Can. S.C.R. 380.

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Duff J.

and *Jones* v. *The Canadian Pacific Railway Co.*(1), but, notwithstanding these judgments, the error will doubtless survive. The burden resting upon the plaintiff is, of course, to establish facts from which the jury may reasonably draw the inferences necessary to sustain the plaintiff's case. In this case the plaintiffs unquestionably acquitted themselves of this onus.

ANGLIN J.—The only question upon this appeal is whether there was sufficient evidence to enable the jury to infer (otherwise than by a mere guess or conjecture) that it was the defendant's automobile which killed the husband and father of the plaintiffs. In my opinion there was.

The appeal, therefore, fails and should be dismissed with costs.

BRODEUR J.—I am of opinion to dismiss this appeal for the reasons given by Mr. Justice Duff.

Appeal dismissed with costs.

Solicitors for appellant: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for the respondents: *McCrossan & Harper.*

(1) 29 Times L.R. 773.

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*Oct. 17, 21.
*Oct. 22.

MARY MAHOMED (PLAINTIFF).....APPELLANT;

AND

THE ANCHOR FIRE AND MARINE INSURANCE COMPANY (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Fire insurance—Blank application—General agent—Misrepresentation—Knowledge of company—Over-valuation—"Dwelling-house"—"Lodging-house."

F., the manager, for British Columbia, of a fire insurance company, with power to accept risks and issue policies without reference to the head-office of the company, received an application from M. for insurance for $2,100 on merchandise, furniture and fixtures contained in a building described as a store and dwelling-house. The application was accepted and a policy issued by him apportioning the insurance upon the three classes of property separately. A loss having occurred, payment was refused on the grounds that the stock was over-valued and the premises improperly described as a dwelling-house whereas, in fact, it was also used as a lodging-house. At the trial it appeared that a portion of the premises was fitted up for lodgers; the plaintiffs testified that F. inspected the premises before the policy was issued and that they had made no apportionment of the insurance, but left the matter altogether in the hands of F. F. testified that he sent an agent to have the application signed and the apportionment made and that he filled in the figures upon the blanks in the application from the agent's report. The jury found that F. inserted the description of the premises and apportioned the insurance.

Held, reversing the judgment appealed from (17 B.C. Rep. 517) that the company was affected by F.'s knowledge of the premises and of the property insured; that the questions as to who had made the apportionment was properly left to the jury; that the evidence justified the jury in finding that it had been made by F.,

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

and that the insured, therefore, had made no valuation as to the stock or the apportionment thereof and could not have misrepresented its value.

Held, per Fitzpatrick C.J. and Davies and Duff JJ.—That the evidence justified the jury in finding that F. had described the premises as a dwelling-house and that the company was bound by his act in doing so.

Per Davies and Duff JJ.—A dwelling-house does not lose its character as such from the fact that it is occupied by one or more lodgers.

Held, per Duff J.—As, under the conditions of the policy in question, notwithstanding an over-valuation the company would still be liable for a certain proportion of the actual value of the property insured, the policy should not be avoided.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), whereby the judgment entered by Murphy J. at the trial, stood affirmed on an equal division of opinion among the judges in the Court of Appeal.

The circumstances of the case are stated in the head-note and the questions in issue on the present appeal are fully referred to in the judgments now reported. At the trial the jury answered the questions submitted to them favourably to the plaintiff and found a verdict in her favour for $940.05. After hearing arguments on objections taken on behalf of the defendants, and upon a motion for the dismissal of the action, the learned trial judge reserved judgment and, subsequently, dismissed the plaintiff's action with costs; his judgment granting a nonsuit is reported at pages 517-519 of the report of the judgment rendered in the court below. On an appeal to the Court of Appeal for British Columbia their Lordships the Chief Justice of British Columbia and Mr. Justice Martin considered that the judgment of the trial judge should be reversed and their Lordships Justices Irving and

(1) 17 B.C. Rep. 517.

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Galliher were of opinion that the judgment then under appeal should be affirmed. On this division of opinion the judgment of the learned trial judge stood affirmed, and the plaintiff appealed to the Supreme Court of Canada.

S. S. Taylor K.C. for the appellant.
J. McDonald Mowat for the respondents.

THE CHIEF JUSTICE.—This is an action on a policy of fire insurance covering certain stock and merchandise, household furniture, etc. There were several defences, but those chiefly relied upon in the Court of Appeal and here have reference to (1) over-valuation, and (2) misrepresentation of the uses to which the premises, in which the property insured was at the time of the application, were put. As to this latter objection I agree with Mr. Justice Duff that the knowledge of the agent was the knowledge of the company; *Holdsworth* v. *The Lancashire and Yorkshire Insurance Co.*(1) and the cases there cited.

The over-valuation is complained of only with reference to the distribution of the total amount of the insurance over the different classes of property covered by the policy. It is alleged that the insured did not have in hand a stock of merchandise to the value represented. It is not contended that the total value of all the property covered by the risk was misrepresented.

The circumstances of the case are quite exceptional. The company is incorporated in the Province of Alberta. The agent, Freeze, who issued the policy, was the manager in the Province of British Columbia,

(1) 23 Times L.R. 521.

and he had authority to accept risks and to issue policies without consulting the head-office. To the application, which was admittedly signed in blank by the insured to the knowledge of Freeze, the latter attached a certificate intended for the private information of the head-office to the effect that he, the agent and manager of the company, had personally inspected the risk and, after having done so, fixed the cash value of the property insured at the amount of $3,000. The total amount of the insurance applied for was $2,100. It must be accepted as admitted also that the application was signed in blank by the insured to the knowledge of Freeze and that the total amount of the insurance asked for was distributed over the different classes of goods insured in the office of the agent by one of his two employees, his brother or one Howden, presumably on knowledge acquired when the latter visited the premises to get the insurance at the request of Freeze. The insured were foreigners with a limited knowledge of the English language. They say that they went to the office of the agent and that the amount of the insurance was there apportioned without reference to them. How that apportionment was really made does not appear, as neither Howden nor the agent's brother was examined, and an inspection of the document does not tend in any way to clear up this point. It is filled up in lead pencil and the figures which purport to represent the value of the different classes of goods insured appear to have been altered at least twice, if not oftener. As this document has been in the possession of the company ever since it was first filled up and it is now produced and relied upon to defeat this claim, it was incumbent on them to give some explanation of the circumstances under which the figures were altered.

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In the absence of such evidence I am disposed to believe the plaintiff and her husband, and I am quite satisfied that, on the facts as they state them to have occurred, it would be impossible to hold that Freeze or either one of his two employees acted with respect to the application as the agent of the insured or that there is evidence of misrepresentation by them with respect to the value of the property.

The policy provides that the application contains a just and true statement of all the facts, condition, value and risk of the property insured, and that if, in case of loss, the property is found by appraisement or otherwise to have been over-valued, the company shall only be liable, in the absence of fraud, for such proportion of the actual value as the amount insured bears to the value given, not exceeding three-fourths of the allowed cash value.

There is no suggestion of fraud here. On the contrary, at the argument, this was entirely repudiated. The only evidence of over-valuation must be extracted from the statement of the appraiser, Rankin, who says that, when he visited the premises after the fire, he came to the conclusion that goods to the value mentioned in the application could not be put into the premises. The jury refused to accept this evidence and I entirely agree in their conclusion.

The appeal should be allowed with costs.

DAVIES J.—In this case the trial judge, on a motion for a nonsuit, reserved the points on which the motion was based, and submitted a number of questions to the jury. The learned judge, afterwards, pursuant to leave reserved, dismissed the action and this judgment was, on appeal, to the Court of Appeal for British

Columbia, sustained on an equal division of opinion in that court.

The grounds on which the learned trial judge dismissed the action were that the premises could not reasonably be regarded as a "dwelling-house and store" because the occupiers took in boarders, and the house was a crowded lodging- house, and that there was an over-valuation of the stock of merchandise on the premises. The two judges of the Court of Appeal who sustained the judgment dismissing the action did so on the ground of over-valuation of the stock of merchandise only.

With regard to the alleged misdescription of the premises as a dwelling-house, I am not able to concur in the holding that the presence of "lodgers," one or more, on the premises proves that the designation of dwelling-house was such a misdescription as vitiated the policy. A dwelling-house does not cease to be such simply because one or more lodgers are taken in by the occupants and, if the facts as found by the jury on ample evidence of the knowledge on the agent's part of the presence in the house of these lodgers or "roomers" at the time the policy was taken out, is considered, this objection must fail.

The substantial objection was as to the alleged over-valuation of the groceries in the shop. It is not contended that the total amount insured under the policy on the fixtures, furniture and groceries was an over-valuation, but that the "apportionment" of that amount was excessive as regards the stock of groceries.

The plaintiff contends that she did not make any valuation of the groceries, but left that expressly to the agent to do and that she did not herself know anything about it or that, in fact, there had been any specific apportionment of the insurance.

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The jury find that Freeze, the agent, made the apportionment himself, and I think there is ample evidence to sustain that finding. Indeed, it seems to me, although Freeze's evidence is somewhat contradictory and hard to reconcile, that, when the application was signed by Mahomed, at her residence, in the presence of one Howden, who had been sent by Freeze to obtain Mahomed's signature, no apportionment of the amount had been made. That was done subsequently by Freeze in his own office after the application had been signed and brought back to him by his clerk, Howden, and was done by Howden and Freeze themselves. In this view, there was no misrepresentation of values on the part of the applicant at all.

The question, therefore, whether Mahomed made or as a fact assisted, in the valuation of the groceries was not one which should have been withdrawn from the jury. Accepting the finding of the jury on this point as justified by the evidence, I am unable to see how the plaintiff can be held guilty of misrepresentation or over-valuation. If she is to be believed, and the jury had a right to believe her and did so, she neither as a fact valued the groceries or, in any way, misrepresented their value. She left that question to the company and their agent apportioned the insurance as he thought best. I do not think that the evidence warrants the conclusion that it was Howden who made the valuation at Mahomed's request. The valuation and apportionment was made and inserted in the application in Freeze's office after the application had been signed and when the applicant was not present. Possibly, Freeze was influenced in making it by the information he received from the clerk, Howden. The latter person was not examined at the trial.

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Bearing in mind the fact that Freèze was the general agent of the company in and for the Province of British Columbia, and had authority to accept risks and issue policies without consulting the head-office of the company, I have, after reading the evidence, concluded that the submission of the question to the jury, whether Freeze or the plaintiff made the valuation of the groceries complained of, was a proper submission to them. On their finding on this point, which I think there is ample evidence to support, I cannot conclude that the plea of over-valuation or misrepresentation by the plaintiff has been sustained.

I would, therefore, allow the appeal and direct judgment to be entered for the amount claimed, namely, $940.05.

IDINGTON J.—On the findings of the jury, founded upon evidence which we cannot discard, judgment should have been entered for the plaintiff.

The local manager of the respondents did not stand, in this case, on the same footing, in relation to them and the duties to be discharged, as a mere soliciting agent. For our present consideration and purposes, he rather represented the company in the business of settling the contract and signing and issuing the policy, just as the Board of Directors might have stood in relation thereto.

The company cannot, therefore, be heard to say that it was either defrauded or warranted against what its manager obviously knew.

The appeal should be allowed with costs throughout.

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DUFF J.—There was evidence from which the jury might properly infer, first, that it was the duty of Freeze, as general manager of the company for Vancouver, to inform himself of the value of the property to which the appellant's application related, and, generally, of the nature of the risk, before forwarding the application to the company. Secondly, that the valuation and the apportionment, as they appeared in the application, were, in fact, made either by Freeze himself or by the employees of the company acting under his direction and with his knowledge and sanction. In these circumstances, the defences relied upon by the company disappear.

First, as to the description of the risk. It is impossible, in my judgment, to contend that the word "dwelling-house" in its primary meaning necessarily bears a signification which would exclude from the objects denoted by it a "lodging-house" of such a character as the appellant's was and, according to the finding of the jury, Freeze knew or ought to have known it to be. That being so, it is our duty to construe the description of the risk in the light of the facts known to Freeze, or, in other words, known to the company: viz., that the property described as a "dwelling-house" was a "lodging-house" of that character. *Bawden* v. *London, Edinburgh and Glasgow Insurance Co.*(1). And, so construing it, there is, of course, no misdescription of which the respondents are entitled to complain.

Secondly, as to the alleged over-valuation: the fact being once established that the valuation and apportionment were made by the company, through their general manager at Vancouver, we are entitled, on the

(1) [1892] 2 Q.B. 534.

authority of the *Bawden Case*(1) to read the application as if that fact were stated in it. The application contains this passage:—

> In case of loss, if the property insured is found by appraisement or otherwise to have been over-valued in the survey and description on which the policy is founded, the company shall only be liable, in the absence of fraud, for such proportion of the actual value as the amount insured bears to the value given in such survey or description, not exceeding three-fourths of the allowed cash value at the time of the fire.

Reading this passage, together with such a recital, it appears to me to be impossible to contend that the over-valuation, if there were any, would have the effect of nullifying the policy.

I have not examined with care the evidence relating to the value of the property insured, and I desire to express no opinion upon it.

ANGLIN J.—There was evidence upon which a jury might properly find that there had been no misrepresentation by or on behalf of the plaintiff of the value of her stock of meat and groceries.

In regard to the misdescription of the premises relied upon by the defendants, assuming it to be such, if it has been sufficiently shewn to have been material (which I doubt), it has been found by the jury that it was known, or should have been known to the defendant company through their agent, Freeze, who inspected the premises for them.

I agree with Macdonald C.J. and Martin J.A. that there was a proper case for submission to the jury; that there is evidence to support its findings; and

(1) (1892) 2 Q.B. 534.

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that, on them, the plaintiff is entitled to judgment for the amount of her claim with costs throughout.

BRODEUR J.—I concur in the opinion of Mr. Justice Duff.

Appeal allowed with costs.

Solicitors for the appellant: *Craig, Bourne & McDonald.*

Solicitors for the respondents: *Russell, Russell & Hancox.*

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS). } APPELLANTS; 1913 *Oct. 30.

AND

SARAH HINRICH (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Railways—Operation—Negligence — Excessive speed — Trespasser — "Railway Act," R.S.C., 1906, c. 37, ss. 275, 408—Cause of accident.

While a train was running at the speed of about thirty miles an hour, on the company's line along the harbour front in the City of Vancouver, B.C., H., who had unlawfully entered upon the right-of-way through a break in the company's fences, attempted to cross the tracks in front of the train. The engine driver saw H., at a distance of about 500 feet and whistled several times. H. paid no attention to the danger signals and continued walking in an oblique direction towards the track, and, observing his apparent intention to cross the track and his disregard of the signals, the engine driver then applied the emergency brakes which failed to stop the train in time to avoid the accident by which H. was killed. In an action for damages by his widow and child,

Held, that, notwithstanding the fact that deceased was a trespasser and committing a breach of section 408 of the "Railway Act," R.S.C., 1906, ch. 37, the company was liable because their engine driver neglected to apply the emergency brakes at the time he became aware of the danger of accident when he first noticed deceased attempting to cross the tracks.

APPEAL from the judgment of the Court of Appeal for British Columbia, which reversed the judgment of nonsuit entered by the trial judge and maintained the plaintiff's action with costs.

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The circumstances in which the accident, which caused the death of the plaintiff's husband are stated in the head-note. At the trial of the action the jury rendered a general verdict against the company and awarded $6,000 damages ($3,000 to the widow and $3,000 to her infant child. The trial judge then rendered judgment upon a motion for nonsuit which had been made before he allowed the case to go to the jury and dismissed the action on the ground that the only inference to be drawn from the evidence was that deceased had been killed in consequence of his own negligence and unlawful act in attempting to cross the tracks while the train was rapidly approaching and he was a trespasser upon the right-of-way. By the judgment now appealed from, this judgment was set aside and judgment was ordered to be entered in favour of the plaintiff in conformity with the verdict of the jury, on the ground that the company was chargeable with negligence which was the ultimate cause of the accident.

Hellmuth K.C. for the appellants admitted the original negligence of the company in running their train at excessive speed at the place where the accident occurred, but contended that the unlawful course of the deceased in attempting to cross the tracks in the face of the rapidly approaching train, while he was a trespasser there and committing a breach of section 406 of the "Railway Act" and also in disregarding the danger signals given by the engine driver, constituted the sole cause of the accident by which he was killed.

D. G. Macdonell for the respondent was not called

upon for any argument, and the appeal was dismissed with costs.

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THE CHIEF JUSTICE.—This appeal was dismissed with costs after hearing counsel for the appellants. I have no doubt that whatever may be the negligence which is fairly attributable to the husband of the respondent, it was open to the jury, on the whole evidence, to find as they did that the determining cause of the accident was the failure on the part of the engine-driver to subsequently take the necessary steps to avoid the consequences of that negligence.

DAVIES and IDINGTON JJ. concurred in the dismissal of the appeal.

DUFF J.—I think this appeal should be dismissed There was evidence from which the jury might conclude properly that the driver of the engine ought to have been aware that the victim of the accident was crossing the track while oblivious of the danger of doing so in time to have averted the accident by applying the emergency brake. In these circumstances, the negligence of the victim is immaterial because it was quite open to the jury to find that that negligence was not a proximate cause of the victim's death as that phrase has been construed and applied in such cases.

ANGLIN J. concurred in the opinion of the Chief Justice.

BRODEUR J.—The jury having found that there was negligence on the part of the company appellant and there being in the case evidence that could justify

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such a verdict, it would be inadvisable for this court to allow this appeal.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *J. E. McMullen.*

Solicitor for the respondent: *D. G. Macdonell.*

FREDERICK BELL (PLAINTIFF).....APPELLANT;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS).....RESPONDENTS.

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*Nov. 26.
*Dec. 23.

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

Evidence—Onus—Railway company—Negligence—Excessive speed—"Railway Act," s. 275—8 & 9 Edw. VII. c. 32, s. 13.

By 8 & 9 Edw. VII. ch. 32, sec. 13, amending section 275 of the "Railway Act" no railway train "shall pass over a highway crossing at rail level in any thickly peopled portion of any city, town or village at a greater speed than ten miles an hour" unless such crossing is constructed and protected according to special orders and regulations of the Railway Committee or Board of Railway Commissioners or permission is given by the Board. In an action against a railway company for damages on account of injuries received through a train passing over such a crossing at a greater speed than ten miles an hour.

Held, reversing the judgment of the Appellate Division (29 Ont. L.R. 247), that the onus was on the company of proving that the conditions existed which, under the provisions of said section, exempted them from the necessity of limiting the speed of their train to ten miles an hour or that they had the permission of the Board to exceed that limit, and as they had not satisfied that onus the plaintiff's verdict should stand.

Sub-section 4, of sec. 13, prohibits trains running "over any highway crossing" at more than 10 miles an hour, if at such crossing an accident has happened subsequent to 1st January, 1900, "by a moving train causing bodily injury," etc., "unless and until" it is protected to the satisfaction of the Board.

Per Duff and Brodeur JJ.—The appellant's action could also be maintained on the ground that the prohibition of sub-section 4 applies to the crossing in question.

The Grand Trunk Railway Co. v. *McKay* (34 Can. S.C.R. 81), distinguished.

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

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1) setting aside a verdict for the plaintiff and ordering a new trial.

The facts of the case were not in dispute and are shewn by the above head-note.

Laidlaw K.C. and *E. H. Cleaver* for the appellant.
D. L. McCarthy K.C. for the respondent.

THE CHIEF JUSTICE.—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario ordering a new trial on the ground of misdirection. The main question at issue between the parties below was whether, in the circumstances of this case, sub-section 4 of section 275 of the "Railway Act," as now amended by 8 & 9 Edw. VII. ch. 32, sec. 13, made it incumbent upon the company to prove that they were exempt from the limitation as to speed which that section imposes. There was a difference of opinion in the lower court. The Chief Justice, dissenting, held that the onus was upon the company and that the appeal should be dismissed. In reaching the same conclusion, I prefer to rely on sub-section 3 of the same section, which was also considered by the majority below. It appears to me after carefully reading the opinion of Mr. Justice Hodgins, that he failed to appreciate the precise point raised in *Grand Trunk Railway Co.* v. *McKay*(2), by which he considered himself bound. In that case, it was held that so long as the railway fences on both sides of the track were maintained and turned in to the guard at the highway

(1) 29 Ont. L.R. 247. (2) 34 Can. S.C.R. 81.

crossing, as provided by the Act, the maximum speed of the train was not limited to six miles an hour in passing through a thickly peopled portion of a city, town or village. There was no question raised as to the burden of proof; the railway fences were admitted to be properly constructed as required by the statute.

At the time of the accident here, the train was going at about forty miles an hour over a highway crossing at rail level in a thickly peopled portion of a town, and the jury found that the plaintiff when using the crossing was injured by the negligence of the defendants in running their train at that speed. There was no proof that the special requirements of the statute as to construction or permission of the Board had been complied with.

The question is, therefore: What is the rate of speed at which a train may pass over a highway crossing at rail level in a thickly peopled portion of any city, town or village, in the absence of proof that the special requirements as to construction or permission of the Board provided by sub-section 3 of section 275 of the "Railway Act" have been complied with? That section reads:—

> Subject to the provisions of sub-section 4 of this section, no train shall pass over any highway crossing at rail level in any thickly peopled portion of any city, town or village, at greater speed than ten miles an hour, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board in force with respect to such crossing, or unless permission is given by some regulation or order of the Board. The Board may from time to time fix the speed in any case at any rate it deems proper.

Nothing can be plainer, it seems to me, than the object which Parliament had in view when that sub-section was introduced in amendment of the "Railway

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Act." The history of the legislation and, what is more important, the language used, make it abundantly clear that the purpose was to provide for the greater security of those who are obliged to use the public highway under admittedly dangerous conditions. The sub-section is applicable to "highway crossings at rail level in thickly settled districts" and it provides that at such crossings the speed limit of a train shall not exceed ten miles an hour unless such crossings are constructed and maintained in accordance with the orders and regulations specially issued by the Railway Committee of the Privy Council or of the Board, or unless by special permission of the Board acting presumably with a proper regard for the public safety. The plain and obvious meaning of the section is that at such dangerous places the speed of the train must not exceed ten miles an hour, but that general prohibition is subject to this limitation that such speed may be exceeded by permission of the Board or if provision is otherwise made for the public safety by way of protection. That is to say, the words after "unless" are to be read as a proviso creating an exemption from the general prohibition contained in the first part of the section. If this is the proper construction of the language used, then it follows necessarily that where the statutory provision is departed from, the company must allege and prove by way of justification that they come within the exception (*The King* v. *James*(1)). This is made abundantly clear when sub-section 3 is read in conjunction with sub-section 5. The latter fixes the time within which the provisions of sub-section 3 are to be complied with by the company. That is to say, to be exempt from the limitation

(1) [1902] 1 K.B. 540, C.C.R.

as to speed the company must within a fixed time make the necessary application to the Board, and unless it is established that the application has been made and granted, the general prohibition governs if an accident occurs under the conditions present here.

To hold otherwise would, it seems to me, amount to saying that it was upon the plaintiff to prove in anticipation that the company had no defence under this head. It has been urged that this is merely a negative requirement, but assuming that to be the case, where is the difference between prescribing that a thing shall not be done unless certain precautions are taken as to construction and so forth, and in prescribing that, if that thing be done, the particular precautions shall be taken? This case comes, in my opinion, within the rule laid down in *Britannic Merthyr Coal Co.* v. *David*(1), followed in *Watkins* v. *Naval Colliery Co.*(2).

I am, therefore, of opinion that the trial judge properly directed the jury in placing upon the defendants in this action the burden of proving that, in the circumstances, the rate of speed which admittedly exceeded ten miles an hour was not excessive, and that this appeal should be allowed with costs. It follows that the cross-appeal must be dismissed also with costs.

DAVIES J.—This is an appeal from the appellate division of the Supreme Court of Ontario directing a new trial of the action on the ground of misdirection by the trial judge on both branches of plaintiff's claim.

The plaintiff sued for injuries sustained by him

(1) [1910] A.C. 74. (2) [1912] A.C. 693.

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from one of defendant's trains when passing over a highway crossing at rail level in a thickly populated district at a much higher rate of speed than the ten miles an hour, permitted by sub-section 3 of section 275 of the "Railway Act" as amended by 8 & 9 Edw. VII. ch. 32. A second branch of his case was a claim under sub-section 4 of the same Act for injuries caused by such excessive speed over a "highway crossing" at which "an accident had happened subsequent to the first day of January, 1900, by a moving train causing bodily injury or death to a person using such a crossing."

The appellate division held there was misdirection on both branches of appellant's claim. With respect to the claim under sub-section 4 based upon the happening of a previous accident at the highway crossing in question, I do not find it necessary to express any opinion, as I have reached the conclusion that there was no misdirection by the trial judge on the claim of the plaintiff under sub-section 3, and that the judgment of the trial court on that claim should be restored. I confess I am not quite clear as to the meaning of the judgment of Hodgins J. speaking for the appellate division upon this sub-section 3.

The learned judge says that the direction of the trial judge "was wrong in not qualifying the statement by the exception contained in section 275, that is as to protection and was not warranted by the "Railway Act as interpreted by *Grand Trunk Railway Co.* v. *McKay*(1)."

The judgment in that case was founded upon the *admission* that the fences of the railway on both sides of the track were maintained and turned into cattle

(1) 34 Can. S.C.R. 81.

guards at the highway crossing as provided by the "Railway Act," and was to the effect that under such conditions there was no limit placed by the Act upon the speed of the trains when crossing the highway. No question arose as to the onus of proof in that case. The fact of the existence of the fencing was admitted. So far from supporting the judgment delivered by Mr. Justice Hodgins, that decision in *McKay's Case* (1) seems to me to be against the learned judge's conclusion.

The only question which appears to me to be open to any doubt with respect to this sub-section 3 is as to which party the onus of proof lies upon. Is a complainant obliged to disprove the existence of the facts which would justify a higher rate of speed than ten miles an hour over level highway crossings in thickly populated districts, or does the onus lie upon the company of justifying a rate of speed in excess of the statutory limit ?

Read in connection with sub-section 5 of the same section 275 which extended the time "to the company" until the 1st of January, 1910, to comply with the provisions of sub-section 3, I cannot doubt that the onus of proof rests upon the company.

They must justify a rate of speed exceeding the statutory limit, and as they did not attempt to do so in this case, but admit a speed of 45 or 50 miles which the jury have found as the cause of the accident, and as I do not think the trial judge misdirected them, I am of opinion that the appeal should be allowed with costs in this court and in the appellate division and the judgment of the trial court restored.

As to the cross-appeal, I think the evidence sufficient to uphold the finding of the jury that the plain-

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tiff exercised reasonable care in approaching the railway line and that such care would not have avoided the accident.

I would dismiss the cross-appeal with costs.

DUFF J.—I think the judgment in favour of the appellant given at the trial can be sustained under either sub-section 3 or sub-section 4 of section 275 of the "Railway Act" as amended by 8 & 9 Edw. VII. ch. 32, sec. 13. The whole of section 13 is as follows:—

Sec. 13. Section 275 of the "Railway Act" is amended by adding thereto the following sub-sections:—

3. Subject to the provisions of sub-section 4 of this section no train shall pass over any highway crossing at rail level in any thickly peopled portion of any city, town, or village at a greater speed than ten miles an hour, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board in force with respect to such crossing or unless permission is given by some regulation or order of the Board. The Board may from time to time fix the speed in any case at any rate that it deems proper.

4. No train shall pass over any highway crossing at rail level at a greater speed than ten miles an hour if at such crossing an accident has happened subsequent to the first day of January, nineteen hundred, by a moving train causing bodily injury or death to a person using such crossing, unless and until such crossing is protected to the satisfaction of the Board; and no train shall pass over any highway crossing at rail level at a greater speed than ten miles an hour in respect of which crossing an order of the Board has been made to provide protection for the safety and convenience of the public and which order has not been complied with.

5. The company shall have until the first day of January, one thousand nine hundred and ten, to comply with the provisions of sub-section 3 of this section.

First, as to sub-section 4: the evidence shewed that at the crossing in question an accident had occurred on the 11th of October, 1910, when one George Lillicrop was injured in the following circumstances:—In broad daylight at about 4 o'clock in the afternoon of

the day mentioned Lillicrop, who was driving on the highway between Burlington and Aldershot, and being very near the railway track within the line of the railway fence was warned that a train was coming; there being no chance to turn round, and judging that to be the safest course, he hurried his horse across the track and succeeded in crossing just in time to escape the on-coming train with the result, however, that his horse ran into the ditch and he was thrown out and severely injured. I think that in these circumstances it can be affirmed that "an accident has happened by a moving train causing bodily injury to a person using the crossing in question" within the meaning of this sub-section; and that the crossing, therefore, falls within the letter of the description of the class of crossings to which the provisions of the sub-section apply. It is contended, however, and this appears to have been the view taken by the majority of the Court of Appeal, that a term ought to be implied to the effect that the operation of the section is limited to those crossings at which an accident has occurred of which the railway company has had notice or ought to be held to have had notice through its employees. I am unable to find any satisfactory ground upon which such an implication can be based. I do not think we are entitled to speculate as to the theory upon which this legislation proceeds, or to read into it qualifying provisions with the object of causing it to conform to our own notions as to how far a legislature might reasonably be expected to go in measuring the responsibility of railway companies for injuries suffered through accidents at level crossings. The provision in question falls very far short of the point to which

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some people would go. I do not think we are entitled to assume that if the legislature intended the enactment only to go into effect subject to the qualification suggested it would have failed to express that qualification. In this view of the section the liability of the company is not disputed.

As to sub-section 3: It is not denied there was evidence from which the jury might properly find that the crossing in question is situated in a thickly peopled portion of the Village of Burlington; and no evidence was given shewing that the crossing was constructed or maintained and protected in accordance with the orders of the Board of Railway Commissioners or that any permission had been given by the Board for the running of trains at a greater speed than 10 miles an hour over it.

I think the effect of the sub-section is this: The rule is laid down with regard to crossings situated as the statute describes that the speed of trains over them shall be limited to ten miles an hour. That is the general rule. Exceptions to that rule may, however, arise in two ways. First, there is the case in which the Board of Railway Commissioners make special provision with regard to a particular crossing for its construction, maintenance, and protection. In that case the general rule does not apply. Then there is the other case in which permission is given by the Board for the running of trains at a higher rate of speed. If a railway company alleges that a particular crossing is taken out of the operation of the general rule by reason of falling within one or other of these exceptional classes of cases, then the onus is on the railway company to establish the facts necessary to bring the crossing

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within the exception. This is so on the simple principle that where a party affirms the existence of a state of facts which is alleged to take his case out of the operation of a general rule, then, generally speaking, the onus is on him to establish that state of facts. The case of *The Grand Trunk Railway Co.* v. *McKay* (1) seems to have been misunderstood. I can find nothing in the decision or in any of the judgments to support the view advanced by the respondents.

ANGLIN J.—Sub-sections 3 and 5 of section 275 of the "Railway Act," as enacted by 8 & 9 Edw. VII., ch. 32, sec. 13, are as follows:—

13. Section 275 of the "Railway Act" is amended by adding thereto the following sub-sections:—

3. Subject to the provisions of sub-section 4 of this section, no train shall pass over any highway crossing at rail level in any thickly peopled portion of any city, town or village at a greater speed than ten miles an hour, unless such crossing is constructed and thereafter maintained and protected in accordance with the orders, regulations and directions specially issued by the Railway Committee of the Privy Council or of the Board in force with respect to such crossing, or unless permission is given by some regulation or order of the Board. The Board may from time to time fix the speed in any case at any rate that it deems proper.

* * * * * *

5. The company shall have until the first day of January, one thousand nine hundred and ten, to comply with the provisions of sub-section 3 of this section.

Upon sufficient evidence the jury at the trial found that the plaintiff was injured by the negligence of the railway company; and, in answer to the question, "What did the negligence consist of?" they said, "By excessive speed through a thickly populated district." The speed was admittedly about 40 miles an hour and the district was proved to be thickly populated. The

(1) 34 Can. S.C.R. 81.

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accident, as found by the jury, resulted from the defendants' railway train being driven at this high rate of speed; and it admittedly occurred on a highway crossing in the town of Burlington.

The defendants contend that the learned trial judge erred in charging the jury that sub-section 3, above quoted, imposed on them the duty of restricting their speed at the Burlington crossing to ten miles an hour under the circumstances in evidence in this case. No evidence had been given of the existence or non-existence of any

> orders, regulations or directions specially issued by the Railway Committee of the Privy Council, or of the (Railway) Board in force with respect to (the) crossing

in question as to its construction or protection, or of any "permission given by a regulation or order of the Board" to run at a higher speed than 10 miles an hour. The Appellate Division was of the opinion that the direction of the learned judge

> was wrong in not qualifying the statement by the exception contained in section 275, that is as to protection, and was not warranted by the Railway Act as interpreted in *Grand Trunk Railway Co.* v. *McKay*(1).

I presume that by this the court meant to hold that the burden of proving that the defendants were not within the exception or exemption created by the concluding clause of sub-section 3 lay upon the plaintiff. Otherwise I am unable to understand the judgment on this branch of the case.

The question is one of interpretation of sub-section 3 of section 275, read with, and in the light of, sub-section 5. Sub-section 3 differs materially from the pro-

(1) 34 Can. S.C.R. 81.

vision considered in the *Grand Trunk Railway Co.* v. *McKay*(1), which limited the speed to

> six miles an hour unless the track is properly fenced in the manner prescribed by this Act.

It was proved that the railway was properly fenced on both sides as required by the Act; and it was, therefore, held that the conditions upon which the rate of speed was limited did not exist. No question arose as to where the onus lay of proving the existence or non-existence of the conditions upon which the statute makes the speed limit inapplicable.

Sub-section 3 of section 275 contemplates an order, regulation or direction as to construction and protection, specially made in respect to the particular crossing, either dealing with it individually or as one of a class to which it had been ascertained to belong either by the Railway Committee of the Privy Council or by the Railway Commission. Its operation was suspended by sub-section 5 for a definite period in order to give the company an opportunity to obtain such order, regulation or direction, if none already existed, and to comply with it, or to procure the requisite permission. After the expiry of the period allowed the obligation to limit the speed to ten miles an hour came into force unless such special order, regulation or direction as to protection existed or had been obtained and had been complied with, or permission for a speed exceeding ten miles an hour had been given by some regulation or order of the Railway Board. The sub-section in effect gives permission to run at a rate exceeding ten miles an hour on such order, regulation and direction being procured and

(1) 34 Can. S.C.R. 81.

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complied with, or upon permission being obtained. *Legh* v. *Lillie*(1). The obtaining and compliance with the order, regulation and direction as to construction and protection, or procuring permission for the higher rate of speed is in the nature of a condition precedent, fulfilment of which has to be established before the right to exceed the speed of ten miles an hour arises.

The clause of sub-section 3 introduced by the word "unless" creates an exception or exemption from the duty or obligation of limiting speed imposed generally by the earlier clause of the sub-section. "Unless" is an apt word to introduce an exception. *Wilson* v. *Smith*(2), at page 1556. It "unloosens" what follows it from what precedes it. *Manning, Bowman & Co.* v. *Keenan*(3), at page 57. The question is upon whom rested the burden of proving whether the defendants were or were not within this provision of exception or exemption ?

Although as a general rule where a plaintiff relies upon the breach by the defendant of a statutory provision which imposes a duty, but contains an exception, he must allege and shew that the defendant is not within the exception, *Spieres* v. *Parker*(4), at page 145; *Williams* v. *The East India Co.*(5); Dwarris on Statutes (Potter ed.), p. 119 (a rule which has been most often enforced in criminal and penal cases; *Rex* v. *Jarvis*(6), at page 154; *The King* v. *Jukes*(7); "where the subject-matter of the allegation lies peculiarly within the knowledge" of the defendant, while,

(1) 6 H. & N. 165, at p. 169.
(2) 3 Burr. 1550.
(3) 73 N.Y. 45.
(4) 1 T.R. 141.
(5) 3 East 192.
(6) 1 Burr. 148.
(7) 8 T.R. 542.

as a matter of pleading, the plaintiff should allege the negative, Bullen & Leake's Precedents of Pleading, 3 ed., p. 60, the defendant must adduce the evidence necessary to bring himself within the exemption; and this exception from the general rule is recognized in criminal cases notwithstanding the strong presumption of innocence. Taylor on Evidence, par. 376*a*; *Apothecaries' Co.* v. *Bentley*(1); *The King* v. *Turner* (2); *Morton* v. *Copeland*(3); *Kent* v. *Midland Railway Co.*(4); *Rex* v. *Thistlewood*(5); *Mahony* v. *Waterford, Limerick and Western Railway Co.*(6), at page 280. It should perhaps be noted that in the statute, 55 Geo. III., ch. 194, sec. 14, dealt with in *Apothecaries' Co.* v. *Bentley*(1), the clause of exception is introduced by the word "unless." If the defendants in the present case had the right to run at a speed exceeding ten miles an hour over the Burlington crossing, they must be presumed to know of the special orders, regulations or directions, or permission under which they enjoy that right. Having regard to sub-section 5, the subject-matter of the existence or non-existence of the conditions under which the exception or exemption provided for in subsection 3 arises, lies peculiarly within their knowledge.

No question has been raised either in the provincial courts or in this court as to the sufficiency of the plaintiff's pleading. Had objection been taken on that ground any necessary amendment would, no doubt, have been allowed. The burden of proving that

(1) 1 Car. & P. 538; R. & M. 159.
(2) 5 M. & S. 206.
(3) 16 C.B. 517.
(4) L.R. 10 Q.B. 1.
(5) 33 How. St. Tr. 682 at p. 691.
(6) [1900] 2 Ir. R. 273.

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such special order, regulation or direction had been made and complied with, or that such permission had been given as sub-section 3 contemplates, rested, I think, upon the defendant company. In that view of the case the direction of the learned trial judge was right, and the judgment for the plaintiff should not have been disturbed.

If the contrary view of the construction of sub-section 3 had prevailed the logical result would appear to have been not to order a new trial for misdirection, but to dismiss the plaintiff's action on this branch of his case, unless, as a matter of indulgence, he should have been allowed a new trial to supplement his evidence, because the former trial had proceeded upon a misapprehension as to the effect of sub-section 3.

The view which I have taken as to the construction and effect of sub-section 3 renders it unnecessary to consider the questions raised in regard to sub-section 4, as to the kind of previous accident to which that sub-section refers and as to its applicability where neither the railway company nor its officials or servants had knowledge of such previous accident. On these points I express no opinion.

The appeal should be allowed with costs in this court and in the Appellate Division and the judgment of the learned trial judge should be restored.

BRODEUR J.—I would allow this appeal for the reasons given by Mr. Justice Duff.

Appeal allowed with costs.

Solicitor for the appellant: *E. H. Cleaver.*
Solicitor for the respondent: *W. H. Biggar.*

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THE ANGLO-AMERICAN FIRE INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS; *Dec. 4, 5. *Dec. 23.

AND

CHARLES A. HENDRY AND THE GAULT BROTHERS COMPANY (PLAINTIFFS) ..... RESPONDENTS.

THE MONTREAL-CANADA FIRE INSURANCE COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

CHARLES A. HENDRY AND THE GAULT BROTHERS COMPANY (PLAINTIFFS) ..... RESPONDENTS.

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

Fire insurance — Application—Misrepresentation—Materiality—Statutory conditions—Variation.

In an action on a policy insuring a stock of merchandise the company pleaded — That the stock on hand at the time of the fire was fraudulently over-valued. That the insured in his application concealed a material fact, namely, that he had previously suffered loss by fire in his business. That the action was barred by a condition in the policy requiring it to be brought within six months from the date of the fire. This was a variation from the statutory condition that it must be brought within twelve months.

Held, affirming the judgment of the Appellate Division (29 Ont. L.R. 356) that the evidence established the value of the stock at the

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

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time of the fire to be as represented by the insured; that the materiality to the risk of the non-disclosure of a former loss by fire was a question of fact for the judge at the trial who properly held it to be immaterial; and that the question whether or not the variation from the statutory conditions was just and reasonable depended on the circumstances of the case, and the courts below rightly held that it was not.

Held, per Davies, Anglin and Brodeur JJ.—That the insured having supplied on demand, duplicate copies of the invoices of goods purchased between the last stock-taking and the time of the fire as well as copies of the stock-taking itself, was not obliged to comply with a further demand for invoices of purchases prior to said stock-taking.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment at the trial in favour of the plaintiffs.

The facts of the cases were not in dispute. The questions at issue to be decided are stated in the above head-note.

DuVernet K.C. and *Heighington* for the appellants. The trial judge should not have held that the non-disclosure of the previous fire was not material to the risk. An insurance company is entitled to knowledge of such a fact in order to refuse the risk if so inclined. See *Western Assur. Co.* v. *Harrison* (2). And evidence of other insurers should not have been admitted. *Thames and Mersey Marine Ins. Co.* v. *"Gunford" Ship Co.* (3), at page 538. As to materiality see also *Ionides* v. *Pender* (4); *Gillis* v. *Canada Fire Assurance Co.* (5).

In many cases a six months' limitation of action has been held just and reasonable. See *Home Ins. Co.* v. *Victoria-Montreal Fire Ins. Co.* (6), and cases re-

(1) 29 Ont. L.R. 33, *sub nom. Strong* v. *Insurance Companies.*
(2) 33 Can. S.C.R. 473.
(3) [1911] A.C. 529.
(4) L.R. 9 Q.B. 531.
(5) Q.R. 26 S.C. 166.
(6) [1907] A.C. 59.

ferred to in May on Fire Insurance, ed. of 1900, vol. 2, page 1146.

Rowell K.C. and *George Kerr* for the respondents, referred to *Hartney* v. *North British Fire Ins. Co.* (1); *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.* (2).

THE CHIEF JUSTICE.—For the purposes of this appeal the two cases were consolidated.

The questions involved relate chiefly to: 1o. the materiality of the misrepresentation of the insured in his application for insurance with respect to a former fire; 2o. the amount and value of the goods insured; 3o. the variation in the policies proscribing legal proceedings after a period of six months.

The question of the materiality in a contract of insurance is declared by the Ontario Act (sec. 156, sub-sec. 6) to be a question of fact for the jury, or for the court if there is no jury as in this case, and the learned trial judge found that the representation was not material. On appeal that question was disposed of by the learned Chief Justice of Ontario in two paragraphs of his judgment which I adopt and incorporate here as the exact expression of my own views.

> The circumstances relied on by the learned trial judge for coming to that conclusion are fully stated in his reasons for judgment, and it is unnecessary to repeat them or to say more than that I am unable to say that he erred in so deciding.
>
> It may be observed, in view of the importance that counsel for the appellants contended was attached by insurance companies to the information which was sought to be obtained by the question as to the applicant for insurance having had property destroyed by fire, that no such question was asked by the Crown Life Insurance Company.

(1) 13 O.R. 581. (2) 44 Can. S.C.R. 40.

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The rule seems to be now well settled that the evidence of underwriters and insurance brokers as to materiality is admissible (17 Halsbury, page 412, No. 805) and the evidence of Messrs. McLean, Curry and Nichols amply justifies the conclusion reached by the trial judge that the misrepresentation was not material.

I would also refer on this branch of the case to the "Marine Insurance Act" (Imp.), 1906, 6 Edw. VII., ch. 41, sec. 18 (4) and (7).

To what the Chief Justice said I would merely add that Mr. DuVernet's very lucid and frank analysis of the evidence has convinced me that in the answer given to the question as to the other fires there was no lack of *bona fides* on the part of the assured, but rather a *bonâ fide* mistake as to the nature of the information which the question was intended to elicit. If the incident is open to two constructions the court ought to adopt that construction which is most favourable to the assured (*Anstey* v. *British Natural Premium Life Association*) (1), and certainly the concurrent findings of the two courts below conclude that question on this appeal. (D. 80, 1, 410; S.V. 81, 1, 223.)

I am also satisfied on the evidence that the stock-in-trade on hand at the time of the fire exceeded in value the amount of the insurance carried by Jeffrey. He took stock in August, 1910, and I agree with the courts below that the evidence establishes it was well and accurately taken. I attach great importance to the corroborative evidence of the commercial travellers whose business it is to estimate the amount of stock carried by their customers. If the stock list then made is accepted as a safe point of departure, there is

(1) 24 Times L.R. 872.

very little in dispute as to the amounts of the purchases and sales made from that time up to the date of the fire. Mr. Grant, the appellants' adjuster, admits, on the assumption that the stock was honestly taken in August, 1910, that there would be on hand in the store at the time of the fire goods of a value substantially in excess of the total amount of insurance. Mr. Gordon, another of the appellants' adjusters, is of the same opinion. In the presence of such evidence the appeal must fail on that point also.

The reasonableness of the variation in the prescription clause is so fully and learnedly discussed in the light of the decided cases by the Chief Justice of Ontario, that it would be mere presumption to attempt to add anything to what he has said. I would merely refer to *Home Insurance Co. of New York* v. *Victoria-Montreal Fire Ins. Co.*(1), and Planiol, vol. 2, No. 2158, 3rd ed.

I would dismiss these appeals with costs.

DAVIES J.—These appeals from the judgments of the Appellate Division of the Supreme Court for Ontario were heard together, there being one appeal book only and the defence of both companies appellants to the actions against them being the same.

The judgments appealed from affirmed that of the trial judge who heard the case twice and who gave judgment for the plaintiff against each of the defendant companies after the second hearing for the amounts insured by them under their respective policies of insurance with interest and costs of all proceedings subsequent to the time of the delivery of his first judgment on the 2nd January, 1912.

(1) [1907] A.C. 59; 35 Can. S.C.R. 208.

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Three principal grounds of objection to the judgment appealed from were stated and argued at not unreasonable length.

The first ground was the alleged fraudulent valuation of the goods destroyed by the fire; the second, the reasonableness of the variation of statutory condition 22 as to the time allowed for bringing suit against the company for the recovery of claims under the policies; and the third the avoidance of the policy in each company by an alleged misrepresentation in the applications for insurance.

As to the first ground, the fraudulent over-valuation of the goods destroyed by the fire, I agree fully with the findings of the learned trial judge, who had the advantage of hearing the case tried before him twice, confirmed by the Appellate Division, that the charge of over-valuation is unfounded.

There had been a stock-taking by Jeffrey, the insured and owner of the goods, in the month of August preceding the December fire. The evidence shewed clearly that this stock-taking was participated in by all of the employees of the insured, as well as by Jeffrey himself, that the quantities and values of the goods were taken down at first upon sheets of paper which were handed in by each of the employees to Jeffrey and then by him and one of his assistants copied into three stock books. Before, however, it was so transcribed into these books these stock sheets were seen by the companies' own agent, Gillespie, who took the applications for the policies sued upon; and he states that the amount of stock as shewn by these original stock sheets was $24,000, or thereabouts.

There were, it is true, some conflicting estimates made from general observation of the stock by com-

mercial travellers of the value of the goods upon the shelves and in the store as they "sized them up," to use the expression of one of them, after the August stock-taking and before the fire in December. Some of these estimates agreed substantially with the result of the stock-taking while others were much below it.

I have, as requested by Mr. DuVernet in his argument, gone carefully through all the evidence called to our attention by him on this material question and read much not specially referred to; and the result is that I agree with the findings of the trial judge concurred in by the Appellate Division that "the stock-taking in August, 1910, was well and accurately done and its results carried honestly and carefully into the three books constituting Exhibit 6," and further, that "at the time of the fire there was in the store approximately $25,000 worth of goods, estimated at cost prices."

These two findings concurred in by the Appellate Division, and upon the correctness of which I cannot find evidence sufficient to cast reasonable doubt, dispose at once of the whole charge of fraudulent over-valuation.

If the stock-taking in August was an honest one, as I hold it was, there cannot be any reasonable doubt under the evidence as to the daily sales between then and the date of the fire and the purchases of goods between these dates that the value of the stock at the time of the fire was substantially in excess of $21,000, the total amount of insurance.

As to compliance by the assured with the conditions of the policies relating to furnishing proofs of loss, I need only say that I fully agree with the findings of the trial judge concurred in by the Appellate

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Division that these conditions were fully complied with when on the 17th March, 1911, Jeffrey delivered to the companies, in accordance with their request, copies of the stock-taking in August with duplicate copies of the invoices of all goods purchased between such stock-taking and the date of the fire. I do not think the further demands of the companies for other invoices of purchases before the stock-taking were reasonable and I agree that complete proofs of loss were delivered on that date, 17th March, 1911.

In 60 days afterwards the claims became payable. The actions brought before that date were premature, but those brought on December 20th, 1911, were in time, on my conclusion with respect to the variation clause as to time.

Then comes the question of the reasonableness of the variation of the statutory condition absolutely barring every action, suit or proceeding, for the recovery of any claim under the policy "unless commenced within six months after the loss or damage shall have occurred."

I concur in the conclusions of law reached by the Appellate Division on this point which is in accordance with the judgment of this court in *Eckhardt & Co.* v. *The Lancashire Ins. Co.*(1), that the justice and reasonableness of a variation or addition must be determined upon the circumstances of the case in which it is sought to be applied. Applying that test to the case before us, I have no difficulty in concurring with the trial judge and the Appellate Division that the variation reducing to *six months from the happening of the loss* the twelve months allowed by the statutory

(1) 31 Can. S.C.R. 72.

conditions for bringing the action is not reasonable or just.

The fire happened on the 25th December, 1910. The original proofs of loss were delivered shortly afterwards. In my opinion, the companies were entitled to demand further proofs of the loss and I think those supplied to them on the 17th March, 1911, complied with the demand to the full extent of the insured's duty and that the still further proofs demanded of all invoices of goods purchased by him before his stock-taking in August, 1910, from the time he began business, or of duplicates thereof, were not such proofs as he was bound to furnish. If it was held that he was bound to comply with all the companies' demands in this regard, it is at least doubtful whether he could have satisfactorily furnished them in time to have brought his action within the six months of the variation clause and goes to shew how unreasonable the limitation is.

The first action was commenced on the 26th April, 1911, and in my view was, therefore, prematurely brought. The second action was begun on the 20th December, 1911, and was in time if the statutory condition 22 is applicable, but too late if the variation was held reasonable. As I hold the variation clause unreasonable the second action was in time.

There remains the question whether the policies were avoided by the negative answer given to the question in the applications for insurance, "Have you ever had any property destroyed by fire?" The fact that the applicant signed the application in blank requesting the agent to fill it up and that the agent did so in accordance with a similar answer in another application to another company given to him by Jeffrey does

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not enable the applicant to escape the effect of his answer. The answer must be taken to be his own. Nor do I give much weight to Mr. Rowell's argument rather faintly pressed that although, as a fact, the applicant Jeffrey had suffered a previous fire the loss had been occasioned by smoke from the fire and not by actual contact with the flames or heat. I prefer to base my judgment on the ground that the question of the materiality of the answer made by Jeffrey to the question, though technically and literally inaccurate, was one of fact for the jury, or for the court, if there is no jury, to determine. Would the literal facts, if given truly in the answer, have increased in the judgment of the companies the moral risk and influenced them to refuse the risk? The trial judge decided that under the circumstances the answer was not material. The previous fire, if it could be dignified with that name, was a very small affair and took place years previously not on the premises where the fire in question in this action took place, but amongst some rubbish in the cellar of a building occupied by Jeffrey in another town in which he then carried on his business. There was a good deal of smoke which damaged some goods. The company which had insurance on the goods damaged investigated the facts, paid some $350 for damages and continued on their insurance. The learned trial judge goes fully into the facts and reasons for the conclusion reached by him and the Appellate Division concurs with him. I am not able to say that both courts were wrong.

There was a cross appeal by the respondent as to the disposition made of the costs; but in view of the conclusion I have reached as to the first action having been prematurely brought I see no reason to interfere with the disposition made of the costs.

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The appeal and cross-appeal should both be dismissed, each with costs in this court.

DUFF J.—I agree that the impeached variation from the statutory conditions was not just and reasonable within the meaning of the Act. That is the only point to which it is necessary to refer specifically.

I think the appeal should be dismissed with costs.

ANGLIN and BRODEUR JJ. concurred with Davies J.

Appeal dismissed with costs.

Solicitors for the appellants: *Heighington, Macklem & Shaver.*

Solicitors for the respondents: *Kerr, Bull, Shaw & Montgomery.*

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*Oct. 28, 29.
*Nov. 3.

JAMES H. BROWNLEE (PLAINTIFF) . . APPELLANT;

AND

HARRY McINTOSH (DEFENDANT) . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Crown lands—Location—Public policy—Evasion of statute—B.C. "Land Act," 8 Edw. VII. c. 30, ss. 34, 36—Sale of Crown lands—Principal and agent—Commission on sales—Quantum meruit—Tainted contract.

B., who had laid out and inspected Crown lands as a Government surveyor, furnished information to the defendant and an associate which enabled them to secure choice locations, comprising over 7,000 acres of these lands, in the names of a number of persons nominated by them and employed as "stakers." Subsequently B. assisted in the disposal of the lands thus secured to innocent purchasers under an arrangement with the defendant and his associate that he was to participate in any profits which should be obtained on such sales. In an action by B. to recover compensation for the services he had rendered in regard to these sales:—

Held, that the circumstances disclosed a scheme concocted in opposition to the policy of the British Columbia "Land Act" and in violation of its provisions respecting the disposal of Crown lands; consequently, the agreement, being tainted with the character of the scheme, ought not to be enforced by the courts.

Per Idington and Anglin JJ.—The plaintiff's claim fails for want of evidence of any request by the defendant that he should render the services in respect of which remuneration is claimed nor an agreement to remunerate him for assistance in effecting the sales in question.

The judgment appealed from (3 West. W.R. 725; 23 West. L.R. 30; 9 D.L.R. 400) stood affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of

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

(1) 3 West. W.R. 725; 23 West. L.R. 30; 9 D.L.R. 400.

Grant Co. J., at the trial, and dismissing the plaintiff's action with costs.

The circumstances of the case which are material to this report are stated in the head-note.

S. S. Taylor K.C. for the appellant.

W. B. A. Ritchie K.C. for the respondent.

THE CHIEF JUSTICE concurred with Duff J.

DAVIES J.—I would dismiss this appeal with costs.

IDINGTON J.—I cannot find any contract ever was made between the appellant and respondent entitling the former to make the claims he sets up.

If the dealings had between the parties, are kept in view, there is nothing in the expressions respondent is alleged to have used that can properly be twisted into a foundation for such a claim for commission as the learned trial judge allowed.

And if under the circumstances I had felt appellant entitled to some compensation for such time as he gave to Mr. Coote, I would say he had been amply compensated by what Mr. Garnham has already paid him, and is not entitled to levy on the co-adventurers a duplicate thereof, even if they are not partners.

The appeal should be dismissed with costs.

DUFF J.—I do not think it is necessary to consider whether the Court of Appeal was justified in reversing the finding of the learned County Court judge on the facts; I have come to the conclusion that the action ought to be dismissed upon another ground.

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Duff J.

The plaintiff bases his claim upon a contract which he alleges he entered into with the defendant and his associate Garnham in the Spring of 1911, by which they agreed that if the plaintiff would assist them in selling certain lands in respect of which they then had a contract of purchase with the British Columbia Government they would remunerate him. The land in question comprises about 7,000 acres in the northern part of British Columbia. These lands had been surveyed by the plaintiff under contract with the Government. In the preceding Autumn the plaintiff, acting for the defendant and his associate, had applied for the purchase of the lands in the names of different persons — there were ten or twelve parcels in all — nominated by them; and the applications having been accepted he had procured the execution of conveyances by the applicants to the defendant McIntosh in trust for Garnham and McIntosh. For this the appellant was paid 25 cents an acre. Later, in the Spring of 1911, according to the plaintiff's story, McIntosh and Garnham made the further arrangement already mentioned upon which the action was brought.

It is perfectly obvious that the scheme entered upon and successfully carried out by McIntosh and Garnham, through the agency of the plaintiff, was a fraud upon the "Land Act." The conditions upon which surveyed public lands might be purchased, in 1910, were those laid down in sections 34 and 36 of the "Land Act" of 1908; and one of those conditions is expressed in sub-section 11 of section 34, in the following words:—

34.—(11) No person who has given notice that he has applied for permission to purchase lands under the provisions of this section

shall be entitled to give notice of his intention to apply for permission to purchase any other lands under the provisions of this section until after he shall have either abandoned his application for permission to purchase or acquired a Crown grant of the lands for which he had previously given notice of his intention to apply for permission to purchase, and shall have obtained a certificate from the Commissioner that he has improved the said land to the extent of three dollars per acre; land which is *bonâ fide* cultivated shall be deemed to be improved land, and in other respects section 22 of this Act shall apply: Provided always, that no person shall purchase more than one tract of land, of whatever extent, under this section, until the above-mentioned improvements have been completed in accordance with the provisions of this Act.

McIntosh, Garnham and the plaintiff would not, of course, be entitled to purchase, under the provisions of this section, more than three separate tracts of land without having complied with the conditions as to improvements. The plan adopted to evade these provisions was to make a number of applications in the names of the nominees of McIntosh and Garnham. There can be no question that the real applicants were McIntosh and Garnham. The scheme was to obtain Crown grants of these lands in violation of the provisions of the statute, although in professed compliance with them, and then sell the lands to purchasers, who, in the ordinary course, would know nothing of the contrivance that had been resorted to. Any agreement entered into for the purpose of carrying out or facilitating the carrying out of this fraud upon the "Land Act" would be an agreement which it would be the duty of the courts to refuse to enforce as soon as the character of it should become apparent. The contract set up by the plaintiff under which he agreed to assist in the sale of the lands is necessarily tainted by the character of the scheme as a whole. It follows that the action ought to be dismissed. For these reasons I concur in dismissing the appeal with costs.

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ANGLIN J.—The purchaser who bought the property, on the sale of which the plaintiff claims a commission, was introduced to the defendant and his partner by one Jones, an agent employed by them, to whom they paid the ordinary commission on the sale.

I fail to find in the record any evidence that the defendant ever agreed with the plaintiff to pay him for assisting in the sale of this property a commission or a remuneration in addition to the 25 cents an acre paid him for procuring the property for the defendant and his partner and furnishing them with reports and information concerning it. Neither do I find evidence of any request from the defendant and his partner, or either of them, that the plaintiff should render the services in respect of which he sues from which, in the circumstances of this case, a promise to pay him for those services should be inferred as a matter of law.

The appeal, in my opinion, fails and should be dismissed with costs.

BRODEUR J. concurred with Duff J.

Appeal dismissed with costs.

Solicitors for the appellant: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for the respondent: *St. John & Jackson.*

THE TRADERS BANK OF CANADA..APPELLANT; 1913

AND *Oct. 29. *Nov. 3.

HERBERT LOCKWOOD, LIQUIDATOR, AND JAMES MCINNES, APPOINTED TO REPRESENT WAGE-EARNERS..... } RESPONDENTS.

In re THE FORT GEORGE LUMBER AND NAVIGATION COMPANY (IN LIQUIDATION).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Winding-up proceedings—Company in liquidation—Sale of assets—Consent to sale of mortgaged ship—Sale by order of court—Mariners' liens—Sale free from incumbrances—Special fund—Privileged charge—Priority—Valuation of security—Release of mortgage—Marshalling securities—Subrogation.

A ship which belonged to a company in liquidation was mortgaged to a bank and was also subject to maritime liens for seamen's wages due at the time of the winding-up order. The bank consented to the sale of the ship, by the liquidator, free from incumbrances at the same time as he sold the other assets of the company by direction of the court. He sold the ship separately and free from incumbrances for $5,000, which was credited, as a special fund, in his accounts. The bank subsequently filed its claim, valuing its security on the ship at $5,000. The purchasers took the ship to sea and it became a total loss. The bank then made claim to the whole of the fund realized on the sale of the ship and their claim was opposed on behalf of the wage lien-holders claiming the right to be paid by priority out of this fund.

Held, affirming the judgment appealed from (4 West. W.R. 1271; 25 West. L.R. 92; 12 D.L.R. 807) that by its consent to the sale of the ship under direction of the court, free from incumbrances,

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

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the bank had assented to the conversion thereof released from its mortgage and that the proceeds of the sale of the ship should be apportioned amongst the creditors in the order and according to the priorities provided by law; consequently it was not entitled to any special charge on the fund realized upon its sale. *Held*, further, that the rights of the wage-earners holding maritime liens were not affected by the loss of the ship after it had been sold by the liquidator under the order of the court and that they were entitled to recover their claims out of the fund realized upon the sale of the ship in priority to the mortgagee.

[MEMO.—The court ordered that the rights of the bank, if any, to relief, by way of subrogation or marshalling of securities, should be reserved to be dealt with on further proceedings in the winding-up of the company.]

APPEAL from the judgment of the Court of Appeal for British Columbia (1), dismissing an appeal, by the present appellant, from certain orders by Clement J., in the matter of the winding-up of the Fort George Lumber and Navigation Company made, respectively, on the 15th, 22nd and 27th of January, 1913.

A statement of the case is given in the head-note. The orders in respect of which the appeal is asserted are recited in the judgment of Mr. Justice Duff, at page 600 of this report.

W. B. A. Ritchie K.C. for the appellant. The right and title of the bank in the "Chilco" was never divested. No "assignment and delivery" of the mortgage was required or made pursuant to section 77 of the "Winding-up Act," or at all. The vessel being valued at $5,000, and that being all that could be got for her, the liquidator had no interest in her, but for convenience she was sold with the other assets of the company, the liquidator in selling her acting on behalf of the bank. The $5,000 paid by the purchaser was the money of the bank, and no question of indemnity

(1) 4 West. W.R. 1271; 25 West. L.R. 92; 12 D.L.R. 807.

arose as no claim was made by the seamen under their liens before the loss of the ship, and by her loss the liens ceased to exist.

The liquidator has no power to make a sale which would divest the liens of the seamen; he represented the company, not its creditors. See *In re Clinton Thresher Co.*(1), *per* Boyd C., and *In re Longdendale Cotton Spinning Co.*(2), *per* Jessel M.R., speaking of the rights of a person having a charge by virtue of mortgage against property of a company in liquidation; also 2 Palmer's Company Precedents (10 ed.), p. 385, and *Keighly, Maxsted & Co.* v. *Durant*(3).

At all events, the seamen could not hold, as they did, their liens upon the ship till she goes down, and then contend that, the security having gone, they would elect to treat the sale as made on their behalf and ask for payment of their liens out of the purchase price. Assuming that they might, before the loss of the ship, have elected to treat the purchase price as representing the ship and enforce their liens then, they cannot do so after the loss of the ship because at the time when they came forward to so enforce their liens they had no liens.

The seamen were entitled, to the extent of $3,152.15, to rank as preferred creditors by virtue of section 70 of the "Winding-up Act" and the effect of taking the security held by the bank to pay the seamen is that the bank is forced, by reason of the liens, to pay off the preferred creditors, and upon no equitable principle can this enure to the benefit of the general creditors. If the order charging the seamen's wages upon the $5,000 which, but for such wages,

(1) 1 Ont. W.N. 445. (2) 8 Ch. D. 150.
(3) [1901] A.C. 240.

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would have been paid over to the bank, was correct then the order should have worked out the equitable rights of the bank by subrogating it to the rights of the seamen as preferred creditors.

Assuming that it is regarded that there was an assignment and delivery of the security to the liquidator within the meaning of section 77 of the "Winding-Up Act," and that the liquidator realized such security, the order charging the liens upon the proceeds of the sale and thereby diverting the money which would otherwise have gone to the bank should provide for payment of the $5,000 to the bank out of the general assets.

Travers Lewis K.C. for the liquidator, respondent. The liquidator has, throughout the proceedings, considered himself as custodian and trustee of the $5,000, proceeds of the sale of the "Chilco," and has been and is prepared to pay it, or any part of it, to whomsoever the court decides to be entitled thereto. The liquidator objects to being joined as a respondent in this appeal; and he is improperly referred to as a respondent, the matter in dispute being a question between the appellant and the class represented by the respondent McInnes; no order has been made joining the liquidator as a party.

The ship was sold, with the consent of the court, without incumbrances, the liquidator at that time having no knowledge of the existence of the maritime liens; the claims on that account were presented after the sale and before the loss of the ship. The sale was free from incumbrances as to the purchasers, but the court has held that this did not relieve the proceeds of the sale from being charged with any lien attaching to the ship.

With reference to the costs incurred by the proceedings taken by way of appeal in this court and in the lower courts, the liquidator submits that, as the dispute is one between the appellant and the wage-earners over a separate fund, these costs should not be borne by the general estate, but out of the separate fund affected; the moneys realized from the sale of the general assets should not be liable for these costs; it would be inequitable to permit these costs to be chargeable against the preferred creditors who are not parties to the dispute, and they have not had an opportunity of appearing in these appeal proceedings.

Chrysler K.C. for the wage-earners, respondents. In the Court of Appeal it was admitted that the wage-earners were entitled to a maritime lien on the ship at the time of her sale. The only question now involved is as to priority of the claims of the lien-holders or mortgagees to the $5,000 received from her sale, the price being insufficient to satisfy both claims.

If there had been no winding-up order made, and the mortgagees had proceeded under their mortgage, the seamen's lien would have attached to the moneys secured by the sale of the vessel. *The "Hope"*(1). How can the position of the parties be reversed and the mortgagee secure a priority over the lien of the seamen by electing to participate in the winding-up ?

When a company is being wound-up the proper procedure for the master and seamen is to place their claims in the hands of the liquidator, and participate in the winding-up, instead of proceeding *in rem. In re Australian Direct Steam Navigation Co.*(2), *per* Jessel M.R., at page 327; *In re Rio Grande do Sul Steamship Company*(3), *per* Brett J., at page 285.

(1) 28 L.T. (N.S.) 287. (2) L.R. 20 Eq. 325.
(3) 5 Ch. D. 282.

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In an action for winding-up the seamen are entitled to priority over the mortgagees for the proceeds of the sale of a vessel of the company being wound-up. *In re The Great Eastern Steamship Co.*(1).

The lien for wages was not lost by any slight delay there may have been in setting forth the claims and there is no evidence before the court that there was any such delay. *Munsen et al.* v. *The "Comrade"*(2). The money realized from the sale of the "Chilco" is still in the hands of the liquidator, who is an officer of the court. *The "Chieftain"*(3).

As to the contention that the seamen's lien followed the vessel and became extinct when it was wrecked and became a total loss, see *Re "Dawson"* (4).

The relationship which the liquidator bears the creditor is that of a trustee. He, without the knowledge or consent of the wage-earners, disposed of the ship, on which they had a maritime lien, for the sum of $5,000, and he is governed by the legal principles controlling a trustee. *In re Oriental Inland Steam Company*(5), *per* James L.J., at page 559, and Mellish L.J., at page 560; Lewin on Trusts (12 ed.), 1150, sec. 2; *Taylor* v. *Plumer*(6), *per* Lord Ellenborough, at pages 574 and 575.

Since the liquidator disposed of the ship, without the knowledge or consent of the wage-earners, and the money received has been kept by him in a separate account, that money is to be considered as the ship itself, and the seamen are entitled to be paid out of that fund in priority to all other claims. Moreover,

(1) 53 L.T. 594.
(2) 7 Ex. C.R. 330.
(3) Bro. & Lush. 212.
(4) Fonb. 229; 17 L.T. (O.S.) 100.
(5) 9 Ch. App. 557.
(6) 3 Maule & Sel. 562, at p. 574.

the ship was sold under an order of the court and, therefore, was free from incumbrance so that no lien could follow the vessel into the hands of the new purchasers.

THE CHIEF JUSTICE and DAVIES J. agreed with Duff J.

IDINGTON J.—Upon the application of the respondent, assented to by the appellant, in a winding-up proceeding, a vessel was sold free from incumbrances under an order of the court and, as a result thereof, it was taken from where, but for this sale, it should have remained and was totally wrecked.

The contention that thereby the rights of those having a lien on that so absolutely sold by order of the court and so dealt with are not only extinguished, but that the benefit of such extinction is to enure entirely to one of the prime movers in such a proceeding involves some strange conception of what law and courts of justice are for.

Yet to give effect to such a contention seems to be the chief if not the sole aim of this appeal.

If the appellant had sold by virtue of its mortgage, or by order of a court enforcing it, the absolute property in the vessel, these prior liens would have come out of the purchase money; or if it had been sold subject to such liens it would only have realized so much less.

But why need I labour with such a question? The appeal should be dismissed with costs for the reasons (so far as necessary for his decision) assigned by the learned Chief Justice of the Court of Appeal, speaking for the majority of the court.

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Duff J.

The time has not arrived for dealing with any equities the appellant may have as against others (who are not before us) than the lien-holders classed as wage-earners now before us.

DUFF J.—This is an appeal brought by the Traders Bank of Canada against the judgment of the Court of Appeal for the Province of British Columbia dismissing its appeal from three orders of the Honourable Mr. Justice Clement, dated, respectively, the 15th day of January, 1913, the 22nd of January, 1913, and the 27th day of January, 1913.

The Fort George Lumber and Navigation Company, Limited, was incorporated under the laws of the Province of British Columbia and empowered, *inter alia,* to carry on a general logging, lumbering and transportation business and, in connection with its business, owned and operated a number of river steamships on the inland waters of the province.

Upon the application of certain creditors the company was, by order of the Supreme Court of British Columbia, bearing date the 4th day of January, 1911, ordered to be wound up under the provisions of the "Winding-Up Act," R.S.C. ch. 144.

By a further order, dated the 23rd of January, 1911, the respondent, Herbert Lockwood, was appointed official liquidator and was directed to call for tenders for the purchase of the assets of the company in liquidation.

The assets comprised mill and camp equipment, machinery of various kinds, and certain river steamships, and these were at the time of the winding-up in various places in the neighbourhood of Fort George and Ashcroft.

Included in them was the steamship "Chilco," upon which the appellant, the Traders Bank, held a mortgage to secure the sum of $10,000.

At the time of the winding-up order the "Chilco" was imbedded in the ice in the Upper Fraser River and there was grave danger of her becoming a total loss when the ice broke up in the Spring of the year.

Pursuant to the order directing the sale of the assets, the liquidator advertised for tenders for the purchase of them, which advertisement included the steamship "Chilco" and equipment.

Pursuant to the said advertisement the two material tenders received were:—

1. A tender for the whole of the assets of the company, at a price of $65,100.

2. A tender, at the price of $37,500 plus $25,000 and interest (the sum alleged to be due the purchasers on certain mortgages held by them on the assets of the company), making in all $62,500 and interest.

After consultation with the committee of creditors of the company, and on behalf of the liquidator, it was arranged with the agents of the purchasers, John K. McLennan and Allan J. Adamson, that they should offer to purchase separately the steamship "Chilco" and equipment, which offer was made by the purchasers, and the liquidator accepted their offer to purchase the steamship for $5,000; thus bringing the total price the purchasers were to pay for the assets of the company, exclusive of book debts, to about the sum of $67,500. The appellant, the Traders Bank, was consulted and approved of the sale of the steamship for the price of $5,000, it being set out in the liquidator's acceptance of the offer of purchase that the

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liquidator made no guarantee as to the present existence of the steamship "Chilco."

The appellant, when asked by the respondent liquidator if it would consent to a sale of the steamer "Chilco" for the sum mentioned, gave its consent.

By order of the Chief Justice, dated 5th March, 1911, the liquidator was directed to sell the said assets upon the terms of the said offer and acceptance, which sale was carried out as directed, and the separate sum of $5,000 was agreed to be paid over by the purchasers to the liquidator for the steamship "Chilco," which sum of $5,000 was duly credited to the company in liquidation.

As directed by the court, and in the usual course of the winding-up proceedings, the respondent liquidator advertised for creditors of the company, and the appellant (by its manager in the City of Vancouver, Arthur Romaine Heiter) filed with the liquidator an affidavit, dated 1st April, 1911, whereby the appellant claimed to be a creditor of the company (among other claims) on a demand note for $10,000 and interest, and, further, stated that the appellant held as security for payment of the said note a mortgage on the steamship "Chilco," which the said appellant, the Traders Bank, valued at $5,000.

The purchasers took possession of the steamship and, in attempting to take the ship to Quesnel, it was wrecked, on or about the 27th April, 1911, and became a total loss.

Maritime liens were then advanced by the respondent McInnes and the class of creditors he represents and they claimed preference on the proceeds of the sale of the steamship. The appellant, the Traders Bank, claimed to be entitled absolutely to this $5,000.

By order, dated the 26th April, 1911, an inquiry before the district registrar at Vancouver was directed to ascertain, *inter alia,* what persons had earned wages upon the steamship "Chilco" and were still unpaid, the amount of such wages, and how much thereof was earned three months prior to the winding-up of the company.

By order, dated the 16th January, 1912, the said inquiry was extended to ascertain, *inter alia,* what maritime liens there were, if any, affecting the steamship "Chilco" at the date of its sale, and whether any and, if so, which of said liens were then and are now chargeable "upon the proceeds of the sale of the steamship 'Chilco'."

Pursuant to these orders the said inquiries were held and the report of the district registrar, dated 9th January, 1913, sets out his findings.

His report contained a finding that certain claimants, therein set out, were entitled to maritime liens on the steamship "Chilco" at the date of said sale in the amounts set opposite their respective names.

The report further contained a finding by the district registrar that "none of" the said liens were chargeable upon the proceeds of the sale of the "Chilco."

The respondent McInnes moved to vary the said reports and, by an order, dated 15th January, 1913, Mr. Justice Clement varied the said report by striking out the words "none of," and held that the said liens were chargeable upon the proceeds of the sale of the "Chilco," and further directed that the wage-earners be paid the total amount set after their respective names in the report out of the proceeds of the sale of the "Chilco" in priority to all other claims.

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A further order, dated the 22nd January, 1913, to the same effect, included the steamship "Chilco," and, by a further order, dated the 27th January, 1913, the reports were approved, subject to the said orders so varying the reports in part.

The appellant appealed to the Court of Appeal for British Columbia from the order of the 15th January, 1913, the order of the 22nd January, 1913, and the order of the 27th January, 1913, and, by judgment, dated the 22nd July, 1913, the Court of Appeal dismissed said appeal. The present appeal is brought from this judgment of the Court of Appeal, by special leave granted in this court, in Chambers, by order dated 16th September, 1913, on the appellant's undertaking to abide by any order as to costs, including costs as between solicitor and client and all other costs which this court may see fit to make.

I think the appeal fails. The liquidator undoubtedly intended to sell and the purchasers intended to buy the ship free from all incumbrances. The sale must be taken to have been authorized with a view to attain the object for which the winding-up proceedings were initiated, namely, to convert the assets of the company and to apply the proceeds in payment of the creditors according to the order and priority ordained by law. It is upon this hypothesis that any claim of the appellant itself against the proceeds of the sale in specie must rest; and, in consenting to the sale, the appellant must be taken to have assented to the fund being dealt with on this principle; and, on this principle, the superiority of the respondents' claim is indisputable.

It is true that the respondents did not, as the bank did, consent to the sale before it took place.

It may be assumed that, in the absence of circumstances giving rise to an estoppel, the sale itself would not, *ex proprio vigore,* pass to the purchaser a title to the ship free from their liens. On the other hand, if immediately after the sale they had attempted to enforce their rights by proceeding against the ship *in rem,* the court would, unquestionably, on the application of the purchaser, have directed the liquidator to apply the proceeds of the sale in his hands in satisfaction of the liens; and these proceeds being sufficient for the purpose would have restrained the proceedings of the lien-holders.

The lien-holders, moreover, might have elected, *mero motû,* to affirm the sale as passing to the purchaser a title free from incumbrances and to proceed themselves against the fund in the liquidator's hands.

Such having been the rights of the parties immediately after the conclusion of the sale, there appears to be no ground for holding that the subsequent loss of the ship in any way prejudiced these rights.

That circumstance does not appear to have altered the position of the parties in the least. The bank could not have withdrawn its assent to a sale free from its own mortgage on discovery, after the sale, of the existence of the liens. There is no suggestion that if the existence of the liens had been known prior to the sale any other course would have been taken. It seems impossible, therefore, to support the view that the lien-holders have, through the destruction of the ship, lost their right to elect to proceed against the fund. The rights of the bank, if any, to subrogation, or in respect to the marshalling of securities, do not appear to have been affected by the judgment appealed from; but it is better that this should be formally stated in the order dismissing the appeal.

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Anglin J.

The appeal should be dismissed with costs, and the liquidator should have his costs, as between solicitor and client.

ANGLIN J.—Although counsel for the appellant argued on behalf of his client that the case at bar should be regarded as one of the taking over of a security by the liquidator at a valuation, under section 77 of the "Winding-Up Act," in answer to a question from the bench, he frankly admitted that he did not himself consider that to be the proper view of it. He was, I think, well advised in making this statement.

That being so, I cannot understand how the appellant can successfully maintain that it is entitled to the whole sum of $5,000, received as proceeds of the sale of the "Chilco" without any provision being made for the satisfaction of the claims of the wage lien-holders, which, admittedly, constituted a charge upon the vessel itself in priority to the appellant's mortgage.

The correspondence between the solicitors for the purchasers and the solicitors for the liquidator seems to make it clear that, at least to the extent of $3,500, there was an agreement that this fund should be held subject to the claims of these lien-holders.

But, apart from any effect which should be given to that correspondence, it is obvious that the liquidator and the appellant mortgagee would, as vendors, be obliged to indemnify the purchasers against these liens, if they remained unaffected by the sale. If they were extinguished by the sale as charges on the vessel, or became unenforceable by proceedings against it, they attached upon the proceeds of the sale which

stood in its stead. In either case, as between the liquidator, representing the estate, and the appellant, the proceeds of the sale of the ship which were in the hands of the liquidator as an officer of the court and subject to equitable administration in the winding-up proceedings, were available to satisfy the claims of the lien-holders as against and in priority to the rights upon them of the appellant. The rights of the parties in regard to this fund were not affected by the subsequent destruction of the "Chilco."

But, in default of obtaining the whole sum of $5,000 to the exclusion of the lien-holders, the appellant asked at bar that it should be subrogated to the rights against the general estate of such of the wage lien-holders as should be paid out of this fund, which represents the appellant's security, or that there should be a marshalling of assets and securities in such manner that, to the extent to which it has two securities — one a lien on the vessel or its proceeds, in which the appellant is interested; and the other a preferential right to payment out of the general assets of the estate, in which the appellant is not interested — the lien-holders should be required to resort to and exhaust the latter security before availing themselves of the former. As against unsecured and unpreferred creditors, represented here by the liquidator, it may well be that this is the appellant's equitable right. But other secured and preferred creditors were not represented before us and, at all events in the apparent uncertainty which exists as to whether the assets will be sufficient to satisfy claims of this class, we could not determine anything here as against such creditors or which would affect their rights. The appellant did not raise this question in the courts of

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Anglin J.

British Columbia so far as the record shews. The notice of appeal to the Court of Appeal contains no allusion to this aspect of the case. The only matter dealt with in the judgments delivered in that court is the claim of the appellant to entirely exclude the lien-holders from any interest in the fund of $5,000. In rejecting that claim of the appellant the courts below were, I think, clearly right. Counsel for the respondents maintains that this is the only matter which was presented or adjudicated upon and that any right which the appellant may have to marshalling or subrogation will arise at a later stage of the liquidation proceedings and will not be affected by the disposition of this appeal. Accepting this view of the matter and on this basis I concur in the dismissal of the appeal.

BRODEUR J.—I concur in the opinion of Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Bowser, Reid & Wallbridge.*

Solicitors for the liquidator, respondent: *Wilson & Whealler.*

Solicitor for the wage-earners, respondents: *B. P. Wintermute.*

THE WAUGH-MILBURN CONSTRUCTION COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

MAUD SLATER (PLAINTIFF) ..... RESPONDENT.

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*Oct. 28.
*Nov. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Negligence — Common employment — Dangerous works — Safety of workmen—Defective system—Employer's liability—Jury's findings—Sufficiency of answers—Practice—Discontinuance against co-defendant—Release of joint tortfeasor.

The plaintiff's husband was a linesman employed, on piece-work, by the defendants with a gang of men setting posts in holes previously dug by the company with which they had contracted to erect the posts and prepare them to carry electric wires. A post set in one of these holes was insufficiently sunk or set in position without proper packing to hold it rigidly in the light soil of an embankment. Deceased was sent up the post to attach cross-bars which were being hoisted to him by fellow-workmen by means of a block and tackle when, owing to the strain, the post fell causing injuries which resulted in his death. The post-holes, as dug by the company, had been accepted by the defendants for the purposes of their contract, but they made no inspection as to their sufficiency, nor did they give instructions in regard to necessary precautions to ensure the safety of their employees engaged in setting up the posts and preparing them for wiring.

Held, affirming the judgment appealed from (4 West. W.R. 1311; 13 D.L.R. 143; 25 West. L.R. 66) that the failure to sink the post-holes to sufficient depth and obtain proper filling to pack the post, and ensure the safety of the employee required to climb it, was personal negligence on the part of the defendants, the consequences of which they could not avoid by pleading that the accident occurred through the fault of a fellow-servant.

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

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Per Duff J.—In the circumstances of the case the answers by the jury that the defendants had failed to set the posts at sufficient depth and pack them with sufficiently rigid material involved a finding that there was negligence in these respects imputable to the defendants for which they were personally responsible in an action for damages.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), by which, on equal division of opinion among the judges, the judgment of Morrison J., entered upon the verdict of the jury at the trial, stood affirmed.

The circumstances of the case are stated in the head-note.

W. B. A. Ritchie K.C. for the appellants. The motion for nonsuit should have prevailed. The point is shortly stated by Irving J. as follows: "The learned judge should have withdrawn the case from the jury. The accident took place by reason of the negligence of the fellow-workmen not filling in the hole with proper holding material and not excavating to a sufficient depth." The defendants themselves were not shewn to be guilty of any negligence. See *Gallagher* v. *Piper* (2); *Cribb* v. *Kynoch*(3); *Young* v. *Hoffman Manufacturing Co.*(4); *McFarlane* v. *Gilmour*(5).

The plaintiff's evidence shewed, as the jury subsequently found, that deceased was a servant in the employ of appellants and, as expressed in the words of Martin J., "the defendant contracting company agreed with the defendant power company, the owner of the electric line, to set up the poles on the power company's right-of-way in the holes that the power

(1) 4 West. W.T. 1311; 13 D.L.R. 143; 25 West. L.R. 66.
(2) 16 C.B.N.S. 669.
(3) (1907) 2 K.B. 548.
(4) (1907) 2 K.B. 646.
(5) 5 O.R. 302.

company had dug for them." The evidence shews that some of these holes had caved in, and that the fellow-workmen of the deceased were employed on piece-work as he was, they to clear out these holes when necessary and fill in around the poles, when in place. There was no suggestion in plaintiff's case of personal negligence by the appellants, and it was not alleged or attempted to be proved that there was any defect of system in regard to the work, or any failure on their part to provide suitable workmen and materials. The fault, according to plaintiff's case, was in the foreman not seeing that the poles were put deeper in the ground, or as the jury put it, filled with sufficiently rigid material to ensure safety.

There was also a further point in support of the motion for nonsuit, viz., that it plainly appears that deceased not only voluntarily incurred the risk of going up a pole which he knew to be insecure, but, in the words of Lord Cairns in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*(1) at page 1166, "that he caused his death by his own folly and recklessness." See *Wakelin* v. *London and South Western Railway Co.*(2), *per* Lord Halsbury, at page 45; *Dominion Iron and Steel Co.* v. *Day*(3); *Quebec and Levis Ferry Co.* v. *Jess*(4); *Canada Foundry Co.* v. *Mitchell*(5), *per* Killam J., at page 459.

The learned trial judge should have given effect to appellants' contention that they were entitled to judgment upon the finding of the jury that the proximate cause of the accident was the failure to set the pole

(1) 3 App. Cas. 1155.
(2) 12 App. Cas. 41.
(3) 34 Can. S.C.R. 387.
(4) 35 Can. S.C.R. 693.
(5) 35 Can. S.C.R. 452.

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sufficiently deep and to fill the hole with sufficiently rigid material to ensure safety. They have not made findings as to whether this arose from defective system or any personal negligence of these defendants, or whether the same arose from negligence of the workmen engaged in setting the pole and filling the hole. There is no finding upon which judgment could be entered for the plaintiff. Where a jury does not give a general verdict but answers questions such answers, to support a verdict for plaintiff, must clearly shew a cause of action. See *Mader* v. *Halifax Electric Railway Co.*(1). The answers of the jury are in the nature of a special case, and they must disclose what the negligence was. A finding which does not disclose whether the negligence found is personal negligence, or is the negligence of the foreman or workmen, will not answer when the action is brought by the representatives of a workman in common employment with those who did the work, and with the foreman, who is equally a fellow-servant with the other workmen. In the judgment of Martin J. dealing with the matter upon the evidence, instead of upon the findings of the jury, the learned judge's reasoning upon the facts is not sufficient to establish that the jury should have found that the appellants had put the deceased to work in a defective place, and that there was neglect of the primary duty cast upon employers in relation to the safety of their servants. The jury, being the constituted tribunal to determine the facts, a judgment cannot be entered in favour of the plaintiff until they have either found a general verdict in her favour or found facts which clearly shew liability in accordance with legal principles.

(1) 37 Can. S.C.R. 94, at p. 98.

The respondent cannot recover damages for negligence against appellants in an action brought and continued down to the end against the appellants and an independent incorporated company, the statement of claim alleging that the injuries were sustained in consequence of the joint negligence of the respective defendants, one of whom plaintiff expressly releases from liability. *Cocke* v. *Jennor*(1); *Duck* v. *Mayeu* (2), at page 513. It is submitted that respondent cannot in an action of tort against two defendants jointly recover, under a statement of claim alleging only joint liability, a verdict against only one of the defendants. The conduct of respondent's counsel at the trial amounted to a distinct refusal to ask for an amendment. The decision in *Longmore* v. *McArthur*(3) does not in any way make against appellant's contention. The statement of claim alleged the joint duty and responsibility and claimed damages against the Vancouver Power Co. and Waugh-Milburn Construction Co. jointly, and the judgment is against the Waugh-Milburn Construction Co. alone.

D. G. Macdonell for the respondent. The power company had the holes already dug. No inquiry was made as to how they had dug the holes. The appellants did not inspect the quality of the filling; the only instruction they gave their workmen was to put the poles in the holes. The appellants personally accepted the defective holes and the defective filling from the power company. One of them, three days before the accident, saw the pole that had been planted and the quality of the filling, but took no action to secure safety.

(1) Hobart 66. (2) (1892) 2 Q.B. 511.
(3) 19 Man. R. 641; 43 Can. S.C.R. 640.

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The appellants, themselves, failed to provide a fit and proper place for deceased to work in. *Ainslie Mining and Railway Co.* v. *McDougall*(1), pages 424-428. The instrumentalities which the appellants personally provided were defective. The holes in which the poles were to be planted, and the filling which their workmen were to use in planting the poles were defective; the holes in not being dug deep enough, and the filling being of too light a material to hold the poles in position.

The course of counsel for plaintiff at the trial was mere discontinuance of the action against one of the defendants for want of evidence to shew liability. It was not a release of a joint tortfeasor.

THE CHIEF JUSTICE.—Lord Watson, in *Johnson* v. *Lindsay*(2), at page 382, states the rule with respect to fellow servants, in the following terms:—

> The immunity extended to masters in case of injuries caused to each other by his servants rests on an implied undertaking by the servants to bear the risks arising from the possible negligence of a fellow servant who has been selected with due care by his master.

That is not this case. Here, as is pointed out by Mr. Justice Martin in his judgment, it is in substance admitted that the accident resulted from the fact that the hole in which the pole was planted was not of sufficient depth to enable it to be erected safely. The fellow servants of the deceased had no responsibility for that omission or defect. The appellants had taken a contract, as stated in the plea to the action, for the placing of the poles of the Vancouver Power Company in holes already dug by that company, and placing cross-arms and stringing wires upon such

(1) 42 Can. S.C.R. 420. (2) [1891] A.C. 371.

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poles. In the same statement of defence, it is said that the dangerous or unfit condition of the pole in question was occasioned by the manner in which the hole in which the pole was planted had been dug by the defendants, the Vancouver Power Company. How can the appellants now be heard to lay the blame on the fellow-servants of the deceased? The latter had no discretion to exercise with respect to the deepening of the holes nor had they authority to make the holes deeper in order that the posts might be more firmly set in them. The appellants had accepted the holes from the Vancouver Power Company as they had been dug by the latter and, in doing so, they impliedly guaranteed that they were sufficient for the purpose. The only direction given their servants was to use such holes so accepted for the purpose of erecting the poles, and not to exercise any discretion with respect to their depth. If by reason of the insufficiency of the holes an accident happened, the responsibility is with the employer who omitted to take the proper precautions in that respect to avoid the accident.

The contention that the questions and answers of the jury do not disclose personal negligence attributable to the appellants or to those for whom they were responsible is not made out. The failure on the part of the appellants to provide a hole of sufficient depth, as found by the jury, to plant the poles firmly and safely is negligence for the consequences of which the employers are as clearly responsible as if they had supplied their servants with defective posts or defective apparatus of any kind.

The verdict of the jury negatives the defence of

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contributory negligence and it is not referred to in the judgment below.

I would dismiss this appeal with costs.

DAVIES J.—The defendant company had a contract to erect electric posts in certain holes which had been dug for the purpose by another contractor and to prepare for the stringing of the electric wires along those posts.

The deceased was one of the men employed in placing cross-bars on one of the posts to carry the electric wires, and, while doing so, was fatally injured by the falling of the post. The jury found that the hole for the post was either not sufficiently deep or the packing was insufficient. It was not part of the defendants' contract to sink those holes. Their contract was to erect the posts in the holes sunk by the contractor who had the contract for that work.

The post erected would, doubtless, have been found sufficiently safe for the purposes for which it was required after it had the support of the wires strung upon it.

The question was, whether the defendants owed a duty to the workmen they employed in the setting up of these posts to see that they were sufficiently supported and strengthened either by providing suitable filling material to put around them in the holes or otherwise, so that the men should not be obliged to incur unduly dangerous risks in climbing the poles and putting the cross-bars for the wires upon them.

I think the defendants owed such a duty and neglected to fulfil it and that the doctrine of common employment was, under the circumstances, no defence.

It is no answer to say that the poles were deeply

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enough sunk and would be safe enough after the wires were strung and they were strengthened thereby.

The question is, were they safe when the unfortunate man was sent aloft to put on the cross-bars? The event shewed they were not, and, in my opinion, it was the employers' duty to provide suitable filling material to ensure safety, or, failing such material, to see that equivalent safe-guards were supplied. Failing in this, the employer cannot invoke the doctrine of common employment to relieve him from liability. Under the facts proved, there was no obligation on the labourers or the foreman either to deepen the hole or to provide other packing or filling than the excavated material lying to their hand.

The defendant Waugh, himself, was present a day or two before the accident and saw the conditions and gave his men no special instructions. Ignorance of the actual facts by the defendants is displaced. The accident was the result, as the jury found, of the neglect of duty by the employer and not of the negligence of a fellow workman.

I would dismiss the appeal with costs.

IDINGTON J.—The undertaking of a dangerous work without adequate means of averting the consequences of such dangers as attendant upon its execution, and protecting therefrom those engaged therein, is negligence.

That is what the appellant is found by the jury to have been guilty of, and there is, *primâ facie*, evidence to support it.

They undertook to set posts in holes which ought to have been, in the view of some men giving evidence, twice as deep as they were to ensure safety.

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It seems idle to talk of superintendents and foremen, engaged to execute such an inherently dangerous project, being negligent in not so digging new holes and incurring the extra expense of so doing something they were not retained to do as to ensure safety.

The same is true of the expense of filling in or setting of the posts though the evidence of what transpired is not so direct but rather affords ground for the mere inference that the foreman and superintendent did exactly what they were expected to do; namely, use such filling-in as nearest to hand, and not expend money on hauling better material from a distance.

Such inference, I think, was open to the jury and if, as I think, the correct one, then it is, I respectfully submit, surely absurd to talk of the foreman or superintendent having been negligent, and that negligence the cause of the accident.

On such condition of facts and circumstances, it devolved, on the appellant to shew, if it could, that the superintendent or foreman was otherwise instructed and duly furnished with adequate material or means of getting same.

The appeal should be dismissed with costs.

DUFF J.—The first ground upon which Mr. Ritchie contends, on behalf of the defendants, who are appealing, that the judgment should be reversed and the action dismissed is that there is no evidence of any breach of duty on the part of the defendants personally. The deceased, Benjamin Slater, was an employee of the appellants who, at the time Slater received the injury that resulted in his death, were engaged in the execution of a contract they had entered

into with the Vancouver Power Company for setting and wiring a line of poles on the power company's railway line between Vedder River and New Westminster. Slater was occupied in pursuance of his duty in fastening the cross-arms on the top of one of the poles which had already been set by the employees of the appellants, when the embankment, in which the pole was set, gave way and Slater was carried to the ground by the uprooted pole and fatally injured. The embankment in which the pole was set was a deep fill which at this place consisted of light soil described by some of the witnesses as "peaty" and by others as simply "a bed of ashes." The poles had a height of 60 feet. They were set in the steep slope of the embankment. One of the witnesses says that in order to obtain a secure setting it would be necessary in such soil to excavate to a depth of at least 9 feet. The defendant Waugh himself admits that the minimum depth necessary for securing safety would be 7 feet. There is ample evidence that in this fill the poles were placed on holes that had been excavated to a depth of less than 6 feet. The evidence shews also that Slater, being engaged in placing the cross-arms on this pole some time after it had been set, would not be able from such inspection as could be made by him in such circumstances to ascertain whether the pole had been set securely or not. In these circumstances there was, of course, enough to entitle the jury to find that there had been negligence in not excavating to a greater depth before setting up the pole. The question is whether negligence has been brought home to the appellants.

I think the evidence justifies the conclusion that the defendant, Waugh, was personally implicated in

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this negligence. The poles were being set, as I have already mentioned, under a contract between the appellants and the Vancouver Power Company. The contract was an oral one. Waugh says that in making the arrangement with the power company he was assured that the holes had already been excavated and that it was understood that these holes were to be accepted, and that his price was fixed upon that basis. He says that if they had found a hole only four feet deep they would doubtless have deepened it before setting the pole. But, he admits that if they found a hole excavated to what he calls a "reasonable depth," six feet, they would not have excavated it further. It was shewn that a contract had been let to a man named Hare, who was one of the witnesses at the trial, to dig a line of post holes for posts of the same character on the other side of the track through this same fill and that although the specification of the contract required holes of 7 feet in depth they were, in fact, excavated only to a depth of 6 feet, and that in that condition they were accepted and the poles were placed in them by the appellants. Waugh, moreover, admits that a few days before the accident took place he walked over this fill. There was a superintendent, Bailey, who was in charge of the execution of the contract for the appellants and there was a foreman named Haines who was in charge of the gang of men who set up the pole in question. No evidence was offered on behalf of the appellants to shew that any instructions had been given to Bailey with regard to the depth to which the poles were to be sunk or with regard to the inspection of the post-holes that had been dug by the power company, or as to any precautions to be taken to secure the stability of the

poles with a view to the safety of the men engaged in placing the wires upon them.

I do not think it would be an unreasonable inference from the evidence I have mentioned, coupled with the lack of evidence as to instructions given by the appellants to Bailey, that the appellants did not consider it to be their duty in the execution of their contract to deepen a hole such as that which occasioned this accident; and that Bailey, the superintendent, was aware that this was the appellants' view. I think, moreover, that the jury might not unreasonably infer that Bailey had no express instructions to do such work for the purpose of securing the safety of workmen engaged in wiring the poles after they had been set up. Whether, moreover, it would be a part of his duty as between him and his employers, in the circumstances, in the absence of instructions would, I am inclined to think, be a question for the jury. However that may be, in all these circumstances the jury were, as it appears to me, entitled to find that a man of Waugh's knowledge and experience, knowing the character of the fill in which the posts were being set, ought to have realized, and if he had exercised any sort of forethought whatever for the safety of his employees, would have realized that exceptional measures would be required for securing the stability of the poles set up in this fill; and that his failure to observe that or his failure to act upon it in giving appropriate instructions was such a want of care as properly casts upon him responsibility for the failure to take such precautions.

Mr. Ritchie's next contention is that the verdict of the jury is insufficient. I am unable to agree with this contention. The jury found the defendants guilty

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of negligence in two respects:—in failing to set the poles sufficiently deep and in failing to fill the post-holes with sufficiently rigid material. I think this involves a finding that there was negligence in these respects and that that negligence is imputable to the defendants personally.

There was a further point made by Mr. Ritchie which, if I understood him correctly, was this. The appellants and the Vancouver Power Company, he said, were charged in the respondent's statement of claim as joint tortfeasors; and he said, the respondents' counsel at the trial having released the Vancouver Power Company, the cause of action against the appellants must be taken to have disappeared on the principle that the release of one joint tortfeasor effects the release of all, because the cause of action is an entirety. This contention cannot be given effect to, in my opinion, because it is perfectly clear that what the respondent's counsel at the trial did was to discontinue the action as against the Vancouver Power Company because the evidence failed to implicate them in the negligence proved and to proceed against the appellants as the persons solely responsible for the injury complained of. It was entirely a question for the trial judge whether that course should or should not be permitted and the appellants' contention fails upon the simple grounds, in my opinion, that on the facts proved the Vancouver Power Company could not be held to be joint tortfeasors with the appellants and, if they could, the respondents at the trial ought not to be taken as releasing the Vancouver Power Company from liability, but simply as discontinuing the action against them.

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ANGLIN J.—The plaintiff is the widow of a deceased employee of the defendant company, suing on behalf of herself and his children to recover damages for his death, caused, she avers, by the negligence of the defendants, an incorporated partnership.

The facts are not seriously in controversy. A pole erected by the defendants fell while the plaintiff's husband was upon it, engaged in placing cross-bars to carry electric wires, and he sustained fatal injuries. The jury found upon sufficient evidence that the fall of the pole was due to the negligence of the defendants in that

> they failed to set the pole sufficiently deep and to fill the hole with sufficiently rigid material to ensure safety.

The recovery was at common law and the main defence relied upon at bar was "common employment."

I think that defence is not available under the circumstances of this case. The hole in which the pole was placed was not made by the defendants, but by a contractor who preceded them. It was no part of the work of the defendant company to deepen that hole. They accepted the holes as they had been dug. The evidence does not establish that the inadequacy of the hole in question was due to the fault of a fellow-workman of the deceased. The defendants' contract was to erect the poles in the holes as dug and this appears to have been the instruction which they gave to their men. There is nothing to shew that it was the duty of their foreman to deepen the hole in question or to see that other filling was procured and used if that adjacent to it was unsuitable. The defendants owed to the plaintiff's husband the duty of furnishing him with a reasonably safe place in which to work — of seeing that the pole which he was required to ascend was securely placed. Notwithstanding the shallow-

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ness of the hole, it is claimed that the pole would not have fallen if sufficiently rigid filling had been used. The jury has found that the defendants were at fault in regard to the filling. The circumstances disclose a case of dangerous employment imposing upon the defendants, as masters, the duty to see that proper precautions were taken to ensure their employee's safety. The defendant, Waugh, admits that no inquiry or inspection was made or directed as to the depth of the hole or the quality of the filling. The filling adjacent to the hole in question, having regard to its shallowness, was unsuitable. No instructions were given to procure or use any other filling. The defendants had erected poles on the opposite side of the railway. They knew the character of the soil. The defendant, Waugh, himself passed the place of the accident only three or four days before it occurred. He had an opportunity then of seeing the nature of the ground in which the particular pole in question was placed and of knowing that special care was necessary there as to the depth of the hole and the character of the filling. Yet there were no inquiries; no instructions were given; no inspection was made or directed. Under such circumstances the jury were, I think, justified in finding the defendants liable at common law.

I would dismiss this appeal.

BRODEUR J. agreed with Anglin J.

Appeal dismissed with costs.

Solicitors for the appellants: *Bowser, Reid & Wallbridge.*

Solicitors for the respondent: *Senkler, Sparks & Van Horne.*

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF RICHELIEU.

1913

*Oct. 14.
*Nov. 10.

FRANÇOIS X. A. PARADIS (PETITIONER) ..... APPELLANT;

AND

PIERRE J. A. CARDIN (RESPONDENT..... RESPONDENT.

ON APPEAL FROM THE DECISION OF BRUNEAU J.

Election law—Preliminary objections—Rules of practice—Repeal—Inconsistency with statutory provision—Judgment on preliminary objections—Final determination of stage of cause—Objections—Irregularity by returning officer—Appeal—Jurisdiction—Issues in question—Construction of statute—(D.) 37 *V. c.* 10, *ss.* 44, 45—*R.S.C.*, 1906, *c.* 7, *ss.* 16, 19, 20, 85—*R.S.C.*, 1906, *c.* 1, *s.* 20.

Under the provisions of the "Dominion Controverted Elections Act, 1874," the judges of the Superior Court for the Province of Quebec made general rules and orders for the regulation of the practice and procedure with respect to election petitions whereby the returning officer was required to publish notice of such petitions once in the Quebec Official *Gazette* and twice in English and French newspapers published or circulating in the electoral division affected by the controversy. By section 16 of chapter 7, R.S.C., 1906, provision is made for the publishing of a similar notice by the returning officer once in a newspaper published in the electoral district.

Held, that the rule of practice is inconsistent with the provision as to the notice required by section 16, chapter 7, R.S.C., 1906, and consequently, has ceased to be in force.

Per Duff and Brodeur JJ.—Even if such rule were still in force,

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

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failure on the part of the returning officer to comply with it would not be sufficient ground for the dismissal of the election petition.

Per Davies, Duff, and Anglin JJ.—Under the provisions of the "Dominion Controverted Elections Act," R.S.C., 1906, ch. 7, secs. 19 and 20, preliminary objections are required to be decided in a summary manner; consequently, a decision by an election court judge on any of the preliminary objections disposes of all the issues raised in that stage of the proceedings. Where an election petition is disposed of by the judge upon one of several objections, without consideration of the others, the Supreme Court of Canada has jurisdiction to hear and determine questions arising upon all the preliminary objections in issue before the election court judge; its jurisdiction is not confined to the objection upon which the judgment appealed from was solely based. Idington J. *contra*. Fitzpatrick C.J. and Brodeur J. expressing no opinion.

APPEAL from the judgment of Mr. Justice Bruneau, in the Controverted Elections Court, in the matter of the controverted election of a member for the Electoral District of Richelieu in the House of Commons of Canada, rendered on the 2nd of June, 1913, maintaining one of several preliminary objections to the election petition and, on that ground alone, dismissing the petition with costs.

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

The judgment of Mr. Justice Bruneau, from which the appeal was taken, is as follows:—

"La cour, après avoir entendu les témoins et les avocats des parties, sur les objections préliminaires, lors de leur instruction et audition, aux sept moyens suivants:—

"1. L'affidavit qui accompagne la pétition d'élection est irrégulier, parce que le protonotaire de cette cour qui l'a reçu ne l'a pas signé du nom que lui donne sa commission;

"2. Les conclusions de la pétition sont également

irrégulières, parce qu'elles demandent des choses étrangères au véritable litige entre les parties, et notamment, la déqualification de personnes qui ne sont pas en cause;

"3. Les allégations, de la pétition ne sont pas conformes à la 3ième Règle de Pratique des elections contestées qui exige que chaque paragraphe ne contienne qu'un seul chef d'accusation;

"4. Les dites allégations sont également trop vagues;

"5. La publication de la dite pétition est illégale et nulle, parce qu'elle est incomplète et insuffisante;

"6. Le pétitionnaire n'a pas établi sa qualité d'électeur, parce qu'il n'a pas prouvé qu'il était sujet britannique;

"7. La Preuve en incombait au pétitionnaire qui allègue spécialement qu'il était habile à voter à la dite élection;

Vu l'article 85 du ch. 7 des Statuts Revisés du Canada, 1906;

"Considérant que la 7ième Règle de Pratique de cette cour relative aux elections contestées, decrète:—

"The returning officer shall publish any petition sent to him under section 8 of the Act, and also any other document sent to him for publication, in accordance with the provisions of the Act, or of these rules, by delivering a copy of such petition or document to the registrar of the registry office in such electoral division, and if there be more than one such registry office in such electoral division, then to each such registrar, and if there be no such registry office within such electoral division, to the municipal secretary-treasurer having his office in the said electoral division, nearest to the place where the said election was

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held. And if there be no such registrar or secretary-treasurer in the said electoral division then to some other public officer in the said electoral division, to be selected by the said returning officer, and by causing without delay a succinct notice of such publication to be given in one number of the Quebec Official *Gazette*, and also in two numbers of a newspaper in the English language and two numbers of a newspaper in the French language, published in or circulating in such electoral division, if such papers there be, and it shall be the duty of each, such registrar, secretary-treasurer or other public officer, to allow all persons to take communication of any such petition or other document without exacting any fee therefor, and any such document sent to the sheriff for publication shall be published in the same manner.

"Considérant que la dite Règle de Pratique n'a jamais été révoquée par les juges de cette cour, qu'elle n'est pas incompatible avec l'article 16 du ch. 7 des Statuts Révisés du Canada, dont elle n'est qu'un complément ou ajouté; qu'elle est absolument conforme à l'économie des règles établies par le Code de Procédure de cette province, exigeant la publication dans deux journaux publiés l'un en français l'autre en anglais, afin que ces avis parviennent plus sûrement aux deux éléments qui constituent la population;

"Considérant que la dite Règle de Pratique a été constamment suivie dans cette province et spécialement dans ce district judiciaire, ce que le pétitionnaire lui-même reconnaît par les qu'il a donnés;

"Considérant que pour se conformer en effet aux exigences des dispositions de la règle précité, l'officier rapporteur à la dite élection, Elie Aurez Laperrière, a donné deux avis en français dans le journal 'Le

Sorelois' et deux en anglais dans le journal *The Sorel News;*

"Considérant que le dit officier rapporteur admet qu'il n'a donné aucun avis dans la Gazette Officielle de Québec;

"Considérant que le défendeur prétend, de plus, que la publication *The Sorel News,* n'est pas et ne peut être le journal (newspaper) contemplé par la susdite Règle de Pratique;

"Considérant que la preuve, à ce sujet, démontre que ce prétendu journal n'est tiré qu'à 20 ou 25 exemplaires, qu'il n'a aucun abonné, aucune circulation dans le public, vu qu'il n'est pas mis en vente, que les matières en sont toujours les mêmes, ce qui appert à la face même des exemplaires produits, qu'on y change que la date de sa publication et les annonçes judiciaires pour lesquelles il est spécialement imprimé, qu'il n'est donné qu'aux annonceurs qui en font la demande;

"Considérant qu'une semblable publication n'est pas et ne peut être, au point de vue juridique, aux termes mêmes de la Règle de Pratique ci-dèssus citée, le journal (newspaper) dans lequel l'avis en question doit être publiée puisqu'il lui manque le caractère essentiel de circulation dans le public; (Stroud Jud. Dict.: vo. 'Newspaper,' art. 2, par. 26; ch. 146, S.R.C., 1906, Code Criminel);

"Considérant qu'une semblable publication ne peut non plus être considérée, pour le même motif, comme un journal purement judiciaire (legal newspaper);

"Considérant que la publication de la dite pétition d'élection n'a pas été, en conséquence, donnée, ni dans un journal anglais, ni dans la Gazette Officielle de Québec;

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"Considérant que la Règle de Pratique impose à l'officier rapporteur, dans la publication de la dite pétition d'élection un devoir impératif et non discrétionnaire, dans l'intérêt de tous les électeurs, et que le défaut d'accomplissement des formalités qu'elle prescrit à cet égard, entraine nécessairement la nullité de la dite pétition d'élection;

"Considérant que le cinquième moyen ci-dessus invoqué par le défendeur, comme objection préliminaire, étant bien fondé, tant en fait qu'en droit, et suffisant par lui-même pour faire rejeter la pétition d'élection en cette cause, il est dès lors inutile pour cette cour, d'examiner et de décider les autres prétentions du dit défendeur;

"Considérant, néanmoins, que le défendeur a tenté vainement de prouveur que le dépot de $1,000 fait avec la présente pétition, avait été obtenu illégalement, à raison de promesses et de faveurs faites à ceux qui en ont souscrit le montant, par le procureur du pétitionnaire, et qu'il y a lieu de lui faire supporter entièrement le coût de l'enquête inutile à ce sujet;

"Pour ces motifs:—Renvoie la dite pétition d'élection avec frais et dépens contre le pétitionnaire, moins ceux de la taxe et du coût des dépositions des témoins suivants du défendeur et qui demeurent entièrement à sa charge, savoir: * * * .

E. A. D. Morgan for the appellant.
Belcourt K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal must be allowed. Notice of the petition was inserted in a newspaper and published in the electoral district in accordance with the provisions of section

16 of the "Controverted Elections Act" (R.S.C., 1906, ch. 7), and that is all that was required. The rule of practice relied upon by the judge below, competently made, it is quite true, by the judges of the Superior Court in Quebec under the "Controverted Elections Act, 1874," is no longer in force.

DAVIES J.—To the election petition in this case several preliminary objections were presented. The learned judge who heard these objections sustained the one complaining that the petition had not been published as required by the "Rules of Court" of the Province of Quebec and dismissed the election petition on that ground. These "Rules of Court" had been passed some years ago under the then existing "Controverted Elections Act" and before the Act was remodelled and passed in its present form. It was admitted that the publication complained of complied with the statutory requirements of the existing Act, but that they did not comply with the requirements of the "Rules of Court" which it was contended were not inconsistent with the statute, and were consequently still in force. I think, however, they clearly are so inconsistent and that to the extent that they require other and further publications than those required by the statute they are necessarily repealed by it.

It was further contended, however, that even if the the ground of want of proper publication, upon which the judge dismissed the petition, was bad, still the judgment should be sustained on the ground that the petitioner had failed to prove his status and qualification as a petitioner. I think, however, there is nothing in this objection and that the proper inference

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from all the evidence is that the petitioner was a qualified voter entitled to present the petition.

As to the question of our jurisdiction on appeal, in my judgment, under the case as it came before us, all or any of the preliminary objections not abandoned in the court below and which counsel thought applicable could have been relied upon by the respondent to sustain the judgment dismissing the petition. He was not confined to the reasons given by the judge or to the particular objection which the judge sustained as fatal to the petition.

The appeal to this court is from the judgment dismissing the petition, and, while that judgment is based upon one of the preliminary objections only, we have jurisdiction to deal with all of the preliminary objections which were heard before the judge and which are in the record before us, and to finally dispose of them. Any construction of the Act limiting the jurisdiction of this court on appeal to deal with the particular objection allowed or disallowed by the judge below would, I think, be at variance with its true construction and the result in many cases would be to delay the trial of the petition unduly, and possibly to defeat it altogether. The duty of the judge who hears the preliminary objections is either to allow them, or some or one of them, and dismiss the petition; or to dismiss or disallow the objections so that the petition shall go to trial.

The section of the Act defining his duties is as follows: —

Sec. 19. Within five days after the service of the petition and the accompanying notice, the respondent may present in writing any preliminary objections or grounds of insufficiency which he has to urge against the petition or the petitioner, or against any further proceeding thereon, and shall, in such case, at the same time, file a

copy thereof for the petitioner, and the court shall hear the parties upon such objections and grounds, and shall decide the same in a summary manner.

In the case before us there were a great many preliminary objections and the issue joined upon them was that they were one and all bad in fact and in law.

That was the issue which came before the trial judge and which he had to dispose of. At the hearing below the defendant confined himself to seven of these objections and the judge rested his judgment upon one of them only, and dismissed the petition.

The section giving an appeal to this court from a decision on preliminary objections, reads as follows:—

An appeal by any party to an election petition who is dissatisfied with the decision shall lie to the Supreme Court of Canada from,—

(*a*) the judgment, rule, order or decision on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive and has put an end to such petition, or which objection, if it had been allowed, would have been final and conclusive and have put an end to such petition: Provided that, unless it is otherwise ordered, an appeal in the last-mentioned case shall not operate as a stay of proceedings nor shall it delay the trial of the petition.

A technical reading of this section might seem to justify a conclusion limiting our jurisdiction on the appeal to the objections the judge below has expressly allowed or disallowed, as the case may be. But a careful reading of the Act satisfies me that such a limited construction of our powers is not correct and that where there are several preliminary objections to an election petition and the judgment of the judge who hears the issue joined on the objections allows one of the objections and dismisses the petition without reference to the others, this court, on appeal, has jurisdiction finally to dispose of all of the objections and of the issue as it came before the judge and give the

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judgment which under the facts and the law the judge should have given. Whether and in what cases such jurisdiction should be exercised depends, of course, upon the evidence in the record or case in appeal.

In this case I think the judge was wrong in dismissing the petition for want of due publication, and I also think that Mr. Belcourt failed to maintain the only other objection he thought it worth while to argue, namely, the want of qualification of the petitioner.

But, suppose we should have been of the opinion that the petitioner's status to file the petition had been disproved — should we have refused to confirm the judgment dismissing the petition because the judge below did not refer to that want of status as one of his reasons for his judgment ? With great respect I think such a refusal would do violence to the spirit and intention of Parliament as expressed in the statute under review.

The appeal should be allowed with costs and the preliminary objections disallowed and dismissed.

IDINGTON J.—The requirements of section 16 of the "Controverted Elections Act," which is as follows:—

> 16. On presentation of the petition the clerk of the court shall send a copy thereof by mail to the returning officer of the electoral district to which the petition relates, and such returning officer shall forthwith publish a notice thereof once in a newspaper published in the district or, if there is no newspaper published in the district, then in a newspaper published in an adjoining district,

having been complied with, I do not think failure to comply with rules framed under the earlier Act which are inconsistent therewith can support the dismissal of the petition herein.

The learned trial judge having determined only

this one of the several preliminary objections presented, we have no power to consider any other.

Section 64 of the Act, which is as follows, so far as bearing upon our jurisdiction:—

64. An appeal by any party to an election petition who is dissatisfied with the decision shall lie to the Supreme Court of Canada from—

(*a*) the *judgment, rule, order or decision on any preliminary objection* to an election petition, the allowance of which objection has been final and conclusive and has put an end to such petition, or which objection, if it had been allowed, would have been final and conclusive and have put an end to such petition;

seems conclusive on this point.

The appeal should be allowed, but I doubt if costs should be given of what relates to so much of the case as is thus undecided, though appellant should be given the general costs of his appeal relative to the point in which he succeeds.

DUFF J.—This is an appeal from a judgment of the Honourable Mr. Justice Bruneau (2nd June, 1913) dismissing the petition given on the hearing on preliminary objections. The judgment was based upon the ground that the petition was not published in accordance with the seventh rule of practice made by the judges of the Superior Court of the Province of Quebec under the "Controverted Elections Act, 1874" (37 Vict. ch. 10, sec. 44), requiring notice of the petition to be published once in the Quebec Official *Gazette* and also in

two numbers of a newspaper in the English language and two numbers of a newspaper in the French language published in or circulating in the electoral division

to which the petition relates. It is not disputed that section 16 of the "Controverted Elections Act" (R.S.C.

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1906, ch. 7), was complied with, that is to say, that a notice of the petition appeared in a newspaper published in the district in accordance with the provisions of that section; and the two points for consideration under this head are: 1st, was the rule in question which, it is not disputed, was competently enacted, displaced by the legislation now embodied in the section just referred to? And 2ndly, if, notwithstanding the language of section 16, the rule is still in force, whether non-compliance with that rule by the returning officer is a sufficient ground for dismissing the petition? As to the first question the material statutory provisions are section 20 of the "Interpretation Act" (R.S.C. 1906, ch. 1), and sections 85 and 86 of the "Controverted Elections Act." For convenience of reference I quote these enactments in full:—

20. Whenever any Act or enactment is repealed, and other provisions are substituted by way of amendment, revision or consolidation—

(*a*) all regulations, orders, ordinances, rules and by-laws made under the repealed Act or enactment shall continue good and valid, in so far as they are not inconsistent with the substituted Act or enactment, until they are annulled and others made in their stead; and,

(*b*) any reference in any unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment; and, if there is no provision in the substituted Act or enactment relating to the same subject-matter, the repealed Act or enactment shall stand good, and be read and construed as unrepealed in so far, and in so far only, as is necessary to support, maintain or give effect to such unrepealed Act, or such rule, order or regulation made thereunder.

Chapter 7, section 85:—

85. The judges of the court or a majority of them, may from time to time, make, revoke and alter general rules and orders, for the

effectual execution of this Act and of the intention and object thereof, and the regulation of the practice and procedure and costs with respect to election petitions and the trial thereof, and the certifying and reporting thereon.

2. Any general rules and orders made as aforesaid, and not inconsistent with this Act, shall be deemed to be within the powers conferred by this Act, and shall, while unrevoked, be of the same force as if they were herein enacted; and shall be laid before the House of Commons within three weeks after they are made, if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the next session of Parliament.

86. Until rules of court have been made by the judges of the court in any province in pursuance of this Act, and so far as such rules do not extend, the principles, practice and rules on which election petitions touching the election of members of the House of Commons in England were on the 26th day of May, one thousand eight hundred and seventy-four, dealt with, shall be observed so far as consistently with this Act they can be observed by the court and the judges thereof.

The construction and effect of these provisions, in so far as relevant to the present point, is not open to dispute. The argument of Mr. Belcourt, who appeared for the respondent, proceeded upon the assumption that the real point at issue must be whether the rule relied upon is "inconsistent" with section 16. With great respect for the learned judge of first instance I do not think the point is doubtful. The rule requires publication in two newspapers, a newspaper in the English language and a newspaper in the French language. The Act requires publication once in a newspaper.

If, as is contended, the effect of the rule, which, of course, has the force of statute, is that non-compliance with it nullifies the petitioner's proceedings, then it appears to me that it must be a rule beyond the authority conferred by sec. 85; for I think it cannot fairly be taken to be within the intendment of that section that, where the Act itself lays down a specific procedure

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in relation to a given matter, the rule-making authority can prescribe additional proceedings with such a sanction. If the rule is one which could not be made under section 85, it would appear to follow that it is a rule which is not protected by the provisions of section 20 of the "Interpretation Act," because one cannot suppose the legislature to have contemplated that a rule made prior to the passing of section 16, which would be beyond the present powers of the rule-making authority under section 85, could remain in force notwithstanding the enactment of section 16. It is not to be supposed that the validity of the rules in force at a given time could be affected by the accident of the day when such rules were passed.

As to the second question, I think that on this ground also the ruling of the learned judge of first instance ought to be reversed. The publication prescribed by the legislature is, in my judgment, not a forensic proceeding. The duty to publish laid upon the returning officer, doubtless, has its own sanction. Non-compliance with it, in my judgment, cannot, where the petitioner himself is entirely without fault, have the result of causing the petition to lapse.

On the hearing of the appeal another point was argued. It was urged by the respondent that the judgment dismissing the petition ought to be sustained on the ground that the petitioner had failed to prove his status, according to the rules laid down in the previous decisions of this court. In dealing with this contention the first point to consider is whether we have jurisdiction to entertain it. That question depends upon the construction of section 64 of the "Controverted Elections Act." It is as follows:

64. An appeal by any party to an election petition who is dissatis-

fied with the decision shall lie to the Supreme Court of Canada from—

(*a*) the judgment, rule, order or decision on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive and has put an end to such petition, or which objection, if it had been allowed, would have been final and conclusive and have put an end to such petition: Provided that, unless it is otherwise ordered, an appeal in the last-mentioned case shall not operate as a stay of proceedings, nor shall it delay the trial of the petition; and,

(*b*) the judgment or decision on any question of law or of fact of the judges who have tried such petition.

It is argued (and it appeared to me at first sight, that such must be the construction of this section) that an appeal is only given from a decision upon a specific preliminary objection or specific preliminary objections. Where the preliminary objections are disallowed there is, of course, necessarily a decision upon each one of them. Where, on the other hand, as in this case, the petition is dismissed upon the ground that a single specific objection is well taken and ought to be given effect to and the judge has refrained from considering or passing upon any of the other objections, the question whether, in such a case, this court has jurisdiction to consider any objection other than that passed upon may become a point of importance. I think the appeal given by section 64 is not only an appeal from any specific rule or decision, but from the "judgment rule or order" given by the judge of first instance before whom the hearing on preliminary objections is held.

It has been laid down in the judgment of this court more than once that the hearing upon preliminary objections is to be treated as one of the steps in the trial of the petition. Sections 19 and 20 indicate to my mind that it was not within the contemplation of the Act that there should be successive hearings on

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preliminary objections. The judgment, therefore, dismissing the petition given on the hearing must, I think, be taken to be the judgment concluding that stage of the trial and on appeal from that judgment I think it is not only open to us, but that it is our duty to consider every objection which was before the judge of first instance and which is presented by either party for consideration in this court.

On the merits, I think the objection fails. I think there is sufficient evidence and I think the proper inference from the evidence is that the petitioner was properly qualified as a petitioner under the Act.

ANGLIN J.—At the close of the argument I entertained no doubt that rule No. 7 of the "Rules of Practice" of the Quebec Superior Court for Dominion Controverted Elections, in so far as it requires publication different from and in excess of that prescribed by section 16 of the "Dominion Controverted Elections Act," was superseded and abrogated by that enactment, and that, publication in accordance with the requirements of section 16 having been shewn, the preliminary objection based on want of due publication fails. Had this been the sole question for determination, the appeal might well have been disposed of at the hearing.

But the respondent, failing to sustain the judgment in his favour upon this objection, seeks to support it on another, which was presented to the judge of first instance, but was not dealt with by him, namely, that the petitioner had not sufficiently established his status in that he had not proved himself to be a British subject. This objection was heard by the learned judge, but was not adjudicated upon by him,

no doubt because he held the objection on the ground of insufficient publication to be well taken and fatal to the petition. The appellant questions the jurisdiction of this court to entertain the objection based on want of status on the ground that the appeal given by section 64 of the "Controverted Elections Act" is confined to objections upon which judgment has been actually pronounced below. The respondent asserts on the other hand that the appeal is from the judgment dismissing the petition and that it is open to him to support that judgment in this court upon any ground taken before the judge of first instance and upon which he might have pronounced it. The question is important because upon its determination depends the right of respondent to a further hearing before the judge of the Superior Court in order to obtain an adjudication by him on the other preliminary objections taken but not dealt with at the former hearing. If, as counsel for petitioner contends, the respondent cannot support the dismissal of the petition on any objection not adjudicated upon in the Superior Court, he should be entitled to such further hearing, since otherwise he might lose the benefit of a good objection properly taken and pressed, merely because the judge of first instance failed to deal with it under the erroneous impression that it was not necessary for him to do so. On the other hand, if the position taken at bar by his own counsel is correct, the respondent will clearly not be entitled to any such further hearing on preliminary objections.

Section 64 of the Dominion "Controverted Elections Act," which gives the right to appeal, is as follows:

An appeal by any party to an election petition who is dissatisfied with the decision shall lie to the Supreme Court of Canada from—

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(*a*) the judgment, rule, order or decision on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive and has put an end to such petition, or which objection, if it had been allowed, would have been final and conclusive and have put an end to such petition: Provided that, unless it is otherwise ordered, an appeal in the last-mentioned case shall not operate as a stay of proceedings, nor shall it delay the trial of the petition.

At first blush it would almost appear that it was intended to confine the appeal to the particular objection which has been allowed. But the appeal is from the judgment rendered on the objection, not from its allowance. That judgment is the dismissal of the petition. It is a well recognized principle of procedure in ordinary litigation that a party in whose favour judgment is pronounced upon one ground may support that judgment in appeal upon any other ground taken before the court which pronounced it and upon which that court might properly have acted. Unless the statute is conclusive against its application, the maxim *ut sit finis litium* and the undoubted policy of Parliament that there should be no undue or unnecessary delay in the bringing of election petitions to trial afford cogent arguments why the ordinary principle of curial procedure to which I have alluded should govern the present case.

Section 19 of the "Controverted Elections Act" makes it abundantly clear that preliminary objections should be speedily dealt with. It appears to contemplate that they should all be disposed of at one hearing. It would, I think, be contrary to the spirit if not to the letter of the Act, that there should be a series of hearings and of appeals on preliminary objections, as might well be the case if they may be disposed of one at a time. Though not as clearly expressed as it

might have been, I find nothing in section 64 which constrains me to put upon it a construction which I should deem out of harmony with the other provisions of the statute, and probably contrary to the intention of Parliament. I, therefore, conclude that it is open to the respondent to ask this court on the present appeal to pass upon his objection to the sufficiency of the proof of the petitioner's status.

On the merits I think that objection cannot be sustained. The evidence adduced by the petitioner that his name appeared on the voters' list furnished for use at the election and that he voted as a deputy returning officer on a certificate obtained after taking the prescribed oath, which was produced and filed, and the certificate of his baptism shewing that he was born at St. Judas, in the County of St. Hyacinthe, in the Province of Quebec, also produced and filed, established the fact that he is a British subject, at all events sufficiently to cast on the respondent the burden of proving the contrary.

The respondent did not seek at bar to maintain the judgment in his favour by invoking any other of the preliminary objections which he took below.

I would, therefore, allow the appeal with costs and dismiss the preliminary objections with costs.

BRODEUR J.—Il s'agit d'une contestation d'élection qui a été renvoyée sur l'objection préliminaire que l'officier-rapporteur n'avait pas publié la pétition suivant les dispositions d'une règle de pratique de la cour supérieure.

Plusieurs autres objections préliminaires avaient été soulevées par l'intimée; mais le juge n'a pris en considération que celle relative à la publication de

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la pétition et il a considéré inutile, vu la conclusion à laquelle il en est venu sur ce point, d'examiner et de décider ces autres objections.

La règle de pratique relative à la publication des pétitions d'élections a été faite par les juges de la cour supérieure de Québec, en 1875, et se lit comme suit:—

L'Officier-Rapporteur publiera toute pétition qui lui sera envoyée en conformité de la section 8 du dit Acte, ainsi que tout autre document qui lui sera envoyé pour publication en conformité des dispositions du dit Acte, ou des présentes règles, en délivrant copie de telle pétition ou de tel document au Régistrateur du Bureau d'Enregistrement dans telle Division Electorale; et, s'il y a plus d'un Bureau d'Enregistrement dans telle Division Electorale, il en délivrera une copie à chaque Régistrateur; et, s'il n'y a aucun Bureau d'Enregistrement dans la Division Electorale, alors copie sera transmise au Sécrétaire-trésorier Municipal, le bureau duquel se trouvant dans la dite Division Electorale, sera le plus proche du lieu où la dite élection aura eu lieu. Et dans le cas où il ne se trouvera pas, dans la dite Division Electorale, tel Régistrateur ou Sécrétaire-trésorier, alors la copie sera transmise à quelqu'autre officier public, au choix du dit Officier-rapporteur, qui se trouvera dans la dite Division Electorale, en donnant sans délai un avis précis de telle publication dans un numéro de la Gazette Officielle de Québec, ainsi que dans deux numéros d'un journal en langue anglaise, et dans deux numéros d'un journal en langue française, publiés ou ayant circulation dans telle Division Electorale, si tels journaux il y a, et il sera du devoir de tout tel Régistrateur, Sécrétaire-trésorier ou autre Officier public de permettre à toute personne de prendre communication de toute telle pétition ou de tout tel document sans exiger pour cela aucun honoraire, et tout document qui sera envoyé au Shérif pour publication sert publié de la manière ci-dessus décrite.

Le statut sur lequel cette règle de pratique était basée est la loi de 1874 (37 Vict. ch. 10, sec. 8), qui disait:—

Lors de la présentation d'une pétition, le greffier de la cour en transmettra copie par la malle à l'officier-rapporteur du district électoral auquel se rapporte la pétition d'élection, lequel lui donnera de suite publicité dans ce district électoral.

Cette disposition de la loi de 1874 a été rappelée en 1891 et remplacée par la section suivante:—

Lors de la présentation d'une pétition, le greffier de la cour en transmettra copie par la poste à l'officier-rapporteur du district électoral auquel se rapporte la pétition, et celui-ci *en donnera de suite avis une fois dans un journal publié dans le district*, ou, s'il n'est pas publié de journal dans ce district, en faisant insérer cet avis dans un journal publié dans un district voisin.

2. Cet avis pourra être dans la forme suivante: "Avis est par le présent donné qu'une pétition a été présentée en vertu de l'Acte des élection fédérales contestées contre l'élection de , écuier, comme membre du parlement du Canada, représentant le district électoral de et (si l'on réclame le siège) réclamant le siège pour

Daté à ce jour de 18 .

A. B.,

Officier-rapporteur.

Cette section de la loi de 1891 a été répétée *verbatim* dans les status refondus de 1906 à la section 16 du chapter 7.

L'appelant prétend que la règle et la nouvelle loi sont incompatibles et qu'en conséquence la règle est par le fait même sans effet.

D'un autre côté, l'intimé dit que le rappel d'une disposition de la loi ne met pas nécessairement à néant les règles qui auraient été faites en vertu de cette loi si les dispositions sont semblables et ne sont pas incompatibles avec la nouvelle loi. If prétend que dans le cas actuel cette incompatibilité n'éxiste pas et que les dispositions de la règle sont, par conséquent, en force et doivent être observées.

Il est à remarquer que dans les statuts de 1874 on ne disait pas comment la publication d'une pétition d'élection devait se faire, et alors les juges de la province de Québec ont cru devoir déterminer qu'un avis de la présentation de la pétition devrait être publié une fois dans la Gazette Officielle et deux fois dans deux journaux.

Il est à présumer que la pratique était loin d'être la même dans toutes les provinces. Cette disposition de la loi de 1874 a dû donner lieu à des inconvénients et

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à des incertitudes et alors il a été jugé à propos en 1891 d'amender la loi de manière à déclarer d'une manière précise comment la publication devait se faire. Comme nous venons de le voir, la loi pourvoit à ce qu'un avis soit publié dans un journal une fois seulement.

Le droit pour les juges de faire des règlements concernant la procédure des pétitions d'élections est rédigé dans des termes bien généraux. Voici, en effet, ces dispositions:—

> Les juges des différentes cours, dans chaque province respectivement, ou la majorité d'entre eux, peuvent, de temps à autre, faire, révoquer et modifier les règles et ordres généraux mentionnés en la présente loi comme règles de cour pour l'exécution efficace de la présente loi, et de son intention et de son objet, et de toutes règles de pratique, procédures et frais se rattachant aux pétitions d'élection et à leur décision, et aux certificates et rapports à faire sur ces pétitions.
>
> 2. Toutes règles générales et tous ordres généraux faits de la manière ci-haut exprimée, qui ne sont pas incompatibles avec la présente loi, sont considérés comme faisant partie des pouvoirs conférés par la présente loi, et ont, jusqu'à ce qu'ils soient révoqués, la même force que s'ils faisaient partie des dispositions de la présente loi; et elles doivent être soumises à la Chambre des Communes dans l'espace de trois semaines après qu'elles ont été faites, si le Parlement est alors en session, et, si le Parlement n'est pas en session, dans les trois premières semaines de la session alors prochaine du Parlement. S.R., c. 9, art. 62.

D'après les dispositions de cette législation le rappel d'une loi ne met fin aux règles qui ont été faites en vertu de cette loi que si elles sont incompatibles avec la nouvelle loi. Y avait-il incompatibilité entre la règle de pratique de 1875 et la loi de 1891 ? Voilà la question que nous avons à décider.

J'en suis venu à la conclusion que l'ancienne règle de pratique a cessé d'avoir force et effet.

Elle déterminait, comme nous venons de le voir, la manière dont l'officier-rapporteur devait faire connaître au public la présentation des pétitions d'élec-

tions. Il fallait qu'un avis fût donné dans la Gazette Officielle de Québec et dans deux journaux du district électoral. Le législateur, par sa loi de 1891, a entrepris lui-même de déterminer comment et où cette publication devait se faire. Il a voulu, je suppose, mettre fin à l'incertitude où l'on devait être avec la disposition un peu vague de la loi de 1874 et il a déclaré qu'à l'avenir l'avis serait publié dans un seul journal du district. Cette législation formelle rend l'ancienne règle de pratique incompatible et y met fin, du moins en tant que cette publication est concernée.

Maintenant, en supposant que la publication serait irrégulière, serait-ce une raison suffisante pour renvoyer la pétition ? Je ne le crois pas. Ce serait là une informalité qui pourrait être purgée sur instruction du juge. Il n'y aurait pas lieu alors de renvoyer la pétition.

Il arrive bien souvent que des pétitions demandent l'annulation de l'élection pour irrégularités commises par l'officier-rapporteur. Serait-ce à dire que son défaut de publier cet avis devrait entraîner le renvoi de la pétition ? Poser la question, c'est la résoudre.

Les pétitions d'élections doivent être d'ailleurs considérées comme toute autre action ou procédure devant les tribunaux. Il n'y a pas de raison pour qu'on soit plus sévère au sujet des informalités qui s'y sont glissées que pour celles qui affectent les actions ordinaires.

Je suis d'opinion que le jugement *a quo* est mal fondé et qu'il doit être renversé avec dépens.

Appeal allowed with costs.

Solicitor for the appellant: *E. A. D. Morgan.*
Solicitor for the respondent: *P. J. A. Cardin.*

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ACTION—*Foreign corporation—Conflict of laws—Incorporation by Dominion authority—Powers—B.C. "Companies Act"—Unlicensed extra-provincial companies—"Carrying on business"—Contract—Transactions beyond limits of province—Promissory notes—Right of action—Juristic disability—Construction of statute—(B.C.) 10 Edw. VII. c. 7, ss. 139, 166, 168.*] The "Companies Act" (B.C.) 10 Edw. VII., ch. 7, secs. 139, 166, 168 prohibits companies incorporated otherwise than under the laws of British Columbia carrying on without registration or licence in the province any part of their business; penalties are provided for doing so without provincial registration or licence; and they are denied the right of maintaining actions, suits or proceedings in the courts of the province in respect of any contract made in whole or in part within the province in the course of or in connection with any business carried on contrary to the provisions of the Act. The appellant company, incorporated under the Dominion "Companies Act," R.S.C., 1906, ch. 79, has its head-office in Winnipeg, Man., and did not become licensed under the B.C. "Companies Act." In February, 1911, the company entered into an agreement with A., who is domiciled in British Columbia, giving him the exclusive right to sell their goods in British Columbia in pursuance of which he ordered goods from the company to be shipped from Winnipeg to him, *f.o.b.* Calgary, Alta., assuming all risk and charges himself from that point to Elko, B.C., where the goods were to be received and sold by him. He gave the company his promissory notes, dated at Winnipeg, for the price of these goods, some of the notes being actually signed by him at Elko. In an action by the company to recover the amount of these notes the trial judge held that the action was barred by the statute and could not be maintained by the company in any court in the Province of British Columbia. On an appeal, *per saltum*, to the Supreme Court of Canada the judgment appealed from (8 D.L.R. 65; 2 West. W.R. 1013; 22 W.L.R. 243) was reversed,

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and it was—*Held, per* Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ., that the transactions which had taken place between the company and A. did not constitute the carrying on of business by the company in the Province of British Columbia within the meaning of the B.C. "Companies Act" and, therefore, the disabilities imposed by that statute could have no effect in respect of the right of the company to recover the amount claimed in the action in the provincial court.—*Per* Idington J.—As the exclusive jurisdiction in respect of bills of exchange and promissory notes has been assigned to the Parliament of Canada, under item 18 of section 91 of the "British North America Act, 1867," the word "contract" as used in section 166 of the B.C. "Companies Act," 10 Edw. VII., ch. 7, cannot be considered as having any application to promissory notes; the plaintiffs' right of action in the provincial court was, therefore, not barred by the provincial statute. JOHN DEERE PLOW CO. *v.* AGNEW..... **208**

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mitted for the opinion of the court some question which, in the opinion of the board, is a question of law. (*Cf.* "*Regina Rates Case*," (44 Can. S.C.R. 328), where this case was followed by Anglin J., and 45 Can. S.C.R. at pp. 323 to 328.) CANADIAN PACIFIC RY. CO. v. CITY OF OTTAWA..... **257**

2——*Reference to master—Final judgment—Jurisdiction.*] *Per* Fitzpatrick C.J., and Idington, Anglin and Brodeur JJ.—Where the judgment sought to be reviewed has finally disposed of one of the issues, forming a distinct and separate ground of action, the Supreme Court of Canada has jurisdiction to hear and determine the appeal. *La Ville de St. Jean* v. *Molleur* (40 Can. S.C.R. 139), and *McDonald* v. *Belcher* ([1904] A. C. 429), followed; *Hesseltine* v. *Nelles* (47 Can. S.C.R. 230) referred to. DENMAN *v.* CLOVER BAR COAL CO..... **318**

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3——*Jurisdiction—"Supreme Court Act," ss.* 36, 37, 46—*Judge in Chambers—Originating petition—Arts.* 71, 72, 875, 876 *C.P.Q.*] A cause, matter or judicial proceeding originating on petition to a judge in chambers, in virtue of articles 875 and 876 of the Quebec Code of Civil Procedure, is appealable to the Supreme Court of Canada where the subject of the controversy amounts to the sum or value of two thousand dollars. TURGEON *v.* ST. CHARLES..... **473**

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4——*Jurisdiction—Reserve of further directions—"Final judgment"—Construction of statute—"Supreme Court Act," R.S.C.* 1906, *c.* 139, *s.* 2 (*e*); 3 & 4 *Geo. V. c.* 51, *s.* 1.] Before the amendment in 1913, to sec. 2 (*e*) of the "Supreme Court Act," R.S.C. 1906, ch. 139, judgments were rendered maintaining an action on a bond by which two of the defendants were ordered to pay to the plaintiffs an amount not exceeding that secured by the bond to be ascertained upon a reference to the master and further directions were reserved; as to another defendant, recovery of the same amount, to be ascertained in the same manner, was ordered, but there was no reserve of further directions. Upon an appeal by the last mentioned defendant, *Held*, Davies J. dissenting, that the judgment sought to be appealed from (23 Man. R. 159) did not finally conclude the action as proceedings still remained to be taken on the reference, consequently, it was not a final judgment within the meaning of section 2 (*e*) of the "Supreme Court Act," prior to the amendment by the statute 3 & 4 Geo. V., ch. 51 (assented to on the 6th of June, 1913), and it was not competent to the Supreme Court of Canada to entertain the appeal. *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.* (19 Can. S.C.R. 434) followed. *Ex parte Moore* (14 Q.B.D. 627) distinguished; *Clarke* v. *Goodall* (44 Can. S.C.R. 284), and *The Crown Life Ins. Co.* v. *Skinner* (44 Can. S.C.R. 616) referred to.—*Per* Anglin and Brodeur JJ.—The amendment of the "Supreme Court Act" by the first section of 3 & 4 Geo. V., ch. 51, has not affected whatever right the appellant may have had at the time the judgment was rendered in respect to an appeal to the Supreme Court of Canada. *Hyde* v. *Lindsay* (29 Can. S.C. R. 99); *Cowen* v. *Evans* (22 Can. S.C.R. 331); *Hurtubise* v. *Desmarteau* (19 Can. S.C.R. 562); and *Taylor* v. *The Queen* (1 Can. S.C.R. 65) referred to.—*Per* Davies J. dissenting.—The judgment in question does not reserve "further directions" and comes within the rule and principle determining what are "final judgments" laid down in the case of *Ex parte Moore* (14 Q.B.D. 627). STEPHENSON *v.* GOLD MEDAL FURNITURE MFG. CO..... **497**

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tion court judge; its jurisdiction is not confined to the objection upon which the judgment appealed from was solely based. Idington J. *contra*. Fitzpatrick C.J. and Brodeur J. expressing no opinion. RICHELIEU ELECTION; PARADIS *v.* CARDIN **625**

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BOARD OF RAILWAY COMMISSIONERS — *Constitutional law — Provincial tramway—Jurisdiction of Board of Railway Commissioners—Highways—Overhead crossings—Apportionment of cost—Legislative jurisdiction—Ancillary powers—"Interested parties"—Construction of statute—"Railway Act," R.S.C.*, 1906, *c.* 37, *ss.* 8, 59, 237, 238—(*B.C.*) 8 & 9 *Edw. VII., c.* 32—*"B.N.A. Act*, 1867," *s.* 92, *item* 10.] On an application by the City of Vancouver, the Board of Railway Commissioners for Canada authorized the Corporation of the City of Vancouver to construct overhead bridges across the tracks of a Dominion railway company, which had been laid down during the years 1909 and 1910 on certain streets in the city, and ordered that a portion of the cost of construction of two of these bridges and of the depression of the tracks at the crossings thereof by the Dominion railway should be borne by a tramway company which derived its powers through provincial legislation and an agreement with the city pursuant to such legislation under which it operated its tramways upon these streets. By the agreement the tramway company became entitled to use the city streets with reciprocal obligations by the city and the company respecting their grading, repair and maintenance, and it was provided that the city should receive a share of the gross earnings of the tramway company. On appeal to the Supreme Court of Canada from the order of the Board:—*Held*, Duff and Brodeur JJ. dissenting, that, in virtue of sections 8 (*a*), 59, 237 and 238 of the "Railway Act," R.S.C., 1906, ch. 37, as amended by chapter 32 of 8 & 9 Edw. VII., the Board of Railway Commissioners for Canada had jurisdiction to determine the "interested parties" in respect of the proposed works and to direct what proportion of the cost thereof should be borne by each of them. *The City of Toronto* v. *Canadian Pacific Railway Co.* ((1908) A. C. 54); *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* ((1899) A.C. 367); *City of Toronto* v. *Grand Trunk Railway Co.* (37 Can. S.C.R. 232); *County of Carleton* v. *City of Ottawa* (41 Can. S.C.R. 552), and *Re Canadian Pacific Railway Co. and York* (25 Ont. App. R. 65) followed.—*Per* Duff and Brodeur JJ., dissenting.—(1) The Parliament of Canada, when it assumes jurisdiction, under the provisions of item 10 of section 92 of the "British North America Act, 1867," in respect of a

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provincial railway, *quâ* railway, must assume such jurisdiction over the work or undertaking "as an integer." (2) The order of the Board cannot be sustained as being made in the exercise of the Dominion power of taxation. (3) As there is no Dominion interest concerned in the provisions of the order under appeal, and the Dominion Parliament has no power to compel the provincial company to assume the burden of the cost of the proposed works, or any portion thereof, the Board of Railway Commissioners had no jurisdiction to assess a proportion of their cost upon the tramway company. (4) The cases cited above must be distinguished as they do not sustain, as a valid exercise of ancillary power by Dominion authority, any enactment professing to control a provincial railway company.—(NOTE. —Leave to appeal to the Privy Council was granted on 14th July, 1913.) B.C. ELECTRIC RAILWAY CO. *v.* V. V. AND E. RAILWAY AND NAVIGATION CO. AND THE CITY OF VANCOUVER..... **98**

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3——*Construction — Route and location plans—Approval—Obstruction to navigation—Demolition of works—Jurisdiction of Board of Railway Commissioners—"Railway Act," R.S.C.*, 1906, *c.* 37, *ss.* 30 (*h*), (*i*), 230, 233.] Where a railway company, in the professed exercise of its powers as a railway company and without the approval of the route by the Minister and of the location plans and works by the Board of Railway Commissioners for Canada, has constructed a solid

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COMPANY LAW—*Company—Subscription for treasury stock—Contract—Principal and agent—Misrepresentation—Fraud—Transfer of shares—Rescission—Return of payments—Want of consideration.*] V. entered into an agreement to purchase for re-sale the unsold treasury stock of a foreign joint stock company "subscriptions to be made from time to time as sales were made"; it was therein provided that the company should fill all orders for stock received through V. at $15 for each share; that V. should sell the stock for $20 per share; that V. should "pay for the stock so ordered with the proceeds of sales made by him or through his agency," and that the contract should continue in force so long as the company had unsold treasury stock with which to fill such orders. The company also gave V. authority to establish agencies in Canada in connection with its casualty insurance business and to appoint medical examiners there. At the time the company had no licence to carry on the business of insurance in Canada, nor any immediate intention of making arrangements to do so, and V. was an official of the company and was aware of these facts. V. appointed T. the sole medical examiner of the

Company Law—*continued.*

company for Vancouver, B.C., assuring him that the company would commence to carry on its casualty insurance business there within a couple of months, and then obtained from him a subscription for a number of shares of the company's treasury stock which were paid for partly by T.'s cheques, payable to the company, and the balance by a series of promissory notes falling due from month to month following the date of the subscription and made payable to V. A number of shares equal to those so subscribed for by T. were then transferred to him by V. out of the allotment made to him by the above mentioned agreement, the certificates therefor being obtained by V. in the name of T. from the company, but the company did not formally accept T.'s subscription nor issue any treasury stock to him thereunder. The company did not commence business in Vancouver within the time specified by V. nor did it obtain a licence to carry on the business of insurance in Canada until many months later. In an action by T. against the company and V. to recover back the money he had paid and for the cancellation and return of the notes.—*Held*, affirming the judgment appealed from (7 D.L.R. 944; 2 West. W.R. 658), Davies and Anglin JJ. dissenting, that, in the transaction which took place, V. was the company's agent; that the company was, consequently, responsible for the deceit practised in procuring the subscription from T.; that there had been no contract for the purchase of treasury stock completed between the company and T.; that the object of T.'s subscription was not satisfied by the transfer of V.'s shares to him, and that he was entitled to recover back the money he had paid and to have the notes returned for cancellation as having been paid over and delivered without consideration and in consequence of the fraudulent representations made by V. INTERNATIONAL CASUALTY CO. *v.* THOMPSON..... **167**

2——*Foreign corporation—Conflict of laws—Incorporation by Dominion authority—Powers—B.C. "Companies Act"—Unlicensed extra-provincial companies—"Carrying on business"—Contract—Transactions beyond limits of province—Promissory notes—Right of action—Juristic disability—Construction of statute*

Company Law—*continued.*

—(*B.C.*) 10 *Edw. VII. c. 7, ss.* 139, 166, 168.] The "Companies Act" (B.C.) 10 Edw. VII., ch. 7, secs. 139, 166, 168, prohibits companies incorporated otherwise than under the laws of British Columbia carrying on without registration or licence in the province any part of their business; penalties are provided for doing so without provincial registration or licence; and they are denied the right of maintaining actions, suits or proceedings in the courts of the province in respect of any contract made in whole or in part within the province in the course of or in connection with any business carried on contrary to the provisions of the Act. The appellant company, incorporated under the Dominion "Companies Act," R.S.C., 1906, ch. 79, has its head-office in Winnipeg, Man., and did not become licensed under the B.C. "Companies Act." In February, 1911, the company entered into an agreement with A., who is domiciled in British Columbia, giving him the exclusive right to sell their goods in British Columbia in pursuance of which he ordered goods from the company to be shipped from Winnipeg to him, *f.o.b.* Calgary, Alta., assuming all risk and charges himself from that point to Elko, B.C., where the goods were to be received and sold by him. He gave the company his promissory notes, dated at Winnipeg, for the price of these goods, some of the notes being actually signed by him at Elko. In an action by the company to recover the amount of these notes the trial judge held that the action was barred by the statute and could not be maintained by the company in any court in the Province of British Columbia. On an appeal, *per saltum*, to the Supreme Court of Canada the judgment appealed from (8 D.L.R. 65; 2 West. W.R. 1013; 22 W.L.R. 243) was reversed, and it was—*Held*, *per* Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ., that the transactions which had taken place between the company and A. did not constitute the carrying on of business by the company in the Province of British Columbia within the meaning of the B.C. "Companies Act" and, therefore, the disabilities imposed by that statute could have no effect in respect of the right of the company to recover the amount claimed in the action in the provincial court.—*Per* Idington J.—As the exclusive jurisdie-

Company Law—*continued.*

tion in respect of bills of exchange and promissory notes has been assigned to the Parliament of Canada, under item 18 of section 91 of the "British North America Act, 1867," the word "contract" as used in section 166 of the B.C. "Companies Act," 10 Edw. VII., ch. 7, cannot be considered as having any application to promissory notes; the plaintiffs' right of action in the provincial court was, therefore, not barred by the provincial statute. JOHN DEERE PLOW Co. *v.* AGNEW **208**

3——*Agreement by directors—Onerous contract—Non-disclosure to shareholders—Breach of contract—Damages—Settlement of accounts—Appeal—Jurisdiction—Reference to master—Final Judgment.*] After some subscriptions for stock had been received and the company was about to offer other stock for public subscription, a meeting of the directors was held at which the plaintiff, then one of the directors and the company's manager, resigned his office as a director and was appointed sales agent for the company's output of coal for five years from that date, at a liberal scale of remuneration, with the exclusive right to make such sales in Alberta, Saskatchewan and Manitoba. At the same time an arrangement was made by which the other directors derived advantages in regard to certain matters in dispute, respecting the affairs of the company, between them and the plaintiff. The material facts and circumstances connected with these arrangements were not disclosed to the shareholders who then held stock in the company nor to other persons who subsequently subscribed for shares of its stock.—*Held,* affirming the judgment appealed from (7 D.L.R. 96; 2 West. W.R. 986; 22 W.L.R. 128), that, as the plaintiff and his co-directors were in a fiduciary position and complete disclosure of the circumstances in regard to the making of the contract had not been made to all the shareholders, present and future, the agreement was not binding upon the company.—The order in the judgment appealed from directing that, on taking the accounts between the parties, an allowance should be made to the plaintiff, on the basis of *quantum meruit,* for services rendered by him while in the employ of the company was not disturbed.—*Per* Fitzpatrick C.J., and Idington, Anglin and Brodeur JJ.—Where the judgment sought to be reviewed has finally disposed of one of the issues, forming a distinct and separate ground of action, the Supreme Court of Canada has jurisdiction to hear and determine the appeal. *La Ville de St. Jean* v. *Molleur* (40 Can. S.C.R. 139), and *McDonald* v. *Belcher* ([1904) A.C. 429) followed; *Hesseltine* v. *Nells* (47 Can. S.C.R. 230) referred to. DENMAN *v.* CLOVER BAR COAL CO. **318**

4——*Incorporation of companies—"Provincial objects"—Limitation—Doing business beyond the province—Insurance company—"Insurance Act,* 1910"; 9 & 10 *Edw. VII. c.* 32, *s.* 3, *s.s.* 3—*Enlargement of company's powers—Federal company—Provincial licence—Trading companies.*] By subsec. 11, sec. 92, of "The British North America Act, 1867," the legislature of any Province in Canada has exclusive jurisdiction for "The Incorporation of Companies with Provincial Objects."—*Held, per* Fitzpatrick C.J. and Davies J., that the limitation defined in the expression "Provincial Objects" is territorial and also has regard to the character of the powers which may be conferred on companies locally incorporated.—*Held, per* Idington, Anglin and Brodeur JJ., that such limitation is not territorial but has regard to the character of the powers only.—*Per* Duff J.—Provincial objects means "objects" which are "provincial" in reference to the incorporating province. Whether the "objects" of a particular company as defined by its constitution are or are not "provincial" in this sense is a question to be determined on the facts of each particular case substantially as a question of fact.——*Held, per* Fitzpatrick C.J. and Davies J. that a company incorporated by a Provincial legislature has no power or capacity to do business outside of the limits of the incorporating Province but it may contract with parties residing outside those limits as to matters ancillary to the exercise of its powers.—*Per* Idington and Brodeur JJ.—Such company has, inherently, unless prohibited by its charter, the capacity to carry on the business for which it was created, in any foreign state or province whose laws permit it to do so.—*Per* Duff J.—A provincial company may conduct its operations outside the limits

of the Province creating it so long as its business as a whole remains provincial with reference to its province of origin. —*Per* Anglin J.—Such a company has, inherently, unless prohibited by its charter, the capacity to accept the authorization of any foreign state or province to carry on within its territory the business for which it was created.— *Held, per* Fitzpatrick C.J. and Davies J., that a corporation constituted by a provincial legislature with power to carry on a fire insurance business with no express limitation as to locality has no power or capacity to make and execute contracts for insurance outside of the incorporating province or for insuring property situate outside thereof. —*Per* Idington, Anglin and Brodeur JJ. —Such a company has power to insure property situate within or without the incorporating province and to make contracts within or without the same to effect any such insurance. In respect to all such contracts it is not material whether the owner of the property insured is, or is not, a citizen or resident of the incorporating Province.—*Per* Duff J.—It is not necessarily incompatible with the provincial character of the "objects" of a provincial insurance company that it should have power to enter into outside the province contracts insuring property outside the province.—*Held, per* Fitzpatrick C.J. and Davies J.—A provincial fire insurance company cannot make contracts and insure property throughout Canada by availing itself of the provisions of sec. 3, subsec. 3, of 9 & 10 Edw. VII. ch. 32 ("The Insurance Act, 1910").— *Per* Fitzpatrick C.J. and Davies J.— That such enactment is *ultra vires* so far as the provincial companies are affected.—*Per* Brodeur J.—Such enactment is *ultra vires* of Parliament.—*Per* Idington J.—Part of said subsection may be *intra vires* but the last part providing for a Dominion license to local companies is not.—*Per* Anglin J.—The said enactment is *ultra vires* except in so far as it deals with companies incorporated by or under Acts of the legislature of the late Province of Canada.— *Held,* that the powers of a company incorporated by a provincial legislature cannot be enlarged either as to locality or objects, by the Dominion Parliament nor by the legislature of another Province.—*Held, per* Fitzpatrick C.J. and

Davies J.—The legislature of a province has no power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province without obtaining a licence so to do from the provincial authorities and paying fees therefor unless such licence is imposed in exercise of the taxing power of the province. And only in the same way can the legislature restrict a company incorporated for the purpose of trading throughout the Dominion in the exercise of its special trading powers or limit the exercise of such powers within the province. Brodeur J. *contra.*—*Per* Idington J.—A company incorporated by the Dominion Parliament in carrying out any of the enumerated powers contained in sec. 91 cannot be prohibited by a provincial legislature from carrying on business, or restricted in the exercise of its powers, within the province though subject to exercise of the exclusive jurisdiction to make laws in relation to "direct taxation within the province." But a company incorporated under the general powers of Parliament must conform to all the duly enacted laws of a province in which it seeks to do business.— *Per* Duff J.—A company incorporated under the residuary legislative power of the Dominion is not in any province where it carries on business subject to the legislative authority of the province in relation to matters falling within the subject "incorporation of companies"; but as regards all other matters falling within the enumerated subjects of section 92 it is subject to such legislative jurisdiction just as a natural person or an unincorporated association would be in like circumstances. The enactments of sections 139, 152, 167 and 168 of the British Columbia "Companies Act" are valid.—*Per* Anglin J.—The provincial legislature may impose a license and exact fees from any Dominion company if the object be the raising of revenue, or obtaining of information, "for provincial, local or municipal purposes" but not if it is to require the company to obtain provincial sanction or authority for the exercise of its corporate powers. And the legislature cannot restrict a company incorporated for the purpose of trading throughout the Dominion in the exercise of its special powers nor limit the exercise of such powers within the province, nor sub-

Company Law—*continued.*

ject such company to legislation limiting the nature or kind of business which corporations not incorporated by it may carry on or the powers which they may exercise within the province. IN RE COMPANIES..... **331**

5——*Constitutional law—Insurance—Foreign company doing business in Canada—Dominion licence—9 & 10 Edw. VII. c. 32, ss. 4, 70*..... **260**

See CONSTITUTIONAL LAW 3.

6——*Contract by directors—Powers—Agreement—Freight rates*..... **520**

See RAILWAYS 7.

7——*Winding-up proceedings—Company in liquidation—Sale of assets—Consent to sale of mortgaged ship—Sale by order of court—Mariners' liens—Sale free from incumbrances—Special fund—Privileged charge—Priority—Valuation of security—Release of mortgage—Marshalling securities—Subrogation*..... **593**

See LIEN.

CONFLICT OF LAWS—*Company law—Foreign corporation—Incorporation by Dominion authority—Powers—B.C. "Companies Act"—Unlicensed extra-provincial companies—"Carrying on business"—Contract—Transactions beyond limits of province—Promissory notes—Right of action—Juristic disability—Construction of statute—(B.C.) 10 Edw. VII., c. 7, ss. 139, 166, 168*..... **208**

See CONTRACT 2.

AND *see* CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—*Railways—Powers of construction and operation—Conflict of laws—Provincial legislation—Interference with Dominion railways—Constitutional law—Jurisdiction of legislature—Construction of statute—7 Edw. VII. c. 8, s. 82 (Alta.)—2 Geo. V. c. 15, s. 7 (Alta.)—"B.N.A. Act," 1867, ss. 91 and 92.*] It is not competent to the Legislature of the Province of Alberta to enact legislation authorizing the construction and operation of railways in such a manner as to interfere with the physical structure or with the operation of railways subject to the jurisdiction of the Parliament of Canada.—Brodeur J. *contra*, was of the opinion that such legislation would be within the jurisdiction of the provincial legislature provided that in its effect there should be no unreasonable interference with federal railways. IN RE ALBERTA RAILWAY ACT..... **9**

Constitutional Law—*continued.*

2——*Provincial tramway—Jurisdiction of Board of Railway Commissioners—Highways—Overhead crossings—Apportionment of cost—Legislative jurisdiction—Ancillary powers—"Interested parties"—Construction of statute—"Railway Act," R.S.C. 1906, c. 37, ss. 8, 59, 237, 238—(B.C.) 8 & 9 Edw. VII., c. 32—"B.N.A. Act, 1867," s. 92, item 10.*] On an application by the City of Vancouver, the Board of Railway Commissioners for Canada authorized the Corporation of the City of Vancouver to construct overhead bridges across the tracks of a Dominion railway company, which had been laid down during the years 1909 and 1910 on certain streets in the city, and ordered that a portion of the cost of construction of two of these bridges and of the depression of the tracks at the crossings thereof by the Dominion railway should be borne by a tramway company which derived its powers through provincial legislation and an agreement with the city pursuant to such legislation under which it operated its tramways upon these streets. By the agreement the tramway company became entitled to use the city streets with reciprocal obligations by the city and the company respecting their grading, repair and maintenance, and it was provided that the city should receive a share of the gross earnings of the tramway company. On appeal to the Supreme Court of Canada from the order of the Board.—*Held*, Duff and Brodeur JJ. dissenting, that, in virtue of sections 8 (*a*), 59, 237, and 238 of the "Railway Act," R.S.C., 1906, ch. 37, as amended by chapter 32 of 8 & 9 Edw. VII., the Board of Railway Commissioners for Canada had jurisdiction to determine the "interested parties" in respect of the proposed works and to direct what proportion of the cost thereof should be borne by each of them. *The City of Toronto* v. *Canadian Pacific Railway Co.* ((1908) A.C. 54); *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* ((1899) A.C. 367); *City of Toronto* v. *Grand Trunk Railway Co.* (37 Can. S.C.R. 232); *County of Carleton* v. *City of Ottawa* (41 Can. S.C.R. 552), and *Re Canadian Pacific Railway Co. and*

Constitutional Law—*continued.*

York (25 Ont. App. R. 65) followed.—*Per* Duff and Brodeur JJ. dissenting.—(1) The Parliament of Canada, when it assumes jurisdiction, under the provisions of item 10 of section 92 of the "British North America Act, 1867," in respect of a provincial railway, *quâ* railway, must assume such jurisdiction over the work or undertaking "as an integer." (2) The order of the Board cannot be sustained as being made in the exercise of the Dominion power of taxation. (3) As there is no Dominion interest concerned in the provisions of the order under appeal, and the Dominion Parliament has no power to compel the provincial company to assume the burden of the cost of the proposed works, or any portion thereof, the Board of Railway Commissioners had no jurisdiction to assess a proportion of their cost upon the tramway company. (4) The cases cited above must be distinguished as they do not sustain, as a valid exercise of ancillary power by Dominion authority, any enactment professing to control a provincial railway company.—(NOTE.—Leave to appeal to the Privy Council was granted on 14th July, 1913.)—B.C. ELECTRIC RAILWAY CO. *v.* V.V. AND E. RAILWAY AND NAVIGATION CO. AND THE CITY OF VANCOUVER. **98**

3——*Insurance—Foreign company doing business in Canada—Dominion license—9 & 10 Edw. VII. c. 32, ss. 4 and 70.*] *Held, per* Fitzpatrick C.J. and Davies J., that sections 4 and 70 of the Act 9 & 10 Edw. VII. ch. 32 (the "Insurance Act, 1910") are not *ultra vires* of the Parliament of Canada, Idington, Duff, Anglin and Brodeur JJ., *contra.—Held, per* Fitzpatrick C.J., and Davies J., that section 4 of said Act operates to prohibit an insurance company incorporated by a foreign state from carrying on its business within Canada if it does not hold a license from the Minister under the said Act and if such carrying on of the business is confined to a single province.—*Per* Idington J.—Section 4 does so prohibit if, and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies as well as others within the terms of which is embraced so much that is clearly *ultra vires.—Per* Duff, Anglin and Brodeur JJ.—The section would

Constitutional Law—*continued.*

effect such prohibition if it were *intra vires.* IN RE "INSURANCE ACT, 1910" **260**

4——*Incorporation of companies—"Provincial objects"—Limitation—Doing business beyond the province—Insurance company—"Insurance Act,* 1910"; 9 *&* 10 *Edw. VII. c.* 32, *s.* 3, *s.s.* 3—*Enlargement of company's powers—Federal company—Provincial licence—Trading companies.*] By subsec. 11, sec. 92, of "The British North America Act, 1867," the legislature of any Province in Canada has exclusive jurisdiction for "The Incorporation of Companies with Provincial Objects."—*Held, per* Fitzpatrick C.J. and Davies J., that the limitation defined in the expression "Provincial Objects" is territorial and also has regard to the character of the powers which may be conferred on companies locally incorporated.—*Held, per* Idington, Anglin and Brodeur JJ., that such limitation is not territorial but has regard to the character of the powers only.—*Per* Duff J.—Provincial objects means "objects" which are "provincial" in reference to the incorporating province. Whether the "objects" of a particular company as defined by its constitution are or are not "provincial" in this sense is a question to be determined on the facts of each particular case substantially as a question of fact.——*Held, per* Fitzpatrick C.J. and Davies J. that a company incorporated by a Provincial legislature has no power or capacity to do business outside of the limits of the incorporating Province but it may contract with parties residing outside those limits as to matters ancillary to the exercise of its powers.—*Per* Idington and Brodeur JJ.—Such company has, inherently, unless prohibited by its charter, the capacity to carry on the business for which it was created, in any foreign state or province whose laws permit it to do so.—*Per* Duff J.—A provincial company may conduct its operations outside the limits of the Province creating it so long as its business as a whole remains provincial with reference to its province of origin.—*Per* Anglin J.—Such a company has, inherently, unless prohibited by its charter, the capacity to accept the authorization of any foreign state or province to carry on within its territory the business for which it was created.—*Held, per* Fitzpatrick C.J. and Davies

J., that a corporation constituted by a provincial legislature with power to carry on a fire insurance business with no express limitation as to locality has no power or capacity to make and execute contracts for insurance outside of the incorporating province or for insuring property situate outside thereof. —*Per* Idington, Anglin and Brodeur JJ. —Such a company has power to insure property situate within or without the incorporating province and to make contracts within or without the same to effect any such insurance. In respect to all such contracts it is not material whether the owner of the property insured is, or is not, a citizen or resident of the incorporating Province.—*Per* Duff J.—It is not necessarily incompatible with the provincial character of the "objects" of a provincial insurance company that it should have power to enter into outside the province contracts insuring property outside the province.—*Held, per* Fitzpatrick C.J. and Davies J.—A provincial fire insurance company cannot make contracts and insure property throughout Canada by availing itself of the provisions of sec. 3, sub-sec. 3, of 9 & 10 Edw. VII. ch. 32 ("The Insurance Act, 1910").—*Per* Fitzpatrick C.J. and Davies J.—That such enactment is *ultra vires* so far as the provincial companies are affected.—*Per* Brodeur J.—Such enactment is *ultra vires* of Parliament.—*Per* Idington J.—Part of said subsection may be *intra vires* but the last part providing for a Dominion license to local companies is not.—*Per* Anglin J.—The said enactment is *ultra vires* except in so far as it deals with companies incorporated by or under Acts of the legislature of the late Province of Canada.—*Held,* that the powers of a company incorporated by a provincial legislature cannot be enlarged either as to locality or objects, by the Dominion Parliament nor by the legislature of another Province.—*Held, per* Fitzpatrick C.J. and Davies J.—The legislature of a province has no power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province without obtaining a licence so to do from the provincial authorities and paying fees therefor unless such licence is imposed in exercise of the taxing power of the province. And only in the same way can the legislature re-

strict a company incorporated for the purpose of trading throughout the Dominion in the exercise of its special trading powers or limit the exercise of such powers within the province. Brodeur J. *contra.*—*Per* Idington J.—A company incorporated by the Dominion Parliament in carrying out any of the enumerated powers contained in sec. 91 cannot be prohibited by a provincial legislature from carrying on business, or restricted in the exercise of its powers, within the province though subject to exercise of the exclusive jurisdiction to make laws in relation to "direct taxation within the province." But a company incorporated under the general powers of Parliament must conform to all the duly enacted laws of a province in which it seeks to do business.—*Per* Duff J.—A company incorporated under the residuary legislative power of the Dominion is not in any province where it carries on business subject to the legislative authority of the province in relation to matters falling within the subject "incorporation of companies"; but as regards all other matters falling within the enumerated subjects of section 92 it is subject to such legislative jurisdiction just as a natural person or an unincorporated association would be in like circumstances. The enactments of sections 139, 152, 167 and 168 of the British Columbia "Companies Act" are valid.—*Per* Anglin J.—The provincial legislature may impose a license and exact fees from any Dominion company if the object be the raising of revenue, or obtaining of information, "for provincial, local or municipal purposes" but not if it is to require the company to obtain provincial sanction or authority for the exercise of its corporate powers. And the legislature cannot restrict a company incorporated for the purpose of trading throughout the Dominion in the exercise of its special powers nor limit the exercise of such powers within the province, nor subject such company to legislation limiting the nature or kind of business which corporations not incorporated by it may carry on or the powers which they may exercise within the province. IN RE COMPANIES 331

CONTRACT — *Company — Subscription for treasury stock—Contract—Principal and agent — Misrepresentation — Fraud—*

Contract—*continued.*

Transfer of shares—Rescission—Return of payments—Want of consideration.] V. entered into an agreement to purchase for re-sale the unsold treasury stock of a foreign joint stock company "subscriptions to be made from time to time as sales were made;" it was therein provided that the company should fill all orders for stock received through V. at $15 for each share; that V. should sell the stock for $20 per share; that V. should "pay for the stock so ordered with the proceeds of sales made by him or through his agency," and that the contract should continue in force so long as the company had unsold treasury stock with which to fill such orders. The company also gave V. authority to establish agencies in Canada in connection with its casualty insurance business and to appoint medical examiners there. At the time the company had no licence to carry on the business of insurance in Canada, nor any immediate intention of making arrangements to do so, and V. was an official of the company and was aware of these facts. V. appointed T. the sole medical examiner of the company for Vancouver, B.C., assuring him that the company would commence to carry on its casualty insurance business there within a couple of months, and then obtained from him a subscription for a number of shares of the company's treasury stock which were paid for partly by T.'s cheques, payable to the company, and the balance by a series of promissory notes falling due from month to month following the date of the subscription and made payable to V. A number of shares equal to those so subscribed for by T. were then transferred to him by V. out of the allotment made to him by the above mentioned agreement, the certificates therefor being obtained by V. in the name of T. from the company, but the company did not formally accept T.'s subscription nor issue any treasury stock to him thereunder. The company did not commence business in Vancouver within the time specified by V. nor did it obtain a licence to carry on the business of insurance in Canada until many months later. In an action by T. against the company and V. to recover back the money he had paid and for the cancellation and return of the notes.—*Held,* affirming the judgment appealed from (7 D.L.R. 944; 2 West. W.R. 658), Davies and Anglin JJ. dissenting, that, in the transaction which took place, V. was the company's agent; that the company was, consequently, responsible for the deceit practised in procuring the subscription from T.; that there had been no contract for the purchase of treasury stock completed between the company and T.; that the object of T.'s subscription was not satisfied by the transfer of V.'s shares to him, and that he was entitled to recover back the money he had paid and to have the notes returned for cancellation as having been paid over and delivered without consideration and in consequence of the fraudulent representations made by V. INTERNATIONAL CASUALTY CO. *v.* THOMPSON **167**

Contract—*continued.*

2——*Foreign corporation—Conflict of laws—Incorporation by Dominion authority—Powers—B.C. "Companies Act"—Unlicensed extra-provincial companies—"Carrying on business"—Contract—Transactions beyond limits of province—Promissory notes—Right of action—Juristic disability—Construction of statute—(B.C.) 10 Edw. VII. c. 7, ss. 139, 166, 168.*] The "Companies Act" (B.C.) 10 Edw. VII., ch. 7, secs. 139, 166, 168, prohibits companies incorporated otherwise than under the laws of British Columbia carrying on without registration or licence in the province any part of their business; penalties are provided for doing so without provincial registration or licence; and they are denied the right of maintaining actions, suits or proceedings in the courts of the province in respect of any contract made in whole or in part within the province in the course of or in connection with any business carried on contrary to the provisions of the Act. The appellant company, incorporated under the Dominion "Companies Act," R.S.C., 1906, ch. 79, has its head-office in Winnipeg, Man., and did not become licensed under the B.C. "Companies Act." In February, 1911, the company entered into an agreement with A., who is domiciled in British Columbia, giving him the exclusive right to sell their goods in British Columbia in pursuance of which he ordered goods from the company to be shipped from Winnipeg to him, *f. o. b.* Calgary, Alta., assuming all risk and charges himself from that point to Elko, B.C., where the goods were to be received and sold by him.

Contract—*continued.*

He gave the company his promissory notes, dated at Winnipeg, for the price of these goods, some of the notes being actually signed to by him at Elko. In an action by the company to recover the amount of these notes the trial judge held that the action was barred by the statute and could not be maintained by the company in any court in the Province of British Columbia. On an appeal, *per saltum*, to the Supreme Court of Canada the judgment appealed from (8 D.L.R. 65;) 2 West. W.R. 1013; 22 W. L. R. 243) was reversed, and it was—*Held, per* Fitzpatrick C.J., and Davies, Duff, Anglin and Brodeur JJ., that the transactions which had taken place between the company and A. did not constitute the carrying on of business by the company in the Province of British Columbia within the meaning of the B.C. "Companies Act" and, therefore, the disabilities imposed by that statute could have no effect in respect of the right of the company to recover the amount claimed in the action in the provincial court.—*Per* Idington J.—As the exclusive jurisdiction in respect of bills of exchange and promissory notes has been assigned to the Parliament of Canada, under item 18 of section 91 of the "British North America Act, 1867," the word "contract" as used in section 166 of the B.C. "Companies Act," 10 Edw. VII., ch. 7, cannot be considered as having any application to promissory notes; the plaintiffs' right of action in the provincial court was, therefore, not barred by the provincial statute. JOHN DEERE PLOW Co. *v.* AGNEW. **208**

3——*Company law—Agreement by directors—Onerous contract—Non-disclosure to shareholders—Breach of contract—Damages—Settlement of accounts.*] After some subscriptions for stock had been received and the company was about to offer other stock for public subscription, a meeting of the directors was held at which the plaintiff, then one of the directors and the company's manager, resigned his office as a director and was appointed sales agent for the company's output of coal for five years from that date, at a liberal scale of remuneration, with the exclusive right to make such sales in Alberta, Saskatchewan and Manitoba. At the same time an arrangement was made by which the other

Contract—*continued.*

directors derived advantages in regard to certain matters in dispute, respecting the affairs of the company, between them and the plaintiff. The material facts and circumstances connected with these arrangements were not disclosed to the shareholders who then held stock in the company nor to other persons who subsequently subscribed for shares of its stock.—*Held*, affirming the judgment appealed from (7 D.L.R. 96; 2 West. W. R. 986; 22 W.L.R. 128), that, as the plaintiff and his co-directors were in a fiduciary position and complete disclosure of the circumstances in regard to the making of the contract had not been made to all the shareholders, present and future, the agreement was not binding upon the company.—The order in the judgment appealed from directing that, on taking the accounts between the parties, an allowance should be made to the plaintiff, on the basis of *quantum meruit*, for services rendered by him while in the employ of the company was not disturbed—DENMAN *v.* CLOVER BAR COAL CO. **318**

AND *see* COMPANY LAW 3.

4——*Liquor laws—"Quebec Licence Law," R.S.Q.*, 1909, *arts.* 924 *et seq.—Property in licence—Agreement—Ownership in persons other than holder—Invalidity of contract—Public policy.*] It is inconsistent with the policy of the "Quebec Licence Law" (R.S.Q., 1909), that the ownership of a licence to sell intoxicating liquors should be vested in one person while the licence is held in the name of another. An agreement having that effect is void inasmuch as it establishes conditions contrary to the policy of the statute. Judgment appealed from (Q.R. 22 K.B. 58) reversed, Brodeur J. dissenting.] TURGEON *v.* ST. CHARLES. **473**

AND *see* LIQUOR LAWS.

5——*Crown lands—Location—Public policy—Evasion of statute—B.C. "Land Act," 8 Edw. VII. c.* 30, *ss.* 34, 36—*Sale of Crown lands—Principal and agent—Commission on sales—Quantum meruit—Tainted contract.*] B., who had laid out and inspected Crown lands as a Government surveyor, furnished information to the defendant and an associate which enabled them to secure choice locations, comprising over 7,000 acres of these lands, in the names of a number of

Contract—*continued.*

persons nominated by them and employed as "stakers." Subsequently B. assisted in the disposal of the lands thus secured to innocent purchasers under an arrangement with the defendant and his associate that he was to participate in any profits which should be obtained on such sales. In an action by B. to recover compensation for the services he had rendered in regard to these sales.—*Held*, that the circumstances disclosed a scheme concocted in opposition to the policy of the British Columbia "Land Act" and in violation of its provisions respecting the disposal of Crown lands; consequently, the agreement, being tainted with the character of the scheme, ought not to be enforced by the courts.—*Per* Idington and Anglin JJ.—The plaintiff's claim fails for want of evidence of any request by the defendant that he should render the services in respect of which remuneration is claimed nor an agreement to remunerate him for assistance in effecting the sales in question.—The judgment appealed from (3 West. W.R. 725; 23 West. L.R. 30; 9 D.L.R. 400) stood affirmed. BROWNLEE *v.* MCINTOSH..... **588**

6 —— *Watercourses — Driving timber — "Damages resulting"—Reparation—Riparian rights—Construction of statute—Arts.* 7298, 7349 *R.S.Q.* 1909—*Servitude—Injury caused by independent contractor—Liability of owner of timber*.....**137**

See RIVERS AND STREAMS.

7——*Sale of goods—Delay in delivery—Damages—Construction of agreement—Deficiencies in machinery — Exemption clause—"Unable to deliver"—"On or about" stated date*..... **518**

See SALE 3.

8——*Powers of directors—Agreement with shipper—Freight rates*..... **520**

See RAILWAYS 7.

9——*Vendor and purchaser—Sale of land—Agreement—Bond to secure payment of price—Conditions as to title*..... **506**

See VENDOR AND PURCHASER.

10——*Fire insurance—Blank application —General agent — Misrepresentation — Knowledge of company—Over-valuation—"Dwelling house"—"Lodging house."* **546**

See INSURANCE, FIRE 1.

COSTS—*Solicitor and client—Retainer —Subsequent proceedings—Habeas corpus —Evidence*..... **508**

See SOLICITOR 1.

2——*Solicitor and client—Special statute —Fixed sum for costs—Delivery of bill— "Solicitors' Act," 2 Geo. V., c. 28, s. 34* **516**

See SOLICITOR 2.

COUNSEL — *Solicitor and client — Retainer—Subsequent proceedings—Habeas corpus—Evidence*..... **508**

See SOLICITOR 1.

CRIMINAL LAW — *Habeas corpus — Common law offences—Construction of statute—"Supreme Court Act," R.S.C., 1906, c. 139, s. 62—Jurisdiction of Supreme Court judges.*] The jurisdiction of judges of the Supreme Court of Canada in respect of *habeas corpus ad subjiciendum* extends only to cases of commitment on charges of offences which are criminal by virtue of statutes enacted by the Parliament of Canada; it does not extend to cases of commitment for offences at common law or under statutes enacted prior to Confederation which are still in force. *Re Sproule* (12 Can. S.C.R. 140) referred to.—The offence of housebreaking as described in the Imperial statute, 7 & 8 Geo. IV., ch. 29, sec. 15, became part of the criminal law of British Columbia on the introduction of the criminal law of England into that colony by the ordinance of 19th November, 1858, continued to be so until the Union of the province with Canada, and since then by virtue of sec. 11 of the "Criminal Code," and it is not an offence to which sec. 62 of the "Supreme Court Act," R.S.C., 1906, ch. 139, has application. IN RE DEAN.. **235**

2——*Perjury—Form of oath.*] A witness who testifies to what is false is guilty of perjury, although, without being asked if he had any objection to being sworn in the usual manner, but without objecting to the form used, he was directed to take the oath by raising his right hand instead of kissing the Bible. CURRY *v.* THE KING..... **532**

CROWN LANDS — *Location — Public policy—Evasion of statute—B.C. "Land Act," 8 Edw. VII. c. 30, ss. 34, 36—Sale of Crown lands—Principal and agent—Commission on sales—Quantum meruit—*

Crown Lands—*continued.*

Tainted contract.] B., who had laid out and inspected Crown lands as a Government surveyor, furnished information to the defendant and an associate which enabled them to secure choice locations, comprising over 7,000 acres of these lands, in the names of a number of persons nominated by them and employed as "stakers." Subsequently B. assisted in the disposal of the lands thus secured to innocent purchasers under an arrangement with the defendant and his associate that he was to participate in any profits which should be obtained on such sales. In an action by B. to recover compensation for the services he had rendered in regard to these sales.—*Held*, that the circumstances disclosed a scheme concocted in opposition to the policy of the British Columbia "Land Act" and in violation of its provisions respecting the disposal of Crown lands; consequently, the agreement, being tainted with the character of the scheme, ought not to be enforced by the courts.—*Per* Idington and Anglin JJ.—The plaintiff's claim fails for want of evidence of any request by the defendant that he should render the services in respect of which remuneration is claimed nor an agreement to remunerate him for assistance in effecting the sales in question. —The judgment appealed from (3 West. W.R. 725; 23 West. L.R. 30; 9 D.L.R. 400) stood affirmed. BROWNLEE *v.* MCINTOSH..... **588**

DAMAGES — *Watercourses — Driving timber — "Damages resulting" —Reparation—Riparian rights—Construction of statute—Arts.* 7298, 7349, *R.S.Q.* (1909)—*Servitude—Injury caused by independent contractor—Liability of owner of timber.*] The privilege of transmitting timber down watercourses in the Province of Quebec given by article 7298 of the Revised Statutes of Quebec, 1909, is not granted in derogation of the obligation imposed upon those making use of watercourses for such purposes to make reparation for damages resulting therefrom by article 7349 (2) of the Revised Statutes of Quebec. The effect of the articles is that persons who avail themselves of the privilege thereby conferred are obliged to compensate riparian owners for all damages which result from the exercise of that right except in regard to such as cannot be avoided by the exercise of reasonable care and skill and

Damages—*continued.*

those in respect of which the riparian proprietor himself may have contributed, or which have been occasioned by his own fault. *Tourville* v. *Ritchie* (21 R.L. 110) referred to.—The judgment appealed from was reversed, Davies and Anglin JJ. dissenting.—*Per* Davies and Anglin JJ., dissenting.—The evidence shewed that the damages complained of were caused by the fault of a *bonâ fide* independent contractor and, consequently, the owner of the timber which was being driven down the watercourse in question was not responsible for them. —(NOTE.—Leave to appeal to the Privy Council was granted on 15th July, 1913.) DUMONT *v.* FRASER..... **137**

2——*Company law—Agreement by directors—Onerous contract—Non-disclosure to shareholders—Breach of contract—Settlement of accounts—Appeal—Jurisdiction—Reference to master—Final judgment.* **318**

See COMPANY LAW 3.

3——*Sale of goods—Designated quality—Fraud on purchaser—Loss of market..* **512**

See SALE 2.

4—— *Trespass — Railways — Occupation of lands—Side-tracks—Continuous trespass..... ..... .* **514**

See RAILWAYS 6.

5——*Sale of goods—Delay in delivery—Construction of agreement—Deficiencies in machinery—Exemption clause—"Unable to deliver"—"On or about" stated date..... ..... .* **518**

See SALE 3.

DEDICATION — *Trespass — Easement —Public way—User—Prescription—Estoppel—"Law and Transfer of Property Act," R.S.O.*, 1897, *c.* 119 ..... **57**

See EASEMENT.

DELIVERY—*Sale of goods—Delay in delivery—Damages—Construction of agreement—Deficiencies in machinery—Exemption clause—"Unable to deliver"—"On or about" stated date..... .* **518**

See SALE 3.

EASEMENT — *Trespass — Easement — Public way — Dedication — User — Prescription — Estoppel — "Law and Transfer of Property Act," R.S.O.* 1897, *c.* 119.] S. brought action against P. for trespass

Easement—*continued.*

on a strip of land called "Ancroft Place" which he claimed as his property and asked for damages and an injunction. "Ancroft Place" was a *cul-de-sac* running east from Sherbourne Street, and the defence to the action was that it was a public street or, if not, that P. had a right of way over it either by grant or user. On the trial it was shewn that the original owners had conveyed the lots to the east and south of "Ancroft Place" to different parties, each deed describing it as a street and giving a right of way over it to the grantee. The deeds to P's. predecessors in title did not give him a similar right of way, but some of these conveyances described it as a street. The deed to one of the predecessors in title of S. had a plan annexed shewing "Ancroft Place" as a street fifty feet wide and the grantee was given the right to register said plan. The evidence also established that for 22 years before the action "Ancroft Place" had been entered in the assessment rolls as a public street and had not been assessed for taxes and that the city had placed a gas lamp on the end ; also, that for over twenty years it had been used by the owners of the lots to the south and east, and from time to time by the owner on the north side, as a means of access to, and egress from, their respective properties. In 1909 the fee in the land in dispute was conveyed to S. who had become owner of the lots to the east and south.—*Held*, Idington J. dissenting, Duff J. expressing no opinion, that the evidence was not sufficient to establish that the land had been dedicated to the public and accepted by the municipality as a street.—*Held*, further, Idington and Duff JJ. dissenting, that the land was not a "way, easement or appurtenance" to the lot to the north "held, used, occupied and enjoyed or taken or known, as part and parcel thereof" within the meaning of sec. 12 of "The Law and Transfer of Property Act," R.S.O., [1897] ch. 119.—*Held*, also, that P. had not acquired a right-of-way by a grant implied from the terms of the deeds of the adjoining lots, Duff J. dissenting; nor by prescription, Duff J. expressing no opinion.—*Per* Duff J.—The facts established justify the inference that the original owners (Mr. and Mrs. Patrick) always entertained the design that the strip of land in question should be a street affording access to the adjoining

Easement—*continued.*

parts of lot 22; that, accordingly, it had been surveyed and laid out as a street, on the ground, in 1884; that the sale to McCully, in 1887, proceeded on the footing that the land purchased by him was bounded to the south by a street and this was one of the elements of value determining the price he paid; that, thereafter, in accordance with the same design, Mrs. P. permitted the successive occupants of the lot bought by McC. to use this strip of land as of right for all the purposes of a street; that these occupants, acting as she intended they should and as the situation, created by her, naturally encouraged them to act, purchased and dealt with it upon the same footing as that upon which the sale to McC. took place: Consequently, the respondent is, on the principle of *Piggott* v. *Stratton* (I DeG. F. & J. 33), as explained in *Spicer* v. *Martin* (14 App. Cas. 12), and of *Cairncross* v. *Lorimer* (3 Macq. 829); *Oliver* v. *King* (8 DeG. M. & G. 110); and *Russell* v. *Watts* (10 App. Cas. 590), precluded from disputing the right of the appellant to use "Ancroft Place" as a street.—*Per* Duff J.—At the time of the sale to McC. the vendor was precluded from using Rachel Street for any purpose inconsistent with its character as a street and its sole value for her as a "street" or "way" was because of the means of access it afforded to the property sold. Its character as a way laid off for the accommodation, *inter alia*, of that property was palpable to everybody; as a way, therefore, it was as regards the vendors interest in it a "way * * * known or taken to be" an adjunct of the property sold and, as such, passed to the purchaser under the provisions of the "Law and Transfer of Property Act." —(Leave to appeal to Privy Council granted, 25th July, 1913). PETERS *v.* SINCLAIR 57

ELECTION LAW — *Preliminary objections—Rules of practice—Repeal—Inconsistency with statutory provision—Judgment on preliminary objections—Final determination of stage of cause—Objections—Irregularity by returning officer—Appeal—Jurisdiction—Issues in question—Construction of statute—*(*D.*) 37 *V. c.* 10, *ss.* 44, 45—*R.S.C.*, 1906, *c.* 7, *ss.* 16, 19, 20, 85—*R.S.C.*, 1906, *c.* 1, *s.* 20.] Under the provisions of the "Dominion Controverted Elections Act, 1874," the judges

Election Law—*continued.*

of the Superior Court for the Province of Quebec made general rules and orders for the regulation of the practice and procedure with respect to election petitions whereby the returning officer was required to publish notice of such petitions once in the Quebec Official *Gazette* and twice in English and French newspapers published or circulating in the electoral division affected by the controversy. By section 16 of chapter 7, R.S.C., 1906, provision is made for the publishing of a similar notice by the returning officer once in a newspaper published in the electoral district.—*Held*, that the rule of practice is inconsistent with the provision as to the notice required by section 16, chapter 7, R.S.C., 1906, and consequently, has ceased to be in force.—*Per* Duff and Brodeur JJ.—Even if such rule were still in force, failure on the part of the returning officer to comply with it would not be sufficient ground for the dismissal of the election petition.—*Per* Davies, Duff, and Anglin JJ.—Under the provisions of the "Dominion Controverted Elections Act," R.S.C., 1906, ch. 7, secs. 19 and 20, preliminary objections are required to be decided in a summary manner; consequently, a decision by an election court judge on any of the preliminary objections disposes of all the issues raised in that stage of the proceedings. Where an election petition is disposed of by the judge upon one of several objections, without consideration of the others, the Supreme Court of Canada has jurisdiction to hear and determine questions arising upon all the preliminary objections in issue before the election court judge; its jurisdiction is not confined to the objection upon which the judgment appealed from was solely based. Idington J. *contra*. Fitzpatrick C.J. and Brodeur J. expressing no opinion. RICHELIEU ELECTION; PARADIS *v.* CARDIN . **625**

EMPLOYER AND EMPLOYEE—*Negligence—Common employment—Dangerous works—Safety of workmen—Defective system—Employer's liability—Jury's findings—Sufficiency of answers—Practice—Discontinuance against co-defendant—Release of joint tortfeasor.*] The plaintiff's husband was a linesman employed, on piece-work, by the defendants with a gang of men setting posts in holes previously dug by the company with which they had contracted to erect the posts

Employer and Employee—*continued.*

and prepare them to carry electric wires. A post set in one of these holes was insufficiently sunk or set in position without proper packing to hold it rigidly in the light soil of an embankment. Deceased was sent up the post to attach cross-bars which were being hoisted to him by fellow-workmen by means of a block and tackle when, owing to the strain, the post fell causing injuries which resulted in his death. The post-holes, as dug by the company, had been accepted by the defendants for the purposes of their contract, but they made no inspection as to their sufficiency, nor did they give instructions in regard to necessary precautions to ensure the safety of their employees engaged in setting up the posts and preparing them for wiring.—*Held*, affirming the judgment appealed from (4 West. W.R. 1311; 13 D.L.R. 143; 25 West. L.R. 66) that the failure to sink the post-holes to sufficient depth and obtain proper filling to pack the post, and ensure the safety of the employee required to climb it, was personal negligence on the part of the defendants, the consequences of which they could not avoid by pleading that the accident occurred through the fault of a fellow-servant.—*Per* Duff J.—In the circumstances of the case the answers by the jury that the defendants had failed to set the posts at sufficient depth and pack them with sufficiently rigid material involved a finding that there was negligence in these respects imputable to the defendants for which they were personally responsible in an action for damages. WAUGH-MILBURN CONSTRUCTION CO. *v.* SLATER **609**

2——*Negligence—Employer's liability—Defective appliances—Warning and instruction—Injury to workman* **510**

See NEGLIGENCE 2.

ESTOPPEL — *Trespass — Easement—Public way—Dedication—User—Prescription—"Law and Transfer of Property Act," R.S.O.*, 1897, *c.* 119. . . . . **57**

See EASEMENT.

EVIDENCE—*Riparian rights—Access to waterfront—Interference—Evidence.*] M., claiming to be a riparian owner on the shore of Ashbridge Bay (part of Toronto harbour), claimed damages from, and an injunction against, the city for inter-

Evidence—*continued.*

fering with his access to the water when digging a channel along the north side of the bay.—*Held*, affirming the judgment of the Court of Appeal (27 Ont. L.R. 1), by which an appeal from a Divisional Court (23 Ont. L.R. 365) was dismissed, that the evidence established that between M.'s land and the bay was marsh land and not land covered with water as contended and, therefore, M. was not a riparian owner. MERRITT *v.* CITY OF TORONTO.... ... **1**

2——*Fire insurance — Application — Misrepresentation—Invoices.*] *Held, per* Davies, Anglin and Brodeur JJ.—That the insured having supplied on demand, duplicate copies of the invoices of goods purchased between the last stock-taking and the time of the fire as well as copies of the stock-taking itself, was not obliged to comply with a further demand for invoices of purchases prior to said stock-taking. ANGLO - AMERICAN FIRE INS. CO. *v.* HENDRY. MONTREAL-CANADA FIRE INS. CO. *v.* HENDRY.. **577**

AND *see* INSURANCE, FIRE 2.

3——*Fraudulent conveyance — Statute of Elizabeth—Husband and wife—Voluntary settlement*..... **44**

See FRAUDULENT CONVEYANCES.

4——*Solicitor and client—Retainer—Subsequent proceedings—Habeas corpus*. **508**

See SOLICITOR 1.

5——*Onus of proof—Operation of railway —Excessive speed—Negligence*..... **561**

See RAILWAYS 9.

FINAL JUDGMENT.

See APPEAL.

FOREIGN CORPORATIONS—*Company law—Conflict of laws—Incorporation by Dominion authority — Powers — B.C. "Companies Act"—Unlicensed extra-provincial companies—"Carrying on business" — Contract — Transactions beyond limits of province—Promissory notes—Right of action—Juristic disability—Construction of statute—(B.C.)* 10 *Edw. VII., c.* 7, *ss.* 139, 166, 168..... **208**

See COMPANY LAW 2.

2——*Constitutional law—Insurance—Foreign company doing business in Canada—*

Foreign Corporations—*continued.*

*Dominion licence—*9 *&* 10 *Edw. VII., c.* 32, *ss.* 4, 70..... **260**

See CONSTITUTIONAL LAW 3.

FRAUD — *Company—Subscription for treasury stock—Contract—Principal and agent — Misrepresentation — Transfer of shares—Rescission—Return of payments—Want of consideration* **167**

See COMPANY LAW 1.

2——*Sale of goods—Designated quality—Fraud on purchaser—Damages—Loss of market*..... **512**

See SALE 2.

FRAUDULENT CONVEYANCES — *Statute of Elizabeth—Husband and wife—Voluntary settlement—Evidence.*] In August, 1908, M. and his brother bought a hotel business in Ottawa for $8,000, paying $6,000 down and securing the balance by notes which were afterwards retired. In November, 1908, M. conveyed a hotel property in Madoc to his wife subject to a mortgage which she assumed. M. and his brother carried on the Ottawa business until March, 1910, when they assigned for benefit of creditors who brought suit to set aside the conveyance to M.'s wife. On the trial it was shewn that for some time before November, 1908, M.'s wife had been urging him to transfer to her the Madoc property, which she had helped him to acquire, as a provision for herself and their children; that she had joined in a conveyance of a property in Toronto in which they both believed she had a right of dower, and the proceeds of the sale of which were applied in the purchase of the Ottawa business; and that all of M.'s liabilities at the time of said conveyance had been discharged. M. ascribed his failure in Ottawa to the action of the License Commissioners in compelling him to move his bar to the rear of the premises whereby his receipts fell off and he lost rents that he had theretofore received, and had to make expensive alterations; and to a fire on the premises early in 1910. The trial judge set aside the conveyance to M.'s wife; his judgment was reversed by a Divisional Court (24 Ont. L.R. 591), but restored by the Court of Appeal.—*Held*, affirming the judgment of the Court of Appeal (27 Ont. L.R. 319), Davies J. dissenting, that the conveyance by M. to his wife was voluntary; that it de-

Fraudulent Conveyances—*cantinued.*

nuded him of the greater part of his available assets and was made to protect the property conveyed against his future creditors and is, therefore, void as against them. McGUIRE *v.* OTTAWA WINE VAULTS CO..... **44**

HABEAS CORPUS — *Habeas corpus—Common law offences—Construction of statute—"Supreme Court Act," R.S.C.*, 1906, *c.* 139, *s.* 62—*Jurisdiction of Supreme Court judges.*—The jurisdiction of judges of the Supreme Court of Canada in respect of *habeas corpus ad subjiciendum* extends only to cases of commitment on charges of offences which are criminal by virtue of statutes enacted by the Parliament of Canada; it does not extend to cases of commitment for offences at common law or under statutes enacted prior to Confederation which are still in force. *Re Sproule* (12 Can. S.C.R. 140) referred to.—The offence of housebreaking as described in the Imperial statute, 7 & 8 Geo. IV., ch. 29, sec. 15, became part of the criminal law of British Columbia on the introduction of the criminal law of England into that colony by the ordinance of 19th November, 1858, continued to be so until the Union of the province with Canada, and since then by virtue of sec. 11 of the "Criminal Code," and it is not an offence to which sec. 62 of the "Supreme Court Act," R.S.C., 1906, ch. 139, has application. IN RE DEAN..... **235**

2——*Solicitor and client—Retainer—Subsequent proceedings—Evidence*..... **508**

See SOLICITOR 1.

HIGHWAYS — *Trespass — Easement — Public way—Dedication—User—Prescription—Estoppel—"Law and Transfer of Property Act," R.S.O.* 1897, *c.* 119.] S. brought action against P. for trespass on a strip of land called "Ancroft Place" which he claimed as his property and asked for damages and an injunction. "Ancroft Place" was a *cul-de-sac* running east from Sherbourne Street, and the defence to the action was that it was a public street or, if not, that P. had a right of way over it either by grant or user. On the trial it was shewn that the original owners had conveyed the lots to the east and south of "Ancroft Place" to different parties, each deed describing it as a street and giving a right of way over it to the grantee. The deeds

Highways—*continued.*

to P.'s predecessors in title did not give him a similar right of way, but some of these conveyances described it as a street. The deed to one of the predecessors in title of S. had a plan annexed shewing "Ancroft Place" as a street fifty feet wide and the grantee was given the right to register said plan. The evidence also established that for 22 years before the action "Ancroft Place" had been entered in the assessment rolls as a public street and had not been assessed for taxes and that the city had placed a gas lamp on the end; also that for over twenty years it had been used by the owners of the lots to the south and east, and from time to time by the owner on the north side, as a means of access to, and egress from, their respective properties. In 1909 the fee in the land in dispute was conveyed to S. who had become owner of the lots to the east and south.—*Held*, Idington J. dissenting, Duff J. expressing no opinion, that the evidence was not sufficient to establish that the land had been dedicated to the public, and accepted by the municipality as a street.—*Held*, further, Idington and Duff JJ. dissenting, that the land was not a "way, easement or appurtenance" to the lot to the north "held, used, occupied and enjoyed, or taken or known, as part and parcel thereof" within the meaning of sec. 12 of "The Law and Transfer of Property Act," R.S.O., [1897] ch. 119.—*Held*, also, that P. had not acquired a right-of-way by a grant implied from the terms of the deeds of the adjoining lots, Duff, J. dissenting; nor by prescription, Duff, J. expressing no opinion.—*Per* Duff J.—The facts established justify the inference that the original owners (Mr. and Mrs. Patrick) always entertained the design that the strip of land in question should be a street affording access to the adjoining parts of lot 22; that, accordingly, it had been surveyed and laid out as a street, on the ground, in 1884; that the sale to McCully in 1887, proceeded on the footing that the land purchased by him was bounded to the south by a street and this was one of the elements of value determining the price he paid; that, thereafter, in accordance with the same design, Mrs. P. permitted the successive occupants of the lot bought by McC. to use this strip of land as of right for all the purposes of a street; that these occupants, acting as

Highways—*continued.*

she intended they should and as the situation, created by her, naturally encouraged them to act, purchased and dealt with it upon the same footing as that upon which the sale to McC. took place: Consequently, the respondent is, on the principle of *Piggott* v. *Stratton* (1 DeG. F. & J. 33), as explained in *Spicer* v. *Martin* (14 App. Cas. 12), and of *Cairncross* v. *Lorimer* (3 Macq. 829); *Oliver* v. *King* (8 DeG. M. & G. 110); and *Russell* v. *Watts* (10 App. Cas. 590), precluded from disputing the right of the appellant to use "Ancroft Place" as a street.—*Per* Duff J.—At the time of the sale to McC. the vendor was precluded from using Rachel Street for any purpose inconsistent with its character as a street and its sole value for her as a "street" or "way" was because of the means of access it afforded to the property sold. Its character as a way laid off for the accommodation, *inter alia*, of that property was palpable to everybody; as a way, therefore, it was as regards the vendor's interest in it a "way * * * known or taken to be and adjunct of the property sold and, as such, passed to the purchaser under the provisions of the "Law and Transfer of Property Act."—(Leave to appeal to Privy Council granted, 25th July, 1913). PETERS *v.* SINCLAIR..... **57**

2——*Constitutional law—Provincial tramway—Jurisdiction of Board of Railway Commissioners—Overhead crossings—Apportionment of cost—Legislative jurisdiction—Ancillary powers—Construction of statute—"Railway Act," R.S.C.*, 1906, *ss.* 8, 59, 237, 238—(*B.C.*) 8 & 9 *Edw. VII. c.* 32—*B.N.A. Act*, 1867, *s.* 92, *item* 10 **98**

See RAILWAYS 2.

3——*Negligence—Operation of tramway—Carelessness of person injured—Reckless conduct of motorman*..... **494**

See NEGLIGENCE 1.

HOUSEBREAKING — *Criminal law—Habeas corpus—Common law offences—Construction of statute—"Supreme Court Act," R.S.C.*, 1906, *c.* 139, *s.* 62..... **235**

See CRIMINAL LAW 1.

HUSBAND AND WIFE.

See MARRIED WOMAN.

INSURANCE — *Constitutional law — Foreign company doing business in Canada —Dominion licence—9 & 10 Edw. VII. c.* 32, *ss.* 4 *and* 70.] *Held, per* Fitzpatrick C.J. and Davies J., that sections 4 and 70 of the Act 9 & 10 Edw. VII. ch. 32 (the "Insurance Act, 1910") are not *ultra vires* of the Parliament of Canada. Idington, Duff, Anglin and Brodeur JJ., *contra.—Held, per* Fitzpatrick C.J., and Davies J., that section 4 of said Act operates to prohibit an insurance company incorporated by a foreign state from carrying on its business within Canada if it does not hold a license from the Minister under the said Act and if such carrying on of the business is confined to a single province.—*Per* Idington J.—Section 4 does so prohibit if, and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies as well as others within the terms of which is embraced so much that is clearly *ultra vires.—Per* Duff, Anglin and Brodeur JJ.—The section would effect such prohibition if it were *intra vires*. IN RE "INSURANCE ACT, 1910"..... **260**

2——*Constitutional law—Incorporation of companies—"Provincial objects"—Limitation—Doing business beyond the province —Insurance company—"Insurance Act*, 1910," 9 & 10 *Edw. VII.*, *c.* 32, *s.* 3, *s.s.* 3—*Enlargement of company's powers—Federal company—Provincial licence—Trading companies*..... **331**

See CONSTITUTIONAL LAW 4.

INSURANCE, FIRE — *Blank application—General agent—Misrepresentation—Knowledge of company—Over-valuation—"Dwelling-house"—"Lodging house."*] F., the manager, for British Columbia, of a fire insurance company, with power to accept risks and issue policies without reference to the head-office of the company, received an application from M. for insurance for $2,100 on merchandise, furniture and fixtures contained in a building described as a store and dwelling-house. The application was accepted and a policy issued by him apportioning the insurance upon the three classes of property separately. A loss having occurred, payment was refused on the grounds that the stock was overvalued and the premises improperly described as a dwelling-house whereas, in fact, it was also used as a lodging-house. At the trial it appeared that a portion

Insurance, Fire—*continued.*

of the premises was fitted up for lodgers; the plaintiffs testified that F. inspected the premises before the policy was issued and that they had made no apportionment of the insurance, but left the matter altogether in the hands of F. F. testified that he sent an agent to have the application signed and the apportionment made and that he filled in the figures upon the blanks in the application from the agent's report. The jury found that F. inserted the description of the premises and apportioned the insurance.—*Held*, reversing the judgment appealed from (17 B.C. Rep. 517) that the company was affected by F.'s knowledge of the premises and of the property insured; that the question as to who had made the apportionment was properly left to the jury; that the evidence justified the jury in finding that it had been made by F. and that the insured, therefore, had made no valuation as to the stock or the apportionment thereof and could not have misrepresented its value.—*Held*, *per* Fitzpatrick, C. J. and Davies and Duff JJ.—That the evidence justified the jury in finding that F. had described the premises as a dwelling-house and that the company was bound by his act in doing so.—*Per* Davies and Duff JJ.—A dwelling-house does not lose its character as such from the fact that it is occupied by one or more lodgers.—*Held*, *per* Duff J.—As, under the conditions of the policy in question, notwithstanding an over-valuation the company would still be liable for a certain proportion of the actual value of the property insured, the policy should not be avoided. MAHOMED *v.* ANCHOR FIRE AND MARINE INS. CO. **546**

2—— *Application — Misrepresentation — Materiality —Statutory conditions —Variation.*] In an action on a policy insuring a stock of merchandise the company pleaded—That the stock on hand at the time of the fire was fraudulently overvalued. That the insured in his application concealed a material fact, namely, that he had previously suffered loss by fire in his business. That the action was barred by a condition in the policy requiring it to be brought within six months from the date of the fire. This was a variation from the statutory condition that it must be brought within twelve months.—*Held*, affirming the judgment

Insurance, Fire—*continued.*

of the Appellate Division (29 Ont. L.R. 356) that the evidence established the value of the stock at the time of the fire to be as represented by the insured; that the materiality to the risk of the non-disclosure of a former loss by fire was a question of fact for the judge at the trial who properly held it to be immaterial; and that the question whether or not the variation from the statutory conditions was just and reasonable depended on the circumstances of the case, and the courts below rightly held that it was not.—*Held*, *per* Davies, Anglin and Brodeur JJ.—That the insured having supplied on demand, duplicate copies of the invoices of goods purchased between the last stock-taking and the time of the fire as well as copies of the stock-taking itself, was not obliged to comply with a further demand for invoices of purchases prior to said stock-taking. ANGLO-AMERICAN FIRE INS. CO. *v.* HENDRY; MONTREAL CANADA FIRE INS. CO. *v.* HENDRY **577**

JUDGE — *Appeal — Jurisdiction — "Supreme Court Act," ss.* 36, 37, 46 — *Judge in chambers—Originating petition—Arts.* 71, 72, 875, 876 *C.P.Q.—Liquor Laws—"Quebec Licence Law," R.S.Q.*, 1909, *arts.* 924 *et seq.—Property in licence —Agreement—Ownership in persons other than holder—Invalidity of contract—Public policy* **473**

See LIQUOR LAWS.

2——*Criminal law—Habeas corpus—Common law offences—Construction of statute —"Supreme Court Act," R.S.C.*, 1906, *c.* 139, *s.* 62 ..... **235**

See CRIMINAL LAW 1.

JURISDICTION — *Criminal law — Habeas corpus—Common law offences — Construction of statute—"Supreme Court Act," R.S.C.*, 1906, *c.* 139, *s.* 62... **235**

See CRIMINAL LAW 1.

AND *see* LEGISLATION.

JURY—*Negligence — Dangerous works— Defective system—Findings of jury—Sufficiency of answers — Practice — Discontinuance against co-defendant—Release of joint tortfeasor* **609**

See NEGLIGENCE 5.

LEGISLATION — *Railways — Powers of construction and operation—Conflict of laws—Provincial legislation—Interference with Dominion railways—Constitutional law—Jurisdiction of legislature—Construction of statute—7 Edw. VII., c. 8, s. 82 (Alta.)—2 Geo. V., s. 7 (Alta.)—"B.N.A. Act, 1867," ss. 91, 92*..... **9**

See CONSTITUTIONAL LAW 1.

2——*Constitutional law—Provincial tramway — Jurisdiction of Board of Railway Commissioners — Highways — Overhead crossings — Apportionment of cost — Legislative jurisdiction—Ancillary powers —Construction of statute—"Railway Act," R.S.C.*, 1906, *ss.* 8, 59, 237, 238—(*B.C.*) 8 *& 9 Edw. VII., c.* 32—"*B.N.A. Act*, 1867," *s.* 92, *item* 10..... **98**

See RAILWAYS 2.

LICENCES — *Liquor laws — "Quebec Licence Law," R.S.Q.*, 1909, *arts.* 924 *et seq.* — *Property in licence — Agreement — Ownership in persons other than holder — Invalidity of contract—Public policy.*] It is inconsistent with the policy of the "Quebec Licence Law" (R.S.Q., 1909), that the ownership of a licence to sell intoxicating liquors should be vested in one person while the licence is held in the name of another. An agreement having that effect is void inasmuch as it establishes conditions contrary to the policy of the statute. Judgment appealed from (Q.R. 22 K.B. 58) reversed, Brodeur J. dissenting. TURGEON *v.* ST. CHARLES **473**

AND *see* LIQUOR LAWS.

2——*Constitutional law—Insurance—Foreign company doing business in Canada — Dominion licence—9 & 10 Edw. VII., c.* 32, *ss.* 4, 70..... **260**

See CONSTITUTIONAL LAW 3.

3——*Constitutional law—Incorporation of companies—"Provincial objects"—Limitation—Doing business beyond the province—Insurance company — "Insurance Act*, 1910," 9 *& 10 Edw. VII., c.* 32, *s.* 3, *s.-s.* 3—*Enlargement of company's powers—Federal company — Provincial licence — Trading companies*..... **331**

See CONSTITUTIONAL LAW 4.

LIEN — *Winding-up proceedings — Company in liquidation—Sale of assets — Consent to sale of mortgaged ship—Sale by order of court—Mariners' liens—Sale free from incumbrances—Special fund—Privileged charge—Priority—Valuation of security — Release of mortgage — Marshalling securities—Subrogation.*] A ship which belonged to a company in liquidation was mortgaged to a bank and was also subject to maritime liens for seamen's wages due at the time of the winding-up order. The bank consented to the sale of the ship, by the liquidator, free from incumbrances at the same time as he sold the other assets of the company by direction of the court. He sold the ship separately and free from incumbrances for $5,000, which was credited, as a special fund, in his accounts. The bank subsequently filed its claim, valuing its security on the ship at $5,000. The purchasers took the ship to sea and it became a total loss. The bank then made claim to the whole of the fund realized on the sale of the ship and their claim was opposed on behalf of the wage lienholders claiming the right to be paid by priority out of this fund.—*Held*, affirming the judgment appealed from (4 West. W.R. 1271; 25 West. L.R. 92; 12 D.L.R. 807) that, by its consent to the sale of the ship under direction of the court, free from incumbrances, the bank assented to the conversion thereof released from its mortgage and that the proceeds of the sale of the ship should be apportioned amongst the creditors in the order and according to the priorities provided by law; consequently it was not entitled to any special charge on the fund realized upon its sale.—*Held*, further, that the rights of the wage-earners holding maritime liens were not affected by the loss of the ship after it had been sold by the liquidator under the order of the court and that they were entitled to recover their claims out of the fund realized upon the sale of the ship in priority to the mortgagee.—[MEMO.—The court ordered that the rights of the bank, if any, to relief, by way of subrogation or marshalling of securities, should be reserved to be dealt with on further proceedings in the winding-up of the company.] TRADERS BANK OF CANADA *v.* LOCKWOOD..... **593**

LIMITATIONS OF ACTIONS — *Trespass—Railways—Occupation of lands—Side-tracks—Continuous trespass—Damages—R.S.C.*, 1906, *c.* 37, *s.* 306..... **514**

See RAILWAYS 6.

LIQUIDATION — *Winding-up proceedings—Company in liquidation—Sale of assets—Consent to sale of mortgaged ship—Sale by order of court—Mariners' liens—Sale free from incumbrances—Special fund—Privileged charge—Priority—Valuation of security—Release of mortgage—Marshalling securities—Subrogation*..... **593**

See LIEN.

LIQUOR LAWS—*Appeal—Jurisdiction—"Supreme Court Act," ss.* 36, 37, 46—*Judge in Chambers—Originating petition—Arts.* 71, 72, 875, 876, *C.P.Q.—Liquor laws—"Quebec Licence Law," R.S.Q.,* 1909, *arts.* 924 *et seq.—Property in licence—Agreement—Ownership in persons other than holder—Invalidity of contract—Public policy.*] A cause, matter or judicial proceeding originating on petition to a judge in chambers, in virtue of articles 875 and 876 of the Quebec Code of Civil Procedure, is appealable to the Supreme Court of Canada where the subject of the controversy amounts to the sum or value of two thousand dollars. —It is inconsistent with the policy of the "Quebec Licence Law" (R.S.Q., 1909) that the ownership of a licence to sell intoxicating liquors should be vested in one person while the licence is held in the name of another. An agreement having that effect is void inasmuch as it establishes conditions contrary to the policy of the statute. Judgment appealed from (Q.R. 22 K.B. 58) reversed, Brodeur J. dissenting. TURGEON *v.* ST. CHARLES..... **473**

MARRIED WOMAN — *Fraudulent conveyance—Statute of Elizabeth—Husband and wife — Voluntary settlement — Evidence.*] In August, 1908, M. and his brother bought a hotel business in Ottawa for $8,000, paying $6,000 down and securing the balance by notes which were afterwards retired. In November, 1908, M. conveyed a hotel property in Madoc to his wife subject to a mortgage which she assumed. M. and his brother carried on the Ottawa business until March, 1910, when they assigned for benefit of creditors who brought suit to set aside the conveyance to M.'s wife. On the trial it was shewn that for some time before November, 1908, M.'s wife had been urging him to transfer to her the Madoc property, which she had helped him to acquire, as a provision for herself and their children;

Married Woman—*continued.*

that she had joined in a conveyance of a property in Toronto in which they both believed she had a right of dower, and the proceeds of the sale of which were applied in the purchase of the Ottawa business; and that all of M.'s liabilities at the time of said conveyance had been discharged. M. ascribed his failure in Ottawa to the action of the Licence Commissioners in compelling him to move his bar to the rear of the premises whereby his receipts fell off and he lost rents that he had theretofore received, and had to make expensive alterations; and to a fire on the premises early in 1910. The trial judge set aside the conveyance to M.'s wife; his judgment was reversed by a Divisional Court (24 Ont. L.R. 591), but restored by the Court of Appeal.—*Held,* affirming the judgment of the Court of Appeal (27 Ont. L.R. 319), Davies J. dissenting, that the conveyance by M. to his wife was voluntary; that it denuded him of the greater part of his available assets and was made to protect the property conveyed against his future creditors and is, therefore, void as against them. MCGUIRE *v.* OTTAWA WINE VAULTS CO. **44**

MORTGAGE — *Winding-up proceedings—Company in liquidation—Sale of assets—Consent to sale of mortgaged ship—Sale by order of court—Mariners' liens—Sale free from incumbrances—Special fund—Privileged charge—Priority—Valuation of security—Release of mortgage—Marshalling securities—Subrogation*..... **593**

See LIEN.

MUNICIPAL CORPORATIONS — *Construction of works—Riparian rights—Access to waterfront*..... **1**

See RIPARIAN RIGHTS 1.

2——*Trespass—Easement—Public way—Dedication — User — Prescription — Estoppel—"Law and Transfer of Property Act," R.S.O.,* 1897, *c.* 119..... **57**

See EASEMENT.

NEGLIGENCE—*Operation of tramway—Carelessness of person injured—Reckless conduct of motorman.*] The carelessness of the plaintiffs in driving across the tracks of a tramway was, in this case, excused by the reckless conduct of the defendant's motorman in failing to use

Negligence—*continued.*

proper precautions to avoid the consequences of their negligence after he had become aware of it. Judgment appealed from (11 D.L.R. 3; 4 West. W.R. 263) affirmed. CITY OF CALGARY *v.* HARNOVIS..... **494**

2——*Employers' liability—Defective appliances—Warning and instruction—Injury to workman.*] The husband of plaintiff sustained injuries, which resulted in his death, while employed in hoisting bags of grain by means of tackle to the upper story of the appellant's warehouse. Deceased had fastened two bags of grain to the rope, which worked over pulleys, without using a slip-knot, and the bags fell upon him causing the injuries. Shortly before the accident he had been warned to be careful in performing the work at which he was engaged, but it did not appear that he had been instructed as to the proper method of securing the bags to the hoisting rope. The action was dismissed at the trial on the ground that the injuries were caused by the negligence of deceased solely, without any fault on the part of his employer. This judgment was reversed by the Court of Review and, in affirming that decision, the judgment appealed from (Q.R. 20 K.B. 378), held that the employer, by his neglect in permitting the deceased to perform his work in an unsafe manner, became responsible in damages for the injury which, as the result of want of proper instructions, was the cause of death. The appeal to the Supreme Court of Canada was dismissed with costs, the Chief Justice dissenting.
DROLET *v.* DENIS..... **510**

3 —— *Railways — Operation — Excessive speed—Trespasser—"Railway Act," R.S. C.*, 1906, *c.* 37, *ss.* 275, 408—*Cause of accident.*] While a train was running at the speed of about thirty miles an hour, on the company's line along the harbour front in the City of Vancouver, B.C., H., who had unlawfully entered upon the right-of-way through a break in the company's fences, attempted to cross the tracks in front of the train. The engine driver saw H., at a distance of about 500 feet and whistled several times. H. paid no attention to the danger signals and continued walking in an oblique direction towards the track, and, observing his apparent intention to cross the track and his disregard of the signals, the engine driver then applied the emergency brakes which failed to stop the train in time to avoid the accident by which H. was killed. In an action for damages by his widow and child.—*Held*, that, notwithstanding the fact that deceased was a trespasser and committing a breach of section 408 of the "Railway Act," R.S. C., 1906, ch. 37, the company was liable because their engine driver neglected to apply the emergency brakes at the time he became aware of the danger of accident when he first noticed deceased attempting to cross the tracks. CANADIAN PACIFIC RWAY. CO. *v.* HINRICH..... **557**

4—— *Evidence — Onus — Railways — Excessive speed—"Railway Act," s.* 275—8 *& 9 Edw. VII. c.* 32, *s.* 13.] By 8 & 9 Edw. VII. ch. 32, sec. 13, amending section 275 of the "Railway Act" no railway train "shall pass over a highway crossing at rail level in any thickly peopled portion of any city, town or village at a greater speed than ten miles an hour" unless such crossing is constructed and protected according to special orders and regulations of the Railway Committee or Board of Railway Commissioners or permission is given by the Board. In an action against a railway company for damages on account of injuries received through a train passing over such a crossing at a greater speed than ten miles an hour.—*Held*, reversing the judgment of the Appellate Division (29 Ont. L.R. 247), that the onus was on the company of proving that the conditions existed which, under the provisions of said section, exempted them from the necessity of limiting the speed of their train to ten miles an hour or that they had the permission of the Board to exceed that limit, and as they had not satisfied that onus the plaintiff's verdict should stand.—Subsection 4, of sec. 13, prohibits trains running "over any highway crossing" at more than 10 miles an hour, if at such crossing an accident has happened subsequent to 1st January, 1900, "by a moving train causing bodily injury," etc., "unless and until" it is protected to the satisfaction of the Board.—*Per* Duff and Brodeur JJ.—The appellant's action could also be maintained on the ground that the prohibition of sub-section 4 applies to the crossing in question.

Negligence—*continued.*

—*The Grand Trunk Railway Co.* v. *McKay* (34 Can. S.C.R. 81) distinguished. BELL *v.* GRAND TRUNK RWAY. CO... **561**

5——*Common employment — Dangerous works—Safety of workmen—Defective system—Employer's liability—Jury's findings —Sufficiency of answers—Practice—Discontinuance against co-defendant—Release of joint tortfeasor.*] The plaintiff's husband was a linesman employed, on piecework, by the defendants with a gang of men setting posts in holes previously dug by the company with which they had contracted to erect the posts and prepare them to carry electric wires. A post set in one of these holes was insufficiently sunk or set in position without proper packing to hold it rigidly in the light soil of an embankment. Deceased was sent up the post to attach cross-bars which were being hoisted to him by fellow-workmen by means of a block and tackle when, owing to the strain, the post fell causing injuries which resulted in his death. The post-holes, as dug by the company, had been accepted by the defendants for the purposes of their contract, but they made no inspection as to their sufficiency, nor did they give instructions in regard to necessary precautions to ensure the safety of their employees engaged in setting up the posts and preparing them for wiring.—*Held,* affirming the judgment appealed from (4 West. W.R. 1311; 13 D.L.R. 143; 25 West. L.R. 66) that the failure to sink the postholes to sufficient depth and obtain proper filling to pack the post, and ensure the safety of the employee required to climb it, was personal negligence on the part of the defendants, the consequences of which they could not avoid by pleading that the accident occurred through the fault of a fellow-servant.—*Per* Duff J.—In the circumstances of the case the answers by the jury that the defendants had failed to set the post at sufficient depth and pack them with sufficiently rigid material involved a finding that there was negligence in these respects imputable to the defendants for which they were personally responsible in an action for damages. WAUGH-MILBURN CONSTRUCTION CO. *v.* SLATER **609**

OATH—*Criminal law—Perjury—Form of oath.*] A witness who testifies to what is false is guilty of perjury, although, without being asked if he had any objection to being sworn in the usual manner, but without objecting to the form used, he was directed to take the oath by raising his right hand instead of kissing the Bible. CURRY *v.* THE KING..... **532**

PERJURY—*Criminal law—Form of oath.*] A witness who testifies to what is false is guilty of perjury, although, without being asked if he had any objection to being sworn in the usual manner, but without objecting to the form used, he was directed to take the oath by raising his right hand instead of kissing the Bible. CURRY *v.* THE KING..... **532**

PRACTICE AND PROCEDURE—*Appeal —Jurisdiction—"Supreme Court Act," ss.*36, 37, 46—*Judge in Chambers—Originating petition—Arts.* 71, 72, 875, 876 *C.P.Q.*] A cause, matter or judicial proceeding originating on petition to a judge in chambers, in virtue of articles 875 and 876 of the Quebec Code of Civil Procedure, is appealable to the Supreme Court of Canada where the subject of the controversy amounts to the sum or value of two thousand dollars. TURGEON *v.* ST. CHARLES..... **473**

AND *see* LIQUOR LAWS.

2——*Appeal—Jurisdiction—Reserve of further directions—"Final judgment"—Construction of statute—"Supreme Court Act," R.S.C.* 1906, *c.* 139, *s.* 2 (*e*); 3 *&* 4 *Geo.* v. *c.* 51, *s.* 1.] Before the amendment, in 1913, to sec. 2 (*e*) of the "Supreme Court Act," R.S.C. 1906, ch. 139, judgments were rendered maintaining an action on a bond by which two of the defendants were ordered to pay to the plaintiffs an amount not exceeding that secured by the bond to be ascertained upon a reference to the master and further directions were reserved; as to another defendant, recovery of the same amount, to be ascertained in the same manner, was ordered, but there was no reserve of further directions. Upon an appeal by the last mentioned defendant, —*Held,* Davies J. dissenting, that the judgment sought to be appealed from (23 Man. R. 159) did not finally conclude the action as proceedings still remained to be taken on the reference, consequently, it was not a final judgment within the meaning of section 2 (*e*) of the "Supreme Court Act," prior to the amendment by the statute 3 & 4 Geo. V.,

Practice and Procedure—*continued.*

ch. 51 (assented to on the 6th of June, 1913), and it was not competent to the Supreme Court of Canada to entertain the appeal. *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.* (19 Can. S.C.R. 434) followed. *Ex parte Moore* (14 Q.B.D. 627) distinguished; *Clarke* v. *Goodall* (44 Can. S.C.R. 284), and *The Crown Life Ins. Co.* v. *Skinner* (44 Can. S.C.R. 616) referred to.—*Per* Anglin and Brodeur JJ.—The amendment of the "Supreme Court Act" by the first section of 3 & 4 Geo. V. ch. 51, has not affected whatever right the appellant may have had at the time the judgment was rendered in respect to an appeal to the Supreme Court of Canada. *Hyde* v. *Lindsay* (29 Can. S.C.R. 99); *Cowen* v. *Evans* (22 Can. S.C.R. 331); *Hurtubise* v. *Desnarteau* (19 Can. S.C.R. 562); and *Taylor* v. *The Queen* (1 Can. S.C.R. 65) referred to.—*Per* Davies J. dissenting.—The judgment in question does not reserve "further directions" and comes within the rule and principle determining what are "final judgments" laid down in the case of *Ex parte Moore* (14 Q.B.D. 627). STEPHENSON *v.* GOLD MEDAL FURNITURE MFG. CO..... **497**

3——*Appeal—Findings of jury—Review by appellate court.*] Where a case has been properly allowed to go to the jury and there is evidence before them from which they could reasonably draw the conclusion at which they arrived, the verdict should not be disturbed on an appeal.—Judgment appealed from (18 B.C. Rep. 184) affirmed. COTTINGHAM *v.* LONGMAN **542**

4——*Election law—Preliminary objections — Rules of practice — Repeal — Inconsistency with statutory provision — Judgment on preliminary objections — Final determination of stage of cause—Objections —Irregularity by returning officer—Appeal — Jurisdiction — Issues in question — Construction of statute*—(*D.*) 37 *V. c.* 10, *ss.* 44, 45—*R.S.C.*, 1906, *c.* 7, *ss.* 16, 19, 20, 85—*R.S.C.*, 1906, *c.* 1, *s.* 20.] Under the provisions of the "Dominion Controverted Elections Act, 1874," the judges of the Superior Court for the Province of Quebec made general rules and orders for the regulation of the practice and procedure with respect to election petitions whereby the returning officer was required to publish notice of

Practice and Procedure—*continued.*

such petitions once in the Quebec Official *Gazette* and twice in English and French newspapers published or circulating in the electoral division affected by the controversy. By section 16 of chapter 7, R.S.C., 1906, provision is made for the publishing of a similar notice by the returning officer once in a newspaper published in the electoral district.—*Held*, that the rule of practice is inconsistent with the provision as to the notice required by section 16, chapter 7, R.S.C., 1906, and, consequently, has ceased to be in force.—*Per* Duff and Brodeur JJ.—Even if such rule were still in force, failure on the part of the returning officer to comply with it would not be sufficient ground for the dismissal of the election petition.—*Per* Davies, Duff, and Anglin JJ.—Under the provisions of the "Dominion Controverted Elections Act," R.S.C., 1906, ch. 7, secs. 19 and 20, preliminary objections are required to be decided in a summary manner; consequently, a decision by an election court judge on any of the preliminary objections disposes of all the issues raised in that stage of the proceedings. Where an election petition is disposed of by the judge upon one of several objections, without consideration of the others, the Supreme Court of Canada has jurisdiction to hear and determine questions arising upon all the preliminary objections in issue before the election court judge; its jurisdiction is not confined to the objection upon which the judgment appealed from was solely based. Idington J. *contra.* Fitzpatrick C.J. and Brodeur J. expressing no opinion. RICHELIEU ELECTION; PARADIS *v.* CARDIN..... **625**

5——*Arbitration — Award — Procedure — Prolonging date for award—Special circumstances—"Railway Act," R.S.C.*, 1906, *c.* 37, *s.* 204..... **242**

See ARBITRATION AND AWARD.

6——*Board of Railway Commissioners — Appeals on questions of law—Stated case—Submission of specific questions — Construction of statute—R.S.C.*, 1906, *c.* 37, *ss.* 55, 56, *s.-s.* 3..... **257**

See APPEAL 1.

7——*Negligence — Dangerous works — Defective system—Findings of jury—Sufficiency of answers—Discontinuance against*

Practice and Procedure—*continued.*

co-defendant — Release of joint tortfeasor 609

See NEGLIGENCE 5.

PRESCRIPTION — *Trespass — Easement — Public way — Dedication — User — Prescription — Estoppel — "Law and Transfer of Property Act," R.S.O.*, 1897, *c.* 119.] S. brought action against P. for trespass on a strip of land called "Ancroft Place" which he claimed as his property and asked for damages and an injunction. "Ancroft Place" was a *cul-de-sac* running east from Sherbourne Street, and the defence to the action was that it was a public street or, if not, that P. had a right of way over it either by grant or user. On the trial it was shewn that the original owners had conveyed the lots to the east and south of "Ancroft Place" to different parties, each deed describing it as a street and giving a right of way over it to the grantee. The deeds to P.'s predecessors in title did not give him a similar right of way, but some of these conveyances described it as a street. The deed to one of the predecessors in title of S. had a plan annexed shewing "Ancroft Place" as a street fifty feet wide and the grantee was given the right to register said plan. The evidence also established that for 22 years before the action "Ancroft Place" had been entered in the assessment rolls as a public street and had not been assessed for taxes and that the city had placed a gas lamp on the end; also, that for over twenty years it had been used by the owners of the lots to the south and east, and from time to time by the owner on the north side, as a means of access to, and egress from, their respective properties. In 1909 the fee in the land in dispute was conveyed to S., who had become owner of the lots to the east and south.—*Held*, Idington J. dissenting, Duff J. expressing no opinion, that the evidence was not sufficient to establish that the land had been dedicated to the public, and accepted by the municipality as a street.—*Held*, further, Idington and Duff JJ. dissenting, that the land was not a "way, easement or appurtenance" to the lot to the north "held, used, occupied and enjoyed, or taken or known, as part and parcel thereof" within the meaning of sec. 12 of "The Law and Transfer of Property Act," R.S.O., [1897] ch. 119. —*Held*, also, that P. had not acquired a

Prescription—*continued.*

right of way by a grant implied from the terms of the deeds of the adjoining lots. Duff J. dissenting; nor by prescription. Duff J. expressing no opinion. —*Per* Duff J.—The facts established justify the inference that the original owners (Mr. and Mrs. Patrick) always entertained the design that the strip of land in question should be a street affording access to the adjoining parts of lot 22; that, accordingly, it had been surveyed and laid out as a street, on the ground, in 1884; that the sale to McCully, in 1887, proceeded on the footing that the land purchased by him was bounded to the south by a street and this was one of the elements of value determining the price he paid; that, thereafter, in accordance with the same design, Mrs. P. permitted the successive occupants of the lot bought by McC. to use this strip of land as of right for all the purposes of a street; that these occupants, acting as she intended they should and as the situation, created by her, naturally encouraged them to act, purchased and dealt with it upon the same footing as that upon which the sale to McC. took place: consequently, the respondent is, on the principle of *Piggott* v. *Stratton* (1 DeG. F. & J. 33), as explained in *Spicer* v. *Martin* (14 App. Cas. 12), and of *Cairncross* v. *Lorimer* (3 Macq. 829); *Oliver* v. *King* (8 DeG. M. & G. 110); and *Russell* v. *Watts* (10 App. Cas. 590), precluded from disputing the right of the appellant to use "Ancroft Place" as a street.—*Per* Duff J.—At the time of the sale to McC. the vendor was precluded from using Rachel Street for any purpose inconsistent with its character as a street and its sole value for her as a "street" or "way" was because of the means of access it afforded to the property sold. Its character as a way laid off for the accommodation, *inter alia*, of that property was palpable to everybody; as a way, therefore, it was as regards the vendor's interest in it a "way * * * known or taken to be" an adjunct of the property sold and, as such, passed to the purchaser under the provisions of the "Law and Transfer of Property Act."—(Leave to appeal to Privy Council granted, 25th July, 1913). PETERS *v.* SINCLAIR 57

PRINCIPAL AND AGENT — *Company —Subscription for treasury stock — Con-*

Principal and Agent—*continued.*

tract—Principal and agent—Misrepresentation — Fraud — Transfer of shares—Rescission—Return of payments—Want of consideration.] V. entered into an agreement to purchase for re-sale the unsold treasury stock of a foreign joint stock company "subscriptions to be made from time to time as sales were made"; it was therein provided that the company should fill all orders for stock received through V. at $15 for each share; that V. should sell the stock for $20 per share; that V. should "pay for the stock so ordered with the proceeds of sales made by him or through his agency," and that the contract should continue in force so long as the company had unsold treasury stock with which to fill such orders. The company also gave V. authority to establish agencies in Canada in connection with its casualty insurance business and to appoint medical examiners there. At the time the company had no licence to carry on the business of insurance in Canada, nor any immediate intention of making arrangements to do so, and V. was an official of the company and was aware of these facts. V. appointed T. the sole medical examiner of the company for Vancouver, B.C., assuring him that the company would commence to carry on its casualty insurance business there within a couple of months, and then obtained from him a subscription for a number of shares of the company's treasury stock which were paid for partly by T.'s cheques, payable to the company, and the balance by a series of promissory notes falling due from month to month following the date of the subscription and made payable to V. A number of shares equal to those so subscribed for by T. were then transferred to him by V. out of the allotment made to him by the above mentioned agreement, the certificates therefor being obtained by V. in the name of T. from the company, but the company did not formally accept T.'s subscription nor issue any treasury stock to him thereunder. The company did not commence business in Vancouver within the time specified by V. nor did it obtain a licence to carry on the business of insurance in Canada until many months later. In an action by T. against the company and V. to recover back the money he had paid and for the cancellation and return of the notes.—*Held*, affirming the judgment appealed from (7 D.L.R. 944; 2 West. W.R. 658), Davies and Anglin JJ. dissenting, that, in the transaction which took place, V. was the company's agent; that the company was, consequently, responsible for the deceit practised in procuring the subscription from T.; that there had been no contract for the purchase of treasury stock completed between the company and T.; that the object of T.'s subscription was not satisfied by the transfer of V.'s shares to him, and that he was entitled to recover back the money he had paid and to have the notes returned for cancellation as having been paid over and delivered without consideration and in consequence of the fraudulent representations made by V. INTERNATIONAL CASUALTY CO. *v.* THOMPSON..... **167**

2——*Fire insurance—Blank application—General agent—Misrepresentation—Knowledge of company — Over-valuation — "Dwelling-house"—"Lodging-house"*.. **546**

See INSURANCE, FIRE 1.

3——*Crown lands — Location — Public policy—Evasion of statute—B.C. "Land Act," 8 Edw. VII., c. 30, ss. 34, 36—Sale of Crown lands—Commission on sales — Quantum meruit — Tainted contract*..... **588**

See CROWN LANDS.

PROMISSORY NOTE.

See BILLS AND NOTES.

PUBLIC POLICY — *Crown lands — Location—Evasion of statute—B.C. "Land Act," 8 Edw. VII., c. 30, ss. 34, 36—Sale of Crown lands—Principal and agent—Commission on sales—Quantum meruit—Tainted contract.*] B., who had laid out and inspected Crown lands as a Government surveyor, furnished information to the defendant and an associate which enabled them to secure choice locations, comprising over 7,000 acres of these lands, in the names of a number of persons nominated by them and employed as "stakers." Subsequently B. assisted in the disposal of the lands thus secured to innocent purchasers under an arrangement with the defendant and his associate that he was to participate in any profits which should be obtained on such sales. In an action by B. to recover compensation for the services he had rendered in regard to these sales.—*Held*,

Public Policy—*continued.*

that the circumstances disclosed a scheme concocted in opposition to the policy of the British Columbia "Land Act" and in violation of its provisions respecting the disposal of Crown lands; consequently, the agreement, being tainted with the character of the scheme, ought not to be enforced by the courts. —*Per* Idington and Anglin JJ.—The plaintiff's claim fails for want of evidence of any request by the defendant that he should render the services in respect of which remuneration is claimed nor an agreement to remunerate him for assistance in effecting the sales in question.—The judgment appealed from (3 West. W.R. 725; 23 West. L.R. 30; 9 D.L.R. 400) stood affirmed. BROWNLEE *v.* MCINTOSH..... **588**

2——*Appeal — Jurisdiction — "Supreme Court Act," ss.* 36, 37, 46—*Judge in chambers—Originating petition—Arts.* 71, 72, 875, 876, *C.P.Q.—Liquor Laws—"Quebec Licence Law," R.S.Q.*, 1909, *arts.* 924 *et seq.—Property in licence—Agreement—Ownership in persons other than holder—Invalidity of contract*..... **473**

See LIQUOR LAWS.

PUBLIC WAY.

See HIGHWAY.

QUANTUM MERUIT—*Company law—Agreement by directors—Onerous contract —Non-disclosure to shareholders—Breach of contract—Damages—Settlement of accounts — Appeal — Jurisdiction — Reference to master—Final judgment*..... **318**

See COMPANY LAW 3.

2——*Crown lands — Location — Public policy—Evasion of statute—B.C. "Land Act,"* 8 *Edw. VII., c.* 30, *ss.* 34, 36—*Sale of Crown lands—Principal and agent—Commission on sales—Tainted contract* **588**

See CROWN LANDS.

"QUEBEC LICENCE LAW" — *Appeal —Jurisdiction—"Supreme Court Act," ss.* 36, 37, 46—*Judge in chambers—Originating petition—Arts.* 71, 72, 875, 876 *C.P.Q. — Liquor laws — Property in licence — Agreement—Ownership in persons other than holder—Invalidity of contract—Public policy*..... **473**

See LIQUOR LAWS.

RAILWAYS—*Powers of construction and operation—Conflict of laws—Provincial legislation—Interference with Dominion railways — Constitutional law — Jurisdiction of legislature—Construction of statute —7 Edw. VII. c.* 8, *s.* 82 (*Alta.*)—2 *Geo. V. c.* 15, *s.* 7 (*Alta.*)—*"B.N.A. Act,"* 1867, *ss.* 91 *and* 92.] It is not competent to the Legislature of the Province of Alberta to enact legislation authorizing the construction and operation of railways in such a manner as to interfere with the physical structure or with the operation of railways subject to the jurisdiction of the Parliament of Canada. —Brodeur J. *contra*, was of the opinion that such legislation would be within the jurisdiction of the provincial legislature provided that in its effect there should be no unreasonable interference with federal railways. IN RE ALBERTA RAILWAY ACT..... **9**

2——*Provincial tramway—Jurisdiction of Board of Railway Commissioners—Highways—Overhead crossings—Apportionment of cost—Legislative jurisdiction—Ancillary powers—"Interested parties"—Construction of statute—"Railway Act," R.S.C.*, 1906, *c.* 37, *ss.* 8, 59, 237, 238—(*B.C.*) 8 & 9 *Edw. VII., c.* 32—*"B.N.A. Act*, 1867," *s.* 92, *item* 10.] On an application by the City of Vancouver, the Board of Railway Commissioners for Canada authorized the Corporation of the City of Vancouver to construct overhead bridges across the tracks of a Dominion railway company, which had been laid down during the years 1909 and 1910 on certain streets in the city, and ordered that a portion of the cost of construction of two of these bridges and of the depression of the tracks at the crossings thereof by the Dominion railway should be borne by a tramway company which derived its powers through provincial legislation and an agreement with the city pursuant to such legislation under which it operated its tramways upon these streets. By the agreement the tramway company became entitled to use the city streets with reciprocal obligations by the city and the company respecting their grading, repair and maintenance, and it was provided that the city should receive a share of the gross earnings of the tramway company. On appeal to the Supreme Court of Canada from the order of the Board.—*Held*, Duff and Brodeur JJ. dissenting, that, in virtue of sections 8 (*a*), 59, 237

and 238 of the "Railway Act," R.S.C., 1906, ch. 37, as amended by chapter 32 of 8 & 9 Edw. VII., the Board of Railway Commissioners for Canada had jurisdiction to determine the "interested parties" in respect of the proposed works and to direct what proportion of the cost thereof should be borne by each of them. The *City of Toronto* v. *Canadian Pacific Railway Co.* ((1908) A.C. 54); *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecour* (1899) A.C. 367); *City of Toronto* v. *Grand Trunk Railway Co.* (37 Can. S.C.R. 232); *County of Carleton* v. *City of Ottawa* (41 Can. S.C.R. 552), and *Re Canadian Pacific Railway Co. and York* (25 Ont. App. R. 65) followed.—*Per* Duff and Brodeur JJ., dissenting.—(1) The Parliament of Canada, when it assumes jurisdiction, under the provisions of item 10 of section 92 of the "British North America Act, 1867," in respect of a provincial railway, *quâ* railway, must assume such jurisdiction over the work or undertaking "as an integer." (2) The order of the Board cannot be sustained as being made in the exercise of the Dominion power of taxation. (3) As there is no Dominion interest concerned in the provisions of the order under appeal, and the Dominion Parliament has no power to compel the provincial company to assume the burden of the cost of the proposed works, or any portion thereof, the Board of Railway Commissioners had no jurisdiction to assess a proportion of their cost upon the tramway company. (4) The cases cited above must be distinguished as they do not sustain, as a valid exercise of ancillary power by Dominion authority, any enactment professing to control a provincial railway company.—(NOTE.—Leave to appeal to the Privy Council was granted on 14th July, 1913.) B.C. ELECTRIC RAILWAY CO. *v.* V.V. AND E. RAILWAY AND NAVIGATION CO. AND THE CITY OF VANCOUVER..... **98**

3——*Location plans—Width of right-of-way—Subsequent alteration—Substituted plans—Approval of new plans—Order having ex post facto effect—Jurisdiction of Board of Railway Commissioners—Construction of statute—"Railway Act," R.S.C.*, 1906, *c.* 37, *ss.* 162, 167.] The Board of Railway Commissioners for Canada has no jurisdiction, by an order permitting a railway company to file a new location plan, to be substituted for and as of the date of a former location plan previously approved by it, to authorize the company to alter, retrospectively, the former location of its railway. The proper method of effecting any such alteration is by proceedings under section 162 or section 167 of the "Railway Act," R.S.C., 1906, chapter 37. CHAMBERS *v.* CAN. PAC. RWAY. CO.. .... . **162**

4——*Construction — Route and location plans—Approval—Obstruction to navigation—Demolition of works—Jurisdiction of Board of Railway Commissioners—"Railway Act," R.S.C.*, 1906, *c.* 37, *ss.* 30 (*h*), (*i*), 230, 233.] Where a railway company, in the professed exercise of its powers as a railway company and without the approval of the route by the Minister and of the location plans and works by the Board of Railway Commissioners for Canada, has constructed a solid filling across navigable waters, the Board, under the provisions of sections 230 and 233 coupled with sub-sections (*h*) and (*i*) of section 30 of the "Railway Act," R.S.C., 1906, ch. 37, has jurisdiction to order the demolition of the works so constructed. GRAND TRUNK PAC. RY. CO. *v.* ROCHESTER..... . **238**

5——*Arbitration and award—Procedure—Prolonging date for award—Special circumstances—"Railway Act," R.S.C.*, 1906, *c.* 37, *s.* 204.] On an arbitration respecting compensation to be paid for lands taken under the "Railway Act," R.S.C., 1906, ch. 37, the arbitrators had fixed a day for their award according to the provisions of section 204. After some proceedings before them it was arranged, for the convenience of counsel for the parties, that further proceedings should be suspended until the return of counsel who were obliged to be present at the sittings of the Judicial Committee of the Privy Council and nothing further was done until after the return of counsel from abroad at a date later than the time so fixed for the award. The arbitrators had not prolonged the time for making the award, but, upon reassembling after the day originally fixed had passed, they fixed a later date for that purpose. The company's arbitrator and counsel then refused to take part in any subsequent proceedings and the two remaining arbitrators continued the hearing and made an

award in favour of the claimant greater than that offered by the company for the lands expropriated. In an action by the company to have the award set aside and for a declaration that the sum offered should be the compensation payable for the lands.—*Held*, Fitzpatrick C.J. and Anglin J. dissenting, that, in the circumstances of the case, the company should not be permitted to object to the manner in which the arbitrators had proceeded in prolonging the time and making the award. The appeal from the judgment of the Court of King's Bench (Q.R. 22 K.B. 221), declaring the award to have been validly made was, consequently, dismissed with costs. CAN. NORTHERN QUEBEC RWAY. CO. *v.* NAUD..... **242**

6——*Trespass—Occupation of lands—Side tracks—Continuous trespass — Damages.*] The Woodstock Rway. Co. was, by its charter, authorized to expropriate land 99 feet in width for its right-of-way and provision was made for compensation to owners. In 1871 it built its right-of-way 14 feet wide. In 1892 the C.P.R. Co., having acquired the rights of the W. Ry. Co., built side-tracks adjoining the right-of-way and within the 99 feet. In 1911 the plaintiffs brought action for trespass by laying such side-tracks on their land.—The court below, (41 N.B. Rep. 225,) held that there was no presumption that the W. Ry. Co. by occupying 14 feet took possession of the whole 99 feet allowed by its charter; that the injury to plainiff's land was not "sustained by reason of the construction or operation of the railway" and, therefore, the limitation of one year in sec. 306 of the "Railway Act" (R.S.C. [1906] ch. 37) did not apply and, if it did, the damage was continuous and plaintiffs could recover damages for six years, assessed at $1,200.—The appeal to the Supreme Court of Canada was dismissed, unanimously as to the merits, but with an equal division on the question of damages, three of their Lordships being of opinion that they were excessive and the case should be sent back for a re-assessment. CANADIAN PACIFIC RWAY. CO. *v.* CARR.. **514**

7——*Freight rates—Discrimination—Rebate — Construction of statute — Quebec "Railway Act," R.S.Q.*, 1888, *art.* 5172—*Company—Contract by directors—Powers —Approval of tariffs.*] An agreement by

which a railway company undertakes to grant a rebate upon shipments of car lots of goods made by a manufacturer who engages to bear the cost of loading and unloading his freight, unless shewn to be an artifice to secure unjust discrimination is not in contravention of the provisions of article 5172 of the Quebec Railway Act, R.S.Q., 1888, prohibiting undue advantage, privilege or monopoly being afforded to any person or class of persons in relation to tolls. Judgment appealed from (Q.R. 21 K.B. 85) affirmed, Idington and Anglin JJ. dissenting.—*Per* Brodeur J. (approving the judgment appealed from.)—The directors of a railway company may bind the company by such an agreement in relation to the business of the railway without having special sanction therefor by the shareholders. QUEBEC AND LAKE ST. JOHN RWAY. CO. *v.* KENNEDY..... **520**

8——*Operation — Negligence — Excessive speed—Trespasser—"Railway Act," R.S. C.*, 1906, *c.* 37, *ss.* 275, 408—*Cause of accident.*] While a train was running at the speed of about thirty miles an hour, on the company's line along the harbour front in the City of Vancouver, B.C., H., who had unlawfully entered upon the right-of-way through a break in the company's fences, attempted to cross the tracks in front of the train. The engine driver saw H., at a distance of about 500 feet and whistled several times. H. paid no attention to the danger signals and continued walking in an oblique direction towards the track and, observing his apparent intention to cross the track and his disregard of the signals, the engine driver then applied the emergency brakes which failed to stop the train in time to avoid the accident by which H. was killed. In an action for damages by his widow and child.—*Held*, that, notwithstanding the fact that deceased was a trespasser and committing a breach of section 408 of the "Railway Act," R.S.C., 1906, ch. 37, the company was liable because their engine driver neglected to apply the emergency brakes at the time he became aware of the danger of accident when he first noticed deceased attempting to cross the tracks. CANADIAN PACIFIC RWAY. CO. *v.* HINRICH..... **557**

9 —— *Evidence — Onus — Negligence — Excessive speed—"Railway Act," s.* 275—8 *&* 9 *Edw. VII. c.* 32, *s.* 13.] By 8 & 9

Railways—*continued.*

Edw. VII. ch. 32, sec. 13 amending section 275 of the "Railway Act" no railway train "shall pass over a highway crossing at rail level in any thickly peopled portion of any city, town or village at a greater speed than ten miles an hour" unless such crossing is constructed and protected according to special orders and regulations of the Railway Committee or Board of Railway Commissioners or permission is given by the Board. In an action against a railway company for damages on account of injuries received through a train passing over such a crossing at a greater speed than ten miles an hour.—*Held*, reversing the judgment of the Appellate Division (29 Ont. L.R. 247), that the onus was on the company of proving that the conditions existed which, under the provisions of said section, exempted them from the necessity of limiting the speed of their train to ten miles an hour or that they had the permission of the Board to exceed that limit, and as they had not satisfied that onus the plaintiff's verdict should stand.—Sub-section 4, of sec. 13, prohibits trains running "over any highway crossing" at more than 10 miles an hour, if at such crossing an accident has happened subsequent to 1st January, 1900, "by a moving train causing bodily injury," etc., "unless and until" it is protected to the satisfaction of the Board.—*Per* Duff and Brodeur JJ.—The appellant's action could also be maintained on the ground that the prohibition of sub-section 4 applies to the crossing in question.—*The Grand Trunk Railway Co.* v. *McKay* (34 Can. S.C.R. 81) distinguished. BELL *v.* GRAND TRUNK RWAY. CO. . **561**

10—*Board of Railway Commissioners—Appeals on questions of law—Stated case—Submission of specific questions—Practice—Construction of statute—R.S.C.*, 1906, *c.* 37, *ss.* 55, 56 *s.-s.* 3..... **257**

See BOARD OF RAILWAY COMMISSIONERS 4.

11—*Negligence—Operation of tramway—Carelessness of person injured—Reckless conduct of motorman*..... **494**

See NEGLIGENCE 1.

RESCISSION — *Company — Subscription for treasury stock—Contract—Principal and agent—Misrepresentation—Fraud —*

Rescission—*continued.*

Transfer of shares—Return of payments—Want of consideration..... **167**

See COMPANY LAW 1.

RETAINER — *Solicitor and client—Subsequent proceedings—Habeas corpus—Evidence*..... **508**

See SOLICITOR 1.

RIPARIAN RIGHTS — *Access to water-front — Interference — Evidence.*] M., claiming to be a riparian owner on the shore of Ashbridge Bay (part of Toronto harbour), claimed damages from, and an injunction against, the city for interfering with his access to the water when digging a channel along the north side of the bay.—*Held*, affirming the judgment of the Court of Appeal (27 Ont. L.R. 1), by which an appeal from a Divisional Court (23 Ont. L.R. 365) was dismissed, that the evidence established that between M.'s land and the bay was marsh land and not land covered with water as contended and, therefore, M. was not a riparian owner. MERRITT *v.* CITY OF TORONTO..... **1**

2——*Watercourses — Driving timber — "Damages resulting"—Reparation—Construction of statute—Arts.* 7298, 7349 *R.S. Q.* (1909)—*Servitude—Injury caused by independent contractor—Liability of owner of timber.*] The privilege of transmitting timber down watercourses in the Province of Quebec given by article 7298 of the Revised Statutes of Quebec, 1909, is not granted in derogation of the obligation imposed upon those making use of watercourses for such purposes to make reparation for damages resulting therefrom by article 7349 (2) of the Revised Statutes of Quebec. The effect of the articles is that persons who avail themselves of the privilege thereby conferred are obliged to compensate riparian owners for all damages which result from the exercise of that right except in regard to such as cannot be avoided by the exercise of reasonable care and skill and those in respect of which the riparian proprietor himself may have contributed, or which have been occasioned by his own fault. *Tourville* v. *Ritchie* (21 R.L. 110) referred to. —The judgment appealed from was reversed, Davies and Anglin JJ. dissenting.—*Per* Davies and Anglin JJ. dissenting.—The evidence shewed that the

Riparian Rights—*continued.*

damages complained of were caused by the fault of a *bonâ fide* independent contractor and, consequently, the owner of the timber which was being driven down the watercourse in question was not responsible for them.—(NOTE.—Leave to appeal to the Privy Council was granted on 15th July, 1913.) DUMONT *v.* FRASER..... **137**

RIVERS AND STREAMS — *Watercourses—Driving timber—"Damages resulting"—Preparation—Riparian rights—Construction of statute—Arts.* 7298, 7349 *R.S.Q.* (1909)—*Servitude—Injury caused by independent contractor—Liability of owner of timber.*] The privilege of transmitting timber down watercourses in the Province of Quebec given by article 7298 of the Revised Statutes of Quebec, 1909, is not granted in derogation of the obligation imposed upon those making use of watercourses for such purposes to make reparation for damages resulting therefrom by article 7349 (2) of the Revised Statutes of Quebec. The effect of the articles is that persons who avail themselves of the privilege thereby conferred are obliged to compensate riparian owners for all damages which result from the exercise of that right except in regard to such as cannot be avoided by the exercise of reasonable care and skill and those in respect of which the riparian proprietor himself may have contributed, or which have been occasioned by his own fault.—*Tourville* v. *Ritchie* (21 R.L. 110) referred to.—The judgment appealed from was reversed, Davies and Anglin JJ. dissenting.—*Per* Davies and Anglin JJ., dissenting.—The evidence shewed that the damages complained of were caused by the fault of a *bonâ fide* independent contractor and, consequently, the owner of the timber which was being driven down the watercourse in question was not responsible for them.—(NOTE.—Leave to appeal to the Privy Council was granted on 15th July, 1913.) DUMONT *v.* FRASER.... **137**

SALE—*Sale of land—Agreement—Bond to secure payment of price—Conditions as to title.*] The defendants, with other persons, entered into an agreement with the plaintiffs, appellants (except E.) for the purchase of lands, at $2 per acre, payable on 1st November, 1905, and afterwards entered into the bond upon which the action was taken. Differences

Sale—*continued.*

arose and plaintiffs refused to proceed with the execution of the agreement unless performance of its terms by the other parties was guaranteed, and, on 7th Sept., 1905, the bond was executed, expressed to be as security for payment of the price of the lands and it also contained a covenant for the payment to the plaintiffs of $2,500, part of the price to and for their own use and benefit as liquidated damages for services rendered and to be rendered by the plaintiffs. This bond was assigned to E. as collateral security for advances to his co-plaintiffs and, during the trial, he was added as a plaintiff. The trial judge ordered judgment in favour of plaintiffs, but this judgment was reversed by the Court of Appeal (19 Man. R. 517), on the ground that plaintiffs had failed to shew that they had acquired any title to or interest in the lands which they had agreed to sell, and it was held that, as plaintiffs could not recover under the agreement, they could not recover under the bond.—The appeal to the Supreme Court of Canada was dismissed with costs. COLWELL *v.* NEUFELD..... **506**

2——*Sale of goods—Designated quality—Fraud on purchaser—Damages—Loss of market.*] G. contracted for the purchase from B. of a quantity of apples for the purpose of selling them on the Christmas market in England. The apples were to be graded as Nos. 1 and 2 and delivered at Wolfville, N.S., before Dec. 1st, 1908. They were delivered accordingly to the number of 584 barrels and sent to St. John, N.B., for shipment. At St. John the fruit inspector opened some barrels, condemned the grading, and they had to be repacked at considerable expense and such delay that the intended market was lost. In the repacking some of the fruit was graded as No. 3 and some rejected as worthless culls. G. sued to recover the cost of repacking, damages for apples not up to the specified quality and loss of profit. He recovered a judgment at the trial on all three heads which the full court affirmed, (41 N.S. Rep. 116.) B. appealed to the Supreme Court of Canada against the award of damages for loss of profit only. The appeal was dismissed with costs. BIGELOW *v.* GRAHAM..... **512**

3——*Sale of goods—Delay in delivery—Damages—Construction of agreement—De-*

Sale—*continued.*

ficiencies in machinery—Exemption clause — "Unable to deliver" — "On or about" stated date.] The action was for the price of a boiler and attachments and K. counterclaimed for damages on account of delay in the shipment of part of the machinery within the time stipulated in the sale-agreement and the unsuitability of other parts for the works in which they were to be used. The trial judge dismissed the counterclaim because of an exemption clause in the agreement providing if for any reason L. & Sons were "unable to fill" K.'s order for the machinery "or deliver the goods at the time stated" that they would not in any way be held responsible for damages, and also because the delay had been caused by failure to deliver a part of the machinery which had not been included in the order. The Supreme Court of Alberta held that as the evidence did not shew inability to deliver the machinery at the time stated the clause did not protect the sellers, and also, that the failure to deliver certain parts of the machinery in question had not been the actual cause of the delay from which the damages claimed had resulted. An appeal to the Supreme Court of Canada, was allowed in part, the judgment appealed from, (4 Alta. L.R. 152,) set aside, the appellants were held entitled to recover $465.30 with interest, the defendant to recover $200 on his counterclaim, and appellants to have leave to enter judgment for the difference. It was ordered that the costs of action and counterclaim should follow these events, and that there should be no costs upon the appeal to the Supreme Court of Canada nor on the appeal to the Supreme Court of Alberta *in banco.* LEONARD & SONS *v.* KREMER..... **518**

4——*Winding-up proceedings — Company in liquidation—Sale of assets—Consent to sale of mortgaged ship—Sale by order of court—Mariners' liens—Sale free from incumbrances — Special fund — Privileged charge—Priority—Valuation of security — Release of mortgage—Marshalling securities—Subrogation.*] A ship which belonged to a company in liquidation was mortgaged to a bank and was also subject to maritime liens for seamen's wages due at the time of the winding-up order. The bank consented to the sale of the ship, by the liquidator, free from

Sale—*continued.*

incumbrances, at the same time as he sold the other assets of the company by direction of the court. He sold the ship separately and free from incumbrances for $5,000, which was credited, as a special fund, in his accounts. The bank subsequently filed its claim, valuing its security on the ship at $5,000. The purchasers took the ship to sea and it became a total loss. The bank then made claim to the whole of the fund realized on the sale of the ship and their claim was opposed on behalf of the wage lienholders claiming the right to be paid by priority out of this fund.—*Held,* affirming the judgment appealed from (4 West. W.R. 1271; 25 West. L.R. 92; 12 D.L.R. 807) that, by its consent to the sale of the ship under direction of the court, free from incumbrances, the bank had assented to the conversion thereof released from its mortgage and that the proceeds of the sale of the ship should be apportioned amongst the creditors in the order and according to the priorities provided by law; consequently it was not entitled to any special charge on the fund realized upon its sale.—*Held,* further, that the rights of the wage-earners holding maritime liens were not affected by the loss of the ship after it had been sold by the liquidator under the order of the court and that they were entitled to recover their claims out of the fund realized upon the sale of the ship in priority to the mortgagee. —[MEMO.—The court ordered that the rights of the bank, if any, to relief, by way of subrogation or marshalling of securities, should be reserved to be dealt with on further proceedings in the winding-up of the company.] TRADERS BANK OF CANADA *v.* LOCKWOOD..... **593**

5——*Crown lands—Location—Public policy—Evasion of statute—B.C. "Land Act," 8 Edw. VII., c. 30, ss. 34, 36—Sale of Crown lands—Principal and agent—Commission on sales—Quantum meruit—Tainted contract*..... **588**

See CROWN LANDS.

SERVITUDE — *Watercourses — Driving timber—"Damages resulting"—Reparation —Riparian rights—Construction of statute —Arts. 7298, 7349 R.S.Q., 1909—Injury caused by independent contractor—Liability of owner of timber*..... **137**

See RIVERS AND STREAMS.

AND *see* EASEMENT.

SETTLEMENT — *Fraudulent conveyance—Statute of Elizabeth—Husband and wife—Voluntary settlement—Evidence* **44**

See FRAUDULENT CONVEYANCES.

SHAREHOLDER — *Company—Subscription for treasury stock—Contract—Principal and agent—Misrepresentation—Fraud—Transfer of shares—Rescission—Return of payments—Want of consideration..* **167**

See COMPANY LAW 1.

2——*Company law—Agreement by directors—Onerous contract—Non-disclosure to shareholders—Breach of contract—Damages—Settlement of accounts—Appeal—Jurisdiction—Reference to master—Final judgment*..... **318**

See COMPANY LAW 3.

SHIPS AND SHIPPING — *Winding-up proceedings—Company in liquidation—Sale of assets—Consent to sale of mortgaged ship—Sale by order of court—Mariners' liens—Sale free from incumbrances—Special fund—Privileged charge—Priority—Valuation of security—Release of mortgage — Marshalling securities — Subrogation*..... **593**

See LIEN.

SOLICITOR — *Solicitor and client — Retainer — Subsequent proceedings — Habeas corpus — Evidence.*] W., master and managing owner of the "Mary A. Duff," retained plaintiff, a barrister, to prosecute some sailors for desertion. The sailors were convicted and imprisoned and plaintiff was also retained to oppose their application for discharge on *habeas corpus* which he did successfully. W. being about to sail gave his note to plaintiff for the amount of his charges. About the same time he was removed from the position of managing owner and the defendant appointed in his stead. Plaintiff's note was presented to the defendant and paid.—The sailors made a second application for a writ of *habeas corpus*, the order was served at the residence of W. and his daughter brought it to plaintiff, who telephoned to defendant concerning it and was told that defendant had no instructions in the matter. Plaintiff attended on the second application for the writ and, defendant refusing to pay his bill, he brought action. —The trial judge and two judges of the full court (45 N.S. Rep. 338) held that defendant's action in paying the former

Solicitor—*continued.*

account and making no objection to his acting on the second occasion estopped him from denying the plaintiff's retainer. —The Supreme Court of Canada unanimously reversed the judgment for the plaintiff, holding that his retainer was at an end when W. settled his account. DUFF *v.* LANE..... **508**

2——*Solicitor and client—Special statute—Fixed sum for costs—Delivery of bill—"Solicitors' Act," 2 Geo. V. c. 28, s. 34.*] Plaintiffs, a firm of solicitors, were retained by defendant in litigation between him and a municipal corporation and in other matters. They succeeded in having a by-law quashed with costs whereupon a special Act was passed by the legislature validating the by-law and ordering the municipality to pay defendant's costs as between solicitor and client providing that "such costs are hereby fixed at eighteen hundred dollars." The plaintiffs delivered to defendant a signed bill of costs containing one item of $1,800, stated to be "settled by agreement between the parties and fixed by statute" and directed to be paid by the corporation to defendant, and detailed items amounting to $84. A month after delivery of the bill action was taken thereon and, on the trial, plaintiffs failed to prove any agreement in writing respecting the $1,800.— The trial judge dismissed the action, holding that the special Act did not relieve the plaintiffs from the necessity of complying with the terms of the "Solicitors Act" and delivering an itemized account of all services rendered. The Appellate Division (28 Ont. L.R. 121) varied this judgment by giving plaintiffs the $84, details of which were given. The appeal to the Supreme Court of Canada was dismissed with costs. GUNDY *v.* JOHNSTONE..... **516**

STATUTE — *Railways—Powers of construction and operation—Conflict of laws—Provincial legislation—Interference with Dominion railways—Constitutional law—Jurisdiction of legislature—Construction of statute—7 Edw. VII. c. 8, s. 82 (Alta.) 2 Geo. V. c. 15, s. 7 (Alta.)—"B.N.A. Act," 1867, ss. 91 and 92.*] It is not competent to the Legislature of the Province of Alberta to enact legislation authorizing the construction and operation of railways in such a manner as to interfere with the physical structure or with

Statute—*continued.*

the operation of railways subject to the jurisdiction of the Parliament of Canada. —Brodeur J. *contra*, was of the opinion that such legislation would be within the jurisdiction of the provincial legislature provided that in its effect there should be no unreasonable interference with federal railways. IN RE ALBERTA RAILWAY ACT..... 9

2——*Provincial tramway—Jurisdiction of Board of Railway Commissioners—Highways — Overhead crossings — Apportionment of cost—Legislative jurisdiction—Ancillary powers—"Interested parties"—Construction of statute—"Railway Act," R.S. C.*, 1906, *c.* 37, *ss.* 8, 59, 237, 238—(*B.C.*) 8 *&* 9 *Edw. VII., c.* 32—*"B.N.A. Act,* 1867", *s.* 92, *item* 10.] On an application by the City of Vancouver, the Board of Railway Commissioners for Canada authorized the Corporation of the City of Vancouver to construct overhead bridges across the tracks of a Dominion railway company, which had been laid down during the years 1909 and 1910 on certain streets in the city, and ordered that a portion of the cost of construction of two of these bridges and of the depression of the tracks at the crossings thereof by the Dominion railway should be borne by a tramway company which derived its powers through provincial legislation and an agreement with the city pursuant to such legislation under which it operated its tramways upon these streets. By the agreement the tramway company became entitled to use the city streets with reciprocal obligations by the city and the company respecting their grading, repair and maintenance, and it was provided that the city should receive a share of the gross earnings of the tramway company. On appeal to the Supreme Court of Canada from the order of the Board.—*Held,* Duff and Brodeur JJ. dissenting, that, in virtue of sections 8 (*a*), 59, 237, and 238 of the "Railway Act," R.S.C., 1906, ch. 37, as amended by chapter 32 of 8 & 9 Edw. VII., the Board of Railway Commissioners for Canada had jurisdiction to determine the "interested parties" in respect of the proposed works and to direct what proportion of the cost thereof should be borne by each of them. The *City of Toronto* v. *Canadian Pacific Railway Co.* ((1908) A.C. 54); *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* ((1899) A.C. 367); *City of*

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Toronto v. *Grand Trunk Railway Co.* (37 Can. S.C.R. 232); *County of Carleton* v. *City of Ottawa* (41 Can. S.C.R. 552), and *Re Canadian Pacific Railway Co. and York* (25 Ont. App. R. 65) followed.—*Per* Duff and Brodeur JJ. dissenting.—(1) The Parliament of Canada, when it assumes jurisdiction, under the provisions of item 10 of section 92 of the "British North America Act, 1867," in respect of a provincial railway, *qua* railway, must assume such jurisdiction over the work or undertaking "as an integer." (2) The order of the Board cannot be sustained as being made in the exercise of the Dominion power of taxation. (3) As there is no Dominion interest concerned in the provisions of the order under appeal, and the Dominion Parliament has no power to compel the provincial company to assume the burden of the cost of the proposed works, or any portion thereof, the Board of Railway Commissioners had no jurisdiction to assess a proportion of their cost upon the tramway company. (4) The cases cited above must be distinguished as they do not sustain, as a valid exercise of ancillary power by Dominion authority, any enactment professing to control a provincial railway company.—(NOTE.—Leave to appeal to the Privy Council was granted on 14th July, 1913.) B.C. ELECTRIC RAILWAY CO. *v.* V.V. AND E. RAILWAY AND NAVIGATION CO. AND THE CITY OF VANCOUVER..... 98

3——*Watercourses — Driving timber — "Damages resulting" — Reparation — Riparian rights—Construction of statute — Arts.* 7298, 7349 *R.S.Q.* (1909) — *Servitude — Injury caused by independent contractor—Liability of owner of timber.*] The privilege of transmitting timber down watercourses in the Province of Quebec given by article 7298 of the Revised Statutes of Quebec, 1909, is not granted in derogation of the obligation imposed upon those making use of watercourses for such purposes to make reparation for damages resulting therefrom by article 7349 (2) of the Revised Statutes of Quebec. The effect of the articles is that persons who avail themselves of the privilege thereby conferred are obliged to compensate riparian owners for all damages which result from the exercise of that right except in regard to such as cannot be avoided by the exercise of reasonable care and skill

Statute—*continued.*

and those in respect of which the riparian proprietor himself may have contributed, or which have been occasioned by his own fault. *Tourville* v. *Ritchie* (21 R.L. 110) referred to.—The judgment appealed from was reversed, Davies and Anglin JJ. dissenting.—*Per* Davies and Anglin JJ. dissenting. — The evidence shewed that the damages complained of were caused by the fault of a *bonâ fide* independent contractor and, consequently, the owner of the timber which was being driven down the watercourse in question was not responsible for them.—(NOTE.—Leave to appeal to the Privy Council was granted on 15th July, 1913.) DUMONT *v.* FRASER.... ..... **137**

4——*Railways — Location plans — Width of right-of-way — Subsequent alteration — Substituted plans—Approval of new plans —Order having ex post facto effect—Jurisdiction of Board of Railway Commissioners—Construction of statute—"Railway Act," R.S.C.*, 1906, *c.* 37, *ss.* 162, 167.] The Board of Railway Commissioners for Canada has no jurisdiction, by an order permitting a railway company to file a new location plan, to be substituted for and as of the date of a former location plan previously approved by it, to authorize the company to alter, retrospectively, the former location of its railway. The proper method of effecting any such alteration is by proceedings under section 162 or section 167 of the "Railway Act," R.S.C., 1906, chapter 37. CHAMBERS *v.* CAN. PAC. RY. CO..... **162**

5——*Foreign corporation—Conflict of laws —Incorporation by Dominion authority — Powers — B.C. "Companies Act" — Unlicensed extra-provincial companies — "Carrying on business" — Contract — Transactions beyond limits of province — Promissory notes—Right of action—Juristic disability—Construction of statute—(B.C.)* 10 *Edw. VII. c.* 7, *ss.* 139, 166, 168.] The "Companies Act" (B.C.), 10 Edw. VII., ch. 7, secs. 139, 166, 168, prohibits companies incorporated otherwise than under the laws of British Columbia carrying on without registration or licence in the province any part of their business; penalties are provided for doing so without provincial registration or licence; and they are denied the right of maintaining actions,

Statute—*continued.*

suits or proceedings in the courts of the province in respect of any contract made in whole or in part within the province in the course of or in connection with any business carried on contrary to the provisions of the Act. The appellant company, incorporated under the Dominion "Companies Act," R.S.C., 1906, ch. 79, has its head-office in Winnipeg, Man., and did not become licensed under the B.C. "Companies Act." In February, 1911, the company entered into an agreement with A., who is domiciled in British Columbia, giving him the exclusive right to sell their goods in British Columbia in pursuance of which he ordered goods from the company to be shipped from Winnipeg to him, *f.o.b.* Calgary, Alta., assuming all risk and charges himself from that point to Elko, B.C., where the goods were to be received and sold by him. He gave the company his promissory notes, dated at Winnipeg, for the price of these goods, some of the notes being actually signed by him at Elko. In an action by the company to recover the amount of these notes the trial judge held that the action was barred by the statute and could not be maintained by the company in any court in the Province of British Columbia. On an appeal, *per saltum*, to the Supreme Court of Canada, the judgment appealed from (8 D.L.R. 65; 2 West. W.R. 1013; 22 W.L.R. 243) was reversed, and it was—*Held, per* Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ., that the transactions which had taken place between the company and A. did not constitute the carrying on of the business by the company in the Province of British Columbia within the meaning of the B.C. "Companies Act" and, therefore, the disabilities imposed by that statute could have no effect in respect of the right of the company to recover the amount claimed in the action in the provincial court.—*Per* Idington J.—As the exclusive jurisdiction in respect of bills of exchange and promissory notes has been assigned to the Parliament of Canada, under item 18 of section 91 of the "British North America Act, 1867," the word "contract" as used in section 166 of the B.C. "Companies Act," 10 Edw. VII., ch. 7, cannot be considered as having any application to promissory notes; the plaintiff's right of action in the provincial court was, therefore, not barred by the provincial

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statute. JOHN DEERE PLOW CO. *v.* AGNEW..... **208**

6——*Habeas corpus—Common law offences—Construction of statute—"Supreme Court Act," R.S.C.*, 1906, *c.* 139, *s.* 62—*Jurisdiction of Supreme Court judges.*] The jurisdiction of judges of the Supreme Court of Canada in respect of *habeas corpus ad subjiciendum* extends only to cases of commitment on charges of offences which are criminal by virtue of statutes enacted by the Parliament of Canada; it does not extend to cases of commitment for offences at common law or under statutes enacted prior to Confederation which are still in force. *Re Sproule* (12 Can. S.C.R. 140) referred to.—The offence of housebreaking as described in the Imperial statute, 7 & 8 Geo. IV., ch. 29, sec. 15, became part of the criminal law of British Columbia on the introduction of the criminal law of England into that colony by the ordinance of 19th November, 1858, continued to be so until the Union of the province with Canada, and since then by virtue of sec. 11 of the "Criminal Code," and it is not an offence to which sec. 62 of the "Supreme Court Act," R.S.C., 1906, ch. 139, has application. IN RE DEAN..... **235**

7——*Construction — Route and location plans—Approval—Obstruction to navigation—Demolition of works—Jurisdiction of Board of Railway Commissioners—"Railway Act," R.S.C.*, 1906, *c.* 37, *ss.* 30 (*h*), (*i*), 230, 233.] Where a railway company, in the professed exercise of its powers as a railway company and without the approval of the route by the Minister and of the location plans and works by the Board of Railway Commissioners for Canada, has constructed a solid filling across navigable waters, the Board, under the provisions of sections 230 and 233 coupled with sub-sections (*h*) and (*i*) of section 30 of the "Railway Act," R.S.C., 1906, ch. 37 has jurisdiction to order the demolition of the works so constructed. GRAND TRUNK PAC. RY. CO. *v.* ROCHESTER..... **238**

8——*Arbitration and award—Prolonging date for award—Special circumstances—"Railway Act," R.S.C.*, 1906, *c.* 37, *s.* 204.] On an arbitration respecting compensation to be paid for lands taken under the "Railway Act," R.S.C., 1906, ch. 37, the arbitrators had fixed a day

Statute—*continued.*

for their award according to the provisions of section 204. After some proceedings before them it was arranged, for the convenience of counsel for the parties that further proceedings should be suspended until the return of counsel who were obliged to be present at the sittings of the Judicial Committee of the Privy Council and nothing further was done until after the return of counsel from abroad at a date later than the time so fixed for the award. The arbitrators had not prolonged the time for making the award but, upon reassembling after the day originally fixed had passed, they fixed a later date for that purpose. The company's arbitrator and counsel then refused to take part in any subsequent proceedings and the two remaining arbitrators continued the hearing and made an award in favour of the claimant greater than that offered by the company for the lands expropriated. In an action by the company to have the award set aside and for a declaration that the sum offered should be the compensation payable for the lands.—*Held*, Fitzpatrick C.J. and Anglin J. dissenting, that, in the circumstances of the case, the company should not be permitted to object to the manner in which the arbitrators had proceeded in prolonging the time and making the award. The appeal from the judgment of the Court of King's Bench (Q.R. 22 K.B. 221), declaring the award to have been validly made, was, consequently, dismissed with costs. CAN. NORTHERN QUEBEC RWAY. CO. *v.* NAUD **242**

9——*Board of Railway Commissioners—Appeals on questions of law—Stated case—Submission of specific question—Practice—Construction of statute—R.S.C.*, 1906, *c.* 37, *s.* 55 *and s.* 56, *s.-s.* 3.] An appeal, under the provisions of section 55, or section 56, sub-section 3, of the "Railway Act," R.S.C., 1906, ch. 37, should not be entertained by the Supreme Court of Canada until the Board of Railway Commissioners for Canada has stated the case in writing and submitted for the opinion of the court some question which, in the opinion of the board, is a question of law. (*Cf.* *"Regina Rates Case,"* (44 Can. S.C.R. 328,) where this case was followed by Anglin J., and 45 Can. S.C.R. at pp. 323 to 328.) CANADIAN PACIFIC RWAY. CO. *v.* CITY OF OTTAWA **257**

Statute—*continued.*

10——*Constitutional law — Insurance — Foreign company doing business in Canada — Dominion licence — 9 & 10 Edw. VII. c. 32, ss. 4 and 70.*] *Held, per* Fitzpatrick C.J. and Davies J., that sections 4 and 70 of the Act 9 & 10 Edw. VII. ch. 32 (the "Insurance Act, 1910") are not *ultra vires* of the Parliament of Canada. Idington, Duff, Anglin and Brodeur JJ., *contra.*—*Held, per* Fitzpatrick C.J., and Davies J., that section 4 of said Act operates to prohibit an insurance company incorporated by a foreign state from carrying on its business within Canada if it does not hold a licence from the Minister under the said Act and if such carrying on of the business is confined to a single province.—*Per* Idington J.—Section 4 does so prohibit if, and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies as well as others within the terms of which is embraced so much that is clearly *ultra vires.*—*Per* Duff, Anglin and Brodeur JJ.—The section would effect such prohibition if it were *intra vires.* IN RE "INSURANCE ACT, 1910"..... **260**

11——*Appeal — Jurisdiction — Reserve of further directions—"Final judgment"—Construction of statute—"Supreme Court Act," R.S.C.*, 1906, *c.* 139, *s.* 2 (*e*); 3 & 4 *Geo. V. c.* 51, *s.* 1.] Before the amendment, in 1913, to sec. 2 (*e*) of the "Supreme Court Act," R.S.C. 1906, ch. 139, judgments were rendered maintaining an action on a bond by which two of the defendants were ordered to pay to the plaintiffs an amount not exceeding that secured by the bond to be ascertained upon a reference to the master and further directions were reserved; as to another defendant, recovery of the same amount, to be ascertained in the same manner, was ordered, but there was no reserve of further directions. Upon an appeal by the last mentioned defendant—*Held*, Davies J. dissenting, that the judgment sought to be appealed from (23 Man. R. 159) did not finally conclude the action as proceedings still remained to be taken on the reference, consequently, it was not a final judgment within the meaning of section 2 (*e*) of the "Supreme Court Act," prior to the amendment by the statute 3 & 4 Geo. V., ch. 51 (assented to on the 6th of June, 1913), and it was not competent to the Supreme Court of Canada to entertain the appeal. *The Rural Municipality of Morris* v. *The London and Canadian Loan and Agency Co.* (19 Can. S.C.R. 434) followed. *Ex parte Moore* (14 Q.B.D. 627) distinguished; *Clarke* v. *Goodall* (44 Can. S.C.R. 284), and *The Crown Life Ins. Co.* v. *Skinner* (44 Can. S.C.R. 616) referred to.—*Per* Anglin and Brodeur JJ.—The amendment of the "Supreme Court Act" by the first section of 3 & 4 Geo. V. ch. 51, has not affected whatever right the appellant may have had at the time the judgment was rendered in respect to an appeal to the Supreme Court of Canada. *Hyde* v. *Lindsay* (29 Can. S.C.R. 99); *Cowen* v. *Evans* (22 Can. S.C.R. 331); *Hurtubise* v. *Desmarteau* (19 Can. S.C.R. 562); and *Taylor* v. *The Queen* (1 Can. S.C.R. 65) referred to.—*Per* Davies J. dissenting. —The judgment in question does not reserve "further directions" and comes within the rule and principle determining what are "final judgments" laid down in the case of *Ex parte Moore* (14 Q.B.D. 627). STEPHENSON *v.* GOLD MEDAL FURNITURE MFG. CO..... **497**

12——*Railways — Freight rates — Discrimination — Rebate — Construction of statute — Quebec Railway Act, R.S.Q.*, 1888, *art.* 5172—*Company—Contract by directors — Powers — Approval of tariffs.*] An agreement by which a railway company undertakes to grant a rebate upon shipments of car lots of goods made by a manufacturer who engages to bear the cost of loading and unloading his freight, unless shewn to be an artifice to secure unjust discrimination, is not in contravention of the provisions of article 5172 of the "Quebec Railway Act," R.S.Q., 1888, prohibiting undue advantage, privilege or monopoly being afforded to any person or class or persons in relation to tolls. Judgment appealed from Q.R. 21 K.B. 85) affirmed, Idington and Anglin JJ. dissenting.—*Per* Brodeur J. (approving the judgment appealed from). —The directors of a railway company may bind the company by such an agreement in relation to the business of the railway without having special sanction therefor by the shareholders. QUEBEC AND LAKE ST. JOHN RWAY. CO. *v.* KENNEDY..... **520**

13——*Evidence — Onus — Railway company — Negligence — Excessive speed — "Railway Act," s.* 275—8 & 9 *Edw. VII.*

Statute—*continued.*

c. 32, *s.* 13.] By 8 & 9 Edw. VII. ch. 32, sec. 13, amending section 275 of the "Railway Act," no railway train "shall pass over a highway crossing at rail level in any thickly peopled portion of any city, town or village at a greater speed than ten miles an hour" unless such crossing is constructed and protected according to special orders and regulations of the Railway Committee or Board of Railway Commissioners or permission is given by the Board. In an action against a railway company for damages on account of injuries received through a train passing over such a crossing at a greater speed than ten miles an hour.—*Held*, reversing the judgment of the Appellate Division (29 Ont. L.R. 247), that the onus was on the company of proving that the conditions existed which, under the provisions of said section, exempted them from the necessity of limiting the speed of their train to ten miles an hour or that they had the permission of the Board to exceed that limit, and as they had not satisfied that onus the plaintiff's verdict should stand. —Sub-section 4, of sec. 13, prohibits trains running "over any highway crossing" at more than ten miles an hour, if at such crossing an accident has happened subsequent to 1st January, 1900, "by a moving train causing bodily injury," etc., "unless and until" it is protected to the satisfaction of the Board. —*Per* Duff and Brodeur JJ.—The appellant's action could also be maintained on the ground that the prohibition of sub-section 4 applies to the crossing in question.—*The Grand Trunk Railway Co.* v. *McKay* (34 Can. S.C.R. 81) distinguished. BELL *v.* GRAND TRUNK RWAY. CO. **561**

14—*Fire Insurance—Application—Misrepresentation—Materiality—Statutory conditions—Variation.*—In an action on a policy insuring a stock of merchandise the company pleaded—That the stock on hand at the time of the fire was fraudulently over-valued. That the insured in his application concealed a material fact, namely, that he had previously suffered loss by fire in his business. That the action was barred by a condition in the policy requiring it to be brought within six months from the date of the fire. This was a variation from the statutory condition that it must be brought within twelve months.—*Held*,

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affirming the judgment of the Appellate Division (29 Ont. L.R. 356) that the evidence established the value of the stock at the time of the fire to be as represented by the insured; that the materiality to the risk of the non-disclosure of a former loss by fire was a question of fact for the judge at the trial who properly held it to be immaterial; and that the question whether or not the variation from the statutory conditions was just and reasonable depended on the circumstances of the case, and the courts below rightly held that it was not. ANGLO-AMERICAN FIRE INS. CO. *v.* HENDRY; MONTREAL-CANADA FIRE INS. CO. *v.* HENDRY **577**

AND *see* INSURANCE, FIRE 2.

15—*Election law—Preliminary objections—Rules of practice—Repeal—Inconsistency with statutory provision—Judgment on preliminary objections—Final determination of stage of cause—Objections—Irregularity by returning officer—Appeal—Jurisdiction—Issues in question—Construction of statute—*(*D.*) 37 *V. c.* 10, *ss.* 44, 45—*R.S.C.*, 1906, *c.* 7, *ss.* 16, 19, 20, 85—*R.S.C.*, 1906, *c.* 1, *s.* 20.] Under the provisions of the "Dominion Controverted Elections Act, 1874," the judges of the Superior Court for the Province of Quebec made general rules and orders for the regulation of the practice and procedure with respect to election petitions whereby the returning officer was required to publish notice of such petitions once in the Quebec Official *Gazette* and twice in English and French newspapers published or circulating in the electoral divisions affected by the controversy. By section 16 of chapter 7, R.S.C., 1906, provision is made for the publishing of a similar notice by the returning officer once in a newspaper published in the electoral district.—*Held*, that the rule of practice is inconsistent with the provision as to the notice required by section 16, chapter 7, R.S.C., 1906, and, consequently, has ceased to be in force.—*Per* Duff and Brodeur JJ.—Even if such rule were still in force, failure on the part of the returning officer to comply with it would not be sufficient ground for the dismissal of the election petition. —*Per* Davies, Duff, and Anglin JJ.—Under the provisions of the "Dominion Controverted Elections Act," R.S.C., 1906, ch. 7, secs. 19 and 20, preliminary objections are required to be decided

Statute—*continued.*

in a summary manner; consequently, a decision by an election court judge on any of the preliminary objections disposes of all the issues raised in that stage of the proceedings. Where an election petition is disposed of by the judge upon one of several objections, without consideration of the others, the Supreme Court of Canada has jurisdiction to hear and determine questions arising upon all the preliminary objections in issue before the election court judge; its jurisdiction is not confined to the objection upon which the judgment appealed from was solely based. Idington J. *contra.* Fitzpatrick C.J. and Brodeur J. expressing no opinion. RICHELIEU ELECTION; PARADIS *v.* CARDIN..... **625**

16 —— *Trespass — Easement — Public way — Dedication — User — Prescription —Estoppel—"Law and Transfer of Property Act," R.S.I.*, 1897, *c.* 119..... **57**

See EASEMENT.

17 —— *Trespass — Railways — Occupation of lands—Side-tracks—Continuous trespass —Damages—R.S.C.*, 1906, *c.* 37, *s.* 306. **514**

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18——*Solicitor and client—Special statute —Fixed sum for costs—Delivery of bill— "Solicitors' Act," 2 Geo. V., c. 28, s. 34* **516**

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19——*Operation of railway—Negligence— Excessive speed—Trespasser in tracks— "Railway Act,"* 1906, *ss.* 275, 408.... **557**

See RAILWAYS 8.

20——*Crown lands—Location—Public policy—Evasion of statute—B.C. "Land Act," ss.* 34, 36*—Sale of Crown lands—Principal and agent—Commission on sales—Quantum meruit—Tainted contract*..... **588**

See CROWN LANDS.

STATUTE OF ELIZABETH — *Fraudulent conveyance—Husband and wife—Voluntary settlement—Evidence.*] In August, 1908, M. and his brother bought a hotel business in Ottawa for $8,000, paying $6,000 down and securing the balance by notes which were afterwards retired. In November, 1908, M. conveyed a hotel property in Madoc to his wife subject to a mortgage which she assumed. M. and his brother carried on the Ottawa business until March, 1910, when they assigned for benefit of creditors who brought suit to set aside the conveyance to M.'s wife. On the trial it was shewn that for some time before November, 1908, M.'s wife had been urging him to transfer to her the Madoc property, which she had helped him to acquire, as a provision for herself and their children; that she had joined in a conveyance of a property in Toronto in which they both believed she had a right of dower, and the proceeds of the sale of which were applied in the purchase of the Ottawa business; and that all of M.'s liabilities at the time of said conveyance had been discharged. M. ascribed his failure in Ottawa to the action of the License Commissioners in compelling him to move his bar to the rear of the premises whereby his receipts fell off and he lost rents that he had theretofore received, and had to make expensive alterations; and to a fire on the premises early in 1910. The trial judge set aside the conveyance to M.'s wife; his judgment was reversed by a Divisional Court (24 Ont. L.R. 591), but restored by the Court of Appeal.—*Held*, affirming the judgment of the Court of Appeal (27 Ont. L.R. 319), Davies J. dissenting, that the conveyance by M. to his wife was voluntary; that it denuded him of the greater part of his available assets and was made to protect the property conveyed against his future creditors and is, therefore, void as against them. MCGUIRE *v.* OTTAWA WINE VAULTS CO..... **44**

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STATUTES — (*Imp.*) 7 *&* 8 *Geo. IV., c.* 29, *s.* 15 (*Housebreaking*)..... **235**

See CRIMINAL LAW 1.

2——(*Imp.*) *"B.N.A. Act*, 1867," *ss.* 91, 92..... **9**

See CONSTITUTIONAL LAW 1.

3——(*Imp.*) *"B.N.A. Act*, 1867," *s.* 92, *item* 10..... **98**

See RAILWAYS 2.

4——(*Imp.*) *"B.N.A. Act*, 1867," *s.* 92, *s.-s.* 11..... **331**

See CONSTITUTIONAL LAW 4.

5——*R.S.C.*, 1906, *c.* 1, *s.* 20 (*Revision of Statutes*)..... **625**

See ELECTION LAW.

Statutes—*continued.*

6——*R.S.C.*, 1906, *c.* 7, *ss.* 16, 19, 20, 85 (*Controverted Elections*) **625**
See ELECTION LAW.

7——*R.S.C.*, 1906, *c.* 37, *ss.* 8, 59, 237, 238 (*Railways*)..... **98**
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8——*R.S.C.*, 1906, *c.* 37, *ss.* 30, 230, 233 (*Railways*)..... **238**
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9——*R.S.C.*, 1906, *c.* 37, *ss.* 55, 56 (*Railways*)..... **257**
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10——*R.S.C.* 1906, *c.* 37, *ss.* 162, 167 (*Railways*) **162**
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11——*R.S.C.*, 1906, *c.* 37, *s.* 204 (*Railways*)..... **242**
See ARBITRATION AND AWARD.

12——*R.S.C.*, 1906, *c.* 37, *s.* 275 (*"Railway Act"*)..... **561**
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13——*R.S.C.*, 1906, *c.* 37, *ss.* 275, 408 (*"Railway Act"*)..... **557**
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14——*R.S.C.*, 1906, *c.* 37, *s.* 306 (*"Railway Act"*)..... **514**
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15——*R.S.C.*, 1906, *c.* 139, *s.* 2 (*c*) (*"Supreme Court Act"*)..... **497**
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16——*R.S.C.*, 1906, *c.* 139, *ss.* 36, 37, 46 (*"Supreme Court Act"*)..... **473**
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17——*R.S.C.*, 1906, *c.* 139, *s.* 62 (*Supreme Court*)..... **235**
See HABEAS CORPUS 1.

18——(*D.*) 37 *Vict. c.* 10, *ss.* 44, 45 (*Controverted Elections*)..... **625**
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19——(*D.*) 8 & 9 *Edw. VII.*, *c.* 32, (*Railways*) **98**
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20——(*D.*)—8 & 9 *Edw. VII.*, *c.* 32, *s.* 13 (*Railways*) **561**
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21——(*D.*) 9 & 10 *Edw. VII.*, *c.* 32, *ss.* 4, 70 (*Business of Insurance*)..... **260**
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22——(*D.*) 9 & 10 *Edw. VII.*, *c.* 32, *s.* 3 (*"Insurance Act*, 1910")..... **331**
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23——(*D.*) 3 & 4 *Geo. V.*, *c.* 51, *s.* 1 (*Supreme Court*)..... **497**
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24——*R.S.O.*, 1897, *c.* 119 (*"Law and Transfer of Property Act"*)..... **57**
See EASEMENT.

25——(*Ont.*) 2 *Geo. V.*, *c.* 28, *s.* 34 (*"Solicitors' Act"*)..... **516**
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26——*R.S.Q.*, 1888, *art.* 5172 (*Railway tolls*) **520**
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SUBROGATION—*Winding-up proceedings—Company in liquidation—Sale of assets—Consent to sale of mortgaged ship—Sale by order of court—Mariners' liens—Sale free from incumbrances—Special fund—Privileged charge—Priority—Valuation of security—Release of mortgage—Marshalling securities*..... **593**
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TITLE TO LAND—*Trespass—Easement—Public way—Dedication—User—Prescription—Estoppel—"Law and Transfer of Property Act," R.S.O.*, 1897, *c.* 119 **57**

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2——*Vendor and purchaser—Sale of land—Agreement—Bond to secure payment of price—Conditions as to title*..... **506**

See VENDOR AND PURCHASER.

TRAMWAYS—*Negligence—Operation of tramway—Carelessness of person injured—Reckless conduct of motorman.*] The carelessness of the plaintiffs in driving across the tracks of a tramway was, in this case, excused by the reckless conduct of the defendant's motorman in failing to use proper precautions to avoid the consequences of their negligence after he had become aware of it. Judgment appealed from (11 D.L.R. 3; 4 West. W.R. 263) affirmed. CITY OF CALGARY *v.* HARNOVIS..... **494**

2——*Constitutional law—Board of Railway Commissioners — Highways — Overhead crossings—Apportionment of cost—Legislative jurisdiction—"Railway Act," R.S.C.*, 1906, *ss.* 8, 59, 237, 238—*B.C.* 8 *&* 9 *Edw. VII., c.* 32—*"B.M.A. Act*, 1867," *s.* 92, *item* 10..... **98**

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TRESPASS — *Railways — Operation — Negligence—Excessive speed—Trespasser on track—"Railway Act," R.S.C.*, 1906, *c.* 37, *ss.* 275, 408—*Cause of accident.*] While a train was running at the speed of about thirty miles an hour, on the company's line along the harbour front in the City of Vancouver, B.C., H., who had unlawfully entered upon the right-of-way through a break in the company's fences, attempted to cross the tracks in front of the train. The engine driver

Trespass—*continued.*

saw H., at a distance of about 500 feet and whistled several times. H. paid no attention to the danger signals and continued walking in an oblique direction towards the track, and, observing his apparent intention to cross the track and his disregard of the signals, the engine driver then applied the emergency brakes which failed to stop the train in time to avoid the accident by which H. was killed. In an action for damages by his widow and child.—*Held*, that, notwithstanding the fact that deceased was a trespasser and committing a breach of section 408 of the "Railway Act," R.S.C., 1906, ch. 37, the company was liable because their engine driver neglected to apply the emergency brakes at the time he became aware of the danger of accident when he first noticed deceased attempting to cross the tracks. CANADIAN PACIFIC RWAY. CO. *v.* HINRICH **557**

2——*Railways—Occupation of lands—Side tracks—Continuous trespass—Damages*. **514**

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See EASEMENT.

VENDOR AND PURCHASER — *Sale of land—Agreement—Bond to secure payment of price—Conditions as to title.*] The defendants, with other persons, entered into an agreement with the plaintiffs, appellants (except E.) for the purchase of certain lands, at $2 per acre, payable on 1st November, 1905, and afterwards entered into the bond upon which the action was taken. Differences arose and plaintiffs refused to proceed with the execution of the agreement unless performance of its terms by the other parties was guaranteed, and, on 7th Sept., 1905, the bond was executed, expressed to be as security for payment of the price of the lands and it also contained a covenant for the payment to the plaintiffs of $2,500, part of the price, to and for their own use and benefit as liquidated damages for services rendered and to be rendered by the plaintiffs. This bond was assigned to E. as collateral security for advances to his co-plaintiffs and, during the trial, he was added as a plaintiff. The trial judge ordered

Vendor and Purchaser—*continued.*

judgment in favour of plaintiffs, but this judgment was reversed by the Court of Appeal (19 Man. R. 517,) on the ground that plaintiffs had failed to shew that they had acquired any title to or interest in the lands which they had agreed to sell, and it was held that, as plaintiffs could not recover under the agreement, they could not recover under the bond. The appeal to the Supreme Court of Canada was dismissed with costs. COLWELL *v.* NEUFELD... **506**

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WARRANTY—*Sale of goods—Designated quality—Fraud on purchaser—Damages—Loss of market*..... **512**

See SALE 2.

WINDING-UP—*Winding-up proceedings—Company in liquidation—Sale of assets—Consent to sale of mortgaged ship—Sale by order of court—Mariners' liens—Sale free from incumbrances—Special fund—Privileged charge—Priority—Valuation of security—Release of mortgage—Marshalling securities—Subrogation.*] A ship which belonged to a company in liquidation was mortgaged to a bank and was also subject to maritime liens for seamen's wages due at the time of the wind-up order. The bank consented to the sale of the ship, by the liquidator, free from incumbrances at the same time as he sold the other assets of the company by direction of the court. He sold the ship separately and free from incumbrances for $5,000, which was credited, as a special fund, in his accounts. The bank subsequently filed its claim, valuing its security on the ship at $5,000. The purchasers took the ship to sea and it became a total loss. The bank then made claim to the whole of the fund realized on the sale of the ship and their claim was opposed on behalf of the wage lienholders claiming the right to be paid by priority out of this fund.—*Held*, affirming the judgment appealed from (4 West. W.R. 1271; 25 West. L.R. 92; 12 D.L.R. 807) that, by its consent to the sale of the ship under direction of the court, free from incumbrances, the bank had assented to the conversion thereof released from its mortgage and that the proceeds of the sale of the ship should be

Winding-up—*continued.*

apportioned amongst the creditors in the order and according to the priorities provided by law; consequently it was not entitled to any special charge on the fund realized upon its sale—*Held*, further, that the rights of the wage-earners holding maritime liens were not affected by the loss of the ship after it had been sold by the liquidator under the order of the court and that they were entitled to recover their claims out of the fund realized upon the sale of the ship in priority to the mortgagee.—[MEMO.— The court ordered that the rights of the bank, if any, to relief, by way of subrogation or marshalling of securities, should be reserved to be dealt with on further proceedings in the winding-up of the company.] TRADERS BANK OF CANADA *v.* LOCKWOOD..... **593**

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